ALTERNATIVE DISPUTE RESOLUTION

MICHAEL G. NOWAKOWSKI[†]

I. INTRODUCTION

The *Survey* period produced a number of interesting developments in the field of alternative dispute resolution ("ADR"). The litigation, as depicted by the United States Supreme Court decisions that follow, all involved the continued support of arbitration as a significant alternative to court action. The enforcement of agreements to arbitrate, the scope of an arbitrator's authority, and the limited review of the courts were typical topics addressed in legal action during the period.

As for other forms of ADR, principally mediation, litigation of issues is surpassed by the support of the process through court rules, statutes, rules of professional conduct (for attorneys and mediators) and governmental regulation. It seems rather apparent that because ADR is expanding, with more programs and disputes dealt with through ADR, further problems and challenges will result. Stay tuned for further developments in future editions of this annual *Survey*.

II. SUPREME COURT CASES

A. Introduction

The Supreme Court's jurisprudence during the *Survey* period considered three cases in the ADR area, not shockingly, all dealing with the Federal Arbitration Act.[1] *Rent-A-Center, West, Inc. v. Jackson*,[2] *Granite Rock Co. v. International Brotherhood of Teamsters*,[3] and *AT&T Mobility LLC v. Concepcion*,[4] might fairly illustrate an "ongoing

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† Commissioner, Federal Mediation and Conciliation Service, Troy, Michigan and Adjunct Professor of Law, Wayne State University Law School. A.B., 1972, Harvard University; J.D., 1975, Wayne State University Law School. The views expressed herein are those of the author only and do not purport to be an official position of the Federal Mediation and Conciliation Service. The author gratefully acknowledges the significant research and organizational contributions of Gregory M. Nowakowski, Esq., Rogers Mantese & Associates, Royal Oak, Michigan. Also to be acknowledged for their contributions to the author's understanding of many aspects of this article are the current and past members of the Alternative Dispute Resolution Section of the State Bar of Michigan and the ADR Committee of the Oakland County Bar Association, particularly Tracy Allen, Earlene Baggett-Hayes, Mary Bedikian, Gene Esshaki, Edward Hartfield, Sheldon Larky, Antoinette Raheem and Martin Weisman.

1. Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006).
2. 130 S. Ct. 2772 (2010).
3. 130 S. Ct. 2847 (2010).
4. 131 S. Ct. 1740 (2011).

favorable treatment of arbitration agreements, particularly those governing non-collective disputes . . ."[5] and reflecting a "conscious policy of diverting employment claims away from the federal court system."[6]

It is accurate to characterize the cases in this *Survey* period as favoring the enforcement of arbitration agreements. However, a policy of diversion away from the federal court system may take reading of the Supreme Court's jurisprudence too far.[7] To be sure, the cases do address the balance between federal judicial review and individual rights to contract for arbitration of future disputes.

In *Rent-A-Center*, the Court held "when an arbitration agreement contains a clause delegating to an arbitrator the task of deciding the enforceability of the agreement, an arbitrator should decide the enforceability of the agreement as a whole; however, the district court should decide a challenge to the enforceability of a specific delegation clause."[8] Similarly defining the balance of federal court power, in *Granite Rock Co.* the Court found that it was the federal court's job (and not an arbitrator's) to determine the effective date of collective bargaining agreement.[9] That is, there are two aspects of "arising under" a contract.[10] The first is whether the subject matter of the dispute arises under the contract.[11] The second is temporal, answering the question about when an arbitration agreement comes into existence.[12] The Court noted that if the agreement to arbitrate does not exist before the dispute,

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5. Stephen F. Befort et al., *A Summary of the Labor and Employment Law Decisions of the United States Supreme Court's 2009-2010 Term*, 26 ABA J. LAB. & EMP. L. 501, 516 (2011).

6. *Id.* (quoting Stephen F. Befort et al., *The Labor and Employment Law Decisions of the Supreme Court's 2003-2004 Term*, 20 LAB. L. 177, 215 (2004)).

7. *See* Stephen F. Befort et al., *The Labor and Employment Law Decisions of the Supreme Court's 2003-2004 Term*, 20 LAB. L. 177, 215 (2004)).

8. Befort et al., *supra* note 5, at 509 (citing *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2779-80 (2010)).

9. Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2853 (2011).

10. *See id.* at 2860-61.

11. Many courts opined that it is the job of the arbitrator, as a creature of the contract and under his or her power and authority arising from that arbitration agreement, to determine whether a particular dispute substantively arises under—and is consequently covered by—an arbitration agreement. For example, does an employment discrimination lawsuit arise from an employment contract containing a standard, broadly defined arbitration clause requiring all disputes arising under the contract go to arbitration? *See* Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2783 (2010) (Stevens, J., dissenting) (citing AT&T Tech., Inc. v. Commc'n. Workers of Am., 475 U.S. 643, 649 (1986)) ("'[Q]uestion[s] of arbitrability' may be delegated to the arbitrator, so long as the delegation is clear and unmistakable.").

12. *Granite Rock*, 130 S. Ct. at 2860.

the dispute could not arise from the subsequent contract (unless of course, the contract clearly notes it includes prior disputes).[13] This temporal aspect is one for courts to decide.[14]

Lastly, in *AT&T Mobility LLC*, the Court found that it was inappropriate for federal courts to declare private contracts unconscionable under state law where an arbitration agreement contained a waiver of class action arbitration; the state law was pre-empted by the Federal Arbitration Act.[15]

From these cases, the Court further clarified the appropriate role of the courts and arbitrators under the Federal Arbitration Act.[16] In addition, while none of these decisions produce monumental changes to alternative dispute resolution jurisprudence, they are decisions narrowly decided,[17] which of course leaves plenty of room for future litigation.

B. Rent-A-Center, West, Inc. v. Jackson[18]

The first case considered by the Supreme Court during the *Survey* period is the *Rent-A-Center* case, which involved an arbitration agreement related to Mr. Jackson's employment with Rent-A-Center, West, Inc.[19] The Court considered "whether, under the Federal Arbitration Act, a district court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator."[20]

The underlying lawsuit involved an employment discrimination lawsuit whereby Antonio Jackson sued his former employer, Rent-A-Center, in federal court pursuant to 42 U.S.C. § 1981.[21] Rent-A-Center, West, Inc. filed a motion to dismiss and compel arbitration under an Arbitration Agreement, which provided for "arbitration of all 'past, present, or future' disputes arising out of Jackson's employment with Rent-A-Center, including 'claims for discrimination' and 'claims for violation of any federal . . . law.'"[22] The Arbitration Agreement was a separate agreement signed by Mr. Jackson as a condition of his

13. *Id.*
14. *Id.* at 2857-58.
15. AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011).
16. Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006).
17. Befort et al., *supra* note 5, at 516.
18. 130 S. Ct. 2772 (2010).
19. *Id.*
20. *Id.* at 2775 (citation omitted).
21. *Id.*
22. *Id.*

employment.[23] Mr. Jackson opposed the company's motion to dismiss and compel arbitration on the ground that the agreement was unconscionable under Nevada law.[24]

The federal district court granted Rent-A-Center's motion to dismiss and compel arbitration, because the Arbitration Agreement clearly covered discrimination claims, and also gave the arbitrator "exclusive authority to decide whether the agreement is enforceable."[25] The court of appeals

> [R]eversed in part, affirmed in part and remanded. The court reversed on the question of who (the court or the arbitrator) had the authority to decide whether the Agreement is enforceable. It noted that "Jackson does not dispute that the language of the Agreement clearly assigns the arbitrability determination to the arbitrator," but held that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconsionability is for the court."[26]

The Supreme Court focused on two provisions of the arbitration agreement critical to its decision: (1) "'Claims Covered by the Agreement' provides for arbitration of all 'past, present, or future' disputes arising out of Jackson's employment with Rent-A-Center,"[27] and (2) the clause delegating authority to the arbitrator (and not the court) to decide whether the agreement was void or voidable.[28] The Court focused also on the usual law of challenging arbitration agreements[29]—that there are two challenges. First, a party can challenge the "validity of the agreement to arbitrate;" and second, a party can challenge the validity of "the contract as a whole."[30] The only meaningful challenge is one that challenges the specific arbitration agreement, and not the challenge to the agreement as a whole.[31]

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23. *Id.*

24. *Rent-A-Center, W., Inc.*, 130 S. Ct. at 2775.

25. *Id.*

26. *Id.* at 2776 (quoting *Rent-A-Center, W., Inc. v. Jackson*, 581 F.3d 912, 917 (9th Cir. 2009)).

27. *Id.* at 2777.

28. *Id.*

29. *Id.*

30. *Rent-A-Center*, 130 S. Ct. at 2778 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006)).

31. *Id.* at 2779.

The Court found that the district court was correct in its determination "that Jackson challenged only the validity of the contract as whole"—even if the contract as a whole was itself a detailed arbitration agreement.[32] Jackson failed to specifically challenge the delegation provision that provided the arbitrator the authority to hear matters relating to validity or invalidity of the Arbitration Agreement.[33] Although Jackson made a challenge in his brief to the Court (but not to the district court or to the court of appeals), the Supreme Court found that "he brought this challenge to the delegation provision too late, and [the Court] will not consider it."[34]

Justice Stevens (joined by Justices Ginsburg, Breyer and Sotomayor) dissented, criticizing the majority's parsing of the arbitration agreement.[35] The dissent questioned whether a party challenging the specific agreement to arbitrate fell within the Court's prior holdings in *Buckeye* and *Prima Paint*:[36]

> In sum, questions related to the validity of an arbitration agreement are usually matters for a court to resolve before it refers a dispute to arbitration. But questions of arbitrability may go to the arbitrator in two instances: (1) when the parties have demonstrated, clearly and unmistakably, that it is their intent to do so; or (2) when the validity of an arbitration agreement depends exclusively on the validity of the substantive contract of which it is a part.[37]

The dissent further stated:

> In my view, a general revocation challenge to a standalone arbitration agreement is, invariably, a challenge to the "making" of the arbitration agreement itself, and therefore, under *Prima Paint,* must be decided by the court. A claim of procedural

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32. *See id.* ("The arguments Jackson made in his response to Rent-A-Center's motion to compel arbitration support this conclusion. Jackson stated that 'the *entire agreement* seems drawn to provide [Rent-A-Center] with undue advantages should an employment-related dispute arise.'").

33. *Id.*

34. *Id.* at 2781 (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 271 (2009)).

35. *Id.* at 2781 (Stevens, Ginsburg, Breyer, & Sotomayor, J.J., dissenting).

36. *Rent-A-Center*, 130 S. Ct. at 2782-85 (discussing past Supreme Court precedent on challenging agreements to arbitrate); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 446 (2006); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

37. *Rent-A-Center,* 130 S. Ct. at 2784.

> unconsionability aims to undermine the formation of the arbitration agreement, much like a claim of unconsionability aims to undermine the clear-and-unmistakable-intent requirement necessary for a valid delegation of a "discrete" challenge to the validity of the arbitration agreement itself . . . . Moreover, because we are dealing in this case with a challenge to an independently executed arbitration agreement—rather than a clause contained in a contract related to another subject matter—any challenge to the contract itself is also, necessarily, a challenge to the arbitration agreement. They are one and the same.[38]

This case reinforces the "fundamental principle that arbitration is a matter of contract"[39] that "may be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'"[40] Where the employee clearly agreed to delegate enforceability to the arbitrator, he will be bound by his agreement.

C. Granite Rock Company v. International Brotherhood of Teamsters[41]

The Supreme Court again addressed arbitration and the role of the federal courts in private arbitration, this time in the context of a labor dispute.[42] The Supreme Court held that the date of ratification for a collective bargaining agreement was a matter for the federal courts—and not a matter for the arbitrator.[43] Justice Thomas, writing for the majority, noted that arbitration is a way to resolve disputes that the parties agree to arbitrate, but only those disputes the parties agree to arbitrate.[44]

Granite Rock operates a concrete and building materials company in California.[45] Many of its employees were unionized by the International Brotherhood of Teamsters, Local 287 ("IBT").[46] The local members went on strike when the collective bargaining agreement negotiations reached an impasse.[47] The parties eventually reached an agreement on a new agreement, which contained a no-strike clause, but which did not

38. *Id.* at 2786-87 (citations omitted).
39. *Id.* at 2776.
40. *Id.* (citing Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).
41. 130 S. Ct. 2847 (2010).
42. *Granite Rock*, 130 S. Ct. at 2853.
43. *Id.* at 2860-64.
44. *Id.* at 2857.
45. *Id.* at 2853.
46. *Id.*
47. *Id.*

contain any provisions related to strike damages.[48] A dispute arose over the strike damages, which the parties could not resolve—resulting in another strike.[49]

Granite Rock sued the union in federal district court, seeking an injunction against further strikes because of the no-strike clause in the newly negotiated collective bargaining agreement.[50] The union argued that the collective bargaining agreement was not validly formed, and therefore, a no-strike clause did not exist to prevent the second strike.[51] The critical issue of fact was whether the collective bargaining agreement was ratified on July 2 or August 22.[52] The federal district court concluded "whether the CBA [Collective Bargaining Agreement] was ratified on July 2 or August 22 was an issue for the court to decide and submitted the question to a jury."[53]

The court of appeals "affirmed in part and reversed in part."[54] "The court of appeals affirmed the district court's dismissal of Granite Rock's tortious interference claims against IBT . . . . But it disagreed with the District Court's determination that the date of the CBA's ratification was a matter for judicial resolution."[55] The court of appeals relied upon two principles in finding the ratification date appropriate for the arbitrator.[56] First, any doubts about arbitrability should be settled in favor of arbitration.[57] Second, the presumption of arbitrability applies even in instances where the validity of the entire contract is placed in question.[58] In distinguishing its opinion from these principles, the Court stated that:

> For purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed. That is the case where, as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement's provisions were enforceable during the period relevant to the parties' dispute. This formation date question requires judicial resolution here because it relates

48. *Granite Rock Company*, 130 S. Ct. at 2853.
49. *Id.* at 2853-54.
50. *Id.* at 2854.
51. *Id.*
52. *Id.* at 2854-55.
53. *Id.* at 2855.
54. *Granite Rock*, 130 S. Ct. at 2855. *See* Granite Rock Co. v Int'l Bhd. of Teamsters, 546 F.3d 1169 (9th Cir. 2008).
55. *Granite Rock*, 130 S. Ct. at 2855.
56. *Id.* at 2856.
57. *Id.* at 2857.
58. *Id.*

> to [l]ocal's arbitration demand in such a way that the District Court was required to decide the CBA's ratification date in order to determine whether the parties consented to arbitrate the matters covered by the demand.[59]

The Court explicitly left open as a question for another day the issue of whether every dispute over a CBA's ratification date requires judicial resolution.[60] The Court also noted a second reason to reverse the court of appeals: the 'ratification dispute' is outside the scope of the arbitration clause (stating "all disputes arising under this agreement . . . shall be [arbitrated]").[61] Applying the common textualist theme so often championed by Justice Thomas, the Court opined that questions about the CBA's very existence cannot be said to "arise under" the agreement.[62] Further, the language of the arbitration clause, read together with remaining provisions, is strictly limited in scope.[63] In other words, the language "arising under" has two facets: first, "arising under" has a meaning as to content; and second, "arising under" has temporal meaning.[64]

> The parties' ratification-date dispute cannot properly be characterized as falling within the . . . scope of this provision for at least two reasons. First, we do not think the question whether the CBA was validly ratified on July 2, 2004—a question that concerns the CBA's very existence—can fairly be said to "arise under" the CBA. Second, even if the "arising under" language could in isolation be construed to cover this dispute, Section 20's remaining provisions all but foreclose such a reading by describing that section's arbitration requirement as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation.[65]

Granite Rock also alleged various federal tort claims which the Court addressed, as part of the claims available on remand: "The Court of Appeals joined virtually all other Circuits in holding that it would not

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59. *Id.* at 2860 (footnotes omitted).

