

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

EXH	MOTION
	SECOND
	APPROVED BY THE REGENTS ACTION
NOTE:	March 2005
	MAR 17 2005

Subject: Litigation

I. NEW CASES

There are no new cases this month.

II. RESOLUTIONS

Lone Star Steakhouse & Saloon of Michigan, Inc. v Board of Regents of the University of Michigan. Michigan Court of Claims. (Judge Paula Manderfield) (Served August 12, 2004); consolidated with Householder v Lone Star, Washtenaw County Circuit Court (Judge Donald Shelton); and Johnson v Lone Star Steakhouse v University of Michigan. Wayne County Circuit Court (Judge William Giovan) and Michigan Court of Claims (Judge Joyce A. Draganchuk).

Plaintiff has been sued by two individuals in separate cases who claim that they contracted Hepatitis A as a result of eating food that had been contaminated by a restaurant employee at a Lone Star Steakhouse. Lone Star claims that it was the negligence of the University of Michigan, when UM failed to report an occurrence of Hepatitis A of a Lone Star employee to appropriate state health authorities, that caused the injuries to the individuals. Plaintiff seeks judgment in the amount that it is judged responsible for in the *Householder* and *Johnson* lawsuits. The University filed a motion to dismiss before Judge Shelton in the *Householder* case. The motion was argued on February 2, 2005 and the motion was granted. On February 4, 2005, the University's motion to dismiss in the *Johnson* case was also granted. This case, insofar as the University is concerned, is now concluded.

III. CASE UPDATES

Jennifer Gratz and Patrick Hamacher v Lee Bollinger, James J. Duderstadt, The University of Michigan, and the University of Michigan College of Literature, Arts and Sciences. U.S. District Court, Eastern District of Michigan. (Judge Patrick J. Duggan) (Filed October 14, 1997) U.S. Court of Appeals, Sixth Circuit.

Plaintiffs filed this class action lawsuit alleging that the University unlawfully discriminated against them and similarly situated individuals when it used race as a factor in making decisions regarding admission to the University of Michigan's undergraduate programs. They seek damages and an offer to Mr. Hamacher of admission as a transfer student. In addition, Plaintiffs ask the court to find that the University violated their rights to nondiscriminatory treatment under the Fourteenth Amendment of the U.S. Constitution and to enjoin the University from continuing those alleged discriminatory practices. The University filed its Answer on December 3, 1997. A motion to

intervene was filed by high school students of color and their parents, Citizens for Affirmative Action's Preservation (CAAP), the NAACP Legal Defense & Educational Fund, the American Civil Liberties Union Foundation, the ACLU Fund of Michigan, and the Mexican American Legal Defense & Educational Fund on February 5, 1998. Plaintiffs opposed the motion; the University defendants did not oppose it. The motion to intervene was denied by Judge Duggan.

Both sides filed motions for summary judgment. In addition, amicus briefs in support of defendants were filed by the U.S. Department of Justice; a group consisting of the American Association of Law Schools, the CIC and Wayne State University; a group of higher education organizations led by the American Council on Education and including the AAU and AAUP; and the State of Ohio. The Court of Appeals consolidated the intervenors' appeal with the appeal filed by the intervenors in the *Grutter v Bollinger*, et al. case; oral argument was heard on both cases on June 8, 1999. The intervenors filed a motion to stay proceedings on plaintiffs' motion for summary judgment; the Court of Appeals granted the motion to stay as to both parties' motions for summary judgment. On August 10, 1999, the Sixth Circuit Court of Appeals reversed the trial court's order denying intervention and remanded for entry of an order permitting intervention by the intervenors. Trial was scheduled to begin in July/August, 2000.

