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Alternative Dispute Resolution Section of the State Bar of Michigan

Use It Or Lose It: The Sixth Circuit Tightens The Reins On Delaying The Right To Arbitrate

Revisiting the discussion of *Hurley v. Deutsche Bank Trust Co. Americas*[1] from the July 2010 Issue of the ADR Quarterly

By: Nicole M. Simone

The decision in *Johnson Associates Corporation, et. al. v. HL Operating Corporation*,[2] decided May 23, 2012 in the Court of Appeals for the Sixth Circuit, tightens the reins on those parties wishing to "test the waters of litigation" before later asserting their right to arbitrate. Parties enter into arbitration agreements to facilitate the private resolution of any future disputes. "An enforceable contractual right to compel arbitration operates as a quasi-jurisdictional bar to a plaintiff's claims, providing grounds for dismissal of the suit."[3] When one party to such an agreement decides to test the waters of litigation before asserting the right to arbitrate, the opposing party is forced to spend time and money preparing a case in litigation, when such preparations may not be fully transferrable to the arbitration process.[4] In delaying its assertion of the right to arbitrate, a defendant could gain a strategic advantage by receiving information through discovery that would not have been available in arbitration.[5] This procedural manipulation is not looked upon favorably by the courts because it can result in a waste of time, money, and judicial resources.

Johnson stands for the proposition that engaging in substantial litigation before asserting the right to arbitrate is equivalent to waiving that right. To rule otherwise would promote waste of judicial time and effort.[6] *Johnson* involved a contract dispute. The parties underwent judicial settlement conferences leading to exchanges of settlement offers and eventually to the parties engaging in pre-trial discovery. The parties spent almost a year in litigation before Defendant finally asserted its right to arbitrate. After one extension for discovery, and with only three days before the response deadline, Defendant served Plaintiffs with notice of its intent to arbitrate. Plaintiffs did not respond to this correspondence. Two days later, Defendant filed a motion to compel arbitration. Plaintiffs produced the requested discovery by the previously ordered deadline, which included 1,151 pages of documents and a 4.111 gigabyte hard drive full of requested information.

1 Hurley v. Deutsche Bank Trust Co. Ams., 610 F.3d 334 (6th Cir. 2010).
2 Johnson Assoc. Corp., et al. v. HL Operating Corp., No. 10-6468 (6th Cir. 2012).
3 *Id.* at 6.
4 *Id.* at 9.
5 *Id.* (citing Stifel, Nicolaus & Co. Inc. v. Freeman, 924 F.2d 157, 159 (8th Cir. 1991)).
6 Johnson Assoc. Corp., No. 10-6468 at 6.

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On Defendant's motions to dismiss or compel arbitration, the District Court ruled that Defendant had waived its right to compel arbitration. The court's decision weighed heavily the fact that Defendant caused undue hardship and prejudice to Plaintiffs. The court reasoned that hardship and prejudice resulted from Defendant forcing Plaintiffs to participate in scheduling conferences, produce discovery materials and prepare discovery responses that would not be fully transferable to arbitration.[7] Defendant appealed the trial court's decision, and the Court of Appeals for the Sixth Circuit reviewed the case de novo.

Revisiting Hurley

The Sixth Circuit's analysis in *Johnson* provides additional insight into the concept of an implied waiver of arbitration, as developed in *Hurley v. Deutsche Bank Trust Co. Americas,* 610 F.3d 334 (6th Cir. 2010) – a case that was the focus of an article published in the July 2010 ADR Quarterly. In *Hurley*, a husband and wife filed a complaint against Deutsche Bank Trust Co. Americas (the "Bank"). The complaint alleged violations of the Servicemembers' Civil Rights Act and claims of infliction of emotional distress, fraud, and conversion. These claims against the Bank stemmed from the foreclosure and sheriff's sale of their home and the Bank's taking of a default judgment for eviction while the husband served in Iraq. The parties litigated for nearly two years, despite the existence of an arbitration clause in the mortgage agreement. Defendant Bank filed answers to the Plaintiffs' complaint and amended complaint and attended a scheduling conference and settlement hearing. The Bank also filed and responded to several motions, including motions for summary judgment and for change of venue. The District Court denied one of the Bank's motions, and in response, the Bank moved to compel arbitration. The District Court denied the motion to compel based on waiver.

