

## ADR Update (Dec. 2015)

by Marnie Huff\*

### I. ADR and settlements in the news

**Tom Brady Wins “Deflategate” Appeal in District Court.** In *National Football League Management Council v. National Football League Players Association*, Nos. 15 Civ. 5916 (RMB)(JCF) and 15 Civ. 5982 (RMB)(JCF) (Sept. 3, 2015), *appeal pending* (2d Cir. Ct. App.), the court overturned Roger Goodell’s suspension of New England Patriots quarterback, Tom Brady, for participating in a conspiracy to deflate footballs during the AFC championship. Generally courts do not get involved in arbitration between parties who have agreed to arbitrate disputes. However, the court has authority to hear appeals under the Federal Arbitration Act (FAA) if certain grounds are met. 9 U.S.C. §10. In this case, the issue involved whether the arbitrator’s award drew its essence from the collective bargaining agreement (CBA) between the players and the NFL. Under CBA, Roger Goodell, as commissioner, had authority and discretion to serve as the hearing officer in the appeal. CBA Article 46 §2(a)). But the arbitrator must apply the CBA in a plausible way and act within the scope of his or her authority. The court found Tom Brady was prejudiced and overturned Goodell’s decision to suspend Brady. Goodell had relied on the integrity of the game and competitive rule policies that are not applied to players in the CBA. In addition, the court found that Brady was denied access to key witnesses and lacked notice of the discipline for the actions he was accused of. The court noted there were inconsistencies in the way Brady was punished: players in the past have never been suspended for equipment tampering, and the punishments used were based on the NFL steroid policy. The court held that the process was fundamentally unfair. Copy of District Court’s opinion available at <http://www.nysd.uscourts.gov/cases/show.php?db=special&id=484>. The NFL’s appeal to the Second Circuit Court of Appeals is pending, with oral argument set for March 3, 2016 after the 2016 Super Bowl. See "NFL 'Deflategate' appeal to be heard March 3, after Super Bowl," available at <http://www.reuters.com/article/us-nfl-brady-idUSKBN0TC27P20151123>.

**IRS appeals arbitration program eliminated.** Effective September 2015, the IRS eliminated its appeals arbitration program due to lack of demand. Under the program, taxpayers and the IRS Office of Appeals were permitted to jointly request binding arbitration on any issue unresolved at the conclusion of the appeals process. Over the fourteen-year period the program was available, only two cases were resolved using arbitration. Taxpayers may still request mediation of unresolved issues that remain after completing settlement discussions in the appeals process. Internal Revenue Bulletin at [http://www.irs.gov/irb/2015-38\\_IRB/ar06.html](http://www.irs.gov/irb/2015-38_IRB/ar06.html).

**Cooper to Serve as Monitor in Daymar College Settlement.** Former Tennessee Attorney General Robert E. Cooper Jr. will serve as compliance monitor in a \$12.4 million settlement reached by the Kentucky Attorney General and Daymar College in a consumer protection lawsuit. The settlement provides debt relief, cash payments, and injunctive terms over Daymar’s future operations. An estimated 12,294 students are eligible. The Owensboro, Kentucky school will be monitored over the next two years. Full story at <http://migration.kentucky.gov/Newsroom/ag/daymarsettlement.htm>

### II. Caselaw Update

## A. Selected Sixth Circuit Cases

**Second ground for vacatur of arbitration award must be addressed by trial court.** In *Bernard J. Schafer; Henry Block v. Multiband Corp.*, No. 14-2518 (6<sup>th</sup> Cir. October 20, 2015) (not for publication), the Court addressed the effect of its earlier decision in *Schafer v. Multiband Corp.*, 551 F. App'x 814, 820-21 (6<sup>th</sup> Cir. 2014) ("Schafer I") (holding arbitrator did not manifestly disregard the law in concluding that Bernard Schafer and Henry Block's indemnification agreements with Multiband Corporation were void). *Schafer I* reversed the district court's judgment vacating an arbitration award and remanded the case for further proceedings. On remand, Schafer and Block argued that the district court was required to rule on a second theory for vacating the arbitration award, involving stock fraud claims. They asserted that the arbitrator did not provide a full and fair hearing, did not give notice that he was deciding those stock fraud claims, and did not allow them to present evidence on those claims. The district court refused to hear this claim, reasoning that *Schafer I* precluded review of the second argument. Conceding that *Schafer I* included some unclear language, the Court of Appeals held that *Schafer I* did not decide Schafer and Block's second argument for vacatur, and the district court should address that argument in the first instance. It did not address Multiband's *res judicata* argument which is to be addressed on remand.

