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*G. HEILEMAN BREWING CO., INC. V. JOSEPH
OAT CORP.*: THE SEVENTH CIRCUIT APPROVES
THE EXERCISE OF INHERENT AUTHORITY TO
INCREASE A DISTRICT JUDGE'S PRE-TRIAL
AUTHORITY UNDER RULE 16*

When interpreting the Federal Rules of Civil Procedure,¹ federal courts often rely upon the concept of inherent authority² as a

* 871 F.2d 648 (7th Cir. 1989) (en banc).

1. Prior to 1938, federal court procedure was a strange mixture of both law and equity. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 62, at 402 (1983). For some time, federal courts erratically conformed to state procedure in all types of actions, including equity, admiralty, and actions at law. F. JAMES, *CIVIL PROCEDURE* § 1.7, at 18 (1965). Eventually, congressional policy favored conformity to state practice only for actions at law. *Id.* at 18-19. However, this gradually led to a "great disuniformity in practice among federal courts." *Id.* at 19. Supreme Court rules, modeled after the English chancery practice, governed the equity practice. *Id.* Therefore, equity practice was largely uniform throughout the nation. *Id.* Nonetheless, even the rules of equity needed improvement. C. WRIGHT, *supra*, at 402. As Judge Learned Hand stated, "the rules of equity pleading fit the pleadings no better than small clothes would suit as professional costume for the counsel." *Monarch Vacuum Cleaner Co. v. Vacuum Cleaner Co.*, 194 F. 172, 174 (S.D.N.Y. 1912).

Due to this anachronistic survival of the separation between law and equity, a fight for rules of civil procedure for the federal courts developed. C. WRIGHT, *supra*, at 402-03. In 1911, the American Bar Association adopted a resolution for such a system. *Id.* at 403. This proposal would set the stage for a federal procedural system. F. JAMES, *supra*, at 19. However, it originally covered only the field of actions at law, and Congress initially refused to pass federal procedural rules. C. WRIGHT, *supra*, at 403. At the suggestion of Chief Justice Taft, later bills were introduced in Congress including a provision for the court to unify law and equity. *Id.* The movement toward a system of unified rules for civil procedure gained support and finally led to congressional passage of the Rules Enabling Act in 1934. F. JAMES, *supra*, at 19.

This Act expressly authorized the creation of federal rules of civil procedure. 28 U.S.C. § 2072 (1982) (originally enacted as Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064) [hereinafter the Act]. In 1935, Chief Justice Hughes appointed an advisory committee of the most distinguished lawyers and professors to prepare and submit a draft of unified rules applicable to both law and equity. C. WRIGHT, *supra*, at 404. After many drafts and the consideration of suggestions, the committee made its final report to the Supreme Court in 1937. *Id.* After being submitted to Congress, the Federal Rules of Civil Procedure [hereinafter Rules] became effective September 16, 1938. *Id.*

Other than the Field Code of 1848, the Rules "represent the largest single accomplishment in American civil procedure." F. JAMES, *supra*, at 20. The two major contributions of the Rules are the unification of federal procedure for the first time in American history and the development of the most modern procedural system in America. *Id.* Although the Rules have been amended several times, most recently in 1983, they have been largely successful and represent modern day practice in the federal courts. C. WRIGHT, *supra*, at 405.

2. Inherent authority is a concept that gives courts a broad range of powers, which although not explicitly listed, are necessary to judicial exercise of its essential functions. See Note, *Compelling Alternatives: The Authority of Federal Judges* to

Order Summary Jury Trial Participation, 57 FORDHAM L. REV. 483, 496 (1988) [hereinafter Note, *Compelling Alternatives*]. In the United States, a concept of inherent authority has developed. In all "matters ancillary to the administration of justice, the courts have an inherent and exclusive power of control" that the legislature may not supersede. Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 461, 482 (1937). Inherent authority did not derive from any constitutional or statutory provisions but rather it "inheres" in the very nature of the court as a judicial institution. Note, *Protective Orders Against the Press and the Inherent Powers of the Court*, 87 YALE L.J. 342, 350 (1977) [hereinafter Note, *Protective Orders*]. Hence, these institutionally derived powers are referred to as "inherent powers." *Id.* at 350. However, lawyers often use the word "inherent" to describe an implied and completely effective power that a statute can supersede. Williams, *supra*, at 473. Although subtle, the distinction is important, and the two must not be confused. At the core of the concept of inherent authority is the element of necessity. Note, *Compelling Alternatives*, *supra*, at 496.

Inherent authority, when exercised, generally falls within one of three categories. First, a court has the power to procure supplies, citizens (i.e., to serve as a witness), and personnel. Note, *Protective Orders*, *supra*, at 350; see, e.g., *Ex parte Peterson*, 253 U.S. 300, 312 (1920) (courts have inherent authority to appoint auditor to effectively perform their duties). Second, a court has the power to govern practice and procedure. Note, *Protective Orders*, *supra*, at 350; see, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980) (courts possess inherent power to assess attorneys' fees when plaintiff files suit or conducts litigation in bad faith); *Alyesha Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975) (court has inherent power to impose attorneys' fees unless forbidden by Congress); *Link v. Wabash R.R.*, 370 U.S. 626, 629 (1962) (court's authority to dismiss sua sponte for plaintiff's failure to prosecute derives from the inherent power of the judiciary); *Moulton v. Commissioner*, 733 F.2d 634, 735 (10th Cir. 1984) (inherent authority to control the court's docket allows the imposition of double costs and attorneys' fees on litigants who file frivolous appeals), *modified*, 744 F.2d 1448 (10th Cir. 1984); *Miranda v. Southern Pacific Trans. Co.*, 710 F.2d 516, 522 (9th Cir. 1983) (court has inherent authority to impose sanctions against attorneys for failing to obey local rules). For further decisions involving the exercise of inherent authority to govern procedure, see *infra* note 4. Third, a court has the power to hold parties in contempt. Note, *Protective Orders*, *supra*, at 350. See, e.g., *Levine v. United States*, 362 U.S. 610, 615 (1960) (courts possess inherent power to punish for contempt); *Michaelson v. United States*, 266 U.S. 42, 65 (1924) (contempt as punishment inherent power in all courts); *United States v. Hudson*, 11 U.S. 31, 34 (1812) (courts need contempt power); *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 562 n.8 (3d Cir. 1985) (contempt power originally rooted in judiciary's inherent powers but now codified at 18 U.S.C. § 401 (1982)).

Courts have formulated different definitions to describe the concept of inherent authority. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980) (inherent powers are those "necessary to the exercise of all others") (quoting *United States v. Hudson*, 7 Cranch 32, 34 (1812)); *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962) (inherent powers are those governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases). In *Ex parte Peterson*, 253 U.S. 300, 312 (1920), the Court explained that inherent powers are those that, in the absence of legislation to the contrary, courts use "to provide themselves with appropriate instruments required for the performance of their duties." See also *Landau E. Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989) ("federal courts possess not only the powers conferred on them by statute but also inherent powers necessary to the courts' effective functioning as courts . . .") (citing *Newman-Green, Inc. v. Alfonso-Larrain R.R.*, 854 F.2d 916, 921-22 (7th Cir. 1988)); *HMG Property Investors, Inc. v. Parque Industrial Rio Canas*, 847 F.2d 908, 915 (1st Cir. 1988) (inherent powers are those rooted in the chancellor's equity powers "to process litigation to a just and equitable conclusion") (quoting *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978)); *Soo Line R.R. v. Escanaba & Lake Superior R.R.*, 840 F.2d 546, 551 (7th Cir. 1988) ("Inherent authority, like its cousin in criminal law the

basis for their decisions.³ Thus, the courts justify orders and rulings that are not supported by a literal reading of the Rules.⁴ Moreover,

'supervisory power,' is just another name for the power of courts to make common law when statutes and rules do not address a particular topic").

Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985), provides a detailed discussion of various types of inherent powers exercised by federal courts. The *Eash* court noted that "inherent powers have been employed in three general fashions." *Id.* at 562. The first, irreducible inherent authority, stems from the fact that "once Congress has created lower federal courts and demarcated their jurisdiction, the courts are vested with judicial powers pursuant to Article III." *Id.* This use of inherent authority covers a narrow range of authority involving fundamental activities of a court; therefore, to deprive the court of control within this area renders the term "judicial power" practically meaningless. *Id.* The second and most common use of inherent power arises from strict functional necessity and encompasses those powers sometimes said to arise from the nature of the court. *Id.* This use of inherent power has been viewed as "essential to the administration of justice and absolutely essential for the functioning of the judiciary." *Id.* at 563 (quoting *Michaelson v. United States*, 266 U.S. 42, 65 (1924); *Levine v. United States*, 362 U.S. 610, 616 (1960)). The third category of inherent powers is said to be "rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court to process litigation to a just and equitable conclusion." *Id.* (quoting *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978); see also BLACK'S LAW DICTIONARY 703 (5th ed. 1979) (inherent powers of court are "those reasonably necessary for administration of justice"); 21 C.J.S. *Courts* § 31 (1940) ("the inherent powers of courts are derived from the laws to which courts owe their existence, and do not exist without express or implied grant").

See generally 4 W. BLACKSTONE, COMMENTARIES *286 for a discussion of the derivation of the inherent power of contempt. See also J. CRATSLEY, INHERENT POWERS OF THE COURT 2 (1980) (defining inherent authority and its utility in litigation); Note, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 179-82 (1985) (discussing restraints placed upon judge's use of inherent authority) [hereinafter Note, *Judiciary Authority*].

3. See *infra* note 4 and accompanying text for decisions based on a district judge's exercise of inherent authority.

4. Federal judges have noted that under certain circumstances they may exercise inherent authority instead of following the Rules. See *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1323 (7th Cir. 1976). For example, Federal Rule of Civil Procedure 53(b) states that a district court may appoint a master "only upon a showing that some exceptional condition requires" the appointment. FED. R. CIV. P. 53(b). Despite this language, courts have exercised inherent authority to interpret the rule broadly. See, e.g., *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982) (Rule 53 does not limit district court's inherent power to appoint person to assist court in administering remedy); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979) (authority to appoint master can derive from inherent power of court); *Schwimmer v. United States*, 232 F.2d 855, 865 (8th Cir. 1956) (beyond provisions of Rule 53, federal district court has inherent power to make reference to master); *Powell v. Ward*, 487 F. Supp. 917, 935 (S.D.N.Y. 1980) (court has power and duty to appoint master), *modified*, 643 F.2d 924 (2d Cir. 1980), *cert. denied*, 454 U.S. 832 (1981) (appointment of master); *Jordan v. Wolke*, 75 F.R.D. 696, 701 (E.D. Wis. 1977); *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 42 F. Supp. 225, 227 (D. Conn. 1940) (power exists independent of rule); see also Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 462 (1958) (federal courts have always exercised inherent authority to appoint masters beyond authority of Rule 53). *But see* *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (district judge abused discretion in referring case to master by exceeding scope of Rule 53(b)).

Federal Rule of Civil Procedure 41(b) states that "for failure of the plaintiff to prosecute . . . a defendant may move for dismissal." FED. R. CIV. P. 41. Courts have exercised inherent authority to construe the rule liberally to allow the court to dis-

by applying the concept of inherent authority to make decisions, courts disregard the limits they previously imposed on the use of such authority.⁵ In *G. Heileman Brewing Company v. Joseph Oat*

miss sue sponte for plaintiff's failure to prosecute. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1962) (inherent power of court to dismiss case sua sponte for want of prosecution not taken away by Rule 41(b)); *Titus v. Mercedes Benz of N. Am.*, 695 F.2d 746, 757 (3d Cir. 1982) (court has inherent authority to dismiss sua sponte for plaintiff's failure to prosecute); *Hylar v. Reynolds Metal Co.*, 434 F.2d 1064, 1065 (5th Cir. 1970) (court has inherent authority to dismiss case), *cert denied*, 403 U.S. 912 (1971); *Provenza v. H. & W. Wrecking Co.*, 424 F.2d 629, 630 (5th Cir. 1970) (district court "has inherent power to dismiss a case for failure to prosecute"); *Torino v. Texaco Inc.*, 378 F.2d 268, 270 (3d Cir. 1967) (sua sponte dismissal based on plaintiff's failure to appear at trial as ordered upheld).

Federal Rule of Civil Procedure 16(c) allows the participants at a pre-trial conference to consider the possibility of settlement and "other matters which may aid in the disposition of the action." FED. R. CIV. P. 16(c)(7), (11). Other district courts have exercised inherent authority and interpreted Rule 16 as authorizing a district court to order a mandatory summary jury trial. Compare *Home Owners Funding Corp. of Am. v. Century Bank*, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988) (court has power to order mandatory summary jury trial pursuant to Rule 16) and *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 47-48 (E.D. Ky. 1988) (mandatory summary jury trials do not conflict with Rule 16) with *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988) (purpose of Rule 16 to allow courts discretion necessary for effective case management and disposition) and *Federal Reserve Bank v. Carey-Canada, Inc.*, 123 F.R.D. 603, 604 (D. Minn. 1988) (court has inherent power to control its docket thereby authorizing summary jury trials) and *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597, 599 (S.D. Ohio 1987) (power to conduct summary jury trials comes either from court's inherent power to manage its cases or Rule 16) with *Strandell v. Jackson County*, 838 F.2d 884, 887-88 (7th Cir. 1987) (district court may not exercise inherent authority to order litigant to participate in summary jury trial because doing so is inconsistent with Rule 16).

Although some district courts have exercised inherent authority with respect to Rule 16 to authorize other procedural orders, the Seventh Circuit has previously refused to act contrary to Rule 16. Compare *Lockhart v. Patel*, 115 F.R.D. 44, 46 (E.D. Ky. 1987) (court has inherent authority to order a party's liability insurer to attend a pre-trial conference) and *In re Lamarre*, 494 F.2d 753, 756 (6th Cir. 1974) (court has inherent authority to order necessary party to pre-trial conference) with *Identiseal Corp. v. Positive Identification Sys., Inc.*, 560 F.2d 298, 302 (7th Cir. 1977) (court may not exercise inherent authority to compel plaintiff to conduct additional discovery during pre-trial because inconsistent with Rule 16) and *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1325 (7th Cir. 1976) (*per curiam*) (neither court's inherent power nor Rule 16 authorize district court to compel party during pre-trial to agree to stipulation of facts).

5. Although a district court has inherent power to control the disposition of cases, such power is limited. Note, *Judicial Authority*, *supra* note 2, at 180. Because the scope of inherent authority is defined by the courts, judges must be cautious when defining and exercising such powers. Note, *Protective Orders*, *supra* note 2, at 350-51. Limitations placed on a court's ability to exercise inherent authority include the due process clause of the fifth amendment to the United States Constitution. *Id.* at 351. The due process clause provides, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. Federal courts have recognized the due process limitation on the exercise of inherent authority. See *Bloom v. Illinois*, 391 U.S. 194, 207-08 (1968) (due process and trial by jury clauses prevent courts from exercising inherent authority to try serious contempt cases before judge as fact-finder); *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974) (due process forbids district judge exercising inherent authority to compel settlement that parties do not approve); *J. M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 351-52 n.11 (D. Conn. 1981) (due process limits judge's authority to impose sanctions

Corporation,⁶ the Seventh Circuit Court of Appeals addressed the issue of whether a federal district court may order represented parties to personally appear at a pre-trial conference.⁷ Federal Rule of Civil Procedure 16, which covers the availability of pre-trial conferences,⁸ states "the court may in its discretion *direct* the attorneys

for failure to follow pre-trial discovery procedures); *but cf.* Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129, 131 (1971) (advocating broad judicial involvement in case management).

