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Paul Turner

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Paul Turner*

I. INTRODUCTION

In 1924, the United States Arbitration Act[1] (USAA) was adopted and has now been construed to apply to litigation concerning arbitration agreements in both federal and state courts.[2] In addition to the USAA, arbitration litigation in thirty-

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* The Honorable Paul Turner is Presiding Justice of the California Court of Appeal, Second Appellate District, Division Five.

1. 9 U.S.C. § 1 et seq. (1994). Unless otherwise indicated, all future references to sections are to the provisions of title 9 of the United States Code.

2. *See* Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). In *Moses H. Cone Memorial Hospital*, the United States Supreme Court held that when arbitration agreements are subject to litigation in state courts, the USAA applies. *See id.* at 24. The Court held the following:

> Federal law in the terms of the Arbitration Act governs that issue in either state or federal court. Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Id. (alteration in original) (footnote omitted) (citations omitted) (quoting 9 U.S.C. § 2). Further, the Court noted the highly unusual effect of the USAA. *See id.* at 25 n.32. The USAA created a body of federal substantive law which is enforced largely in state courts. *See id.* The Court noted the following:

> The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction

five states proceeds under the terms of the Uniform Arbitration Act promulgated by the National Conference of Commissioners on Uniform State Laws.[3] Other states have arbitration provisions similar to those contained in the Uniform Arbitration Act.[4] The extent to which the USAA controls the conduct of litigation in state courts is a question which has not been firmly resolved. As arbitration becomes a more widely used means of dispute resolution, the need for courts to resolve the extent to which the terms of the USAA affect state court litigation is more apparent. The uncertainty of state court litigation concerning arbitration awards will continue as long as the preemptive effort of the USAA remains unclear. That uncertainty will only lead to clients and their lawyers attempting to test the effect of the USAA on awards which are adverse to them in state court litigation.

There is one aspect of federal arbitration law which has recently been clarified in terms of litigation in *federal* courts–the limited ability of a judge, after an arbitration award has been returned, to set aside the award because of a manifest disregard of the law by the arbitrator. After some uncertainty concerning this issue, in 1995, the United States Supreme Court clarified that a federal court judge may set aside an arbitration award when the arbitrator manifestly disregarded the law.[5] However, because many arbitration disputes subject to the USAA are litigated in state courts, the question remains whether state judges are *required* to follow the *First Options* rule allowing an award to be vacated because the arbitrator manifestly disregarded the law.

The purpose of this Article is to examine the question of whether state courts are required by the USAA to apply the manifest disregard of the law test to a motion to vacate an arbitration award. The answer to that question appears to be

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under 28 U.S.C. § 1331 or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. Section 3 likewise limits the federal courts to the extent that a federal court cannot stay a suit pending before it unless there is such a suit in existence. Nevertheless, although enforcement of the Act is left in large part to the state courts, it nevertheless represents federal policy to be vindicated bythe federal courts where otherwise appropriate.

Id. (citations omitted). Some commentators view resolving once and for all the applicability of the USAA to state court litigation as a decision of enormous significance. One commentator described the *Moses H. Cone Memorial Hospital* decision as opening a "new era for arbitration." *See* James Zimmerman, Note, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Pre-empted?*, 51 VAND. L. REV. 759, 764 (1998). Another commentator described *Moses H. Cone Memorial Hospital* as part of a Supreme Court endorsement of arbitration–an endorsement made with gusto. *See* Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1, 10 (1996).

3. *See* UNIF. ARBITRATION ACT § 1 et. seq., 7 U.L.A. 1 (1997).

4. *See, e.g.*, CAL. CIV. PROC. CODE § 1280 et seq. (West 1982 & Supp. 1999).

5. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (citing 9 U.S.C. § 10; Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (holding that parties must abide by an arbitrator's decision if it is not in manifest disregard of the law)).

"no" because the principal preemptive effect of the USAA is to insure that arbitration agreements are enforced in state and federal courts. Moreover, the manifest disregard of the law doctrine does not find its basis in the USAA; rather, it is a creature of federal common law. Further, sections 10 and 12 of the USAA permit for an arbitration award to be vacated under specified circumstances, and these provisions, by their very terms, apply only in federal courts.[6] Hence, the USAA cannot be read as requiring state court judges to set aside an arbitration award when there has been a manifest disregard of the law by an arbitrator. State courts and legislatures can adopt such a rule, but state court judges are not required to apply the manifest disregard of the law rule because of the USAA.

II. STANDARDS OF REVIEW AND INTERPRETATION OF FEDERAL STATUTES

The issue of the scope of the preemptive effect of the USAA is in large part a question of interpretation of federal statutes. The question of how a federal statute, such as the USAA, is to be construed has been the subject of disjointed discussion by the United States Supreme Court. The Court has never issued a comprehensive statement of how federal statutes are to be construed. However, in separate decisions, the Court has articulated principles of statutory interpretation of federal statutes, which are pertinent to an examination of the USAA. In *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno,*[7] the Court held the following: "The starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'"[8]

The United States Supreme Court has noted that "the statutory language controls its construction"[9] and "'[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.'"[10] In interpreting a statute, the Court has noted the following:

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

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6. *See* 9 U.S.C. §§ 10, 12.

7. 494 U.S. 827 (1990).

8. *Id.* at 835 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

9. Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3 (1981).

10. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940)).

> Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will.[11]

On another occasion, the Court stated, "We do not, however, construe statutory phrases in isolation; we read statutes as a whole."[12] Further, in interpreting a statute, the Court has emphasized the importance of avoiding "absurd results,"[13] "'an odd result,'"[14] or "unreasonable results whenever possible."[15] Moreover, the Court has noted, "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided."[16]

In *Griffin* v. *Oceanic Contractors, Inc.*,[17] the Court stated the following: "Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."[18] When a statute is unambiguous, its language cannot "be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[19] Application of these principles to the USAA can provide a useful basis for interpreting the Act and its effect in state court litigation where a party seeks to set aside an arbitration award.

