# The Inherent Power of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution

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## INTRODUCTION

Consulting firms on a project to construct, operate, and maintain the North Coast Superaqueduct Project sued the general contractor, subcontractors, and insurers to recover their fees after a segment of the pipeline burst.[1] The litigation quickly ballooned.[2] Twelve parties became involved, plus "a welter of claims, counterclaims, cross-claims, third party claims" and a myriad of issues arose.[3] To further complicate matters, one party moved to dismiss for failure to join an indispensable party whose presence would destroy the diversity jurisdiction of the federal court.[4] In an effort to resolve this complex case, the district judge ordered the parties to mediation.[5]

In response, one of the parties, a defendant subcontractor, unsuccessfully moved for reconsideration of the mediation order.[6] The subcontractor then filed a mandamus petition arguing that the district court lacked the authority to order mediation.[7] In this case, no local rules or statutes authorizing court-compelled Alternative Dispute Resolution (ADR) participation[8] were yet in place, so the requested mandamus petition raised the issue of whether the district courts possess the inherent power to compel unwilling litigants to participate in nonbinding methods of ADR.

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1. *In re* Atlantic Pipe Corp., 304 F.3d 135, 138 (1st Cir. 2002).
2. *Atlantic Pipe Corp.*, 304 F.3d at 139.
3. *Id.* at 145.
4. *Id.* at 139.
5. *Id.*
6. *Id.*
7. *Atlantic Pipe Corp.*, 304 F.3d at 139.
8. *See* Alternative Dispute Resolution Act, 28 U.S.C. § 651(b) (2003). "Each United States District court shall devise and implement its own [ADR] program, by local rule . . . to encourage and promote the use of [ADR] in its district." *Id.*

In *In re Atlantic Pipe Corp.*,[9] the case detailed above, the First Circuit held that federal district courts have the inherent power to mandate nonconsensual, nonbinding ADR.[10] Courts that adopt this holding reason that the inherent power of the courts to manage their dockets and caseloads gives the courts the authority to compel unwilling litigants to participate in ADR. Conversely, other courts have held that the district courts do not have the inherent authority to order unwilling litigants to participate in ADR processes.[11] These courts narrowly construe inherent power and believe that this power does not give courts the authority to compel parties into nonbinding ADR processes.

This article argues that the federal district courts have the inherent authority to compel litigants to participate in nonbinding ADR processes, when local statutes or rules are not in place to authorize such compulsion. There are five reasons why the courts have the inherent power to compel participation in ADR processes. First, the federal courts' inherent powers are necessary to manage the courts' affairs. Second, inherent powers are key to achieving the orderly and expeditious disposition of cases.[12] Third, the courts' inherent powers are strong, giving courts the ability to control the conduct of those appearing before them.[13] Fourth, the use of ADR eases crowded dockets by fostering settlement.[14] Fifth, all civil cases are to use ADR processes.[15] Since courts have strong inherent powers that are key to efficiently managing their proceedings and ADR is an effective case management technique that is to be used in all civil cases, then courts must have the inherent power to compel participation in nonbinding ADR.

Part I of this article explores the possible sources of court authority to compel litigants into ADR processes. Part II examines the federal circuit split on inherent authority. Part III argues that

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9. 304 F.3d 135 (1st Cir. 2002).

10. *Atlantic Pipe Corp.*, 304 F.3d at 145.

11. *See, e.g.*, *In re* NLO, Inc., 5 F.3d 154, 158 (6th Cir. 1993) (holding that federal district courts do not have the inherent power to compel ADR participation).

12. Link v. Wabash Railroad Co., 370 U.S. 626, 631 (1962).

13. Chambers v. NASCO, Inc., 501 U.S. 32, 33 (1991).

14. *In re* Novak, 932 F.2d 1397, 1404 (11th Cir. 1991). The court in *Novak* praised the use of ADR by holding that ADR fosters settlement which in turn results in savings in costs and judicial resources and allows the court to efficiently manage their dockets. *See id.* In this case, the court held that Federal Rule of Civil Procedure 16(a), authorizing the courts to direct attorneys or pro se litigants to appear before it for pretrial conferences, did not authorize the court to order an insurer for the defendant to appear at the pretrial conference. *Id.*

15. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (2003).

federal courts necessarily possess the inherent powers to compel parties to participate in ADR processes based on the inherent power to manage and control their docket. Part IV proposes two possible ways to clarify the courts' inherent powers. Part V concludes.

## I. BACKGROUND: SOURCES OF JUDICIAL POWER

There are four potential sources of judicial authority for empowering courts to order mandatory non-binding mediation of pending cases: (1) The Federal Rules of Civil Procedure, (2) Civil Justice Reform Act of 1990, (3) Alternative Dispute Resolution Act of 1998, and (4) the court's inherent powers. Each source will be discussed in turn.

### *A. Rule 16 of the Federal Rules of Civil Procedure*

As adopted in 1938, Rule 16 of the Federal Rules of Civil Procedure authorized federal district courts to direct the attorneys for the parties to appear in a court conference to consider matters to aid in the disposition of cases.[16] Primarily, these conferences were used to simplify the issues and plot the course of the lawsuit.[17] In 1983, Rule 16 was significantly amended to grant express authority to federal district courts to consider settlement and the use of ADR in resolving cases. In 1993, Rule 16 was further amended to define and clarify the power of federal courts to compel unwilling litigants into nonbinding forms of ADR. Each amendment and its subsequent effect will be discussed.

#### *1. The 1983 Amendment*

Federal Rule of Civil Procedure 16 was amended in 1983 to grant express authority to federal district courts at pretrial conferences to consider settlement and the use of special procedures to assist in resolving disputes.[18] The amendment gave courts discretion to direct the parties' attorneys and any unrepresented parties "to appear before [them] for a conference or conferences before trial for such purposes as . . . facilitating the settlement of the

16. FED. R. CIV. P. 16 (1938) (Rule 16 has since been amended in 1983 and 1993).

17. *See* FED. R. CIV. P. 16 advisory committee's note (1938) (Rule 16 has since been amended in 1993).

18. FED. R. CIV. P. 16(a), (c) (1983) (Rule 16 has since been amended in 1993).

case."[19] Ambiguity was caused by the deletion of a previous draft of the Judicial Conference Report, to the 1983 amendment, containing the phrase "only with the voluntary consent of the parties."[20] Following adoption of the amendment, some courts held the deletion indicated that the district courts could compel ADR participation; other courts held it did not.

