

CIVIL PROCEDURE
CASES, PROBLEMS, AND EXERCISES
Fourth Edition

CHAPTER 9
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TABLE OF CONTENTS

TABLE OF CASES	v
Chapter 9. Alternative Dispute Resolution and Settlement	1
A. Introduction	1
B. Alternative Dispute Resolution Processes	1
1. Arbitration	1
Gilmer v. Interstate/Johnson Lane Corporation	3
Notes and Questions	9
Exercise	13
2. Mediation	14
Joseph B. Stulberg, <i>The Theory and Practice of Mediation:</i> A Reply to Professor Susskind	15
Notes and Questions	17
Exercise	18
C. Case Settlement	19
1. Judicial Settlement Conferences	19
United States v. Glens Falls Newspapers	20
Notes and Questions	23
2. Court-Annexed ADR	24
In re Atlantic Pipe Corporation	25
Notes and Questions	33
Exercise	35
D. Legal Rules That Support Settlement	36
Problems	37
Marek v. Chesny	38
Notes and Questions	46

TABLE OF CASES

The principal cases are in bold type.

African-American Slave Descendants'
Litigation, In re, 34, 35
Alexander v. Gardner-Denver Co., 3
American Express Co. v. Italian Colors
Restaurant, 11
AT&T Mobility LLC v. Concepcion, 10
Atlantic Pipe Corporation, In re,
25
Bouchard Transportation Co. v.
Florida Dept. of Environmental
Protection, 34
Chambers v. NASCO, 34
Circuit City Stores v. Adams, 9
Delta Air Lines, Inc. v. August, 43
Discover Bank v. Superior Court, 10
Gilmer v. Interstate/Johnson Lane
Corporation, 3
Glens Falls Newspapers, United
States v., 20
Hensley v. Eckerhart, 41
Hudson, United States v., 34
Marek v. Chesny, 38
National Football League
Management Council v. National
Football League Players Assoc., 13
Nick v. Morgan's Foods, Inc., 35
NLO, Inc., In re, 29
Penn Plaza LLC v. Pyett, 10
Stolt-Nielsen v. Animal Feeds, 10
Strandell v. Jackson County, 29
United Paperworkers Int'l Union,
AFL-CIO v. Misco, Inc., 12

CHAPTER 9

ALTERNATIVE DISPUTE RESOLUTION AND SETTLEMENT

■ ■ ■

A. INTRODUCTION

This Chapter explores some of the processes that are used to resolve disputes without a trial. Collectively, these processes are often called “alternative dispute resolution” or ADR. They are “alternative” in two senses. In some situations parties end their dispute using an ADR procedure without ever filing suit; in these instances, the process serves as an alternative to engaging in litigation. Parties also use ADR processes in conjunction with litigation to reach a settlement in their case; then ADR provides a method for disposing of litigation as an alternative to trial or a pre-trial judicial decision. When used this way, ADR is often intertwined with litigation procedures and strategy.

First, this Chapter examines two of the basic ADR processes: arbitration and mediation. Parties choose arbitration as a complete substitute for litigation, while they use mediation either as a substitute dispute resolution method or as a way to settle a filed case. There often is confusion over the differences between these two processes, probably due to lack of familiarity and misapplication of the labels “arbitration” and “mediation.” For lawyers to advise their clients adequately about the processes available to them, they need to understand the differences.

Second, the Chapter introduces the role of the courts in settling litigation. Judges often preside over settlement conferences or suggest that parties use an ADR process. Many courts provide parties access to one or more ADR processes and, as you will see, judges even have the power to order unwilling parties to participate. Finally, the Chapter discusses how the American system for allotting attorneys’ fees and the federal rules encourage parties to settle cases.

B. ALTERNATIVE DISPUTE RESOLUTION PROCESSES

1. ARBITRATION

Arbitration is a process of adjudication. But instead of a decision by a publically-appointed judge, the outcome of disputes are decided by a third-party neutral arbitrator, or a panel of arbitrators, who are private

individuals. The decision, called an arbitral award, is usually regarded as final, with only a very narrow opportunity for court review. The process and the arbitrator(s) are selected by the agreement of the parties either before or after they have a dispute. This agreement is the source of the arbitrator's power to decide the dispute.

Arbitration is commonly designated as the resolution process for disputes in labor relations, commercial relationships, individual employment contracts, and many consumer transactions. The parties may negotiate their own terms to govern their arbitration or select a set of procedural rules provided by organizations such as the American Arbitration Association or the International Chamber of Commerce. In addition, parties may opt to have their proceeding administered by one of these organizations.

An advantage of arbitration is that traditional arbitral procedures can make the process quicker and less expensive than litigation. The format for the process depends on the ground rules agreed to by the parties, but it is typically more informal than a court proceeding. There may be discovery, but it is usually limited. At the hearing, evidence is frequently considered without strict adherence to evidentiary rules. The parties may require an arbitrator to observe a strict deadline for delivering the award, which is often provided without any written explanation. The arbitrator can be anyone agreed upon by the parties, who may prefer a business person or an expert to a generalist judge. The parties may agree to keep the arbitration process private, which provides an important reason to choose this process for disputes they would like to keep out of the public eye. Unlike mediation or other consensual processes, arbitration assures the parties that there will be a resolution to their dispute.

Arbitration originally developed as a private adjudicatory process to resolve commercial disputes within specialized business sectors and in the twentieth century it became common in labor-management grievance processes. The courts, however, were hostile to enforcing agreements to arbitrate until 1925 when Congress passed what later became known as the Federal Arbitration Act (FAA). Even so, until fairly recently courts hesitated to enforce agreements to arbitrate statutory claims, as opposed to claims based on a contract. The reluctance had its roots in a belief that statutes would be frustrated if not adequately enforced and that arbitrators would not be as reliable as courts at enforcing statutory rights. This attitude changed beginning in 1985 in a series of cases that expanded the subject matter that parties could agree to arbitrate. First, the Supreme Court enforced an agreement to arbitrate antitrust claims in a case involving an international commercial transaction. Subsequent cases expanded statutory arbitration to domestic cases involving the Racketeer Influenced and Corrupt Organizations Act (RICO) and the 1933 and 1934 Securities and Exchange Acts. There was still doubt, however, that

arbitration was appropriate outside the commercial context for claims based on civil rights statutes. This issue was resolved in the following case. Play close attention to the arguments that the arbitration procedure is inadequate because it differs from court procedures and to the way in which the Court deals with those claims.

GILMER V. INTERSTATE/JOHNSON LANE CORPORATION

500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The Court of Appeals held that it could and we affirm.

I

Respondent Interstate/Johnson Lane Corporation (Interstate) hired petitioner Robert Gilmer as a Manager of Financial Services in May 1981. As required by his employment, Gilmer registered as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). His registration application, entitled “Uniform Application for Securities Industry Registration or Transfer,” provided, among other things, that Gilmer “agree[d] to arbitrate any dispute, claim or controversy” arising between him and Interstate “that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register.” Of relevance to this case, NYSE Rule 347 provides for arbitration of “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.”

Interstate terminated Gilmer’s employment in 1987, at which time Gilmer was 62 years of age. After first filing an age discrimination charge with the Equal Employment Opportunity Commission (EEOC), Gilmer subsequently brought suit in the United States District Court for the Western District of North Carolina, alleging that Interstate had discharged him because of his age, in violation of the ADEA. In response to Gilmer’s complaint, Interstate filed in the District Court a motion to compel arbitration of the ADEA claim. In its motion, Interstate relied upon the arbitration agreement in Gilmer’s registration application, as well as the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. The District Court denied Interstate’s motion, based on this Court’s decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), and because it concluded that “Congress intended to protect ADEA claimants from the waiver of a judicial forum.” The United States Court of Appeals for the Fourth Circuit reversed, finding “nothing in the text, legislative

history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.” We granted certiorari to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims.

II

The FAA was originally enacted in 1925, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. Its primary substantive provision 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.” 9 U.S.C. § 2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, § 3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, § 4. These provisions manifest a “liberal federal policy favoring arbitration agreements.”

It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U.S.C. §§ 1–7; § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.; and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2). In these cases we recognized that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

Although all statutory claims may not be appropriate for arbitration, “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an “inherent conflict” between arbitration and the ADEA’s underlying purposes. Throughout such an inquiry, it should be kept in mind that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”

III

Gilmer concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration. He argues, however, that compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA. Like the Court of Appeals, we disagree.

A

Congress enacted the ADEA in 1967 “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.” To achieve those goals, the ADEA, among other things, makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s age.” This proscription is enforced both by private suits and by the EEOC. In order for an aggrieved individual to bring suit under the ADEA, he or she must first file a charge with the EEOC and then wait at least 60 days. An individual’s right to sue is extinguished, however, if the EEOC institutes an action against the employer. Before the EEOC can bring such an action, though, it must “attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Chapter through informal methods of conciliation, conference, and persuasion.”

As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. “[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC’s role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information

concerning alleged violations of the ADEA “from any source,” and it has independent authority to investigate age discrimination. . . .

Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA. “[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.” Moreover, Gilmer’s argument ignores the ADEA’s flexible approach to resolution of claims. The EEOC, for example, is directed to pursue “informal methods of conciliation, conference, and persuasion,” which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress’ grant of concurrent jurisdiction over ADEA claims to state and federal courts because arbitration agreements, “like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise.”

B

In arguing that arbitration is inconsistent with the ADEA, Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration “res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,” and as such, they are “far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” Consequently, we address these arguments only briefly.

Gilmer first speculates that arbitration panels will be biased. However, “[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” In any event, we note that the NYSE arbitration rules, which are applicable to the dispute in this case, provide protections against biased panels. The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators’ backgrounds. In addition, each party is allowed one peremptory challenge and unlimited challenges for cause. Moreover, the arbitrators are required to disclose “any circumstances which might preclude [them] from rendering an objective and impartial determination.” The FAA also protects against bias, by providing that courts may overturn arbitration decisions “[w]here there was evident partiality or corruption in

the arbitrators.” There has been no showing in this case that those provisions are inadequate to guard against potential bias.

Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas, will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” Indeed, an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence.

A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions, resulting, Gilmer contends, in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. The NYSE rules, however, do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a description of the award issued. In addition, the award decisions are made available to the public. Furthermore, judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements. Finally, Gilmer’s concerns apply equally to settlements of ADEA claims, which, as noted above, are clearly allowed.⁴

It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to “damages and/or other relief.” The NYSE rules also provide for collective proceedings. But “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” Finally, it should be remembered that

⁴ Gilmer also contends that judicial review of arbitration decisions is too limited. We have stated, however, that “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute” at issue.

arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief.

C

An additional reason advanced by Gilmer for refusing to enforce arbitration agreements relating to ADEA claims is his contention that there often will be unequal bargaining power between employers and employees. Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held . . . that agreements to arbitrate in that context are enforceable. As discussed above, the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

. . . We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act. Accordingly, the judgment of the Court of Appeals is *Affirmed*.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Section 1 of the Federal Arbitration Act (FAA) states:

"[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

The Court today, in holding that the FAA compels enforcement of arbitration clauses even when claims of age discrimination are at issue, skirts the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue. In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) to binding arbitration.

. . . Not only would I find that the FAA does not apply to employment-related disputes between employers and employees in general, but also I would hold that compulsory arbitration conflicts with the congressional purpose animating the ADEA, in particular. As this Court previously has noted, authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. The ADEA, like Title VII of the Civil Rights Act of 1964, authorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act. Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief, I would conclude that an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims. . . .

