Vol. 17
No. 3
July, 2010



The ADR Quarterly
Alternative Dispute Resolution Section of the State Bar of Michigan



# Confidentiality Does Not Automatically Extend to Pre-Mediation Resolution Sessions

*by Laura A. Athens*

Preservation of confidentiality is a significant advantage of mediation. Confidentiality is designed to encourage frank and open dialogue and collaborative problem solving without fear that statements made during the mediation will be used against a party at a subsequent proceeding. Parties expect that matters discussed during mediation will remain confidential, but this protection does not apply automatically to other alternative dispute resolution (ADR) processes. The Michigan Court Rules protecting confidentiality in mediation do not specifically address early intervention conferences, facilitations and resolution sessions.

## *Confidentiality Under the Michigan Court Rules*

Michigan Court Rules governing civil and domestic relations mediation safeguard confidentiality by mandating that "[s]tatements made during the mediation, including statements made in written submissions, may not be used in any other proceedings, including trial."[1] The rules further provide that "any communications between parties or counsel and the mediator related to the mediation are confidential and shall not be disclosed without the written consent of all parties."[2] The rules contain limited exceptions; the prohibition against disclosure does not apply to: (1) the mediator's report to the court regarding participants, the mediation completion date and whether settlement was reached or further ADR proceedings are contemplated; (2) information that court personnel reasonably require to administer and evaluate the mediation program; (3) information the court needs to resolve mediator fee disputes; and (4) information the court needs to address failure of a party, attorney or other representative to attend the mediation.

The Michigan Court Rules preserve confidentiality of mediations conducted in connection with litigation in the Michigan court system; they do not, however, address the multitude of ADR processes that occur in other forums. Participants in other ADR arenas must determine whether any statute or rule provides for confidentiality or, conversely, requires disclosure. Frequently, a confidentiality agreement is necessary. Mechanisms often are in place to ensure that such agreements are signed before the process begins. For example, the Oakland County Civil Early Intervention Conference (EIC) program requires participants to sign a confidentiality statement. However, the terms of confidential agreements or statements must be carefully examined to ensure that all key aspects of communications are protected and will remain confidential.

A situation may arise in which one party refuses to enter into a confidentiality agreement. Under those circumstances, the party wishing to preserve confidentiality will need to determine whether to forego the ADR process rather than risking disclosure of information at a later proceeding, or to participate without the benefit of confidentiality.

## *Confidentiality of Special Education Mediation*

Even if a statute provides for confidentiality of mediation, one should not assume that the same protection extends to other ADR processes. For example, the Individuals with Disabilities Education Act (IDEA)

Continued on Page 2

Continued from Page 1

*Laura A. Athens is an attorney, mediator and arbitrator in Farmington Hills. Her practice focuses primarily on education law. Ms. Athens has served as a Mediator and Hearing Officer in special education and vocational rehabilitation matters. She is a member of Professional Resolution Experts of Michigan, LLC (PREMi), the State Bar of Michigan Alternative Dispute Resolution Council and former Chair of the Oakland County Bar Association ADR Committee. Ms. Athens has also served as an Adjunct Professor at Wayne State University Law School teaching education law, health law and bioethics.*

contains not only voluntary mediation provisions, but also provisions for mandatory early resolution sessions when a parent files a special education complaint.

IDEA and its regulations contain elaborate terms regarding mediation, including an explicit requirement that all mediation discussions "shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding."[3] IDEA also mandates that the school district and parents participate in a "resolution session" within 15 days of the school district's receipt of the parents' request for an administrative due process hearing.[4] A resolution session is not required, however, when a district files a request for a due process hearing.

### *No Confidentiality Mandate for Resolution Session*

The resolution session provides the parties with an early informal opportunity for a face-to-face discussion that may effectively resolve the dispute and prevent the conflict from escalating. The resolution session is mandatory unless the parents and the district agree, in writing, to waive the meeting or agree to participate in mediation. An agreement reached through a resolution session is voidable by either party within three business days of its execution to permit the parties to consult with their respective legal counsel.

