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Court-Ordered ADR: What are the Limits?

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I. INTRODUCTION

Increasingly, courts across the country are turning to non-judicial dispute resolution processes — "alternative dispute resolution" or "ADR" — to handle overwhelming caseloads.[1] Proponents of non-judicial processes state that ADR benefits courts and litigants by reducing the time between the filing and disposition of cases, saving judges' time so that they are available for the cases that really need them, saving money for the parties to the suit, and perhaps most importantly, increasing litigants' satisfaction with the manner in which their disputes are resolved.

A growing body of empirical evidence has begun to support the proponents' claims. A study of court-annexed arbitration showed greater litigant satisfaction with the process and more rapid termination of cases.[2]

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1. In Florida, the circuit and county courts may refer any civil matter or a selected issue to mediation or nonbinding arbitration. If the court orders the parties to use nonbinding arbitration and a party files for a trial *de novo*, that party risks the assessment of arbitration costs, court costs, and attorneys' fees if the judgment after the trial *de novo* is not more favorable than the arbitration decision.

In the federal district court for the Eastern District of Michigan, judges refer parties to a "mediation" program which actually works like nonbinding arbitration. After referral, the parties and their attorneys participate in a hearing before a three-attorney panel. The panel provides its evaluation of the case to the parties. If the parties accept the evaluation, it is entered as judgment in the case. If a party rejects the evaluation, the party risks sanctions if the final verdict does not improve upon the panel's evaluation by at least 10%. (Recently, in Tiedel v. Northwestern Michigan College, 865 F.2d 88 (6th Cir. 1988), the Sixth Circuit held that a federal district court did not have the authority to assess attorneys' fees as a sanction).

The federal district court for the Eastern District of Kentucky has adopted a local rule which provides that a judge may set any civil case for summary jury trial or other alternative method of dispute resolution.

In Hawaii state courts, all tort cases are assigned to an arbitration program. An arbitrator holds a conference with counsel within 30 days from the date a case is assigned. The arbitrator oversees discovery requests and timelines (discovery is permitted only with the consent of the arbitrator), attempts to aid in the settlement of the case if all parties consent in writing, and if a case does not settle, conducts an arbitration hearing and issues an award. A party who appeals an arbitration award risks sanctions if the final verdict does not improve upon the arbitration award by at least 15%.

Pursuant to a Minnesota statute, Hennepin County District Court judges have the discretion to assign civil cases involving claims of more than $50,000 to mediation. MINN. STAT. § 484.74, subd. 1 (1990). The court also refers a variety of cases to a nonbinding arbitration program.

2. Roberto, *Note—Limits of Judicial Authority in Pretrial Settlement Under Rule 16 of the Rules of Civil Procedure*, 2 OHIO ST. J. DIS. RES. 311, 319 (1987) [hereinafter Roberto].

Likewise, research in Hawaii and the Northern District of California has demonstrated high litigant and attorney satisfaction with court-annexed ADR programs. Most recently, the Office of the State Court Administrator in Minnesota released a report which compared adjudication with court-annexed mediation and arbitration. Mediation and arbitration scored higher than adjudication on every measure of client satisfaction.[3]

Yet, a nagging tension exists. On one hand are harried judges who see "the promotion of informed and fair settlements [as] one of the most important aims of pretrial management"[4] and view ADR as a useful, beneficial, even necessary settlement tool. These judges are joined by state and federal legislators who are concerned about the expense and delay which are hampering the courts.[5] On the other hand are parties and attorneys who have consciously chosen the traditional litigation process.[6]

Should courts be permitted to "sidetrack" these parties and their attorneys from traditional litigation? Or is ADR, in the words of a Pennsylvania court, simply a "[n]ew device" which is *part* of contemporary litigation, a device which *must* be used "to adapt the ancient institution of [trial] to present needs" and to make litigation "an efficient instrument in the administration of justice?"[7]

Guidance on these questions is strikingly sparse, particularly in light of the courts' increasing experimentation with ADR. One commentator has noted that the rules, statutes, and cases dealing with this issue "constitute only a few 'dots' in a dot-to-dot line drawing which has yet to be completed."[8] Of necessity, therefore, the analysis in this article will focus on

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3. KOBBERVIG, MEDIATION OF CIVIL CASES IN HENNEPIN COUNTY: AN EVALUATION (Feb. 1991) (52 page report produced by Office of Minnesota State Court Administrator).

4. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 773 (1981).

5. Indeed, on December 1, 1990, President Bush signed the Judicial Improvement Act into law. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended in various sections of 5, 9, 11, 17, 18, and 28 U.S.C.). Title I of the Act — the Civil Justice Reform Act of 1990 — is called a "civil justice expense and delay reduction plan" and provides that every U.S. district court must convene a local advisory group to tailor such a plan for the district. Among the six "principles and guidelines" which must be considered in drawing up a plan is one which provides "authorization to refer appropriate cases to alternative dispute resolution programs that — (A) have been designated for use in a district court; or (B) the court may make available, including mediation, mini-trial, and summary jury trial." 28 U.S.C. § 473(a)(6)(A-B) (1990).

