ARBITRATOR'S ERROR AND THE "FACE OF THE AWARD" RULE

By John B. Rich*

Introduction

In *Mid Atlantic v. Bien*, the Tenth Circuit U.S. Court of Appeals adopted the "face-of-the-award" rule, despite granting a "double recovery" to an elderly couple.[1] In *Bien,* petitioner Cross Defendant-Appellant / Cross-Appellee Mid Atlantic Capital Corporation ("Mid Atlantic"), a brokerage firm, moved to modify an arbitration award to investors to correct evident material miscalculations of figures under the Federal Arbitration Act ("FAA"). Mid Atlantic claimed the arbitration panel awarded Respondents Beverly Bien and David H. Wellman a double-recovery. In response, Ms. Bien and Mr. Wellman, a married couple, moved to confirm the arbitration award and claimed the district court could only modify the award to correct the double-recovery if there was "an evident material miscalculation of figures" on the face of the award.[2] While the district court found the arbitration award to be "disturbing," the court ruled in favor of Ms. Bien and Mr. Wellman. The court concluded that it lacked the authority to modify the reward because the alleged double counting appeared only upon looking at the arbitration record. The court denied Mid Atlantic's motion to modify and granted Ms. Bien and Mr. Wellman's motion to confirm the award. The court agreed with the couple and adopted the "face-of-the-award" rule, holding that a miscalculation or mistake is "evident" only if it appears in the award.[3]

The Tenth Circuit affirmed. With this decision, the Tenth Circuit joins the Fourth, Sixth, and Eleventh Circuits in affirming the "face-of-the-award" rule, widening the split in the circuits.[4]

Facts

Ms. Bien and Mr. Wellman opened several brokerage accounts with Mid Atlantic, a brokerage firm registered with the Financial Industry Regulatory Authority ("FINRA"). Through Ms. Bien and Mr. Wellman's brokerage accounts they invested in two vehicles, Sonoma Ridge Partners and KBS REIT ("KBS"). Ms. Bien and Mr. Wellman's contracts with Mid Atlantic included identical arbitration clauses that obligated the parties to resolve all disputes through binding arbitration conducted according to FINRA rules.

After the Sonoma Ridge Partners and KBS investments suffered substantial losses, Ms. Bien and Mr. Wellman initiated arbitration proceedings against Mid Atlantic. They alleged Mid Atlantic had sold them unreasonably risky investments. Ms. Bien and Mr. Wellman sought damages, attorney's fees, costs, and interest.

At arbitration, Ms. Bien and Mr. Wellman's expert offered two ways to calculate the losses at issue. The first option looked to their "net out-of-pocket" losses.[5] The net out-of-pocket losses were calculated at $292,411. The second option looked to Ms. Bien and Mr. Wellman's "market-adjusted-damages."[6] The market-adjusted-damages were, "the difference between the actual return on these investments and what the return would have been if [Ms. Bien and Mr. Wellman's] money had been invested in a well-managed 'benchmark' account."[7] The expert calculated the market-adjusted-damages to be between $484,684 and $618,049. Mid Atlantic presented no expert testimony. During the closing arguments of the hearing, Ms. Bien and Mr. Wellman read a written final prayer for relief in which they requested market-adjusted damages. They asserted that if they were compensated for their net out-of-pocket losses it would be "inconsistent with case law" and would not make them whole.[8] On top of the market-adjusted damages, Ms. Bien and Mr. Wellman also prayed for $118,560 in attorney's fees, $26,812.82 in costs, interest on the damages at 8% per year, and punitive damages.

The arbitration panel ruled in favor of Ms. Bien and Mr. Wellman, ordering Mid Atlantic to pay them; (1) initial-investment-loss damages and (2) compensatory damages.

Damages Award	Ms. Bien	Mr. Wellman	Both	Total
Initial Investment Loss	$240,321	N/A	$52,090	$292,411
Compensatory Damages	$437,286	$47,397	N/A	$484,683
Total	$677,607	$47,397	$52,090	$777,094

The arbitration panel also ordered Mid Atlantic to pay interest at 8% per year on each form of damages to "accrue from the date Ms. Bien and Mr. Wellman initiated arbitration proceedings until the damages were paid in full."[9] In addition to the damages previously listed, the award consisted of $118,560 in attorney's fees, $26,812.82 in costs, and all arbitration fees. Punitive damages were not awarded. The arbitration panel ordered Ms. Bien and Mr. Wellman to "reassign ownership of all Sonoma Ridge Partners and KBS REIT investments to [Mid Atlantic]."[10]