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11. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (citations omitted) (quoting Chemehuevi Tribe of Indians v. Federal Power Comm'n, 420 U.S. 395, 402-03 (1975); Richards v. United States, 369 U.S. 1, 11 (1962); United States v. Heirs of Boisdoré, 49 U.S. (8 How.) 113, 122 (1850)).

12. United States v. Morton, 467 U.S. 822, 828 (1984); *see also* Stafford v. Briggs, 444 U.S. 527, 535 (1980) ("'And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law.'" (quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1856))).

13. *See* United States v. Turkette, 452 U.S. 576, 580 (1981) (citing Trans Alaska Pipeline Rate Cases, 436 U.S. 631, 643 (1978); Commissioner v. Brown, 380 U.S. 563, 571 (1965)).

14. *See* Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 454 (1989) (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989)).

15. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982).

16. Commissioner v. Asphalt Prods. Co., 482 U.S. 117, 121 (1987).

17. 458 U.S. 564 (1982).

18. *Id.* at 571.

19. *See* West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98-99 (1991) (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)).

III. THE USAA

A. Provisions Relating to Issues Other than Vacating an Award

The USAA is codified in title 9 of the United States Code, and it does not contain a preemption clause.[20] Before discussing sections 10 and 12, which are the provisions in the USAA that permit an award to be set aside or vacated, it is appropriate to review the other portions of the Act, some of which, particularly section 2, have a preemptive effect in state court litigation.[21] However, most of the provisions of the USAA, by their very terms, apply only in federal court. Section 2 of the USAA establishes the enforceability of arbitration agreements arising in commerce.[22] Section 2 states the following:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[23]

Section 2 makes no reference to state or federal courts, and the United States Supreme Court identified section 2 as being the principal preemptive provision of the USAA.[24] The language of section 2 is broad and wide ranging, reaching every contract in commerce with an arbitration clause. As to contracts within the sweep of its language, section 2 admits to no exceptions.

Other provisions of the USAA make specific references to the federal courts. Those references to federal courts and proceedings appear to create a limitation on the potential preemptive effect of other provisions apart from section 2. For example, section 3 involves the right of a party to an arbitration agreement to a stay of a judicial proceeding.[25] The stay is to occur while the arbitration process is completed, and section 3 refers to a "suit or proceeding . . . brought in any of the

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20. *See* 9 U.S.C. § 1 et seq. (1994).
21. *See id.* §§ 2, 10, 12.
22. *See id.* § 2.
23. *Id.*
24. *See id.*; Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
25. *See* 9 U.S.C. § 3.

courts of the United States upon any issue referable to arbitration."[26] Section 4 provides a means to compel arbitration.[27] Section 4 provides that a petition to compel arbitration is to be brought in "any United States district court" that would have jurisdiction under title 28 of the United States Code, service of the petition is to be made in accord with the Federal Rules of Civil Procedure, and for a limited jury trial right as to contract formation issues.[28] Section 4 is awash in reference to federal courts and makes no reference to proceedings before a state court judge.[29] Likewise, section 7 refers to proceedings in the federal courts.[30] Specifically, the failure of a witness to attend an arbitration is enforced in federal court.[31] Section 9,

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26. *See id.* Section 3 states in its entirety the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Id.

27. *See id.* § 4.

28. *See id.* Section 4 provides the following:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Id.

29. *See id.*

30. *See id.* § 7.

31. *See id.* The relevant portions of section 7 are as follows:

> The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or

which provides for confirmation of an award, permits such a request to be made in "the United States court in and for the district which such award was made."[32] Section 9, by its very terms, does not require a motion to confirm an award to be made in a federal court.[33] Section 11 provides a procedure and standards for modifying an award.[34] The beginning of section 11 states that "[i]n 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."[35] Section 16 provides for appeals of

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arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Id.

32. *See id.* § 9. Section 9 states in its entirety the following:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Id.

33. *See id.*

34. *See id.* § 11.

35. *Id.* Section 11 states in its entirety the following:

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.

The order may modify and correct the award, so as to effect the intent thereof and

various orders.[36] Section 16(b) states in relevant part that "[e]xcept as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order."[37] The foregoing statutory provisions refer in many cases to proceedings in federal court.[38] However, section 2 does not contain any such limitation on its scope.[39]

B. The Provisions of the USAA Relating to Vacating Awards

Section 10 of the USAA is the specific provision setting forth the grounds for vacating an award.[40] Section 10 states in its entirety the following:

> (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.
>
> (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.

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promote justice between the parties.

Id.

36. *See id.* § 16.

37. *Id.* § 16(b). Section 16 states in its entirety the following:

(a) An appeal may be taken from—
(1) an order–
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing,
or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.
(b) Except as otherwise provided in section 1292(b) of
title 28, an appeal may not be taken from an interlocutory order–
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

Id. § 16.

38. *See id.* §§ 9, 11, 16.

39. *See id.* § 2.

40. *See id.* § 10.

> (5) Where 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.
>
> (b) 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.[41]

The USAA does not specify any other grounds for setting aside an award. Section 12 prescribes the appropriate procedure for a motion to vacate an arbitration award, which states in relevant part the following:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.[42]

In addition, there is nothing in the USAA which adverts to the manifest disregard of the law standard for vacating an arbitration award. Further, although section 2 does not refer to any particular court, sections 10 and 12 of the USAA refer to proceedings in federal courts.[43] Finally, the USAA lacks an express preemption clause.