The Sixth Circuit affirmed this ruling, basing its determination on the principle that a party may waive its agreement to arbitrate by taking actions that are completely inconsistent with any reliance on an arbitration agreement and by delaying its assertion to such an extent that the opposing party incurs actual prejudice.[8] The court focused heavily on the Bank's participation in a lengthy litigation and the fact that the Bank sought by motion to change venue of the action. Moreover, the Court of Appeals for the Sixth Circuit rested its decision on the fact that the Bank's motion to compel arbitration came only after an unfavorable opinion from the court.

So What Happened in Johnson?

Upon a de novo review of the District Court's opinion in *Johnson*, the Sixth Circuit analyzed Defendant's right to enforce its arbitration agreement by using the same two elements of inquiry used in *Hurley*: (1) whether Defendant was inconsistent in its reliance on the right to arbitrate, and (2) whether Plaintiffs suffered prejudice as a result of the delay in asserting this right. While Defendant cited several cases stating that the attempts at settlement, the failure to raise arbitration as an affirmative defense, and the filing of answers and counterclaims were insufficient to demonstrate that Defendant acted inconsistently with its right to arbitrate, the Sixth Circuit held that when considered collectively, the element of inconsistency was met.

With regard to the second element, prejudice, the court found that Plaintiffs had suffered actual prejudice as required under the rule in Hurley, despite Defendant's argument that, under prior case law, delay alone was insufficient to establish prejudice. The court pointed out that this was not simply a case of delay. Instead, the court stated that "in addition to an eight-month delay and expenses involved with numerous scheduling motions and court-supervised settlement discussions, Plaintiffs also engaged in substantial discovery. The combination of all these factors caused Plaintiffs to suffer 'actual prejudice.'"[9]

7 *Id.* at 9.
8 Hurley v. Deutsche Bank Trust Co. Ams., 610 F.3d 334, 338 (6th Cir. 2010).
9 Johnson Assoc. Corp., No. 10-6468 at 10.

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In reviewing two specific assertions by Defendant, the Sixth Circuit in Johnson made it clear that it would not permit a party to force its opponent to incur substantial cost and effort in initial discovery and then subsequently choose to exercise its right to arbitrate. First, the Sixth Circuit held that despite the existence of a no-waiver provision, Defendant had effectively waived its right to arbitrate by delaying its assertion of this right until after sufficient litigation had been completed. The Court stated that to permit Defendant to delay the assertion of this right would allow Defendant to "test the water before taking a swim" and would result in waste of judicial time and effort.[10]

Second, the Sixth Circuit held that regardless whether a defendant is required to raise arbitration as an affirmative defense under Rule 8(c), a defendant's failure to raise arbitration at the time of filing an answer suggests an intent to litigate rather than arbitrate. Defendant argued that the District Court was wrong to hold that, since it did not raise arbitration as an affirmative defense, it had waived its right to assert it later. Defendant argued that Rule 8(c), providing a list of affirmative defenses, contains no mention of arbitration. The Sixth Circuit reasoned that whether or not arbitration was an affirmative defense within the meaning of Rule 8(c), raising it at the time of the answer to Plaintiff's complaint is "the main opportunity for a defendant to give notice of potentially dispositive issues to the plaintiff; and the intent to invoke an arbitration provision is just such an issue."[11] Thus, the court held that by failing to raise arbitration, Defendant expressed its intention to continue in litigation.