60. *Id.* at 2861.

61. *Granite Rock*, 130 S. Ct. at 2862.

62. *Id.*

63. *Id.*

64. *Id.* at 2862 ("[T]he CBA provision requiring arbitration of disputes "arising under" the CBA is not fairly read to include a dispute about when the CBA came into existence.").

65. *Id.* (citation omitted).

recognize [federal tort] claim[s] under [the Act]."[66] The Court was not persuaded that the National Labor Relations Act ("NLRA") remedies were so woefully inadequate that there should be a federal common law to address and make whole the aggrieved party.[67] The Court seemed to dislike Granite Rock asserting various tort theories when Granite Rock did not fully explore the already existing remedies under the NLRA.[68]

Justice Sotomayor, concurring as to the issue of federal common law, disagreed with the majority (along with Justice Stevens), stating that the parties clearly agreed to arbitrate disputes under the new collective bargaining agreement—which the parties specifically made effective as of May 1, 2004.[69] Therefore, the CBA and the arbitration clause clearly covers the dispute in question, which arise after May 1, 2004.[70] Justice Sotomayor went on to say:

> Because it is . . . undisputed that the parties executed a binding contract in December 2004 that was effective as of May 2004, we can scarcely pretend that the parties have a formation dispute . . . . I would hold that the parties agreed to arbitrate the no-strike dispute, including Local 287's ratification-date defense, and I would affirm the judgment below on this alternative ground.[71]

The message of *Granite Rock* is clear to those negotiating a collective bargaining agreement—be specific about what disputes you agree to arbitrate. The arbitration language here is specific in regard to disputes arising *under* the agreement—not to whether a contract is actually made.

D. AT&T Mobility LLC v. Concepcion[72]

The Supreme Court in the *AT&T Mobility* case held that the Federal Arbitration Act ("FAA") preempted a California rule against class action arbitration waivers in consumer contracts.[73] In a five to four decision, the Court focused significantly upon the difference between traditional arbitration and class action arbitration in making its decision.[74]

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66. *Id.* at 2863.
67. *See Granite Rock Company*, 130 S. Ct. at 2864.
68. *Id.* at 2865.
69. *Id.* at 2867 (Sotomayor, J., concurring in part and dissenting in part).
70. *Id.*
71. *Id.* at 2868-69.
72. 131 S. Ct. 1740 (2011).
73. *AT&T Mobility*, 131 S. Ct. at 1753.
74. *Id.*

Furthermore, the Court paid particular attention to the safeguards instituted by AT&T to encourage individual claimants to file for arbitration (thus reducing the value of class action arbitration) of their claims.[75] The main issue the Court considered was "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."[76] The Court disagreed with the California Supreme Court and held that the FAA preempted California law, thus allowing a consumer to waive the right to class action arbitration in a cellular phone contract.[77]

The Concepcions entered into a cellular phone contract with AT&T.[78] The underlying dispute involved alleged false advertising where AT&T offered consumers free telephones, but "were charged $30.22 in sales tax based on the phones' retail value."[79] The Concepcions originally filed a lawsuit against AT&T in California Federal District Court, alleging various theories of liability, including false advertising and fraud (which was later consolidated into a class action).[80] AT&T filed a motion to compel arbitration under the terms of the Concepcion's contract.[81] The cellular phone contract contained several applicable provisions including: "arbitration of all disputes between the parties" to proceed on an individual basis—and not as a class; consumers may initiate a dispute by completing a simple, one-page notice, that "AT&T must pay all costs for non-frivolous claims" (regardless of success on the merits); the dispute is heard in the consumer's county; denies ability for AT&T "to seek reimbursement of its attorney's fees," and provides that "in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees."[82]

The district court denied AT&T's motion to compel arbitration.[83] Although it favorably described the arbitration provisions as "quick, easy to use" and consumer friendly,[84] it relied upon prior California rule

75. *Id.*
76. *Id.* at 1744.
77. *Id.* at 1753.
78. *Id.* at 1744.
79. *AT&T Mobility*, 131 S. Ct. at 1744.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1745.

established in *Discover Bank v. Superior Court*,[85] which articulated that class-action waivers in arbitration contracts were unconscionable.[86]

The Ninth Circuit affirmed the district court's ruling in *AT&T Mobility*, finding the class-action waiver unconscionable and the *Discover Bank* rule "was simply a refinement of the unconscionability analysis applicable to contracts generally in California."[87] Thus the FAA did not preempt the state law of California.[88] Section 2 of the FAA states that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*[89]

The Supreme Court considered the preemption issue on appeal,[90] and interpreted Section 2 to preserve agreements to arbitrate unless a general contract defense applies, "but not by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue."[91] The Court then examined the FAA savings clause, noting that it is unreasonable to be construed "to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[92] One of the primary objectives of the FAA is to ensure that parties who agree to arbitrate under certain terms and conditions actually arbitrate under those terms and conditions.[93]

In reaching its conclusion, the Court addressed past precedent in cases where an arbitration contract is silent about arbitration by class, the parties cannot read into that contract the ability to proceed by class-action arbitration.[94] The reason is because of the differences between class action arbitration and traditional arbitration:

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85. 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1751 (2011).

86. *AT&T Mobility*, 131 S. Ct. at 1745 ("[T]he court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions." (citation omitted)).

87. *Id.*

88. *Id.*

89. 9 U.S.C. § 2 (2011) (emphasis added).

90. *AT&T Mobility*, 131 S. Ct. at 1746.

91. *Id.* at 1746 (citing Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

92. *Id.* at 1748.

93. *Id.*

94. *Id.* at 1749-50.

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank*, rather than consensual, is inconsistent with the FAA.[95]

The Court then proceeded to address in more detail the differences between bilateral arbitration and class-wide arbitration, citing three categories of issues.[96] First, class action arbitration makes arbitration much more formal, with more issues, and potential legal pitfalls.[97] For example, an arbitrator must not only decide the underlying dispute, but must also decide issues of class certification (e.g., numerosity, similar issues).[98] This extra layer of decision-making makes class action arbitration more time-consuming and costly to litigants.[99] The Court referred to statistics from the American Arbitration Association (AAA), which stated that few class action arbitrations were actually resolved via final award on the merits, and the time for those settled, withdrawn, or dismissed was significantly longer than individual arbitration.[100]

A second reason, and one that appears to be virtually indistinguishable from the first, is that "class arbitration *requires* procedural formality," as the AAA's rules governing class action arbitrations mimic the Federal Rules of Civil Procedure.[101] The Court looked to the legislative intent of the FAA, originally passed on 1925, and the relatively new advent of class action arbitration, and considered that Congress, when passing the FAA, could not have considered arbitrators considering classes of claimants.[102] Perhaps most importantly, and to a great extent underemphasized by the Court was the issue that arbitrators would be entrusted to protect the rights of non-signatory parties: "[A]nd it is at the very least odd to think that an arbitrator would

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95. *Id.* at 1750-51.

96. *AT&T Mobility*, 131 S. Ct. at 1751.

97. *Id.*

98. *See id.*

99. *Id.*

100. *Id.* (finding that of the 283 class arbitrations opened as of Sept. 2009, 162 had been settled, withdrawn, or dismissed and none resulted in a final reward on the merits).

101. *Id. See also* FED. R. CIV. P. 23.

102. *AT&T Mobility*, 131 S. Ct. at 1751-52.

be entrusted with ensuring that third parties' due process rights are satisfied."[103]

Finally, the Court reviewed the risks to defendants by class action arbitration.[104] Normally, the advantages of resolving all issues in a single case could be considered a benefit to defendants. The Court drew back, noting that when defendants face potentially devastating losses, the pressure to settle questionable claims would be great.[105] Such pressure is augmented by the fact that there is virtually no appeal mechanism for final decisions on the merits of class action arbitrations, unlike class actions in court.[106] Nor can parties cure this issue by expanding the scope of judicial review of final decisions by including appeal mechanisms in their contracts, under previous Supreme Court precedent in *Hall Street Associates L.L.C. v. Mattel, Inc.*[107] "The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under Section 10 focuses on misconduct rather than mistake."[108] The Court held that arbitration is a matter of contract, and if parties agree to proceed individually, and not by class, the contract should be enforced under the FAA.[109]

Justice Thomas, in a concurring opinion, reached the same result by drawing a distinction between the validity and revocability of a contract.[110] Justice Thomas read Section 2 of the FAA to allow for "revocation" of a contract (as opposed to "invalidity" or "non-enforcement").[111] True to Justice Thomas' textualist approach, discussing related provisions like "reading [Sections] 2 and 4 harmoniously, the 'grounds . . . for the revocation' preserved in [Section] 2 would mean grounds related to the making of the agreement . . . . to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress or mutual mistake."[112] Applying this statutory analysis to the Concepcions, Justice Thomas found that "contract defenses unrelated to the making of the agreement"—such as the policy defense of unconsionability—failed the

103. *Id.*
104. *Id.*
105. *See id.* at 1752.
106. *Id.*
107. 552 U.S. 576 (2008).
108. *AT&T Mobility*, 131 S. Ct. at 1752.
109. *Id.* at 1753.
110. *Id.* at 1754.
111. *Id.* at 1753 (Thomas, J., concurring).
112. *Id.* at 1754-55. *See also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S 395, 403-04 (1967).

Prima Paint test.[113] "Accordingly, the *Discover Bank* rule is not a 'groun[d] . . . for revocation of any contract' as I would read [Section] 2 of the FAA in light of [Section] 4 . . . . Under this reading, the FAA dictates that the [] agreement here be enforced and the *Discover Bank* rule is pre-empted."[114]

Justice Breyer, writing for the Dissent, attacked the majority by suggesting it made the wrong comparisons:

> The majority compares the complexity of class arbitration with that of bilateral arbitration . . . . But if incentives are at issue, the *relevant* comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures—whether arbitration procedures or ordinary judicial procedures are at issue.[115]

In the future, class-action arbitrations will survive where the parties specifically agree to contract language allowing the same. In *Green Tree Financial Corporation v. Bazzel*,[116] the Court held that in the absence of specific language prohibiting class arbitrations, such procedures were permissible.[117] In *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*,[118] the Court determined that a party may not be compelled to submit to class action arbitration without a specific contractual provision evidencing consent.[119] Given the majority rule in *AT&T Mobility v. Concepcion,* sustaining the contractual waiver of class arbitration,[120] it seems clear that potential parties to arbitration need to pay particular attention to the negotiation of their contractual arbitration provisions. Beyond that, "any future decisions on the availability of class proceedings in arbitration, absent express consent of the parties in the

113. *AT&T Mobility*, 131 S. Ct. at 1755.
114. *Id.* at 1756.
115. *Id.* at 1759 (Breyer, J., dissenting).
116. 539 U.S. 444 (2003).
117. *Id.* at 452.
118. 130 S. Ct. 1758 (2010).
119. *Id.* at 1776; *see also* 9 U.S.C. § 11 (2006) (stating "arbitration is a matter of consent, not coercion.").
120. *AT&T Mobility*, 131 S. Ct. at 1740.

arbitration clause, will depend strictly on the composition of the Court at the time the issues arises."[121]

III. ENFORCEMENT OF AGREEMENTS TO ARBITRATE

A. Introduction

As is obvious to anyone reading this *Survey* article, arbitration has become the most dominant means of alternative dispute resolution. It allows the parties to a dispute to fashion their own procedures and provide whatever limitations or conditions they prefer on either the process or the arbitrator. With the exception of a few instances of compulsory arbitration in the public sector, this method of ADR is based upon the voluntary agreement of the parties. Thus, courts look to the negotiated agreement to arbitrate to resolve issues of arbitrability, discretion of the arbitrator, and scope of the award.

The practice of arbitration is governed by the Federal Arbitration Act,[122] which applies to maritime and commercial disputes, state laws like the Michigan Arbitration Act,[123] and common law applicable to other types of disputes based upon contract law analysis. The Labor Management Relations Act (the Taft-Hartley Act) of 1947[124] provides for federal court jurisdiction to enforce collective bargaining agreements which contain arbitration provisions. The sections that follow will examine cases during the *Survey* period dealing with attempts to enforce these agreements to arbitrate, and later, challenges to arbitration awards.

B. Statutory Versus Common Law Arbitration

1. Cole v. FES a/k/a Vrtech[125]

Judge Cohn interpreted an Independent Sales Commission Agreement (ISCA), which provided for the arbitration of all disputes between the parties as sufficient to require a stay of the proceedings pending arbitration "[b]ecause the arbitration provision refers to the American Arbitration Association and the Commercial Arbitration Rules,

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121. *See* Gene J. Esshaki, *Class Action Arbitrations AT&T Mobility LLC vs. Concepcion—The final word or just another confusing decision in a long line of confusing cases?*, 19 THE ADR Q. (State Bar of Mich.) 2, 5 (2011).

122. 9 U.S.C. §§ 1-9 (1925).

123. MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West 2000).

124. 29 U.S.C. § 105 (2006).

125. No. 10-12041, 2010 WL 3584270, at *1 (E.D. Mich., Sept. 13, 2010).

this is sufficient to invoke the FAA."[126] The court, in a lengthy footnote, distinguishes statutory versus common law arbitration:[127]

> A statutory arbitration agreement is one that contains the requirements set forth in the MAA [Michigan Arbitration Act]. The MAA requires that the agreement be in writing and confer jurisdiction upon any circuit court to enter a judgment based on the arbitration award. [MICH. COMP. LAWS 600.5001(1) (West 2012)]. If the parties' agreement does not comport with the requirements of the MAA, it is a common law arbitration agreement. An agreement for statutory arbitration pursuant to the MAA is valid, enforceable, and irrevocable except upon grounds that justify the rescission or revocation of any contract. In contrast, common-law arbitration agreements are unilaterally revocable before an arbitration award is made.[128]

2. Byers v. Honeytree II Ltd. Partnership[129]

The Michigan Court of Appeals, in an unpublished opinion, sustained summary disposition of a harassment case because the defendant successfully established that "not only had the parties never actually reached an agreement to arbitrate, even if there was an agreement it was for common-law arbitration rather than statutory arbitration and, therefore, defendant had the right to unilaterally revoke its agreement to arbitrate any time before an arbitration award was announced."[130] This was true because the writings alleged by the plaintiff to constitute an arbitration agreement did not provide for circuit court enforcement of the arbitration award.[131] "In order to be considered statutory arbitration rather than common-law arbitration, the arbitration agreement must include a provision that the circuit court enter a judgment upon the arbitration award."[132]

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126. *Id.* at *2.