IDEA and its regulations are silent as to whether confidentiality applies to the resolution session. Because the statute does not address confidentiality, the Secretary of the United States Department of Education has declined to clarify in the regulations whether confidentiality is required in resolution sessions. The Secretary has noted that nothing in the statute would prevent parties from entering into a confidentiality agreement; however, the state cannot mandate confidentiality as a condition of the parent's participation.[5]

When resolution sessions were added to IDEA in 2004, Congress specifically found that parents and schools should have "expanded opportunities to resolve their disagreements in positive and constructive ways."[6] The legislative history indicates that Congress broadened ADR opportunities in an effort to restore trust and foster cooperation between parents and schools, encourage expeditious resolution of disputes and prevent disagreements from escalating into costly litigation.[7] The legislative history also reveals that the resolution session is designed to encourage communication regarding issues and promote collaboration concerning possible solutions.

### *When One Party Refuses to Agree to Confidentiality*

As a practical matter, uncertainty regarding the confidentiality of resolution sessions frequently is addressed through voluntary entry into a confidentiality agreement signed by the parties. However, problems may arise when one party refuses to sign such an agreement.

Very few cases have addressed the confidentiality of resolution sessions. Judges and hearing officers who have addressed the issue have concluded that nothing in the statute or regulations require that resolution session discussions be kept confidential. They have held that resolution sessions are not confidential unless the parties otherwise agree. Documents and testimony regarding discussions at resolution sessions may be admitted into evidence at due process hearings when there is no confidentiality agreement.

Neither party can force the other to agree to confidentiality as a precondition to participation in the resolution session. Serious consequences may ensue for parents who refuse to participate in a resolution session without a confidentiality agreement. Regardless of the merits of the underlying case, an administrative hearing officer may dismiss a case based on the parents' failure to participate in the mandated ADR process.

### *Repercussions Associated with Lack of Confidentiality*

Some parents may unwittingly share private information and settlement proposals during a resolution session without knowledge that the district may introduce this evidence at a due process hearing. If parents choose to proceed with a resolution session without the benefit of a confidentiality agreement, statements made and information shared during the session may be used against them in a subsequent formal proceeding. This places parents in the untenable position of having to choose between participating in a resolution session without confidentiality protection or risk dismissal of their case.

The United States District Court of the District of Columbia ruled that notes and testimony regarding discussions during a resolution session should have been admitted into evidence at the administrative due process hearing. The court found nothing in the statute or regulations required that resolution session

Continued on Page 3

Continued from Page 2

discussions be kept confidential. The court rejected an analogy to Federal Rule of Evidence 408, which makes settlement offers inadmissible in court, finding that the resolution session in that case was not a settlement negotiation.[8]

A state administrative hearing officer reached a similar conclusion. The parents' attorney argued that notes memorializing discussions at the resolution session were confidential because they were related to settlement. The state administrative hearing officer ruled that the local hearing officer properly admitted the documents into evidence because the resolution session is not confidential, reasoning that had Congress intended resolution sessions to be confidential, it could have included a confidentiality requirement in the resolution session provisions as it had in the mediation provisions.[9]

A local hearing officer dismissed a due process complaint because of the parent's failure to participate in a resolution session. The parent attended an initial resolution session, but declined to continue a second resolution session after the district refused to sign a confidentiality agreement. In dismissing the parent's complaint, the hearing officer reasoned that because nothing in IDEA requires resolution sessions to be confidential, neither party can demand that the other sign a confidentiality agreement as a condition to their participation in a resolution session.[10]

Dismissal of a parent's due process complaint is permitted under IDEA regulations at the conclusion of a 30-day period when the parent refuses to participate and the district has made reasonable efforts to obtain the parent's participation in a resolution session.[11] The only sanction for the district's refusal to participate in a resolution session is that the case against the district may proceed to a due process hearing.[12]