The Seventh Circuit decision of *Standrell v. Jackson County, Ill.*[21] exemplified the courts that held the 1983 version of Rule 16 did not authorize the court to compel nonconsensual ADR. This case was a civil rights action brought by the Strandells, the parents of decedent, Michael Strandell, against Jackson County, Illinois.[22] Jackson County had arrested, strip-searched, and imprisoned Michael, who was being held as a pretrial detainee; Michael committed suicide following his detainment.[23] During a pretrial conference, the district court ordered the parties to participate in a summary jury trial, a type of ADR.[24] The plaintiffs, the Strandells, refused to participate in the ADR for fear the process would divulge privileged statements.[25] The district court rejected this argument, holding the Strandells' attorney in criminal contempt and fining him $500 for refusing to proceed with the summary jury trial.[26] The attorney appealed, arguing that the district court lacked the power to compel a summary jury proceeding.[27]

The Seventh Circuit held that the 1983 version of Rule 16 alone, with no local rules or statutes to authorize compulsion in ADR, did not authorize the court to compel participation in a nonbinding summary jury trial.[28] The court concluded that the intent of Rule 16 was to foster the use of ADR techniques, but Rule 16 did not require that unwilling litigants be sidetracked from the courts of litigation and into ADR techniques.[29] Thus, the *Strandell* decision narrowly construed the powers of the courts under Rule 16.

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19. FED. R. CIV. P. 16(a) (1983) (Rule 16 has since been amended in 1993).
20. Federal Reserve Bank of Minn. v. Carey-Canada, Inc., 123 F.R.D. 603, 608 (Minn. Cir. 1998) (interpreting the deletion of the words "only with the voluntary contest" to indicate that compelled participation was consistent with the amendment).
21. 838 F.2d 884 (7th Cir. 1987).
22. *Strandrell*, 838 F.2d at 884.
23. *Id.*
24. *Id.* at 885.
25. *Id.*
26. *Id.*
27. *Strendrell*, 838 F.2d at 884.
28. *Id.*
29. *Id.* at 887.

However, in the 1988 decision of *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*,[30] the United States District Court for the District of Minnesota held that a district court had the power to compel participation in a nonbinding summary jury trial in light of the court's inherent powers and Rule 16.[31] This products liability case arose from the defendant's fire-proofing of the building with asbestos-containing products.[32] The plaintiff alleged property damage and subsequent damage to the health of its employees from the asbestos exposure.[33] The district court ordered the parties to participate in a summary jury trial.[34] Both parties requested to have their participation excused because of the costs of the procedure.[35] Their requests were denied.[36]

In denying the request, the court held that district courts have the ability under Rule 16 and the courts' inherent power to compel ADR participation.[37] This court interpreted the deletion of a previous draft of the Judicial Conference Report[38] to mean that compelled participation in summary jury trial was consistent with the Federal Rules of Civil Procedure.[39] Thus, the court in *Carey-Canada, Inc.* broadly interpreted the power authorized by Federal Rule 16 by holding the court could compel nonbinding ADR participation.

Similarly, in the 1988 decision of *Arabian American Oil Co. v. Scarfone*,[40] the United States District Court for the Middle District of Florida held that Federal Rules of Civil Procedure Rules 16(a)(1), 16(a)(5), and 16(c)(11) were a basis to compel unwilling litigants to use summary trial procedures.[41] In this civil case, the court evaluated the defendants' motion to be dismissed from participation in a court-ordered summary jury trial.[42] In praise of ADR techniques, the court noted that even if the pretrial sum-

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30. 123 F.R.D. 603 (Minn.Cir. 1998).
31. *Carey-Canada, Inc.*, 123 F.R.D. at 608.
32. *Id.* at 603.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Carey-Canada, Inc.*, 123 F.R.D. at 603.
37. *Id.* at 604.
38. *See Carey-Canada, Inc.*, 123 F.R.D. at 608 (interpreting the deletion of the words "only with the voluntary consent" to indicate that compelled participation was consistent with the amendment).
39. *Carey-Canada, Inc.*, 123 F.R.D. at 607.
40. 119 F.R.D. 448 (M.D. Fla. 1988).
41. *Scarfone*, 119 F.R.D. at 448.
42. *Id.*

mary procedures do not achieve settlement, the value of the procedures are immeasurable to the later binding trial since parties come more fully prepared because the summary jury procedure crystallizes the issues and the proof.[43] The court also held that summary jury trials do not abolish the parties' rights because the parties are still entitled to a trial if the ADR does not lead to settlement.[44] Thus, *Scarfone* is another case that broadly interpreted the power authorized by the 1983 amendment to Federal Rule 16 and the courts' inherent power.

Following the 1983 amendment of Rule 16, some courts held that Rule 16 and the courts' inherent powers gave the courts the power to compel nonbinding ADR; other courts held Rule 16 and the courts' inherent powers did not. To address this conflict of authority, Rule 16 of the Federal Rules of Civil Procedure was further amended in 1993.

### 2. *1993 Amendment*

Congress most recently amended Rule 16 in 1993. The Advisory Committee Notes to the amendment stated that the goal of the changes was to eliminate questions regarding the authority of the court to facilitate settlement.[45] The present form of Rule 16(a) empowers federal courts, in their discretion, to direct the attorneys for the parties and pro se parties to appear before them for pretrial conferences that are designed to expedite the disposition of the action, which include facilitating settlement.[46] Rule 16(c)(9) further permits courts to take appropriate action, with respect to the "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."[47] Thus, Rule 16 is used in conjunction with local statutes or rules to compel litigants into nonbinding forms of ADR.

The federal courts have consistently interpreted the 1993 amendment as a direct limit on the courts' power under Rule 16 in that courts must rely on local rule or statute to compel unwilling litigants to participate in ADR. An example is the 1996 decision of *State of Ohio v. Louis Trauth Dairy, Inc.*,[48] in which the United

43. *Id.* at 449.
44. *Id.*
45. FED. R. CIV. P. 16 advisory committee's notes. *See also*, State of Ohio v. Louis Trauth Dairy, Inc., 164 F.R.D. 469, 470 (S.D. Ohio 1996).
46. FED. R. CIV. P. 16(a)(1), (5).
47. FED. R. CIV. P. 16(c)(9).
48. 164 F.R.D. 469 (S.D. Ohio 1996).