127. *Id.* at *2 n.1.

128. *Id.* at *2 (citing Wold Architects & Eng'rs v. Strat, 474 Mich. 223, 230-31, 713 N.W.2d 750 (2006) (internal citations omitted)).

129. No. 288907, 2010 WL 481011, at *1 (Mich. Ct. App. Feb. 11, 2010). *appeal denied*, 487 Mich. 854, 784 N.W.2d 216 (2010).

130. *Id.*

131. *Id.* at *2.

132. *Id.* (citation omitted).

3. Smaza v. ARS Investments[133]

In another unpublished opinion of the Michigan Court of Appeals, the distinction between statutory and common-law arbitration was made.[134] Here the parties had formed a partnership which the trial court ultimately dissolved and "[t]he trial court entered a stipulated order referring the case to binding arbitration for resolution of all claims and issues concerning the dissolved partnership and distribution of its assets to the parties."[135] The appellate court determined that this was a case of common-law arbitration, "[b]ecause the order submitting the parties' dispute to arbitration did not provide that a judgment could be entered in accordance with the arbitrator's decision . . . ."[136] As a result, "the common law does not limit the parties' ability to arbitrate real estate disputes . . . ."[137] Furthermore, because the agreement to arbitrate did not indicate that time was material, the court would not consider the delay as sufficient grounds to reverse the arbitrator's award.[138] Lastly, the plaintiff's argument that the facts were incorrectly determined by the arbitrator are insufficient because "judicial review of a common-law arbitration award is limited to instances of bad faith, fraud, misconduct, or manifest mistake . . . ." and "[a]n arbitrator's factual conclusions are not proper subjects for judicial review."[139]

4. Blue River Financial Group, Inc. v. TBI Enterprises, LLC[140]

In this rather complicated arbitration case involving the interpretation of an Asset Purchase Agreement (APA), the agreement to arbitrate provided that the arbitrator had authority to consider all claims, including those of fraud and misrepresentation, and the award could not be challenged on the basis of exceeding his authority or by his award of damages for the tort claims.[141] Although an award may be vacated by an error of law that ultimately leads to an obvious wrong conclusion, the plain language of the agreement prevented such reversal: "[t]he arbitrators shall make a good faith effort to apply substantive applicable

133. No. 293933, 2011 WL 898622 (Mich. Ct. App. Mar. 15, 2011).
134. *Id.* at *3.
135. *Id.* at *2.
136. *Id.* at *3.
137. *Id.*
138. *Id.*
139. *Smaza*, 2011 WL 898622, at *4 (citation omitted).
140. Nos. 289396, 290366, 2010 WL 3447901 (Mich. Ct. App. Sept. 2, 2010), *appeal denied*, 488 Mich. 1047, 794 N.W.2d 610 (2011).
141. *Id.* at *5.

law, but an arbitration decision shall not be subject to review because of errors of law. . . [Section 13.15(g)]."[142]

5. Cullen v. Klein[143]

In a case involving multiple claims of a physician against his co-employees and professional partners, the employment agreement provided that "[a]ny dispute or controversy arising out of or relating to this Agreement or to the interpretation or the breach thereof (except for matters which may only be resolved in court by way of injunctive relief), shall be referred to and determined by arbitration in Detroit, Michigan."[144] The court determined that plaintiff's claims for minority shareholder oppression, defamation, intentional infliction of emotional distress, tortious interference with a business relationship, and civil conspiracy are subject to the arbitration agreement, notwithstanding the fact that the defendants were co-employees; they were also running the business.[145]

However, with respect to the plaintiff's statutory claim under the Person's with Disabilities Civil Rights Act (PWDCRA),[146] the court held "that plaintiff did not waive his right to pursue a PWDCRA count in the circuit court and cannot be compelled to arbitrate this claim."[147] The reason for the exception was that the arbitration language made no reference to statutory discrimination claims, and thus, did not constitute a clear waiver of his right to bring a court action.[148]

6. Collier v. Liberty Mutual Insurance Company[149]

Where the plaintiff's action against the insurance company resulted from a medical condition alleged to have occurred in an auto accident insured by the defendant, the parties had the original matter arbitrated and an award was issued.[150] The award contained no findings of fact or

142. *Id.* at *6.

143. No. 291810, 2010 WL 3666758 (Mich. Ct. App. Sept. 21, 2010), *appeal denied*, 489 Mich. 971, 798 N.W.2d 792 (2011).

144. *Id.* at *1.

145. *Id.* at *3-5.

146. *See* MICH. COMP. LAWS ANN. §§ 37.1101-1607 (West 1998).

147. *Cullen*, 2010 WL 3666758, at *6.

148. *Id.* at * 5-6 (citing Rembert v. Ryan's Family Steak Houses, Inc., 235 Mich. App. 118, 156, 596 N.W.2d 208 (Mich. Ct. App. 1999), *appeal denied*, 461 Mich. 927, 605 N.W.2d 318 (1999)).

149. No. 294965, 2011 WL 668370, at *1 (Mich. Ct. App. Feb. 24, 2011).

150. *Id.*

conclusions of law.[151] In a subsequent claim, the plaintiff asserted that collateral estoppel prevents relitigation of defendant's liability for injuries caused by the original accident.[152] The court of appeals held the trial court erred in granting summary disposition to the plaintiff because "[f]or purposes of collateral estoppel, the arbitration award contains no factual determinations. Accordingly, there is no 'valid and final judgment' on an essential question of fact."[153] Thus, there was no showing of causation.[154] This case illustrates the dilemma of deciding in advance what type of arbitration award the parties prefer to have issued.

C. Conditions Precedent

Conditions precedent to arbitration involve anything, contractual or otherwise, that must occur before arbitration. For example, there must be an agreement, including an agreement to arbitrate or arbitration clause, and there must be a dispute that falls within the scope of the arbitration clause. Virtually all of the cases not about vacatur could be to some extent categorized here. Few cases successfully challenge arbitration in this way because dispute centers, like the AAA and the National Center for Dispute Settlement, employ process measures to determine whether there is an arbitration agreement and well-established Supreme Court doctrine states that if there is an arguable agreement including an agreement to arbitrate, the questions of contract construction are for the arbitrator.[155]

1. Inhalation Plastics Inc. v. Medex Cardio-Pulmonary, Inc.[156]

The Sixth Circuit Court of Appeals dealt with an interesting arbitration clause where plaintiffs alleged a breach of contract and the defendant moved to compel arbitration.[157] The trial court ruled that the claim did not fall within the scope of the arbitration provision.[158] On appeal, the court stated: "[w]e are now faced with the difficult task of applying a poorly drafted alternative dispute resolution clause to a poorly

151. *Id.*
152. *Id.*
153. *Id.* at *3.
154. *Id.*
155. *See* United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960); United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987).
156. 383 F. App'x 517 (6th Cir. 2010).
157. *Id.* at 518.
158. *Id.*

drafted pleading in an attempt to determine whether Count II falls within the scope of Section 2.1.3 of the APA."[159] "When determining whether a claim falls within the scope of the clause, we look to the plain language of the agreement."[160]

In its analysis, the court noted that "[t]he alternative dispute resolution clause at issue in this case is not a broadly worded clause, and it does not cover all disputes arising out of the parties' agreements. Specifically, it applies only to disagreements over the 'amount due for any Production Lease Payment to be paid hereunder."[161] Consequently, the court held that the district court should determine if the defendant breached the contract, and if it so holds, the amount of damages should be determined by independent accountants in accordance with the arbitration provision of their agreement.[162]

2. Binder v. Medicine Shoppe International, Inc.[163]

Here, the court addressed the standards required for a non-signing party to be bound by an arbitration agreement.[164] Non-signers of an arbitration agreement may be bound under five theories: (1) incorporation by reference (where another document incorporates the arbitration clause by reference), (2) assumption (the non-signatory assumes the responsibility despite failure to sign), (3) agency (there is some standard agency relationship), (4) veil-piercing/alter ego (a non-signer cannot hide under a corporate signature simply because of that corporate signature), and (5) estoppel (a non-signer derived significant benefit from the contract).[165] The court found that the non-signing parties (individuals who formed a corporation) were bound to the arbitration agreement under an estoppel theory because they derived benefit from the contract.[166] They were also bound under an assumption theory by signing a guarantee.[167]

This case also dealt with issues of timeliness to challenge arbitration, fraudulent inducement, material misrepresentation of future conduct,

159. *Id.* at 520.
160. *Id.* at 521.
161. *Id.*
162. *Inhalation Plastics*, 383 F. App'x at 522.
163. No. 09-14046, 2010 WL 2854308 (E.D. Mich. Jul. 20, 2010).
164. *Id.* at *3. *See also* Javitch v. First Union Sec., Inc., 315 F.3d 619, 629 (6th Cir. 2003).
165. *Javitch*, 315 F.3d at 629.
166. *Binder*, 2010 WL 2854308, at *6.
167. *Id.*

reasonable reliance, and severability of venue provisions.[168] With respect to a preliminary matter of waiver, the Court noted "that a party must explicitly object to arbitration before proceedings are too far advanced."[169] For example, a preliminary waiver is not appropriate after a hearing and an award is issued.

Citing the Supreme Court in *Prima Paint Corporation v. Flood & Conklin Manufacturing Company*,[170] the court only addressed the validity of the arbitration clause itself, not that of the contract as a whole.[171] Furthermore, it held that "Michigan's statutory prohibition on out-of-state arbitration is without effect," as it is pre-empted by the Federal Arbitration Act.[172] As to the misrepresentation and reliance issues, the court ruled that although the defendant had misrepresented its intentions, the "[p]laintiffs relied on the Offering Circular, but only to the extent that they would not have to arbitrate outside of Michigan."[173] Plaintiffs never objected to arbitration per se, but wanted the arbitration to be held in Michigan.[174] Since the contract provided for severability, and because "[t]he Court cannot discard a valid agreement to arbitrate on the sole basis of a faulty venue provision," the court ordered arbitration in Michigan.[175]

3. *Cornerworld Corporation v. Timmer*[176]

The defendant Timmer claimed Cornerworld Corporation violated an Earn-Out Agreement (which contained an arbitration clause) and defaulted on obligations under a Secured Debenture.[177] The condition precedent was whether Timmer attended or filed arbitration claims prior to litigating in court.[178] In other words, the court considered whether Timmer waived his rights to arbitration by proceeding in court on the Secured Debenture.[179] With ample precedent, it was noted that "[a] party may waive an agreement to arbitrate by engaging in two courses of conduct: (1) taking actions that are completely inconsistent with any

168. *Id.* at *6-10.
169. *Id.* at *5.
170. 388 U.S. 395, 403-04 (1967).
171. *Binder*, 2010 WL 3854308, at *6.
172. *Id.*
173. *Id.* at *8.
174. *Id.*
175. *Id.* at *10.
176. No. 1:09-CV-1124, 2010 WL 4702343 (W.D. Mich. Nov. 12, 2010).
177. *Id.* at *2.
178. *Id.* at *3.
179. *Id.*

reliance on an arbitration agreement; and (2) 'delaying its assertion to such an extent that the opposing party incurs actual prejudice.'"[180] The court stated that:

> Timmer has never denied that disputes over the Earn Out Agreement are subject to arbitration. He has merely presented an argument that the failure to abide by the Earn Out Agreement is also an event of default under the Secured Debenture. Based upon the language of the transaction documents, this is at least an arguable position . . . . the Court declines to adopt the Special Master's recommendation regarding the waiver of AAA arbitration.[181]

D. Labor Relations Cases

In the context of labor relations cases, the *Survey* period provided two cases from the Sixth Circuit Court of Appeals, and four cases from the Michigan Court of Appeals.

1. International Association of Machinists & Aerospace Workers, Local Lodge 1943 v. AK Steel Corporation[182]

In this case, the Sixth Circuit applied the long-established distinction between "substantive arbitrability" and "procedural arbitrability."[183] Noted in footnote 1 of the U.S. Supreme Court decision in *John Wiley & Sons, Inc. v. Livingston*, "[s]ubstantive arbitrability is whether an issue is within the scope of an agreement's arbitration clause and must be submitted to arbitration."[184] By contrast,

> [p]rocedural arbitrability is whether the submission of the grievance that is subject to arbitration followed the proper procedures, including timeliness, to qualify for arbitration. While procedural arbitrability is generally determined by the arbitrator

180. *Id.* at*1.

181. *Id.* at *3; *see also Inhalation Plastics*, 383 F. App'x at 517 (discussing scope of disputes subject to arbitration); Plainfield Specialty Holdings II, Inc. v. Children's Legal Svcs., PLLC, No. 08-14905, 2011 WL 806656 (E.D. Mich. Mar. 2, 2011) (discussing unique situation involving preservation of collateral during various court and arbitration proceedings).

182. 615 F.3d 706 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 945 (2011).

183. *Id.* at 709.

184. *Id.* at 709 n.1; *see also* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 552 (1964).