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court “has effectively rewritten the statute”, and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration. Although I remain persuaded that it erred in doing so, the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other. Until today, however, the Court has not read § 2 of the FAA as broadly encompassing disputes arising out of the employment relationship. I believe this additional extension of the FAA is erroneous. Accordingly, I respectfully dissent.

NOTES AND QUESTIONS

1. *Arbitration of employment disputes.* The arbitration clause in *Gilmer* was not technically in Mr. Gilmer’s employment contract, but located instead in rules referenced in his application to register to participate on stock exchanges. Thus the majority did not consider the argument Justice Stevens raised in dissent that the FAA does not require enforcement of agreements to arbitrate in employment contracts. What are the special concerns about requiring arbitration of claims brought by an employee against his employer? Are employment discrimination claims a special case?

The issue of the FAA’s coverage for employment contracts was resolved in *Circuit City Stores v. Adams*, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001), which held that the employment exemption in § 1 of the FAA should be read very narrowly and confined to employees like seamen and railroad employees. As a result, agreements to arbitrate employment claims are, in general, enforceable and in the wake of this decision many employers have added pre-dispute arbitration clauses to their employment contracts that require employees to arbitrate all disputes related to their employment.

A collective bargaining agreement also may now commit union members to arbitrate individual disputes, including statutory civil rights claims. In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S.Ct. 1456, 173 L.Ed.2d 398 (2009), the Supreme Court held that individual employees' claims under the ADEA were arbitrable when the union contract that agreed to arbitration on behalf of its members contained a clear and unmistakable waiver of the employees' right to judicial resolution.

2. *Agreements to arbitrate.* Arbitration is a creature of contract. In addition to their traditional use in commercial relationships, agreements to arbitrate are now common not only for statutory claims and in the employment context but also for consumer complaints. Unless a party can prove a contract law defense such as fraud or duress, courts will enforce an agreement to arbitrate even when there is an imbalance of power between the parties and the agreement is a take-it-or-leave-it adhesion contract. The agreement not only substitutes an arbitrator for a judge as the decisionmaker; it also determines the scope of the issues to be decided in arbitration and the procedures to be used in the process. The primary limitation is found in the state contract law doctrine of unconscionability, which typically prevents enforcement of contracts characterized by both substantive and procedural unconscionability.

3. *Class action arbitration.* One of Mr. Gilmer's objections to arbitration for ADEA claims was the lack of broad equitable relief and class actions in arbitration. Why might a class procedure be important for enforcement of the ADEA? Since the *Gilmer* decision, there has been some development of the idea of an arbitration class action. But in *Stolt-Nielsen v. Animal Feeds*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), the U.S. Supreme Court held that arbitrators cannot interpret an arbitration clause that is silent on class action arbitration to permit the procedure. This has led to predictions that businesses will draft silent clauses and hence prevent class action arbitration in disputes with employees and consumers.

In addition to agreements that are silent on class action arbitrations, some arbitration clauses explicitly rule out the procedure. The California Supreme Court held that such provisions are unconscionable when they are used in consumer contracts of adhesion that involve small amounts of damages and it is alleged that the party with superior bargaining power inserted the provision to cheat large numbers of consumers out of small amounts of money. *Discover Bank v. Superior Court*, 36 Cal.4th 148, 113 P.3d 1100 (2005). This holding was tested and rejected in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Consumers brought a class action in federal court challenging AT&T Mobility's charge of \$32.22 in sales tax on a cell phone it advertised as "free." The company argued that the claims had to be arbitrated individually under a clause in the cell phone contract that required arbitration, but prohibited class action arbitration. Lower federal courts held that the arbitration clause was unconscionable and unenforceable under California law, but the U.S. Supreme Court reversed. It held that the FAA preempts the *Discover Bank* rule because it stands as an obstacle to

achieving the FAA's objectives. According to the majority, class arbitration, when required by the *Discover Bank* case rather than being consensual, interferes with fundamental attributes of arbitration. It sacrifices arbitration's informality and makes the process slower and more costly. And, the Court reasoned, it increases the risk to defendants. Without the multilayered judicial review that is available for court proceedings, it is more likely that errors will be uncorrected in arbitration. This risk is unacceptable when thousands of claims are aggregated.

More recently, the Supreme Court held that class action waivers are enforceable in the employment context, despite a provision of the National Labor Relations Act that gives employees a right to band together in a class when suing their employers. *Epic Systems Corp. v. Lewis*, ___ U.S. ___, 138 S.Ct. 1612, ___ L.Ed. ___ (2018). The Court found no conflict between the NLRA and the FAA's command to enforce arbitration agreements.

Other arbitration cases have suggested that parties could be excused from arbitration if the process could not provide "effective vindication" of statutory rights. In *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013), the Court found that this principle did not extend to class action waivers. Plaintiffs were not allowed to proceed with a class action claiming antitrust violations when they had signed a waiver, even though the claims would be too expensive to prove on an individual basis, and even though they claimed that Amex had used its monopoly power to compel an arbitration agreement that would preclude the enforcement of statutory rights. The bottom line is that a class action waiver in an arbitration agreement will be strictly enforced.

4. *Discovery*. Discovery in arbitration is typically curtailed compared to the procedures available in a case under the Civil Procedure system. This is one of the features of arbitration that may make it faster and less expensive than a court case. It is also one of the features of arbitration that Mr. Gilmer objected made the process unfair for his ADEA claim. Are there features of employment discrimination claims that make generous discovery particularly important for a plaintiff? Did Gilmer gain other advantages by giving up discovery under the Federal Rules of Civil Procedure?

5. *Proposals for change*. In reaction to the expansion of arbitration and the U.S. Supreme Court's interpretations of the FAA, the Arbitration Fairness Act has been repeatedly, but unsuccessfully, introduced in Congress. The Act would prevent enforcement of pre-dispute arbitration agreements that require arbitration of consumer, employment, franchise disputes, or disputes under a statute designed to protect civil rights. Would this legislation deny access to a lower-cost alternative to litigation? What is the effect of limiting the prohibition to pre-dispute agreements? If this legislation is enacted, what is a possible effect on the court system?

In response to perceived abuses in the consumer financial services industry, Congress created the Consumer Financial Protection Bureau (CFPB) in the Dodd-Frank Act in 2010. It was directed to study pre-dispute arbitration

clauses in consumer finance agreements and to regulate or prohibit such clauses if it determined that it would be in the public interest and for the protection of consumers. In 2017, the CFPB issued a regulation barring class action waivers in mandatory pre-dispute arbitration clauses in contracts for financial services and products. It did not bar mandatory pre-dispute arbitration agreements altogether, but did require reporting of arbitration cases and outcomes. The rule was disapproved by a joint resolution of Congress under the Congressional Review Act and is no longer in force.

6. *Involvement of courts in arbitration.* Although arbitration is intended as a substitute for litigation, not all arbitrations proceed without court involvement. First, a party may need to invoke the power of the courts to enforce the agreement to arbitrate the dispute, as happened in the *Gilmer* case. Under the FAA, a party can file suit seeking an order for the uncooperative party to arbitrate or, if the other party tries to litigate, can file a motion to stay the court proceedings while the case is arbitrated according to the parties' agreement.

Second, a winning party may need a court's help to enforce the arbitral award. Under the FAA, a party may "confirm" a U.S. domestic award in court within one year of the decision. Once confirmed, the award is regarded as a court judgment and may be enforced in the same manner as any judgment. There is also a system created by treaty for enforcing international arbitral awards.

7. *Court review of arbitral awards.* A losing party may seek to block confirmation and have the court vacate or modify the award. Traditionally, however, review by the courts is very narrow. As emphasized by the U.S. Supreme Court:

Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrators' view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37–38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). The FAA authorizes a court to vacate an arbitral award in certain instances of fraud or corruption, arbitrator misconduct, or where the arbitrators "exceeded their powers." Note that these grounds do not include court review of the merits of an arbitral decision. Can you think of policy reasons for the FAA's limited list of procedural grounds to vacate awards?

The narrow judicial check on arbitral awards is illustrated by the "deflate-gate" scandal involving the four-game suspension of quarterback Tom Brady of the New England Patriots for his participation in a scheme to deflate the pressure in footballs used in the 2015 American Football Conference Championship game. Brady requested arbitration, which was available under the collective bargaining agreement between the players' union and the league.

League Commissioner, Roger Goodell, served as the arbitrator and confirmed the discipline. When Brady and the union sought judicial review, the U.S. District Court vacated the award, finding fundamental unfairness and lack of notice. On appeal, however, the U.S. Court of Appeals reversed. Consistent with doctrine limiting the scope of judicial review of arbitral awards, it concluded that the Commissioner had “properly exercised his broad discretion under the collective bargaining agreement” and it reinstated the punishment. *National Football League Management Council v. National Football League Players Assoc.*, No. 15–2801 (2d Cir. 2016). The twist in this case is that the arbitrator was not a neutral party; Goodell was reviewing his own disciplinary decision. But because the collective bargaining agreement allowed this, the court found it was within his authority.

8. Although erroneous interpretations or applications of law are, in general, not grounds to vacate an arbitral award, some courts recognize a narrow common-law ground and will overturn an award if it is in “manifest disregard of the law.” This requires more than an error or misunderstanding of the law; although the courts have articulated differing interpretations of this standard, typically the record must show that the arbitrator(s) knew the law and explicitly disregarded it. Only very rarely have courts actually vacated awards under the test’s stringent standard. In addition, the meaning and continued validity of this ground is in doubt in the wake of recent decisions from the U.S. Supreme Court and the federal courts of appeal that split on the issue.

9. Are typical arbitral procedures consistent with in-depth court review? Arbitrators usually provide written opinions in labor and international commercial arbitrations, but in other arenas the award is often limited to a single sentence designating the outcome. Could a court effectively review a decision that does not provide reasons? What would be lost, or gained, if awards looked more like court opinions and contained conclusions of law and findings of fact?

EXERCISE

Check the terms of a consumer agreement you’ve entered into, such as a credit card agreement, cellular telephone agreement or computer purchase agreement. If you don’t have an actual agreement, assume you’ve just bought an electronics product of your choice, and check the terms and conditions for the product and the warranty (available on-line). You may find that you have agreed to arbitrate disputes arising out of your agreement. Use the internet to find the arbitration rules designated in the agreement or, if none are designated, the American Arbitration Association rules for consumer disputes. How do the rules compare in scope and specificity to the Federal Rules of Civil Procedure? How is the arbitrator chosen? How much will arbitration cost you? Would you prefer to litigate or arbitrate disputes of the sort covered by your agreement?

2. MEDIATION

A mediation session is an informal meeting of a mediator with the parties and, when the disputants are represented, often the parties' lawyers. Mediation is perhaps best described as "facilitated negotiation." The presiding neutral is not a decisionmaker like a judge or arbitrator, and has no power to resolve the dispute for the parties. Instead, the parties attempt to reach their own agreement with the assistance of the mediator. The process emphasizes exploring and trying to satisfy the parties' underlying interests. In some cases, an improved understanding of these interests may lead to a better relationship or bring emotional closure. The parties have flexibility in choosing the outcome; it is not necessarily a result of applying the law, but ideally responds to their particular circumstances and interests. Hence the parties' agreement may depart from the legal remedy that a court deciding the case would impose.

