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Ninth Circuit Upholds Mass Arbitration Consolidation

BY DAVID M. KRUEGER, MEEGAN BROOKS, AND CARLO LIPSON

THE NINTH CIRCUIT'S RECENT decision in *Jones v. Starz Entertainment, LLC,* 129 F.4th 1176 (9th Cir. 2025), marks a significant development in the continued rapid evolution of mass arbitration. What began as a mass arbitration involving over one hundred thousand identical demands against Starz—which could have incurred over $12 million in arbitration fees if administered individually—may now provide critical guidance into the future of mass arbitrations across the country.

By enforcing the parties' agreement to consolidate the claims, the Ninth Circuit has paved the way for a more efficient and cost-effective path to mitigate the mass arbitration risk, potentially transforming the arbitration landscape for companies and plaintiffs' lawyers alike.

Pre-Arbitration Consolidation

The initial dispute in *Jones v. Starz Entertainment, LLC* concerned purported violations of the Video Privacy Protection Act (VPPA), including claims against the

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Lists of People with Claims or Pertinent Knowledge: Work Product-Protected or Not??

BY THOMAS SPAHN AND MCGUIRE WOODS

DISCOVERY RULES AND COURT orders normally require litigants to list people with possible claims or potentially responsive information. But as in many other contexts, the "intensely practical" work product doctrine can apply in different ways to different lists.

In *Civil Rights Dep't v. Grimmway Enterprises, Inc.,* a California agency sued a "large agricultural employer" for discrimination. No. 2:21-cv-01552-DAD-AC, 2025 U.S. Dist. 34852, at *2 (E.D. Cal. Feb. 26, 2025). When the employer sought information about its employees' claims, the court approved the agency's reliance on Fed. R. Civ. P. 33(d), under which a litigant can point to business records as supplying the requested information. Here, the agency pointed to

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video streaming provider for allegedly disclosing the identity of its consumers and their watched content. Notably, Starz had an arbitration agreement with its customers, requiring the resolution of any disputes through third-party arbitration provider Judicial Arbitration and Mediation Services (JAMS).

By incorporating the JAMS rules into the parties' arbitration agreement, the agreement provided the option for the consolidation of claims, barring applicable law providing otherwise. Thus, following over 7,200 individual claimants initiating proceedings against Starz, JAMS ordered the consolidation of these filings to be presided over by a single arbitrator. This consolidation—favored by Starz but opposed by the claimants—had the additional effect of eliminating the need for Starz to pay over $12 million in initiation fees for the thousands of individual claims. Following the consolidation, the claimants repeatedly used their state statutory right to disqualify the appointed arbitrators, thereby preventing the arbitration from moving forward.

One of the claimants, named plaintiff Kiana Jones, attempted to circumvent this consolidation by filing a petition to compel individual arbitration of her claims in the Central District of California. According to the plaintiff, the consolidation of the claims amounted to Starz's failure, neglect, or refusal to engage in an individual, bilateral arbitration, as required by the parties' agreement. Thus, due to Starz's purported failure to engage in individual arbitration with her, plaintiff Jones claimed that she was a party aggrieved within the meaning of § 4 of the Federal Arbitration Act (FAA), which allows for an aggrieved party to petition a federal district court to compel arbitration.

The district court and Ninth Circuit rejected these arguments and affirmed the arbitration provider's decision to consolidate thousands of individual claims into a single proceeding.

Summary of Decision

In upholding the lower court's ruling, the Ninth Circuit unanimously came to several conclusions that may shape the future management of mass arbitrations.

First, the court noted that consolidation is a procedural issue that should be decided by the arbitral forum rather than the court. In doing so, arbitration providers like JAMS gain additional authority to manage mass arbitrations, even before the appointment of an arbitrator.

Next, the court rejected the plaintiff's claim that she was an "aggrieved" party under the FAA due to Starz's alleged failure and refusal to arbitrate with her individually. Rather, the Ninth Circuit reasoned that the decision to consolidate does not qualify as a failure to arbitrate under the FAA, given that Starz had paid the required fees, complied with JAMS' procedures, and participated in arbitrator selection, thus further demonstrating the company's willingness to arbitrate. Additionally, the panel noted that because it was JAMS—rather than Starz—that opted to consolidate the claims, that decision should not be characterized as a refusal by Starz to arbitrate.

