



www.jamsadr.com

[About](#) | [Neutrals](#) | [Rules & Clauses](#) | [Practices](#) | [Panel Net](#)

JAMS Institute

LEARNING FROM EACH OTHER

November 6, 2019

ADR Case Update 2019 - 22

Federal Circuit Courts

- COURT REQUIRES ARBITRATOR TO DISCLOSE OWNERSHIP STATUS**

Monster Energy Company v. City Beverages, LLC (Olympic Eagle Distributing)
2019 WL 5382062
United States Court of Appeals, Ninth Circuit
October 22, 2019

(NOTE: This case is of obvious significance to JAMS. The summary is intentionally very brief. We strongly encourage you to read the case in its entirety and to look for direction from the company regarding any practice ramifications flowing from it.)

Beverage distributor Olympic Eagle contracted with Monster to sell and promote Monster drinks for 20 years in an exclusive territory. Monster retained the right to terminate the agreement without cause upon payment of a severance fee. Monster exercised its right to terminate and offered a severance fee of \$2.5 million to Olympic. Olympic invoked Washington's Franchise Investment Protection Act, which prohibits franchise contract termination absent good cause. The court granted Monster's motion and compelled arbitration with JAMS, pursuant to the agreement between Monster and the distributor. The arbitrator issued an interim award, finding that Olympic was not entitled to protection under FIPA. Two months later, the arbitrator awarded Monster attorneys' fees. The court confirmed the Award and Olympic appealed.

The United States Court of Appeals for the Ninth Circuit vacated and remanded. In a 2-1 opinion, the Court stated that vacatur of an arbitration award is supported where an arbitrator fails to disclose to the parties any dealings that might create an impression of bias. The Court found that the arbitrator's ownership interest in JAMS and its "more than trivial" business dealings between JAMS and Monster created an impression of bias, should have been disclosed, and supported vacatur.

- ARBITRATORS DID NOT EXCEED POWERS**

McGee v. Armstrong et. al
2019 WL 5556756
United States Court of Appeals, Sixth Circuit

October 29, 2019

McGee, a member of the OH National Guard, is a former employee of the Summit County Board of Developmental Disabilities. Armstrong is the Board's Superintendent. McGee worked under renewable one-year employment agreements, which provided for arbitration, per AAA Rules, of claims arising out of removal, suspension, or demotion and provided for military leave in accordance with Board Policy. The 2011-2012 employment agreement revised the military leave language, providing the employee would be entitled to military leave in accordance with Ohio law. McGee did not sign that contract. Shortly after returning from military leave in 2012, McGee was terminated from his job. McGee sued the Board for wrongful termination, various breaches of contract, and discrimination and retaliation based on military service. The court granted the Board's motion to compel arbitration, excluding two breach of contract claims. An arbitrator determined that all of the claims identified as possibly subject to arbitration were arbitrable and granted Defendant's motion for summary judgment. The court granted summary judgment on McGee's breach of contract claims. McGee appealed.

The Court of Appeals for the Sixth Circuit affirmed. The contract provided that questions of arbitrability were for the arbitrator and, applying *Henry Schein*, the lower court did not err in referring the contested claims to arbitration. The arbitrators did not exceed their powers when they granted Armstrong's motion for summary judgment. The dispositive motion section of AAA Rules provided that the arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party shows substantial cause. The court did not err in granting Armstrong's motion for summary judgment on the breach of contract claims. While McGee did not sign the 2011-2012 employment agreement, he was informed that the revisions to the contract would be implemented even if he chose not to sign. McGee also acquiesced to its terms when he complied with them by sending his military earning statement to the Board to receive differential pay.

- **FIRM'S OFFER TO PAY PLAINTIFF'S ARBITRATION COSTS CURES SUBSTANTIVE UNCONSCIONABILITY**

Plummer v. McSweeney

2019 WL 5405642

United States Court of Appeals, Eighth Circuit

October 23, 2019

Plummer hired McSweeney's law firm after receiving an out-of-the-blue call from a woman named Yolanda, who informed Plummer that her transvaginal mesh implant was defective and that she could connect her with an attorney to obtain compensation for mesh removal surgery. After undergoing the surgery, Plummer sued McSweeney and his firm for fraud, unjust enrichment, and legal malpractice. McSweeney moved to compel arbitration in light of a retainer agreement signed by Plummer, which provided for binding arbitration with JAMS and an acknowledgment that "arbitration is client's only recourse." The court declined to enforce the contract on grounds of unconscionability under DC law. McSweeney appealed.

