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ADR Case Update 2021 - 13

Federal Circuit Courts

- **COURT DECLINES TO EXTEND *MONSTER ENERGY* TO DEALINGS WITH COUNSEL; JAMS MUST PROVIDE CONFLICT-RELATED DISCLOSURES**

EHM Productions, dba TMZ v. Starline Tours of Hollywood
2021 WL 2584404
United States Court of Appeals, Ninth Circuit
June 24, 2021

TMZ terminated its agreement with Starline to run a celebrity bus tour, asserting that Starline failed to handle the enterprise's revenues under the agreement's terms. TMZ and Starline brought their claims and counterclaims to arbitration before JAMS. In the final award, the Arbitrator: concluded that TMZ legally terminated the agreement, granted TMZ's anti-SLAPP motion, striking four of Starline's counterclaims, and concluded that the litigation privilege codified in the California Civil Code also provided an additional basis for dismissing the counterclaims. Starline appealed to a three-arbitrator JAMS appellate panel. The Panel affirmed the award except with respect to the Arbitrator's decision regarding the anti-SLAPP motion, which the Panel concluded was not allowed in arbitration proceedings. The court denied Starline's motion to vacate the award and granted TMZ's motion to confirm. Days later, the Ninth Circuit issued *Monster Energy*, interpreting the standard for "evident partiality" to warrant vacatur of an arbitration award under the FAA. Based on *Monster Energy*, Starline requested disclosure of each Arbitrator's ownership interest in JAMS and the number of arbitrations and mediations for which JAMS as an entity was engaged by TMZ, its affiliates, and their counsel. JAMS responded that each Arbitrator issued disclosures consistent with their legal and ethical obligations during the arbitration. Given that the Arbitrators had issued their final decisions, they had no further jurisdiction. Starline filed a Rule 59(e) motion, arguing in part that the Arbitrators and JAMS failed to make disclosures required under the *Monster Energy* decision. The court denied the motion, and Starline appealed.

The United States Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded in part. Starline's argument that the award should be vacated for evident partiality based solely on the Arbitrators' failure to disclose JAMS's non-trivial business dealings –

regardless of whether they were with TMZ or TMZ and counsel – sought a significant and unwarranted extension of *Monster Energy*. *Monster Energy* only required disclosure when an arbitrator held an ownership interest in JAMS and JAMS engaged in non-trivial business dealings with a party to the arbitration. The Court declined to stretch the *Monster* opinion to require disclosure of non-trivial business dealings with counsel. The Court also held that the district court did not err when it declined to vacate the award on the grounds that the arbitrator did not produce a form indicating she had no conflicts with the Boies Schiller law firm (after TMZ's counsel merged with the firm). The Arbitrator's decision not to provide a supplemental disclosure form revealing no further disclosures with regard to Boies Schiller did not demonstrate evident partiality. The Court also found that the court did not err when it declined to vacate the award on the grounds that the Arbitrator improperly granted an anti-SLAPP motion. The Arbitrator clearly had authority to address and resolve Starline's counterclaims – just not under the procedural rubric of CA's anti-SLAPP law. The Appeal Panel reasonably concluded that Starline failed to demonstrate prejudice from the Arbitrator's error because the Arbitrator would have correctly reached the same conclusion outside the anti-SLAPP context, and she did not intentionally ignore or disregard the law. The Court also held that the court did not err when it declined to vacate the arbitration award based on the Arbitrator's interpretation of CA partnership law. Starline failed to point to any case law indicating that a party could breach its fiduciary duty when exercising a right granted under the joint venture agreement (i.e., an ability to compete with the joint venture after the extinguishment of the non-compete clause therein). The Court found that the district court clearly erred in interpreting JAMS's response to the request for information under *Monster Energy*. JAMS's response to the request for disclosures post-*Monster Energy* reflected the position that the Arbitrators were not required to provide the information set out in *Monster Energy* because they no longer had jurisdiction. The court construed this response as the disclosure itself, which was clear error. In denying the Rule 59(e) motion on that basis, the court abused its discretion. The Court remanded this particular issue to the district court to consider how the parties could obtain from JAMS the information required by *Monster Energy*.

- **ENTRY OF DEFAULT AGAINST COMPANIES WHO FAILED TO APPEAR AT HEARING WAS WARRANTED**

CKR Law LLP v. Anderson Investments International et al.
2021 WL 2519600
United States District Court, S.D. New York
June 21, 2021

CKR Law Firm served as an escrow agent in a series of financial transactions involving Anderson Investments. After parties to the financial transactions alleged that the respondents engaged in wrongful conduct in connection with the transactions, CKR petitioned to compel arbitration of all disputes. When the respondents failed to appear at the hearing convened by the Court, CKR moved for default judgment against all respondents.