Lastly, the Ninth Circuit distinguished between class or representative arbitrations and consolidated arbitrations. The court clarified that class arbitrations involve named claimants binding absent class members to a decision, whereas consolidated arbitrations consist of each claimant pursuing their own claims, even if heard by the same arbitrator. The panel cited various similarities between the proceedings but ultimately focused on the fact that the arbitration agreement plainly contemplated the possibility of consolidation by incorporating the JAMS Rules. Moreover, the *Starz* court dismissed the plaintiff's concerns of unconscionability in Starz's terms based on similar reasoning, holding that Starz never agreed to the class arbitration that the plaintiff sought and that unconscionability claims cannot be used as a "sword" to modify the agreement.

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Implications for Businesses

In unanimously affirming the trial court's ruling, the Ninth Circuit's decision carries several important implications for businesses, particularly those in the retail and e-commerce arena. Notably, the panel distinguished its conclusions from the Ninth Circuit's recent ruling in *Heckman v. Live Nation Ent., Inc.,* 120 F.4th 670 (9th Cir. 2024) in which this same court found an arbitration agreement to be substantively unconscionable due to "serious misgivings" about the mass arbitration protocol at issue. Some plaintiffs' attorneys have gone so far as to read *Heckman* to suggest that mass arbitration procedures are, per se, unenforceable. Defendants, in turn, have tried to limit *Heckman* to its extreme facts and specific arbitration forum.

The Court's new decision in *Jones v. Starz Entertainment, LLC* takes the wind out of the former argument by illustrating that, barring unconscionable or otherwise invalid terms, mass arbitration provisions can act as legitimate strategies to mitigate costly arbitrations.

Call to Action – Mass Arbitration Provisions

Jones v. Starz Entertainment, LLC underscores the importance of well-drafted arbitration agreements and establishes an important precedent for companies facing costly mass arbitration, as well as the importance of properly invoking each arbitrator provider's procedural rules in managing the otherwise potentially crippling effects of mass arbitration.

By allowing arbitration providers like JAMS, American Arbitration Association, or National Arbitration and Mediation to consolidate claims and streamline the arbitration process, companies can reduce the administrative burden and costs associated with handling thousands of individual arbitrations.

Given the rapidly evolving landscape of arbitration in light of the Ninth Circuit's rulings in *Heckman* and now *Starz,* companies should closely evaluate their dispute resolution terms to avoid potential issues and expenses associated with mass arbitration. ■

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Lists of People with Claims

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600 of defendant's own business files to identify employees affected by defendant's alleged wrongdoing. And the court cited the agency's work product protection in bluntly denying defendant's request for more information "[t]o the extent [it] seeks a subjectively curated list of the individuals plaintiff [agency] deems to be important to its case." *Id.* at *26.

The same distinction might arise when a litigant complies with a rule requirement or discovery request to list individuals with possibly pertinent knowledge—but declines to specify the subset of individuals who are more important than others or might provide testimony. ■

Reread All the Jury Instructions!

BY MICHAEL LIED

IT IS NOT UNCOMMON FOR A JURY, during deliberations, to have questions. At that point, the judge and counsel have to figure out how to deal with the situation. In a case recently decided by the Seventh Circuit, the district court told the jury to just reread all the instructions they had previously been given.

Republic Technologies and BBK Tobacco (known as "HBI") both sell organic hemp rolling papers for cigarettes, and, presumably, other smoking materials (wink wink). They sued each other regarding packaging "trade dress" and false advertising.

The result was a mixed jury verdict on the infringement claims. The district court later entered a permanent injunction against some of HBI's advertising practices.

Both sides appealed. As pertinent to this article, Republic argued that the district court's response to a jury question failed to clarify properly that HBI could be liable under the federal Lanham Act if its advertising misled commercial middlemen (rather than individual smokers).

The following are excerpts from the appellate opinion addressing the jury question and relevant caselaw:

At trial, the court gave an agreed jury instruction on Republic's Lanham Act false advertising claim. It explained that, for the jury to find HBI engaged in false advertising, it had to find that HBI made a misleading statement that "conveys a false impression and actually misleads a consumer" and that the "deception was likely to influence the purchasing decisions of consumers."

On the second day of jury deliberations, the court received several questions from the jury. One asked: "Is there a definition of 'consumer'? Is that only the End User of the product or including anyone who purchases the product?" The parties disagreed on how to respond. The court held an off-the-record conversation on the question and upon return stated its view that "the answers are contained in the instructions." Republic objected, arguing that when there is "a clear answer, as a matter of law, .. we ought to give it to the jury." The court noted the objection and nonetheless sent a note to the jury stating: "As to your questions, I can only advise you (at this time) to refer to and review *all* the instructions. including the cautionary instructions."