"Rules of practice and procedure should be created by the exercise of inherent authority only sparingly when the need is apparent and pressing." Note, *Protective Orders*, *supra* note 2, at 353. Therefore, courts may not exercise inherent authority merely because it is convenient. Note, *Judicial Authority*, *supra* note 2, at 180. Neither may inherent powers be used to usurp the appropriate functions of the other branches of government due to the separation of powers doctrine. *Id.* For a discussion of the separation of powers doctrine as it relates to judicial authority, see A. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* (1953). Federal courts have formulated different reasons for the limitations placed on the exercise of inherent authority. See *Roadway Express Inc. v. Piper*, 447 U.S. 752, 764 (1980) ("because inherent powers are shielded from democratic controls they must be exercised with restraint and discretion"); *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989) (federal courts may not exercise inherent authority inconsistent with Rules); *HMG Property Investors, Inc. v. Parque Indus. Rio Canas, Inc.*, 847 F.2d 908, 915 (1st Cir. 1988) (federal judges do not enjoy inherent power to provide themselves with appropriate instruments required for performance of duties where statute or rule holds to contrary); *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 12 (1st Cir. 1985) ("too cavalier a resort to inherent powers could result in subverting or trivializing the rules of procedure.").

Federal courts have also placed limits on the exercise of inherent authority during pre-trial proceedings in the context of Rule 16. See *Strandell v. Jackson County*, 838 F.2d 884, 886-87 (7th Cir. 1987) (federal court exercising inherent authority to compel summary jury trial is contrary to Rule 16); *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (Rule 16(c)(7) not designed for district judges exercising inherent authority to impose settlement negotiations on unwilling litigants); *Del Rio v. Northern Blower Co.*, 574 F.2d 23, 26 (1st Cir. 1978) (trial judges cannot effect settlements through coercion); *Identiseal Corp. v. Positive Identification Sys., Inc.*, 560 F.2d 298, 302 (7th Cir. 1977) (Rule 16 "does not . . . confer upon the court the power to compel the litigants to obtain admissions of fact . . ."); *J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318, 1323-25 (7th Cir. 1976) (*per curiam*) (Rule 16, non-coercive in nature, does not authorize compelling stipulation of facts); *McCargo v. Hedrick*, 545 F.2d 393, 402 (4th Cir. 1976) (Rule 16 is subordinate and conciliatory rather than compulsive in character).

For a discussion of a district judge's authority during pre-trial proceedings, see Connolly, *Why Do We Need Managerial Judges*, 23 JUDGES J. 34 (1984); Smith, *Pre-Trial Conference - A Study of Methods*, 29 F.R.D. 348 (1961).

6. 871 F.2d 648 (7th Cir. 1989) (*en banc*) [hereinafter *Heileman III*].

7. *Id.* at 650.

8. "The pre-trial conference is largely derived from the early nineteenth century English and Scottish practices which provided for oral presentation of preliminary matters in open court." Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 491 (1985). Pre-trial conferences developed as a move to facilitate judicial administration by streamlining trials. *Id.* at 491. The main purpose of the pre-trial conference is to define and simplify the issues, lessen judicial surprise at trial, reduce the risk of judicial error, conclude stipulations on matters of evidence, and to promote settlements. 3 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 16.02 (3d ed. 1974). Judge Coffey noted in his dissent that the purpose of a pre-trial conference is to set the parameters of litigation,

for the parties and any *unrepresented*⁹ parties to appear before it for a conference"¹⁰ The *Heileman* court held that Rule 16, enhanced by the inherent authority of the courts, permits federal courts to compel represented parties to attend pre-trial conferences for settlement discussions.¹¹

The *Heileman* litigation involved a four million dollar contract

clarify the issues, and organize its presentation with the aid of the attorneys and unrepresented parties to improve judicial efficiency at trial. *Heileman III*, 871 F.2d at 661 (Coffey, J., dissenting).

The pre-trial conference became part of federal practice with the promulgation of Rule 16 in 1938. Menkel-Meadow, *supra*, at 491. However, under Rule 16 a pre-trial conference is not required in every case in federal court. C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 91, at 602 (4th ed. 1983). However, most districts do provide, by local rule, for a pre-trial conference in every case. *Id.* The court determines the proper time for the pre-trial conference, although the usual practice is to hold it shortly before trial. *Id.* In more complicated cases it may be preferable to have the conference at an earlier date to shape the pre-trial proceedings under the court's direction. *Id.*

At least one attorney from each side that will participate in the trial must attend the pre-trial conference. *Id.* If plaintiff's counsel fails to attend without an adequate excuse, the court may exercise inherent authority to dismiss the action. *Id.* at 602-03. The pre-trial conference differs in form according to the particular judge or court. *Id.* at 603. Some are rather formal with elaborate hearings in open court resulting in a memorial order of the proceedings. *Id.* Other pre-trial conferences are conducted in the judge's chambers with no record kept of the proceedings. *Id.* Therefore, decisions reached at pre-trial conferences are often unreviewable until after a final judgment is rendered on the merits. Resnick, *Managerial Judges and the Court Delay: The Unproven Assumptions*, 23 JUDGES J. 8, 10 (1984).

In the past few decades, federal district judges have become active case managers due to a growth in litigation and a steadily increasing caseload. Note, *Judicial Authority*, *supra* note 2, at 171. This expanding role of the district judge has elicited debate about the process of discussing settlement during pre-trial conferences under Rule 16. *Id.* The present controversy concerning Rule 16 is whether cases and settlements are controlled by the attorneys, the parties, or the judges. Menkel-Meadow, *supra*, at 492.

The drafters of the original version of Rule 16 excluded the use of the pre-trial conference as a means for discussing settlement. *Id.* at 491. In the 1940's and the 1950's, judges believed that the only time they should mention settlement was to question the parties as to whether the possibility of settlement was discussed. Osterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L. FORUM 7 (1982). In the 1960's, judges began favoring an active role in achieving settlement. *Id.* This trend led to the eventual amendment of Rule 16 in 1983. *Id.* The modern version of Rule 16 encourages settlement as a tool for efficient judicial management. *Id.*

Rule 16 has been the most popular of the Rules. C. WRIGHT, *supra*, at 601. The pre-trial conference has gained this notoriety due to the belief that it will help reduce court congestion. *Id.* at 602. This belief is premised on the proposition that pre-trial conferences will increase the number of settlements and will shorten the trial in those cases that are tried. *Id.* The true aim of the pre-trial conference, however, is to reduce the need for trial consistent with the full preservation of the litigants' rights. *Id.* at 603-04.

9. See *infra* note 82 for a discussion of Rule 16's distinction between represented and unrepresented parties.

10. FED. R. CIV. P. 16(a) (emphasis added).

11. *Heileman III*, 871 F.2d at 656.

dispute¹² between four parties: G. Heileman Brewing Company, Inc. ("Heileman"), RME Associates, Inc. ("RME"), Joseph Oat Corporation ("Oat"), and N.V. Centrale Suicker Maatschappij ("CSM").¹³ On November 9, 1984, a federal magistrate¹⁴ ordered¹⁵ a pre-trial conference¹⁶ to facilitate settlement efforts.¹⁷ The magistrate ordered¹⁸ each party, with the exception of CSM, to send to the pre-

12. This action arose out of a dispute over the construction of a waste water treatment system ("system"), for G. Heileman Brewing Company, Inc. ("Heileman") by RME Associates, Inc. ("RME") and Joseph Oat Corporation ("Oat"). *Heileman III*, 871 F.2d at 654 n.9. The events leading up to this litigation began when Heileman hired RME, a consulting firm, to build a waste water treatment plant at Heileman's brewery in Lacrosse, Wisconsin. *Id.* Thereafter, RME contracted with Oat, who agreed to design, engineer, and test the system in Heileman's plant. *Id.* N.V. Centrale Suicker Maatschappij ("CSM"), a Dutch Corporation, owned and licensed the system and designated Oat as its exclusive licensee in the United States. *Id.*

The system did not work as expected and a contract dispute arose between Heileman, RME, and Oat. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415, 1417 (7th Cir. 1988), *rev'd on reh'g en banc*, 871 F.2d 648 (7th Cir. 1989) [hereinafter *Heileman II*]. On December 20, 1982, Oat filed suit against Heileman and RME in New Jersey federal district court, and RME counter-claimed. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275, 277 (W.D. Wis. 1985), *rev'd*, 848 F.2d 1415 (7th Cir. 1988), *rev'd on reh'g en banc*, 871 F.2d 648 (7th Cir. 1989) [hereinafter *Heileman I*]. The case was transferred to the Western District of Wisconsin where RME then joined CSM as a third-party defendant. *Heileman I*, 107 F.R.D. at 277.