6. They are joined by judges such as Judge Jack Weinstein who insists:

> [I]f cases are growing in the federal courts, so be it! That is what judges and courts are there to do: to hear cases. We are public servants pledged to do justice, not exalted elites who bless the masses with such bites of judicial time as we deign to dole out. If some judges are truly overburdened, then the first resort should be to add judges or to add support staff, not to shut the courthouse door.

Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1909-10 (1989).

7. Kimbrough v. Holiday Inn, 478 F. Supp. 566, 568 (E.D. Pa. 1979).

8. Roberto, *supra* note 2, at 329.

the few cases addressing courts' authority to order the use of ADR and will describe the patterns that are beginning to emerge. Most of the cases involve court-ordered arbitration programs or orders to participate in summary jury trials. Challenges mounted against these processes have been based primarily on the seventh amendment[9] guarantee of a right to a jury trial and charges that courts have exceeded the authority granted under Rule 16 of the Federal Rules of Civil Procedure (a very small number of challenges, not dealt with here, have been based on equal protection claims and other rules in the Federal Rules of Civil Procedure). Courts have used various standards to test the extent and limits of their authority but few limits on that authority have been revealed. With one notable exception, courts have strongly defended their right to order parties to use ADR.

II. SEVENTH AMENDMENT CHALLENGES

Generally, those who have objected to court-ordered ADR have relied heavily upon the seventh amendment's guarantee of the right to a jury trial. This focus is logical, but it has not persuaded courts to rescind their orders for the use of ADR. Why? The context is important. Most of the seventh amendment objections have involved challenges to local federal court rules.[10] Judges have broad discretion in designing these local rules. Indeed, the only substantial limitation upon their discretion is the requirement that local rules be consistent with the Federal Rules of Civil Procedure.[11]

The Sixth Circuit *has* declared that a local rule establishing pretrial procedures violates the seventh amendment if the rule permits a judge to *compel* settlement prior to trial on terms which one or both of the parties find completely unacceptable.[12] But ADR processes do not compel *settle-*

9. U.S. CONST. amend. VII.

10. Under the Federal Rules of Civil Procedure 1, 16 and 83, federal district courts have adopted a wide variety of local rules which outline alternative methods of dispute resolution. Some of these rules provide for the use of ADR in conjunction with traditional pretrial conferences (*e.g.*, E.D. Cal., E.D. Penn., N.D. Cal., E.D. Mich.). Several courts' local rules establish the use of non-binding arbitration (*e.g.*, E.D. Cal., E.D. N.Y., E.D. Penn., N.D. Cal., E.D. Mich. [referred to as "Michigan mediation"]). Other courts use mediation or summary jury trials (*e.g.*, N.D. Ohio, E.D. Ky.).

11. McCargo v. Hedrick, 545 F.2d 393, 402 (4th Cir. 1976). *See* Frazier v. Heebe, 482 U.S. 641 (1987) (district courts have power to enact local rules necessary for courts to conduct their business); G. Heilman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc) (federal district court has inherent power to order a party represented by an attorney to personally attend a pretrial settlement conference and to impose sanction for failure to comply with order); *In re* La Marre, 494 F.2d 753, 756 (6th Cir. 1974) (court found no grounds for denying trial court the power to require parties' attendance at pretrial conference); Lockhart v. Patel, 115 F.R.D. 33 (E.D. Ky. 1987) (upheld striking defendant's pleadings in medical malpractice case as an appropriate sanction for insurer's failure to send representative from home office to attend settlement conference as directed by court).

12. *In re* La Marre, 494 F.2d at 756.

ment. They compel parties' and attorneys' *participation in processes* that are *aimed* at facilitating settlement. Based on this distinction and three standards of analysis — the "ultimate access" standard, the "onerous condition" standard, and the "basic procedural innovation" standard — the courts ultimately have defended court-ordered ADR against seventh amendment challenges.

III. Ultimate Access

In response to seventh amendment charges against ADR processes, some courts simply have conducted an analysis to determine whether the litigants ultimately had access to a jury. The cost of the ADR process, the time required for preparation, the impact of the process on future settlement discussions — none of these factors has been considered. If the litigants eventually had access to a jury, certain courts have been satisfied that the right to a jury trial was not violated.