States District Court for the Western Division of Ohio held that Rule 16 must work in conjunction with a statute or local rule to compel ADR participation.[49]

This case was brought by the State of Ohio alleging price fixing by the dairies.[50] The court ordered the parties to participate in a summary jury trial.[51] The defendants moved to be excused from the proceedings.[52] The motion was denied because, in Ohio, a local rule authorized the discretion of the court to "assign any civil case for a summary jury trial, mandatory, non-binding arbitration hearing, settlement week conference, or other alternative method of dispute resolution."[53] Therefore, the local rule authorized the court to compel the litigants into ADR.[54]

The amended version of Rule 16 may have addressed the courts' power to compel litigants to participate in ADR under Rule 16, but it did not resolve the issue of the courts' inherent powers to compel nonbinding forms of ADR. The Advisory Committee's Notes to the 1993 amendment state the 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."[55] Thus, the inherent powers of the court to compel ADR participation are not defined or limited by Rule 16.

### *B. Local Rules Adopted Under the Civil Justice Reform Act of 1990*

A second potential source of judicial authority to order parties to participate in nonbinding ADR is the Civil Justice Reform Act (CJRA) of 1990.[56] The CJRA required every federal district across the country to develop and implement a civil justice plan to reduce the costs and delay of civil justice within the district.[57] In developing the CJRA, Congress made two key decisions regarding civil justice reform within the federal system.[58] The first was that the

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49. *Louis Trauth Dairy, Inc.*, 164 F.R.D. at 470-71.
50. *Id.* at 469.
51. *Id.* at 470.
52. *Id.*
53. *Id.* at 471 (quoting Southern District of Ohio Local Rule 53.1).
54. *Louis Trauth Dairy, Inc.*, 164 F.R.D. at 471.
55. FED. R. CIV. P. 16 advisory committee's note.
56. Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1990).
57. *Id.*
58. Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165, 173 (1992).

reform was to be accomplished locally and was to be based on the recommendations of district-wide community advisory groups that would be comprised of not only federal court personnel but also the lawyers and clients.[59] The second decision made by Congress supported increased judicial case management, more extensive than the pretrial conferences required by the Federal Rules.[60]

Supporting the creation of the CJRA, Congress found that the use of ADR should be expanded and that ADR should be used in civil litigation.[61] The Advisory Group that was formed under the CJRA created The Subcommittee on Alternate Dispute Resolution to expand the use of ADR.[62] The Subcommittees' job was to evaluate the types of ADR and how best to use them in settlement.[63] Thus, the CJRA was designed to increase use of ADR, noting ADR as one way to reduce the costs and delays of civil litigation.

Although the CJRA was created with a sunset provision and has expired, many districts continue to apply local procedures that they adopted under the CJRA.[64] These procedures are authorized to continue under the Alternative Dispute Resolution Act of 1998.[65]

In *Atlantic Pipe Corp.*, the First Circuit stated that these local rules, created under the CJRA, may provide authority to order participation in nonbinding ADR processes.[66] The court noted that the District of Puerto Rico adopted a plan to institute a method of ADR pursuant to the CJRA, but the creation of local rules or statutes regarding ADR never occurred.[67] Without the local rules, CJRA does not authorize the court to compel parties to participate in nonbinding ADR processes.[68] Thus, the CJRA, like Rule 16, does not resolve the issue of whether the federal district courts have the inherent authority to compel ADR participation.

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59. *Id.*
60. *Id.* at 174.
61. *Id.* at 173.
62. *Id.* at 178-79.
63. Mullenix, *supra* note 53, at 179.
64. Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J. L. REFORM 887, 891 (1998).
65. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(c) (2003).
66. *Atlantic Pipe Corp.*, 304 F.3d at 140.
67. *Id.* at 140-41.
68. *Id.* at 141.

### C. *The Alternative Dispute Resolution Act of 1998*

Another source of judicial authority is the Alternative Dispute Resolution Act of 1998 (ADR Act).[69] The ADR Act provides broad authority for federal district courts to develop ADR programs.[70] The Act requires every district court to devise and implement its own ADR program and to require litigants in all civil cases to use an ADR process.[71] The Act also allows existing programs to continue, like those formed following the CJRA, as long as the programs are effective and meet the purpose of the statute.[72] The provisions do not provide guidance as to the proper role of ADR alongside traditional adjudication, and tremendous discretion is left to the courts as to which forms of ADR are suitable and how to structure the procedures.[73] The Act also gives the courts the discretionary power to adopt local rules or statutes that work in conjunction with the Act to compel participation in nonbinding ADR processes.[74]

Under the Act, many states have enacted some form of mandatory mediation, by local rule or statute, to empower courts to compel participation by litigants. Indiana,[75] North Carolina,[76] Delaware,[77] Louisiana,[78] Alabama,[79] Montana,[80] Maine[81] and Texas[82] all have adopted various types of mandatory mediation programs designed to address various civil actions in the courts.[83] Many states mandate mediation for family law disputes by adopting a local rule or statute under the ADR Act.[84] Both Kentucky[85] and Califor-

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69. The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2003).
70. Caroline Harris Crowne, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1768 (2001).
71. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (2003).
72. *Id.* at § 651(c).
73. Crowne, *supra* note 69, at 1793.
74. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (2003).
75. IND. CODE § 2.2 (2003).
76. N.C. GEN. STAT. § 7A-38.1 (1999).
77. DEL. CODE ANN. tit. § 7702 (2003).
78. LA. REV. STAT. ANN. § 9:4108 (West 2000).
79. ALA. CODE § 6-6-20 (2003).
80. MONT. CODE ANN. § 54 (2003).
81. ME. REV. STAT. ANN. tit. 19-A, § 251 (West 1998).
82. TEX. CIV. CODE ANN. §154.021 (Vernon 2003).
83. Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 374-77 (2001).
84. *Id.* at 378.
85. KY. REV. STAT. ANN. §403.036 (2003).

nia[86] have adopted some form of court-mandated mediation for family law disputes such as child custody and/or divorce.[87]

Despite the broad sweeping provisions of the Act, authorization under the Act to compel litigants to participate in ADR is limited to local rule.[88] Absent a local rule, the Act itself does not authorize any court to compel ADR.[89] Although the power to compel ADR under the Act is limited, the Act does not refer to the courts' inherent powers. Thus, like Rule 16 and the CJRA, the ADR Act does not conclusively resolve the issue of whether the courts' inherent power can compel parties to participate in nonbinding forms of ADR.[90]

### *D. Inherent Powers*

The courts' inherent powers are the fourth possible source of judicial authority to compel ADR participation. The Supreme Court has defined inherent powers as those powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[91] The courts' inherent powers are non-specified, and these powers have not been specifically granted.[92] Instead, the federal courts' inherent powers are implied by Article III of the Constitution, which grants express authority to the federal judges.[93] The grant implies that they have ancillary inherent powers that are essential to exercise their enumerated ones.[94] These vaguely defined powers are the inherent powers of the court.