Bottom Line:

The Johnson opinion tightens the reins on delaying the election to arbitrate. This opinion prohibits a party from wasting an opposing party's time and resources, or those of the judicial system, by entering into pre-trial proceedings to gain a strategic advantage. The Sixth Circuit has made it clear that parties will be held accountable to assert their rights as early as possible. Courts will not tolerate parties embarking on a fishing expedition before asserting their right to arbitrate. By delaying this right to arbitrate, a party is deemed to have waived this right and will be forced to continue litigation.

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10 *Id.* at 9.
11 *Id.* at 6.

With Mediation Skills You Can do More than Mediate

By: Raytheon "Raye" Rawls, J.D.

Editor's Note - The Alternative Dispute Resolution Section, in collaboration with Michigan State University College of Law, is proud to announce that Professor Raytheon Rawls will provide a skills-based advanced mediation training at the ADR Section Annual Meeting and Conference on October 5-6, 2012. Professor Rawl's training will focus on the effective application of dialogue and consensus building to resolve conflict and the expanding use of mediation in the public arena. Professor Rawls graciously agreed to provide our readers with a "sneak peek" at some of the issues she will be presenting at the upcoming Annual Meeting. Her article (below) describes how mediation skills can be used in a creative manner to help community organizations and governmental agencies to resolve conflict. Enjoy the article, and join us at the Annual Meeting for the full advanced training!

I started mediating in 1983 with the Neighborhood Justice Center of Atlanta (NJC). The NJC was founded by the United States Department of Justice in 1978 in an effort to explore alternative ways to resolve disputes other than litigation.

The NJC has a distinguished history and provenance. In 1976, Warren E. Burger, Chief Justice of the United States Supreme Court, convened the "Roscoe E. Pound Conference in the Causes of Popular Dissatisfaction with the Administration of Justice." Chief Justice Burger believed that there were too any cases in the courts and he sought additional processes to reduce court dockets and achieve greater judicial efficiency. Out of that conference emerged ideas on how to make the justice system more workable, more efficient, fairer and less costly in terms of time, money and emotional well-being. This conference led to the legal system's widespread interest in institutionalizing alternative dispute resolution (ADR). Griffin Bell, a judge in the U.S. Court of Appeals for the Fifth Circuit, attended the Pound Conference. A few months after that conference, President Jimmy Carter appointed Judge Bell Attorney General of the United States. One of his first acts as Attorney General was to create the Office for the Improvement in the Administration of Justice in the Department of Justice. This act led to the creation of the Neighborhood Justice Center of Atlanta and several other centers throughout the country.

Now mediation and other dispute resolution processes are commonly used in many court programs, corporations, government and nonprofit organizations. Scores of people are being trained as mediators by private companies, nonprofit organizations, law schools and other academic arenas. However, to be quite frank, sometimes it is hard to get work. So what's a mediator to do?

There are many arenas where mediation skills can be used to accomplish organizational and community goals. Following are some examples of work I have done that flowed directly or indirectly from my mediation training. No doubt some of you will have your own unique experiences, and you will be encouraged to share them as well.

- This summer we are planning a Dialogue with a community that has been torn apart for years by issues of race and economic disparity. At long last, the community has decided to come together to address these issues. We will use a dialogue process created by the Public Conversations Project to lay the groundwork for planning community and economic development projects. But, until people are willing to talk openly and honestly about what the underlying issues are that keep them apart, they are unlikely to move forward. In this workshop, we will present and discuss a model of Dialogue and how mediators can use it to prepare other communities to use mediation and other conflict transformation processes.

- For the next few months, I will be working with a planner to conduct focus groups around the Master Plan for an island that is part of the state of Georgia. Several groups will be participating in this conversation. Each group brings a different perspective and may view the issues through a different filter. Some live on the island, some are environmentalists, some are interested in enhancing the island's ability to be self-sustainable, etc. I have worked with this Planner on many projects, using my skills to separate interests from positions, and design processes that ebb and flow depending on the mood and goals of the people in the room. Sometimes the goal of the process is to build consensus, sometimes not. Mediators possess some fundamental skills that can easily be transferred to consensus building work. Sometimes additional training is required, but there are many similarities.