On the same day, Heileman filed an action against Oat and RME in Wisconsin state court. *Id.* RME then cross-claimed against Oat, counter-claimed against Heileman, and later joined CSM. *Id.* In the early phase of litigation, Heileman and Oat withdrew the claims against each other. *Id.* Subsequently, Oat dismissed its complaint against RME thus leaving only RME's claims against Oat and CSM in the Western District of Wisconsin. *Heileman II*, 848 F.2d at 1417. However, RME and CSM were still involved in the parallel state court suit. *Id.* Thereafter, Heileman was granted leave to intervene and substitute for RME in RME's claims against Oat. *Heileman I*, 107 F.R.D. at 277 n.1.

The district court scheduled a trial date for January 14, 1985, for RME's claims. *Heileman II*, 848 F.2d at 1417. However, on November 7, 1984, RME filed a motion to postpone the trial. *Heileman I*, 107 F.R.D. at 278. On November 9, 1984, a magistrate, whom the district court designated to hear pre-trial matters, conducted a hearing on that motion and learned that RME, CSM and Heileman began to discuss the possibility of settlement. *Heileman II*, 848 F.2d at 1417. Oat did not want to settle and was not a party to the settlement discussions. *Id.* RME's motion was granted and an order was entered continuing the trial. *Heileman I*, 107 F.R.D. at 278.

13. *Heileman III*, 871 F.2d at 654.

14. The district court authorized a magistrate to resolve all pre-trial matters pursuant to 28 U.S.C. § 636(b)(1)(A)(1982). *Heileman II*, 848 F.2d at 1417.

15. The November Order was reduced to written form on November 19, 1984, and stated in pertinent part:

5. A settlement conference, which shall include the Heileman Brewing Company, shall be held herein on December 14, 1984 at 2:00 p.m.

(c) . . . In addition to counsel, each party shall be represented at the conference by a representative having full authority to settle the case, excepting only CSM, whose authorized representative in the Netherlands shall be available by telephone throughout the duration of the conference

Heileman I, 107 F.R.D. at 278 (court's emphasis).

16. The magistrate ordered and set the pre-trial conference for December 14, 1984. *Id.*

17. *Id.*

18. *Heileman III*, 871 F.2d at 658 (Coffey, Easterbrook, Ripple, Manion, J.J.,

trial conference a representative with full authority to settle¹⁹ the case.²⁰ With the exception of Oat,²¹ all parties²² complied with the magistrate's November Order.²³

Oat and its insurer did not want to settle; therefore, neither sent a representative to the pre-trial settlement conference.²⁴ Oat's counsel did appear along with Oat's insurance adjuster.²⁵ Both, however, were excluded²⁶ from the settlement discussions because they lacked settlement authority.²⁷ Subsequently, the magistrate continued the conference until December 19, 1984, when it again ordered²⁸

dissenting). The dissenters stated that the majority's demand that each party send a representative "with full authority to settle" was unjustified since neither Rule 16 nor any other rule, statute, or doctrine imposes a duty on litigants to bargain in good faith over settlement before resorting to trial. *Id.*

19. See *infra* notes 48 and 68 for a discussion of what is required of a representative with full authority to settle.

20. *Heileman I*, 107 F.R.D. at 278.

21. Oat's liability insurer, National Union Fire Insurance Company of Pittsburgh, retained John Possi who appeared as counsel for Oat. *Heileman I*, 107 F.R.D. at 278-79. Joseph McMahon, an independent adjuster, represented National and took the position that National was not interested in making any payment in order to settle. *Id.* at 279. Neither Possi nor McMahon possessed authority to enter into a monetary settlement. *Heileman II*, 848 F.2d at 1417.

22. Counsel appeared on behalf of RME along with two principals of RME and a representative of RME's insurer. *Heileman I*, 107 F.R.D. at 278. Counsel appeared on behalf of CSM, along with another, who reported that a representative of CSM having authority to settle was standing by, via telephone, in the Netherlands. *Id.* General Counsel appeared along with another attorney on behalf of Heileman. *Id.*

23. *Id.*

24. *Heileman II*, 848 F.2d at 1417-18.

25. *Id.* at 1418.

26. Possi and McMahon remained at the courthouse despite being excluded from the December 14th conference. *Heileman II*, 848 F.2d at 1417. Both were called into the courtroom when the magistrate issued his December Order and continued the conference. *Id.* at 1417.

27. *Id.*

28. The December Order was reduced to written form on December 18, 1984, and stated in pertinent part:

The progress of the conference was impaired by the fact that neither plaintiff Joseph Oat Corporation, or its carrier National Union, was represented in addition to counsel, by a representative having full authority to settle the case as specifically directed by Paragraph 5(c) of the court Order of November 19, 1984

It appearing that a substantial possibility exists that a number of the claims and issues in these cases may be susceptible of settlement, and that other matters might be considered . . . so as to secure the just and speedy determination of this litigation at the least expense to the parties,

IT IS HEREBY ORDERED:

2. In addition to counsel, each party and the insurance carriers of plaintiff Oat and defendant RME, shall be represented at the conference in person by a representative having full authority to settle the case or to make decisions and grant authority to counsel with respect to all matters that may be reasonably anticipated to come before the conference; provided, however, that third-party defendant CSM, a Netherlands corporation, may appear in person by its counsel only, provided an authorized representative of CSM having the authority aforesaid, shall be available by telephone in the Netherlands throughout the duration of the conference.

each party, including RME's and Oat's liability insurers, to send a representative with full authority to settle the case.²⁹ On December 19, 1984,³⁰ the conference resumed.³¹ On this occasion, Oat's inside counsel and outside corporate counsel appeared on behalf of Oat.³² Although both had authority to speak on behalf of Oat, neither had authority to settle the case.³³

On June 17, 1985, the magistrate ordered³⁴ Oat and its insurer to pay the expenses,³⁵ including attorney's fees, incurred by the parties who attended the December 19th conference.³⁶ The district court held that it has authority, under Rule-16,³⁷ to require parties to send representatives with full settlement authority to a pre-trial conference.³⁸ Therefore, the court held that sanctions were appropriate for Oat's failure to comply with the magistrate's pre-trial order.³⁹

On appeal,⁴⁰ the Seventh Circuit Court of Appeals reversed,

Heileman I, 107 F.R.D. at 279 (court's emphasis).

29. *Id.*

30. Sometime between December 14th and December 19th, 1984, Possi spoke to Oat's outside corporate counsel by telephone to discuss the magistrate's December Order. *Heileman II*, 848 F.2d at 1417. Oat's outside corporate counsel told Possi that National was not willing to settle if they had to pay any money and, therefore, would not send a representative to the December 19th conference. *Id.* Thereafter, Oat's vice president authorized its outside corporate counsel to attend the conference and inform the court that Oat was not willing to pay any money to settle. *Id.* at 1418.

31. *Heileman I*, 107 F.R.D. at 279.

32. *Id.*

33. *Id.*

34. *Id.* at 282-83 (magistrate's June Order attached as appendix to district court's opinion).

35. The district court imposed a sanction of \$5,860.01 against Oat, representing the costs and attorneys' fees for opposing parties (RME, RME's insurer, CSM, and Heileman) attending the conference. *Heileman III*, 871 F.2d at 650. The district court found authority to do so pursuant to Federal Rule of Civil Procedure 16(f). *Id.* Rule 16(f) provides in pertinent part "[i]f a party or a party's attorney fails to obey a scheduling or pre-trial order . . . the judge shall require the party of the attorney representing the party or both to pay the reasonable expenses incurred because of any non-compliance with the rule . . ." Fed. R. Civ. P. 16(f).

36. *Heileman II*, 848 F.2d at 1418.

37. Rule 16 provides "[i]n any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for conference . . . for such purposes as . . . facilitating the settlement of the case. Fed. R. Civ. P. 16(a)(5).

38. *Heileman I*, 107 F.R.D. at 277.