### *Meaningless Stepping Stone?*

It is unclear whether Congress' failure to include confidentiality in the resolution session provisions was an intentional or inadvertent omission. Admitting resolution session discussions into evidence at a due process hearing chills the parties' willingness to share sensitive information, freely exchange concerns and suggest possible solutions for fear that this information may come back to haunt them. Ordering dismissal of a matter because parents are reluctant to participate in a resolution session that does not include confidentiality protections is unfair. The parents' only choice, in such a situation, is to participate in a very guarded and unproductive manner or try to convince district personnel to waive the resolution session and engage in mediation instead.

It is doubtful that Congress intended the parties to simply go through the motions of a resolution session as a meaningless and futile exercise leading to a due process hearing. Protecting the confidentiality of resolution sessions would not undermine any of the purposes of IDEA. Failing to include a confidentiality provision for resolution sessions leads to confusion and defeats the legislative intent to restore trust and foster cooperation between parents and school districts. Extending confidentiality protections to resolution sessions would promote IDEA's preference for early, voluntary, collaborative resolution of special education disputes.

*An abridged version of this article appeared in the Feb. 15, 2010 issue of *Michigan Lawyers Weekly*.

Footnotes

1 MCR 2.411(C)(5); 3.216(H)(8).

2 MCR 2.411(C)(5); 3.216(H)(8).

3 20 U.S.C. 20 §1415(e)(2)(G).

4 20 U.S.C. §1415(f)(1)(B).

5 71 Fed. Regis. 46704 (2006).

6 20 U.S.C. §1400(c)(8).

7 H.R. 1350 Conference Report, Reducing Unnecessary Lawsuits and Litigation in Special Education, November 17, 2004.

8 *Friendship Edison Public Charter School v. Smith*, 561 F. Supp. 2d 74 (U.S. Dist. D.C. 2008).

9 *Homer Central Sch. Dist.*, 47 IDELR 145 (N.Y. SEA 2006).

10 *Marinette Sch. Dist.*, 47 IDELR 143 (Wisc. LEA 2007).

11 34 CFR 300.510(b)(4).

12 34 CFR 300.510(b)(5)

*"This article is reprinted with permission. It appeared in the May 2010 edition of the Oakland County Bar Association magazine,* LACHES*, and an abridged version of the article appeared in February 15, 2010 edition of* Michigan Lawyers Weekly*."*

*Tricia Jones, author of* Conflict Coaching: Conflict Management Strategies and Skills for the Individual.

# SAVE THE DATE

## Friday, October 22 and Saturday, October 23, 2010

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

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

**WHY:** To receive Eight Hours of Interactive Advanced Mediation Training by Professor Tricia Jones, author of *Conflict Coaching: Conflict Management Strategies and Skills for the Individual*. Conflict coaching is an ADR process in which the coach meets individually with disputants to help them better understand their conflict and to develop skills to engage in constructive conflict management. Professor Jones will also present on Creating Constructive Conflict Cultures in Organizations.

Friday afternoon and Saturday morning, Professor Jones will lead participants through interactive learning experiences, sharing practical tools and methods to elevate your skills and awareness to the next level.

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 Lelli's restaurant in Auburn Hills.

On Saturday afternoon colleagues can join in optional excursions, including a Nature Walk - on the Paint Creek Trail, Urban Walk - shopping and lunch in downtown Rochester and the Village of Rochester Hills or a History Walk - touring Meadowbrook Hall. Come Join the Fun and receive the **Best Advanced Mediation Training Value** in Michigan!

**WHERE:** Cooley Law School – Auburn Hills Campus, 2630 Featherstone Road

Hotel Rooms are available at Hilton Suites in Auburn Hills, $59/night, including breakfast.