The mediation process is flexible and can be adapted to many different circumstances. Following pre-mediation preparation and selection of a mediator, the mediation session typically begins in a joint session with all the participants present. The mediator starts with an introduction that reviews and explains the process. Then each side presents its view of the dispute in an initial statement. This is often followed by a discussion in joint session moderated by the mediator. The mediator may break the group up and meet separately with each party for private discussions called caucuses. The full group may reconvene, or the mediator may shuttle between caucus meetings. If an agreement is reached, it is reviewed with all present and often recorded in a memorandum of understanding that is signed by the parties. If the parties do not reach an accord, the mediation is terminated and the parties may turn (or return) to other dispute resolution procedures, including litigation.

In order for the mediation process to work effectively, the parties need to be assured that they can participate freely and discuss their interests without fear that their statements will be used against them if settlement is unsuccessful and the case ends up in adjudication. Consequently, many state laws provide a privilege or other protection against disclosure of mediation communications in discovery, at trial, or in an arbitral hearing.

As with arbitration, sometimes a court needs to be brought into the process to enforce a mediated outcome. Instead of the confirmation process established for arbitral awards by the FAA, mediated agreements are typically enforced as a matter of contract law.

The following excerpt explores the characteristics of mediation through the role of effective mediators.

**JOSEPH B. STULBERG, THE THEORY AND PRACTICE OF
MEDIATION: A REPLY TO PROFESSOR SUSSKIND**

6 Vt. L. Rev. 85, 91-97 (1981)

A mediator is a catalyst. Succinctly stated, the mediator's presence affects how the parties interact. His presence should lend a constructive posture to the discussions rather than cause further misunderstanding and polarization, although there are no guarantees that the latter condition will not result. It seems elementary, but many persons equate a mediator's neutrality with his being a non-entity at the negotiations. Nothing could be further from the truth. . . . Much as the chemical term catalyst connotes the mediator's presence alone creates a special reaction between the parties. Any mediator, therefore, takes on a unique responsibility for the continued integrity of the discussions.

A mediator is also an educator. He must know the desires, aspirations, working procedures, political limitations, and business constraints of the parties. He must immerse himself in the dynamics of the controversy to enable him to explain (although not necessarily justify) the reasons for a party's specific proposal or its refusal to yield in its demands. He may have to explain, for example, the meaning of certain statutory provisions that bear on the dispute, the technology of machinery that is the focus of discussion, or simply the principles by which the negotiation process goes forward.

Third, the mediator must be a translator. The mediator's role is to convey each party's proposals in a language that is both faithful to the desired objectives of the party and formulated to insure the highest degree of receptivity by the listener. The proposal of an angry neighbor that the "young hoodlum" not play his stereo from 11:00 p.m. to 7:00 a.m. every day becomes, through the intervention and guidance of a mediator, a proposal to the youth that he be able to play his stereo on a daily basis from 7:00 a.m. to 11:00 p.m.

Fourth, the mediator may also expand the resources available to the parties. Persons are occasionally frustrated in their discussions because of a lack of information or support services. The mediator, by his personal presence and with the integrity of his office, can frequently gain access for the parties to needed personnel or data. This service can range from securing research or computer facilities to arranging meetings with the governor or President.

Fifth, the mediator often becomes the bearer of bad news. Concessions do not always come readily; parties frequently reject a proposal in whole or in part. The mediator can cushion the expected negative reaction to such a rejection by preparing the parties for it in private conversations. Negotiations are not sanitized. They can be extremely emotional. Persons can react honestly and indignantly, frequently launching personal attacks

on those representatives refusing to display flexibility. Those who are the focus of such an attack will, quite understandably, react defensively. The mediator's function is to create a context in which such an emotional, cathartic response can occur without causing an escalation of hostilities or further polarization.

Sixth, the mediator is an agent of reality. Persons frequently become committed to advocating one and only one solution to a problem. There are a variety of explanations for this common phenomenon, ranging from pride of authorship in a proposal to the mistaken belief that compromising means acting without principles. The mediator is in the best position to inform a party, as directly and as candidly as possible, that its objective is simply not obtainable through those specific negotiations. He does not argue that the proposal is undesirable and therefore not obtainable. Rather, as an impartial participant in the discussions, he may suggest that the positions the party advances will not be realized, either because they are beyond the resource capacity of the other parties to fulfill or that, for reasons of administrative efficiency or matters of principle, the other parties will not concede. If the proposing party persists in its belief that the other parties will relent, the question is reduced to a perception of power. The mediator's role at that time is to force the proposing party to reassess the degree of power that it perceives it possesses.

The last function of a mediator is to be a scapegoat. No one ever enters into an agreement without thinking he might have done better had he waited a little longer or demanded a little more. A party can conveniently suggest to its constituents when it presents the settlement terms that the decision was forced upon it. In the context of negotiation and mediation, that focus of blame—the scapegoat—can be the mediator.

. . . One way to generate a list of the desirable qualities and abilities a mediator should possess is to adopt the posture of a potential party to a mediation session and analyze the type of person that it would want in the role. The following qualities and abilities would probably be included: capable of appreciating the dynamics of the environment in which the dispute is occurring, intelligent, effective listener, articulate, patient, non-judgmental, flexible, forceful and persuasive, imaginative, resourceful, a person of professional standing or reputation, reliable, capable of gaining access to necessary resources, non-defensive, person of integrity, humble, objective, and neutral with regard to the outcome. . . .

. . . [A] mediator must be neutral with regard to outcome. Parties negotiate because they lack the power to achieve their objectives unilaterally. They negotiate with those persons or representatives of groups whose cooperation they need to achieve their objective. If the mediator is neutral and remains so, then he and his office invite a bond of trust to develop between him and the parties. If the mediator's job is to assist the parties to reach a resolution, and his commitment to neutrality

ensures confidentiality, then, in an important sense, the parties have nothing to lose and everything to gain by the mediator's intervention. In these two bases of assistance and neutrality there is no way the mediator could jeopardize or abridge the substantive interests of the respective parties.

. . . There is a variety of information that parties will entrust to a neutral mediator, including a statement of their priorities, acceptable trade-offs, and their desired timing for demonstrating movement and flexibility. All of these postures are aimed to achieve a resolution without fear that such information will be carelessly shared or that it will surface in public forums in a manner calculated to embarrass or exploit the parties into undesired movement. This type of trust is secured and reinforced only if the mediator is neutral, has no power to insist upon a particular outcome, and honors the confidences placed in him. If any of these characteristics is absent, then the parties must calculate what information they will share with the mediator, just as they do in communicating with any of the parties to the controversy.

NOTES AND QUESTIONS

1. *The role of law in mediated outcomes.* The key difference between mediation and adjudication has been summed up with the observation that in mediation pre-existing legal structures are not applied to the parties' dispute, but instead the parties produce their own structure through the process.

[T]he central quality of mediation . . . [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.

Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305, 325 (1971).

Do you think, however, that disputants in a mediation are likely to ignore completely what they would be entitled to under applicable legal structures? If your client sued for divorce in a state with a rule that each spouse receives half the marital assets, would you advise her to disregard that legal allocation rule in mediation if her spouse argues he is entitled to a larger share? One should not think of mediation as necessarily displacing legal rules, but as expanding the possible relevant considerations. For example, perhaps your client's spouse wants to keep the family home and your client has other priorities, such as accepting a new job in a different city, and she would like to retain custody of their children. Under these circumstances, how could she use the allocation rule to help satisfy her interests in mediation? Despite the flexibility to create their own norms in mediation, parties often "bargain in the shadow of the law." See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

2. *Information exchange and confidentiality.* Many of the mediator functions described by Professor Stulberg involve facilitating communication. Often this happens without direct disclosures between the parties. One of the keys to a successful mediation is the willingness of the parties to reveal information that a mediator can use to assist them in developing options for a mutually acceptable resolution. Confidentiality, which can take three separate forms in mediation, is a crucial aspect of the proceeding because it encourages the parties to be candid and forthcoming. First, the mediator is ethically bound not to reveal communications to the other side without the consent of the party who revealed the information. Second, under many statutes and court rules, communications made in mediation are privileged or otherwise protected from disclosure in court proceedings. And third, the parties can contract to keep their communications confidential from others, such as the public, press, fellow employees, etc.

3. *Mediator neutrality.* As described by Professor Stulberg, the form of mediation typically practiced in the United States places great emphasis on the neutrality of the mediator. This neutrality incorporates the same type of impartiality—freedom from favoritism, bias, or self-interest—that we expect from judges in the adversary system. In addition, a mediator is supposed to be neutral as to the outcome of the dispute. This is different from the role of a judge, who cares very much about the outcome and tries to make her decision consistent with the law. A mediator, in contrast, relies on the parties for the outcome. An important aspect of not favoring either side means not influencing the content of the agreement. Thus the mediator is supposed to be indifferent to the substantive outcome reached by the parties. Does this mean that a mediator should stand by and let parties reach an agreement the mediator thinks is unfair or unjust? What if one of the parties has an attorney and the other does not, or there is another form of imbalance of power?

EXERCISE

This is a role play simulation that contrasts the processes of arbitration and mediation. Your professor will divide you into groups of three with two designated as disputants and one as the neutral. The disputants will receive a short set of instructions for their roles. After they read the instructions, the neutral will preside over two proceedings. First, the neutral will conduct an arbitration. Each disputant will have a short period of time to present their case and argue why they should prevail, followed by questions from the arbitrator and rebuttals by each side. The arbitrator then decides who wins and records the decision, but does not share the result with the parties. Second, the neutral will conduct a mediation. The disputants will be able to discuss their situation with the help of the mediator and try to reach a resolution of their disagreement. When time is called, your professor will ask the neutrals to report the decisions they made as arbitrators and the parties to describe the agreements they reached, if any. As you conduct the exercise, monitor your reactions. Which process do you prefer and why? Which do you think is better suited to this dispute between these parties?

C. CASE SETTLEMENT

First, this section introduces settlement as a judicial function. Judges have long held settlement conferences with the parties, or they may encourage parties to use an ADR process on a private voluntary basis to attempt settlement. Second, as ADR has become more prevalent over the past few decades, many courts now offer additional settlement processes in court-sponsored programs. The materials trace the sources of authority for these programs and explore courts' powers to require parties to participate in settlement activities.

1. JUDICIAL SETTLEMENT CONFERENCES

Judicial settlement conferences are held under Rule 16, which authorizes pretrial conferences and case management techniques. As originally adopted in 1938, Rule 16 contemplated these conferences as an important step in trial preparation. Through exchange of information, plans for trial could be sharpened, issues might be simplified, and surprise could be avoided. The original rule did not mention any role for the court in encouraging the parties to settle. As the importance of this function grew over the years, however, the rule evolved to provide authority for settlement activities.

The growth in judicial settlement conferences was part of a major shift in many judges' conception of their roles. As indicated in the readings on the "vanishing trial" in Chapter 1, judges have greatly increased the work they do in the pretrial period of a case. Much of this work is managing cases to reduce their cost and the length of time to their disposition. Among other things, judges set schedules for case development, determine limits on the discovery process by deciding discovery disputes, and resolve motions. They also engage in a range of functions designed to encourage settlement. These functions include helping the parties select and plan for an appropriate ADR process, referring parties to a settlement process, or directly presiding over settlement discussions.

In 1983, Rule 16 was amended to recognize courts' increasingly common practice of using pretrial conferences as judicial settlement conferences or as a forum to discuss the possibility of using other settlement procedures in a case. After further amendment in 1993 and subsequent style revisions, Rule 16 now authorizes courts to use pretrial conferences to "consider and take appropriate action on the following matters: . . . (I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." Fed.R.Civ.P. 16(c)(2)(I). This language and other changes updating the rule were designed to make clear the judge's authority to require participation in settlement procedures even over the objection of a party. While a judge cannot coerce a party to settle, she does have authority to insist on

attendance at a settlement conference by parties who have settlement authority, not just their attorneys.