Defendants filed a motion for Relief from Order Regarding Class Certification and Bifurcation in Light of Subsequent Authority, citing recent Supreme Court decisions that warrant the court to revisit its earlier decision; the motion was denied. The University filed an appeal to the Sixth Circuit Court of Appeals; the appeal was denied on September 26, 2000. Judge Duggan granted the Intervenor's request for extension of dates. Defendants and Plaintiffs filed renewed motions for summary judgment. Amicus briefs were filed by General Motors Corporation and by the Michigan Attorney General. Oral arguments on the motions for summary judgment were heard on November 16, 2000. On December 13, 2000, Judge Duggan issued his opinion, stating that diversity is a compelling governmental interest and that the University's current undergraduate admissions program meets the standards set by the Supreme Court in *Bakke*. He also ruled that the admissions programs in 1995-1998 were unconstitutional. Both plaintiff and defendants filed requests for interlocutory appeals of Judge Duggan's December 13, 2000 decision. On February 26, 2001, Judge Duggan issued his decision on the intervenors' motion for summary judgment. Judge Duggan dismissed the intervenors' claim that the University was justified in using race as a factor in admissions to remedy the present effects of past discrimination.

The Plaintiffs and the University filed appeals with the U.S. Court of Appeals. Plaintiff filed a motion for *en banc* review of the case; the Court of Appeals ruled that the motion would be held in abeyance until after the parties filed briefs, after which time the Court would make a determination as to whether the cases should be submitted to the three-judge panel for adjudication or referred to the *en banc* court. A number of amicus briefs were filed with the Court of Appeals, including General Motors Corporation, 33 of the world's largest companies, the United Auto Workers, the National Organization for Women Legal Defense Fund and the American Council on Education. The Court of Appeals scheduled oral argument for October 23, 2001. On October 16, 2001, the Court of Appeals granted the intervenors' motion for hearing *en banc*; oral argument was heard before all of the active Sixth Circuit judges on December 6, 2001. On October 1, 2002, plaintiff filed a Rule 11 petition for *writ of certiorari* (before judgment) with the U.S. Supreme Court, requesting that the Court bypass the Sixth Circuit Court of Appeals and review this case along with the law school case. On October 16, the Intervenor's filed a separate petition for *writ of certiorari* before judgment with the U.S. Supreme Court. The University filed its responses to those petitions on October 29, 2002. On December 2, 2002, the Supreme Court granted certiorari

before judgment on the Constitutional issue only. CIR filed its brief on January 16, 2003. Also on that day, amicus briefs were filed in support of Petitioner and in support of neither party. The University filed its brief on February 18. In addition, 42 amicus briefs were filed in support of the University. The Intervenors filed a motion for argument time during oral argument, which was denied by the Court. Oral argument was heard on April 1, 2003. On June 23, 2003, the Supreme Court issued its opinion. It held that diversity is a compelling interest justifying the use of race and ethnicity as one factor in undergraduate admissions. The Court also found that the University's current undergraduate admissions policy is not narrowly tailored to achieve diversity and remanded the case to the federal district court for further proceedings consistent with this opinion. Plaintiff filed a motion for attorneys' fees with the district court. Plaintiff also filed a motion for partial summary judgment on liability and a motion for class certification and partial summary judgment with respect to certain nominal and incidental damages claims. Defendants filed a response to those motions as well as a motion for stay of briefing and a request for hearing on plaintiff's motions. On January 27, 2005, Judge Duggan issued his opinion, finding that the plaintiffs were prevailing parties in a limited sense but that they failed to achieve their primary objective, namely that any consideration of race violates the Constitution. He awarded approximately \$671,000 in attorneys' fees and costs to the plaintiffs.

On February 25, 2005, Plaintiffs filed a brief with the court, arguing that Defendants have the burden of proving that plaintiffs and the other class members would not have been admitted under a more narrowly tailored admissions process. They also argue that defendants may not carry this burden by applying a hypothetically-devised admissions process to the decisions that were made and that plaintiffs have standing to seek damages and additional relief.

Respectfully submitted,



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Vice President and General Counsel

March 2005