39. *Id.* at 282. CSM, RME, and Heileman eventually settled. *Heileman II*, 848 F.2d at 1418. On July 17, 1985, the district court dismissed CSM from the case with prejudice pursuant to the settlement. *Id.* Oat and Heileman also settled. *Id.* On December 5, 1985, the district court dismissed Heileman's claims against Oat with prejudice. *Id.* Because all the parties settled, the district court dismissed the case, and the sanctions judgment against Oat and National was upheld. *Id.* However, Oat expressly reserved its right to appeal the sanctions judgment. *Id.* at 1418-19.

40. Oat appealed the district court's decision affirming the magistrate's June Order that required Oat to pay sanctions to Heileman, CSM, RME, and RME's insurer. *Heileman II*, 848 F.2d at 1418 n.2. Although the district court also sanctioned National, the notice of appeal in the record names Oat as the only appealing party. *Id.* at 1416 n.1. Of the appellees, only Heileman and CSM submitted appellate briefs.

holding that under Rule 16, district courts may not compel represented parties to appear for settlement conferences.⁴¹ The Seventh Circuit panel found that the magistrate had no authority to order Oat to send a representative other than its attorney to the December 19th settlement conference.⁴² The court therefore concluded that the sanctions imposed on Oat for failing to comply with the magistrate's pre-trial orders were improper.⁴³

The Seventh Circuit granted the parties' petitions for rehearing *en banc*⁴⁴ to address the issue⁴⁵ of whether a federal district court may order represented litigants to appear at a pre-trial conference.⁴⁶ The court concluded that district judges have the inherent authority to actively manage the preparation of cases to promote the just, speedy, and inexpensive determination of every action.⁴⁷ Finding that the district court's orders furthered these interests, the court held that the district court had authority to order a representative

Id. at 1418 n.2.

41. *Id.* at 1422.

42. *Id.*

43. *Id.*

44. *Id.* at 1415.

45. Because the *Heileman* court determined that the district court did have inherent authority to order a represented litigant to attend a pre-trial conference, the court also considered whether the district court abused its discretion by issuing the order requiring a representative of Oat to appear at the conference. *Heileman III*, 871 F.2d at 653. The majority concluded that the district court did not abuse its discretion. *Id.* at 655. The majority reasoned that because the case was complex, the stakes were high, and much judicial time would be involved during a trial, the burden of requiring a corporate representative to attend the conference was not unreasonable. *Id.* at 654. The majority also noted that due to the benefits to be gained by the litigants and the court, the expenses and distance for Oat's representative to travel to the conference were reasonable. *Id.*

Finally, the majority addressed the issue of whether the district court abused its discretion by sanctioning Oat for failing to comply with the magistrate's December Order. *Id.* at 655. The majority concluded that the district court did not abuse its discretion by sanctioning Oat. *Id.* at 657. The court reasoned that although the language of the November Order may have been ambiguous, the December Order clearly gave Oat notice that it was required to send a corporate representative to the December 19th conference. *Id.* at 656.

The court distinguished between an attorney representing a corporation and a corporate representative. *Id.* The court noted that the latter is a person holding "a position with the corporate entity." *Id.* Therefore, the majority found that although Oat sent an attorney to the conference, no corporate representative attended as the magistrate's December Order required. *Id.* The majority held that the district court properly sanctioned Oat pursuant to Rule 16(f). *Id.* See *supra* note 35 for a description of Rule 16(f).

46. *Heileman III*, 871 F.2d at 650.

47. *Id.* at 652. The *Heileman* court relied on Federal Rule of Civil Procedure 1 ("Rule 1") for the proposition that a district court may construe Rule 16 liberally to effectively manage its cases for trial. *Id.* Rule 1 states that the Rules shall be construed to secure the just, speedy, and inexpensive determination of every action. FED. R. CIV. P. 1. However, Rule 1 may not be used as an excuse to ignore the words the drafters used to pursue those goals. *Heileman III*, 871 F.2d at 666.

of Oat with full settlement authority⁴⁸ to attend the pre-trial conference.⁴⁹ In so holding, the court found that the sanctions imposed on Oat for failing to comply with the pre-trial orders were appropriate.⁵⁰

The *Heileman* court began its analysis by citing Rule 16,⁵¹ which addresses the use of pre-trial conferences as a means for district courts to manage the progress of litigation and to dispose of costly, unnecessary litigation.⁵² The court emphasized that Rule 16 provides that parties may discuss settlement possibilities at a pre-trial conference.⁵³ However, Rule 16's language does not expressly give the court authority to order represented parties to appear at a pre-trial conference.⁵⁴ The precise language of Rule 16 only provides that attorneys and unrepresented parties may be ordered to participate in a pre-trial conference.⁵⁵ Nonetheless, the court held that district courts possess procedural authority outside the explicit language of the Rules.⁵⁶

The court explained that a district court has the power to de-

48. The court noted that in the context of this case, "authority to settle" means that the corporate representative was required to hold a position capable of binding Oat to any settlement position. *Heileman III*, 871 F.2d at 653.

49. *Id.* at 652-53.

50. See *supra* note 45 and accompanying text for a discussion of the sanctions judgment.

51. Rule 16(a) governs the objectives of the pre-trial conference and provides:

- (a) In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
- (1) expediting the disposition of the action;
 - (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
 - (3) discouraging wasteful pre-trial activities;
 - (4) improving the quality of trial through more thorough preparation; and
 - (5) facilitating the settlement of the case.

FED. R. CIV. P. 16(a)(1)-(5).

52. *Heileman III*, 871 F.2d at 650. The majority cited its decision in *Link v. Wabash R.R.*, 291 F.2d 542, 547 (7th Cir. 1961), *aff'd*, 370 U.S. 626 (1962), to note that pre-trial procedure is an integral part of the judicial process. *Heileman III*, 871 F.2d at 650. In *Link*, the court noted that it must be able to control and enforce the pre-trial conference to maintain the orderly administration of justice. *Link*, 291 F.2d at 547. See *supra* note 8 and accompanying text for discussion of the pre-trial conference as a tool to reduce a court's docket. *But cf.* Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147 (1978). Flanders conducted a study in six representative federal district courts. *Id.* at 161. That study indicated that the court with the largest role in the settlement process during the pre-trial conference had the fewest settlements per year. *Id.* In contrast, the court with the least amount of judicial involvement had the second largest number of settlements. *Id.*

53. Rule 16(c)(7) states that "[t]he participants at any conference under this rule may consider and take action with respect to . . . the possibility of settlement" FED. R. CIV. P. 16(c)(7).

54. See *supra* note 51 for a description of express authority under Rule 16.

55. FED. R. CIV. P. 16(a).

56. *Heileman III*, 871 F.2d at 651.

wise ingenious procedural techniques, such as ordering represented parties to appear at pre-trial conferences, which are not governed by rule or statute.⁵⁷ Rather, this power is grounded in the inherent power of a court to manage its cases so as to achieve orderly and expeditious dispositions.⁵⁸ The court concluded that because Rule 16 does not specifically prohibit a district court from ordering represented parties to appear at pre-trial conferences, it may exercise inherent authority, interpret the rule broadly, and order these represented parties to appear.⁵⁹

The *Heileman* court stated that the Rules are to be liberally construed.⁶⁰ However, the court pointed out that district courts may not exercise inherent authority in a manner inconsistent with the Rules⁶¹ because inherent powers must be exercised with restraint and discretion.⁶² The majority concluded that the district court's use of inherent authority to order represented parties to appear at pre-trial conferences was consistent with Rule 16.⁶³

The *Heileman* court then addressed the magistrate's demand that Oat send a "representative with authority to settle"⁶⁴ to the pre-trial conference.⁶⁵ The court explained that a district court may not compel unwilling litigants to participate in settlement negotia-

57. *Id.* at 651. The court cited to *Link* and noted that a district court's ability to take procedural action may be governed not by rule or statute, but rather by the court's inherent power to effectively manage its cases. *Id.*

58. *Id.*

59. *Id.* at 652. The court asserted that the mere absence of the language "and represented parties" in Rule 16 does not prohibit a district judge from exercising inherent authority to order such a party to a pre-trial conference. *Id.* The court reasoned that the missing language does not give rise to a negative implication with the intent of excluding such parties from the scope of Rule 16. *Id.*

60. *Id.* at 652. See *supra* note 47 for Rule 1's apparent authorization of a liberal construction of the rules.