The following case reflects the extent to which settlement is an essential part of a court's functions. It also shows how settlement can modify some traditional values associated with litigation, such as public access to court processes.

UNITED STATES V. GLENS FALLS NEWSPAPERS

160 F.3d 853 (2d Cir. 1998)

BRIEANT, DISTRICT JUDGE.

. . . This litigation was commenced on September 2, 1988, when the United States of America, through the Environmental Protection Agency (the "EPA"), sued the Town of Moreau in Saratoga County, New York ("the Town"), for an order granting immediate access, pursuant to CERCLA [the Comprehensive Environmental Response, Compensation, & Liability Act (Superfund)] § 104(e)(3), 42 U.S.C. §§ 9604(e)(3) & (5), and sued General Electric Company ("GE") for an order directing GE to proceed with the balance of a response action previously approved by the EPA pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a). The Town was also named as an indispensable party defendant in connection with the response action and the State of New York intervened as a plaintiff.

The litigation concerns the Caputo/Moreau landfill located in the Town. It is alleged that between 1958 and 1968, when portions of the landfill were used as an industrial waste disposal facility, and thereafter, high levels of trichloroethylene (TCE) and other pollutants found their way from the landfill into the underlying aquifer. GE has been designated as a potential responsible party.

. . . [T]he parties have disputed whether remedies selected by the EPA complied with the applicable federal and state requirements. The State of New York, appearing by the Attorney General, objected to the EPA's failure to require that a permanent public water supply be provided, not only to the present residents whose well water was contaminated with TCE, a carcinogen, but also to those areas of the Town where such contamination would prevent future construction from being served by individual wells drawn from the same aquifer. Providing a public water supply for that portion of the Town of Moreau adversely affected by the landfill may well require participation by or consent of the adjoining Town of Queensbury and the Saratoga County Water Authority, neither of which is a party to the litigation. Since 1990, the EPA, the Attorney General of New York, the Town and GE have been negotiating a complex, global settlement which would resolve all of the issues concerning the water supply and the remediation of the landfill site and the aquifer. All of the numerous

engineering alternatives presently being considered by the parties are complex and expensive.

On March 14, 1997, there was a conference with the district court at which counsel for all parties to the record agreed that the public disclosure of draft settlement documents would endanger the settlement negotiations. They requested the court issue a confidentiality order on consent. Counsel relied on the general powers of the court to manage its caseload, and Local Rule 5.7 of The United States District Court for the Northern District of New York, which contains an express direction that pretrial and settlement statements provided to the Clerk of the District Court shall not be placed in the public file. The District Court issued the Consent Order on March 14, 1997.

On February 21, 1997, the Post Star attempted to obtain access to the draft settlement documents by means of a state court Article 78 proceeding based on New York Public Officers Law Article 6 (Freedom of Information Law), §§ 84 *et seq.* ("FOIL"). The state court denied relief as barred by the Consent Order, and did not reach the issue of access under FOIL. Thereafter, the Post Star sought to intervene in this litigation solely for the purpose of vacating the Consent Order.

The court (Judge Kahn) denied the Post Star's motion for intervention, holding:

[T]he court finds that the presumption of public access to settlement conferences, settlement proposals, and settlement conference statements is very low or nonexistent under either constitutional or common law principles. Weighed against this presumption is the strong public policy which encourages the settlement of cases through a negotiated compromise. The instant litigation is quite complex and has been pending for nine years. It is a case which has a dire need of the opportunity to reach a negotiated end. Fortunately, it appears that the long negotiations that have preceded this order have begun to yield fruit. The parties should be encouraged in that pursuit. The proposed intervenors object to private negotiations on the ground that this will leave the public with a settlement to review that is a fait accompli. In a perfect world, the public would be kept abreast of all developments in the settlement discussions of lawsuits of public interest. In our world, such disclosure would, as discussed above, result in no settlement discussions and no settlements. The argument is thus well-meaning but misplaced.

After a careful consideration of the history of these proceedings, it is the Court's opinion that granting the relief sought by the intervenors, which would open all of the settlement negotiation processes to the public, would delay if not altogether

prevent a negotiated settlement of this action. This finding alone warrants the denial of the motion.

We agree with the position taken by the district court that litigation to the ultimate end is a blunt instrument for the resolution of the complex problems presented by ordering a response to a CERCLA site, and that opening settlement negotiations in this case prior to the crafting of a tentative agreement would not be in the public interest, nor required by the Constitution or laws.

There is no question that fostering settlement is an important Article III function of the federal district courts. Every case must be dropped, settled or tried, and a principal function of a trial judge is to foster an atmosphere of open discussion among the parties' attorneys and representatives so that litigation may be settled promptly and fairly so as to avoid the uncertainty, expense and delay inherent in a trial.

. . . In addition to recognizing that federal trial judges have an important role in settling cases, we have specifically endorsed the "larger role" of the court in the resolution through settlement of suits "affecting the public interest." Where a case is complex and expensive, and resolution of the case will benefit the public, the public has a strong interest in settlement. The trial court must protect the public interest, as well as the interests of the parties, by encouraging the most fair and efficient resolution. This includes giving the parties ample opportunity to settle the case.

. . . One consideration is whether release of the materials is likely to impair in a material way the performance of Article III functions. Recognizing that fostering settlement of any case or controversy is an Article III function, and that courts have an even larger role in settling cases such as this affecting the public interest, we agree with the trial court that settlement negotiations in this case would be chilled to the point of ineffectiveness if draft materials were to be made public.

Few cases would ever be settled if the press or public were in attendance at a settlement conference or privy to settlement proposals. A settlement conference is an opportunity for the parties, with the court acting as an impartial mediator, to have a frank discussion about the value of avoiding a trial. During these colloquies the parties are often called upon to evaluate both the strengths and weaknesses of their respective cases. As the district court in this case pointed out,

At a minimum, the parties would be reticent to make any concessions at a settlement conference if they could expect that their statements would be published to the public at large. . . . Settlement positions are often extreme and should they be made public a litigant would reasonably fear being judged in the court of public opinion based upon what are nothing more than

bargaining positions. These concerns would hardly encourage negotiations. The present case, of interest to the public and the press, clearly presents the need for a private forum in which to explore settlement.

The public interest in settlement of this complex and expensive environmental clean-up case supports the trial court's decision to foster settlement and weighs heavily against the negligible to nonexistent presumption of access in this case.

... We conclude that the presumption of access to settlement negotiations, draft agreements, and conference statements is negligible to nonexistent. We also conclude that release of these discussions and documents is likely to impair materially the trial court's performance of its Article III function of crafting a settlement of this case. The need for a fair and efficient resolution through settlement of this complex, expensive, ten-year-old case of great public importance far outweighs the negligible presumption of access to settlement materials.

We have considered all of the Post Star's contentions on this appeal and have found them without merit. We affirm the order appealed from.

NOTES AND QUESTIONS

1. Perhaps somewhat ironically, the court finds that the *public* interest requires a *private* process. In its assessment of the public interest, the court is firmly convinced that the case would be better settled than tried. Do you agree? The opinion refers to trial as "a blunt instrument" for resolving the complex issues in the case. Who do you think is best positioned to select among engineering alternatives and balance cost with benefit? Would the court be able to impose a solution that includes a public water supply when it would affect neighboring towns that are not parties to the lawsuit?

2. A judicial settlement conference process is usually an informal process and the degree to which a judge is actively involved in encouraging settlement varies widely with the predilection of the judge. Some judges gently encourage settlement in general terms; others conduct a mediation, taking on the role of the mediator; yet others conduct an unstructured discussion. Often, as described in *Glen Falls Newspapers*, the parties are asked to evaluate the strengths and weaknesses of their cases and to make concessions. At the extreme, some judges may signal their views on the merits of the case to send a message that settlement would be more favorable than proceeding to trial.

3. Put yourself in the shoes of one of the parties and express in your own words the benefits of keeping the settlement negotiations confidential. Are you convinced? What is lost if the public is not privy to the proposals? On the other hand, would the settlement process be workable with full public involvement?

Parties typically prefer to keep settlement discussions private even in cases that do not attract public attention. They need to be free to make proposals, even if they are inconsistent with their litigation position, without

the fear that those proposals could be introduced in subsequent litigation if they are unable to settle the case. Federal Rule of Evidence 408 excludes certain types of settlement statements from evidence and many states have a mediation privilege that applies more broadly to protect the confidentiality of mediation statements and documents prepared for use in the mediation process.

4. One controversial issue is whether a judge should conduct a settlement conference in a case he is assigned for trial. Why might attorneys prefer to try to settle a case before a magistrate judge or a judge who would not be presiding at trial in the event the case does not settle? Would it make a difference if the settling judge would be deciding the case at a bench trial?

2. COURT-ANNEXED ADR

Many jurisdictions have now established court-based programs that provide ADR processes for litigants. The following case and notes describe the development of court-annexed ADR in the federal district courts. The program in each district was crafted for local conditions and needs, which has resulted in a great deal of variation in the menu of ADR processes available.

In addition to judicial settlement conferences and mediation, which have been discussed above, other processes district courts offer include early neutral evaluation (ENE), court-annexed arbitration, summary jury trial, and minitrial. ENE is a meeting between the parties and a neutral who is usually an expert in the subject matter of the case. Each side makes a summary presentation of the case after which the neutral makes a non-binding evaluation and recommends an efficient approach to resolving the dispute. In court-annexed arbitration, the parties make presentations before a panel of arbitrators who issue a decision. The parties can either accept the decision, settle the case on their own terms, or reject the decision and proceed *de novo* in the trial court. A summary jury trial is an abbreviated trial held in a courtroom before a judge and a jury. The jury deliberates and issues a nonbinding verdict. A mini-trial entails presentations of summaries of the evidence before representatives of the parties with settlement authority. A neutral presides over the trial-type proceeding and may give his opinion if requested, but his central role is to facilitate subsequent settlement discussions. These are all evaluative processes that can serve as a prediction of the result if the case were to proceed to trial. Perhaps even more importantly, they require the parties to focus on the case and educate them about its strengths and weaknesses. They are often followed by negotiation or mediation in which the parties use the information from the evaluative process to help them settle the case.

In addition to the ADR programs in the federal district courts, all the federal courts of appeals have mediation programs as authorized by

[Federal Rule of Appellate Procedure 33](#), and many bankruptcy courts have ADR programs as well. In state courts, the availability of ADR programs varies greatly depending on legislation and state court rules. In some states, such as Florida, mediation is fully institutionalized and routine. Courts must refer certain cases to mediation on the motion of one of the parties and may refer them on the judge's initiative. [FLA. STAT. ANN. § 44.102\(2\)](#). In other states, such as Minnesota, mediation has become an important part of the litigation culture through rules that require attorneys to discuss ADR with their clients. [MINN. GEN. R. PRAC. 114](#).

Some of the federal district court programs established by local rule authorize judges to require parties to participate in certain ADR processes whether they are willing or not. The following case considers whether there is also a broader judicial power to require parties to mediate even in the absence of such a rule.

IN RE ATLANTIC PIPE CORPORATION

[304 F.3d 135 \(1st Cir. 2002\)](#)

SELYA, CIRCUIT JUDGE.