For example, in *Rhea v. Massey-Ferguson, Inc.*, [13] a personal injury matter, the federal district court in the Eastern District of Michigan sent the case to "mediation" (actually arbitration, as explained in the sidebar) under a local rule.[14] The mediation panel awarded $100,000 to the plaintiff. The defendant rejected the award and demanded a jury trial; the plaintiff accepted the award. Under the local rule, the defendant risked liability for actual costs unless the verdict at trial was more than ten percent *below* the evaluation. The trial was held before a jury and its award was $228,000, more than *twice* the amount of the evaluation. The district court awarded $5,400 in actual costs to the plaintiff.

On appeal, the Sixth Circuit held that the local rule did not violate the defendant's right to a jury trial. The court observed, "The Seventh Amendment 'was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details.' "[15] More particularly, the court found that "[a]t the core of these fundamental elements is the right to have a ' "jury *ultimately* determine the issues of fact if they cannot be settled by the parties or determined as a matter of law." ' "[16]

Finally, the court could not help but note that, despite the defendant's claim that its constitutional rights had been violated, "[i]n keeping with the Seventh Amendment's requirements," Massey-Ferguson had indeed had the benefit of appearing before a jury and receiving the jury's award.[17]

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13. 767 F.2d 266 (6th Cir. 1985).
14. *Id.* at 268.
15. *Id.* (quoting Galloway v. United States, 310 U.S. 372, 392 (1943)).
16. *Id.* (quoting Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 149 (5th Cir. 1981) (quoating Woods v. Holy Cross Hospital, 591 F.2d 1164, 1178 (5th Cir. 1979)).
17. *Id.* at 269.

The federal district court in *New England Merchants National Bank v. Hughes*,[18] performed a similar analysis as it upheld the constitutionality of a local rule which provided for compulsory arbitration of certain claims. In response to the defendant's objection to the rule, the court simply explained, "Local Rule 8 does not in any way abridge the constitutional right of a litigant to trial by jury since the litigant is entitled to demand a trial *de novo* provided he has complied with the procedures set forth in Local Rule 8."[19]

IV. Onerous Condition

Confronted with more substantive challenges, some courts have taken an analytical step beyond the "ultimate access" standard to the "onerous condition" standard, which explicitly balances the parties' right to a jury trial against the benefits served by ADR and the degree to which ADR actually inhibits the ability of parties to exercise their seventh amendment right. The Pennsylvania Supreme Court introduced the onerous condition test in *Smith's Case*.[20] There, a challenge based on the right to a jury trial was brought against a local rule authorizing the compulsory arbitration of all cases involving claims of less than $1,000. The rule also required payment of the arbitrator's fees as a precondition to an appeal from the arbitration award. In response to the challenge, the court stated: "All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of *onerous conditions, restrictions or regulations which would make the right practically unavailable.*"[21] The Pennsylvania court then referenced several conditions which previously had been found constitutional, including the requirement that parties provide security for the prosecution of an appeal and satisfaction of the final judgment and the requirement that the parties pay a jury fee prior to commencement of trial.[22] Based on this analysis and precedent, the Pennsylvania Supreme Court held that the local rule did not impose onerous conditions and thus was constitutional. The court also emphasized that the burdens imposed on parties by compulsory arbitration were far outweighed by the benefits of a speedy, less expensive, and more efficient trial system.[23]

However, the arbitration program did not escape totally unscathed. Returning to the onerous condition test, the court examined the arbitrator's fees and noted:

18. 556 F. Supp. 712 (E.D. Pa. 1983).
19. *Id.* at 714.
20. 381 Pa. 223, 112 A.2d 625 (1955), *appeal dismissed sub nom.* Smith v. Wissler, 350 U.S. 858 (1958).
21. *Id.* at 231, 112 A.2d at 629 (emphasis added).
22. *Id.* at 232, 112 A.2d at 630.
23. *Id.* at 231-32, 112 A.2d at 629-30.

> [T]he necessity of paying [$75 in arbitrators' fees] as a condition for the right to appeal [from the arbitration award] would seemingly operate as a strong deterrent, amounting practically to a denial of that right [to a jury trial], if the case should involve only, as in the present instance, as little as $250.[24]

Thus, courts generally required that the court rules provide for a lower rate of compensation to arbitrators when only a comparatively small claim was involved.[25]

In 1978, the Pennsylvania Supreme Court again used the onerous condition standard to uphold the constitutionality of a statute establishing compulsory arbitration in medical malpractice cases where health care providers were defendants. In *Parker v. Children's Hospital of Philadelphia*,[26] the court emphasized that arbitration as a condition precedent approached unconstitutional proportions only when substantial restrictions were placed on the right to jury trial. Appellants contended that such onerous restrictions existed. First, they argued that malpractice cases were so complex and expensive to try that the arbitration system effectively required two trials and, thus, the system was unduly burdensome.[27] Appellants also claimed that arbitration penalized appeals because the statute imposed all costs of both the arbitration and trial (including expert witnesses' expenses) on the losing party if the appeal was found to be "capricious, frivolous, and unreasonable."[28]

The court rejected both of defendants' arguments, noting specifically that there was no evidence that a second trial would be required.[29] The court also incorporated into the analysis the state's interest in providing an efficient alternative for dispute resolution and remarked:

> Where the reason for the postponement of the right results from the effort on the part of the state to achieve a compelling state interest and the procedure is reasonably designed to effectuate the desired objective, it cannot be said that there has been a constitutionally impermissible encroachment upon that right. The

24. *Id.* at 232, 112 A.2d at 630.