Traditionally, the inherent powers of the court have concerned docket management.[95] Docket management concerns include consolidating cases, scheduling trial dates, granting continuances and

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86. CAL. FAM. CODE § 3170 (West 2000).

87. Streeter-Schaefer, *supra* note 82, at 379-80.

88. *Atlantic Pipe Corp.*, 304 F.3d at 141.

89. *Id.*

90. *Id.* at 142. The First Circuit noted that under the Act, the courts' power to authorize compulsory ADR participation was limited to those jurisdictions where a formal ADR program had been established by rule or statute. *Id.* However, the Act did not strip the courts of their inherent power to compel such participation. *Id.*

91. *Chambers*, 501 U.S. at 43 (citing United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812)).

92. Robert J. Pushaw, Jr., *The Inherent Powers of Federal courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738 (2001).

93. *Id.* at 847.

94. *Id.*

95. *Id.* at 760-61.

recesses,[96] dismissing cases for failure to prosecute[97] or for failing to comply with the courts' orders,[98] sanctioning parties,[99] and appointing special masters to assist in fact-finding.[100] The courts have also used their inherent powers to compel parties to participate in ADR processes. If a litigant does not participate in court-ordered ADR, then the litigant is charged with failure to prosecute.[101] Thus, the district courts' inherent powers authorize a variety of tools to facilitate control over cases. A discussion of cases relevant to inherent powers will follow.

In *Link v. Wabash Railroad Co.*,[102] the Supreme Court broadly interpreted the inherent powers of the federal courts. This case grew out of a collision between the plaintiff's car and the defendant's train.[103] After six years of litigation, and following the previous postponement of two trial dates by the defendant's unsuccessful motion for judgment on the pleadings, the district court notified both litigants' attorneys that a pretrial conference was set to be held.[104] On the day of the conference, the plaintiff's counsel notified the judge's secretary that he could not be there because he was doing some paper work, but he could be there the next afternoon or anytime the following day.[105] The court reviewed the case and found the counsel did not show good reason for the nonappearance.[106] In an exercise of the court's inherent power, the court dismissed the action for failure to prosecute.[107] The plaintiff appealed, the Seventh Circuit affirmed,[108] and the Supreme Court granted certiorari.[109]

In resolving the case, the Supreme Court held that federal courts have the inherent power to dismiss a case because of failure to prosecute.[110] This ability, held the Court, is necessary to prevent undue delays in the disposition of cases and to avoid backup

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96. *Id.* at 760.
97. Link v. Wabash Railroad Co., 370 U.S. 626, 636 (1962).
98. Woodson v. Surgitek, Inc., 57 F.3d 1406, 1406 (5th Cir. 1995)
99. Baker v. Rivair Flying Service, Inc., 744 F.2d 1438, 1442 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 2016 (1985).
100. Reilly v. United States, 863 F.2d 149, 156 (1st Cir. 1988).
101. Pushaw, *supra* note 91, at 762.
102. 370 U.S. 626 (1962).
103. *Link*, 370 U.S. at 627.
104. *Id.*
105. *Id.* at 627-28.
106. *Id.* at 628-29.
107. *Id.* at 629.
108. Link v. Wabash Railroad Co., 291 F.2d 542 (7th Cir. 1961).
109. 368 U.S. 918 (1961).
110. *Link*, 370 U.S. at 629.

in the courts' dockets.[111] The Supreme Court also noted that inherent powers are essential in order to achieve the orderly and expeditious disposition of cases.[112] By holding that inherent powers are essential and that they allow district courts to terminate a parties' constitutional right to trial, the Court indicated that inherent powers are strong.

The Court in *Link* held that the Federal Rules of Civil Procedure do not limit the courts' inherent powers unless a Rule specifically references a direct limitation on the courts power.[113] The Court stated that Rule 41(b)[114] was not created to abrogate the inherent power of the courts to clear their calendars of cases gone dormant because of the inaction of parties.[115] This holding denoted that the rule does not abrogate the inherent powers of the courts by mere negative implication.[116]

In *Chambers v. NASCO, Inc.*,[117] the Supreme Court again broadly construed the district courts' inherent powers. This case was brought by a purchaser, NASCO, for specific performance of a contract with Chambers to sell a television station to NASCO.[118] Specific performance was decreed by the district court and Chambers appealed.[119] Then, Chambers engaged in a series of actions to "frustrate the sale's consummation."[120] On appeal, the court affirmed the judgment for NASCO and remanded the case.[121] On remand, the district court, relying on its inherent power, imposed sanctions against Chambers for attorney's fees and expenses for nearly one million dollars for frivolous appeal.[122] Chambers appealed to the Supreme Court, which granted certiorari.[123] Two holdings from *Chambers* are relevant to the inherent power of the courts, and each will be discussed in turn.

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111. *Id.*
112. *Id.*
113. *Id.* at 630.
114. FED. R. CIV. P. 41(b). Rule 41(b) states that the defendant may move for failure to prosecute, but the rule makes no mention of the courts' sua sponte ability to dismiss the case for failure to prosecute. *See id.*
115. *Link*, 370 U.S. at 631.
116. *See id.* at 630.
117. 501 U.S. 32 (1991).
118. *Chambers*, 501 U.S. at 32.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* In addition to frivolous appeal, the sanctions also addressed acts of fraud and attempts to reduce NASCO to exhausted compliance. *Id.*
123. 498 U.S. 807 (1990).

First, the Supreme Court held that federal courts sitting in diversity could assess attorney fees as a sanction for bad-faith conduct, even without applicable rules or statutes under state law.[124] The Court held that the district courts may use their inherent power if neither statutes nor rules are "up to the task."[125] The court further noted that the Federal Rules of Civil Procedure did not displace the inherent power of the courts to impose sanctions.[126] Therefore, if the rules or statutes do not facilitate the courts' ability to control their affairs, then the courts may rely on their inherent powers to do so.

Second, the Supreme Court held that the federal courts have the "inherent power to manage their own proceedings and to control the conduct of those who appear before them."[127] This power may be used to punish conduct of those who abuse the judicial process.[128] The ability to control the parties to litigation denotes that the courts' inherent powers are quite strong.