This mandamus proceeding requires us to resolve an issue of importance to judges and practitioners alike: Does a district court possess the authority to compel an unwilling party to participate in, and share the costs of, non-binding mediation conducted by a private mediator? We hold that a court may order mandatory mediation pursuant to an explicit statutory provision or local rule. We further hold that where, as here, no such authorizing medium exists, a court nonetheless may order mandatory mediation through the use of its inherent powers as long as the case is an appropriate one and the order contains adequate safeguards. Because the mediation order here at issue lacks such safeguards (although it does not fall far short), we vacate it and remand the matter for further proceedings.

I. BACKGROUND

In January 1996, Thames-Dick Superaqueduct Partners (Thames-Dick) entered into a master agreement with the Puerto Rico Aqueduct and Sewer Authority (PRASA) to construct, operate, and maintain the North Coast Superaqueduct Project (the Project). Thames-Dick granted subcontracts for various portions of the work, including a subcontract for construction management to Dick Corp. of Puerto Rico (Dick-PR), a subcontract for the operation and maintenance of the Project to Thames Water International, Ltd. (Thames Water), and a subcontract for the fabrication of pipe to Atlantic Pipe Corp. (APC). After the Project had been built, a segment of the pipeline burst. Thames-Dick incurred significant costs in repairing the damage. Not surprisingly, it sought to recover those costs from other parties. In response, one of PRASA's insurers filed a declaratory judgment action in a local court to determine whether Thames-

Dick's claims were covered under its policy. The litigation ballooned, soon involving a number of parties and a myriad of issues above and beyond insurance coverage.

On April 25, 2001, the hostilities spilled over into federal court. Two entities beneficially interested in the master agreement—CPA Group International and Chiang, Patel & Yerby, Inc. (collectively CPA)—sued Thames-Dick, Dick-PR, Thames Water, and various insurers in the United States District Court for the District of Puerto Rico, seeking remuneration for consulting services rendered in connection with repairs to the Project. A googol of claims, counterclaims, cross-claims, and third-party complaints followed. Some of these were brought against APC (the petitioner here). To complicate matters, one of the defendants moved to dismiss on grounds that, *inter alia*, (1) CPA had failed to join an indispensable party whose presence would destroy diversity jurisdiction, and (2) the existence of the parallel proceeding in the local court counseled in favor of abstention.

While this motion was pending before the district court, Thames-Dick asked that the case be referred to mediation and suggested Professor Eric Green as a suitable mediator. The district court granted the motion over APC's objection and ordered non-binding mediation to proceed before Professor Green. The court pronounced mediation likely to conserve judicial resources; directed all parties to undertake mediation in good faith; stayed discovery pending completion of the mediation; and declared that participation in the mediation would not prejudice the parties' positions *vis-à-vis* the pending motion or the litigation as a whole. The court also stated that if mediation failed to produce a global settlement, the case would proceed to trial.

After moving unsuccessfully for reconsideration of the mediation order, APC sought relief by way of mandamus. Its petition alleged that the district court did not have the authority to require mediation (especially in light of unresolved questions as to the court's subject-matter jurisdiction) and, in all events, could not force APC to pay a share of the expenses of the mediation. . . .

Prior to argument in this court, . . . the district court considered and rejected the challenges to its exercise of jurisdiction. . . .

III. THE MERITS

There are four potential sources of judicial authority for ordering mandatory non-binding mediation of pending cases, namely, (a) the court's local rules, (b) an applicable statute, (c) the Federal Rules of Civil Procedure, and (d) the court's inherent powers. Because the district court did not identify the basis of its assumed authority, we consider each of these sources.

A. *The Local Rules*

A district court's local rules may provide an appropriate source of authority for ordering parties to participate in mediation. In Puerto Rico, however, the local rules contain only a single reference to any form of alternative dispute resolution (ADR). That reference is embodied in the district court's Amended Civil Justice Expense and Delay Reduction Plan (CJR Plan).

The district court adopted the CJR Plan on June 14, 1993, in response to the directive contained in the Civil Justice Reform Act of 1990 (CJRA), 28 U.S.C. §§ 471–482. Rule V of the CJR Plan states:

Pursuant to 28 U.S.C. § 473(b)(4), this Court shall adopt a method of Alternative Dispute Resolution (“ADR”) through mediation by a judicial officer.

Such a program would allow litigants to obtain from an impartial third party—the judicial officer as mediator—a flexible non-binding, dispute resolution process to facilitate negotiations among the parties to help them reach settlement.

D.P.R. R. app. III (R. V.). In addition to specifying who may act as a mediator, Rule V also limits the proper procedure for mediation sessions and assures confidentiality.

The respondents concede that the mediation order in this case falls outside the boundaries of the mediation program envisioned by Rule V. It does so most noticeably because it involves mediation before a private mediator, not a judicial officer. Seizing upon this discrepancy, APC argues that the local rules limit the district court in this respect, and that the court exceeded its authority thereunder by issuing a non-conforming mediation order (i.e., one that contemplates the intervention of a private mediator). The respondents counter by arguing that the rule does not bind the district court because, notwithstanding the unambiguous promise of the CJR Plan (which declares that the district court “shall adopt a method of Alternative Dispute Resolution”), no such program has been adopted to date.

This is a powerful argument. APC does not contradict the respondents' assurance that the relevant portion of the CJR Plan has remained unimplemented, and we take judicial notice that there is no formal, ongoing ADR program in the Puerto Rico federal district court. Because that is so, we conclude that the District of Puerto Rico has no local rule in force that dictates the permissible characteristics of mediation orders. Consequently, APC's argument founders.

B. *The ADR Act*

There is only one potential source of statutory authority for ordering mandatory non-binding mediation here: the Alternative Dispute Resolution Act of 1998 (ADR Act), 28 U.S.C. §§ 651–658. Congress passed

the ADR Act to promote the utilization of alternative dispute resolution methods in the federal courts and to set appropriate guidelines for their use. The Act lists mediation as an appropriate ADR process. Moreover, it sanctions the participation of “professional neutrals from the private sector” as mediators. Finally, the Act requires district courts to obtain litigants’ consent only when they order arbitration, not when they order the use of other ADR mechanisms (such as non-binding mediation).

Despite the broad sweep of these provisions, the Act is quite clear that some form of the ADR procedures it endorses must be adopted in each judicial district by local rule. *See id.* § 651(b) (directing each district court to “devise and implement its own alternative dispute resolution program, by local rule adopted under [28 U.S.C.] section 2071(a), to encourage and promote the use of alternative dispute resolution in its district”). In the absence of such local rules, the ADR Act itself does not authorize any specific court to use a particular ADR mechanism. Because the District of Puerto Rico has not yet complied with the Act’s mandate, the mediation order here at issue cannot be justified under the ADR Act.

. . . Hence, we conclude that where, as here, there are no implementing local rules, the ADR Act neither authorizes nor prohibits the entry of a mandatory mediation order.

C. *The Civil Rules*

The respondents next argue that the district court possessed the authority to require mediation by virtue of the Federal Rules of Civil Procedure. They concentrate their attention on Fed.R.Civ.P. 16, which states in pertinent part that “the court may take appropriate action[] with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule. . . .” Fed.R.Civ.P. 16(c)(9). But the words “when authorized by statute or local rule” are a frank limitation on the district courts’ authority to order mediation thereunder, and we must adhere to that circumscription. Because there is no statute or local rule authorizing mandatory private mediation in the District of Puerto Rico, Rule 16(c)(9) does not assist the respondents’ cause.

D. *Inherent Powers*

Even apart from positive law, district courts have substantial inherent power to manage and control their calendars. This inherent power takes many forms. *See* Fed.R.Civ.P. 83(b) (providing that judges may regulate practice in any manner consistent with federal law and applicable rules). By way of illustration, a district court may use its inherent power to compel represented clients to attend pretrial settlement conferences, even though such a practice is not specifically authorized in the Civil Rules.

Of course, a district court’s inherent powers are not infinite. There are at least four limiting principles. First, inherent powers must be used in a

way reasonably suited to the enhancement of the court's processes, including the orderly and expeditious disposition of pending cases. Second, inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule. Third, the use of inherent powers must comport with procedural fairness. And, finally, inherent powers "must be exercised with restraint and discretion."

. . . We begin our inquiry by examining the case law. In *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir.1987), the Seventh Circuit held that a district court does not possess inherent power to compel participation in a summary jury trial.⁵ In the court's view, Fed.R.Civ.P. 16 occupied the field and prevented a district court from forcing "an unwilling litigant [to] be sidetracked from the normal course of litigation." But the group that spearheaded the subsequent revision of Rule 16 explicitly rejected that interpretation. See Fed.R.Civ.P. 16, advisory committee's note (1993 Amendment) ("The [amended] rule does not attempt to resolve questions as to the extent a court would be authorized to require [ADR] proceedings as an exercise of its inherent powers."). Thus, we do not find *Strandell* persuasive on this point.

The *Strandell* court also expressed concern that summary jury trials would undermine traditional discovery and privilege rules by requiring certain disclosures prior to an actual trial. We find this concern unwarranted. Because a summary jury trial (like a non-binding mediation) does not require any disclosures beyond what would be required in the ordinary course of discovery, its principal disadvantage to the litigants is that it may prevent them from saving surprises for the time of trial. Since trial by ambush is no longer in vogue, that interest does not deserve protection.

Relying on policy arguments, the Sixth Circuit also has found that district courts do not possess inherent power to compel participation in summary jury trials. See *In re NLO, Inc.*, 5 F.3d 154, 157–58 (6th Cir.1993). The court thought the value of a summary jury trial questionable when parties do not engage in the process voluntarily, and it worried that "too broad an interpretation of the federal courts' inherent power to regulate their procedure . . . encourages judicial high-handedness. . . ."

The concerns articulated by these two respected courts plainly apply to mandatory mediation orders. When mediation is forced upon unwilling litigants, it stands to reason that the likelihood of settlement is diminished. Requiring parties to invest substantial amounts of time and money in mediation under such circumstances may well be inefficient.

The fact remains, however, that none of these considerations establishes that mandatory mediation is always inappropriate. There may

⁵ A summary jury trial is an ADR technique in which the opposing attorneys present their case, in abbreviated form, to a mock jury, which proceeds to render a non-binding verdict.

well be specific cases in which such a protocol is likely to conserve judicial resources without significantly burdening the objectors' rights to a full, fair, and speedy trial. Much depends on the idiosyncracies of the particular case and the details of the mediation order.

In some cases, a court may be warranted in believing that compulsory mediation could yield significant benefits even if one or more parties object. After all, a party may resist mediation simply out of unfamiliarity with the process or out of fear that a willingness to submit would be perceived as a lack of confidence in her legal position. In such an instance, the party's initial reservations are likely to evaporate as the mediation progresses, and negotiations could well produce a beneficial outcome, at reduced cost and greater speed, than would a trial. While the possibility that parties will fail to reach agreement remains ever present, the boon of settlement can be worth the risk.

This is particularly true in complex cases involving multiple claims and parties. The fair and expeditious resolution of such cases often is helped along by creative solutions—solutions that simply are not available in the binary framework of traditional adversarial litigation. Mediation with the assistance of a skilled facilitator gives parties an opportunity to explore a much wider range of options, including those that go beyond conventional zero-sum resolutions. Mindful of these potential advantages, we hold that it is within a district court's inherent power to order non-consensual mediation in those cases in which that step seems reasonably likely to serve the interests of justice.

E. The Mediation Order

Our determination that the district courts have inherent power to refer cases to non-binding mediation is made with a recognition that any such order must be crafted in a manner that preserves procedural fairness and shields objecting parties from undue burdens. We thus turn to the specifics of the mediation order entered in this case. As with any exercise of a district court's inherent powers, we review the entry of that order for abuse of discretion.