The United States District Court, S.D. New York granted the motion. The Court had subject matter jurisdiction over the petition, which adequately alleged diversity between the parties and an amount in controversy exceeding \$75,000. A party can enter default by failing to defend in the action. Here, the respondents, after having been served, failed to attend a telephonic hearing or otherwise participate in the action. The entry of default against the companies was warranted. The petition to compel arbitration adequately alleged that each of the relevant contracts contained an arbitration clause and that the respondents failed or refused to arbitrate. The court had the authority to order the respondents to arbitrate before JAMS, as sought in the petition.

- **SETTLEMENT AGREEMENT DID NOT ABROGATE, MODIFY, OR TERMINATE THE ARBITRATION CLAUSES OF PURCHASE AGREEMENT**

Sommerfeld, et al., v. Adesta, LLC
2021 WL 2583212
United States Court of Appeals, Eighth Circuit
June 24, 2021

When Adesta was sold, the purchase agreement provided that Plaintiffs, shareholders, and executives of Old Adesta would indemnify the purchaser for liability arising from Old Adesta's

work for the New York State Thruway Authority (NYSTA). Adesta LLC (New Adesta) initiated arbitration against the Plaintiffs related to work on the NYSTA project, raising claims for indemnification. Plaintiffs brought a state court action, seeking a declaration that New Adesta's arbitral claims were released and discharged in a settlement agreement related to Plaintiffs' alleged breach of restrictive covenants and misappropriation of trade secrets when they started their own venture. New Adesta moved to compel arbitration and dismiss the Plaintiffs' case. The court granted the motion, and Plaintiffs appealed.

The United States Court of Appeals for the Eighth Circuit affirmed. The Settlement Agreement did not abrogate, modify, or terminate the arbitration clauses set forth in the Purchase Agreement. The underlying issue of this case, indemnification for NYSTA work, fell entirely outside the scope of the Settlement Agreement, which did not mention NYSTA obligations or indemnification. The court did not abuse its discretion by dismissing the action after granting the motion to compel arbitration; district courts may do so when it is clear the entire controversy will be resolved by arbitration. Here, the Court determined that the parties had a valid agreement to arbitrate all claims, which fell within the scope of the arbitration clauses.

- **COURT WRONGLY DETERMINED THAT TRANSPORTATION WORKER EXEMPTION APPLIED**

Hamrick v. Partsfleet et al.

2021 WL 2546405

United States Court of Appeals, Eleventh Circuit

June 22, 2021

Hamrick, a driver for final-mile delivery service U.S. Pack, sued his employer on behalf of himself and others, alleging that they were mischaracterized as independent contractors and were entitled to unpaid overtime compensation and other relief under FLSA. U.S. Pack moved to compel arbitration under the arbitration provisions in the agreements. The court denied the motion, concluding that the drivers were "transportation workers" under section one of the FAA and thus exempt from arbitrating their claims. U.S. Pack appealed.

The United States Court of Appeals for the Eleventh Circuit dismissed in part and reversed and remanded in part. In concluding that the drivers fell within the transportation worker exemption, the court focused on the movement of goods and not the class of workers. This was error. The transportation worker exemption applies if the worker belongs to a class of workers in the transportation industry and the class of workers actually engages in foreign or interstate commerce. The Court reversed the order denying U.S. Pack's motion to compel and remanded for the district court to apply the proper test. The Court held that it did not have jurisdiction to review the part of the court's order denying the motion to compel arbitration under state law.

- **CASE REMANDED TO DETERMINE WHETHER PLAINTIFF BOUND BY ARBITRATION AGREEMENT**

Bill Hansen v. LMB Mortgage Services, Inc.

2021 WL 2386391

United States Court of Appeals, Ninth Circuit

June 11, 2021

LMB, a website for persons interested in refinancing their mortgages, collected information from a visitor identified as Willena Hansen, who included details of a property that she owned with her son, Bill. After receiving a text message from LMB regarding mortgage refinancing, Bill brought a putative class action, alleging that LMB violated the Telephone Consumer Protection Act by sending texts without the recipients' consent. LMB moved to compel arbitration based on Bill's assent to the arbitration agreement or, in the alternative, holding Bill to the arbitration agreement if Willena formed the arbitration agreement. The court denied LMB's motion to compel arbitration under the FAA, determining that the existence of an agreement to arbitrate was in issue. Defendants appealed.

The United States Court of Appeals for the Ninth Circuit vacated and remanded. The court mistakenly issued a nonfinal order denying LMB's motion to compel arbitration while stating its

intent to schedule a trial to resolve the factual issues. As a matter of first impression, the Court held that denial of a motion to compel arbitration under the FAA is immediately appealable even if the district court intended to reconsider the question of arbitrability following further fact-finding and possibly a trial. The Court remanded to the district court to proceed to trial and comply with FAA §4, which makes clear that if the making of an arbitration agreement is in issue, the court shall proceed summarily to the trial thereof.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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