Similarly, many circuit decisions have broadly construed the courts' inherent powers. In *Baker v. Rivair Flying Serv., Inc.*,[129] the United States Court of Appeals for the Tenth Circuit held that the district court had the inherent power to sanction the attorneys for contumacious behavior, even before Rule 16 was amended to authorize such sanctions.[130]

In *Woodson v. Surgitek, Inc.*,[131] the United States Court of Appeals for the Fifth Circuit indicated that the courts' inherent powers were strong by holding that the court had the ability to dismiss a case for failure to obey an order.[132] And in *Reilly v. United*

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124. *Chambers,* 501 U.S. at 33.
125. *Id.*
126. *Id.* at 42, 46.
127. *Id.* at 33.
128. *Id.*
129. 744 F.2d 1438 (10th Cir. 1984).
130. *Baker*, 744 F.2d at 1442. This case was a three party action in which the plaintiff's attorney, after being denied a motion for a continuance, moved for another continuance based on the failure to depose a witness. *Id.* at 1439. The attorney then announced he might have been responsible for the deposition delay. *Id.* The court granted the continuance but sanctioned the attorney for his negligence. *Id.* at 1440. This holding was prior to the amendment to Rule 16 of the Federal Rules of Civil Procedure that authorizes imposing such sanctions. *Id.* at 1441. The court held that the spirit and purpose of the amendment had always been within the power of the courts. *Id.*
131. 57 F.3d 1406 (5th Cir. 1995).
132. *Woodson*, 57 F.3d at 1417. This was a products liability action that was dismissed under the courts' inherent power as a sanction for the plaintiff's failure to follow the courts' orders. *Id.* at 1407, 1415. On appeal, the court cited *Link v. Wabash* to support the holding that it was within the courts' inherent power to dismiss the case. *Id.* at 1417.

*States*, the United States Court of Appeals for the Fifth Circuit held that the courts' inherent powers authorized appointing technical advisors in complex cases.[133] Thus, the inherent powers of the court are strong and grant a variety of discretionary remedies.

However, the courts' inherent powers were narrowly construed by the United States Court of Appeals for the First Circuit in *United States v. Horn*.[134] In this case, the court annulled the district court's order, which had imposed sanctions comprised of attorney fees and costs, holding that sovereign immunity barred the district court from using its inherent powers to assess attorney fees and costs.[135] The First Circuit reasoned that inherent power had definite limits and that the power is interstitial; it applied only when there is no effective alternative provided by rule, state or constitutional clause.[136] By concluding that inherent power is limited by rule or statute, this holding narrowly interpreted the courts' inherent power.

In applying this narrow interpretation of the courts' inherent powers, the inherent powers of the court are not limited unless a local rule or statute directly displaces the inherent power. If there are no local rules or statutes on point, then the inherent powers of the court are not affected. Therefore, the inherent powers of the court generally are strong and grant the court a variety of discretionary measures that are necessary to control the affairs of the court and to manage those that appear before the court.

## II. SPLIT OF AUTHORITY

A split of authority as to whether the federal district courts have the inherent power to compel unwilling litigants into nonbinding forms of ADR has developed. Two camps have emerged. One camp proclaims that it is within the inherent powers of the court to compel nonbinding ADR on litigants as a necessary power of the court to effectively manage its docket and caseload. The

133. *Reilly*, 863 F.2d at 156. In this medical malpractice case, the doctors' alleged negligence during labor caused a baby to be born with severe brain damage. *Id.* at 153. The defendants appealed the district courts' appointment of a technical advisor to assist in damage calculations. *Id.* at 153-55. On appeal, the court held that the district courts' inherent powers included the ability to appoint technical advisors in complex cases. *Id.* at 156. The court noted "after all [the Civil Rules] were never meant to become the sole repository of all a federal court's authority." *Id.*

134. 29 F.3d 754 (1st Cir. 1994).

135. *Id.* at 757.

136. *Id.* at 760.

other camp holds that inherent powers are to be narrowly construed and do not extend to authorize the compulsion of litigants into nonbinding ADR participation. The division among federal district courts will be explored though recent decisions.

### *A. Camp One: Courts Have the Inherent Power*

A recent example of a decision holding that district courts have the inherent power to compel ADR participation is *Atlantic Pipe Corp.*[137] In this case, the United States Court of Appeals for the First Circuit held that federal courts have the inherent power to compel participation in nonbinding, nonconsensual ADR when the local rules are not yet in force to authorize compelling the litigants into ADR.[138]

The decision in *Atlantic Pipe Corp.* began as a suit to recover fees for a consulting service.[139] Recall from the introduction, this was a complex case involving twelve parties, numerous claims, cross-claims, counterclaims, third-party claims, and a myriad of issues.[140] In an effort to facilitate settlement, the district court ordered the parties to mediation.[141] One party, a subcontractor, unsuccessfully moved for reconsideration of the order.[142] The subcontractor then sought a writ of mandamus prohibiting the nonconsensual mediation.[143]

In reviewing the writ of mandamus, the First Circuit had to decide whether the district courts had the inherent power, apart from positive law, to compel nonbinding participation in ADR.[144] In this district, there were no local rules or statutes to authorize ADR participation.[145] Without the local rules authorization, other possible sources for authority to compel ADR participation such as local rules, an applicable statute, and the Federal Rules of Civil Procedure were not available to authorize compulsion in ADR participation.[146] The First Circuit held that the district courts have

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137. *Atlanta Pipe Corp.*, 304 F. 3d at 145.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 139.
142. *Atlantic Pipe Corp.*, 304 F.3d at 139.
143. *Id.*
144. *Id.* at 143.
145. *Id.* at 140.
146. *Id.* at 140-43.

substantial inherent power to manage their docket,[147] and this inherent power gave the district court the inherent power to compel ADR participation.[148]

While the First Circuit Court of Appeals in *Atlantic Pipe Corp.* gave the green light to the district courts to use their inherent powers to compel ADR participation, the court also noted four limits to the inherent powers of a district court.[149] The first limit is that inherent powers must be used to enhance the court's processes including the orderly and expeditious disposition of pending cases.[150] Second, inherent powers cannot be used to contradict an applicable statute or rule.[151] Third, inherent powers must be used in a manner that comports with procedural fairness.[152] And fourth, the inherent powers "must be exercised with restraint and discretion."[153] However, these limitations do not affect the strength of the courts' inherent power to compel nonbinding ADR participation when there is no local rule or statute on point and the order comports with fairness.

Previous decisions have held that the federal district courts have the inherent power to compel litigants to participate in ADR. Recall from Part I, A-1 above, the decisions in *Carey-Canada, Inc.* and *Scarfone.* Each case will be further discussed.