25. *See* Christie-Lambert Van & Storage Co. v. McLeod, 39 Wash. App. 298, , 693 P.2d 161, 167 (1984) (upheld the constitutionality of arbitration process but noted "the costs or fees imposed upon an appellant from a mandatory arbitration award as a precondition to obtaining a jury trial must not be so large in proportion to the amount in controversy as to constitute an unconstitutional restriction upon the right to a jury trial"); Opinion of the Justices, 113 N.H. 205, 304 A.2d 881, 887 (1973) (in an advisory opinion, the New Hampshire Supreme Court stated that a required payment of arbitrators' fees of $750 or $1,125 to obtain a jury trial on appeal from a mandatory arbitration award of a case involving $3,000 or less would unconstitutionally infringe upon the jury trial right).

26. 483 Pa. 106, 394 A.2d 932 (1978).

27. *Id.* at 119, 394 A.2d at 939.

28. *Id.* at 120, 394 A.2d at 939.

29. *Id.* at 119, 394 A.2d at 939.

> acceptance in this jurisdiction of arbitration as a viable, expeditious, alternative method of dispute-resolution is no longer subject to question . . . . We are therefore satisfied that the precondition of compulsory arbitration in cases of this type does not present the type of 'onerous' restriction which we referred to in *Smith's Case*.[30]

The federal district court in the Eastern District of Pennsylvania adopted the state court's reasoning in 1979, in *Kimbrough v. Holiday Inn*.[31] In this case, which involved a personal injury claim, the defendants moved to vacate an order referring the matter to an experimental compulsory arbitration program instituted by the Department of Justice.[32] The district court had adopted the program through its local rule 49. The program provided that certain types of cases with money damages of $50,000 or less would be referred automatically to arbitration. "Unless a party demanded a trial *de novo* within 20 days after the entry of the award, the arbitration panel's decision becomes a final, non appealable judgment."[33] The local rule also imposed the amount of the arbitration fees upon the party who demanded the trial *de novo* and failed to obtain a more favorable judgement, exclusive of interest and costs. The rule also imposed upon the defendant interest on the award from the time it was filed. Using arguments very similar to those raised in *Parker*, the defendants claimed that the program created a burdensome, onerous condition upon their right to a jury trial.[34] They asserted that because the arbitration limits were so high — $50,000 — they had to conduct a full scale trial at the arbitration level to protect the parties' interests and that, as a result, they would be required to conduct two full trials. Like the court in *Parker*, the court rejected these contentions and found that "arbitration is a useful tool to promote greater efficiency in litigation and . . . pre-trial review in no way infringes upon

30. *Id.* at 120-21, 394 A.2d at 939-40 (citations omitted).

31. 478 F. Supp. 566 (E.D. Pa. 1979).

32. *Id.* at 567.

33. *Id.*

34. *See Id.* at 567-71. Defendants also argued that the Eastern District's local rule violated the equal protection guarantees of the Constitution based on several claimed deficiencies. First, the defendants noted that the pilot program inherently treated litigants in the Eastern District of Pennsylvania differently from those in other districts. *Id.* at 575. Second, they observed that interest was required only of defendants who appeal from arbitration awards. *Id.* Finally, the defendants argued that the classification of claims for arbitration based on amount in controversy and subject matter jurisdiction were arbitrary, and bore no rational relationship to a legitimate governmental interest. *Id.* at 575-76. The Court responded to the first challenge by finding that any disparity between districts was minimal. *Id.* at 575. The court also found that an equal protection argument based on geographic differences ignored the fact that "by their very nature," local rules would differ from district to district. *Id.* Finally, after analysis, the Court found the interest provision, the jurisdictional categories and the subject matter categories rational and thus not violative of equal protection guarantees. *Id.* at 577.

constitutional rights of litigants."[35] Indeed, the court asserted that arbitration benefitted the parties by "forc[ing] counsel to focus their attention on the basic elements of the case," eliminating "discovery which is of marginal advantage at trial" and making "settlement . . . a viable possibility."[36]

V. Basic Procedural Innovation

Some courts have used a very different standard to respond to parties' seventh amendment challenges—determining whether a non-judicial pre-trial procedure represents a "procedural innovation" which is so basic that it is actually "outcome-determinative." This standard focuses less on the extent to which an ADR process impedes upon the parties' *progress* to trial by jury and more on the ADR process's potential *impact* upon a jury's decision. The standard may be different, but the bottom line is the same. Courts using the basic procedural innovation analysis have concluded that court-ordered ADR processes do not violate the seventh amendment.