In *Skylar Gunn v. NPC International, Inc.*, *William Harris v. NPC International, Inc.*, *Candace Jowers v. NPC International, Inc.*, *Tiffney Penley v. NPC International, Inc.*, *Leah Redmond v. NPC International, Inc.*, Case Nos. 14-6036, 14-6040, 14-6041, 14-6042, and 14-6044 (6<sup>th</sup> Cir. August 28, 2015) (not for publication), the Court addressed whether the defendant employer failed to timely assert its right to arbitration, and therefore waived its contractual right to insist on arbitration of employees' claims for unpaid compensation. Affirming the district court, the Court of Appeals held the employer's litigation actions were completely inconsistent with reliance on the arbitration agreement and resulted in actual prejudice to the plaintiffs. The Court relied on *Johnson Associates Corp. v. HL Operating Corp.*, 680 F.3d 713, 716 (6<sup>th</sup> Cir. 2012) and *Hurley v. Deutsche Bank Trust Co.*, 610 F.3d 334, 338 (6<sup>th</sup> Cir. 2010), and distinguished *Shy v. Navistar Int'l Corp.*, 781 F.3d 820, 827-28 (6<sup>th</sup> Cir. 2015). Here, before it moved to arbitrate, the employer delayed for almost 15 months, it engaged in settlement negotiations, it had filed several motions (some dispositive), and it had received unfavorable rulings on initial dispositive motions. The Court also rejected the defendant's claim that, in these collective actions, the waiver issue should be considered individually as to each plaintiff (evaluating each opt-in plaintiff from the date of opt-in).

## B. Tennessee ADR Cases

### 1. Arbitration

In a 32 page opinion, the Court of Appeals in *Mid-South Maintenance Inc., et al. v. Paychex Inc., et al.*, No. W2014-02329-COA-R3-CV (Tenn. Ct. App. August 14, 2015) addresses a number of arbitration issues. The plaintiffs and Paychex, Inc. had expressly agreed to arbitrate any disputes arising from their contract. They also agreed that New York law governed. The plaintiffs later sued Paychex and one of the Paychex's employees who had not signed the arbitration agreement

(the non-signatory employee). The claims were for breach of fiduciary duty, negligence, and aiding and abetting conversion. The trial court denied the defendants' motion to compel arbitration on the ground that the plaintiff's tort claims were outside the scope of the arbitration agreement, citing Tennessee law. The Court of Appeals reversed, holding that, pursuant to federal and New York law, and the arbitration agreement's delegation clause, the arbitrator (not the trial court) is the proper tribunal to determine issues regarding the scope and unconscionability of the arbitration agreement. The Court also concluded that the plaintiffs' claims against the non-signatory employee were intertwined with the claims against Paychex, thus all disputes regarding arbitrability of claims against the non-signatory employee must also be resolved by the arbitrator. In the course of its decision-making, the Court addressed a number of issues, including: 1) choice of law, 2) whether the court (not the arbitrator) determines arbitrability where the plaintiffs claimed they never received a copy of the purported arbitration agreement, 3) whether the plaintiffs had waived the arbitrability issue by failing to list it as an issue in their appellate brief, 4) whether the parties' agreement to have AAA rules apply meant that, per the AAA rules, the arbitrator would decide his or her own jurisdiction, 5) whether to address an unconscionability issue not addressed by the trial court, and 6) severability of the arbitration agreement from the underlying contract.

*Akilah Louise Wofford, et al. v. M. J. Edwards & Sons Funeral Home Inc., et al.*, No. W2015-00092-COA-R3-CV (Tenn. Ct. App. November 23, 2015) concerns enforceability of an agreement to arbitrate a dispute between a consumer and funeral home. The consumer signed a two page funeral services contract which included a short, completely one-sided, mandatory arbitration clause and referred to a "Part 3" of the contract. Part 3 included additional arbitration provisions. The funeral home did not provide a copy of Part 3 to the consumer to read. Arbitration clauses are not common in funeral services contracts in Memphis. The contract was presented on a "take it or leave it" basis after the funeral home had already embalmed the body of the deceased and performed additional services to the plaintiff. The trial court refused to compel arbitration, finding no meeting of the minds as to the arbitration agreement. On appeal, the funeral home argued that the Court of Appeals should consider not only the signed agreement, but also the Part 3 document allegedly incorporated by reference into the parties' contract. The Court held there was no meeting of minds regarding the additional Part 3 document that had additional arbitration provisions, so it was not properly incorporated by reference into the parties' contract. Thus, the consumer was not bound by its provisions. Further, the arbitration provision actually contained in the parties' contract is an adhesion contract that is unenforceable because it is beyond the expectations of an ordinary person.

