
Is Rule 60(b)(5) the Achilles' Heel of the Federal Arbitration Act?

BY: Jason B. Tompkins

The Federal Arbitration Act ("FAA") was enacted in 1925 to ensure that arbitration provisions in contracts are enforced, and the courts have repeatedly held that judicial review of arbitration awards under the FAA is subject to "one of the narrowest standards of judicial review in all of American jurisprudence." See, e.g., *The Lattimer-Stevens Company v. The United Steelworkers of America, AFL-CIO, District 27, Sub-District 5*, 913 F.2d 1166, 1169 (6th Cir. 1990). "It is well-established that courts do not sit to hear claims of factual or legal error by an arbitrator and that an arbitrator's award will not be set aside for errors in judgment or mistakes of law or fact. Where an arbitrator acts within the scope of his or her authority, even serious error or improvident fact finding does not justify overturning the arbitrator's decision." 4 Am. Jur. 2d *Alternative Dispute Resolution* § 206 at 263.

The FAA includes only a handful of reasons that a court may vacate, modify, or correct an arbitration award. Section 10 of the FAA provides that a district court may vacate an arbitration award under four circumstances: (a) corruption, fraud, or undue means in procuring the award; (b) the arbitrators' evident partiality or corruption; (c) the arbitrators' misconduct in refusal to postpone the hearing, refusal to hear material evidence, or action that prejudiced a party's rights; or (d) the arbitrators' exceeded their powers or imperfectly executed them so that a mutual, final, and definite award was not made. 9 U.S.C. § 10. Section 11 of the FAA enumerates three circumstances in which an arbitration award may be modified or corrected: (a) 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) the arbitrators' award upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; or (c) imperfection in matter of form not affecting the merits of the con-

troversy. 9 U.S.C. § 11.

Prior to the United States Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008), courts also generally recognized a few non-statutory grounds for vacating or modifying arbitration awards. Like the FAA's express grounds, the common law grounds have been construed narrowly. The most common non-statutory basis for vacating an arbitration award is "manifest disregard of the law," which applies only where the arbitrator recognized, yet deliberately ignored, a clear rule of law. See *Aldre v. Avis Rent-A-Car*, 247 F. App'x 167, 169-70 (11th Cir. 2007). Another non-statutory basis for "vacatur" is where the arbitration award violates or contravenes public policy. See *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 401 (5th Cir. 2007). The *Hall Street* decision, however, casts doubt on the continued validity of non-statutory grounds such as these. In *Hall Street*, the Supreme Court stated that sections 10 and 11 of the FAA "provide the FAA's exclusive grounds for expedited and modification." *Hall Street*, 128 S. Ct. at 1403 (holding that parties to an arbitration agreement may not agree to expanded judicial review). Post-*Hall Street* decisions, however, have not been uniform in deciding that the Supreme Court sounded the death knell for these doctrines.¹

The Federal Rules of Civil Procedure apply to proceedings to confirm arbitration awards to the extent that the FAA does not provide otherwise. Fed. R. Civ. P. 81(a)(6)(B) ("These rules, to the extent applicable, govern proceedings under the following laws, except as these laws provide other procedures: . . . (B) 9 U.S.C., relating to arbitration . . ."). Parties dissatisfied with arbitration awards have sometimes attempted to use Federal Rule of Civil Procedure 60(b)'s "grounds for relief" to avoid the effect of the awards. Several Circuits have been unreceptive, and have held that

various subsections of Rule 60(b) cannot be used to alter the effect of arbitration awards because the FAA includes procedures for modifying or vacating arbitration awards. See, e.g., *e.spire Communications, Inc. v. CNS Communications*, 39 F. App'x 905 (4th Cir. 2002) (holding that Rule 60(b)(1) does not apply in proceedings to confirm arbitration awards); *AT&T Co. v. United Computer Systems, Inc.*, 5 F.3d 534 (9th Cir. 1993) (stating that Rule 60(b)(3) cannot be used to "circumvent" the limitations on vacating arbitration awards); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234 (D.C. Cir. 1971) (holding that Rule 60(b)(6) was not "meant to be applied to final arbitration awards").

