

1 Fed.Appx. 709

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.

INVESTORS EQUITY LIFE INSURANCE
COMPANY OF HAWAII, LTD., a Hawaii
corporation; Wayne C. Metcalf, III, Insurance
Commissioner of the State of Hawaii,
Petitioners-Counter-Respondents-Appellees,
v.

ADM INVESTOR SERVICES, INC., a Delaware
Corporation,

Respondent-Counter-Petitioner-Appellant.

Investors Equity Life Insurance Company of
Hawaii, Ltd., a Hawaii corporation; Reynaldo D.
Graulty, Insurance Commissioner of the State of
Hawaii,

Petitioners-Counter-Respondents-Appellees,
v.

ADM Investor Services, Inc., a Delaware
Corporation,

Respondent-Counter-Petitioner-Appellant.

Reynaldo D. Graulty, Insurance Commissioner of
the State of Hawaii, Petitioner-Appellee,

v.

Investors Equity Life Insurance Company of
Hawaii, Ltd., a Hawaii corporation, Respondent,
and

ADM Investor Services, Inc., a Delaware
Corporation, Respondent-Appellant.

Nos. 98-15140, 98-15290, 99-15122.

Argued and Submitted Nov. 16, 2000.

Decided Jan. 12, 2001.

Liquidator for insolvent insurer sought judicial confirmation of arbitration award against insurer's commodities broker. The United States District Court for the District of Hawaii, [David Alan Ezra, J.](#), affirmed award, and broker appealed. The Court of Appeals held that evidence supported finding that broker was negligent.

Affirmed.

West Headnotes (5)

^[1] **Insurance**
🔑 Actions

Under Hawaii law, liquidator for insolvent insurer, seeking recovery of trading losses, commissions, and fees suffered by insurer, was asserting derivative claims on behalf of insurer, rather than independent claims belonging to insurer's creditors, policyholders, and annuitants, and thus was not precluded from asserting claim against creditor. [HRS § 431:15-310\(a\)\(12\)](#).

[Cases that cite this headnote](#)

^[2] **Alternative Dispute Resolution**
🔑 Matters to Be Determined by Court

Issue of whether particular person or entity is proper party to arbitration proceeding is procedural issue to be determined by arbitrators.

[Cases that cite this headnote](#)

^[3] **Contracts**
🔑 Legal Remedies and Proceedings

Although parties to contract are generally entitled to select law which applies to contractual claims, their tort claims against each other are not governed by contractual choice-of-law provision.

[1 Cases that cite this headnote](#)

^[4] **Brokers**

🔑 Evidence

Finding that commodities broker, holding customer's nondiscretionary account, was negligent was supported by evidence that broker was aware that customer's trading in account was speculative and not bona fide hedge; broker's account officers knew that "hedge" account had embedded loss of almost \$18 million at time it was opened, while customer's net worth was only \$6 million.

1 Cases that cite this headnote

^[5] **Alternative Dispute Resolution**

🔑 Scope of Relief

Under Hawaii law, arbitration panel, finding that insolvent insurer's commodities broker was negligent in handling insurer's account and awarding damages, was authorized to also award prejudgment interest in amount of 10 percent per annum. HRS §§ 478-3, 636-16.

Cases that cite this headnote

*710 Appeal from the United States District Court for the District of Hawaii; [David Alan Ezra](#), District Judge, Presiding. D.C. No. CV-97-01382-DAE/BMK.

Before [HUG](#), [TROTT](#), and [WARDLAW](#), Circuit Judges.

MEMORANDUM*

**1 ADM Investor Services ("ADM") appeals the district court's order affirming *711 the American Arbitration Association Panel's ("Panel") award of \$6.9 million in damages to the Insurance Commissioner of the State of Hawaii, as Liquidator ("Liquidator") for Investors Equity Life Insurance Co. ("IEL"). We have jurisdiction under [28 U.S.C. § 1291](#), and affirm.

