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TOP STORY

Repeat Player Bias in Arbitration Questioned

Party is seeking U.S. Supreme Court review of vacatur based on arbitrator bias

By Andrew K. Robertson

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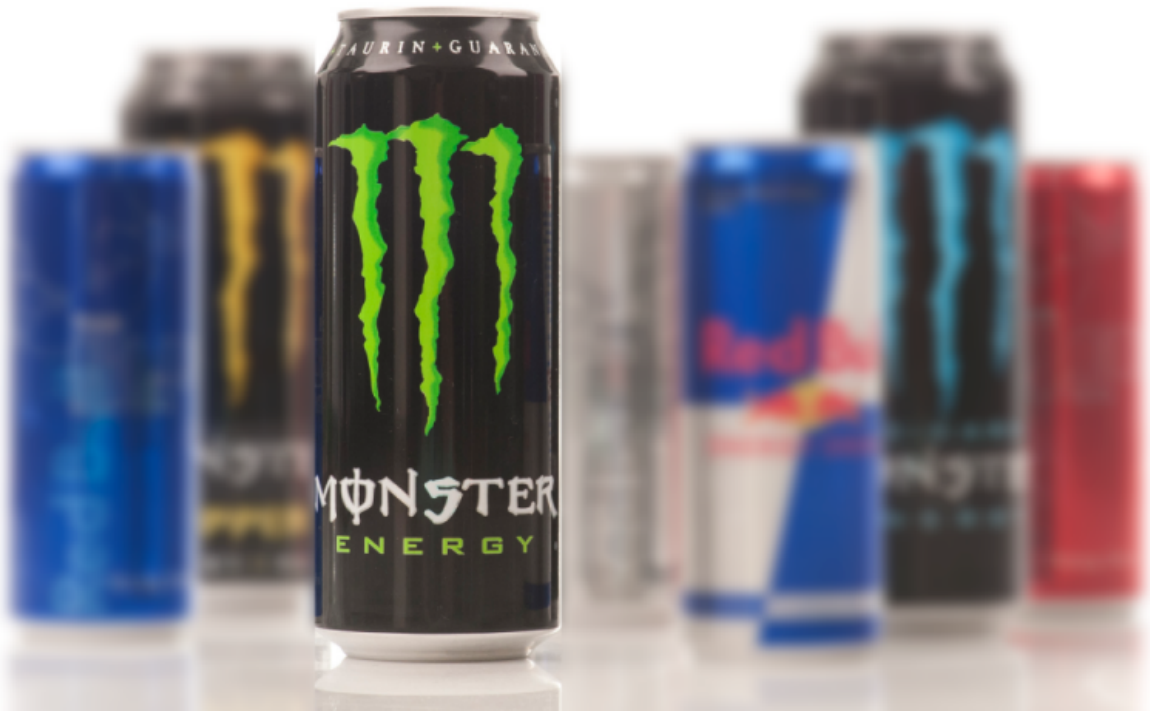
A neutral's failure to disclose substantial financial interests and business relationships before arbitrating a dispute could lead to vacatur in court. A federal court of appeals vacated an arbitrator's award based on "evident partiality" because the neutral did not disclose his ownership interest in the arbitral body that conducted the arbitration or the entity's non-trivial business dealings with a party involved in the arbitration. The court's decision reflects a growing concern that parties who frequently appear before a particular ADR provider may benefit from a "repeat player bias." The issue is getting national attention as the U.S. Supreme Court considers a petition for writ of certiorari seeking guidance on the "evident partiality standard."



The neutral did not disclose that he was a co-owner of JAMS nor that JAMS had administered 97 arbitrations involving Monster within five years

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Monster v. City Beverages

City Beverages, LLC, d/b/a Olympic Eagle Distributing (City Beverages) contracted with Monster Energy Co. (Monster) to distribute energy drinks for Monster. After Monster terminated the agreement, the parties proceeded to arbitration through JAMS, the arbitration organization specified in the contract. City Beverages sought a determination that it was entitled to protection under Washington state law, which would render the termination improper.

Before arbitration, the arbitrator disclosed that each JAMS neutral has "an economic interest in the overall financial success of JAMS" and that the parties should assume that a JAMS neutral has administered an arbitration with a party to the arbitration. However, the arbitrator did not disclose that he was a co-owner of JAMS, nor did he disclose that JAMS had administered 97 arbitrations involving Monster within five years.