> unless the parties provide otherwise, substantive arbitrability is generally determined by the court unless the parties provide otherwise.[185]

Here the International Association of Machinists (IAM), as successor to an independent union, attempted to renegotiate a collective bargaining agreement which resulted in a lockout of approximately one year.[186] Upon settlement of the new contract, the parties also negotiated a "Transition Agreement" which "established a six-month Transition Period, from March 15 through September 15, during which the Transition Agreement would govern. Under Section K(3) of the Transition Agreement, 'the terms and conditions of this Agreement take precedence over the 2007 Labor Agreement during the Transition Period.'"[187] Furthermore, the agreement excluded grievances that occur during the Transition Period from the grievance and arbitration procedures, except for four (4) explicitly narrow types of issues.[188]

The union filed a number of grievances during the Transition Period which the company, naturally, rejected and refused to submit to arbitration.[189] The union sought to compel arbitration under the long-term 2007 Collective Bargaining Agreement that had been reached and ratified at the same time as the Transition Agreement.[190] The union argued, and the company did not dispute, that the 2007 CBA gave the arbitrator the authority to determine issues of substantive arbitrability.[191] The District granted the union's motion for summary judgment, and the Company appealed.[192]

The court of appeals noted the narrow issue it was to address: "Our role is thus limited to determining whether the substantive arbitrability of the ninety-three grievances should be determined by a court or by an arbitrator rather than whether the grievances themselves are arbitrable."[193] It was determined that the district court erred in finding that the Transition Agreement required submission to the arbitrator questions of substantive arbitrability.[194] While referring to fundamental

185. *Int'l Assoc. of Machinists*, 615 F.3d. at 709 n.1 (citations omitted); *see also John Wiley & Sons*, 376 U.S. at 552.
186. *Id.* at 709.
187. *Id.* at 709-10.
188. *Id.* at 710.
189. *Id.*
190. *Id.*
191. *Int'l Assoc. of Machinists*, 615 F.3d at 710.
192. *Id.* at 711.
193. *Id.*
194. *Id.* at 712.

contract interpretation, it was noted that "[a]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration."[195]

As to the intent of the parties, as evidenced by the two contracts,

> [t]he Transition Agreement explicitly excludes nearly all claims from the grievance and arbitration procedures outlined in the 2007 Agreement. This demonstrates the parties' intent not to be bound by these procedures (including the procedure for deciding substantive arbitrability) for claims arising under the Transition Agreement or during the Transition Period.[196]

2. Teamsters Local Union No. 89 v. Kroger Company[197]

This case presented a claim by the union that the employer violated the Master Collective Bargaining Agreement (Master CBA) by subcontracting its warehouse operation to two separate companies who hired all of the International Brotherhood of Teamsters (IBT) members formerly employed by Kroger.[198] These new employers reached separate collective bargaining agreements with the IBT.[199] Kroger and the IBT entered into a Letter of Understanding to meet and resolve any outstanding grievances resulting from the IBT members' employment with Kroger, or to submit these to arbitration under the Master CBA.[200] It did not address the resolution of any future grievances.[201]

The Teamsters subsequently determined that Kroger was subcontracting bargaining unit work to companies other than the two who reached an agreement with the union.[202] The union filed grievances alleging violation of the Master CBA, and Kroger responded that these employees were no longer employees of Kroger, nor did the company have any collective bargaining relationship with the local union.[203]

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195. *Id.* at 71 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995)).

196. *Id.* at 712-13.

197. 617 F.3d 899 (6th Cir. 2010).

198. *Id.* at 900-01.

199. *Id.* at 901.

200. *Id.* at 902-03.

201. *Id.* at 902.

202. *Id.* at 900-01.

203. *Teamsters Local Union No. 89*, 617 F.3d at 903.

Hence, these were "not subject to the grievance and arbitration provisions of the Master Agreement or local supplement."[204]

"The district court concluded that the 'Letter of Understanding fell within the scope of the Master Agreement's arbitration clause, and therefore compelled arbitration of Local 89's claims."[205] In reviewing the trial court's granting of summary judgment to the union, the Sixth Circuit narrowly defined the issue: "[w]e must determine whether the dispute is arbitrable, meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of the agreement."[206] The court then emphasized the well-established presumption of arbitrability—"[t]he arbitration clause included in the Master Agreement is broad, and therefore we apply a strong presumption of arbitrability in evaluating Local 89's grievances."[207] Kroger could prevail only by presenting convincing evidence that the parties intended to exclude these claims from arbitration—which the company failed to do, and thus could not overcome the presumption of arbitrability.[208]

Kroger further argued that the contract with the union "ceased to apply" when it subcontracted its operation to another company.[209] This argument was also rejected by the court because "where the dispute turns not on whether the parties ever agreed to arbitrate, but rather whether an agreement to arbitrate has expired or terminated, the question of termination is for the arbitrator."[210] The court further explained: "[t]he reason an arbitrator, not the court, should decide whether an arbitration agreement has expired or terminated is because resolution of these issues involves examining and interpreting the termination provisions of the agreement."[211]

Lastly, the court addressed Kroger's argument that the employees in question were no longer Kroger's employees—and thus could not file a grievance.[212] The Master Agreement contained provisions relating to the rights of employees who lost their jobs as a result of the company's subcontracting.[213] "These provisions provide protections to *former* Kroger employees who lost their positions at Kroger because Kroger

204. *Id.*
205. *Id.*
206. *Id.* at 904.
207. *Id.* at 905.
208. *Id.* at 906.
209. *Teamsters Local Union No. 89*, 617 F.3d at 906.
210. *Id.* (quoting Int'l Ass'n of Bridge, Structural, and Ornamental Iron Workers, Local Union No. 44 v. J & N Steel & Erection Co., 8 F. App'x 381, 386 (6th Cir. 2001)).
211. *Id.* at 907.
212. *Id.*
213. *Id.*

subcontracted out its KDC operations."[214] To accept Kroger's analysis "essentially would create a blanket exception of subcontracting-related claims from the Master Agreement's arbitration provision because, once the subcontracted-out employees were off Kroger's payroll, there would be no one eligible to file a grievance."[215]

3. AFSCME Council 25 v. Wayne County[216]

The Michigan Court of Appeals reversed the Wayne County Circuit Court's order to compel arbitration over a dispute regarding retiree health care benefits.[217] The collective bargaining agreement between the parties provided in Article 10.01 for arbitration over differences as to the interpretation and application of the contract that might arise "*during the term of this Agreement.*"[218] It was undisputed that the CBA expired on July 31, 2008 and that the dispute did not arise any earlier than September 3, 2008.[219] Thus, "under the plain language" of the contract, the "dispute was not arbitrable."[220]

The union contended that the arbitration provision "survives the expiration of the [contract] when the dispute concerns the kinds of rights which could accrue or vest during the term of the contract."[221] Parties may explicitly agree to exclude even accrued or vested rights from arbitration.[222] In *Highland Park v. Michigan Law Enforcement Union*, the court analyzed a case with a similar arbitration provision to conclude that the employer had successfully rebutted the presumption of arbitrability by the specific contract language limiting the arbitration of grievances to those arising during the term of the agreement.[223]

214. *Id.* at 908.
215. *Teamsters Local Union No. 89*, 617 F.3d at 908.
216. 290 Mich. App. 348, 810 N.W.2d 53 (2010).
217. *Id.* at 349-50.
218. *Id.* at 350-51.
219. *Id.* at 351.
220. *Id.*
221. *Id.* at 351-52 (quoting Cnty. of Ottawa v. Jaklinski, 423 Mich. 1, 23 (1985)). *See also* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 205-06 (1991).
222. *Litton Fin. Printing Div.*, 501 U.S. at 205-06.
223. City of Highland Park v. Mich. Law Enforcement Union, Teamsters Local No. 129, 148 Mich. App. 821, 823, 385 N.W.2d 701 (1986).

4. American Federation of State v. Hamtramck Housing Commission[224]

The court of appeals dealt with another AFSCME case a month later when the employer denied the union's demand to arbitrate because of its delay in filing for arbitration.[225] The circuit court held for the employer, ruling that the union's delay was not reasonable.[226] The court of appeals reversed because "the issue whether the grievance was not arbitrable because of laches was an issue for the arbitrator to decide, not the trial court."[227] Relying on the principle that any ambiguity over the question "must be resolved in favor of submitting the question to the arbitrator for resolution," the panel concluded that it is the arbitrator, not the court, that must decide the issue.[228]

> [A]llowing the arbitrator to determine the question of timeliness is consistent with the purpose of arbitration. Allowing procedural challenges to be heard by a court rather than by the arbitrator runs contrary to the presumption of arbitrability and would leave every arbitration subject to piecemeal litigation, a result contrary to a central purpose of arbitration.[229]

The prior AFSCME case is distinguishable because the dispute in that case arose after the contract expired, and in the present case, it was only "the timing of the demand for arbitration" which was at issue.[230] "[T]he right to arbitrate 'vests' on the date the alleged grievance arises, and is thus enforceable even if it is not demanded until after the contract expires."[231]

5. AFSCME Council 25 v. Wayne County[232]

The *Survey* period yielded yet another AFSCME case dealing with the enforcement of an arbitration clause. This case perhaps could be

224. 290 Mich. App. 672, 804 N.W.2d 120 (2010).
225. *Id.* at 673.
226. *Id.*
227. *Id.*
228. *Id. See also* AT&T Tech., Inc. v. Commc'n Workers of Am., 475 U.S. 643, 650 (1986); *John Wiley & Sons*, 376 U.S. at 558.
229. *Am. Fed'n of State*, 290 Mich. App. at 676 (citing *John Wiley & Sons, Inc.*, 376 U.S. at 558).
230. *Id.* at 677 n.3.
231. *Id.* at 676 n.2 (citing N. Cal. Dist. Counsel of Hod Carriers v. Penn. Pipeline, Inc., 162 Cal. Rptr. 851 (Cal. Ct. App. 1980), *cert. denied*, 449 U.S. 874 (1980)).
232. 292 Mich. App. 68, ---N.W.2d--- (2011).

included in the section dealing with vacatur of awards,[233] but it seems appropriate to include it in the labor relations portion. Here, the union's collective bargaining agreement with Wayne County provided for a number of classifications, including court clerks, and provisions for filling of vacant positions by seniority.[234] In 2002, the union alleged that the County breached the CBA with respect to the filling of a court clerk position.[235] After a grievance was filed, an arbitration award was rendered in December 2004, which found in favor of the union.[236] The intervenor Third Circuit Court (TCC) did not abide by the arbitrator's award as it contended it was not aware of the arbitration proceedings until after the ruling, and there existed a long-term practice of allowing judges to choose the courtroom clerks to be assigned to their particular courtrooms.[237] Thereafter, the TCC promulgated Local Administrative Order No. 2005-06 granting exclusive authority to the judge to make an assignment or selection of a court clerk to serve in the judge's courtroom.[238]

The standard of review would be based upon constitutional grounds rather than on a review of typical arbitration provisions.[239] The appeals court concluded that the TCC was not a party to the CBA, had not participated in the arbitration proceedings, and had standing to attack the arbitration award.[240] Thus, it held

> [U]nder the judicial branch's inherent constitutional authority the [TCC]'s judges have the exclusive authority to make the determination with respect to the assignment or selection of a particular court clerk to serve in a judge's courtroom. Promulgation of LAO 2005-06 constituted a proper exercise of the [TCC]'s authority, and the [TCC] was not bound by the CBA, nor the arbitrator's ruling, on the narrow issue of courtroom assignments.[241]

233. *See infra* section IV.
234. *AFSCME Council 25*, 290 Mich. App. at 71-72.
235. *Id.* at 72.
236. *Id.*
237. *Id.*
238. *Id.* at 74.
239. *Id.* at 79-80.
240. *AFSCME Council 25*, 292 Mich. App. at 79-80.
241. *Id.* at 105.

E. Conclusion

Although it may be obvious, the lesson to be learned from these cases is that parties to an agreement to arbitrate should pay particular attention to the negotiation of the agreement, and then, of course, to the drafting of the clause carefully ensuring that it reflects the intent of the parties. The courts are merely interpreting and enforcing contract law. The law has not been significantly changed inasmuch as the courts will still resolve differences over substantive arbitrability—that is concerned with questions of contract formation and whether the subject of the dispute is covered by the agreement; whereas procedural arbitrability—covering concerns like timeliness, defenses or waivers, is to be decided by the arbitrator.

IV. JUDICIAL REVIEW OF ARBITRATION AWARDS

A. Introduction

The Federal Arbitration Act[242] governs the rights of parties to arbitration agreements, and allows the court to vacate an arbitration award in the following instances:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[243]

Not surprisingly, during the *Survey* period, few courts were willing to vacate arbitration awards or interfere with the decision of the

242. 9 U.S.C. §§ 1-16 (2006).
243. 9 U.S.C. § 10(a) (2006).

arbitrator—citing the principle that when the parties agree to allow an arbitrator to decide the matter, the arbitrator should decide the issue. The parties should be bound by their agreement.

B. Manifest Disregard of the Law or Evident Partiality

1. Barrick Enterprises, Inc. v. Crescent Petroleum, Inc.[244]

In a commercial case involving claims and counterclaims between a supplier and distributor of gasoline, the parties agreed to arbitrate after the lawsuit was filed.[245] "The Arbitration Order further provided that the scope of the arbitration was to be limited to the evaluation and determination of the account balance between the parties."[246] The parties also agreed that the arbitrator's decision shall be final and binding, and that an accounting firm would provide the arbitration.[247] After an award in favor of the plaintiff, the defendant moved to vacate the award.[248]

The defendant's claims included timeliness (an issue easily resolved by the court), an objection to ex parte communications by the arbitrator, and an argument that the arbitrator used an improper evidentiary procedure (this latter claim was dismissed by the court as not warranting vacatur).[249] However, the issue of the arbitrator's conduct is worth discussing. The arbitration agreement allowed the arbitrator "to direct questions and request documents from the parties" to better understand their accounting practices.[250] Representatives from each party were interviewed by the arbitrator without counsel present.[251]

The court noted,

> [T]he Sixth Circuit held that parties in arbitration waive their right to complain about defects in the arbitration process if such objections are not raised at that time: 'It is also well settled that defects in proceedings prior to or during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of the defect. Moreover, if the impeaching party's own action contributes to a variance from the prescribed

244. No. 07-1508, 2010 WL 2990098 (E.D. Mich. Jul. 28, 2010).
245. *Id.* at *1.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.* at *2.
250. *Barrick Enter., Inc.*, 2010 WL 2990098, at *4.
251. *Id.* at *3-4.

> procedure, such party may be estopped to complain of the variance.'[252]

Here, counsel for the defendant had been informed of the ex parte meeting with representatives of the plaintiff, and did not object.[253] Furthermore, he "*explicitly agreed* to follow a similar course of conduct with his own client, stating to the Arbitrator that 'I think your approach is wise.'"[254] Defendant's motion to vacate was denied.[255]

2. Engenius v. Ford Motor Company[256]

Plaintiffs were suppliers of engineering services to Ford.[257] Over several years, the parties entered into contracts that the plaintiffs assert were not paid for by the defendant and that the latter tortuously interfered with the contractual relationship via an affiliate of the plaintiffs.[258] Ford succeeded in summary disposition by the trial court to have all claims resolved by binding arbitration under their contract.[259] After an award was rendered in the amount of $22,689,989.43 for the plaintiffs, Ford attempted to vacate the award.[260]

The Court of Appeals noted that MCR 3.602(J)(2)

> [P]rovides that a court may vacate an arbitration award only if (1) "the award was procured by corruption, fraud, or other undue means." (2) "there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights," (3) "the arbitrator exceeded his or her powers," or (4) "the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights."[261]

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252. *Id.* at *5 (quoting Order of Ry. Conductors and Brakemen v. Clinchfield R. Co., 407 F.2d 985, 988 (6th Cir. 1969), *cert. denied*, 90 S. Ct. 104 (1969)).
253. *Id.*
254. *Id.* at *5.
255. *Id.* at *8.
256. No. 290682, 2010 WL 2977407 (Mich. Ct. App. Jul. 29, 2010).
257. *Id.* at *1.
258. *Id.* at *1-2.
259. *Id.*
260. *Id.* at *1.
261. *Id.* at *3.