In *Carey-Canada, Inc.*, the United States District Court for the District of Minnesota held that in light of the courts' inherent powers and under the 1983 version of amended Rule 16, the district courts were authorized to compel ADR participation.[154] The court also held that the use of its discretion [inherent powers] must be protected.[155] If the courts' discretion is not protected, stated this court, then the courts can not effectively and efficiently function and will fail to meet their duty to provide a "just and speedy disposition of every case."[156] The court also praised the use of ADR, noting that it was a valuable tool that facilitated settlement, which in turn saved money and judicial resources.[157] There-

147. *Atlantic Pipe Corp.*, 304 F.3d at 140-43 (quoting Link v. Wabash Railroad Co., 370 U.S. at 630-31).
148. *Id.* at 145.
149. *Id.* at 143.
150. *Id.*
151. *Id.*
152. *Atlantic Pipe Corp.*, 304 F.3d at 143.
153. *Id.*
154. *Carey-Canada, Inc.*, 123 F.R.D. at 608.
155. *Id.* at 604.
156. *Id.* (quoting Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky 1987)).
157. *Id.*

fore, this case, like *Atlantic Pipe Corp.*, held that the court had the inherent power to compel litigants to participate in ADR.

Another case which held that courts have the inherent power, under the 1983 Rule 16, to compel nonbinding ADR participation is *Scarfone.* In this case, the court held that Rule 16 and the courts' inherent powers were a basis to compel nonconsensual ADR participation.[158] The court also held that the district courts' inherent power should not be abrogated because the district courts are in the best position to process and evaluate the cases before them.[159] The court noted that the courts are adversely affected if their inherent powers do not authorize them to perform the duties of a just, speedy, and inexpensive trial.[160] Thus, this decision, like the decisions of *Atlantic Pipe Corp.* and *Carey-Canada*, broadly construed the inherent powers of the court in that the powers could compel litigants to participate in nonbinding ADR.

Therefore, federal circuit and district courts have held that the district courts' inherent powers authorize compelling litigants to participate in nonbinding ADR processes. These courts reasoned that the federal district court's power to manage its docket, in order to fulfill its duties of a speedy and just trial, authorizes the courts to compel ADR participation. However, other circuit courts have held that the power of the federal district courts to manage their dockets does not extend to authorize compelling litigants to participate in ADR. The following section will further analyze the premise behind this holding.

### *B. Camp Two: Courts Lack the Inherent Power*

The United States Court of Appeals, Sixth Circuit decision of *In Re NLO, Inc.*[161] provides an example of the camp which holds that the district courts lack the inherent power to compel ADR participation.[162] In this case, the employees of a uranium plant brought suit alleging negligent exposure to dangerous levels of radioactive and hazardous materials.[163] The district court ordered the parties to participate in a summary jury trial, which would be open to the

158. *Scarfone*, 119 F.R.D. at 448.
159. *Id.* at 449.
160. *Id.*
161. 5 F.3d 154 (6th Cir. 1993).
162. *NLO, Inc.*, 5 F.3d at 158.
163. *Id.* at 155.

public.[164] The plaintiff petitioned for a writ of mandamus prohibiting the order to participate in the summary jury trial.[165]

In review of the writ of mandamus, the Sixth Circuit made two key holdings. The first was that the district court lacked the inherent power to compel participation in the summary jury trial.[166] The second was that Rule 16 did not grant compulsory authority for ADR.[167] Each holding will be in turn discussed.

With respect to the first holding, that the district court lacked the inherent power to compel participation in the summary jury trial,[168] the court reasoned that limits on the district court's power were necessary because "power corrupts."[169] The court quoted Richard Posner, stating that, "there are obvious dangers in too broad an interpretation of the federal courts' inherent power . . . it encourages judicial high-handedness ('power corrupts')."[170] Furthering the argument against compelling litigants into ADR participation, the court held that the time delay of the ADR process was improper.[171] This case exemplified the approach that narrowly construed the inherent power of the district court by holding it was "misplaced" to use the inherent authority to justify mandatory ADR participation.[172]

The second key holding was that Rule 16 of the Federal Rules of Civil Procedure did not grant compulsory authority for ADR participation.[173] The court interpreted the 1983 Advisory Committee Notes to Rule 16(c)(7) to indicate that the rule was designed to explore and urge the use of ADR, rather than compel ADR on the unwilling.[174] This decision was made before the 1993 amendment clarified the proper role of Rule 16 in compelling ADR participation and the role of Rule 16 regarding the courts' use of its inherent powers.[175] Yet, this court held that the courts' inherent powers did not authorize court-compelled mediation.

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164. *Id.*
165. *Id.* at 155.
166. *Id.* at 158.
167. *NLO, Inc.*, 5 F.3d at 157.
168. *Id.* at 158.
169. *Id.*
170. *Id.*
171. *Id.*
172. *NLO, Inc.*, 5 F.3d at 158.
173. *Id.* at 157.
174. *Id.*
175. *See* FED. R. CIV. P. 16 advisory committee's note (stating that the Rule does not attempt to define the role of the inherent power of the court to compel ADR participation).

Similarly, the Seventh Circuit Court of Appeals decision in *Strandell* held that the federal district courts lacked the power to authorize the compelling of litigants into nonbinding ADR.[176] Recall from the discussion of *Strandell* in Part I, A-1 above, the *Strandell* court held that, under the 1983 version of Rule 16, the district court lacked the power to compel ADR participation without local rules or statutes to authorize such compulsion.[177] This court also held that the district court lacked the discretionary or inherent powers to compel ADR participation.[178] Narrowly construing the district courts' inherent power, the Seventh Circuit stated that "a crowded docket does not permit the court to avoid the adjudication of cases properly within its congressionally-mandated jurisdiction."[179]

Therefore, the Seventh Circuit Court of Appeals held in *Strandell* that courts lack inherent powers to compel ADR participation because docket management does not condone the avoidance of adjudicating trials.[180] Similarly, the Sixth Circuit Court of Appeals decision in *NLO, Inc.* held that the courts could not rely on their inherent powers to compel ADR participation because fears of broad inherent powers would lead to judicial high-handedness.[181] However, the First Circuit Court of Appeals held in *Atlantic Pipe Corp.* that the court had the inherent power to compel ADR participation. Thus, there is a circuit split on the courts' inherent power to compel nonbinding ADR participation. The role of the courts' inherent powers will be further analyzed in Part III.

## III. ANALYSIS

When no local statues or rules are on point, the question of whether the federal district courts' inherent power can compel litigants to participate in nonbinding ADR can be resolved based on the analysis of the role of the courts' inherent powers and the present use of ADR in civil litigation. The arguments for and against inherent powers authorizing compulsion into ADR are discussed below.

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176. *Strandell*, 838 F.2d at 887.
177. *Id.*
178. *Id.*
179. *Id.* at 888.
180. *Id.*
181. *NLO, Inc.*, 5 F.3d at 158.