IV. THE DEVELOPMENT OF THE MANIFEST DISREGARD OF THE LAW TEST FOR VACATING AN ARBITRATION AWARD

The USAA fails to mention the manifest disregard of the law test for vacating an award. The manifest disregard of the law ground has its genesis in dictum in the decision of *Wilko* v. *Swan*.[44] *Wilko* directly addressed the question of whether the Securities Act of 1933 prohibited arbitration.[45] The dictum in *Wilko* appeared as follows during a discussion of the limited right of the federal courts to review an

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41. *Id.*
42. *Id.* § 12.
43. *See id.* §§ 2, 10, 12.
44. 346 U.S. 427, 436-37 (1953), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (re-examining the Supreme Court's decision in *Wilko*).
45. *See id.*

arbitration award:

> While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would "constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.[46]

Various Circuit Courts of Appeal then picked up on this oblique obiter dictum and articulated a rule that allowed for a limited right to a review on the merits of an arbitration award for a manifest disregard of the law.[47]

In 1995, the United States Supreme Court spoke with clarity on the subject of a review on the merits of an arbitration award for a manifest disregard of the law and held the following:

> Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. Hence, who–court or arbitrator–has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration.[48]

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46. *Id.* (citations omitted) (quoting Wilko v. Swan, 201 F.2d 439, 445 (2d Cir. 1953)).

47. *See, e.g.*, Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991) (recognizing the manifest disregard of the law theory as proposed by *Wilko*); Sargent v. Paine Webber Jackson & Curtis, Inc., 882 F.2d 529, 532 (D.C. Cir. 1989) (noting the application of *Wilko*); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988) (recognizing the manifest disregard standard of review); S.D. Warren Co. v. United Paperworkers' Int'l Union, 815 F.2d 178, 186-87 (1st Cir. 1987) (recognizing the manifest disregard standard of review), *vacated*, 484 U.S. 983 (1987) (vacating on other grounds); Stroh Container Co. v. Delphi Indus., 783 F.2d 743, 749 (8th Cir. 1986) (recognizing the manifest disregard standard of review); Anaconda Co. v. District Lodge No. 27 of the Int'l Ass'n of Machinists and Aerospace Workers, 693 F.2d 35, 37 (6th Cir. 1982) (noting the adoption of *Wilko*); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1127 (3d Cir. 1969) (noting the framework offered by *Wilko*); San Martine Compania De Navegacion, S.A., v. Saguenay Terminals Ltd., 293 F.2d 796, 801 (9th Cir. 1961) (discussing the application of *Wilko*); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960) (affirming the arbitration award under *Wilko*). *But cf.* Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992) (rejecting the manifest disregard of the law standard of review, but permitting an award to be set aside if a majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the ultimate result); Robbins v. Day, 954 F.2d 679, 684 (11th Cir. 1992) (refusing to adopt the manifest disregard of the law standard of judicial review); R.M. Perez & Assocs. v. Welch, 960 F.2d 534, 539 (5th Cir. 1992) (declining to adopt the manifest disregard of the law standard).

48. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (citation omitted).

After the *First Options* case was decided, the Eleventh Circuit, which had declined to adopt the manifest disregard of the law test, began to apply this standard of review to the merits of an arbitration award.[49] To date, the Seventh Circuit has not addressed this issue in a citable, published opinion although it has been mentioned in dicta.[50] The issue has not been addressed at all in the Fifth Circuit after *First Options* was decided.

Every federal circuit which has discussed the issue has recognized the manifest disregard of the law standard for vacating an arbitration award as a judicially created standard; thus, it is not part of the USAA.[51] This is because the manifest disregard of the law doctrine is not statutorily based, but is premised on federal common law.[52] Hence, the manifest disregard of the law doctrine is not based on the USAA; rather, it is a creature of common law.

V. THE CALIFORNIA SUPREME COURT'S APPROACH TO USAA PREEMPTION

The California Supreme Court was the first state high court to evaluate in depth the preemptive effect of the USAA. In December 1996, the California

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49. *See* Scott v. Prudential Sec., Inc., 141 F.3d 1007, 1017 (11th Cir. 1998) (stating that "a party may challenge an arbitration award without reliance on the FAA if the award is: . . . (3) entered in 'manifest disregard of the law'" (quoting Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456, 1459 n.5 (11th Cir. 1997))).

50. *See* Koveleskie v. SBC Capital Mkts., Inc., 79 Fair Empl. Prac. Case (BNA) 73 (7th Cir. Feb. 4, 1999), *available in* 1999 WL 50226; Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 480 (7th Cir. 1997); Flexible Mfg. Sys. Pty. Ltd. v. Super Prods. Corp., 86 F.3d 96, 98-99 (7th Cir. 1996).

51. *See* DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821-22 (2d Cir. 1997); Denver & Rio Grande W. R.R. Co. v. Union Pac. R.R. Co., 119 F.3d 847, 849 (10th Cir. 1997); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996); Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 135 (6th Cir. 1996); Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 237-38 (1st Cir. 1995); O.R. Sec., Inc. v. Professional Planning Assocs., 857 F.2d 742, 746-47 (11th Cir. 1988); Sheet Metal Workers Int'l Ass'n Local Union No. 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 746 (9th Cir. 1985); National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co., 551 F.2d 136, 143 (7th Cir. 1977).

52. *See* Jih v. Long & Foster Real Estate, Inc., 800 F. Supp. 312, 317 (D. Md. 1992); United Indus. Workers v. Government of the V.I., 792 F. Supp. 420, 428 (D.V.I. 1992); Warth Line, Ltd. v. Merinda Marine Co., 778 F. Supp. 158, 161 (S.D.N.Y. 1991); Chasser v. Prudential-Bache Sec., Inc., 703 F. Supp. 78, 79 (S.D. Fla. 1988); Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 134 (1997); Jessica L. Gelander, Comment, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 MARQ. L. REV. 625, 634 (1997); Emil Bukhman, Note, *Time Limits on Arbitrability of Securities Industry Disputes Under the Arbitration Rules of Self-Regulatory Organizations*, 61 BROOK. L. REV. 143, 151 (1995).