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- I am currently working with an expert in school board governance. He provides a highly contentious and dysfunctional school board with information, based on his expertise in the subject matter and his legal expertise, to assist the board in transforming to one that functions well and serves its constituency. I attended his presentation along with another experienced mediator. We were poised to step in, if needed, to reframe, paraphrase, and get to underlying issues that were not stated explicitly in the governance sessions.

Lastly, we will talk about the knowledge and skills needed to successfully mediate in the public arena. With sunshine laws and differing rules about confidentiality - not to mention the challenges and opportunities of working with elected officials - this is an area ripe with opportunities for the mediator seeking to expand her or his practice.

SAVE THE DATE!!!

Friday, October 5 and Saturday, October 6, 2012

ANNUAL MEETING AND TRAINING

8 hours of Advanced Mediator Training sponsored by
State Bar of Michigan Section on Alternative Dispute Resolution
with Special Recognition and Appreciation to MSU College of Law

WHO: Anyone involved or interested in Alternative Dispute Resolution: mediators, arbitrators, attorneys, advocates, neutrals, trainers and participants.

WHY: To receive Advanced Mediator Training Credit: Eight Hours of Interactive Advanced Mediation Training by Professor Raytheon Rawls, Fanning Institute, University of Georgia, Athens, Georgia. Raye Rawls is a nationally prominent mediator, arbitrator and trainer in the field of mediation and alternative dispute resolution. She has provided training in the field of dispute resolution nationally and internationally. She has mediated and arbitrated over 2000 cases for various city, state and federal courts around the country, local, state and federal agencies such as EEOC and the United States Postal Service, corporations, non-profit organizations, community justice centers, and community organizations involving a wide variety of issues.

Friday afternoon and Saturday morning, Professor Rawls will lead participants through interactive learning experiences, sharing practical tools and methods to take your skills and awareness to the next level. Her topics include Dialogue and Consensus Building on Friday afternoon, and Saturday morning she will add those skills to discussion and practice of Mediating in the Public Arena.

Friday night the ADR Section will honor the recipients of its Distinguished Service, Nanci S. Klein, and George N. Bashara, Jr. awards during the cocktail hour and dinner program at the Faculty Club at MSU.
Saturday afternoon colleagues can join in optional excursions and lunch.

Come Join the Fun and receive the Best Advanced Mediation Training Value in Michigan!

WHERE: MSU College of Law – East Lansing, Michigan

HOW: Watch for registration and further information via the ADR Section's listserve and ADR Quarterly publication, or go to our Section website at www.michbar.org.

CONFERENCE COST: $125 DINNER COST: $45

The ADR Quarterly is published by the ADR Section of the State Bar of Michigan. The views expressed by contributing authors do not necessarily reflect the views of the ADR Section Council. The ADR Quarterly seeks to explore various viewpoints in the developing field of dispute resolution.

For comments, contributions or letters, please contact:

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http://www.michbar.org/adr/newsletter.cfm

Upcoming Mediation Trainings

General Civil Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 2.411(F)(2)(a):

Bloomfield: **September 7, 14, 24, 27 & 28**
November 2, 9, 16, 28 & 30

Trainings sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call (248) 338-4280

Ypsilanti: **September 27-29, October 19-20**

Training sponsored by Institute for Continuing Legal Education
Register online at www.icle.org, or call 1-877-229-4350.

Grand Ledge: **October 25-27, 29-30**

Training sponsored by Resolution Services Center
Call 517-485-2274, or visit www.resolutionservicescenter.org/training/

Domestic Relations Mediation Training

The following 40-hour mediation trainings have been approved by SCAO to fulfill the requirements of MCR 3.216(G)(1)(b):

Bloomfield: **October 1, 8, 15, 22, 29**

Trainings sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call (248) 338-4280

Advanced Mediation Training

Mediators listed on court rosters must complete eight hours of advanced mediation training every two years. The following training fulfills this requirement:

Bloomfield: **September 13**

Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call 248-338-4280

Traverse City: **October 9**

"Things Mediators Hate to Hear"