The United States Court of Appeals for the Eighth Circuit reversed and remanded with instructions. The Court held that McSweeney's offer on appeal to pay Plummer's arbitration costs, which she said were prohibitively expensive given her income, cured any substantive unconscionability that the agreement contained. The offer also cured any issue regarding substantive unconscionability where the arbitration provision in effect allowed only the firm to obtain redress of claims. The Court disagreed with the lower court's assertion that Plummer demonstrated an egregious instance of procedural unconscionability because she lacked a meaningful choice. She received the retainer agreement three days before her surgery; however, she had a month after Yolanda's phone call during which she could have contacted other doctors and attorneys. The agreement informed Plummer, in bold letters, of her "Freedom to Contract." Though Plummer said that she could not bargain with McSweeney, she could have obtained legal services elsewhere. The fact that Plummer did not read the agreement did not advance her argument – she had a duty to read the contract she signed. Plummer's argument that McSweeney and his firm violated ethical duties by failing to explain the ramifications of the

arbitration provision failed because the contract apprised Plummer of the basic consequences of the arbitration provision.

New York

- **ARBITRATOR DID NOT MANIFESTLY DISREGARD THE LAW**

Nexia v. Miratech

2019 WL 5431313

Supreme Court, Appellate Division, First Department, New York

October 24, 2019

Nexia and Miratech entered into a Master Services Agreement (MSA) under which Miratech would work to upgrade Nexia's IT system. When Nexia refused to pay, after Phase 2 of the project, Miratech brought an arbitration action for payment. The arbitrator awarded Miratech for Phase 2 and Phase 3 of the project. The arbitrator explained that Miratech was to be compensated for Phase 3 although there was no meeting of the minds as to the pricing of the work performed because Nexia had been unjustly enriched by Miratech's work. Nexia commenced a special proceeding to vacate the award. The Supreme Court, New York County, denied the petition and granted Miratech's motion to confirm. Nexia appealed.

The Supreme Court, Appellate Division, First Department, New York affirmed. A party seeking to vacate an award bears a heavy burden. As long as an arbitrator is even arguably construing or applying the contract, an award should be upheld. Nexia asserted that the arbitrator manifestly disregarded the law in failing to apply the limitations of liability clause of the MSA to the damages awarded for Phase 2. Since no invoices were paid for Phase 2, however, the arbitrator reasoned that the limitation of liability clause did not limit the damages awarded to Miratech for work performed under Phase 2. In reaching this conclusion, the arbitrator did not contradict an express term of the contract – he interpreted it. Even if the arbitrator's interpretation was erroneous, that did not equate to manifest disregard of the law.

- **ARBITRATION AWARD INDEFINITE AND NON-FINAL**

Rosenberg v. Schwartz

2019 WL 5406812

Supreme Court, Appellate Division, Second Department, New York

October 23, 2019

Rosenberg and Schwartz were each 50% owners of a shade and drapery business. When they decided to go their separate ways, they proceeded to arbitration before a Beth Din (rabbinical court). The Beth Din issued an award, determining the allocation of the assets of the business, including the accounts receivable incurred prior to the award. Rosenberg petitioned to confirm the award, maintaining that the Beth Din determined that accounts receivable would be paid to him. Schwartz argued that the proper interpretation of the award was that accounts receivable would be split. The Supreme Court granted the petition and Schwartz appealed.

The Supreme Court, Appellate Division, Second Department, New York affirmed as modified. An award may be vacated when the arbitrator "so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." This award was indefinite and non-final as it did not clearly define how the accounts receivable that were incurred prior to the date of the award were to be distributed. That portion of the award should have been vacated and the matter remitted to the Beth Din.

Texas

- **COURT ERRED IN RENDERING JUDGMENT ON MEDIATED SETTLEMENT AGREEMENT**

Highsmith v. Highsmith
2019 WL 5482657
Supreme Court of Texas
October 25, 2019

After Meredith decided to end her marriage to Charles, the parties proceeded to mediation and executed a "Mediated Settlement Agreement (MSA)." Charles subsequently filed a divorce petition in Travis County, asking the court to approve the MSA. Meredith filed an answer with a general denial but did not reference the MSA. Charles appeared for the hearing at which the court orally rendered judgment on the MSA. Meredith did not attend because she did not receive notice. Meredith moved to set aside the judgment and revoke the MSA. The court denied the motions and entered a final divorce decree, incorporating the MSA's terms. Meredith appealed and the Court of Appeals reversed. Charles appealed.

The Supreme Court of Texas affirmed in part, reversed in part, and remanded. Meredith asserted that the MSA was unenforceable because it was signed before a suit for divorce was in existence. The Court held that a pending suit for divorce at the time the MSA is signed was not a requirement for a statutorily binding MSA. Because Meredith did not receive notice to which she was constitutionally entitled, however, the trial court erred in rendering judgment on the MSA in her absence.

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

Contact Information

David Brandon
Program Manager
JAMS Institute
415-774-2648

DBrandon@jamsadr.com