Ford raised three arguments to vacate the award. One was that the arbitrators incorrectly determined their jurisdiction under the agreement.[262] Since Ford had initially moved to have this entire dispute resolved through binding arbitration, the court concluded that the panel had applied the contract, and that "[t]his determination by the arbitrators constituted a finding of fact, and is therefore, not reviewable by this Court."[263] Secondly, Ford contends that the arbitrators exceeded their authority by awarding damages for tortious interference, claiming that it could not interfere with its own contract.[264] Since the award held that Ford interfered with the employees of an affiliate of the plaintiff, this argument was also rejected.[265] Lastly, Ford contended that settlement discussions which took place before the final award was issued constituted improper ex parte communication.[266] Here, the panel member appointed by Ford was directed to communicate a settlement recommendation by the neutral member of the panel.[267] Ford rejected the proposal, but made no objection until after the award was rendered. "Ford should have objected to the communication as soon as Lippitt first approached Ford with the offer."[268]

"It is well settled that a party cannot adopt a 'wait and see' approach during arbitration by raising an issue for the first time only after receiving an unfavorable ruling."[269] Ford's motion to vacate was denied.[270]

3. *Ozormoor v. T-Mobile USA, Inc.*[271]

In *Ozormoor,* the court addressed allegations that an arbitrator exceeded his authority by deciding the parties' rights under a telephone service contract's limitation cause, which provided: "Except as otherwise stated in this Agreement, and unless prohibited by law, a claim or dispute must be brought within 1 year from the date the cause of action arises."[272] The court dismissed Ozormoor's argument that the arbitrator, by deciding the contractual statute of limitations limited his ability to

262. *Engenius*, 2010 WL 2977407, at *3.
263. *Id.* at *5.
264. *Id.*
265. *Id.*
266. *Id.* at *6.
267. *Id.*
268. *Engenius*, 2010 WL 2977407, at *6.
269. *Id.*
270. *Id.*
271. No. 08-11717, 2010 WL 3272620 (E.D. Mich. Aug. 19, 2010).
272. *Id.* at *3.

bring a claim, acted with "manifest disregard of the law."[273] He contended that the contract's limit was "clearly unreasonable" by shortening the traditional statutory period; the court found that by mutual agreement the parties often shorten limitations periods, and therefore, the arbitrator acted within the scope of his authority, and without manifest disregard.[274]

Ozormoor also claimed that the Michigan Consumer Protection Act (MCPA) required that any waiver of a right be clearly stated.[275] Reviewing the contract, the court concluded that the "MPCA does not contain any prohibition against shortening its six-year period of limitations, and we will not read such a prohibition into the act."[276] Furthermore, the contested contractual provision was clearly stated.[277] Finally, the plaintiff argued that the arbitrator acted in manifest disregard of the court's order by splitting the arbitrator's fee after the court had severed the cost-splitting requirement under the arbitration provision.[278] This argument was also dismissed reasoning that "[b]ecause the arbitrator apportioned the fees in accordance with the relevant AAA rules, he did not act in a manifest disregard of the law."[279]

4. Amway Global v. Woodward[280]

Petitioner, Amway Global, sought to confirm an arbitration award of $25.8 million in damages for breach of contract.[281] Respondents contended that the award should be vacated because the arbitrator manifestly disregarded the law.[282] Amway terminated a number of what Amway called Independent Business Owners (IBO) (the persons through whom Amway sells its products).[283] Amway contended that the IBOs committed contract violations and torts associated with alleged solicitations by the IBOs of potential Amway competitors.[284]

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273. *Id.* at *4.
274. *Id.*
275. *Id.* at *5.
276. *Id.* (quoting Dean v. Haman, No. 259120, 2006 WL 1330325, at *3 (Mich. Ct. App. May 16, 2006)).
277. *Ozormoor*, 2010 WL 3272620, at *5.
278. *Id.* at *6.
279. *Id.*
280. 744 F. Supp. 2d 657 (E.D. Mich. 2010).
281. *Id.* at 659.
282. *Id.* at 660.
283. *Id.* at 659.
284. *Id.*

The court first analyzed the proper standard of review with respect to the claim of manifest disregard of the law.[285] Relying heavily on general principles of contract law, and recent Supreme Court precedent, the court held that the "terms of the parties' agreement," which specifically addressed the arbitrator's authority to decide questions of arbitrability, should be reviewed under a deferential standard.[286]

Next, the court applied the standard to the arguments raised by the respondents that the arbitrator made decisions that "fly in the face of clearly established legal precedent."[287]

The respondents identified three ways the arbitrator erred:[288]

> First, they contend[ed] that the parties' arbitration agreement requires only current IBOs, and not former IBOs, to participate in arbitration . . . . that the arbitrator erred by failing to follow, or give preclusive effect to, the Fifth Circuit's ruling in *Morrison v. Amway Corp[oration]* . . . [and] the arbitrator ruled contrary to clearly established law by failing to hold that the parties' arbitration agreement is procedurally and substantively unconscionable.[289]

The court dismissed each of these reasons. First, the court found as reasonable the argument that arbitration provisions usually survive the termination or expiration of the contract.[290] Therefore, the fact that the parties' contracts were terminated did not matter. Secondly, the issue preclusion argument did not apply because of critical factual distinctions—in particular, in *Morrison*, the disputes occurred prior to the arbitration agreement, while the case here involved disputes after the formation of the agreement to arbitrate.[291] Finally, the agreement to arbitrate was not procedurally unconscionable.[292]

The respondents lastly attempted to challenge the arbitrator's determination on liability by claiming manifest disregard and undue

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285. *Id.* at 663.

286. *Amway Global*, 744 F. Supp. 2d at 663-68.

287. *Id.* at 669-70 (citing Merrill Lynch v. Jaros, 70 F.3d 418, 421 (6th Cir. 1995)) ("[A]n arbitrator will not be deemed to have acted in manifest disregard of the law 'unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.'").

288. *Id.* at 670.

289. *Id.* at 670-71 (citation omitted).

290. *Id.* at 670.

291. *Id.* at 671.

292. *Amway Global*, 744 F. Supp. 2d at 671.

means as the basis to vacate the award.[293] Again, the court dismissed these arguments, stating that it could not conclude the determinations about liability manifestly disregarded the law.[294] With respect to the respondents' claims that the award should be set aside for undue means because the plaintiff allegedly hid a discrepancy in one of the expert's testimony in discovery, the court rejected this challenge, because the unredacted transcripts were provided to all parties.[295]

5. Merkel v. Lincoln Consolidated Schools[296]

In a labor case, the court of appeals refused to vacate an award where the "[p]laintiffs alleged that defendants failed to raise the issue of arbitrability during the grievance [hearing] . . . but instead, raised the issue for the first time in its post-hearing brief."[297] The collective bargaining agreement provided that "[i]f either party disputes the arbitrability of any grievance under the terms of this Agreement, the arbitrator shall first render a decision as to the arbitrability thereof. Should the grievance be determined nonarbitrable, it shall be returned to the parties with no opinion on its merits."[298]

The arbitrator determined that the union had missed the time limits under the contract to file the grievance, and the contract provided that they should be strictly observed unless extended by written agreement of the parties.[299] He ruled that the grievance was, therefore, not arbitrable.[300] As to the timeliness of the defendant's objection, the court noted that the arbitrator did consider evidence on the issue during the hearing: "After a thorough review of the evidence submitted by the parties, together with their helpful post-hearing briefs . . . . [the arbitrator found that he had] no jurisdiction to resolve this dispute."[301] The plaintiffs also acknowledged in their post-hearing brief that the issue of arbitrability was raised during the hearing, specifically, by questions asked about the filing of the grievance.[302]

293. *Id.* at 673.
294. *Id.* at 679.
295. Id. at 683.
296. No. 292795, 2010 WL 4103150 (Mich. Ct. App. Oct. 19, 2010).
297. *Id.* at *1.
298. *Id.* (quoting Article VII (C) of the CBA).
299. *Id.* at *3.
300. *Id.*
301. *Id.* at *4.
302. *Merkel*, 2010 WL 4103150, at *4.

6. Draeger Safety Diagnostics, Inc. v. New Horizon Interlock, Inc.[303]

The District Court for the Eastern District of Michigan again illustrated its broad enforcement of arbitration awards in a case where the plaintiffs were manufacturers of breath alcohol ignition interlock devices to be used on automobiles to prevent a car from starting when the driver is under the influence.[304] Plaintiff's contract with the defendant provided that the latter would be an authorized provider in Michigan.[305] Upon expiration of the contract, the plaintiff initiated arbitration proceedings to get the defendant to return various records to the plaintiff.[306] The arbitrator agreed, and also awarded reasonable attorney fees, costs and expenses for the arbitration.[307] The plaintiff then brought suit in federal district court to enforce the award.[308]

The court refused to vacate the award based upon manifest disregard because "[t]he parties agree the contract expired, and that Defendant was required to return certain equipment and records to Plaintiff. The arbitrator found that there was evidence that Defendant did not return all equipment to Plaintiff, and failed to return any customer records or reports."[309] An interesting side-note to this case was the absence of the defendant from the arbitration hearing.[310] Having participated in a subsequent phone conference with the court,

> [T]he Defendant did not challenge the validity of the underlying contract or arbitration provision. Also, the Defendant did not question the integrity of the arbitration proceeding or the arbitrator's impartiality or authority to enter the award. While absent from the arbitration hearing, Defendant admitted that he was notified of the hearing. He simply missed it because of his own scheduling error.[311]

303. No. 11-50160, 2011 WL 653651 (E.D. Mich. Feb. 14, 2011).
304. *Id.* at *1.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.* at *2.
309. *Draeger*, 2011 WL 653651, at *5.
310. *Id.*
311. *Id.*

7. Sharonann and Mitchell v. W.H.I.C.-USA, Inc.[312]

In *Sharonann,* the defendants contended the arbitrator erred in "finding that the individual plaintiffs were the real parties in interest when they were not named in the contracts, by finding that the proofs to support fraudulent misrepresentation had been established, by awarding damages for a violation of franchise law, and by awarding unwarranted damages."[313]

Thus, the standard of review regarding legal error by the arbitrator is: "Any error of law must be discernible from the face of the award itself. Stated otherwise, a legal error must be plainly evident because the court will not examine the arbitrator's mental path leading to the award."[314] The court then determined that the challenged rulings were based upon underlying factual findings, which are not reviewable by the court.[315]

8. WHRJ, L.L.C. v. City of Taylor[316]

The Michigan Court of Appeals maintained a pattern of upholding arbitration awards when it reversed the trial court's holding that the arbitrator had exceeded his authority in a case involving the renewal of a letter of credit.[317] The arbitration clause in the development agreement provided: "*Any* controversy or claim *arising out of or related to* this Agreement or the breach thereof, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[318]

The court further reasoned that

> [B]ecause the letter of credit is part of the agreement, or at the very least, *related to the agreement,* and the arbitration clause does not contain any exclusions or exceptions, any dispute regarding defendant's ability to draw on the letter of credit—including the event of its nonrenewal—is an issue subject to arbitration and the trial court erred in concluding otherwise.[319]

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312. No. 295800, 2011 WL 833070 (Mich. Ct. App. Mar. 10, 2011).
313. *Id.* at *2.
314. *Id.* at *1 (citing Ann Arbor v. AFSCME Local 369, 284 Mich. App. 126, 144, 771 N.W.2d 843 (2009)).
315. *Id.* at *2.
316. No. 295299, 2011 WL 1141142 (Mich. Ct. App. Mar. 29, 2011).
317. *Id.* at *1.
318. *Id.* at *4 (emphasis added).
319. *Id.* at *5.

Therefore, the court of appeals held that "the trial court erred in engaging in its own interpretation of the development agreement as a basis to vacate the award.[320]

9. City of Roosevelt Park v. Police Officers Labor Council[321]

In a situation where a union filed grievances over the allocation of overtime, the parties agreed to skip Step 3 of the grievance procedure (providing for a review by city council when the grievance involves a discharge or suspension in excess of thirty days) and proceed to Step 4 (arbitration).[322] They agreed to let the arbitrator determine the arbitrability of the grievances, and he found they were indeed arbitrable.[323] The plaintiff filed an action to set aside the award, claiming that by skipping step three, the grievances could never advance to arbitration.[324]

In reviewing the arbitrator's decision, the court noted that the contract language created an ambiguity which allowed the arbitrator to consider parol evidence from prior negotiations.[325] "The unrebutted parol evidence showed that the plaintiff had suggested eliminating Step 3 completely from the grievance procedure without any significant changes to Step 4."[326] The union sought to maintain Step 3 to provide additional protection for grievances involving long suspensions or discharges.[327] The court held that the trial court erred in failing to give deference to the arbitrator's interpretation of the contract: "so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his."[328]

10. Own Capital v. Celebrity Suzuki of Rock Hill[329]

Plaintiffs provided a loan to defendants Celebrity Suzuki and guarantor, Helmi Felfel.[330] After an alleged default, they pursued

320. *Id.* at *7.
321. No. 295588, 2011 WL 1816512 (Mich. Ct. App. May 12, 2011).
322. *Id.* at *1.
323. *Id.*
324. *Id.*
325. *Id.* at *2.
326. *Id.*
327. *Roosevelt Park*, 2011 WL 1816512, at *2.
328. *Id.* (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960)).
329. No. 11-10109, 2011 WL 2118748 (E.D. Mich. May 25, 2011).

arbitration under the promissory note, resulting in an award against the defendants.[331] Defendants attempted to vacate the award, claiming that Felfel did not sign the note in his individual capacity, "that the contractual procedures for selecting the arbitrator were not followed," and that the arbitrator exhibited "evident partiality" by failing to disclose other disputes he had been involved in with the plaintiff.[332]

The court first determined that the arbitrator had authority to render an award against Felfel: "Defendant Felfel signed the Guaranty, indicating his consent, which he does not challenge here. The document clearly and unequivocally incorporates the Note, calls the Note to Felfel's attention, and by attaching the Note makes the terms of it readily available to both parties."[333] Furthermore, since the arbitration clause was incorporated into the Guaranty, Felfel was subject to arbitration.[334]

Second, the court held that the "[d]efendants undisputedly waived their right to object to the process by which the arbitrator was selected. Defendants' counsel stated in a letter that they did not object: 'If we are to proceed with the arbitration, we do not object to any of the arbitrators on your list.'"[335] "Because they clearly manifested that consent, they have waived their contractual right to enforce the selection procedure."[336]

Lastly, with respect to evident partiality, the court ruled that

> The sum and substance of Defendants' argument is that the arbitrator selected here was serving as the arbitrator in four other matters involving Plaintiff while he was presiding over the arbitration at issue in this case, and that he rendered a decision in favor of Plaintiff in three of those cases prior to deciding this case. These facts do not rise to the level of evident partiality.[337]