### *A. Arguments for Inherent Powers*

This article advances five reasons why the federal district courts' inherent powers authorize the court to compel ADR participation. First, the inherent powers of the courts are necessary to manage their proceedings. Second, inherent powers are key to achieving orderly and expeditious disposition of cases.[182] Third, the courts' inherent powers are strong, giving the court the ability to control the conduct of those that appear before them.[183] Fourth, ADR eases crowded dockets, which facilitates docket management.[184] And fifth, all civil cases are to use ADR processes.[185] Since federal courts need inherent powers to manage their proceedings and facilitate docket management, and ADR is an effective docket management technique that is to be used in all civil litigation, courts must have the inherent power to compel participation in nonbinding ADR.

The first reason the courts have the inherent powers to compel nonbinding ADR participation is that the Supreme Court held in *Chambers* that the courts' inherent powers are necessary to manage their proceedings and to control the parties appearing before them.[186] Without the ability to manage their proceedings and control the parties that appear before them, the courts would be awash in the constant and ever-changing needs and demands of the parties. Therefore, if the court concludes that the use of ADR methods would be an effective way to manage the litigation, then the court has the inherent power to compel the litigants to participate in ADR.

The second reason the courts have the inherent power to compel nonbinding ADR participation is that inherent powers are key to achieving orderly and expeditious disposition of cases.[187] In *Link v. Wabash Railroad Co.,* the Supreme Court held that the courts' inherent power to manage their proceedings and those that appear before them grants the courts the ability to resolve cases before them.[188] Arguably, without the inherent power to control the litigation process, cases would continue on as the parties searched for more evidence to advance their position. Thus, it follows that

182. *Link*, 370 U.S. at 631.
183. *Chambers*, 501 U.S. at 33.
184. *Novak*, 932 F.2d at 1404.
185. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651(b) (2003).
186. *Chambers*, 501 U.S. at 33.
187. *Link*, 370 U.S. at 631.
188. *Id.*

the courts have the inherent power to compel ADR participation, in an effort to achieve the orderly and expeditious disposition of cases.

The third reason that the courts have the inherent power to compel nonbinding ADR participation is that the courts' inherent power is strong. This premise is based on a number of decisions that have broadly construed the courts' inherent powers. Inherent powers have authorized the federal district courts to assess attorneys fees, even without the authorization of local rules or statutes;[189] to dismiss a case for failure to prosecute[190]or for failure of a party to obey the courts orders;[191] to appoint technical advisors in complex cases;[192] and to compel nonbinding ADR participation.[193] In *Chambers* the Supreme Court held that the federal courts may rely on their inherent power if neither the rules or statutes are "up to the task."[194] Therefore, courts may rely on the strength of their inherent power to authorize compulsion in nonbinding ADR participation if the local rules or statutes are not yet in place.

The fourth reason the courts have the inherent power to compel ADR participation is that ADR is an effective tool in case management. The use of ADR in the litigation process has been praised in the Civil Justice Reform Act, the Alternative Dispute Act, and numerous cases. Each source of ADR praise will be discussed.

In creating both the CJRA and the ADR Act, Congress desired to expand and increase the use of ADR. Congress found, in support of the CJRA, that the increased use of ADR was one way to reduce the costs and delays of civil litigation.[195] To further increase the use of ADR, Congress passed the ADR Act, which requires the use of ADR in all civil cases.[196] Thus, Congress believes that ADR methods should be utilized in the courtroom.

In further praise of ADR, many cases have held that the use of ADR methods is invaluable to the litigation process. In *Scarfone,* the court noted that the benefits of using ADR, even if ADR does not produce a settlement, is immeasurable to the later trial be-

189. *Chambers,* 501 at 33.
190. *Link,* 370 U.S. at 629.
191. *Woodson,* 57 F.3d at 1417.
192. *Reilly,* 863 F.2d at 156.
193. *Atlantic Pipe Corp.,* 304 F.3d at 145; *Scarfone,* 110 F.R.D. at 448; *Carey-Canada, Inc.,* 123 F.R.D. at 608.
194. *Chambers,* 501 U.S. at 33.
195. Civil Justice Reform Act of 1990, 28 U.S.C. § 471 (1990).
196. Alternative Dispute Resolution Act, 28 U.S.C. § 651(b) (2003).

cause both parties come fully prepared since the process crystallizes the proof and issues.[197] Similarly, in *Carey-Canada, Inc.*, the court called ADR a valuable settlement tool that facilitates major cost savings.[198] Also, in *NLO, Inc.*, the Sixth Circuit noted that ADR is a valuable tool in expediting cases.[199] Finally, in *Novak*, the Eleventh Circuit noted that ADR fosters settlement, which in turn eases crowded dockets and results in saving both money and judicial resources.[200] These cases have praised the use of ADR in facilitating settlement which leads to decreasing the costs of litigation and saves judicial resources.

Fifth, ADR is to be used in all civil litigation. The ADR Act of 1998 requires every federal court to create and use its own ADR program.[201] The Act also requires the use of ADR in all civil cases.[202] Thus, ADR is to be used in all civil litigation.

Because courts have strong inherent powers that are key to efficient and orderly management of their proceedings and ADR is an effective case management technique that is to be used in all civil cases, it follows that courts must have the inherent power to compel participation in nonbinding ADR.

### *B. Arguments Against Inherent Powers*

There are three reasons advanced by the circuit courts that hold that the inherent powers do not authorize nonbinding ADR participation. The first is that a broad interpretation of inherent powers, such as authorizing the compulsion into non-binding ADR, encourages judicial high-handedness because power corrupts. The second is that the courts lack the power to refer cases to ADR that the court should be adjudicating. The third is that the use of ADR delays the litigants' court dates. Each of these premises will be discussed.

In *NLO, Inc.*, the Sixth Circuit held that the courts do not have the inherent power to compel participation in nonbinding ADR processes.[203] The court reasoned that authorizing nonbinding participation in ADR was a broad interpretation of inherent powers that encouraged judicial "high-handedness" because power itself

197. *Scarfone*, 119 F.R.D. at 449.
198. *Carey-Canada, Inc.*, 123 F.R.D. at 604.
199. *NLO, Inc.*, 5 F.3d at 158.
200. *Novak*, 932 F.2d at 1404.
201. Alternative Dispute Resolution Act, 28 U.S.C. § 651(b) (2003).
202. *Id.*
203. 5 F.3d at 158.

corrupts.[204] The Sixth Circuit reasoned that limits on the district court's power were necessary because of the corruptive nature of power itself.