Supreme Court issued its opinion in *Rosenthal* v. *Great Western Financial Securities Corp.*[53] Under California law, issues of fraud in the inducement of a contract that contains an arbitration clause are generally tried summarily based on affidavits or declarations containing certification that they were executed under penalty of perjury as permitted by California Code of Civil Procedure section 2015.5.[54] The procedure for adjudicating these issues under California law is set forth in California Code of Civil Procedure sections 1281.2 and 1290.2.[55] The USAA, in section 4, also provides for judicial resolution of the question whether there is an enforceable contract that contains an arbitration clause.[56] Section 4 states in relevant part that "[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[57] However, if there is a dispute as to whether a contract was actually formed, then a hearing is held before the district court judge, which may include a jury trial on contract formation issues.[58] To the contrary, California law does not provide for a jury trial resolution of contract formation issues.

In *Rosenthal*, a case involving interstate commerce that was subject to the USAA, the California Supreme Court was required to decide whether the jury trial right in section 4 applied to a state court pre-arbitration lawsuit containing allegations that the defendants fraudulently induced the plaintiffs, elderly retirees, to enter into investment contracts specifying arbitration clauses.[59] The California Supreme Court posited the issue to be decided as follows:

> In one important respect, however, section 1281.2 differs from section 4 of the USAA: the California statute does not provide for a jury trial of issues as to the making of the arbitration agreement or the resisting party's default thereunder.

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53. 926 P.2d 1061, 1068-72 (Cal. 1996).

54. *See* CAL. CIV. PROC. CODE § 2015.5 (West 1983).

55. *See id.* §§ 1281.2, 1290.2. California Code of Civil Procedure section 1281.2 provides the following:

> On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:
>
> . . . .
>
> (b) Grounds exist for the revocation of the agreement.

Id. § 1281.2. California Code of Civil Procedure section 1290.2 provides the following:

> A petition under this title shall be heard in a summary way in the manner and upon the notice provided by law for the making and hearing of motions, except that not less than 10 days' notice of the date set for the hearing on the petition shall be given.

Id. § 1290.2.

56. *See* 9 U.S.C. § 4 (1994).

57. *Id.*

58. *See supra* note 28 and accompanying text.

59. *See* Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061, 1066-67 (Cal. 1996).

> Instead, our statutory scheme requires petitions to compel arbitration to be determined "in the manner . . . provided by law for the making and hearing of motions."
>
> The question thus arises whether section 4 of the USAA, or sections 1281.2 and 1290.2, provide the procedure to be followed in a California court in a case where the USAA governs arbitrability of the controversy.[60]

The *Rosenthal* court answered that question by focusing on two issues–the express language of section 4 and general principles of federal preemption.[61]

First, the *Rosenthal* court looked to the express language of section 4 and stated the following:

> Section 4 of the USAA does not explicitly govern the procedures to be used in state courts. As already noted, the statute contemplates a petition in "United States district court," and provides that certain steps are to be taken "in the manner provided by the Federal Rules of Civil Procedure." This language has led the United States Supreme Court to express its doubt that section 4 is applicable in state courts. Thus, in *Southland Corp.*, the court explained: "In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that [sections] 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings." In *Volt Info. Sciences* v. *[Board of Trustees of the Leland] Stanford [Junior] U[niv].*, the high court again declined to decide the issue, which it stated had been "expressly reserv[ed]" in *Southland Corp.* The court remarked that sections 3 and 4 "by their terms appear to apply only to proceedings in federal court."[62]

Like section 4, section 10, by its very terms, applies only in federal court.[63] Section 10(a) begins by stating that "[i]n 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."[64] This statutory language weighs materially against the application of section 10 to a

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60. *Id.* at 1068 (alteration in original) (citation omitted) (quoting CAL. CIV. PROC. CODE § 1290.2).

61. *See id.* at 1068-69.

62. *Id.* at 1068 (last alteration in original) (citations omitted) (quoting Volt Info. Sciences v. Board of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 477 n.6 (1989); Southland Corp. v. Keating, 465 U.S. 1, 16 n.10 (1984)).

63. *See* 9 U.S.C. § 10 (1994).

64. *Id.* § 10(a).

forum other than the United States district court of the district in which the award was made. The same is true as to section 12 in which reference is made to the "district within which the award was made" and service of the petition to vacate "by the marshal of any district within which the adverse party may be found in like manner as other process of the court."[65] The references to the "district" and to the "marshal of any district" in section 12, when construed with section 10, are consistent with application of those portions of the USAA to federal rather than to state courts.[66] However, in *Rosenthal*, the California Supreme Court held that the mere fact that the language concerning the jury trial right under the USAA referred to federal courts was not dispositive of the issue regarding its applicability to litigation in a non-federal forum.[67]

Second, in addition to applicable statutory language, the *Rosenthal* court looked to broad principles of federal preemption in determining that the jury trial right adverted to in section 4 of the USAA did not apply to state court litigation concerning arbitration agreements.[68] Before reviewing the specific analysis in *Rosenthal*, it is appropriate to identify the preemption standards developed by the United States Supreme Court. These standards were faithfully applied by the California Supreme Court in *Rosenthal*.[69] The general parameters of federal preemption in the absence of an express preemption clause were summarized by the United States Supreme Court in *Freightliner Corp.* v. *Myrick*[70] as follows:

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[71]

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65. *See id.* § 12.
66. *See id.*
67. *See Rosenthal*, 926 P.2d at 1068-69.
68. *See id.*
69. *See id.*
70. 514 U.S. 280 (1995).
71. *Id.* at 287 (citations omitted) (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). The United States Supreme Court has emphasized the federal nature of the American constitutional government that allows for states to adopt different procedures from those applicable to federal courts. In *Howlett* v. *Rose*, 496 U.S. 356 (1990), the United States Supreme Court reasoned as follows:

> The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule, "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal

Applying the foregoing preemption tests, the *Rosenthal* court held the following:

> The question whether a jury trial is called for thus requires us to go beyond the language of section 4 of the USAA and apply broader principles of federal pre-emption. It is a "general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts," even when the controversy is governed by substantive federal law. "By the same token, however, where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" Thus, as we have previously recognized, a state procedural rule must give way "if it impedes the uniform application of the federal statute essential to effectuate its purpose, even though the procedure would apply to similar actions arising under state law." At a minimum the state procedure must be neutral as between state and federal law claims. More exactingly, the state rule may be pre-empted if it would stand "'"as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'" Uniform national application of a federal substantive law requires, in particular, that state courts not apply procedural rules that would "frequently and predictably produce different outcomes . . . based solely on whether the [federal] claim is asserted in state or federal court."
>
> Like other federal procedural rules, therefore, "the procedural provisions of the [USAA] are not binding on state courts . . . *provided applicable state procedures do not defeat the rights granted by Congress.*" We think it plain the California procedures for a summary determination of the petition to compel arbitration serve to further, rather than defeat, the enforceability policy of the USAA. Sections 1281.2 and 1290.2 are neutral as between state and federal law claims for enforcement of arbitration agreements. They display no hostility to arbitration as an alternative to litigation; to the contrary, the summary procedure provided, in which the existence and validity of the arbitration agreement is decided by the court in the manner of a motion, is designed to further the use of private arbitration as a means

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law.

> These principles are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.

Id. at 372-73 (citations omitted) (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954)). Nonetheless, the United States Supreme Court has made it clear that state courts do not have unlimited authority to place restrictions on the right to recover damages as authorized by federal law. *See* Felder v. Casey, 487 U.S. 131, 151 (1988). In *Felder*, a decision applied to the USAA in *Rosenthal*, the United States Supreme Court held the following: "States may make the litigation of federal rights as congenial as they see fit–not as a *quid pro quo* for compliance with other, uncongenial rules, but because such congeniality does not stand as an obstacle to the accomplishment of Congress' goals." *Id.* Later, the *Felder* Court noted the following: "Just as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Id.* (alteration in original) (citations omitted) (quoting Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942)).

> of resolving disputes more quickly and less expensively than through litigation. Finally, having a court, instead of a jury, decide whether an arbitration agreement exists will not "frequently and predictably produce different outcomes." Because the California procedure for deciding motions to compel serves to further, rather than defeat, full and uniform effectuation of the federal law's objectives, the California law, rather than section 4 of the USAA, is to be followed in California courts.[72]

Hence, the California Supreme Court held that the jury trial right in section 4 of the USAA did not apply in pre-arbitration state court litigation.[73] Further, the California Supreme Court held that California's rule allowing for the use of declarations or, in certain circumstances, live testimony before a judge to resolve contract formation questions was not preempted by the USAA.[74] In other words, the California Supreme Court examined the text of the USAA and used traditional preemption principles in evaluating the application of the act to a pre-arbitration dispute concerning the existence of a contractual obligation to arbitrate.[75]

VI. UNITED STATES SUPREME COURT ANALYSIS OF THE LIMITED PREEMPTIVE EFFECT OF THE USAA

In addition to the analysis in *Rosenthal*, the extent to which the United States Supreme Court has identified the limited preemptive effect of the USAA is of special consequence. It is appropriate to examine the historical development over the past fifteen years of the United States Supreme Court's analysis concerning the limited preemptive effect of the USAA. In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*,[76] the Supreme Court identified section 2 of the USAA as the primary substantive provision in the following manner:

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72. *Rosenthal*, 926 P.2d at 1069-70 (alteration in original) (footnote omitted) (citations omitted) (quoting *Felder*, 487 U.S. at 138; McCarroll v. Los Angeles County Dist. Council of Carpenters, 315 P.2d 322, 331 (Cal. 1957); McClellan v. Barrath Const. Co., 725 S.W.2d 656, 658 (Mo. Ct. App. 1987)).

73. *See id.*

74. *See id.* A sound argument can be made that the California Supreme Court in *Rosenthal* did not have to go beyond the express language in section 4 to determine its applicability to a pre-arbitration state court proceeding adjudicating whether the parties entered into an enforceable contract containing an arbitration clause. The United States Supreme Court has emphasized that in construing a federal statute, "[t]he starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.'" *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). As clearly, concisely, and persuasively noted by the California Supreme Court, the language of section 4 certainly applies in a federal district court. *See Rosenthal*, 926 P.2d at 1069-70. However, the additional preemption discussion provides further ground for concluding that the jury trial right in section 4 was inapplicable to pre-arbitration state court proceedings involving contract formation issues subject to the USAA.

75. *See Rosenthal*, 926 P.2d at 1069-70.

76. 460 U.S. 1 (1983).

> Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.[77]

Later, in *Southland Corp.* v. *Keating*,[78] the United States Supreme Court defined the preemptive scope of the USAA as follows: "In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[79] The Court further noted that it was not deciding whether all of the USAA preempted state law.[80] The Court held the following:

> The contention is made that the Court's interpretation of [section] 2 of the Act renders [sections] 3 and 4 "largely superfluous." This misreads our holding and the Act. In holding that the Arbitration Act pre-empts a state law that withdraws the power to enforce arbitration agreements, we do not hold that [sections] 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings.[81]

In *Volt Information Sciences* v. *Board of Trustees of the Leland Stanford Junior University*,[82] the United States Supreme Court expounded at some length on the limited preemptive effect of the USAA on state court litigation involving arbitration and provided the most extensive discussion of the USAA and preemptive principles.[83] The Court held the following:

> The [USAA] contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when

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77. *Id.* at 24 (alteration in original) (footnote omitted) (citation omitted) (quoting 9 U.S.C. § 2 (1994)).
78. 465 U.S. 1 (1984).
79. *Id.* at 16 (footnotes omitted).
80. *See id.* at 16 n.10.
81. *Id.* (citation omitted).
82. 489 U.S. 468 (1989).
83. *See id.* at 476-78.

> Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law–that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[84]

The Court further identified the principal purpose for the USAA as follows:

> The [USAA] was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," and to place such agreements "'upon the same footing as other contracts.'" While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered."[85]

Later, in *Volt*, the Court identified the parameters of the preemptive effect of the USAA as follows: "In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the [USAA] preempts state laws which 'require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'"[86]

In *Allied-Bruce Terminix Cos.* v. *Dobson*,[87] the Supreme Court stated that the "Act's basic purpose" was to "put arbitration provisions on "'the same footing'" as a contract's other terms."[88] In *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*,[89] the Supreme Court held the following: "Earlier this Term, we upheld the enforceability of a pre-dispute arbitration agreement governed by Alabama law, even though an Alabama statute provides that arbitration agreements are unenforceable. Writing for the Court, [Justice Breyer] observed that Congress passed the [USAA] 'to overcome courts' refusals to enforce agreements to arbitrate."[90]

In *Doctor's Associates, Inc.* v. *Casarotto*,[91] the Supreme Court synthesized its 1989 ruling in *Volt* as follows:

> *Volt* involved an arbitration agreement that incorporated state procedural rules, one of which, on the facts of that case, called for arbitration to be stayed pending the

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84. *Id.* at 477 (citations omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

85. *Id.* at 478 (citations omitted) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. REP. NO. 68-96, at 2 (1924))).

86. *Id.* (quoting *Southland*, 465 U.S. at 10 (citing Perry v. Thomas, 482 U.S. 483, 490 (1987); *Southland*, 465 U.S. at 10-16)).

87. 513 U.S. 265 (1995).

88. *See id.* at 275 (quoting *Scherk*, 417 U.S. at 511).

89. 514 U.S. 52 (1995).

90. *Id.* at 55 (citation omitted) (quoting *Allied-Bruce*, 513 U.S. at 270.

91. 517 U.S. 681 (1996).

> resolution of a related judicial proceeding. The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself. We held that applying the state rule would not "undermine the goals and policies of the [USAA]," because the very purpose of the Act was to "ensur[e] that private agreements to arbitrate are enforced according to their terms."[92]

The foregoing United States Supreme Court authority establishes the following general jurisprudence concerning the limited preemptive effect of the USAA.[93] The "primary substantive provision of the Act" is section 2.[94] The intent or design of Congress has been variously described by the United States Supreme Court as "foreclos[ing] state legislative attempts to undercut the enforceability of arbitration agreements"[95] and "'overrul[ing] the judiciary's long-standing refusal to enforce agreements to arbitrate.'"[96] Furthermore, the "very purpose"[97] and basic premise of the USAA was to place arbitration agreements on "'the same footing as other contracts'"[98] and this was "'motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'"[99] Although the United States Supreme Court has not yet directly confronted the issue, the Court has never held that the federal rule allowing judicial review of an award for a manifest disregard of the law preempts a conflicting state rule.

VII. LEGISLATIVE HISTORY OF THE USAA

In light of *Rosenthal* and United States Supreme Court jurisprudence in the field, it is appropriate to review the legislative history of the USAA. The historical basis of the USAA was the adoption of the New York state arbitration law.[100]

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92. *Id.* at 688 (alteration in original) (citations omitted) (quoting Volt Info. Sciences v. Bd. Of Trustees of the Leland Stanford Junior Univ., 489 U.S. 468, 478-79 (1989)).

93. *See id.*; *see also Mastrobuono*, 514 U.S. at 55 (discussing the reason why Congress passed the USAA); *Allied-Bruce*, 513 U.S. at 275 (discussing "the Act's basic purpose"); *Volt*, 489 U.S. at 477-78 (discussing the USAA's "goals and policies").

94. *See* Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24 (1983).

95. *See* Southland Corp. v. Keating, 465 U.S. 1, 16 (1983).

96. *See Volt*, 489 U.S. at 478 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-20 (1985)).

97. *See Doctor's*, 517 U.S. at 688; *Ferro Corp.* v. *Garrison Indus.*, 142 F.3d 926, 936 (6th Cir. 1998).

98. *See Volt*, 489 U.S. at 478 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. REP. NO. 68-96, at 2 (1924))).

99. *See* id. (quoting *Dean Witter Reynolds*, 470 U.S. at 220).

100. *See* Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1062, 1067 (1996) (citing Recommendation and Study Relating to Arbitration 3 Cal. Law Revision Comm. Rep., at G-28 (1960); Eddy S. Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 S.

After the adoption of the 1920 arbitration act in New York, the American Bar Association Committee on Commerce, Trade, and Commercial Law drafted a proposed federal arbitration statute.[101] In 1922, the 67th Congress introduced a Senate bill that provided for a federal arbitration act.[102] The purpose of the 1922 Senate bill was that "[t]he fundamental conception underlying the law is to make arbitration agreements valid, irrevocable, and enforceable."[103] The heading on the Senate bill was as follows: "A BILL To make valid and enforceable written provisions or arrangements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations."[104] However, the Senate bill did not reach the senators and died in committee.[105]

After some rewriting at the suggestion of members of Congress, the American Bar Association proposal was reintroduced.[106] The proposal, which would ultimately become the USAA, was first introduced in the 68th Congress in the House of Representatives on December 5, 1923.[107] On December 12, 1923, the exact same bill was introduced in the Senate.[108] While the 1923 legislation was under consideration by the 68th Congress in 1924, the Congress had before it the record of the aforementioned January 31, 1923 hearings before the 67th Congress where the concept of a national arbitration law was initially considered.[109]

The report prepared in the House of Representatives stated the following: "The purpose of this bill is to make valid and enforc[ea]ble agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction o[f] admiralty, or which may be the subject of litigation in the Federal courts."[110] The report prepared for the Senate identified the purpose of the bill as follows:

CAL. L. REV. 375, 388 n.45 (1957)).