In the light of the FAA's language and the case law, it seems that arbitration awards are nearly unassailable. Indeed, the Court of Appeals has stated that, because judicial review and modification of arbitration awards is so "narrowly limited," the "FAA presumes that arbitration awards will be confirmed." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998). The Eleventh Circuit has long recognized that "*the court must grant such an order* [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [the FAA]." *Booth v. Hume Pub., Inc.*, 902 F.2d 925, 932 (11th Cir. 1990) (emphasis in original).

Nevertheless, the Eleventh Circuit may have recently acknowledged the FAA's Achilles' heel (at least as to the scope of judicial review) by holding that Rule 60(b)(5) could be used to modify an order confirming an arbitration award the Court of Appeals had previously ruled could not be modified under the FAA. The case of *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*, 508 F.3d 995 (11th Cir. 2007) ("*Baker P*"), arose out of a dispute about real-estate taxes that American Multi-Cinema agreed to pay on certain properties that it leased from AIG Baker. The parties submitted the dispute to an arbitration panel, which awarded more than \$866,000 to AIG Baker. When AIG Baker filed an action to confirm the award, American Multi-Cinema contended for the first time that it had actually paid more than \$225,000 directly to the tax authority, rather than to AIG Baker as required by the lease. Because this information was never pre-

sent to the arbitration panel before it rendered its award, the district court modified the arbitration award based on "an evident material mistake," as provided by 9 U.S.C. § 11(a).

The Court of Appeals reversed, holding that the FAA, 9 U.S.C. § 11(a), "embraces only an 'evident material mistake' that appears in a description 'in the award.'" *Baker I*, 508 F.3d at 999. A "mistake," according to the Court of Appeals, does not include the arbitration panel's lack of knowledge of information available before or during the arbitration. *Id.* at 999-1001. The Court of Appeals stated that "judicial review of arbitration decisions is 'among the narrowest known to the law' and could be modified only for a mistake or miscalculation *on the face of the award*." *Id.* at 1001.

On remand, the district court entered final judgment confirming the arbitration award in its entirety, but shortly thereafter granted American Multi-Cinema's motion for partial relief from the judgment pursuant to Federal Rule of Civil Procedure 60(b)(5) (permitting relief from a final judgment where "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable."). This procedural device enabled the district court to give American Multi-Cinema a credit against the final judgment confirming the arbitration award for the amount paid directly to the tax authority plus prejudgment interest on that amount.

Drawing a distinction between the arbitration award itself and its order confirming the arbitration award, the district court held that Rule 60(b)(5) permitted it to acknowledge that American Multi-Cinema had paid more than \$225,000 to the tax authority – an amount undisputedly included in the arbitration panel's \$866,000 award. The district court held that *its* judgment confirming the arbitration was no different than any other judgment, and, therefore, was subject to Rule 60(b)(5) if the ends of justice would be served. Relying upon a case from the former Fifth Circuit, *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980), the district court held that AIG Baker was not entitled to "knowing receipt of a quarter-of-a-million dollar windfall" from payment by American Multi-Cinema for taxes that it had already paid and for which AIG Baker was not re-

sponsible.

The Eleventh Circuit affirmed. *AIG Baker Sterling Heights, LLC v. American Multi-Cinema, Inc.*, 579 F.3d 1268 (11th Cir. 2009) (“*Baker I*”). The Court of Appeals first held that the district court’s relief *from its own judgment* did not violate the law of the case because the earlier appeal and mandate involved only the issue of modification of the arbitration award *itself*. Turning to the issue of whether the district court’s judgment transgressed the FAA, the Eleventh Circuit stated that the FAA’s exclusive grounds for modification of an arbitration award did not control the district court’s Rule 60(b)(5) relief from its own judgment confirming the arbitration award. Rather, section 13 of the FAA states that a judgment confirming an arbitration award “has the same force and effect as a judgment in a standard civil action and is subject to all the provisions of the law relating to those judgments,” including the Federal Rules of Civil Procedure. *Baker II*, 579 F.3d at 1272.