Monster prevailed and the district court awarded Monster $3 million in attorney fees. City Beverages moved to vacate the award in a federal district court based on "evident partiality" under the Federal Arbitration Act after later discovering the extent of the arbitrator's relationship with JAMS.

The district court affirmed the award, holding that the arbitrator's disclosures were sufficient and that City Beverages waived any claim of evident partiality because it failed to timely object when it first learned of "potential repeat player bias."

The Ninth Circuit Reverses

On appeal, the U.S. Court of Appeals for the Ninth Circuit addressed whether City Beverages waived its evident partiality claim and whether the claim had merit. The court found that City Beverages could not have waived the claim because it did not have actual or constructive notice of the arbitrator's ownership interest in JAMS.

Addressing the merits, the court found that the arbitrator's ownership interest and right to profit from all JAMS arbitrations were "substantial" and exceeded the general economic interest that was disclosed. The court also found that JAMS and Monster had engaged in "more than trivial business dealings" because Monster named JAMS in its form arbitration agreements, and thus, used JAMS 97 times in five years. The court held that these facts created a "reasonable impression of bias" and vacated the arbitration award.

Significance of Neutral's Disclosures

The *Monster* decision "highlights the necessity for an arbitrator to disclose anything that might possibly be of interest to the parties when they are considering whether to select that arbitrator as a neutral to decide their dispute," says Neal M. Eiseman, New York, NY, chair of the Arbitration Subcommittee of the ABA Section of Litigation's Alternative Dispute Resolution Committee. As co-owner of JAMS, disclosure of only a general economic interest was not sufficient notice of the full extent of the neutral's pecuniary interest, Eiseman explains.

How Much of a Concern Is "Repeat Player Bias"?

Monster is also instructive as to "the problem of repeat players in arbitration," observes Mitchell L. Marinello, Chicago, IL, cochair of the Section of Litigation's Alternative Dispute Resolution Committee. The fact that JAMS had administered 97 arbitrations for Monster over a five-year period raises the question of whether there is "a disadvantage when a one-time user of an arbitration comes up against a party who's been in front of that same arbitration service numerous times," Marinello poses.

The dissent expounds on this point by hinting that arbitrators *do* have incentives to rule favorably towards repeat players, and that doing so is an "inevitable result of the structure of the industry."

Although, according to Marinello, "the dissent makes some awfully good points," Section leaders are skeptical as to whether such bias affects the outcomes of alternative dispute resolution. "I don't think there is a problem with actual bias infecting many arbitrations," notes Henry R. Chalmers, Atlanta, GA, cochair of the Section's Alternative Dispute Resolution Committee. But even so, the Ninth Circuit's disclosure requirement may "contribute to eliminating bias in a minor way," says Chalmers.

Larger Impact?

Chalmers is not convinced that the impact of the decision will be that dramatic. "It's a fairly narrow ruling," Chalmers observes. "The majority of arbitrators do not have a financial ownership interest in their administrative bodies. It is just not going to apply to that many instances," he asserts.

In any event, the full impact of the *Monster* decision is yet to be determined. After the Ninth Circuit denied a petition for rehearing en banc, Monster filed a successful motion to stay and subsequently filed a petition for a writ of certiorari with the U.S. Supreme Court.

Editor's note: As of June 29, 2020, the cert petition was denied by the U.S. Supreme Court.

Andrew K. Robertson is a contributing editor for Litigation News.

Hashtags: #RepeatPlayerBias #AppellateTwitter #9thCircuit #Arbitration #ADR

Related Resources

- Sunu M. Pillai, "Disclosure of Arbitrators' Interest in Arbitral Institutions," *Alternative Dispute Resolution* (Feb. 13, 2020).
- Theodore J. Folkman & David L. Evans, "*Monster Energy v. City Beverages*—Ninth Circuit's New Disclosure Rules for Owner-Neutral," *Alternative Dispute Resolution* (Jan. 2, 2020).
- Anthony R. McClure, "Court Orders Clarification of Arbitration," *Litigation News* (Nov. 11, 2019).

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