**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: $100, includes box lunch on Friday**

# Upcoming ADR Trainings

## General Civil

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

Lansing: **August 19-21, 27-28**
*Training sponsored by Resolution Services Center*

Call 517-485-2274, or visit www.resolutionservicescenter.org/training/

Bloomfield: **September 17, 24, October 1, 8, 15**
*Training sponsored by Oakland Mediation Center*

Register online at www.mediation-omc.org or call 248-338-4280

Plymouth: **October 7-9, 29-30**
*Training sponsored by Institute for Continuing Legal Education*

Register online at www.icle.org, or call 1-877-229-4350.

Ann Arbor: **October 1-3, 15-17 April 1-3, 8-10, 2011**
*Training sponsored by Dispute Resolution Center of Washtenaw and Livingston Counties*

Contact: Jainelle Robinson
(734) 222-3745 or
(517) 546-6007 - Fax: (734) 222-3760
Website: www.thedisputeresolutioncenter.org

## Domestic Relations Mediation Training

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

Bloomfield: **October 5, 12, 19, 26, November 2**
*Training 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: **August 17**
Trainer: Tracy Allen
*Training sponsored by Oakland Mediation Center*

Register online at www.mediation-omc.org or call 248-338-4280

Petoskey: **September 10**

Drafting Enforceable Agreements and the New Standards of Conduct
Trainer: Anne Bachle Fifer
*Training sponsored by Northern Community Mediation*

Contact Jane Millar, 231-487-1771

Lansing: **September 20-21**

Adult Guardianship and Elder Care Mediation Training
Trainers: Zena Zumeta, Susan Butterwick
*Training sponsored by Mediation Training & Consultation Institute*

Register online at www.learn2mediate.com or call 1-734-663-1155

# Can You Be A Sponsor for the ADR Section Annual Meeting?

The ADR Section of the State Bar of Michigan is once again providing sponsorship opportunities for ADR Section members in the following denominations:

**GOLD -- $500 or more**

**SILVER -- $250 to $499**

**BRONZE -- $100 to $249**

Sponsors will be recognized and thanked at the Annual Dinner and named in the Annual Meeting materials provided to attendees. As in the past, your contributions will make it possible to provide tote bags, music, appetizers and cocktails for the Reception at this year's Annual Meeting and Conference.

If you would like to become a Sponsor for the Annual Meeting, please contact A. David Baumhart, III by September 15th, so we can receive your check timely and place the acknowledgement in the Program materials. Thank you for your help!

**A. David Baumhart III, J.D.**
**ADR Advantages, PLC**
**2040 Post House Court**
**Bloomfield Hills, MI 48304**
**Direct Dial: (248) 338-8848**
**Fax: (248) 251-0234**
**Email: dave@adradvantages.com**

# Class action arbitrations Has the obituary been written?

*By Gene J. Esshaki, Esq.*
*Abbott, Nicholson, Quilter, Esshaki & Youngblood, P.C.*
*May 18, 2010*

*Gene J. Esshaki is a Graduate of Wayne State University Law School. Since graduation, he has continuously practiced law in the Detroit Metropolitan Area, specializing in complex commercial litigation. He is a neutral Arbitrator on the complex case panels of the American Arbitration Association and the International Center for Dispute Resolution. He has an active practice in mediation and is appointed frequently by state and federal judges to mediate some of their most complex commercial cases. Gene is a member of the American Board of Trial Advocates and currently sits on the Council of the ADR Section. He is a founding shareholder in Abbott, Nicholson, Quilter, Esshaki & Youngblood, P.C., located in Detroit, Michigan.*

The decision of the United States Supreme Court in *Stolt-Nielsen, S.A., et al. v. Animal Feeds International Corp.*, Docket No. 08-1198, decided April 27, 2010, appears to have put an end to class action arbitrations. This decision will be viewed by advocates of consumer rights as a significant blow to their cause. Corporations providing consumer services and goods, however, will greet this decision with open arms.