Despite the compelling nature of the premise that power is corruptive, federal courts have the power to dismiss cases, sanction parties, and the basic ability to "control the conduct of the parties"[205] before them. If strong inherent powers are truly corrupting the federal courts, then other more "powerful" court activities, such as dismissal of a case, would also be under fire. Therefore, the corruptive nature of power is not a convincing argument against inherent powers to compel ADR participation. Since courts have strong inherent powers, as in the authority to control the conduct of parties to litigation, then courts must have the power to compel ADR participation.

Another argument against the inherent power to compel ADR participation is that courts should not refer their cases to ADR when the courts themselves are supposed to be hearing the case. In the decision of *Strandell*, the Seventh Circuit held that the courts lacked the inherent power to compel litigants to participate in ADR because docket management did not excuse the court from the adjudication of cases it was supposed to hear.[206] This court viewed ADR as an excuse not to hear the case.

The argument that the district courts use ADR to avoid cases oversimplifies the nonbinding ADR approach. The ADR participation is used to foster settlement, but if no settlement is mutually agreed upon, then the case goes to trial. Thus, the courts are not excusing themselves of their duties by ordering the parties to participate in ADR; the courts merely are encouraging settlement earlier in the litigation process.

The third argument against the use of ADR is that ADR postpones the litigants' court date until the ADR process has occurred. In *NLO, Inc.*, the court held that the time delay caused by assembling and participating in the ADR was improper.[207] While the ADR participation may cause a delay in trial date, most cases settle before judgment is reached.[208] Thus, the court sets a date and

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204. *Id.* at 157.
205. *Chambers*, 501 U.S. at 32.
206. *Strandell*, 838 F.2d at 888.
207. *NLO, Inc.*, 5 F.3d at 158.
208. Campbell C. Hutchison, *The Case for Mandatory Mediation*, 42 LOY. L. REV. 85, 87 (1996) (noting that most cases settle out of court, some estimating numbers as high as 95%).

may even hear arguments only to have the case settled before judgment is rendered. The encouragement of early settlement through ADR participation may delay a trial time, but the advantages of conserving scarce judicial resources are a strong argument that counters the time delay.

Dismissing the arguments against the courts' inherent powers to compel ADR participation, this article argues that the federal district courts have the inherent power to compel nonconsensual participation in nonbinding ADR. The courts' inherent power stems from the necessary ability of the courts to effectively manage their affairs and to achieve orderly and expeditious disposition of cases.[209] Inherent powers give the courts the ability to manage their proceedings and to control the conduct of those that appear before them.[210] A majority of cases have acknowledged the strength of the courts' inherent powers. Also, many courts have praised the use of ADR to effectively manage the courts' caseload.[211] And finally, ADR is to be used in all civil cases.[212] Therefore, the inherent power to compel participation in ADR processes stems from the courts' inherent power to manage the affairs of the court in order to fulfill its' duty to provide a "just, speedy and inexpensive determination"[213] of the cases before it.

## IV. PROPOSAL

This article suggests two proposals to further clarify the inherent powers of the federal district court to authorize court-ordered participation in nonbinding forms of ADR. The first is an amendment to the ADR Act. The second is an amendment to Federal Rule 16, which would acknowledge the inherent powers of the court. Each proposal will be discussed.

The first proposal is to amend to the ADR Act. The proposed amendment to the ADR Act would make reference to the federal courts' inherent powers and the federal courts' ability to compel participation in nonbinding forms of ADR under the Act's provisions. While the Act currently requires the federal courts to authorize the use of ADR in all civil actions by local rule, the Act should acknowledge the inherent power of the court to compel par-

209. *Link*, 370 U.S. at 631.
210. *Chambers*, 501 U.S. at 33.
211. *Novak,* 932 F.2d at 1404.
212. Alternative Dispute Resolution Act, 28 U.S.C. § 651(b) (2003).
213. FED. R. CIV. P. 1.

ticipation in ADR if the local rule is not yet in place. Once the local rules are established, then the inherent power is unnecessary to compel participation in ADR.

The second proposal is an amendment to the Federal Rules of Civil Procedure Rule 16(c)(9). While Rule 16(c)(9) currently permits the court to take appropriate action with respect to the settlement and use of special procedures to assist in resolving the dispute, the action is to be based on local statute or rule.[214] The amendment should note that if local rule or statute is not yet in place, then Rule 16 is to work in conjunction with the courts' inherent powers to compel participation in nonbinding forms of ADR. This amendment would codify the majority common-law approach that is apparent in the *Atlantic Pipe Corp.* holding that courts have the inherent power to compel ADR participation.

In the interim, federal courts should adopt the approach of the First Circuit in *Atlantic Pipe Corp.* This approach broadly interprets the courts' inherent powers and holds that inherent powers authorize compelling nonconsensual participation in ADR.

Thus, this article poses two possible ways to clarify and to advance the inherent powers of the federal courts. One is to amend the ADR Act to acknowledge the ability of the court to invoke its' inherent powers if the ADR Act requirements are not yet in place. The second is to amend Rule 16 of the Federal Rules of Civil Procedure to include authorization of the inherent powers of the court to compel nonbinding ADR participation if the local rules or statutes are not yet in place. In either scenario, the inherent powers of the court need not be invoked once the local rules or statutes have been established. In the interim, courts should rely on their inherent powers to compel ADR participation.

## V. CONCLUSION

The federal courts possess the inherent power to compel participation in nonbinding forms of ADR. The United States Supreme Court has long acknowledged that inherent powers are necessary to effectively manage the affairs of the courts and to control the conduct of those appearing before them.[215] The use of the courts' inherent powers are key in the achievement of the orderly and expeditious disposition of cases.[216] Also, many cases have con-

214. FED. R. CIV. P. 16(c)(9).
215. *Chambers*, 501 U.S. at 33.
216. Link v. Wabash Railroad Co., 370 U.S. 626, 631 (1962).

strued inherent powers as a strong force to be reckoned with, and it has been held that inherent powers may be safely used when the rules or statutes are not "up to the task."[217] Furthermore, the use of ADR is an effective tool in the management of court proceedings,[218] and ADR is to be used in all civil cases.[219] And the recent decision of *Atlantic Pipe Corp.* held that it was within the inherent powers of the court to compel participation in ADR processes.[220] Following the logic of these decisions, the federal district courts have the inherent power to compel participation in ADR when no local rule or statute is on point.

217. *Chambers*, 501 U.S. at 32.
218. *Novak*, 932 F.2d at 1404.
219. Alternative Dispute Resolution Act of 1998, 28 U.S.C.A. § 651(b) (2003).
220. *Atlantic Pipe Corp.*, 304 F. 3d at 143.