The U.S. Supreme Court first established the "basic procedural innovation" standard in *Miner v. Atlas*.[37] There, the Court invalidated a local rule which authorized a court sitting in admiralty to order the taking of oral depositions, declaring that oral depositions represented "basic procedural innovations" which, "though concededly 'procedural' may be of as great importance to litigants as many a 'substantive' doctrine."[38] The Court clarified the definition of basic procedural innovations in 1973, in *Colgrove v. Battin*,[39] when it upheld the validity of a local rule establishing a jury of six in a civil trial court because it found that a six-member jury was *not* a basic procedural innovation.[40] The Court went on to explain that basic procedural innovations:

> are those aspects of the litigatory process which bear upon the ultimate outcome of the litigation . . . . Since there has been shown to be 'no discernable difference between the results reached by the two different-sized juries' . . . a reduction in the size of the civil jury from twelve to six plainly does not bear on the ultimate outcome of the litigation.[41]

This standard was first explicitly applied to non-judicial pre-trial procedures in *Kimbrough v. Holiday Inn*.[42] In addition to considering whether pre-trial arbitration represented an onerous condition upon the right to a jury trial, the court in *Kimbrough* examined the arbitration program to de-

35. *Id.* at 571.
36. *Id.*
37. 363 U.S. 641 (1960).
38. *Id.* at 650.
39. 413 U.S. 149 (1973).
40. *Id.* at 164.
41. *Id.* at 164, n.23 (quoting Williams v. Florida, 399 U.S. 78, 101 (1970)).
42. 478 F. Supp. 566 (E.D. Pa. 1979).

termine whether "there [was] a substantial likelihood that the *outcome of the trial would be influenced* by the change [arbitration as a condition precedent to trial]."[43] Because the arbitration award was non-binding and not admissible at trial, the court found no such influence on the outcome of the final verdict and concluded that the local rule establishing the arbitration program was not a basic procedural innovation.[44]

Most recently, this standard was used by the court in *McKay v. Ashland Oil, Inc.*,[45] in response to the plaintiff's motion for reconsideration of the court's order for another non-judicial pretrial procedure — the summary jury trial. The court found that the summary jury trial, like non-binding arbitration, was not "outcome-determinative," did not represent a basic procedural innovation and, thus, did not violate the seventh amendment. The court observed:

> A summary jury trial is far less intrusive into the independence of the trial lawyer or litigant than . . . local rules [which provide for the imposition of costs as a sanction for last-minute settlements entered into after the jury has been brought in] upheld by the above authorities. No presumption of correctness attaches to the verdict of the summary jury, nor is any sanction imposed for failure to accept its advisory verdict. It is merely a useful settlement device. It may require an expenditure of time and preparation but so do pretrial orders, memoranda, conferences, marking of exhibits, etc. In no way is the summary jury trial 'outcome-determinative' under the Supreme Court's *Colgrove* test.[46]

Thus, whatever the standard used, courts have overcome seventh amendment challenges to ADR.

VI. Rule 16 Challenges

The other primary source of challenges to court-annexed ADR processes has been Federal Rule of Civil Procedure 16. This rule was drafted in 1938 and not revised until 1983. Significantly, the original rule called for a pretrial conference of counsel with the court "to prepare for, not avert, trial."[47] Pretrial conferences were not designed explicitly for

43. *Id.* at 569 (emphasis added).

44. *Id.* at 573-74.

45. 120 F.R.D. 43 (E.D. Ky. 1988).

46. *Id.* at 46. *See also* Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (finding the summary trial "a legitimate device" in providing litigants "with the most expeditious and just case resolution."); Davison v. Sinai Hospital of Baltimore, 462 F.Supp. 778, 781 (D. Md. 1978) (holding that a Maryland statute requiring that malpractice claims against doctors and health care providers must be submitted to a three member arbitration panel does not violate the seventh amendment right to a jury trial) (The provision "cuts off no defense, interposes no obstacle . . . takes no question of fact from either court or jury. At most . . . it is merely a rule of evidence.").