Mid Atlantic moved in the district court to modify the award, arguing that the arbitration panel had given Ms. Bien and Mr. Wellman a double recovery. Mid Atlantic claimed that the panel's $292,411 award in initial-investment-loss corresponded with Ms. Bien and Mr. Wellman's expert's testimony that their net out-of-pocket losses were of an equal amount. Mid Atlantic also claimed that the panel's $484,683 award in compensatory damages almost matched the $484,684 in market-adjusted damaged that the expert had calculated. The expert presented net out-of-pocket damaged and market-adjusted damages as alternatives, and Ms. Bien and Mr. Wellman had only requested market-adjusted damages in their final prayer. By awarding Ms. Bien and Mr. Wellman both forms of damages, the panel potentially gave them a double recovery. Mid Atlantic asked that the district court to modify the arbitration award in order to correct this issue.

In response, Ms. Bien and Mr. Wellman moved for the district court to confirm the award. They claimed that there must be "an evident material miscalculation of figures" on the face of the award for the district court to modify it.[11] Ms. Bien and Mr. Wellman argued that the district court lacked the authority for modification of the award because the alleged double recovery appeared here only when one delved into the arbitration record.

The court read 9 U.S.C. §11(a) as only authorizing the court to correct an evident material miscalculation of figures if the miscalculation appeared on the face of the award.

The district court agreed with Mid Atlantic that "what the panel called 'initial investment loss[es]'" and "compensatory damages" corresponded with what Ms. Bien and Mr. Wellman had called, respectively, "net out-of-pocket losses" and "market-adjusted damages."[12] The district court found that by awarding "both net out-of-pocket losses … and market-adjusted damages," the panel essentially gave Ms. Bien and Mr. Wellman a double-recovery.[13]

Even though the district court agreed with Mid Atlantic, however, it still ruled in favor of Ms. Bien and Mr. Wellman. The court read 9 U.S.C. §11(a) as only authorizing the court to correct an evident material miscalculation of figures if the miscalculation appeared on the face of the award. The district court concluded that they lacked the authority to modify the award because the double counting at issue only appeared upon looking into the arbitration record. As a result, the court denied Mid Atlantic's motion to modify the award and granted Ms. Bien and Wellman's motion to confirm the award.

After receiving proposed judgements from both parties, the district court entered an amended final judgement. The judgement awarded Ms. Bien and Mr. Wellman damages, attorney's fees, and costs in the same amount that the arbitration panel specified. The court confirmed the 8% yearly prejudgment interest on the damages but did not include interest on the attorney's fees or costs. The court applied the 2.1% federal rate listed in 28 U.S.C. §1961 for post judgment interest. Lastly, the court ordered Ms. Bien and Mr. Wellman to reassign to Mid Atlantic their ownership interests in the investments in Sonoma Ridge Partners and KBS, including any post award distributions.

Both parties filed appeals from the amended final judgement in the Tenth Circuit Court of Appeals. Mid Atlantic's appeal presented one question: Did the district court err by holding that it lacked authority to modify the arbitration award to correct an alleged evident material miscalculation of figures because that miscalculation did not appear on the face of the award? Ms. Bien

and Mr. Wellman raised three questions, asking whether the district court erred by: (1) granting post-award interest on damages, but not on attorney's fees and other costs; (2) awarding post judgment interest at the federal rate; and (3) ordering Ms. Bien and Mr. Wellman to reassign to Mid Atlantic any post-award distributions from their ownership interests in Sonoma Ridge Partners and KBS (as well as interest thereon).

Holding

A. Mid Atlantic's Question

Mid Atlantic's question was broken into two parts. First, whether 9 U.S.C. §11(a) permits courts to look beyond the face of the arbitration award when deciding whether to modify an award. Second, if not, does the face of this arbitration award contain an evident material miscalculation of figures.

1. Part 1

For §11(a) to authorize courts to modify arbitration awards, the award must contain "an evident miscalculation of figures. . ."[14] Mid Atlantic argued that the district court erred in interpreting §11(a) to embody a face-of-the-award limitation. The Tenth Circuit recognized that there is a narrow and deferential standard of review in arbitration context, requiring it to interpret §11(a) as written. By drawing inferences from the text and context of the FAA and looking to the persuasive authority of their sister circuits the Tenth Circuit concluded that §11(a) does embody a face-of-the-award limitation.