101. *See Arbitration of Interstate Commercial Disputes: Hearings on S. 1005 & H.R. 646 Before the Joint Comm. of Subcomms. on the Judiciary, United States Senate and House of Representatives,* 68th Cong. 10 (1924) (statement of W.H.H. Piatt, Chairman, Comm. on Commerce, Trade, & Commercial Law, ABA) [hereinafter *Hearings*].

102. *See* S. 4214, 67th Cong. (1922).

103. *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 Before the Subcomm. of the Comm. on the Judiciary, United States Senate,* 67th Cong. 2 (1923) (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.).

104. S. 4214; *see* Letter from Herbert Hoover, Secretary of Commerce, to the Honorable Frank B. Brandegee, Chairman of the Senate Judiciary Committee (Jan. 7, 1924) (appearing in *Hearings, supra* note 101, at 20) [hereinafter *Hoover*].

105. *See* S. 4214.

106. *See Hearings, supra* note 101, at 10 (statement of W.W.H. Piatt, Chairman, Comm. on Commerce, Trade, & Commercial Law, ABA); Hoover, *supra* note 104, at 20.

107. *See* H.R. DOC. No. 68-646, at 1-11 (1923).

108. *See* S. DOC. No. 68-1005, at 1-11 (1923).

109. *See Hearings, supra* note 101, at 6 (statement of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.).

110. H.R. REP. No. 68-96, at 1 (1924).

> The purpose of the bill is clearly set forth in section 2, which, as proposed to be amended, reads as follows:
>
> SEC. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[111]

The Senate report emphasized that the effect of the bill would be to abolish the judicial reluctance to enforce arbitration agreements.[112] During Senate debate, Senator Thomas J. Walsh stated, "In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced."[113] The same point was raised during House debate.[114]

There was virtually no mention of what is now section 10 of the USAA in the legislative committee reports and none in congressional debates. The 1924 House report stated the following: "The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence,

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111. S. REP. NO. 68-536, at 2 (1924).

112. *See id.* at 2-3 (noting that historically equity courts refused to enforce arbitration agreements).

113. 68 CONG. REC. 984 (1924) (statement of Sen. Walsh).

114. *See* 68 CONG. REC. 1931 (statement of Rep. Graham) ("Originally, agreements to arbitrate, the English courts refused to enforce . . . . This bill simply provides . . . an opportunity to enforce an agreement . . . to arbitrate . . . ."). Much of the political support for what ultimately would become the USAA came from business interests. The report of the Committee on Judiciary noted that "[House Bill No. 646] was drafted by a committee of the American Bar Association and is sponsored by that association and by a large number of trade bodies whose representatives appeared before the committee." H.R. REP. No. 68-96, at 1. Among the representatives who spoke on behalf of the legislation were two lawyers representing the New York State Chamber of Commerce, *see Hearings*, *supra* note 101, at 5, 13 (statements of Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y. & Julius Henry Cohen, Member, Comm. on Commerce, Trade, & Commercial Law, ABA); a representative of the American Farm Bureau Federation, *see id.* at 11 (statement of Gray Silver, Representative, Am. Farm Bureau Fed'n); a representative of the National League of Marine Merchants of the United States, Western Fruit Jobbers' Association of America, and International Apple Shippers' Association of America, *see id.* at 12 (statement of R.S. French, Representative, Nat'l League of Marine Merchants of the United States, W. Fruit Jobbers' Ass'n of Am., & Int'l Apple Shippers' Ass'n of Am.); and a spokesperson for the Canners' League of California, *see id.* at 13 (statement of C.G. Woodbury, Spokesperson, Canners' League of Cal.). One witness introduced a list of 67 commercial organizations endorsing the proposed federal arbitration act. *See id.* at 21-22 (list submitted by Charles L. Bernheimer, Chairman, Comm. on Arbitration, Chamber of Commerce of the State of N.Y.).

or for palpable error in form."[115] The 1924 Senate report stated that the award could be set aside (1) where it was secured "by corruption, fraud, or undue means"; (2) "where there was partiality or corruption on the part of the arbitrators"; (3) where arbitrators "have been guilty of misconduct or have refused to hear evidence"; (4) where the arbitrators' "misbehavior" was "prejudicial to . . . either party"; or (5) where arbitrators "have exceeded their powers."[116] A brief on the proposed USAA, which was made a part of the record during the Senate hearings, stated the following:

> The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means–cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.[117]

VIII. CONCLUSION

The USAA has been characterized by the United States Supreme Court as an anomaly–a peculiarity in federal statutory law.[118] That necessarily renders application of the previously discussed traditional standards of statutory interpretation articulated by the United States Supreme Court more difficult. However, there are several bright lines that can be recognized in evaluating whether the USAA requires state courts to apply the manifest disregard of the law test for vacating an arbitration award.

First, and most importantly, there is no mention in the USAA of the manifest disregard of the law test.[119] The absence of such language in the USAA "'must ordinarily be regarded as conclusive'" according to the Supreme Court's standards of statutory interpretation.[120] The most persuasive evidence of legislative purpose is the language of a statute;[121] however, the USAA makes no reference to the manifest disregard of the law test. Second, sections 10 and 12 of the USAA allow for vacating an award and do not, by their very terms, apply to state courts.[122] The

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115. H.R. REP. NO. 68-96, at 2.