47. Padovani v. Bruchhausen, 293 F.2d 546, 548 (2nd Cir. 1961).

exploring or encouraging settlement. Instead, pretrial conferences were to be used for simplifying and eliminating issues, amending pleadings where necessary, avoiding unnecessary proof of facts and generally reducing opportunities for surprise at trial. Ultimately, the focus of the pretrial conference was on insuring the economical and efficient *trial* of every case on its merits.[48]

As the caseload of the courts grew and as pursuit of settlement came to be seen as a necessary and legitimate part of the judicial case management role, there were calls for the revision of Rule 16 to better encourage pretrial management. In 1983, the Advisory Committee on Rules responded to those calls with the current Rule 16 which provides in pertinent part:

> RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT
> (A) PRETRIAL CONFERENCES; OBJECTIVES. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . . .
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> . . . .
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> (5) facilitating the settlement of the case . . . .
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> . . . .
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> (C) SUBJECTS TO BE DISCUSSED AT PRETRIAL CONFERENCES. The participants at any conference under this rule may consider and take action with respect to . . . .
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> . . . .
>
> (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . . .
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> . . . .
>
> (10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
> (11) such other matters as may aid in the disposition of the action.[49]

The 1983 amendments expanded the list of matters to be discussed at the pretrial conference and specifically recognized "facilitating the settlement of the case" as an objective.[50] The Advisory Committee's Notes even

48. Roberto, *supra* note 2, at 312.
49. FED. R. CIV. P. 16.
50. *Id.* at (a)(5).

make it clear that some conferences might focus *solely* on settlement.[51]

In addition to recognizing settlement as an appropriate subject of a pretrial conference, the 1983 amendments look outside the traditional litigation process for the resolution of disputes. Rule 16(c)(7) specifically references "extrajudicial procedures" to resolve disputes. Rule 16(c)(10) authorizes the judicial use of special pretrial procedures to expedite complex cases. The Advisory Committee's Notes do not endorse any particular pretrial techniques and instead highlight flexibility and experience.[52]

Thus, Rule 16 clearly gives the courts the authority to move parties toward settlement in pretrial procedures, and the courts have used Rule 16 as a basis for ordering pretrial ADR which focuses on settlement. However, Rule 16 simultaneously places some rather murky limitations on the courts' authority. This murkiness is most evident in the following crucial sentence from the Advisory Committee's Notes: "Although it is not the purpose of Rule 16(c)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it."[53] When does court-ordered ADR "impose settlement negotiations on unwilling litigants" and when does it "provid[e] a neutral forum for discussing" settlement?[54] This language and its inherent tension have been partly responsible for widespread differences in courts' pretrial practices and, recently, wildly contradictory case law.

In January, 1988, the Seventh Circuit handed down its opinion in *Strandell v. Jackson County*.[55] The case involved a civil rights action brought by the parents of Michael Strandell against Jackson County, Illinois after the arrest, strip search, imprisonment, and suicidal death of their son.[56] At the first pretrial conference, the trial judge encouraged the parties to participate in a summary jury trial. The plaintiffs refused to consent to the procedure, and the case was set for trial.[57] At a second pretrial conference six months later, the court expressed its view that the anticipated five-to-six week trial could not be accommodated easily on its crowded docket and ordered the parties to participate in a summary jury trial.[58] On the day chosen for the summary jury trial, the parties and their counsel appeared, but the plaintiffs' attorney refused to proceed. The court held the attorney in criminal contempt. Plaintiffs' attorney appealed, arguing that the court

51. FED. R. CIV. P. 16 advisory committee notes.
52. *Id.*
53. *Id.*
54. The Civil Justice Reform Act of 1990 is not much clearer when it provides that courts may have the authority to "refer" cases to alternative dispute resolution. Does this mean "order" parties into ADR? Or does it mean that courts have only the power to "suggest" ADR?
55. 838 F.2d 884 (7th Cir. 1988).
56. *Id.* at 884.
57. *Id.* at 884-85.
58. *Id.* at 885.

lacked the power to compel a summary jury trial and maintaining that such a proceeding violated his clients' rights.[59]

The Seventh Circuit first observed that a district court has substantial power to control and manage its docket.[60] However, the court also noted that such power must be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure which "strik[e] the delicate . . . balance between the needs for judicial efficiency and the rights of the individual litigant."[61] The court then focused on Rule 16. The district court had cited subsections (c)(7) and (c)(11) as authorizing a mandatory summary jury trial.[62] The Seventh Circuit disagreed and referenced the Advisory Committee's Notes, saying: "In our view, while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation."[63] In support of its position, the court found clarity in the murky passage described above. In particular, the court asserted: "While the drafters intended that the trial judge 'explor[e] the use of procedures other than litigation to resolve the dispute,' — including 'urging the litigants to employ adjudicatory techniques outside the courthouse,' they *clearly did not intend* to require the parties to take part in such activities."[64] Ultimately, the Seventh Circuit held that Rule 16 did not give the trial court the authority to compel the parties' use of the summary jury trial.[65]

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59. *Id.*

60. *Id.* at 886.

61. *Id.* at 886-87.

62. *Id.* at 887. For the district court's opinion *see* Strandell v. Jackson County, 115 F.R.D. 333 (S.D. Ill. 1987).