For the novice, class actions are a judicially created process in which many claims arising out of a single wrong can be addressed in a single action. The rationale behind class actions is that it saves judicial time and resources by resolving in a single action claims that could individually run into the hundreds, thousands and even millions. Instead of 100,000 individual claims being filed in courts throughout the country for a single wrong allegedly committed by a defendant, all the claims are consolidated in a single court and resolved at one time. Procedures exist in the federal court rules and the rules of each state court that permit potential members of a class to "Opt Out" and, thus, not be bound by the class decision, such that they are free to pursue their own rights against the defendant. In most instances, however, the claims are so small that individual plaintiffs will simply not pursue them because the cost of pursuit greatly outweighs the prospect of recovery.

By way of example, the local purchaser of monthly cable service who happens to be inadvertently overcharged $1.00 on his service contract every month for 24 months, will not file an independent action against the cable provider because the amount at issue, $24.00, does not justify even the filing fee for the claim, let alone the cost of its prosecution. If, on the other hand, 100,000 cable subscribers have been simultaneously overcharged each month for 2 years, the amount at issue increases from $24.00 to $2,400,000, justifying the filing fee and a vigorous prosecution of the case. If successful, cable subscribers, while not individually participating in the litigation, will enjoy the benefits of its resolution through a reduction in future cable prices, a refund of fees already paid, or other concessions made by the cable company.

The federal courts and each state have adopted rules governing class action litigation that specify how such actions are to be administered by the courts and require judges to make an independent determination that the ultimate resolution of a case is, in fact, in the best interest of class participants. This process prevents the straw case that purports to cut off all class claims against a wrongdoer for less than fair compensation.

The question of whether class actions could be brought in an arbitration setting was undecided for a number of years. Since arbitration is a creature of contract, that is, parties agree to submit their disputes to binding resolution before an arbitrator outside the purview of a court, it had been argued that class action arbitration could not occur in the absence of a specific agreement by the contracting parties approving class arbitration as an acceptable procedure for conflict resolution.

It is easy to understand that a provider of consumer services, such as the local telephone company, would much rather have customer disputes resolved in private arbitration where the prospect of a jury trial does not exist and the expense of litigation is limited. On the other hand, consumer service providers do not want class action arbitration because it permits the prosecution of numerous, relatively small claims in a single action that, absent the procedure, would in all likelihood never otherwise be brought.

The Supreme Court was squarely faced with the issue of whether class action arbitrations are permissible in a commercial setting in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 2003. In that action, a fractured Supreme Court issued a plurality decision, at least facially, concluding that class arbitration was not clearly precluded by a commercial lending contract's broad arbitration clause providing that "all disputes . . . arising from or related to this contract or the relationships which result . . . will be resolved by binding arbitration by one arbitrator selected by (lender) with consent of you." Two separate class actions had been brought in the lower courts of South Carolina alleging violations of that state's Consumer Protection Code by Green Tree Financial. In each action, the lower court certified the class and then compelled private arbitration pursuant to the parties' agreement. Thereafter, each arbitration award was confirmed by the lower court. The Supreme Court of South Carolina withdrew appeals of the cases from its Court of Appeals, consolidated them and affirmed the decision of the trial courts approving class arbitration.

Justice Breyer of the United States Supreme Court in a plurality decision indicated that the arbitration clause in question did not clearly preclude class arbitration and, thus, the broad public policy favoring arbitration expressed in the Federal Arbitration Act (FAA) did not foreclose class arbitration. Accordingly, the issue was one for resolution under state-law contract interpretation. Three justices concurred with Justice Breyer and one concurred in the result only, thus the plurality.