**Optional arbitration agreement signed by a patient's health care agent enforceable as a "health care" decision.** In *Billy Bockelman, et. al. v. GGNSC Gallatin Brandywood LLC, et. al.*, No. M2014-02371-COA-R3-CV (Tenn. Ct. App. September 18, 2015), the decedent's attending physician had determined she lacked lack mental capacity. She had previously given an agent the power to make "health care decisions," and was subsequently placed in a nursing home. The agent completed all nursing home admission contracts on behalf of the decedent, including an optional arbitration agreement. After the patient's death, the agent sued the nursing home. The trial court granted the nursing home's motion to compel arbitration. On appeal, the agent claimed she lacked authority to sign the arbitration agreement because the patient was competent at the time of admission, the agreement was not a "health care decision," and the

arbitration agreement was unconscionable. The Court of Appeals upheld the trial court's order compelling arbitration. First, clear and convincing evidence, based on the attending physician's determination, showed the patient was incompetent, even though other medical records included some evidence of competence. Second, entering into an arbitration agreement as part of a nursing home admission is a "health care" decision because it is part of the admission process. Finally, the ADR Agreement is not unconscionable it was optional, it had mutuality, and its terms were not misrepresented by the nursing home.

## 2. Settlements; Releases

In *Dana Jo Stricklin v. Jerone Trent Stricklin*, No. W2015-00538-COA-R3-CV (Tenn. Ct. App. September 21, 2015) the Mother sought to modify the parties' permanent parenting schedule. During a trial recess that followed the Mother's testimony, the parties settled. The Mother's attorney announced the parties had agreed to a new parenting plan. The agreed-upon terms were announced in open court in the parties' presence. The judge stated he was "glad the parties were able to work out their dispute 'for the best interest of the child,'" but did not make any findings on best interests. The record on appeal does not include a transcript of the Mother's testimony. After the trial court entered an order approving the modified plan, the Father stated he did not consent to the plan. The trial court denied the Father's motion to set aside the order. The Court of Appeals, relying on *Harbour v. Brown for Ulrich*, 732 S.W.2d 598 (Tenn. 1987), held that parties' consent was not required at the time of entry of the order because the parties had announced their agreement in open court where the terms of the agreement were determined. Nevertheless, the order was not legally sufficient. Citing *Tuetken v. Tuetken*, 320 S.W.3d 262 (Tenn. 2010) and *Fletcher v. Fletcher*, No. M2010-01777-COA-R3-CV, 2011 WL 4447903 (Tenn. Ct. App. Sept. 26, 2011), the Court held that the trial court's order did not contain a finding that the modified parenting plan was in the child's best interests. Therefore, the Court of Appeals vacated the order and remanded the case for further proceedings.

**Settlement of will must be in good faith.** In *In Re Estate of Vide Mae McCartt*, No. E2014-02185-COA-R3-CV (Tenn. Ct. App. Sep. 25, 2015), five grandchildren contested the decedent's will. After mediation, the grandchildren and living children entered into a settlement agreement which the trial court approved. One of the decedent's non-marital grandchildren (the petitioner) was not part of the settlement agreement. She brought an action, arguing that she was entitled to a share of the estate under the agreement and that her siblings perpetrated a fraud by representing that the decedent had only three children and heirs at law when she actually had four children. The defendants argued that the petitioner was time barred and that *res judicata* applied. The trial court granted defendants' motion to dismiss for failure to state a claim. The Court of Appeals found that any interested party may bring a will contest, and all other interested parties are free to join. Those involved in litigation may settle if done in good faith. In the present case, the complaint's allegations raise a legitimate issue of whether the heirs were acting in good faith. The Court vacated the judgment and remanded for further proceedings.

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