63. *Strandell*, 838 F.2d at 887.

64. *Id.* (emphasis added) (quoting FED. R. CIV. P. 16 advisory committee notes). Curiously, the court also quoted a Second Circuit decision which observed: "Rule 16 . . . was not designed as a means for clubbing the parties — or one of them — into an involuntary compromise." *Id.* (quoting Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)). The use of this quote is curious because the opinion from the jury in a summary jury trial is purely advisory. Indeed, it does not appear that the trial court even planned to impose any sanctions like those used in the mandatory arbitration programs described in the text.

65. *Strandell*, 838 F.2d at 888. The court in *Strandell* also addressed the effect of a mandatory summary jury trial on the rules regarding discovery and work-product privilege. During discovery in this case, the plaintiffs had obtained statements from 21 witnesses. After discovery closed, the defendants filed a motion to compel production of the witnesses' statements. The plaintiffs responded that the statements constituted privileged work-product, and that the defendants could have obtained the information contained in the statements through ordinary discovery. The district court denied defendants' motion to compel production, finding that defendants had failed to establish "substantial need" and "undue hardship." *Id.* Based on these facts, the Seventh Circuit found that the disclosure of information required in a summary jury trial could "affect seriously" the rules regarding discovery and work-product privilege by upsetting the "carefully-crafted balance between the needs for pretrial disclosure and party confidentiality." *Id. See also In re* Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1433, 1437 (D. Colo. 1988) (although the court upheld its authority to require parties and their attorneys to discuss settlement in 20 remaining cases, the court also noted that a

District courts' reactions to the Seventh Circuit's ruling were swift and negative. The opinions in *Arabian American Oil Co. v. Scarfone*,[66] and *McKay v. Ashland Oil, Inc.*,[67] were issued three months after *Strandell*. In *Arabian American Oil Co.*, two of the defendants moved the court to excuse their participation in a court-ordered summary jury trial, alleging that there was no possibility of settlement in the case and that they wished to avoid the expenditure of time and money that the summary jury trial would require.[68] The court discussed *Strandell* and found it to be neither persuasive nor binding precedent.[69] Instead, the court examined Rule 16 and found the intent to be quite different from that divined by the Seventh Circuit:

> [Rule 16] gives the court the power to direct parties to appear before it for various purposes, including expediting the disposition of the action; facilitating the settlement of the case; and taking action in regard to matters which may aid in the disposition of the action. Rule 16 calls these procedures conferences, but what is in a name. The obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition. Whatever name the judge may give to these proceedings their purposes are the same and are sanctioned by Rule 16.[70]

Ultimately, the court denied defendants' motions to the extent that they were based upon a suggestion that the court did not have the authority to require the parties' participation in summary jury trials.[71]

In *McKay*, the court first found mandatory use of the summary jury trial valid under the "basic procedural innovation" standard and then went on to respond to *Strandell* "in a spirit of furthering constructive debate."[72] The court began by directly contradicting the Seventh Circuit:

> In the view of this court, a trial court's requiring participation in a summary jury trial is *all but expressly authorized* by these provisions of Rule 16 [subsections (a)(5), (c)(7), (c)(10) and (c)(11)] . . . . Plainly Rule 16 would authorize the trial judge to hold a final pretrial conference in the form of a condensed trial. In a summary jury trial, the court just has laymen sit in and give their reactions.[73]

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case management device can represent an abuse of discretion if "the device chosen requires parties to disclose particular strategies or evidence which would prejudice their presentations at trial.").

66. 119 F.R.D. 448 (M.D. Fla. 1988).
67. 120 F.R.D. 43 (E.D. Ky. 1988).
68. 119 F.R.D. at 448.
69. *Id.* at 449.
70. *Id.* at 448.
71. *Id.* at 449.
72. 120 F.R.D. at 46.
73. *Id.* at 48 (emphasis added).

Moreover, the court pointedly observed that the Judicial Conference of the United States "has passed a formal resolution endorsing the experimental use of summary jury trials."[74] In that resolution, the Conference "purposely . . . deleted" language limiting the experiment to voluntary summary jury trials.[75] Thus, the court concluded, "[t]he belief of the Judicial Conference that mandatory summary jury trials were authorized by the Federal Rules of Civil Procedure seems apparent."[76]

In *Federal Reserve Bank of Minneapolis v. Carey-Canada*,[77] which was decided several months later in 1988, Magistrate Janice Symchych analyzed the rationales of *Strandell*, *Arabian American Oil*, and *McKay*. *Federal Reserve Bank* was an asbestos products liability case which was expected to require four to six weeks of court time.[78] Symchych had ordered the parties to participate in a three-day summary jury trial followed by a settlement conference.[79] All of the parties requested to be excused from participation in the summary jury trial, arguing that the process would be too expensive and would not accurately reflect a jury trial because several major evidentiary rulings had not yet been made by the trial judge.[80] In addition, they insisted that the possibility of settlement was extremely remote.[81] Symchych first observed the need for active settlement activity by the court:

> Parties and attorneys are often and understandably reluctant to accept and participate in procedures outside the traditional norm. It is often difficult to focus the attention of counsel and litigants on settlement as an alternative means of resolving a case. The

74. *Id.* For text of the resolution *see* Strandell v. Jackson County, 115 F.R.D. 333, 335 (S.D. Ill. 1987). *McKay*, 120 F.R.D. at 48 n.16.