61. *Heileman III*, 871 F.2d at 652. In *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988), this court noted that inherent authority should be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure. *Id.* at 886.

62. *Heileman III*, 871 F.2d at 654. For a further discussion of the limitations placed on the exercise of inherent authority, see *supra* note 5.

63. *Heileman III*, 871 F.2d at 656. The court reasoned that Rule 16 is enhanced by federal courts exercising inherent authority to order represented litigants to attend pre-trial conferences for the purpose of discussing settlement. *Id.* The majority agreed with an interpretation of Rule 16 from the Tenth Circuit. *Id.* In that case, *In re Baker*, 744 F.2d 1438 (10th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1014 (1985), the court noted that the purpose of the 1983 amendment to Rule 16 was to allow courts to manage their cases by exercising inherent authority. *Id.* at 1441. The *Heileman* majority incorrectly asserted that it was not acting inconsistent with Rule 16. *Heileman III*, 871 F.2d at 652. The court reasoned that the only time inherent authority is proscribed is when the Rules directly mandate a specific procedure to the exclusion of others. *Id.*

64. See *supra* note 48 for a discussion of what is required of a representative with authority to settle. For a discussion of the practical consequences of the magistrate's demand, see *infra* note 68 and accompanying text.

65. *Heileman III*, 871 F.2d at 653.

tions.⁶⁶ However, the court distinguished between requiring parties to attend settlement conferences and requiring parties to participate in settlement discussions.⁶⁷ The court found the magistrate's demand as merely requiring the attendance of a representative of Oat with full authority to settle.⁶⁸ Therefore, the *Heileman* court determined that the district court properly exercised its inherent authority when it ordered Oat to send a representative with settlement authority to the pre-trial conference.⁶⁹ Accordingly, the court found that the district court properly imposed sanctions on Oat for failing to comply with the pre-trial orders.⁷⁰

The Heileman court erred in concluding that a district court may order a represented party to appear at a pre-trial conference. This decision was incorrect for three reasons. First, the court acted in a manner inconsistent with the Rules by exercising inherent authority in an area of procedure specifically addressed by the legislature.⁷¹ Second, the court violated the "plain meaning" principle and the maxim of *expressio unius est exclusio alterius*,⁷² two principles of statutory construction. In so doing, the court interpreted Rule 16 too broadly and failed to address Federal Rule of Civil Procedure 45. Thus, the court ignored the explicit language of those rules. Third and lastly, the court upset the congressionally mandated balancing process between the need for judicial efficiency and the litigant's right to a trial.⁷³ In this regard, the court placed too much

66. *Id.*

67. See *Heileman III*, 871 F.2d at 653 (magistrate merely required a representative of Oat with authority to settle to be present to accept settlement if desirable terms proposed).

68. *Id.* However, as Judge Easterbrook noted in his dissent, the majority in effect required a representative of Oat to conduct good faith negotiations on the spot. *Id.* at 665 (Easterbrook, Posner, Coffey, Manion, J.J., dissenting). The only reason Oat was held in contempt of court and sanctioned was that counsel for Oat did not have the authority to sign a check for Oat. *Id.* Therefore, the majority takes a naive position by stating that Oat was required only to be present while others "voluntarily" pursue settlement. *Id.*

69. *Id.* at 654.

70. *Id.* at 657.

71. See *Heileman III*, 871 F.2d at 666 (Manion, J., dissenting). Judge Manion noted that since the purpose of inherent authority is to fill gaps within a statute or rule, it necessarily follows that where a statute or rule specifically addresses an area of procedure, the exercise of inherent authority to exceed the rule's limitations is improper. *Id.* See also *Strandell v. Jackson County*, 838 F.2d 884, 886-88 (7th Cir. 1988) (exercise of inherent authority improper when area of concern addressed by legislature); *Society International v. Rogers*, 357 U.S. 197, 207 (1958) (district court's authority to dismiss case for failing to comply with discovery request comes from Federal Rule of Civil Procedure 37 and, therefore, to rely on the court's inherent power can only obscure analysis).

72. See *infra* note 83 and accompanying text for the meaning of the principle of statutory construction termed *expressio unius est exclusio alterius*.

73. *Heileman III*, 871 F.2d at 660 (Coffey, J., dissenting). Judge Coffey noted that the majority exercised a power that the drafters of Rule 16 specifically denied them. *Id.* Therefore, the majority upset the balance embodied within the Rules by

emphasis on judicial efficiency and failed to give the litigant's rights proper consideration.

Courts may exercise inherent authority to fill gaps left unaddressed in a particular rule;⁷⁴ however, courts may not regulate situations governed by rule in a manner inconsistent with the Rules.⁷⁵ The extent of a district judge's authority to order the attendance of parties at pre-trial conferences is provided for by Rule 16 and, therefore, there are no gaps within the rule for the district court to fill.⁷⁶ Therefore, because Rule 16 does not give a district court express authority⁷⁷ to order represented parties to attend pre-trial conferences, the district court's exercise of inherent authority to broaden the scope of the rule was improper.⁷⁸

In addition to the court's improper exercise of inherent authority, the court violated two key principles of statutory construction when it approved the trial court's imposition of sanctions. Under the "plain meaning" principle of statutory construction, a statute must

compelling a represented party to attend the pre-trial conference. *Id.*

74. See *Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co.*, 840 F.2d 546, 551 (7th Cir. 1988) (inherent power simply "another name for the power of courts to make common law when statutes and rules do not address a particular area"). See *supra* note 71 for Judge Manion's approval of such a limitation on the exercise of inherent authority.

75. FED. R. CIV. P. 83. This rule provides that "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in a manner not inconsistent with these rules . . ." *Id.* See *supra* note 61 for the Seventh Circuit's approval of Rule 83.

76. See *supra* note 51 for the express authority of a district judge under Rule 16 to order the attendance of parties at pre-trial conferences.

77. See *supra* note 59 and accompanying text for the majority's assertion that express authority is not needed to order represented parties to attend pre-trial conferences. The court relied on *Link v. Wabash R.R.*, 370 U.S. 626 (1962) for this proposition. *Heileman III*, 871 F.2d at 652. However, the court failed to note that the holding in *Link* was narrow. However, in *Link*, the plaintiff's counsel deliberately failed to attend a pre-trial conference, and the district court dismissed the suit even though the Rules did not specifically authorize the court to do so. *Link*, 370 U.S. at 628-29. The *Link* case involved Federal Rule of Civil Procedure 41(b), which authorizes defendants to move for dismissal for a plaintiff's failure to prosecute. FED. R. CIV. P. 41(b). The *Link* court reasoned that due to the ancient practice of trial courts dismissing cases for want of prosecution, "[i]t would require a much clearer expression of purpose than Rule 41(b) provides for [the court] to assume that it was intended to abrogate" a court's power to dismiss sua sponte for this plaintiff's failure to prosecute. *Link*, 370 U.S. at 630-32. Therefore, the *Link* court merely held that the language of Rule 41(b), as applied to a court's power to dismiss for want of prosecution, does not give rise to a negative implication sufficient to convince the court that the Rule's drafters intended to limit the court's power.

However, *Link* does not stand for the proposition that negative implication cannot be used as a starting point to interpret the Rules. *Id.* Moreover, *Heileman III* involved much more than the mere absence of language since Rule 16 specifically designates who may be ordered to attend a pre-trial conference. See *supra* note 51 for Rule 16's specific language of participants covered under the Rule.

78. See *supra* note 71 for decisions limiting the exercise of inherent authority when the legislature has addressed the particular area of concern.

be enforced literally when its language is clear.⁷⁹ Rule 16 states that attorneys and unrepresented parties may be ordered to appear at a pre-trial conference.⁸⁰ Because the words "attorneys" and "unrepresented parties" are clear,⁸¹ courts must construe Rule 16 literally and only apply the rule to those specified parties. This is clearly supported by the drafters' consistent distinction between represented and unrepresented parties throughout Rule 16's language.⁸²

The majority's reasoning also violates the maxim *expressio unius est exclusio alterius*. This rule of statutory construction states that where a statute expressly provides a form of conduct, the manner of its performance, and designates the persons and things to which it applies, there is a strong inference that all omissions are to be understood as exclusions.⁸³ The original version of Rule 16 gave district judges discretion to "direct the attorneys for the parties" to appear at a pre-trial conference.⁸⁴ In 1983, however, the drafters of Rule 16 added the words "and any unrepresented parties" to the rule.⁸⁵ By so doing, the drafters increased a district judge's discretion as to whom a trial judge may order to attend pre-trial conferences.⁸⁶ The amended language indicates the drafters decided that only attorneys and unrepresented parties may be ordered to appear.

79. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (D. Sands 4th ed. 1984). See *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981) (language of statute in question controls its construction); *United States v. Turkette*, 452 U.S. 576, 580 (1981) (statute's explicit language controls its construction); *Palestine Information Office v. Schultz*, 674 F. Supp. 910, 917 (D.C. Cir. 1987) (courts obligated to defer to Congress and apply plain and ordinary meaning of words when words are clear). See generally Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87, 94 (1984) (discussing limitations of judge's authority to interpret statutes that are clear in meaning).

80. FED. R. CIV. P. 16.

81. *Lockhart v. Patel*, 115 F.R.D. 44, 46 (E.D. Ky. 1987) (court clearly has authority to order litigants' attendance).

82. Rule 16(b) regarding scheduling orders requires a judge to consult with the "attorneys for the parties and any unrepresented parties." FED. R. CIV. P. 16(b). Rule 16(d) provides that the pre-trial conference shall be attended by "at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties." FED. R. CIV. P. 16(d). Rule 16(f) provides that sanctions may be imposed "if no appearance is made on behalf of a party" at a pre-trial conference. FED. R. CIV. P. 16(f). This language is significant since an attorney appears on behalf of a represented client at a pre-trial conference. *Heileman III*, 871 F.2d at 667.

83. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.23 (D. Sands 4th ed. 1984). See *Marshall v. Gibson's Prods., Inc.*, 584 F.2d 668, 675 (5th Cir. 1979) (expression of certain powers within statute implies exclusion of others); *Alcoa Steamship Co. v. Federal Maritime Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965) (where Congress specifically expressed its delegation of power, its silence indicates it did not intend to grant power). See generally R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 276-86 (1985) (discussing maxim *expressio unius est exclusio alterius* as applied in federal courts).

84. *Heileman III*, 871 F.2d at 659 (Coffey, J., dissenting).

85. *Id.* at 659-60.

86. *Id.*

Thus, represented parties are excluded from the scope of Rule 16.⁸⁷ Consequently, the *Heileman* court's exercise of inherent authority to include represented parties within the rule's scope violated the maxim *expressio unius exclusio alterius*.

The majority also violated this key principle of statutory construction by ignoring the significance of Rule 45. Rule 45, which regulates compulsory attendance at a judicial proceeding authorizes judges to invoke the subpoena power only for hearings and trials.⁸⁸ Pre-trial conferences were purposely excluded from the scope of Rule 45. Neither the Supreme Court nor Congress has given federal courts the authority to direct represented parties to attend pre-trial conferences, much less the power to compel them to attend.⁸⁹ The court's extension of inherent authority as a substitute for the subpoena power in the context of pre-trial conferences violated the maxim *expressio unius est exclusio alterius* and, therefore, was incorrect.

In addition to requiring a represented party to appear, the court was unjustified in requiring Oat to send a representative to the pre-trial conference "with authority to settle."⁹⁰ The majority claimed that Rule 16(c)(7) authorizes such a demand.⁹¹ Rule 16(c)(7) provides that the participants⁹² at a pre-trial conference may consider the possibility of settlement.⁹³ Applying the plain meaning rule, it is significant that the drafters chose the words "may consider" with regard to the possibility of settlement. This language demonstrates that the drafters intended settlement discussions at pre-trial conferences to be voluntary.⁹⁴ Therefore, the *Heileman* majority exercised

87. *Id.* at 658.

88. FED. R. CIV. P. 45.

89. *Heileman III*, 871 F.2d at 660 (Coffey, J., dissenting).

90. See *supra* notes 48 and 68 for discussion of what is required of a representative with authority to settle.

91. *Heileman III*, 871 F.2d at 653.

92. Because Rule 16(c)(7) does not define "participants" it is necessary to refer back to Rule 16(a), which defines participants as attorneys and unrepresented parties. *Id.* at 666-68 (Manion, J., dissenting).

93. FED. R. CIV. P. 16(c)(7).

94. *Heileman III*, 871 F.2d at 661 (Coffey, J., dissenting). The advisory committee's note to Rule 16 also indicates that the majority has interpreted Rule 16(c)(7) too broadly. The Committee noted that Rule 16(c)(7) was not intended to impose settlement negotiations on unwilling litigants or to encourage coercive settlement practices. *Id.* (citing FED. R. CIV. P. 16(c)(7) advisory committee note). The committee further noted that the rule allows district judges to explore the use of procedures to resolve the dispute. FED. R. CIV. P. 16(c)(7) advisory committee note. This includes urging the litigants to employ adjudicatory techniques. *Id.* The committee's choice of words indicates that courts may not compel parties to pursue settlement. *Heileman III*, 871 F.2d at 661 (Coffey, J., dissenting). The majority justified the district court's order by distinguishing attendance at the pre-trial conference from participation in settlement negotiations. *Id.* at 653. Such a distinction is not warranted because a party unwilling to settle, such as Oat, would apparently satisfy the district court's December Order by appearing at the pre-trial conference and stating that it refuses to settle. *Id.* In

inherent authority so as to violate key principles of statutory construction.

Finally, the majority's decision was incorrect because the court failed to give the litigants' rights proper consideration. The Rules are the product of a careful balancing process considering the need for judicial efficiency and the litigant's right to a trial.⁹⁵ Although the Rules⁹⁶ allow district judges some inherent authority, the *Heileman* majority went too far. By heavily tipping the scale in favor of judicial efficiency, the court failed to give proper consideration to the litigants' right to receive a trial.

Because Congress determined the appropriate balance between these two competing needs, federal judges must conform to this balance when devising new procedural methods.⁹⁷ The district court disrupted this balance when it ordered represented parties to appear at a pre-trial conference.⁹⁸ Congress has statutorily provided litigants with a right to conduct their cases personally or by counsel.⁹⁹ The distinction between unrepresented and represented parties throughout Rule 16¹⁰⁰ is consistent with and reinforces this right.¹⁰¹ Nonetheless, in an effort to reduce its docket, the majority placed little significance on this congressional concern. Oat has a right to be represented by counsel at the pre-trial conference.¹⁰² Therefore, the majority's concern to expedite the case did not justify ordering a representative of Oat to appear personally.¹⁰³

The majority was also unjustified in allowing the trial court to order a representative with authority to settle to attend the pre-trial conference. By so doing, the majority authorized district judges to pressure litigants who do not want to settle, such as Oat, into partic-

requiring such an appearance, the district court merely exercised its inherent authority to waste the parties' time by requiring them to do what their attorneys were hired to do.

95. S. REP. NO. 174, 85th Cong., 2d Sess. 7, reprinted in 1958 U.S. CODE CONG. & ADMIN. NEWS 3023, 3026.

96. See *supra* notes 47 and 75 for the authorization of a district judge's limited amount of inherent authority under Rule 1 and Rule 83.

97. *Strandell v. Jackson County*, 838 F.2d 884, 886-87 (7th Cir. 1987).

98. *Heileman III*, 871 F.2d at 660 (Coffey, J., dissenting).

99. 28 U.S.C. § 1654 (1982).

100. See *supra* note 82 for the consistent distinction between unrepresented and represented parties under Rule 16.

101. *Heileman III*, 871 F.2d at 667 (Manion, J., dissenting).