As an initial matter, we agree with the lower court that the complexity of this case militates in favor of ordering mediation. At last count, the suit involves twelve parties, asserting a welter of claims, counterclaims, cross-claims, and third-party claims predicated on a wide variety of theories. The pendency of nearly parallel litigation in the Puerto Rican courts, which features a slightly different cast of characters and claims that are related to but not completely congruent with those asserted here, further complicates the matter. Untangling the intricate web of relationships among the parties, along with the difficult and fact-intensive arguments made by each, will be time-consuming and will impose significant costs on the parties and the court. Against this backdrop, mediation holds out the

dual prospect of advantaging the litigants and conserving scarce judicial resources.

In an effort to parry this thrust, APC raises a series of objections. . . .

. . . APC posits that the appointment of a private mediator proposed by one of the parties is per se improper (and, thus, invalidates the order). We do not agree. The district court has inherent power to “appoint persons unconnected with the court to aid judges in the performance of specific judicial duties.” In the context of non-binding mediation, the mediator does not decide the merits of the case and has no authority to coerce settlement. Thus, in the absence of a contrary statute or rule, it is perfectly acceptable for the district court to appoint a qualified and neutral private party as a mediator. The mere fact that the mediator was proposed by one of the parties is insufficient to establish bias in favor of that party.

We hasten to add that the litigants are free to challenge the qualifications or neutrality of any suggested mediator (whether or not nominated by a party to the case). APC, for example, had a full opportunity to present its views about the suggested mediator both in its opposition to the motion for mediation and in its motion for reconsideration of the mediation order. Despite these opportunities, APC offered no convincing reason to spark a belief that Professor Green, a nationally recognized mediator with significant experience in sprawling cases, is an unacceptable choice. When a court enters a mediation order, it necessarily makes an independent determination that the mediator it appoints is both qualified and neutral. Because the court made that implicit determination here in a manner that was procedurally fair (if not ideal), we find no abuse of discretion in its selection of Professor Green.⁷

APC also grouses that it should not be forced to share the costs of an unwanted mediation. We have held, however, that courts have the power under Fed.R.Civ.P. 26(f) to issue pretrial cost-sharing orders in complex litigation. Given the difficulties facing trial courts in cases involving multiple parties and multiple claims, we are hesitant to limit that power to the traditional discovery context. This is especially true in complicated cases, where the potential value of mediation lies not only in promoting settlement but also in clarifying the issues remaining for trial.

The short of the matter is that, without default cost-sharing rules, the use of valuable ADR techniques (like mediation) becomes hostage to the parties’ ability to agree on the concomitant financial arrangements. This means that the district court’s inherent power to order private mediation in appropriate cases would be rendered nugatory absent the corollary power to order the sharing of reasonable mediation costs. To avoid this pitfall, we hold that the district court, in an appropriate case, is empowered

⁷ We say “not ideal” because, in an ideal world, it would be preferable for the district court, before naming a mediator, to solicit the names of potential nominees from all parties and to provide an opportunity for the parties to comment upon each others’ proposed nominees.

to order the sharing of reasonable costs and expenses associated with mandatory non-binding mediation.

The remainder of APC's arguments are not so easily dispatched. Even when generically appropriate, a mediation order must contain procedural and substantive safeguards to ensure fairness to all parties involved. The mediation order in this case does not quite meet that test. In particular, the order does not set limits on the duration of the mediation or the expense associated therewith.

We need not wax longiloquent. As entered, the order simply requires the parties to mediate; it does not set forth either a timetable for the mediation or a cap on the fees that the mediator may charge. The figures that have been bandied about in the briefs—\$900 per hour or \$9,000 per mediation day—are quite large and should not be left to the mediator's whim. Relatedly, because the mediator is to be paid an hourly rate, the court should have set an outside limit on the number of hours to be devoted to mediation. Equally as important, it is trite but often true that justice delayed is justice denied. An unsuccessful mediation will postpone the ultimate resolution of the case—indeed, the district court has stayed all discovery pending the completion of the mediation—and, thus, prolong the litigation. For these reasons, the district court should have set a definite time frame for the mediation.

The respondents suggest that the district court did not need to articulate any limitations in its mediation order because the mediation process will remain under the district court's ultimate supervision; the court retains the ability to curtail any excessive expenditures of time or money; and a dissatisfied party can easily return to the court at any time. While this might be enough of a safeguard in many instances, the instant litigation is sufficiently complicated and the mediation efforts are likely to be sufficiently expensive that, here, reasonable time limits and fee constraints, set in advance, are appropriate.

A court intent on ordering non-consensual mediation should take other precautions as well. For example, the court should make it clear (as did the able district court in this case) that participation in mediation will not be taken as a waiver of any litigation position. The important point is that the protections we have mentioned are not intended to comprise an exhaustive list, but, rather, to illustrate that when a district court orders a party to participate in mediation, it should take care to assuage legitimate concerns about the possible negative consequences of such an order.

To recapitulate, we rule that a mandatory mediation order issued under the district court's inherent power is valid in an appropriate case. We also rule that this is an appropriate case. We hold, however, that the district court's failure to set reasonable limits on the duration of the mediation and on the mediator's fees dooms the decree.

IV. CONCLUSION

We admire the district court's pragmatic and innovative approach to this massive litigation. Our core holding—that ordering mandatory mediation is a proper exercise of a district court's inherent power, subject, however, to a variety of terms and conditions—validates that approach. We are mindful that this holding is in tension with the opinions of the Sixth and Seventh Circuits in *NLO* and *Strandell*, respectively, but we believe it is justified by the important goal of promoting flexibility and creative problem-solving in the handling of complex litigation.

That said, the need of the district judge in this case to construct his own mediation regime ad hoc underscores the greater need of the district court as an institution to adopt an ADR program and memorialize it in its local rules. In the ADR Act, Congress directed that “[e]ach United States district court shall authorize, by local rule under section 2071(a), the use of alternative dispute resolution processes in all civil actions. . . .” 28 U.S.C. § 651(b). While Congress did not set a firm deadline for compliance with this directive, the statute was enacted four years ago. This omission having been noted, we are confident that the district court will move expediently to bring the District of Puerto Rico into compliance.

We need go no further. For the reasons set forth above, we vacate the district court's mediation order and remand for further proceedings consistent with this opinion. The district court is free to order mediation if it continues to believe that such a course is advisable or, in the alternative, to proceed with discovery and trial.

NOTES AND QUESTIONS

1. The District of Puerto Rico local rule discussed in *Atlantic Pipe* was adopted pursuant to the Civil Justice Reform Act of 1990 (CJRA), which was an attempt by Congress to reduce litigation costs and delay in civil cases. The legislation required the district courts to form local advisory groups to evaluate the docket and make proposals. The districts then formulated individualized civil expense and delay reduction plans. Under the plans, many districts implemented case management techniques or alternative dispute resolution programs. By 1996, over half the federal district courts offered mediation pursuant to the CJRA, making it the primary federal court ADR process. ELIZABETH PLAPINGER & DONNA STIENSTRA, *ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS* 4 (1996).

2. Congress further encouraged the development of ADR in the federal courts with the Alternative Dispute Resolution Act of 1998 (ADR Act), which directed *all* district courts to establish ADR programs. Each court must offer at least one of the ADR processes described in the introduction to this section. The Act itself does not require litigants to participate in ADR, but it requires the courts to “encourage and promote” the use of ADR, 28 U.S.C. § 651(b), and to adopt local rules to “require that litigants in all civil cases consider the use

of an alternative dispute resolution process at an appropriate stage in the litigation,” *id.* § 652(a).

3. What if a party or parties do not want to spend time and money on ADR? As indicated in *Atlantic Pipe*, with an appropriate local rule adopted pursuant to the CJRA or the ADR Act, a district court has the authority to order unwilling parties to participate in many types of ADR procedures pursuant to [Federal Rule of Civil Procedure 16](#). Without a local rule, a court may be able to rely on its inherent power. Do these powers mean that a court should exercise this authority to order parties to participate? What do you think of the concern voiced by the court in *NLO* that an ADR process may be a waste of time if the parties do not participate voluntarily?

4. The Supreme Court has defined inherent powers as those which “‘must necessarily result to our courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.’” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812)). These powers are to be “exercised with restraint and discretion,” *id.* at 44, but their scope has proved malleable, with courts relying on them in many contexts. For example, courts have recognized inherent powers to assess attorney’s fees as a sanction for misconduct, to dismiss a suit for failure to prosecute, to dismiss an action on grounds of forum non conveniens, to appoint an expert as an advisor to the judge, and to order represented parties to appear at a pretrial settlement conference, all in contexts where the Federal Rules of Civil Procedure did not provide authority. When there is a rule that governs a particular situation, however, a court should ordinarily use the rule rather than its inherent powers.

In the case of Rule 16, the text refers to using settlement procedures “when authorized by statute or local rule.” But the advisory committee’s notes explicitly leave open the question of inherent power, stating “[t]he rule does not attempt to resolve questions as to the extent a court would be authorized to require [ADR procedures] as an exercise of its inherent powers.” Do you think requiring ADR procedures over the objection of a party is a matter that *should* be left to a judge’s discretion as a matter of inherent power? Are there instead advantages to adopting local rules to govern ADR, as directed by Congress in the ADR Act? Do you agree that the need for flexibility in handling complex litigation justified the district court judge’s use of inherent powers in *Atlantic Pipe*?

5. At the beginning of its opinion, the First Circuit states that a court may use its inherent powers to order mandatory mediation if the case is “appropriate” and “the order contains adequate safeguards.” What types of cases might not be appropriate for mandatory mediation? See, e.g., *Bouchard Transportation Co. v. Florida Dept. of Environmental Protection*, 91 F.3d 1445, 1448–49 (11th Cir. 1996) (finding an abuse of discretion when the district court exercised its inherent power to order the State of Florida to mediate without first deciding the State’s claim that it was immune from suit); *In re African-*

American Slave Descendants' Litigation, 272 F. Supp. 2d 755 (N.D. Ill. 2003) (refusing request to compel mediation as premature when motions to dismiss were pending). Would *Atlantic Pipe* have been an appropriate case for court-ordered mediation if the district court had not yet resolved the question of its subject matter jurisdiction?

6. Are there desirable procedural safeguards in addition to those the court required in *Atlantic Pipe*? When a district court has adopted a local rule governing ADR, that rule can provide some safeguards on a consistent basis.

7. What constitutes compliance with a court's order to mediate? Is a party "mediating" if it attends the session with the mediator and opposing party and listens politely, but does not make any settlement offers and rejects the other party's offers without discussion? Some local court rules require "good faith participation" or "meaningful participation" by the parties. It is not always clear what that entails and it can be difficult for courts to enforce these rules. *But see Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001) (upholding district court's imposition of fines for a party's minimal participation in court-ordered mediation under a local rule that authorizes "sanctions the judge deems appropriate" if a party fails to appear, is substantially unprepared to mediate, or fails to participate in good faith). In what is undoubtedly an extreme case, defendant Joseph Francis, founder of *Girls Gone Wild*, served time in jail for criminal contempt for his abusive language and disrespectful behavior at a mediation in a civil case stemming from enticing underage girls to be videotaped. Michael D. Young, *Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars*, 25 Alternatives to High Cost Litig. 97 (2007). Francis eventually agreed to settle the case, but later sought to rescind his agreement on the ground it was made under the duress of incarceration.