Continued on Page 7

Continued from Page 7

Following the decision in *Green Tree Financial*, numerous lower courts issued decisions confirming the availability of class arbitration in the absence of a specific reference in the parties' contract establishing the intent of the parties to the contrary. The courts reasoned that because of the long established policy favoring arbitration, the party opposing class arbitration had the burden of establishing that class arbitration was never intended when the parties entered into their arbitration agreement. In the absence of specific language prohibiting class arbitration, the courts concluded that under broadly worded arbitration clauses, such actions are permissible.
As a direct result of the decision in *Green Tree Financial* and subsequent opinions of the courts interpreting that decision, the American Arbitration Association (AAA) adopted Supplementary Rules for Class Arbitrations, effective October 8, 2003. The Rules were designed to provide arbitrators with direction on how to proceed in class arbitrations. Additionally, the Rules provided for strategic review and intervention by the courts during the class arbitration process.

On April 27, 2010, the world of presumed class action arbitrations came to an end. The United States Supreme Court issued its opinion in *Stolt-Nielsen* which concluded that the imposition of class arbitration, in the absence of express agreement by the parties approving it, is inconsistent with the provisions of the Federal Arbitration Act. The five justice majority concluded that the subsequent interpretations of the *Green Tree Financial* plurality opinion were, in fact, in error and misunderstood the true directions of the Court in that opinion. Instead of concluding that parties will have been presumed to have agreed to class arbitration in a broad arbitration clause, in the absence of specific evidence of intent to the contrary, the *Stolt-Nielsen* majority concluded that a party may not be compelled under the FAA to submit to class arbitration unless there is a specific contractual basis for concluding that the party agreed to do so. The court felt that agreeing to class arbitration is dramatically different than agreeing to bilateral arbitration. This difference is so great, that it cannot be presumed the parties consented to class arbitration by simply agreeing to submit their disputes to an arbitrator. The court even addressed the Supplementary Rules for Class Arbitrations adopted by the AAA and indicated that, to the extent the Rules provide that the presumption of privacy and confidentiality that generally applies in bilateral arbitration shall not apply in class arbitrations (Rule 9(a)), a basic assumption of the parties at the time of entering into their agreement, confidentiality, would be thwarted under the Class Rules. The Court concluded that the differences between bilateral and class action arbitrations are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings.

The dissent in *Stolt-Nielsen*, including Justice Breyer, the author of the plurality opinion in *Green Tree Financial*, was clearly distressed with the majority opinion and the implication it has for future consumer protection actions. The minority felt that the better rule was the consistent recognition by arbitration panels and the courts post-*Green Tree* that a silent, broadly worded arbitration clause should be construed to permit class arbitration. The minority indicated that broad language, silent as to class proceedings, should be interpreted to permit a class proceeding. The minority continued by pointing out that the majority opinion apparently demands contractual language one must read as affirmatively authorizing class arbitration. The breadth of an arbitration clause in the absence of any provision waiving or banning class proceedings is no longer sufficient. The minority attempted to distinguish the majority opinion by observing that the decision applied to sophisticated business entities in situations where it is customary for one party to specifically select the contract language. It noted that the majority opinion thus spared the affirmative-authorization requirement in contracts of adhesion presented on a take it or leave it basis, particularly in consumer protection cases. While the minority distinguishes the facts in this manner, the majority clearly had an opportunity to carve out this exception for non-business agreements and did not do so. By pointing this out, the minority simply reinforces the fact that the rule is, absent express provision specifically affirming class arbitration, it will not be inferred, even in a broad-based arbitration clause.

For consumer advocates, the *Stolt-Nielsen* decision is less than welcome. In general, a cellular service contract provides that any and all disputes between the parties must be resolved through arbitration. Where that consumer is overcharged a nominal amount each month for a period of years, the commencement of an arbitration to recover those funds is simply not practical. On the other hand, the parties have agreed in their contract that all disputes must be resolved in arbitration and the courts will uphold that agreement. Accordingly, litigation, including class action proceedings, is out of the question given the "agreement' to arbitrate. The prospect that in arbitration a class can be formed to address multiple claims of multiple parties arising from the same alleged misconduct has now been closed.