The court drew inference from the FAA by interpreting §11(a) as written and giving words their plain meaning when "read in their context and with a view to their place in the overall statutory scheme."[15] Starting with §11(a)'s plain meaning, the court first looked at the phrase "miscalculation of figures." In American English, a "miscalculation of figures" refers to mathematical, not legal, errors.[16] "Material" is found to mean "important; essential; relevant."[17] Then, the court looked to define "evident" which means "plain or obvious."[18] Combining the definitions, the court found §11(a) to allow courts to correct obvious, significant mathematical errors. Even with these dictionary definitions, the court did not find the meaning of "evident" to be evident. The court viewed the issue to be whether a miscalculation must be obvious on the face of the award or after one looks to the arbitration record. To help infer the meaning, the court looked to §11(a)'s context in the FAA.

The FAA's principle purpose is to "ensur[e] that private arbitration agreements are enforced according to their terms."[19] The FAA's purpose is furthered by reading "evident" as relating to a miscalculation appearing on the face of the award. Face-of the award limitations preserve the integrity of the parties' bargain by preserving the deal for an arbitrator's resolution as opposed to a court's. A face-of-the-award interpretation keeps arbitration from being a "prelude to a more cumbersome and time-consuming judicial review process."[20] As the court notes, reading §11(a) to allow courts to hunt through the arbitration record for "evident" miscalculations opens the door to the full-bore legal and evidentiary appeals that the parties contracted to avoid.

The court viewed the face-of-the-award limitation to be part of the "old soil" that §11(a) brought with it from previous New York law.[21] When Congress transplanted "an evident miscalculation of figures" into §11(a), New York courts had long interpreted that phrase to mean a miscalculation that appeared "on its face."[22] The language in §11(a) has been untouched over decades so the court believed that the face-of-the-award limitation that has long been attached to §11(a) is "old soil" and should remain attached.

The structure of the FAA further confirms that the face-of-the-award limitation should be respected. Section 9 of the FAA says that courts "'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected."[23] §11(a) only allows for modification to "address egregious departures from the parties' agreed-upon arbitration.[24] Mid Atlantic's proposed interpretation would change §11(a) from an exception to address egregious departures into a free for all authorization for courts to dig into arbitration records.

The Tenth Circuit recognized that it must use a narrow and deferential standard of review in the context of arbitration. Therefore, the court does "not sit to hear claims of factual or legal error by an arbitrator."[25] Reading §11(a) to allow courts to dive into arbitration records would open arbitration awards to judicial second-guessing, undercutting the narrow standard of review.

Mid Atlantic further argued that "[t]he only way to determine whether a miscalculation or mistake is 'material' is to analyze the [arbitration] record."[26] Meaning, if §11(a) allowed a face-of-the-award limitation, then the term "material" would have no effect. The court found this argument invalid because it is generally evident when there is a material mathematical error in an award without delving into the records.

The court found that it is clear based on the purpose, history, and structure of the FAA that Congress intended §11(a) to function with a face-of-the-award limitation. Section 11(a) allows courts to review an arbitration award, not an arbitration record. The face-of-the-award limitation furthers Congress's goal of providing "just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[27] This combined with the persuasive authority from sister courts lead the court to conclude §11(a) allows courts to correct only evident material miscalculations that appear on the face of the award.

2. Part 2

Having come to the conclusion that §11(a) does incorporate a face-of-the-award limitation, the court moved on to the second part of Mid Atlantic's question: whether the arbitration award contained an evident material miscalculation of figures.

Mid Atlantic claimed that the arbitration award contained a clear double counting. Mid Atlantic's reasoning was that the $292,411 for initial investment loss represented the net out-of-pocket losses calculated by Ms. Bien and Mr. Wellman's ex-

pert and the $484,683 in compensatory damages represented the $484,684 in market adjusted damages also calculated by the expert. The expert at one point stated that "market-adjusted damages include net out-of-pocket damages."[28] Mid Atlantic stated that by awarding initial investment losses and compensatory damages, the panel mistakenly awarded Ms. Bien and Mr. Wellman damages twice.

Even if the court had accepted this, the issue would have been whether this mistake appeared on the face-of-the-award. It is evident that the mistake did not. The award never mentioned that there was any correlation between the initial investment loss or compensatory damages and net out-of-pocket losses or market-adjusted damages. Therefore, there was no math issue on the face-of-the-award, and Mid Atlantic did not meet its burden of identifying any evident material miscalculation. Therefore, the court upheld the district court's decision to not fix the alleged double recovery in favor of Ms. Bien and Mr. Wellman.

