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Leading Horses to Water: May Courts Which Have the Power to Order Attendance at Mediation Also Require Good-Faith Negotiation - Decker v. Lindsay

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LEADING HORSES TO WATER: MAY COURTS WHICH HAVE THE POWER TO ORDER ATTENDANCE AT MEDIATION ALSO REQUIRE GOOD-FAITH NEGOTIATION?

Decker v. Lindsay[1]

I. INTRODUCTION

There is a tacit assumption in the world of litigation that some cases can be settled, while other cases cannot.[2] But, of course, the simple fact that a case *can* be settled does not mean that it *will* be settled. This raises some questions: Of those cases which can reach a conclusion without litigation, how many will actually do so? And what, if anything, should the legal system do to facilitate the settlement of such cases?[3]

Settlement is a favorite of the law,[4] and courts encourage it as a social good which may even outweigh other important policy considerations.[5] Reasons for this favoritism include a desire to avoid the time-consuming uncertainty and cost of litigation,[6] settlement's contributions to the efficient use of the court system,[7] and a general wish for peaceful resolution of controversies.[8]

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1. 824 S.W.2d 247 (Tex. Ct. App. 1992).

2. William M. Levine, *Matrimonial Arbitration: An Option For the 90's*, MASS. LAW. WKLY., Mar. 25, 1991, at 5.

3. *See* Diana C. Bork, *Reasonable Legal Reform*, NAT'L L.J., Sept. 30, 1991, at 17. *But see* Bob Gibbins, *Propositions Built on Myth*, NAT'L L.J., Oct. 7, 1991, at 17.

4. Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910).

5. *See, e.g.*, Hernandez v. Telles, 663 S.W.2d 91 (Tex. Ct. App. 1983). In *Hernandez*, vigorous policies against deceptive business practices gave way to the stronger policy favoring settlement and compromise of claims. *Id.* at 93.

6. *See* Pfizer, Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972), *cert. denied*, 406 U.S. 976 (1972).

7. Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984).

8. Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 428-29 (1986).

The quest for speedy and efficient justice may be as old as the first dispute — it has certainly been a fixture on the American legal horizon, at least since Judge Learned Hand more than fifty years ago opined, "As a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."[9] The search has led to statutes,[10] court decisions,[11] and commentary[12] which debate a broadening of judicial power that might include a more active role in directing parties toward settlement. But how active can the courts be? And what role can courts assume in encouraging orderly settlement when one or both parties are adamantly litigious? It will be the scope of this Note to explore the limits of that expanding role, and to show how some courts have defined its boundaries.

II. FACTS AND HOLDING

Plaintiffs brought suit in a Texas District Court over a rear-end car collision, claiming economic and medical damages.[13] They planned to prosecute the matter through trial.[14] The district judge, on October 18, 1991, ordered the parties to mediate.[15] She based her order on the Texas statute authorizing a court to refer pending matters to alternative dispute resolution procedures (ADR) either by its own motion or by motion of a party.[16] The judge did not consult with either party before ordering mediation in the case.[17]

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9. Irving R. Kaufman, *The Public's Right to Speedier Justice*, N.Y. TIMES, Oct. 16, 1987, at 39, col. 2.

10. *See, e.g.*, FED. R. CIV. P. 1 (establishing that the rules of civil procedure should be "construed to secure the just, speedy, and inexpensive determination of every action").

11. *See, e.g.*, G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989). This case allows "a pretrial magistrate to compel a represented litigant to attend pretrial conferences with 'full authority to settle.'" Thomas A. Tozer, *The* Heileman *Power: Well-Honed Tool or Blunt Instrument?*, 66 IND. L.J. 977, 980 (1991) (quoting *Heileman*, 871 F.2d at 655 n.11).

12. *See, e.g.*, Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

13. *See Decker*, 824 S.W.2d at 249.

14. *Id.*

15. *Id.* at 248.

16. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021 (West Supp. 1992). This section is entitled "Referral of Pending Disputes for Alternative Dispute Resolution Procedure," and it reads as follows:

> (a) A court may, on its own motion or the motion of a party, refer a pending dispute for resolution by an alternative dispute resolution procedure including:
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> (1) an alternative dispute resolution system established under Chapter 26, Acts of the 68th Legislature, Regular Session, 1983 (Article 2372aa, Vernon's Texas Civil Statutes);
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> (2) a dispute resolution organization; or
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> (3) a nonjudicial and informally conducted forum for the voluntary settlement of citizens' disputes through the intervention of an impartial third party, including those alternative dispute resolution procedures described under this subchapter.

Id.

17. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(b) ("The court shall confer with the parties in the determination of the most appropriate alternative dispute resolution procedure."). *But see* Downey v. Gregory, 757 S.W.2d 524 (Tex. Ct. App. 1988) (holding that while this chapter contemplates that the court will confer with counsel before referral, no hearing is required).