Instead, the challenging party has the burden to demonstrate that a reasonable person would determine that the arbitrator had a bias towards the opposing party.[338]

In order to sustain that burden, "the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator." It is not enough to demonstrate "an amorphous

330. *Id.* at *1.
331. *Id.* at *4.
332. *Id.*
333. *Id.* at *6.
334. *Id.*
335. *Own Capital*, 2011 WL 2118748, at *7.
336. *Id.*
337. *Id.* at *10.
338. *Id.* at *9.

institutional predisposition toward the other side," because that would simply be the appearance-of-bias standard that [the Sixth Circuit has] previously rejected.[339]

11. Cumberland Valley Association v. Antosz[340]

In a case arising out of the Oakland County Circuit Court's denial of the defendant's motion to vacate the arbitration award, the court held that the arbitrator had the authority to refuse to postpone the hearing at the request of the defendant.[341] The parties had agreed to abide by AAA rules to resolve their dispute.[342] Neither the defendants nor their attorney participated in the preliminary hearing conference call with the AAA case manager, after which a hearing date was set for two weeks later.[343] Defendants' attorney did not request a postponement until four days prior to the scheduled hearing.[344]

The court held that the communications alleged to have taken place during this process "were questions of fact for the arbitrator to determine. An arbitrator's factual conclusions are not proper subjects for judicial review."[345] Further, the court determined:

> The arbitrator obviously did not believe that defendants had shown sufficient cause for an adjournment at that late date after failing to participate in the conference call and requesting a postponement four days before the scheduled hearing. Because the arbitrator's credibility determinations and weighing of the evidence are not matters for appellate review, the trial court properly denied defendants' motion to vacate the arbitration award.[346]

12. Jaguar Trading Ltd. Partnership v. Presler[347]

In *Jaguar*, the facts were not in dispute and the court addressed a technical procedural requirement necessary to confirm an arbitration

339. *Id.* (quoting Andersons, Inc. v. Hortan Farms, Inc., 166 F.3d 308, 329 (6th Cir. 1998)).
340. No. 294799, 2011 WL 2119664 (Mich. Ct. App. May 26, 2011).
341. *Id.* at *1.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.* at *2.
346. *Cumberland*, 2011 WL 2119664, at *3.
347. 289 Mich. App. 319, 808 N.W.2d 495 (2010).

award under the Michigan Court Rules and the Michigan Arbitration Act.[348] In this case the plaintiff had obtained an arbitration award in excess of $25,000.[349] Plaintiff then filed the arbitration award with the clerk of the court in an attempt to confirm the award.[350] The trial court denied the defendant's motion to vacate and granted summary disposition for the plaintiff, "holding that MCR 3.602(1) allows a party seeking confirmation of an arbitration award to initiate a proceeding by filing the award with the clerk of the court."[351]

The defendant appealed the order on the ground that no complaint had been filed in the circuit in order to invoke the court's jurisdiction.[352] On appeal, the court agreed with the defendant that "[t]o be effective, a filed award must be "confirmed" by the court . . . .[which must] necessarily [] result in an order of confirmation by the court. And . . . MCR 3.602(B)(1) requires a party seeking any order under MCR 3.602 to first file a complaint if no action is pending."[353] Relying on precedent provided by the Michigan Supreme Court, "'[a]fter an arbitration award is rendered, the successful party has one year *to commence a civil action* requesting that the court confirm the award and reduce it to judgment.'"[354] Furthermore,

> In Michigan, "civil action" is broadly defined as an action "commenced by filing a complaint with a court." MCR 2.101(B), MCL 600.1901. . . . The procedure to obtain a money judgment on an arbitration award is governed by the rules applicable to civil actions *and commences with the filing of a complaint with a court.* MCR 3.602.[355]

Thus, the court concluded: "Having failed to invoke circuit-court jurisdiction under the MAA by properly initiating a civil action through the filing of a complaint, plaintiff was entitled to neither confirmation of the arbitration award nor summary disposition."[356]

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348. *Id.* at 321; *see also* MICH. CT. R. 3.602; MICH. COMP. LAWS ANN. §§ 600.5001-5035 (West 2000).

349. *Jaguar*, 289 Mich. App. at 321.

350. *Id.*

351. *Id.* at 322.

352. *Id.*

353. *Id.* at 324.

354. *Id.* (quoting Gordon Sel-Way Inc. v. Spence Bros., Inc., 438 Mich. 488, 501-02, 475 N.W.2d 704 (1991) (emphasis added)).

355. *Jaguar*, 289 Mich. App. at 326 (quoting *Gordon Sel-Way Inc.*, 438 Mich. at 501-02 (emphasis added)).

356. *Id.* at 326.

In an interesting change of direction, the court then went on to rule that the one-year statute of limitations did not bar further proceedings in this case, essentially because the plaintiff had filed the award with the county clerk within one year after it was rendered: "Accordingly, MCR 3.602(I) does not itself prohibit plaintiff from filing a complaint in the lower court for confirmation of the timely filed [arbitration] award."[357]

C. Commentary

With no surprise, these cases reinforce the notion that the courts are very unlikely to vacate an arbitrator's award. The statutory grounds for vacatur will be carefully examined and great deference will be given to the arbitrator's factual and contractual conclusions.

V. DOMESTIC RELATIONS ADR

A. Cipriano v. Cipriano[358]

Aside from the Supreme Court cases, one of the more significant cases during the *Survey* period involved a divorce between Mary Cipriano and Salvatore Cipriano. The trial court initially issued a divorce order, awarding Mary Cipriano fifty-five percent of the marital property and $66,000 per year to her in periodic alimony of $5,500 per month.[359] Salvatore Cipriano moved to amend the trial court's order to allow him to make installment payments.[360] The trial court referred the case to the friend of the court for a hearing "to determine whether the additional property award to Mary Cipriano would necessitate an adjustment in the alimony . . . ."[361] The parties agreed to arbitration, and the arbitrator's final award terminated his alimony obligation, and required that the defendant continue to pay $5,500 a month until the balance of his debt was satisfied.[362] Plaintiff sought to have the arbitrator's award vacated, which was denied by the trial court when it confirmed the award, but reduced the defendant's monthly payments to $3,870 without altering the total amount of the award.[363] Two cases were consolidated on appeal.[364]

357. *Id.* at 327.
358. 289 Mich. App. 361, 808 N.W.2d 230 (2010).
359. *Id.* at 365.
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.*
364. *Cipriano*, 289 Mich. App. at 367.

The first challenge of the plaintiff dealt with ex parte communication with the arbitrator: "Mary Cipriano argues that the trial court should have vacated the arbitrator's award because the arbitrator received communications from Salvatore Cipriano after the arbitration hearing and before the arbitrator's award."[365] Once the case was submitted to the arbitrator, the arbitrator sent portions of his decision to the parties in hopes of encouraging settlement.[366] In response, Salvatore Cipriano placed a telephone call to the arbitrator, stating that his financial situation prevented him from paying a lump-sum payment of approximately one-half of a million dollars.[367] The arbitrator merely listened without comment.[368] The arbitrator issued the award, which allowed installment payments, crediting previous payments by Salvatore Cipriano against the total amount due and owing and stopping spousal support payments.[369]

The court began its analysis by stating: "[t]o resolve Mary Cipriano's argument regarding the results of ex parte contact, the definitive question is not whether there is a bright-line rule but, rather, whether the ex parte contact violated the parties' arbitration agreement."[370] While interpreting the Domestic Relations Arbitration Act (DRAA)[371] the court stated that "[t]he DRAA contemplates that the parties will determine how they will produce the information necessary to resolve their dispute. The DRAA does not impose procedural formalities that restrict this freedom."[372] Thus, the court turned to the arbitration language agreed upon by the parties:

> "The format for the arbitration shall be determined by the arbitrator[s], with the objective of expediting the hearing." Mary Cipriano has not shown that the arbitrator exceeded his powers, according to the arbitration agreement, by receiving Salvatore Cipriano's ex parte contacts. According to the parties' agreement, the arbitrator retained the discretion to receive information from Salvatore Cipriano in order to expedite the proceedings.[373]

365. *Id.*
366. *Id.* at 368-69.
367. *Id.*
368. *Id.*
369. *Id.*
370. *Cipriano*, 289 Mich. App. at 370.
371. MICH. COMP. LAWS ANN. §§ 600.5070-5082 (West 2005).
372. *Cipriano*, 289 Mich. App. at 370 (citations omitted).
373. *Id.* (citations omitted).

Furthermore, the court analyzed *Miller v. Miller*,[374] which involved similar ex parte communications in the context of an arbitrator in a domestic-relations arbitration to shuttle between parties, located separately, in reviewing evidence before an award is issued.[375] The court found similar conduct here as in *Miller*: that the arbitrator, *before* the contact, was considering the ability of Salvatore Cipirano to make the payments (having reviewed the financial records for Salvatore Cipriano for a number of years).[376] Lastly, the arbitrator acted by communicating to the parties: "While Salvatore Cipriano's conduct was improper, the arbitrator responded promptly and decisively to disclose the contacts and prevent further contact."[377]

Secondly, the court dismissed the challenge to the retroactive credits, noting the clear language of MCL 552.603(2) allowing modification from the date of notice of petition for modification of support (and no further).[378] Here, the arbitrator's award was made after the motion to modify was made by Salvatore Cipriano, therefore complying with the terms of MCL 552.603(2).[379]

Thirdly, the court quickly dismissed the "law-of-the-case" argument, because that doctrine holds "that an appellate court's ruling on a particular issue binds the appellate court and all lower tribunals with respect to that issue."[380] The doctrine does not apply to arbitration proceedings, as arbitration is not a court or tribunal, as defined by Black's Law Dictionary.[381]

Finally, the court of appeals reviewed the trial court's reduction in monthly payments under the standards for modifying an arbitration award in statutory arbitration cases:

> MCR 3.602(K)(2) provides . . . for modification [or correction] of an arbitration award:
>
> On motion made within 91 days after the date of the award, the court shall modify or correct the award if:

374. 474 Mich. 27, 32, 707 N.W.2d 341 (2005).
375. *Cipriano*, 289 Mich. App. at 370.
376. *Id.* at 370-71.
377. *Id.*
378. *Id.* at 375; *see also* MICH. COMP. LAWS ANN. § 552.603(2) (West 2005).
379. *Cipriano*, 289 Mich. App. at 375.
380. *Id.* (citation omitted).
381. *Id.* (citing BLACK'S LAW DICTIONARY (8th ed. 2004)).

> (a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;
>
> (b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or
>
> (c) the award is imperfect in a matter of form, not affecting the merits of the controversy.[382]

A request for an order to modify or correct an arbitration award under this rule must be made by motion.[383] If there is not a pending action between the parties, the party seeking the requested relief must first file a complaint as in other civil actions.[384] A complaint to correct or modify an arbitration award must be filed no later than 21 days after the date of the arbitration award.[385] Salvatore Cipriano asked the court to modify the award based on equitable reasons, but failed to assert which standard applied as listed above to allow the court to modify the award.[386] Similarly the trial court failed to make any analysis of M.C.R. 3.602(K)(2), and therefore the "trial court erred by modifying the award of the arbitrator without a timely complaint and without reference to MCR 3.602(K)(2). We reverse the order of the trial court and remand the case to the trial court to reinstate the $5,500 monthly payments that were awarded in arbitration."[387]

B. Voltz v. Voltz[388]

In a case where the appellant argued "that the arbitrator exceeded his authority by making an award that 'was contrary to the controlling laws of equity' to the division of property,"[389] the court held that the issue was not preserved by filing a timely motion to vacate or modify an award under the DRAA.[390] In subsequent dicta, the court reviewed the

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382. *Id.* at 378 (citing MICH. CT. R. 3.602(K)(2)).
383. *Id.*
384. *Id.* at 377.
385. *Cipriano*, 289 Mich. App. at 377.
386. *Id.* at 378.
387. *Id.* Moreover, the court found the motion untimely, having been filed more than nine months after the arbitration award. *Id.* at 377.
388. No. 291573, 2010 WL 199614 (Mich. Ct. App. Jan. 21, 2010).
389. *Id.* at *1.
390. *Id.*

arbitrator's award and stated: "we cannot conclude that there was an error of law 'so substantial that, but for the error, the award would have been substantially different.'"[391]

In requiring the appellant to pay COBRA benefits and awarding certain vehicles to the respondent, the court noted: "[A]n equitable distribution need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution."[392] The court deferred to the arbitrator's judgment.[393]

C. Crowley v. Crowley[394]

In a similar case, the court of appeals held that an ex-wife could not challenge the arbitrator's distribution of property where he divided the assets equally.[395] The defendant contended that the distribution was not equal, based upon the defendant's interpretation of property values.[396] The court refused her challenge because the "defendant's primary complaints with the ultimate property division are based on the arbitrator's factual determinations. Courts may not review an arbitrator's factual findings or decision on the merits."[397] The court also concluded that "defendant failed to timely challenge the arbitrator's award under MCR 3.602(J)."[398] She also contended that the award must be vacated because it was not rendered "within 60 days of the conclusion of the arbitration hearing" as required by law.[399] Lastly, the court dismissed this argument as well citing its own precedent: "that relief from an untimely arbitration award was not warranted where the appellant failed to allege that any substantial differences would have resulted from a timely arbitration ruling, and nothing in the record indicated that the arbitrator's delay had any effect on the property division."[400]

391. *Id.*
392. *Id.* at *2 (citations omitted).
393. *Id.*
394. No. 288888, 2010 WL 1507972 (Mich. Ct. App. Apr. 15, 2010).
395. *Id.* at *2.
396. *Id.*
397. *Id.* (citations omitted).
398. *Id.* at *3.
399. *Id.*
400. *Crowley*, 2010 WL 1507972, at *3.