102. See *supra* note 99 and accompanying text for the congressional right of a litigant to be represented by counsel.

103. See *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1987) ("a crowded docket does not permit the court to avoid the adjudication of cases properly within its congressionally mandated jurisdiction"); *Taylor v. Oxford* 575 F.2d 152, 154 (7th Cir. 1978) (innovative experiments concerning procedural techniques may be admirable considering heavy caseloads in district courts, but experiments must stay within limitations of statute).

ipation in settlement negotiations.¹⁰⁴ However, neither Rule 16 nor any other rule, statute, or doctrine imposes a duty on federal litigants to bargain in good faith over settlement before resorting to trial.¹⁰⁵ On the contrary, litigants have a constitutional right to a trial if they do not want to settle.¹⁰⁶ Because there is no federal judicial power to coerce settlement,¹⁰⁷ the majority tipped the scale in favor of judicial "efficiency" at the expense of the litigants' rights.

The majority's decision invites judicial abuse because the events that occur during pre-trial conferences are rarely subject to review.¹⁰⁸ Therefore, district judges have an incentive to use strong-arm settlement techniques to dispose of their cases in order to reduce their calendar workload.¹⁰⁹ Another major drawback to the majority's holding is the threat to the judge's impartiality. By creating a situation where judges will be more active with the attorneys and parties, in the informal setting of pre-trial conferences, judges are more apt to develop a personal bias concerning the case and the litigants.¹¹⁰ Therefore, the litigants' right to a fair and impartial judge is threatened.¹¹¹

104. See *Heileman III*, 871 F.2d at 669 (Manion, J., dissenting).

105. In *Del Rio v. Northern Blower Co.*, 574 F.2d 23, 26 (1st Cir. 1978), the court stated that "[h]owever desirable it may be from the standpoint of the court's disposing of its calendar that cases be settled rather than tried, there is no duty to settle cases or to reduce one's claims." See *La Buy v. Howes Leather Co.*, 352 U.S. 249, 258-59 (1957) (litigants entitled to trial by court regardless of court's docket congestion); *National Ass'n of Gov't Employees v. National Fed'n of Fed. Employees*, 844 F.2d 216, 223 (5th Cir. 1988) (failure to settle case at pre-trial conference as suggested by court does not constitute grounds for sanctions). In *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987), the court stated "[w]hile the pre-trial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation"; see also *Kothé v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985) (not purpose of amended Rule 16 to impose settlement negotiations on unwilling litigants); *Perez v. Maine*, 760 F.2d 11, 12 (1st Cir. 1985) (parties free to choose whether to settle); *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974) (on due process grounds, no judge can compel settlement prior to trial on terms that parties find completely unacceptable); *Padovani v. Bruchhausen*, 293 F.2d 546, 547-48 (2d Cir. 1961) (although court can utilize Rule 16 to meet mounting burden of docket congestion, it has overriding responsibility to ensure justice between litigants before court); 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1525 (Supp. 1987) ("[a]s the Advisory Committee Note indicates [Federal Rule of Civil Procedure 16(c)(7)] does not force unwilling parties into settlement negotiations"). For a further discussion that a federal litigant has no duty to settle, see *Report of the Advisory Committee on Federal Civil Rules*, 97 F.R.D. 165, 211 (1982); Clark, *To An Under-standing Use of Pre-Trial*, 29 F.R.D. 454, 456 (1961); Smith, *Pre-Trial Conference — A Study of Methods*, 29 F.R.D. 348, 353 (1961).

106. U.S. CONST. amend. VII.

107. *Heileman III*, 871 F.2d at 658 (Posner, J., dissenting).

108. Resnick, *supra* note 8, at 54. For a discussion of case law involving judicial abuse during the pre-trial conference, see Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 432 (1982).

109. See *Heileman III*, 871 F.2d at 666 (Ripple, J., dissenting).

110. Resnick, *supra* note 108, at 402.

111. *Id.* at 434.

Because the language of Rule 16 does not expressly grant the power to compel represented parties to attend pre-trial conferences, the authority for a judge to do so must be accomplished through the federal rule-making process outlined in the Rules Enabling Act.¹¹² This Act¹¹³ was designed to promote a uniform system¹¹⁴ of practice and procedure in federal courts.¹¹⁵ Recently, in the Judicial Improvements and Access to Justice Act,¹¹⁶ Congress made clear its concern that district courts must not disrupt the careful process of evaluation and consensus outlined in the Rules Enabling Act for establishing and amending the Rules.¹¹⁷ Therefore, district courts may not devise new procedural techniques, such as ordering represented parties to attend pre-trial conferences, without Congress' approval.

In conclusion, the *Heileman* decision extends a district judge's inherent authority during the pre-trial conference. This grant of broad discretion was improper because the legislature has already specifically defined the extent of a district judge's pre-trial authority under Rule 16 and Rule 45. Therefore, a district judge may not exercise inherent authority to increase his powers during the pre-trial conference. The majority also violated principles of statutory construction by its liberal interpretation of Rule 16 and by failing to address Rule 45. Finally, the majority upset the appropriate balance between judicial efficiency and the rights of the litigants by placing too much weight on judicial efficiency. Through its holding, the *Heileman* majority opens the door to judicial abuse during pre-trial conferences and threatens the litigant's right to a trial and an impartial judge.

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112. *Heileman III*, 871 F.2d at 663 n.5 (Easterbrook, J., dissenting).

113. The Act provides in pertinent part:

... [Rules of procedure] shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of 90 days after they have thus been reported.

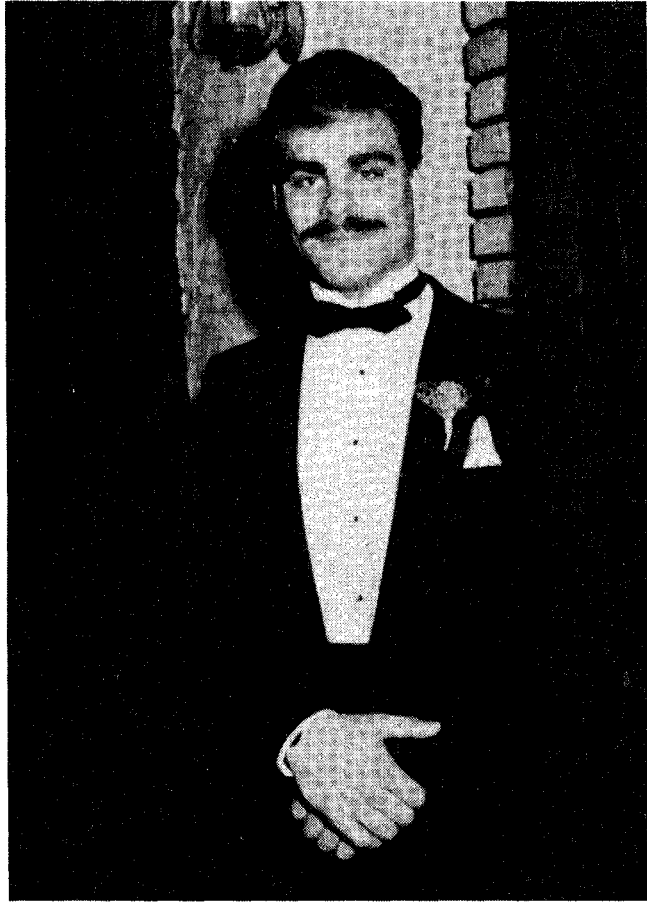
All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect
28 U.S.C. § 2072 (1982).

114. See *Heileman III*, 871 F.2d at 666 (Ripple, J., dissenting). As Judge Ripple stated, the majority encourages each district court "to march to its own drummer." *Id.* The majority's rhetoric will be used in the future to justify other questionable procedural innovations. *Id.* In so doing, the majority's decision will cause great disuniformity among the district courts. *Id.*

115. *Heileman III*, 871 F.2d at 665 (Ripple, J., dissenting).

116. Pub. L. No. 100-702, § 401, 102 Stat. 4642 (1988).

117. *Id.* §§ 401-07, 102 Stat. at 4648-52.



(May 14, 1964 - May 19, 1990)

Shortly after Brad Adas finished his article, he was diagnosed with leukemia. Brad's article exemplifies the dedication he had for the study of law and any other project he undertook. Although just blossoming as a future attorney, the legal community as well as his family and friends have suffered a great loss. Brad had the potential to develop a great legal mind. With his passing, unfortunately, the legal community will never experience the potential Brad had to offer. The entire John Marshall Law School community would like to express its condolences to the Adas family and Brad's fiancée, Sharon Tomich.