8. The district court in *Atlantic Pipe* appointed a private mediator suggested by one of the parties, which the court of appeals described as "procedurally fair (if not ideal)." What effect might this method of appointment have on the mediation? Will it be easy for the mediator to establish his neutrality?

Court programs have many different designs and sources of mediators. Some courts employ mediators, others rely on volunteer lawyers trained to mediate, and yet others provide the parties a list of private mediators who meet requirements for education and experience established by the court. Do you think courts should routinely provide mediators in the way they provide judges? Should the court or the parties pay the mediator? If a court orders mediation, does it bear responsibility for the quality of the mediator?

EXERCISE

The Federal Rules of Civil Procedure provide a uniform set of procedures in all the federal district courts. At the same time, however, Rule 83 authorizes courts to adopt local rules, so long as they are "consistent with—but not duplicative of—Acts of Congress" and the Federal Rules of Civil Procedure.

Local rules provide flexibility in tailoring procedures to local conditions and litigation practices, but they also introduce inconsistencies among the districts that can pose challenges for attorneys who do not practice regularly in a particular district. The CJRA's "grass roots" approach to reform expanded the role of local rules and contributed significantly to district-to-district procedural variation. The ADR Act continued this trend.

For the district a) where you plan to practice after graduation, b) where your law school is located, or c) assigned by your professor, use the court's web site or an online research database to find the local rules. Scan the rules to get a sense of their subject matter and find the rule that governs ADR. Print the rule and bring it to class for discussion. In addition, answer the following questions.

1. What processes are included in the district's ADR program?
2. Are the processes voluntary or does the court have the authority to require parties to participate?
3. Does the rule contain procedural safeguards that you think will help ensure a fair ADR process?

D. LEGAL RULES THAT SUPPORT SETTLEMENT

Litigation involves transaction costs that are not always recovered in the remedies available in court and the desire to avoid these transaction costs can create an incentive to settle cases. In addition to monetary costs, costs in a larger sense may include emotional strain, lost future business opportunities, and time spent on litigation. In the United States, the largest component of the monetary cost of litigation is attorney's fees. In the absence of a statutory provision to the contrary, fees are allocated according to the "American Rule": each side bears its own fees. This practice is in contrast to the allocation in Great Britain where, according to the "English Rule," the loser pays the fees of the prevailing party.

In the ongoing political debate over litigation costs in the United States there have been proposals to adopt a "loser pays" approach as a way to reduce litigation and curb these costs. Economic analysis presents a far more complex picture. A survey of the economic literature on fee shifting concludes that with the current state of economic knowledge it is not possible to predict whether moving in the direction of the English Rule would raise or lower the total costs of litigation. Avery W. Katz & Chris W. Sanchirico, *Fee Shifting Litigation: Survey and Assessment*, ssrn.com/abstract=1714089 (2010).

How does the American Rule affect settlement? The economic analysis is similarly complex and does not point toward a single answer. Under some circumstances, however, forcing each party to bear its own litigation costs can increase the possibility, or size, of a possible zone for settlement. To demonstrate this possibility, assume a simplified situation in which a

plaintiff anticipates a jury award of \$500,000 (taking into account potential recoveries and estimated probabilities of those amounts), but this amount would be reduced by \$100,000 the plaintiff would have to pay in attorney's fees. The plaintiff's net recovery after trial would be \$400,000. If the defendant also values the case at \$500,000 and would spend \$125,000 to litigate through trial, the cost to the defendant will total \$625,000. In considering settlement, each party would like a result more favorable than if the case went to trial. Assume that the plaintiff's attorney has billed \$15,000 at this stage of the case and the defendant's accrued bill is \$10,000. That means if the plaintiff can recover \$415,000 in settlement now, she would avoid the need to expend \$85,000 in attorney's fees and would be in a position equivalent to her estimated result of a trial. Making a payment of \$615,000 would accomplish the same for the defendant. Thus at any settlement amount greater than \$415,000 for the plaintiff or less than \$615,000 for the defendant, each party would be better off than if it proceeded to trial. This creates a bargaining zone of possible settlement outcomes and an incentive to settle the litigation to avoid incurring the cost of attorney's fees.

Some of the other monetary costs of litigation are allocated according to Rule 54(d). These costs, enumerated in [28 U.S.C. § 1920](#), include court filing fees, jury and witness fees, photocopying costs, and expenses for a court reporter. Unless the court orders otherwise, the prevailing party submits these costs and they are charged to the losing party. Rule 68 is designed on the theory that altering this default allocation of costs can promote settlement. The following problems apply these two rules.

PROBLEMS

1. Patrick sues Denise for \$100,000 in damages due to an automobile accident. The case is in federal court under diversity jurisdiction. The jury awards only \$25,000 and there is no order regarding costs. How much money will Patrick receive if his attorney's fees are \$15,000 and his costs under § 1920 are \$2,000?

2. The case is the same except that Denise makes an offer of judgment pursuant to Rule 68 for \$30,000. Patrick declines the offer and the case proceeds to trial. The jury awards Patrick \$25,000. This time how much will he recover? (Assume \$1,500 of his § 1920 costs were incurred after the Rule 68 offer and Denise's costs after the offer totaled \$2,000.)

3. Does your answer change if Denise's lawyer made the settlement offer during a phone call with Patrick's lawyer?

4. Can Patrick make an offer of judgment under Rule 68?

5. The case is the same as in problem 2, except that the jury finds Denise not liable. Who pays what amount in costs?

In cases brought under certain U.S. statutes, fee shifting changes the normal allocation of attorney's fees through provisions that require the losing party to pay the prevailing party's fees. This is typically done in circumstances when Congress decides to encourage meritorious claims. For example, under Title VII of the Civil Rights Act, a successful plaintiff in an employment discrimination suit is awarded not only damages but also attorney's fees on the theory that such suits help eliminate discriminatory practices and thus the plaintiff is serving public purposes by acting as a "private attorney general." Another statute, the Equal Access to Justice Act, provides for awards of attorney's fees to plaintiffs who prevail in suits against the federal government "unless the position of the United States was substantially justified." This provision is designed to help level the playing field for a party opposing the vast resources of the government and to deter agencies from fighting claims when the government's position is weak.

What happens when an offer of judgment is made in a case subject to a fee shifting statute? Rule 68 is designed to encourage settlement, while fee shifting statutes are intended to encourage certain types of litigation. The Supreme Court considered the conflicting policy incentives in the following case. Chesny, the plaintiff, filed suit under 28 U.S.C. § 1983, a statute that provides remedies for violations of federal law by state officials, other persons "acting under the color of state law," and local governments. The prevailing party in a § 1983 suit may be awarded attorney's fees under 28 U.S.C. § 1988.

MAREK V. CHESNY

473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985)

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U.S.C. § 1988, when the plaintiff recovers a judgment less than the offer.

I

Petitioners, three police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against the officers in the United States District Court under 42 U.S.C. § 1983 and state tort law.

Prior to trial, petitioners made a timely offer of settlement "for a sum, including costs now accrued and attorney's fees, ONE HUNDRED THOUSAND (\$100,000) DOLLARS." Respondent did not accept the offer. The case went to trial and respondent was awarded \$5,000 on the state-

law “wrongful death” claim, \$52,000 for the § 1983 violation, and \$3,000 in punitive damages.

Respondent filed a request for \$171,692.47 in costs, including attorney’s fees. This amount included costs incurred after the settlement offer. Petitioners opposed the claim for postoffer costs, relying on Federal Rule of Civil Procedure 68, which shifts to the plaintiff all “costs” incurred subsequent to an offer of judgment not exceeded by the ultimate recovery at trial. Petitioners argued that attorney’s fees are part of the “costs” covered by Rule 68. The District Court agreed with petitioners and declined to award respondent “costs, including attorney’s fees, incurred after the offer of judgment.” 547 F.Supp. 542, 547 (N.D. Ill. 1982). The parties subsequently agreed that \$32,000 fairly represented the allowable costs, including attorney’s fees, accrued prior to petitioners’ offer of settlement. Respondent appealed the denial of postoffer costs.

The Court of Appeals reversed. 720 F.2d 474 (CA7 1983). The court rejected what it termed the “rather mechanical linking up of Rule 68 and section 1988.” *Id.*, at 478. It stated that the District Court’s reading of Rule 68 and § 1988, while “in a sense logical,” would put civil rights plaintiffs and counsel in a “predicament” that “cuts against the grain of section 1988.” *Id.*, at 478, 479. Plaintiffs’ attorneys, the court reasoned, would be forced to “think very hard” before rejecting even an inadequate offer, and would be deterred from bringing good-faith actions because of the prospect of losing the right to attorney’s fees if a settlement offer more favorable than the ultimate recovery were rejected. *Id.*, at 478–479. The court concluded that “[t]he legislators who enacted section 1988 would not have wanted its effectiveness blunted because of a little known rule of court.” *Id.*, at 479.

. . . We reverse.

II

Rule 68 provides that if a timely pretrial offer of settlement is not accepted and “the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay *the costs incurred after the making of the offer.*” (Emphasis added.) The plain purpose of Rule 68 is to encourage settlement and avoid litigation. The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits. This case requires us to decide whether the offer in this case was a proper one under Rule 68, and whether the term “costs” as used in Rule 68 includes attorney’s fees awardable under 42 U.S.C. § 1988.

A

The first question we address is whether petitioners’ offer was valid under Rule 68. Respondent contends that the offer was invalid because it lumped petitioners’ proposal for damages with their proposal for costs.

Respondent argues that Rule 68 requires that an offer must separately recite the amount that the defendant is offering in settlement of the substantive claim and the amount he is offering to cover accrued costs. Only if the offer is bifurcated, he contends, so that it is clear how much the defendant is offering for the substantive claim, can a plaintiff possibly assess whether it would be wise to accept the offer. He apparently bases this argument on the language of the Rule providing that the defendant “may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, *with costs then accrued*” (emphasis added).

The Court of Appeals rejected respondent’s claim We, too, reject respondent’s argument. We do not read Rule 68 to require that a defendant’s offer itemize the respective amounts being tendered for settlement of the underlying substantive claim and for costs.

. . . This construction of the Rule best furthers the objective of the Rule, which is to encourage settlements. If defendants are not allowed to make lump-sum offers that would, if accepted, represent their total liability, they would understandably be reluctant to make settlement offers. As the Court of Appeals observed, “many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney’s fees in whatever amount the court might fix on motion of the plaintiff.” 720 F.2d, at 477.

Contrary to respondent’s suggestion, reading the Rule in this way does not frustrate plaintiffs’ efforts to determine whether defendants’ offers are adequate. At the time an offer is made, the plaintiff knows the amount in damages caused by the challenged conduct. The plaintiff also knows, or can ascertain, the costs then accrued. A reasonable determination whether to accept the offer can be made by simply adding these two figures and comparing the sum to the amount offered. Respondent is troubled that a plaintiff will not know whether the offer on the substantive claim would be exceeded at trial, but this is so whenever an offer of settlement is made. In any event, requiring itemization of damages separate from costs would not in any way help plaintiffs know in advance whether the judgment at trial will exceed a defendant’s offer.

Curiously, respondent also maintains that petitioners’ settlement offer did not exceed the judgment obtained by respondent. In this regard, respondent notes that the \$100,000 offer is not as great as the sum of the \$60,000 in damages, \$32,000 in preoffer costs, and \$139,692.47 in claimed postoffer costs. This argument assumes, however, that postoffer costs should be included in the comparison. The Court of Appeals correctly recognized that postoffer costs merely offset part of the expense of continuing the litigation to trial, and should not be included in the calculus.