B. Ms. Bien and Mr. Wellman's Questions

The three questions Ms. Bien and Mr. Wellman raised on their cross appeal were whether the district court erred by: (1) granting post-award interest on damages, but not attorney's fees and other costs; (2) awarding post-judgement interest at the federal rate; and (3) ordering Ms. Bien and Mr. Wellman to reassign to Mid Atlantic any post-award distributions from their ownership in Sonoma Rudge Partners and KBS. The court found that the district court did not err in any of these respects.

1. Post-Award Interest on Damages

The court of appeals found that the district court did not err in granting post-award interest only on damages, while not awarding it for attorney's fees and costs. The arbitration award ordered Mid Atlantic to pay Ms. Bien and Mr. Wellman damages, attorney's fees, and arbitration costs. On top of these payments, the arbitration award stated that Mid Atlantic was "liable for and shall pay . . . interest at the rate of 8% per annum beginning February 6, 2015[,] until" each type of damages was "paid in full."[29] The award only mentioned interest on damages, not attorney's fees and costs. The award specifically implied the denial of interest on attorney's fees and costs when it stated,"[a]ny and all claims for relief not specifically addressed herein . . . are denied."[30] The district court did not err in granting interest only on damages and the court affirmed this portion of the amended final judgement.

2. Post-Judgement Interest at Federal Rate

The court of appeals also found that the district court did not err in awarding post-judgment interest at the federal rate. Federal law sets the rate at which post-judgment interest accrues on civil judgments in federal court.[31] Section 9 U.S.C. §13 gives judgements modifying or confirming arbitration awards the "same force and effect" as any other judgement and subjects them to the same "provisions of law."[32] When a district court confirms or modifies an arbitration award, the cause of action underlying the award "merges into the judgement" and the federal rate applies.[33] The parties do have an option to contract around this merger rule, setting forth a different interest rate, but they must express this intent using "clear unambiguous and unequivocal language."[34] The parties did not express their intent to contract around the federal interest rate and, therefore, the district court was correct in applying the federal post-judgement interest rate.

3. Reassignment of Ownership in Sonoma Rudge Partners and KBS

Finally, the court of appeals found that Ms. Bien and Mr. Wellman were unable to show that the district court erred by ordering them to reassign to Mid Atlantic the post-award distributions from their ownership interests in Sonoma Ridge Partners and KBS.

After the service of the arbitration award, Ms. Bien and Mr. Wellman contacted Mid Atlantic about reassigning their investments. Mid Atlantic thought that reassignment at this point was premature because Ms. Bien and Mr. Wellman had moved to vacate the award. Ms. Bien and Mr. Wellman maintained ownership of the investments throughout the district courts proceedings. Like the arbitration award, the district court's ruling ordered Ms. Bien and Mr. Wellman to reassign their ownership in the investments, however the district court clarified that "the reassignment shall include any and all amounts distributed to [Ms. Bien and Mr. Wellman] by the Sonoma Ridge Partners and KBS REIT investments after the [arbitration] award, as well as any interest on such distributions."[35] Ms. Bien and Mr. Wellman argued that the court strayed from the language of the arbitration award and that the initial award did not require them to pay Mid Atlantic the post-award distributions from the investments. This argument failed. They did not cite to any on-point legal authority supporting a finding of error. Ms. Bien and Mr. Wellman were paid cash for the investments post award and both investments if liquidated had no value other than the substantial distribution received for their ownership interests in KBS. They made no credible argument for retaining the distributions, other than the fact that then investment itself had no value. The court found this argument unpersuasive and rejected Ms. Bien and Mr. Wellman's last contention. The court affirmed the amended final judgement in all respects.

Conclusion

Although Ms. Bien and Mr. Wellman were not successful on any of their cross claims, they were successful in affirming the arbitration award and the ruling from the district court. The court was almost hesitant in affirming the face-of-the-award rule in this case. It seemed to agree with Mid Atlantic that the arbitration award granted Ms. Bien and Mr. Wellman double recovery. However, the court believed the law was clear, and there was just nothing it could do to remedy the situation.

The face-of-the-award rule is controversial because it sometimes allows mistakes to go without remedy. It is more than likely that all parties were aware that the arbitration damages correlated with damages calculated by Ms. Bien and Mr. Wellman's expert. It seems clear that Ms. Bien and Mr. Wellman recovered twice. However, if one had no knowledge of the arbitration or the damages calculated by the expert, it would be impossible to see that there was an error made.

The mistake made in this arbitration award was an anomaly, and it would not have been prudent to open the arbitration award to additional scrutiny.