D. Vyletel-Rivard v. Rivard[401]

The Michigan Supreme Court granted leave to appeal the Michigan Court of Appeals' analysis of the number and timing of motions to vacate or modify an arbitrator's award.[402] However, the case was dismissed by stipulation.[403] In the earlier case by a per curium opinion, the court held:

> [T]hat the date the 21-day period of MCR 3.602(J)(2) begins is dependent on whether a motion to correct errors or omissions is filed. If a motion to correct errors or omissions is not filed, then the 21-day period begins on the date the initial written award is delivered. However, if a motion to correct errors or omissions is filed, then the 21-day period begins on the date the arbitrator's decision on the motion is delivered. This construction of MCR 3.602(J)(2) recognizes that the initial written arbitration award may be modified, and it does not require a party to move to vacate the arbitration award until such modifications are, in fact, made or denied.[404]

In an interesting secondary argument, the defendant contended that the arbitrator exceeded his authority by awarding the plaintiff $210,000 for her tort claim, because she had not pleaded a tort claim nor had she requested personal injury damages in her complaint.[405] The court rejected this contention because the parties' agreement to arbitrate included submission of "[o]ther contested domestic relations matters" to arbitration.[406] The trial court also had concluded that the "defendant impliedly consented to the arbitration of the personal injury claim because the claim was tried and briefed at arbitration and defendant made no objection until after the award was issued."[407]

E. Anoshka v. Anoshka[408]

Here, the Michigan Court of Appeals was confronted by the situation of the death of one of the parties prior to the full expiration of the terms

401. 486 Mich. 938, 782 N.W.2d 505 (2010).
402. *Id.* at 938.
403. Vyletel-Rivard v. Rivard, 486 Mich. 1060, 783 N.W.2d 385 (2010).
404. Vyletel-Rivard v. Rivard, 286 Mich. App. 13, 23-24, 777 N.W.2d 722 (2009).
405. *Id.* at 16.
406. *Id.*
407. *Id.* at 19.
408. No. 296595, 2011 WL 1485305 (Mich. Ct. App. Apr. 19, 2011).

of the arbitration award.[409] The estate of the plaintiff sought an amended judgment of divorce based upon changed circumstances, and a remand to update the arbitration award.[410] The court upheld the trial court's denial of the motion because the trial court had no power, particularly under MCL 600.5081 (governing vacation or modification of arbitration awards in domestic relations cases), to change an award based on changed circumstances.[411] The court relied on the "defenses of laches and unclean hands, as well as general principles of equity."[412]

VI. MEDIATION ISSUES

The *Survey* period produced few statutory changes or case law dealing with mediation. The Michigan Court of Appeals decided one somewhat unique case involving mediation under the Michigan Telecommunications Act.[413] More important to the field of ADR were the changes in the Michigan Court Rules regarding mediation confidentiality and the role of the attorney-mediator.[414] Lastly, there were efforts conducted by the State Court Administrative Office (SCAO) to develop a statewide roster of mediators for use in court-annexed mediation, recommendations for improving the Standards of Conduct for Mediators, and promoting studies as to the effectiveness of mediation.[415]

A. Quick Communications, Inc. v. Michigan Bell Telephone Company[416]

This was an interesting case involving "mediation" under the Michigan Telecommunications Act (MTA).[417] Under the MTA, complaints based on ICAs (interconnection agreements) are to be sent to an alternative dispute resolution process.[418]

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409. *Id.* at *1.

410. *Id.*

411. *Id.* at *3 (citing MICH. COMP. LAWS ANN. § 600.5081 (West 2009)).

412. *Id.* at *1.

413. MICH. COMP. LAWS ANN. §§ 484.2101-2701 (West 1991). *See also* Quick Commc'n, Inc. v. Mich. Bell Tel. Co., No. 286679, 2010 WL 3928768 (Mich. Ct. App. Oct. 7, 2010).

414. *See* MICH. CT. R. 2.412.

415. *See* MICHIGAN SUPREME COURT STATEWIDE MEDIATOR ROSTER COMMITTEE, REPORT TO THE MICHIGAN SUPREME COURT (July 2010), *available at* http://courts.michigan.gov/scao/resources/publications/reports/StatewideMediatorRosterJuly2012.pdf.

416. No. 286679, 2010 WL 3928768 (Mich. Ct. App. Oct. 7, 2010).

417. *Id.* at *1 (citing MICH. COMP. LAWS ANN. §§ 484.2101-2701 (West 1991)).

418. MICH. COMP. LAWS ANN. § 484.2203(14) (West 2005).

By law, the MPSC is required to appoint an administrative law judge to act as mediator and to order the parties to mediation. This was done and the mediator issued a recommended settlement that obliged the parties to pay each other for alleged overpayments or underpayments, respectively. The MPSC entered its December 18, 2007 order, which adopted the recommended settlement of the administrative law judge.[419] This order was based upon the agreement of the parties to accept the recommendation of the mediator.[420]

Subsequently, the plaintiff moved to enforce the PSC order while arguing it was entitled to purchase certain services from the respondent, which the latter contended were not available.[421] "The PSC referred this matter to the mediator," who in turn provided "a clarification of the recommended settlement."[422] The PSC then adopted the mediator's clarification of the settlement agreement and provided such by order of the PSC as provided for by statute: "Within 7 days after the date of the recommended settlement, each party shall file with the commission a written acceptance or rejection of the recommended settlement. *If the parties accept the recommendation, then the recommendation shall become the final order in the contested case* under section 203."[423]

In analyzing how to interpret the terms of the recommended settlement order of the PSC, the court of appeals concluded: "The December 18th order did not reflect the considered judgment of the PSC after a contested case hearing; it simply reflected the agreement of the parties to the recommended settlement. We therefore conclude that the PSC's order is a consent judgment and that the law of contracts applies."[424] Therefore, based upon contract law, "[i]n the present case, both parties insist that the contract can be enforced as written. However, the recommended settlement cannot be enforced [as] written because it provided for something that does not exist."[425] The court thus reversed the orders of the PSC, and nullified the acceptance of the recommended settlement.[426] It further remanded to the PSC to provide "for a new alternative dispute process, which shall be conducted before a different mediator."[427]

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419. *Quick Commc'n*, 2010 WL 3928768, at *9 (Saad, J., dissenting).
420. *Id.*
421. *Id.* at *10.
422. *Id.* at *2.
423. *Id.* at *4 (emphasis added) (citing MICH. COMP. LAWS ANN. § 484.2203(a)(3) (West 2005)).
424. *Id.* at *5.
425. *Quick Commc'n*, 2010 WL 3928768, at *5.
426. *Id.* at *7.
427. *Id.*

Judge Saad provided a dissent in which he asserted that the petitioner attempted to enforce its implausible interpretation of the MPSC's initial order which necessitated an attempt of the PSC to interpret its own order.[428] Since the court has "held that the MPSC has the right to modify or clarify its orders and because this is exactly what the MPSC did here, I would affirm."[429]

From an ADR perspective, we can be sure that a settlement (by agreement or by acceptance of the mediator's recommendation) will be considered a consent judgment, and not a court order.[430] The terms will be reviewed as any contract.[431] Consequently, it will be important that the parties clearly understand the terms of their agreement. This unique form of "mediation" provides for a mediator's recommended settlement (not the norm for most mediators or mediations). Hence, in the unusual situation of a mediator drafted settlement, it should accurately reflect the terms agreed upon by the parties.

B. MCR 2.412: Mediation Communications; Confidentiality and Disclosure[432]

This new court rule applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 and MCR 3.216.[433] The effect of this rule was to "consolidate provisions related to mediation confidentiality under the general civil and domestic mediation rules into one rule, and to expand the number of exceptions to mediation confidentiality."[434] The rule begins by providing for definitions of a "mediator,"[435] "mediation communications,"[436] "mediation party,"[437] "mediation participant,"[438] "protected individual,"[439] and "vulnerable."[440] The rule then provides: "Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and

428. *Id.* at *8 (Saad, J., dissenting).
429. *Id.* at *9 (Saad, J., dissenting).
430. *See id.* at *4.
431. *Quick Commc'n*, 2010 WL 3928768, at *4.
432. MICH. CT. R. 2.412 was proposed April 5, 2011 and made effective September 1, 2011.
433. MICH. CT. R. 2.412(A).
434. MICH. CT. R. 2.412, cmt.
435. MICH. CT. R. 2.412(B)(1).
436. MICH. CT. R. 2.412(B)(2).
437. MICH. CT. R. 2.412(B)(3).
438. MICH. CT. R. 2.412(B)(4).
439. MICH. CT. R. 2.412(B)(5).
440. MICH. CT. R. 2.412(B)(6).

may not be disclosed to anyone other than mediation participants except in subrule (D)."[441]

This is where the court rule gets interesting. Subrule (D) provides for Exceptions to Confidentiality:

Mediation communications may be disclosed under the following circumstances:

(1) All mediation parties agree in writing to disclosure.

(2) A statute or court rule requires disclosure.

(3) The mediation communication is in the mediator's report under MCR 2.411(C)(3) or MCR 3.216(H)(6).

(4) The disclosure is necessary for a court to resolve disputes about the mediator's fee.

(5) The disclosure is necessary for a court to consider issues about a party's failure to attend under MCR 2.410(D)(3).

(6) The disclosure is made during a mediation session that is open or is required by law to be open to the public.

(7) Court personnel reasonably require disclosure to administer and evaluate the mediation program.

(8) The mediation communication is

(a) a threat to inflict bodily injury or commit a crime,

(b) a statement of a plan to inflict bodily injury or commit a crime, or

(c) is used to plan a crime, attempt to commit or commit a crime, or conceal a crime.

(9) The disclosure

(a) Involves a claim of abuse or neglect of a child, a protected individual, or a vulnerable adult; and

441. MICH. CT. R. 2.412(C).

(b) Is included in a report about such a claim or sought or offered to prove or disprove such a claim; and

(i) Is made to a governmental agency or law enforcement official responsible for the protection against such conduct, or

(ii) Is made in any subsequent or related proceeding based on the disclosure under subrule (D)(9)(b)(i).

(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is used or offered to prove or disprove misconduct allegations in the attorney disciplinary process.

(11) The mediation communication occurs in a case out of which a claim of legal malpractice arises and the disclosure is sought or offered to prove or disprove a claim of legal malpractice against a mediation participant.

(12) The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of the mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown

(a) that the evidence is not otherwise available, and

(b) that the need for the evidence substantially outweighs the interest in protecting confidentiality.[442]

M.C.R. 2.412(E) addresses the scope of disclosure and when confidential communications are permitted.[443]

Since the court rule is new, it is likely to take some time before it becomes a source of litigation and further disputes. However, from reading the rule, a few items jump out to this Author. To begin, the rule applies to court referred mediation, not to private mediation that often takes place.[444] The definitions are going to be critical, including those of

442. MICH. CT. R. 2.412(D)
443. MICH. CT. R. 2.412(E).
444. MICH. CT. R. 2.412(A).

a "mediation communication", which is significantly broad, and that of the distinction between "mediation party" and "mediation participant."[445] The greatest cause for concern relates to the fact that mediation communications "may" be disclosed in a large number of circumstances (formerly there were five, and now there are twelve).[446] The most troublesome reasons for possible disclosure seem to include: (1)—where "all mediation parties agree"—such that they want the mediator to testify to prove they are right in their interpretation of a settlement agreement, or to attack the mediator; (10) is connected with allegations of professional misconduct; (11) is involved in a claim of legal malpractice; and (12) is used to "enforce, rescind, reform, or avoid liability."[447] It seems to me that these exceptions to confidentiality will bring additional litigation from disgruntled parties likely to be detrimental to the mediation process.

C. Michigan Rules of Professional Conduct

Rule 2.4 Lawyer Serving as Third-Party Neutral[448]

> (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
>
> (b) A lawyer serving as a third-party neutral must inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer must explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.[449]

Although this is a new rule of professional conduct, it ought not result in any significant amount of litigation or further disputes. Most, if

445. MICH. CT. R. 2.412(B)(1)-(6).
446. MICH. CT. R. 2.412(D).
447. MICH. CT. R. 2.412(D)(1)-(12).
448. MICH. R. PROF'L CONDUCT 2.4 (Rule made effective Jan. 1, 2011 by Order of the Michigan Supreme Court, Oct. 26, 2010).
449. MICH. R. PROF'L CONDUCT 2.4.

not all, professionals serving as third-party neutrals make this distinction in an opening statement explaining the process to the parties to a dispute. Certainly a lawyer in the capacity should do likewise.

D. Developments of the State Court Administrative Office—Office of Dispute Resolution

1. Mediation After Case Evaluation—A Caseflow Study of Mediating Cases Evaluated Under $25,000[450]

This study involves approximately 93 cases from Kent, Macomb and Oakland Counties.[451]

The cases met the following criteria: (1) the case evaluation award was under $25,000; (2) the award was rejected by one or all of the parties; (3) parties were ordered to mediation either with a private mediator or with a Community Dispute Resolution Program (CDRP) center; (4) the case was ordered to mediation under the pilot; and (5) the case was disposed between March 1, 2001 and September 17, 2009.[452]

Overall, the report showed favorable results through mediation. The recommendations for future pilot programs included: "1. Placing mediation before case evaluation. The data suggests that by simply ordering a case to mediation, a significant number of cases will settle . . . . . 2. Postponing scheduling the trial until dispute resolution processes are concluded."[453]

2. Statewide Mediator Roster Committee—Report to the Michigan Supreme Court[454]

"In 2009, the State Court Administrative Office (SCAO) appointed a 26-member Statewide Mediator Roster Committee to study the current process for qualifying mediators to serve on court rosters under MCR 2.411 and MCR 3.216, and to recommend court rule amendments that

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450. MICHELLE HILLIKER, STATE COURT ADMINISTRATORS OFFICE REPORT: MEDIATION AFTER CASE EVALUATION—A CASEFLOW STUDY OF MEDIATING CASES EVALUATED UNDER $25,000 (2011), *available at* http://courts.mi.gov/scao/resources/publications/reports/mediation-after-case-evaluation.pdf.

451. *Id.* at 1.

452. *Id.* (Executive Summary).

453. *Id.* at 13.

454. STATEWIDE MEDIATOR ROSTER COMMITTEE, REPORT TO THE MICHIGAN SUPREME COURT (2010), *available at* http://courts.mi.gov/scao/resources/publications/reports/StatewideMediatorRosterJuly2010.pdf.

would improve current practices for courts, litigants and mediators."[455] Some judges favored a centralized system, while others were opposed to any system that "would take away from Judges the ability to administer the ADR programs at a local level."[456] The committee addressed several concepts of a centralized system, including: "(1) website functionality for courts, mediators and the public; (2) an online application process; and (3) components of a complaint system."[457] The report reached the following conclusion:

> The committee recommends that the state court administrator centralize mediator qualification and assignment mechanisms currently managed by the trial courts. The committee believes that this will result in efficiencies for litigants, courts, and mediators. The committee also recommends that courts should be able to retain their own roster if they choose. The draft rule proposals appearing in this report reflect the committee's recommendations for designing a centralized system.[458]

To date, the report has resulted in proposed changes in the MCR, specifically, a new rule: MCR 2.413—State Mediator List.[459]

3. Standards of Conduct for Mediators[460]

In an attempt to improve the standards of conduct for mediators, a committee was formed to address changes from the standards first implemented in 2001.[461] Potential changes included combining the ABA's standards for commercial, civil and domestic relations mediators; reporting malpractice and other professional misconduct; and dealing

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455. *Id.* at 2.
456. *Id.* at 4.
457. *Id.* at 3.
458. *Id.* at 21.
459. *Id.* at 20.
460. STATE COURT ADMINISTRATOR'S OFFICE, STANDARDS OF CONDUCT SUBCOMMITTEE OF THE MEDIATOR CONFIDENTIALITY AND STANDARDS OF CONDUCT COMMITTEE, PROPOSAL FOR REVISING MICHIGAN'S STANDARDS OF CONDUCT FOR MEDIATORS (2010), *available at* http://courts.michigan.gov/scao/resources/publications/reports/ODR-ProposalforRevisingMSCM.pdf [hereinafter PROPOSAL FOR REVISING MICHIGAN'S STANDARDS].
461. *See* DONNA J. CRAIG, STATE BAR OF MICHIGAN, EQUAL ACCESS INITIATIVE AND THE ALTERNATIVE DISPUTE RESOLUTION SECTION, REPORT OF THE TASK FORCE ON DIVERSITY IN ALTERNATIVE DISPUTE RESOLUTION, 24 (Mar. 2011), *available at* http://www.michbar.org/adr/pdfs/TaskForce_Diversity.pdf.

with ethical issues when mediators change roles and become arbitrators in the same dispute.[462] The proposed new standards are scheduled for release for comment in November 2011.[463]

4. Training Review Committee[464]

A committee has been established to review the current training requirements for mediator qualification under the court rules. To date, no changes can be reported.