^[1] The district court did not err in finding that in the arbitration proceeding the Liquidator asserted derivative claims on behalf of IEL, rather than independent claims belonging to IEL's creditors, policyholders, and annuitants. The Liquidator specifically sought recovery of

trading losses, commissions, and fees suffered by IEL. It was authorized to prosecute all claims on behalf of the insurer, IEL. See [Haw.Rev.Stat. § 431:15-310\(a\)\(12\)](#). The arbitration award was not directly awarded to IEL's creditors, policyholders, and annuitants. Their recovery, if any, depended on the outcome of an independent liquidation proceeding. Therefore the district court correctly concluded that the Panel did not act in manifest disregard of the law in finding that the Liquidator was entitled to assert a claim against ADM.

^[2] The district court alternatively found that the issue of whether the Liquidator was entitled to assert derivative claims on behalf of IEL's creditors, annuitants, and policyholders was a procedural issue to be determined by the Panel. We agree. The general rule is that "[o]nce it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." [John Wiley & Sons, Inc. v. Livingston](#), 376 U.S. 543, 557, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). Because the issue of whether a particular person or entity is a proper party to the arbitration proceeding is a procedural issue to be determined by the arbitrators, see [Daiei, Inc. v. United States Shoe Corp.](#), 755 F.Supp. 299, 303 (D.Haw.1991), the district court did not err.

^[3] Nor did the district court err in finding that the Panel did not act with manifest disregard of the law when it applied Hawaii law rather than abiding by the contractual choice-of-law provision. Although parties are generally entitled to select the law which applies to contractual claims, we have expressly determined that tort claims are not governed by a contractual choice-of-law provision. See [Sutter Home Winery, Inc. v. Vintage Selections, Ltd.](#), 971 F.2d 401, 407-08 (9th Cir.1992) (tort claims are not governed by contractual choice-of-law provisions); [Consol. Data Terminals v. Applied Digital Data Sys.](#), 708 F.2d 385, 390 n. 3 (9th Cir.1983) (holding that "tort law and the law of punitive damages, are not controlled by the contract choice of law provision"). Here, the Panel awarded damages to IEL based on a finding that ADM negligently handled IEL's account. Therefore, the district court correctly found that the Panel did not act with manifest disregard of the law in applying Hawaii law.

**2 ^[4] The district court also correctly found that the Panel did not act with manifest disregard of law in holding ADM liable for negligence. ADM contends that the duty owed by a commodities broker holding a non-discretionary account is an "exceedingly narrow one, consisting at most of a duty to properly carry out transactions ordered by the customer." The arbitrators

found as a factual matter, however, that ADM was aware that IEL's trading in the ADM account was speculative and not a bona fide hedge. See Haw. Ins.Code § 431:6-321. While ordinarily a *712 broker may rely on a hedge letter from its customer, Chicago Board of Trade Rule 431.02.07, it may not do so where there is "reason to suspect otherwise." *Id.* The Panel found "immediate, repeated, and overwhelming" evidence of speculation known to ADM's account officers; most significantly that while IEL's net worth was only \$6 million, the "hedge" account had an embedded loss of almost \$18 million at the time it was opened. We have found that a broker such as ADM can be held liable for not supervising its customers. See *Vucinich v. Paine, Webber, Jackson, & Curtis, Inc.*, 803 F.2d 454, 461 (9th Cir.1986); *Kotz v. Bache Halsey Stuart, Inc.*, 685 F.2d 1204, 1207-08 (9th Cir.1982). During the arbitration proceeding, even ADM's experts testified that a negligence cause of action existed in this case. Therefore, we conclude that the district court did not err in holding that the Panel did not act with manifest disregard of the law.

Footnotes

- * This disposition is inappropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

¹⁵¹ Finally, the district court did not err in confirming the Panel's award of prejudgment interest in the amount of 10 percent per annum. Because the award of 10 percent per annum prejudgment interest was within the fixed statutory maximum under Hawaii law, the Panel was authorized to make this award. [Haw.Rev.Stat. § 478-3](#) (authorizing a prejudgment award at the a 10 percent per annum interest rate); [Haw.Rev.Stat. § 636-16](#); *Sussel v. Civil Serv. Comm'n of the City and the County of Honolulu*, 74 Haw. 599, 851 P.2d 311, 320 (Haw.1993).

AFFIRMED.

All Citations

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