*An earlier version of this article first appeared in the PreMIer Source dated June 16, 2010.* 247254

# U.S. Court of Appeals for the Sixth Circuit

*Carly E. Osadetz*

**Engaging substantially in litigation and, therefore, prejudicing opposing party could result in waiver of arbitration rights**

Although the concept of a waiver of the right to arbitrate by one's actions is well-known, there are few Michigan cases discussing the specific conduct required to show waiver. In cases that have addressed this issue, courts have held that parties may waive their right to arbitration by (1) taking actions that are completely inconsistent with any reliance on an arbitration agreement; and (2) delaying the enforcement of any agreement so long as to actually prejudice the opposing party. The U.S. Court of Appeals for the Sixth Circuit recently issued an opinion, which explains and is instructive on the issue of waiver by action.

In *Hurley v. Deutsche Bank Trust Co. Americas*, No. 09-1964, 2010 FED App. 0191P (6th Cir.), decided on July 1, 2010, the Court held that Defendants waived their arbitration rights because they engaged in active litigation for almost two years, initiated a change in venue, and attempted to enforce the arbitration agreement only after the district court rendered an unfavorable opinion.

Continued on Page 8

The ADR Quarterly

State Bar of Michigan
306 Townsend St.
Lansing, MI 48933

PRESORTED STANDARD
U.S. POSTAGE PAID
KALAMAZOO, MI
PERMIT #1



Continued from Page 7

Plaintiffs, James Hurley, a sergeant in the Michigan Army National Guard, and Brandi Hurley, his wife, filed suit after Defendants, Deutsche Bank Trust Company Americas and David C. Lohr and Orlans Associates, P.C., foreclosed on their home, held a sheriff's sale, and obtained a default judgment for eviction while Sergeant Hurley served in Iraq. When he returned home after nearly two years, Plaintiffs filed a complaint in the Eastern District of Michigan alleging violations of the Servicemembers' Civil Rights Act and claims of infliction of emotional distress, fraud, and conversion.

Although the mortgage agreement included an arbitration clause, for nearly two years Plaintiffs and Defendants litigated the case in federal court. Defendants filed answers to Plaintiffs' complaint and amended complaint, attended a Rule 16 scheduling conference and settlement hearing, and filed and responded to several dispositive and non-dispositive motions, including motions for summary judgment, and a motion to change venue which resulted in the case being transferred to the Western District of Michigan. After the district court issued an unfavorable opinion denying one of Defendants' motions for summary judgment, they moved to compel arbitration, which the district court denied based on waiver.

The court of appeals affirmed the district court and found that, through their conduct, Defendants had waived their rights to arbitration.

The Court explained that Defendants satisfied the first requirement for waiver because they took actions completely inconsistent with any reliance on an arbitration agreement. The Court emphasized that instead of enforcing the arbitration clause at the outset, Defendants decided to participate in active and lengthy litigation. Although no one action was dispositive, the Court specifically noted the importance of Defendants' motion to change venue. Because this motion allowed Defendants to "proactively select the forum in which they wished to defend against Plaintiffs' claims," the Court found it to be particularly significant. Likewise, the Court also stressed that Defendants filed their motion to compel arbitration only after the district court issued an unfavorable decision. Moreover, the Court rejected Defendants' argument that the inclusion of new remedies changed the scope of the case, and thus permitted them to compel arbitration.

Regarding the second requirement for waiver, the Court found that Plaintiffs' had suffered actual prejudice from Defendants' decision to delay asserting their right to arbitration, because they had incurred the cost of litigation, attorney fees and discovery, argued several motions, and changed venue based on Defendants' actions.

*Carly E. Osadetz is a third year law student at the University of Michigan Law School, and a Summer Associate at Clark Hill, PLC.*

*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:*

*Kevin Hendrick*
***313-965-8315***
*Toni Raheem*
**248-569-5695**
*or Phillip A. Schaedler*
***517-263-2832***

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