116. *See* S. REP. NO. 68-536, at 4.

117. *Hearings*, *supra* note 101, at 36 (statement of W.W. Nichols, President, Am. Mfrs. Export Ass'n of N.Y.).

118. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1982).

119. *See supra* notes 51-52 and accompanying text.

120. *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835 (1990) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

121. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (citing United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940)).

122. *See supra* notes 40-43 and accompanying text.

language and the procedures identified in sections 10 and 12 refer only to federal, not state, courts.[123] Third, the object and policy of the USAA does not require application of the manifest disregard of the law test.[124] The Supreme Court has noted that the purpose of the USAA was to effect the enforcement of arbitration agreements;[125] however, the manifest disregard of the law standard is a ground for setting aside an arbitration award, not a ground for enforcing one.[126] Fourth, there is nothing in the legislative history of the USAA which suggests that sections 10 and 12 must apply to state courts.[127] Fifth, there is nothing in the congressional debates or reports that mention the manifest disregard of the law test, much less suggest that the USAA required its application in state court proceedings.[128] Last, there is no evidence that Congress ever *intended* to displace a state law which does not permit on the merits a review of an arbitration award for a manifest disregard of the law,[129] which is the essential element of a preemption claim.[130]

These factors indicate a logical legal incongruity in the law insofar as a federal court is required to apply the manifest disregard of the law standard, but this standard is not mandated on state court judges. However, this incongruity does not permit the USAA to be construed to require that state judges apply the manifest disregard of the law test in post-arbitration litigation where a party seeks to vacate an award.[131] The manifest disregard of the law test is rarely used to set aside an arbitration award.[132] The federal courts have described the manifest disregard of the law standard as "very narrowly limited"[133] or "'severely limited.'"[134] There is no statistical data to indicate that it successfully leads to vacating arbitration awards

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123. *See supra* note 43 and accompanying text.
124. *See supra* notes 2, 53-86 and accompanying text.
125. *See supra* notes 2, 87-99 and accompanying text.
126. *See supra* notes 44-52 and accompanying text.
127. *See supra* notes 100-09 and accompanying text.
128. *See supra* notes 109-17 and accompanying text.
129. *See supra* notes 100-17 and accompanying text.
130. *See* Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); *see also* English v. General Elec. Co., 496 U.S. 72, 78 (1990) (holding that an employee's state law claim was not preempted by Energy Reorganization Act absent congressional intent to preempt).
131. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).
132. *See* Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 252-54 (1993) (noting that most circuits did not even recognize the standard before the *First Option*'s decision in 1995).
133. *See* Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110 (2d Cir. 1980) (citing I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 429-32 (2d Cir. 1974)).
134. *See* Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2d Cir. 1993) (quoting Office of Supply, Gov't of the Republic of Korea v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972)).

with any regularity.[135] Moreover, the judicial perception that a particular rule is unreasonable cannot displace the plain language of the USAA.[136] Finally, the other six factors previously articulated outweigh any speculative effect concerning possible differing results in state courts as distinguished from federal courts.

In summation, application of neutral principles of statutory interpretation identified by the United States Supreme Court leads to the conclusion that the USAA does not require state courts to apply the manifest disregard of the law test to post-arbitration challenges of an arbitrator's award. State courts and legislatures, as well as Congress, are certainly free to require the manifest disregard of the law standard to be applied in state court.[137] Further, state appellate courts may choose to construe their own arbitration statutes to permit the use of the manifest disregard of the law standard. However, Congress did not mention the manifest disregard of the law test in the USAA or in the events leading up to its adoption. In any event, it is difficult to see how sections 10 and 12 would apply to state court proceedings. The task before state court judges is to make certain that bright lines are drawn in connection with this issue so that it is resolved promptly once and for all.

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135. In terms of federal preemption issues, it is important to note the fact that there is no data to support the conclusion that the manifest disregard of the law standard leads to different results in federal and state courts. If predictably different results in federal and state courts are frequent, such results favor according a preemptive effect to a congressional enactment. *See* Felder v. Casey, 487 U.S. 131, 138 (1988); Rosenthal v. Great W. Fin. Sec. Corp., 926 P.2d 1061, 1069 (Cal. 1996). However, there is no evidence of frequent and predictably different outcomes depending on the forum where the litigation is commenced.

136. *See* Commissioner v. Asphalt Prods. Co., 482 U.S. 117, 121 (1987).

137. Several state supreme courts have adopted the manifest disregard test as a basis for vacating arbitration awards. This has been done as part of the development of state common law or as an interpretation of arbitration statutory law. *See, e.g.*, Saturn Const. Co. v. Premier Roofing Co., 680 A.2d 1274, 1280 (Conn. 1996); Board of Educ. v. Prince George's County Educators' Ass'n, 522 A.2d 931, 939 (Md. 1987); Geissler v. Sanem, 949 P.2d 234, 237 (Mont. 1997); Coblentz v. Hotel Employees & Restaurant Employees Union Welfare Fund, 925 P.2d 496, 501 (Nev. 1996); Perini Corp. v. Greate Bay Hotel & Casino, Inc., 610 A.2d 364, 366 (N.J. 1992) *overruled by* Trentina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 640 A.2d 788 (N.J. 1994) (adopting a different standard of review for arbitration awards); Fleet Constr. Co. v. Town of N. Smithfield, 713 A.2d 1241, 1243 (R.I. 1998); Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 951 (Utah 1996); Madison Landfills, Inc. v. Libby Landfill Negotiating Comm., 524 N.W.2d 883, 888 (Wis. 1994). No state has included the manifest disregard of the law test as a ground for vacating an award in their arbitration statutes.