On appeal, Republic argued that the district court should have granted its motion for a new trial because the court erroneously referred the jury back to the initial instructions instead of clarifying who could be a "consumer" under the false advertising instruction.

The appeals court disagreed. Its reasoning follows:

A trial judge tries to give a jury instructions on the law that applies to the issues the jury must decide, striking a balance between giving the jury all it needs but without unnecessary detail. From the trial judge's point of view, it's helpful if the parties agree to all or nearly all of the instructions, as in this case. Despite those efforts, juries sometimes ask the judge during deliberations for further explanations.

That happened here. The parties agreed that the jury should be instructed in accordance with Seventh Circuit Pattern Instruction 13.3.1 on the elements of the Lanham Act claim. The key portion of that instruction read this way:

For Republic to succeed on its claim of false advertising, Republic must prove five things by a preponderance of the evidence:

1. HBI made a false or misleading statement of fact in a commercial advertisement about the nature; quality; characteristic; or geographic origin of its own product or Republic's product. A statement is misleading if it conveys a false impression *and actually misleads a consumer*. A statement can be misleading even if it is literally true or ambiguous.
2. The statement actually deceived

or had the tendency to deceive a substantial segment of HBI's audience.

3. The deception was *likely to influence the purchasing decisions of consumers*....

During deliberations, the jury sent the court a note asking whether "consumer" could be "only the End User of the product or including anyone who purchases the product?"

After consulting with counsel, the court responded that the jury should "refer to and review *all* the instructions including the cautionary instructions." Republic objected to the court's decision not to issue a supplemental instruction that would have made more explicit that Republic could prove its claim by showing that commercial middlemen, as distinct from end users, could be or were deceived.

We review for abuse of discretion a district court's response to a jury question. *United States v. Funds in the Amount of One Hundred Thousand & One Hundred Twenty Dollars ($100,120.00) ("Funds"),* 901 F.3d 758, 769 (7th Cir. 2018). Our review focuses on "whether the response: (1) fairly and adequately addressed the issues; (2) correctly stated the law; and (3) answered the jury's question specifically." *Stevens v. Interactive Financial Advisors, Inc.,* 830 F.3d 735, 741 (7th Cir. 2016). And while we have said that "the [district] court has an obligation to dispel any confusion quickly and with concrete accuracy," *United States v. Sims,* 329 F.3d 937, 943 (7th Cir. 2003), it is also true that "a judge need not deliver instructions describing all valid legal principles." *Gehring v. Case Corp.,* 43 F.3d 340, 343 (7th Cir. 1994). Further, we will reverse "only if the response resulted in prejudice." *Funds,* 901 F.3d at 769.

It is rare for us to vacate a judgment based on a district court's decision not to issue a clarifying response when the initial instruction was a correct statement of law. See, *e.g., Knowlton v. City of Wauwatosa*, 119 F.4th 507, 521 (7th Cir. 2024) (decision to refer jury back to original, correct instruction was not an abuse of discretion; standard "does not require the 'best' answer"); *Durham,* 645 F.3d at 894 ("a judge does not err by instructing the jury to re-read the instructions in response to a question, so long as the original jury charge clearly and correctly states the applicable law."). Such caution on the part of a trial judge is understandable. An incorrect response could prejudice either party and jeopardize the eventual verdict. "As long as the original instructions accurately and understandably state the law, referring a jury back to those instructions can be the most prudent course..... Deviating from these instructions creates the needless risk of reversible error." *Emerson v. Shaw,* 575 F.3d 680, 685-86 (7th Cir. 2009) (affirming denial of habeas relief).

The district judge here had to choose between referring the jury back to an agreed instruction on the elements of the Lanham Act claim or issuing a disputed answer resolving whether Lanham Act liability can be based on a misleading statement to an intermediate purchaser. See *Republic Technologies (NA), LLC v.*

BBK Tobacco & Foods, LLP ("New Trial Order"), No. 16-CV-3401, 2023 WL 6198827, at *4 (N.D. Ill. Sept. 22, 2023) ("This Court decided not to provide a supplemental instruction because the parties disagreed on the correct answer to the question...."). This juxtaposition—and the absence of a clear answer in the statute or in our caselaw—persuades us that the district court's decision to refer the jury back to the original instructions was not an abuse of discretion. See *United States v. Mealy,* 851 F.2d 890, 902 (7th Cir. 1988) ("If the original jury charge clearly and correctly states the applicable law, the judge may properly answer the jury's question by instructing the jury to reread the instructions."). In this case, the court heard both sides, weighed the choices, and stuck with the original instruction that both sides had approved. That was not an abuse of discretion. See *Knowlton,* 119 F.4th at 521 (not abuse of discretion to refer jury back to original instruction when question involved clarification of agreed initial instruction).