Rule 60(b)(5), the Eleventh Circuit stated, “encompasses the power to declare a judgment satisfied ‘when damages are paid before trial or a tortfeasor or obligor has paid the judgment debt.’” *Baker II*, 579 F.3d at 1272 (citing *Gibbs v. Maxwell House, A Div. of Gen. Foods Corp.*, 738 F.2d 1153, 1155 (11th Cir. 1984)). The Court held that the district court did not abuse its discretion in awarding American Multi-Cinema relief under Rule 60(b)(5) because “*Baker* benefitted concretely from American’s payment to the taxing authority, and that the payment ‘had satisfied some of the judgment against American.’” *Id.* at 1273-74.²

Surprisingly, the circumstances of the *Baker* case – an undisputed windfall of more than \$225,000 – did not fit neatly within any of the recognized statutory or non-statutory grounds for modification or vacatur of an arbitration award. Yet, Rule 60(b)(5) allowed the district court to see that justice was done by giving American Multi-Cinema credit for amounts it already paid that were clearly part of the arbitration award. The Eleventh Circuit’s acceptance of this procedure raises the question of the extent to which Rule 60(b) may alter the usual rubber-stamping of arbitration awards. It is unlikely, however, that any other subsection of Rule 60 could be used in the same

manner. As noted above, courts have rejected attempts to use other subsections of Rule 60(b) in confirmation proceedings, and in a footnote of *Baker II*, the Eleventh Circuit stated that Rule 81(a)(6)(B) “may mean that courts cannot use Rule 60(b) . . . to grant relief from a judgment confirming an award for reasons covered in sections 10 or 11 of the FAA.” *Baker II*, 579 F.3d at 1272 n.4.

But there is a significant distinction between the application of Rule 60(b)(5) and the remaining subsections of Rule 60(b). Unlike the cases applying other subsections, Rule 60(b)(5)’s use in *Baker* did not implicate the *merits* of the arbitrators’ decision. *Baker II*, 579 F.3d at 1272 n.3 (“Nor did the district court, as *Baker* contends, revisit the merits of a matter decided at arbitration.”).³ The arbitrators decided that American Multi-Cinema was responsible for a certain amount of taxes. The district court’s Rule 60(b) order did not alter the arbitrators’ conclusion – *i.e.*, it did not decide that American Multi-Cinema was not, in fact, responsible for those taxes; it merely recognized that American Multi-Cinema had already fulfilled part of its responsibility. Although the *Baker* case exposed a vulnerability, albeit indirect, in the FAA’s seemingly ironclad judicial review limitations, it is likely limited to the specific factual situation presented there – where one of the parties has presented uncontroverted evidence that it has satisfied a portion of the arbitration award.

Endnotes

¹ For a discussion of several decisions regarding application of “manifest disregard of the law” after *Hall Street*, see Christopher Walsh, *Stolt-Nielson’s Comfort for the ‘Average Arbitrator’: An Analysis of the Post-Hall Street ‘Manifest Disregard’ Award Review Standard*, 27 *Alternatives to High Cost Litig.* 19 (2009).

² Judge Kravitch dissented in part, writing, in essence, that Rule 60(b) cannot be used “as an end run around the FAA after §§ 10 and 11 were found to be inapplicable.” Judge Kravitch, citing to *Hall Street*, stated that sections 10 and 11 are exclusive.

³ Even other clauses of subsection (b)(5) are unlikely to succeed in most circumstances. For instance, the final clause – “applying it prospectively is no longer equitable” – would not have worked in *Baker* because “monetary judgments ‘do not generally have prospective application because they are final in the sense of involving a set monetary outlay.’” *McCormick Intern., LLC v. AGCO Corp.*, 2007 WL 1098525, at *2 (W.D. Mich. Apr. 12, 2007) (holding that Rule 60(b)(5) did not provide relief from arbitrator’s monetary award).