75. *McKay*, 120 F.R.D. at 48.

76. *Id.* The court also addressed the Seventh Circuit's finding that the mandatory summary jury trial violated privilege and protection of work product, saying:

> The concern of the Seventh Circuit . . . seems misplaced. Modern federal courts require a comprehensive pre-trial order, exchange of witness lists and summaries of anticipated testimony, and the listing and marking of all exhibits. Because a summary jury trial is based on facts disclosed by discovery and is to be a synopsis of the actual trial, it is hard to see how anything would be disclosed by a summary jury trial that would not be disclosed at the real trial and would not already be contained in the pretrial order, which is also an overview of the real trial. If the Seventh Circuit means that a summary jury trial prevents a litigant from saving some juicy tidbit as a surprise for the trial a la Perry Mason, the pretrial orders used by most courts are supposed to do the same thing. Trial by ambush has long since been eliminated from the federal system.

Id. See also, Federal Reserve Bank of Minneapolis v. Carey-Canada, 123 F.R.D. 603, 606 (D. Minn. 1988) ("If the Seventh Circuit implication is that a SJT [summary jury trial] prevents the litigant from saving some surprise for the trial, the Federal Rules of Civil Procedure are designed to avoid that eventuality. Trial by ambush is no longer an accepted method of practice.")

77. 123 F.R.D. 603 (D. Minn. 1988).

78. *Id.* at 607.

79. *Id.* at 603.

80. *Id.* at 604.

81. *Id.*

> need to compel the parties to address settlement, is an integral aspect of the docket management function of the court in this era of complex, protracted litigation.[82]

Symchych noted that she rejected the view of the Seventh Circuit and accepted the rationale of *Arabian American Oil* and *McKay* as a "better approach."[83] Further, like the courts in *Arabian American Oil* and *McKay*, Symchych found outright support for the courts' use of mandatory summary jury trials in Rule 16:

> The Advisory Committee Notes articulate that the obvious goal of the amendments [to the Federal Rules of Civil Procedure] was the promotion of case management of which settlement is a valuable tool. Therefore, it is difficult to reconcile the argument that Rule 16 does not permit courts to order the parties to participate in summary jury trials with the goals of that rule. It is hard to imagine that the drafters of the 1983 amendments actually intended to strengthen courts' ability to manage their caseloads while at the same time intended to deny the court the power to compel participation by the parties to the litigation.[84]

Regarding the parties' specific objections, Symchych observed that "in a case such as this, it is reasonable to require the parties to engage in settlement efforts with some degree of intensity . . . . [A]n investment of three days for the SJT [summary jury trial] when compared to a potential real jury trial lasting four-to-six courtroom weeks is reasonably proportionate."[85] She also asserted that "this court can decide crucial evidentiary issues for the purpose of the SJT proceeding."[86] Finally, based on the applicable case law, rules and responses to the parties' objections, Symchych denied the parties' request to be excused from participation in the summary jury trial.[87]

VII. Conclusion

The final word on the courts' authority to order the use of ADR as part of their pretrial practice definitely is not established. However, a pattern seems to be emerging. Most significantly, the courts generally have tended to defend their right to require parties to participate in non-binding processes — mediation, non-binding arbitration, summary jury trial — in order to encourage settlement. Whether they use the "ultimate access" standard, the "onerous condition" standard or the "basic procedural inno-

82. *Id.*
83. *Id.* at 606.
84. *Id.* at 607 (citation omitted).
85. *Id.*
86. *Id.*
87. *Id.* at 608.

vation" standard, the courts have unanimously protected court-ordered ADR against the charge that it deprives litigants of their seventh amendment rights. Similarly, with the exception of the Seventh Circuit, the courts have found that Rule 16 gives them the authority to require litigants' participation in processes designed to encourage settlement.

However, there are a few anomalies in the pattern which may represent slight or potential limitations upon courts' authority to order the use of ADR. Penalty provisions and fees may be found unconstitutional if they appear too large in relation to the amount in controversy in a case. In addition, the language of Rule 16 is ambiguous enough that courts grappling with this issue in the future *could* divine a limitation upon the extent to which they may require parties to focus on settlement. We will have to wait and see whether these limitations become more prominent and whether other patterns develop in the future.