B

The second question we address is whether the term “costs” in Rule 68 includes attorney’s fees awardable under 42 U.S.C. § 1988. By the time the Federal Rules of Civil Procedure were adopted in 1938, federal statutes had authorized and defined awards of costs to prevailing parties for more than 85 years. Unlike in England, such “costs” generally had not included attorney’s fees; under the “American Rule,” each party had been required to bear its own attorney’s fees. The “American Rule” as applied in federal courts, however, had become subject to certain exceptions by the late 1930’s. Some of these exceptions had evolved as a product of the “inherent power in the courts to allow attorney’s fees in particular situations.” But most of the exceptions were found in federal statutes that directed courts to award attorney’s fees as part of costs in particular cases.

. . . The authors of Federal Rule of Civil Procedure 68 were fully aware of these exceptions to the American Rule. The Advisory Committee’s Note to Rule 54(d), 28 U.S.C.App., contains an extensive list of the federal statutes which allowed for costs in particular cases; of the 35 “statutes as to costs” set forth in the final paragraph of the Note, no fewer than 11 allowed for attorney’s fees as part of costs. Against this background of varying definitions of “costs,” the drafters of Rule 68 did not define the term; nor is there any explanation whatever as to its intended meaning in the history of the Rule.

In this setting, given the importance of “costs” to the Rule, it is very unlikely that this omission was mere oversight; on the contrary, the most reasonable inference is that the term “costs” in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 “costs.” Thus, absent congressional expressions to the contrary, where the underlying statute defines “costs” to include attorney’s fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.

Here, respondent sued under 42 U.S.C. § 1983. Pursuant to the Civil Rights Attorney’s Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. § 1988, a prevailing party in a § 1983 action may be awarded attorney’s fees “as part of the costs.” Since Congress expressly included attorney’s fees as “costs” available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This “plain meaning” interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.

Unlike the Court of Appeals, we do not believe that this “plain meaning” construction of the statute and the Rule will frustrate Congress’ objective in § 1988 of ensuring that civil rights plaintiffs obtain “‘effective access to the judicial process.’” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), quoting H.R.Rep. No. 94–1558, p. 1 (1976). Merely subjecting civil

rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress, in considering § 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for "helping to lessen docket congestion" by settling their cases out of court. See H.R.Rep. No. 94-1588, *supra*, at 7.

Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants.

To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68, however, is in no sense inconsistent with the congressional policies underlying § 1983 and § 1988. Section 1988 authorizes courts to award only "reasonable" attorney's fees to prevailing parties. In *Hensley v. Eckerhart*, *supra*, we held that "the most critical factor" in determining a reasonable fee "is the degree of success obtained." *Id.*, at 436, 103 S.Ct., at 1941. We specifically noted that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Ibid.* In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the postoffer services of his attorney. This case presents a good example: the \$139,692 in postoffer legal services resulted in a recovery \$8,000 less than petitioners' settlement offer. Given Congress' focus on the success achieved, we are not persuaded that shifting the postoffer costs to respondent in these circumstances would in any sense thwart its intent under § 1988.

Rather than "cutting against the grain" of § 1988, as the Court of Appeals held, we are convinced that applying Rule 68 in the context of a § 1983 action is consistent with the policies and objectives of § 1988.

Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives.

III

Congress, of course, was well aware of Rule 68 when it enacted § 1988, and included attorney's fees as part of recoverable costs. The plain language of Rule 68 and § 1988 subjects such fees to the cost-shifting provision of Rule 68. Nothing revealed in our review of the policies underlying § 1988 constitutes "the necessary clear expression of congressional intent" required "to exempt . . . [the] statute from the operation of" Rule 68. We hold that petitioners are not liable for costs of \$139,692 incurred by respondent after petitioners' offer of settlement.

The judgment of the Court of Appeals is *Reversed*.

[The concurring opinions of JUSTICE POWELL and JUSTICE REHNQUIST are omitted.]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The question presented by this case is whether the term "costs" as it is used in Rule 68 of the Federal Rules of Civil Procedure and elsewhere throughout the Rules refers simply to those taxable costs defined in 28 U.S.C. § 1920 and traditionally understood as "costs"—court fees, printing expenses, and the like—or instead includes attorney's fees when an underlying fees-award statute happens to refer to fees "as part of" the awardable costs. Relying on what it recurrently emphasizes is the "plain language" of one such statute, 42 U.S.C. § 1988,³ the Court today holds that a prevailing civil rights litigant entitled to fees under that statute is *per se* barred by Rule 68 from recovering any fees for work performed after rejecting a settlement offer where he ultimately recovers less than the proffered amount in settlement.

I dissent. The Court's reasoning is wholly inconsistent with the history and structure of the Federal Rules, and its application to the over 100 attorney's fees statutes enacted by Congress will produce absurd variations in Rule 68's operation based on nothing more than picayune differences in statutory phraseology. Neither Congress nor the drafters of the Rules could possibly have intended such inexplicable variations in settlement incentives. Moreover, the Court's interpretation will "seriously undermine the purposes behind the attorney's fees provisions" of the civil rights laws, *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 378 (1981) (REHNQUIST, J.,

³ Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, as amended, 42 U.S.C. § 1988. That section provides in relevant part that "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

dissenting)—provisions imposed by Congress pursuant to § 5 of the Fourteenth Amendment. . . . Finally, both Congress and the Judicial Conference of the United States have been engaged for years in considering possible amendments to Rule 68 that would bring attorney’s fees within the operation of the Rule. That process strongly suggests that Rule 68 has not previously been viewed as governing fee awards, and it illustrates the wisdom of deferring to other avenues of amending Rule 68 rather than ourselves engaging in “standardless judicial lawmaking.” *Delta Air Lines, Inc. v. August*, *supra* 450 U.S., at 378, 101 S.Ct., at 1163 (REHNQUIST, J., dissenting).

. . . As with all of the Federal Rules, the drafters intended Rule 68 to have a uniform, consistent application in *all* proceedings in federal court. In accordance with this intent, Rule 68 should be interpreted to provide uniform, consistent incentives “to encourage the settlement of litigation.” *Delta Air Lines, Inc. v. August*, *supra*, 450 U.S., at 352, 101 S.Ct., at 1150. Yet today’s decision will lead to dramatically different settlement incentives depending on minor variations in the phraseology of the underlying fees-award statutes—distinctions that would appear to be nothing short of irrational and for which the Court has no plausible explanation.

Congress has enacted well over 100 attorney’s fees statutes, many of which would appear to be affected by today’s decision. As the Appendix to this dissent illustrates, Congress has employed a variety of slightly different wordings in these statutes. It sometimes has referred to the awarding of “attorney’s fees *as part of* the costs,” to “costs *including* attorney’s fees,” and to “attorney’s fees and *other* litigation costs.” Under the “plain language” approach of today’s decision, Rule 68 will operate to *include* the potential loss of otherwise recoverable attorney’s fees as an incentive to settlement in litigation under these statutes. But Congress frequently has referred in other statutes to the awarding of “costs *and* a reasonable attorney’s fee,” of “costs *together* with a reasonable attorney’s fee,” or simply of “attorney’s fees” without reference to costs. Under the Court’s “plain language” analysis, Rule 68 obviously will *not* include the potential loss of otherwise recoverable attorney’s fees as a settlement incentive in litigation under these statutes because they do not refer to fees “as” costs.

The result is to sanction a senseless patchwork of fee shifting that flies in the face of the fundamental purpose of the Federal Rules—the provision of uniform and consistent procedure in federal courts. . . . [M]any statutes contain several fees-award provisions governing actions arising under different subsections, and the phraseology of these provisions sometimes differs slightly from section to section. It is simply preposterous to think that Congress or the drafters of the Rules intended to sanction differing applications of Rule 68 depending on which particular subsection of, *inter*

alia, the Privacy Act of 1974, the Home Owners' Loan Act of 1933, the Outer Continental Shelf Lands Act Amendments of 1978, or the Interstate Commerce Act the plaintiff happened to invoke.

. . . The Court argues . . . that its interpretation of Rule 68 “is neutral, favoring neither plaintiffs nor defendants.” This contention is also plainly wrong. As the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure has noted twice in recent years, Rule 68 “is a ‘one-way street,’ available only to those defending against claims and not to claimants.” Interpreting Rule 68 in its current version to include attorney’s fees will lead to a number of skewed settlement incentives that squarely conflict with Congress’ intent. To discuss but one example, Rule 68 allows an offer to be made any time after the complaint is filed and gives the plaintiff only 10 days to accept or reject. The Court’s decision inevitably will encourage defendants who know they have violated the law to make “low-ball” offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability. Indeed, because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery.

This sort of so-called “incentive” is fundamentally incompatible with Congress’ goals. Congress intended for “private citizens . . . to be able to assert their civil rights” and for “those who violate the Nation’s fundamental laws” not to be able “to proceed with impunity.” Accordingly, civil rights plaintiffs “‘appear before the court cloaked in a mantle of public interest’”; to promote the “*vigorous* enforcement of modern civil rights legislation,” Congress has directed that such “private attorneys general” shall not “be deterred from bringing good faith actions to vindicate the fundamental rights here involved.” Yet requiring plaintiffs to make wholly uninformed decisions on settlement offers, at the risk of *automatically* losing all of their postoffer fees no matter what the circumstances and notwithstanding the “excellent” results they might achieve after the full picture emerges, will work just such a deterrent effect.

Other difficulties will follow from the Court’s decision. For example, if a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching injunctive or declaratory relief, it is altogether unclear how the Court intends judges to go about quantifying the “value” of the plaintiff’s success. And the Court’s decision raises additional problems concerning representation and conflicts of interest in the context of civil rights class actions. These are difficult policy questions, and I do not

mean to suggest that stronger settlement incentives would necessarily conflict with the effective enforcement of the civil rights laws. But contrary to the Court's . . . discussion, the policy considerations do not all point in one direction, and the question of whether and to what extent attorney's fees should be included within Rule 68 has provoked sharp debate in Congress, in the Advisory Committee on the Federal Rules, and among commentators. The Court has offered some interesting arguments based on an economic analysis of settlement incentives and aggregate results. But I believe Judge Posner had the better of this argument in concluding that the incentives created by interpreting Rule 68 in its current form to include attorney's fees would "cu[t] against the grain of section 1988," and that in any event a modification of Rule 68 to encompass fees is for Congress, not the courts.

NOTES AND QUESTIONS

1. Calculate what Chesny, the plaintiff, might have received if the Court had affirmed the Seventh Circuit and the District Court had granted an award of full attorney's fees. Compare it to what he received under the Court's holding.

2. Under Rule 68, what was Chesny obligated to pay in costs? The Court interprets the plaintiff's "costs" for purposes of Rule 68 as including attorney's fees because it imports the definition of "costs" from § 1988. Does this mean that Chesny had to pay the defendants' post-offer attorney's fees? Read § 1988 (in footnote 3 of Justice Brennan's dissent) again carefully. How is it different from the English Rule?

3. Rule 68 has been described as "the defendant's best friend." Why? On the issue of its neutrality, economic analysis supports the dissent's view that the rule favors defendants. *See e.g.*, Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. Legal Stud. 93 (1986).

4. *Marek v. Chesny* describes Rule 68 as establishing a "clear policy of favoring settlement of all lawsuits" and some scholars claim that the whole structure of the litigation system reveals a "preference for private ordering." Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. Rev. 1, 4 (1996). As you proceed through the civil procedure course, try to think how each procedural rule affects settlement incentives and strategy.