VII. MISCELLANEOUS

A. Arbitration Ethics

The American Bar Association and the College of Commercial Arbitrators collaborated on an annotation to the Code of Ethics for Arbitrators in Commercial Disputes.[465] And while "the Code has been referred to for guidance and has been cited by many courts (and has been adopted in part by some) it does not have the force of law and cannot in itself provide a basis for judicial decision."[466] However, it is rare that such a unique collection of annotated cases is published, and every arbitrator should review periodically the ethical requirements of arbitration, to ensure that the arbitrator follows the Code's "generally accepted standard of ethical conduct for the guidance of arbitrators and parties in commercial disputes, in the hopes of contributing to the maintenance of high standards and continued confidence in the process of arbitration."[467]

462. PROPOSAL FOR REVISING MICHIGAN'S STANDARDS, *supra* note 460.

463. Presentation of Doug Van Epps to the Oakland County Bar Association ADR Committee, Nov. 8, 2011.

464. *See generally, id.*

465. American Bar Association, College of Commercial Arbitrators, Annotations to the Code of Ethics for Arbitrators in Commercial Disputes, *available at* http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p123778.pdf (last visited Mar. 18, 2012).

466. *Id.* at 1.

467. *Id.* at 2.

B. Legislation

1. Arbitration Fairness Act of 2009[468]

During the *Survey* period, little movement occurred in any legislative changes to the Federal Arbitration Act. While the bulk of this article involves court interpretation and law-making, this section discusses the advancement of legislative changes, sometimes in response to the courts.

Nationally, for example, Senate Bill 931, referred to as the "Arbitration Fairness Act of 2009" introduced by Senator Feingold, attempted to draw back on the scope of permissible pre-dispute arbitration agreements, largely in part due to the increasing pressure of court decisions allowing large companies to put an arbitration process in virtually all of their consumer contracts.[469] The bill was drafted specifically in response to a series of United States Supreme Court decisions extending the Act "to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes."[470] To achieve this goal, the bill would make all pre-dispute arbitration agreements over "civil rights disputes," "consumer disputes," "employment disputes," and "franchise disputes" unenforceable and invalid.[471] The bill was referred to and died in the Judiciary Committee—a similar fate as virtually all other legislative action during the *Survey* period.

It is worth noting that arbitration has been criticized as inappropriate in these situations for it favors the repeat players,[472] limits judicial review,[473] is not transparent,[474] and strips individuals of substantive statutory rights.[475] If companies, institutions and neutrals are to continue to develop this area of ADR, many of these issues may have to be addressed to gain further acceptance.

468. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

469. *Id.* § 2 (discussing the need for an amendment to the Federal Arbitration Act).

470. *Id.* § 2(2).

471. *Id.*

472. *Id.* § 2(4).

473. *Id.* § 2(5).

474. Arbitration Fairness Act of 2009, § 2(6), H.R. 1020, 111th Cong. (2009); S. 931, 111th Cong. (2009).

475. *Id.* § 2(7).

2. Revised Uniform Arbitration Act ("RUAA")

In Michigan, many advocates have promoted the adoption of the Revised Uniform Arbitration Act, including Mary Bedikian as one of the most vocal, through written materials such as *Why the State Bar of Michigan Should Endorse the Revised Uniform Arbitration Act*:

> The RUAA enhances the UAA by including important procedural protections not part of the UAA regulatory scheme. The key protections . . . . include notice requirements for initiating arbitration, validating the use of electronic records and contracts consistent with federal law, bifurcating the role of courts to direct consolidation of proceedings in the interest of justice, strengthening the arbitral disclosure process by requiring arbitrators to disclose known financial interests or personal relationships that could affect impartiality, permitting limited forms of discovery, and specifying requirements for awards of punitive damages.[476]

The State Bar of Michigan Alternative Dispute Resolution Section continues to support passage of the RUAA for the reasons noted in the Bedikian report:

> The RUAA does not depart from the foundational provisions of the UAA or the FAA. Rather, it includes provisions that were previously addressed by arbitrators or courts on a case-by-case basis, resulting in process inefficiencies, increased costs, and disparate results. The RUAA is a qualitatively improved statute that will offer arbitration participants enhanced predictability and, over time, increase the national uniformity of state arbitration legislation.[477]

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476. Mary A. Bedikian, *Why the State Bar of Michigan Should Endorse the Revised Uniform Arbitration Act*, ADR Q. 1 (2010), *available at* www.michbar.org/adr/pdfs/Jan10.pdf.. For a summary of the differences between the Uniform Arbitration Act and the Revised Uniform Arbitration Act, see the ADR Section Council of the State Bar of Michigan's *Part III—A Comparative Overview of the Uniform Arbitration Act and the Revised Uniform Arbitration Act*, 19-24 (2006); Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, 56 DISP. RESOL. J. 28 (2001).

477. Bedikian, *supra* note 476, at 4.

C. State Bar of Michigan Report on Diversity in ADR

This project provided a unique opportunity for a broad array of voices on the issues of both ADR and diversity to come together, educate and learn from each other, and envision a world where diverse populations of people can access a diverse spectrum of ADR processes provided by a diverse group of professionals and organizations to resolve disputes and engage in conflicts constructively.[478]

The primary question addressed by the Task Force was: "What would an ADR system look like that effectively addresses issues of diversity?"[479] The Task Force then developed a number of "Action Proposal Themes," which were: (1) "Better understand and consider cultures, languages and other factors among potential ADR End Users so that more diverse End Users may gain optimal access to and benefit from ADR";[480] (2) "Support individuals from diverse communities in becoming successful ADR providers so the ADR provider pool will better reflect a wider spectrum of End Users;"[481] (3) "Increase the cultural competence of all ADR providers so that the needs of all ADR End Users may be better met";[482] (4) "Increase community knowledge of, access to and receptivity to ADR, while ensuring that the ADR provided is tailored to the needs of all End Users."[483]

In conclusion, the report provided:

> In order to create an ADR system in Michigan which truly is effective in addressing issues of diversity, much work is needed. This report builds on efforts already underway, but it is also a beginning. Its value today lies in the creativity and innovation of the proposals from diverse stakeholders. In the long-term, the value of this effort will be measured by commitment and action to create an ADR system in Michigan that effectively addresses issues of diversity. This is our goal, and our challenge.[484]

D. Related Concerns

While a *Survey* author could discuss innumerable issues tangentially related to ADR, there are three issues that deserve mention here: ripeness

478. CRAIG, *supra* note 461, at 3.
479. *Id.* at 14.
480. *Id.* at 20.
481. *Id.* at 22.
482. *Id.* at 24.
483. *Id.* at 26.
484. CRAIG, *supra* note 461, at 29.

associated with appealing an arbitrator's award, mortgage foreclosure mediation in a time when foreclosures are at an all-time high, and pre-litigation mediation and the attempt to reduce litigation costs. Parties in arbitration may, from time to time, now complain that arbitration is just as costly (or more costly) than simply filing in court—where parties know the judges through their prior decisions, and where the process is set in advance and known to all, even before the filing. The possibility of pre-litigation mediation may be an avenue to reduce the costs of court litigation (and even pre-arbitration mediation for the cost of arbitration). These issues are briefly outlined below.

1. Ripeness

Rarely does the issue of ripeness arise in enforcement of arbitration awards. However, in *Dealer Computer Services, Inc.*,[485] the Court of Appeals for the Sixth Circuit held that a motion to confirm an arbitration award was not ripe for judicial review.[486] "This case poses the question whether a district court has jurisdiction to confirm an arbitration panel's interim award denying class arbitration."[487] The court found that because the appellant did not show harm from waiting until a decision on the merits, the issue was not ripe for judicial review.[488]

Dealer Computer Services (DCS) "developed an electronic parts catalog system known as Computerized Publication Display (CPD)," allowing auto dealers to maintain their part inventories.[489] Various Ford dealerships entered into contracts with DCS to provide such computer services, each containing an arbitration clause.[490] A number of disputes arose over these contracts with a class of 2,470 Ford dealerships with similar contract claims.[491] An arbitration panel was assembled, and issued a class certification for the dealerships.[492] DCS moved to vacate the arbitrators' decision that the case *could* proceed as a class action arbitration (dubbed "Clause Construction Award").[493] The district court

485. Dealer Computer Serv., Inc. v. Dub Herring Ford, 623 F.3d 348, 349 (6th Cir. 2010).
486. *Id.*
487. *Id.* at 349.
488. *Id.*
489. *Id.*
490. *Id.*
491. *Dealer Computer Serv.*, 623 F.3d at 349.
492. *Id.* at 350.
493. *Id.*

"held that DCS's motion to vacate was not ripe for judicial review and that the district court therefore lacked jurisdiction."[494]

The proceedings continued, where the panel considered evidence and arguments as to class certification, and eventually denied class certification.[495] DCS moved to reopen a previously decided case (DCS-I) and affirm the class non-certification decision.[496] The court applied traditional ripeness analysis to DCS's appeal:

> The key factors to consider when assessing the ripeness of a dispute are: (1) the likelihood that the harm alleged by a party will ever come to pass; (2) the hardship to the parties if judicial relief is denied at this stage in the proceedings; and (3) whether the factual record is sufficiently developed to produce a fair adjudication of the merits.[497]

The court of appeals found that "[h]ere, in contrast [to a final award], the interim class arbitration determination, albeit a significant procedural step in the arbitration proceedings, has no impact on the parties' substantive rights or the merits of any claim."[498] The predominant argument advanced by DCS was that the award lacked the preclusive effect to protect DCS from other arbitrators' decisions about class certification in the other 2,469 arbitrations.[499] The court found that the harm was too speculative, as the possibility of unnecessary duplicative cases (and expenses/legal issues associated with such cases), was not enough to show harm sufficient to overcome the ripeness requirements.[500]

The dissent, which noted the rule that courts *must* confirm arbitration awards under 9 U.S.C. § 9, also noted that class certification decisions are so crucial to the life-span of a litigation that the Federal Rules of Civil Procedure allow appeals of district courts' orders granting or denying class certification:[501] "the concession that a motion to vacate the present award by the dealers would be ripe effectively concedes that this court has jurisdiction over the present Motion;"[502] and allowing

494. *Id.* (citing Dealer Computer Serv., Inc. v. Dub Herring Ford (*DCS-I*), 547 F.3d 558 (2008)).
495. *Id.*
496. *Id.*
497. *Dealer Computer Services*, 623 F.3d at 351 (citing *DCS-I*, 547 F.3d at 560-61).
498. *Id.*
499. *Id.* at 358.
500. *Id.* at 359.
501. *Id.* at 362 (Mays, J., dissenting) (citing 9 U.S.C. § 9 (1947)).
502. *Id.*

piecemeal adjudication serves to undermine the policy favoring arbitration,[503] as outlined by the Supreme Court cases discussed above.[504]

2. Mortgage Foreclosure Mediation

Making the statement that the foreclosure crisis has hit the United States is hardly breaking news. With mortgage foreclosures somewhere in the 250,000 per month range in 2011,[505] ADR may be a solution. Florida is in the process of implementing mediation programs for mortgage foreclosures in an effort to reduce the burden on the market.[506] While there are obviously many challenges, from political pressure to process and design issues, mortgage foreclosure mediation may be part of the solution.[507] Thus far, foreclosure mediation in Michigan has not been regularly or systematically utilized.

3. Pre-Litigation Compulsory Mediation

Finally, pre-litigation (and potentially pre-arbitration mediation) may reduce the currently inflated costs of arbitration: "First and foremost, it offers a chance for disputes to resolve their issues without forcing a settlement on either of [the parties] (as is the case with arbitration or if compulsory arbitration were enacted)."[508] While there are a number of disadvantages or shortcomings of compulsory mediation (e.g., settlement rates may not be great, and unbalanced power between the parties),[509] mediation (compulsory or not) could solve many of the disputes currently clogging the state courts today.

VIII. CONCLUSIONS AND COMMENTARY

In the ever-expanding arena of ADR trends are difficult to predict. Two trends that seem apparent are the continued emphasis on cost-saving

503. *Dealer Computer Serv.*, 623 F.3d at 362.

504. *See supra* Part II.

505. *See e.g.*, *Foreclosure Activity at 40-Month Low*, REALTYTRAC (May 10, 2011), *available at* http://www.realtytrac.com/content/press-releases/foreclosure-activity-at-40-month-low-6578 (discussing foreclosures in April 2011).

506. Sharon Press, *Mortgage Foreclosure Mediation in Florida—Implementation Challenges for an Institutionalized Program*, 11 NEV. L.J. 306, 307 (2011).

507. *See id.*

508. Kendall D. Isaac, *Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating*, 32 U. LA VERNE L. REV. 165-83 (2011). For examples of compulsory arbitration, see the proposals contained in the Employee Free Choice Act, H.R. 1409, 111th Cong. (2009).

509. *See* Isaac, *supra* note 508, at 178.

alternatives like mediation, and the likelihood of future litigation over a number of issues that will arise with the increase of alternative dispute resolution processes. With regard to the former, experience with mediation in many disciplines has proved to be more than successful. Court-annexed mediation efforts seem to be growing, and disputants, lawyers and judges appear to be satisfied with the results. Grievance mediation in labor disputes has grown, often at the expense of decreased arbitration. All this leads to the conclusion that the parties have a continued interest in cost-saving by reducing formal procedures to the extent possible and expediting their dispute resolution procedures.

As to the potential increase in litigation, it seems likely that disgruntled parties, the use of ADR by inexperienced practitioners, and even the occasional poor performing neutral will lead to disputes over statutory and privately negotiated systems. Success in ADR will depend upon careful drafting of statutory and/or contractual dispute resolution procedures and settlement agreements. Competent practitioners and qualified neutrals may be dealing with newer and more complicated processes—perhaps combining stepped procedures like negotiation followed by mediation and arbitration or even "med-arb." It is imperative that continued education and training be provided for all so that growing pains can be avoided.