Trainer: Anne Bachle Fifer

Training sponsored by Conflict Resolution Services
Contact: Jennifer Kowal, 231-941-5835

Bloomfield: **October 18**

Michigan's New Mediator Standards of Conduct

Trainer: Dale Ann Iverson

Training sponsored by Oakland Mediation Center
Register online at www.mediation-omc.org or call 248-338-4280

ADVANCED MEDIATOR TRAINING

NORTHERN COMMUNITY MEDITION will sponsor an eight hour advanced mediator training on September 28, 2012 at Stafford's Perry Hotel, 100 Lewis Street, Petoskey, Michigan 49770. The training will be held from 8:00 am to 5:00 pm. and is approved for MCR 2.411(F) (4) credit by the State Court Administrative Office. Course information:

"Mediating Monetary Claims and Damages"

Speaker: Stephen J. Tresidder, Esq.

Text: J. Anderson Little, "Making Money Talk"

The fee for the course is $292.00. This includes the textbook, other course materials, continental breakfast and lunch. Judges and active volunteer mediators for Northern Community Mediation will only be charged $42.00 for the textbook.

REGISTER NOW by contacting Jane Millar at (231) 487 1771 or jane@northernmediation.org

State Bar of Michigan -- ADR Section Petition to Revise By-Laws

Section members will be asked to vote on the following amendments to the Section's By-Laws at the annual meeting to be held on October 6, 2012 at 8:30 a.m. at the Michigan State University College of Law in East Lansing, Michigan.

ARTICLE II - Membership

SECTION 1. DUES. Each member or affiliate of the Section shall pay to the State Bar of Michigan annual dues **in the amount previously established by a two-thirds vote of the Section Council after notice of the proposed dues amount to Section members of ~~Thirty Dollars ($30.00)~~**. Any member or affiliate of the State Bar of Michigan upon request to the Executive Director and upon payment of dues for the current fiscal year (October 1 - September 30), shall be enrolled as a member or affiliate, as applicable, of the Section. Thereafter, the annual Section dues shall be paid in advance each year beginning on the 1st day of October next succeeding such enrollment. Members so enrolled and whose dues are so paid shall constitute the voting membership of the Section. Any member of the Section whose annual dues shall be more than six (6) months past due shall automatically cease to be a member of the Section.

Notwithstanding the above, in the event a member of the State Bar of Michigan or a person wishing to join the Section pursuant to Section 5 (who has never been a member of the Section) should submit an initial written request to the Executive Director to join the Section after January 1 of the fiscal year shall become a member or affiliate, as applicable, for the balance of the fiscal year in which the application is made, without payment of dues to the Section.

ARTICLE V - Duties and Powers of the Council

SECTION 9. NOTICE OF MEETINGS. Written notice of meetings of the Council shall be provided at least seven (7) days in advance of any such meeting, **~~by facsimile, email, first-class mail postage fully prepaid, or by any other method permitted by law~~**. In the event the Bylaws of the State Bar of Michigan require a greater notice, such greater notice shall be provided. In the event of an emergency, notice of a meeting may be given by telephone, email or facsimile transmission upon twenty-four (24) hours prior notice. The presence of a person or his or her written proxy shall constitute waiver of notice of such meeting.

ARTICLE VI - Section Meetings

SECTION 5. NOTICE OF MEETINGS. Written notice of meetings of the Section shall be provided at least seven (7) days in advance of any such meeting, **~~by first-class mail, postage prepaid, or by any other method permitted by law~~**. In the event the Bylaws of the State Bar of Michigan require a greater notice, such greater notice shall be provided.

ARTICLE VII -- Miscellaneous Provisions

[NEW] **SECTION 7. NOTICES. Any notices required to be given in these bylaws or the bylaws of the State Bar of Michigan may be delivered by facsimile, email, electronic notice to the Section's listserv, first-class mail, postage fully prepaid or by any other method permitted by law.**

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The ADR Quarterly

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