

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE UPPER DECK COMPANY, LLC
and RICHARD P. McWILLIAM,
Plaintiffs-Appellants,

v.

AMERICAN INTERNATIONAL
SPECIALTY LINES INSURANCE
COMPANY,

Defendant-Appellee.

No. 07-56070
D.C. No.
CV-05-1945 IEG
(RBB)
OPINION

Appeal from the United States District Court
for the Southern District of California
Irma Gonzalez, District Judge, Presiding

Argued and Submitted
November 20, 2008—Pasadena, California

Filed December 9, 2008

Before: Pamela Ann Rymer and Milan D. Smith, Jr.,
Circuit Judges, and Edward R. Korman,* District Judge.

Per Curiam Opinion

*The Honorable Edward R. Korman, Senior United States District
Judge for the Eastern District of New York, sitting by designation.

COUNSEL

Duke F. Wahlquist, Rutan & Tucker, LLP, Costa Mesa, California, for the plaintiffs-appellants.

Peter A. Stroili, D'Amato & Lynch, LLP, New York, New York, (argued); Jeffrey A. Miller, Lewis Brisbois Bisgaard & Smith LLP, San Diego, California, for the defendant-appellee.

OPINION

PER CURIAM:

This appeal arises out of an insurance policy that The Upper Deck Corporation (“Upper Deck”), purchased from American International Specialty Lines Insurance Company (“AISLIC”). The policy insured a tax strategy that KPMG, an accounting firm, developed for Upper Deck. The IRS investigated the tax strategy and determined that it constituted an improper tax shelter. Upper Deck then settled with the IRS for \$80 million in back taxes and interest, and with the California Franchise Tax Board for \$17 million in back taxes and interest.

After AISLIC rejected Upper Deck's claim that the policy covered the loss incurred as a result of the settlement, Upper Deck and its Chief Executive Officer, Richard McWilliam, filed a complaint in the United States District Court for the Southern District of California seeking, *inter alia*, a declaratory judgment that the policy issued by AISLIC covered the loss. Subsequently, the district court granted AISLIC's motion to compel arbitration.

A three-member panel of arbitrators held that Upper Deck and McWilliam were not entitled to coverage because Upper Deck had abandoned the tax strategy that AISLIC had insured. The district court confirmed the arbitration award. *Upper Deck Co. v. Am. Int'l Specialty Lines Ins. Co.*, 495 F.Supp.2d 1092, 1104 (S.D. Cal. 2007). Upper Deck and McWilliam appeal. We affirm for substantially the same reasons stated in the opinion of the district court, except for its discussion of the arbitrators' reliance on the failure of McWilliam to comply with § 9(b) of the policy. *Id.* at 1096-1104. We do not reach that issue because we agree with the district court that the alternative grounds for the arbitrators' award "drew [their] essence from the [p]olicy and plausibly interpreted [it]." *Id.* at 1104.

AFFIRMED.