It is not in the spirit of justice to allow someone to recover twice for a single harm. A criminal may not be charged twice for a single crime. Why should a party in a civil suit be required to pay damages twice for a single mistake? Should not a court be able to take reasonable measures to keep this from happening? By not allowing courts to look past the-face-of-the-award, defendants are not only hurt when overpaying damages, but plaintiffs are encouraged to take advantage of the rule and attempt to disguise damages when making their complaints in hopes that a mistake is made so that they can collect more without the courts asking questions.

On the other hand, a face-of-the-award approach ensures that arbitration remains an efficient means to resolve disputes rather than "merely a prelude to a more cumbersome and time-consuming judicial review process."[36] Arbitration is a means to keep our courts from becoming too overcrowded and a face-of-the-award rule helps further mitigate this issue. By keeping parties from claiming that there was a mistake made in an arbitration it helps uphold the reason arbitrations exist: to keep parties from going to court. Without the face-of-the-award rule many more cases would go to court and much more time would be wasted by our justice system.

The mistake made in this arbitration award was an anomaly, and it would not have been prudent to open the arbitration award to additional scrutiny.

But Mid Atlantic v. Bien is a perfect example of why an absolute face-of-the-award standard is not always "just." Ms. Bien and Mr. Wellman were aware that they received a double recovery and took advantage of Mid Atlantic. The ruling of the court, however, is an example of why it is more important to keep arbitrations private to preserve their integrity and usefulness rather than opening a can of worms by allowing courts to analyze what happens in arbitrations so that they can resolve a mistake here or there. The mistake made in this arbitration award was an anomaly, and it would not have been prudent to open the arbitration award to additional scrutiny. That is why the Tenth Circuit joined the Fourth, Sixth, and Eleventh Circuits in affirming the face-of-the-award rule.

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1 Mid Atl. Capital Corp. v. Bien, 956 F.3d 1182, 1191 (10th C ir. 2020).
2 *See* 9 U.S.C. §11(a).
3 *Mid. Atl., supra* note 1, at 1189.
4 *Id*. at 1197, 1203, 1210. *See* Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 194 (4th Cir. 1998), Grain v. Trinity Health, Mercy Health Servs. Inc., 551 F.3d 374 (6th Cir. 2008), Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Const. Co., 744 F.2d 1482, 1483–84 (11th Cir. 1984).
5 *Mid. Atl., supra* note 1, at 1187.
6 *Id*.
7 *Id*.
8 *Id*. at 1188.
9 *Id*.
10 *Id*. at 1211 (Quoting Aplt.'s App.,Vol. I, at 28 (Arbitration Award, dated Dec. 12, 2016)).
11 *Mid. Atl., supra* note 1, at 1188.
12 *Id*. at 1189 (Quoting Aplt.'s App., Vol. V, at 1084).
13 *Id*.
14 *See* 9 U.S.C. §11(a).
15 Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, (2019).
16 *See* Calculate, New Oxford American Dictionary 242 (2d ed. 2005).
17 *Id*. at 1045.
18 *Id*. at 585.
19 AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344, (2011).
20 Hall St. Assoc. v. Mattel, Inc., 552 U.S. 576, at 588 (2008).
21 *Mid. Atl.*, *supra* note 1, at 1194.
22 *See* Remington Paper Co. v. London Assurance Corp. of Eng., 43 N.Y.S. 431 (N.Y. App. Div. 1896) (affirming order concluding that "[t]he party who seeks to set aside an award upon the ground of mistake must show, from the award itself, that but for the mistake the award would have been different.").
23 *Hall St.*, *supra* note 20, at 582.
24 *Id*. at 586.
25 *Stolt-Nielsen*, 559 U.S. at 696.
26 *Mid. Atl.*, *supra* note 1, at 1195.
27 *Hall St.*, *supra* note 20, at 588.
28 *Mid. Atl.*, *supra* note 1, at 1205.
29 Aplt.'s App., Vol. I, at 28.
30 *Id*.
31 *See* 28 U.S.C. §1961; Youngs v. Am. Nutrition, Inc., 537 F.3d 1135, 1146 (10th Cir. 2008).
32 *See* 9 U.S.C. §13.
33 *See* Tricon Energy Ltd. v.Vinmar Int'l, Ltd., 718 F.3d 448, 457 (5th Cir. 2013).
34 *See* Newmont U.S.A., Ltd. v. Ins. Co. of N. Am., 615 F.3d 1268, 1276 (10th Cir. 2010).
35 *Mid. Atl.*, *supra* note 1, at 1211.
36 *Hall St.*, *supra* note 20.