Republic also argues that the district court applied the wrong legal standard when assessing whether Republic was prejudiced by the district court's response. According to Republic, the district court required it to show that a properly instructed jury "must have" found in its favor when it should have needed to show only that a properly instructed jury "might well have" found in its favor.

The district court did not apply an incorrect legal standard. It used the phrase "must have" only to explain Republic's argument: "Republic reasons that the jury must have inferred that 'consumers' means 'end users.'" *New Trial Order*, 2023 WL 6198827, at *5. This is a fair characterization of Republic's position both in the district court and on appeal. For example, in its opening brief on appeal, Republic argues: "the very fact that the jury asked the question—whether a 'consumer' is 'only the End User of the product or including anyone who purchases the product?'—indicates that at least some of the jurors viewed the question as potentially dispositive."

The district court cited *Cook v. IPC Int'l Corp.,* 673 F.3d 625, 629 (7th Cir. 2012), for the point that Republic now argues it overlooked: that a party is prejudiced by an instructional error when "a properly instructed jury might well have found in the plaintiff's favor." *New Trial Order*, 2023 WL 6198827, at *4, quoting *Cook,* 673 F.3d at 629. This is an accurate statement of the law, though we do not mean to imply that the standard for prejudice is a precise one. See *Boyd v. Illinois State Police,* 384 F.3d 888, 894 (7th Cir. 2004) (erroneous supplemental jury instruction would require new trial only if "jury was likely to be confused or misled"); see also, *e.g., Jimenez v. City of Chicago,* 732 F.3d 710, 717 (7th Cir. 2013) (affirming where district court refused narrower jury instruction requested by defense: "Even if we believe that the jury was confused or misled, we would need to find that the defendants were prejudiced before ordering a new trial.").

Like the district court, we are not persuaded that a different response to the jury question "might well have" or was "reasonably likely" to have caused the jury to return a verdict for Republic. This is so for two reasons.

First, the closest thing to an answer to the jury's question in the original instructions resolved the issue in Republic's favor. The second bullet point of the Lanham Act instructions—sandwiched between the two provisions referring to "consumers"—required the jury to find that the statement "actually deceived or had the tendency to deceive a substantial segment *of HBI's audience*." By referring the jury to the initial instructions, the court referred it to this instruction—which implies that the relevant purchasing public is "HBI's audience," whoever that may be. See *Knowlton*, 119 F.4th at 521 (district court did not abuse discretion by referring jury to original instruction containing broad language bearing on jury's question); *Durham,* 645 F.3d at 894 (telling jury to reread instructions was not abuse of discretion when instructions addressed jury's question).

Second, even if the jury believed that only "end users" could be "consumers," Republic presented evidence at trial that HBI's statements misled that group. For example, the jury heard testimony from Republic executive Seth Gold that HBI's claim to sell the world's first and only organic hemp rolling papers could influence "a very large number of ... potential purchasers." Gold's testimony focused on the public appeal of organic products to ultimate purchasers. Gold also testified to the likely effect on end users of HBI's statements about "natural gum," "Alcoy, Spain," wind power, and charitable donations. He told the jury that resellers also care about these statements because they know that consumers make purchasing decisions based on such factors.

Republic presented evidence at trial regarding the possibility of HBI's statements misleading both end users and intermediaries. It now seeks a new trial because the district court did not point the jury in a particular direction. The district court's decision not to do so was not an abuse of discretion. See *EEOC v. AutoZone, Inc.,* 809 F.3d 916, 923 (7th Cir. 2016) (affirming denial of motion for new trial and finding no prejudice from supposedly confusing jury instructions when appellant had ability to make argument to the jury).

Conclusion

A few lessons flow from this case. First, it may make a difference if the parties agreed on the instruction, which later led to the jury's question. Second, it matters whether the parties agree that a clarifying instruction is needed. Third, even if the parties agree, the court may not, and need not. Fourth, a new instruction isn't needed if the other instructions correctly state the law, even if not perfectly. Fifth, a supplemental instruction carries the risk of injecting error into the case and the eventual verdict. Finally, the appellate court is unlikely to disapprove a direction that the jury just reread all the instructions.

The case is *Republic Technologies (NA), LLC v. BBK Tobacco & Foods, LLP,* ___F.4th ___, Nos. 23-2973 & 23-3096, 2025 U.S. App. LEXIS 9894 (7th Cir. Apr. 25, 2025). ■

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