The judge's order instructed the parties and their attorneys to "proceed in a good faith effort to try to resolve this case."[18] The order indicated that while parties can be ordered to attend a mediated settlement conference, they are not bound by the outcome.[19] It instructed the parties to pay for the mediator as part of the court costs incident to the case.[20] The judge's order bound each party and their attorneys to the Rules of Mediation, which accompanied the order;[21] those rules were to be made an explicit part of any agreement to mediate.[22] The rules added that "while no one is asked to commit to settle their dispute in advance of mediation, all parties commit to participate in the proceedings in good faith with the intention to settle, if at all possible."[23]

Plaintiffs made a timely objection to the order, listing six reasons why mediation was an inappropriate procedure for their case.[24] The objections indicated that the lawsuit's simplicity and its expected short duration made it an unlikely candidate for mediation, that plaintiff doubted the case could be settled, and that plaintiff refused to pay mediator's fees as ordered by the court.[25] The plaintiffs objected to a procedure which they said would compromise other valuable rights available to them at trial and complained that the order was a violation of both federal and Texas constitutions.[26] The judge overruled plaintiffs' objections to the order to mediate.[27] Plaintiffs, now relators, sought mandamus relief from the Texas Court of Appeals, reiterating their objections to the mediation order.[28]

The court of appeals dismissed all of relators' objections, save one, as being either misplaced or within the discretion of the trial judge.[29] The lone objection seized by the Court as pertinent was the argument that the judge's order violated

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18. *Decker*, 824 S.W.2d at 248.
19. *Id.* at 249.
20. *Id.* at 248.
21. *Id.*
22. *Id.* at 248-49.
23. *Id.* at 249.
24. The objections listed were:

(1) the lawsuit arises out of a simple rear-end car collision, where the only issues are negligence, proximate cause, and damages; (2) trial is likely to last for only two days; (3) it is relators' opinion that mediation will not resolve the lawsuit, and they have not agreed to pay fees to the mediator; (4) mediation may cause relators to compromise their potential cause of action under the *Stowers* doctrine; (5) the law does not favor alternative dispute resolution where one of the litigants objects to it and when the litigants have been ordered to pay for it; and (6) court-ordered mediation, over the relators' objection and at their cost, violates their right to due process under the fifth and fourteenth amendments to the United States Constitution and Article I, § 13 of the Texas Constitution and their right to open courts under Article I, § 13 of the Texas Constitution.

Id. at 249.
25. *Id.*
26. *Id.*
27. *Id.* at 248.
28. *Id.* at 249.
29. *Id.* at 249-50.

the Texas Constitution's open courts provision by requiring negotiation.[30] The appeals court conditionally granted the petition for writ of mandamus, holding that when a party clearly indicates its wish not to negotiate a settlement of a dispute but to proceed to trial, a referral to mediation cannot require good-faith negotiation.[31]

III. LEGAL BACKGROUND

A. Judicial Powers

While lawsuits in this country are not likely to drone on like Dickens' celebrated case of *Jarndyce and Jarndyce*,[32] the alarm is ringing over the condition of our courts, both state and federal.[33] Some say overcrowded dockets lead judges to become more interested in managing, and thereby settling, cases.[34] In fact, it was not too long ago that a federal district judge remanded a properly removed case to state court, citing an overcrowded docket.[35]

While current voices are pleading the case for alternative dispute resolution to cure the ills of an overburdened system,[36] the concept of extra-judicial alternatives to litigation has been with us for some time.[37] For example,

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30. *Id.* at 251; TEX. CONST. art. I, § 13.

31. *Decker*, 824 S.W.2d at 252.

32. Dickens unfolds this case as follows:

> This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house in Chancery-lane; but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

CHARLES DICKENS, BLEAK HOUSE 6-7 (Thomas Y. Crowell Company 1971) (1853).

33. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 65 (1985); E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986).

34. Resnik, *supra* note 12, at 379.

35. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 339 (1976).

36. Lieberman & Henry, *supra* note 8, at 425-26.

37. *See, e.g.*, Heckers v. Fowler, 69 U.S. (2 Wall.) 123, 127 (1864).

Wisconsin has had statutes since the early 19th Century which allowed for the use of arbitrators instead of the courts in practically all civil actions.[38]

Alternatives to a trial's seemingly inevitable delay and expense can be suggested[39] or mandated.[40] They can come from the judiciary[41] or the legislature.[42] The Supreme Court of Connecticut, for example, has said it is a "proper exercise of the judicial office to suggest the expediency and practical value of . . . settling suits."[43] Further, the Minnesota Court of Appeals has upheld the mandatory mediation provision of a farm mortgage moratorium statute.[44] In a system which has traditionally protected the right to litigate,[45] alternative methods are favorites of the law for the same reasons that settlement is generally encouraged: both allow cases to be cleared from crowded dockets and allow for "amicable solutions to controversies" to be reached.[46]

The United States Supreme Court says judicial activism[47] of this type is firmly within a court's inherent capacity to control the parties to a lawsuit, even during the pre-trial period. In *Roadway Express, Inc. v. Piper*,[48] the Court approved a trial judge's broad powers to manage cases, authorizing trial courts to impose sanctions for failure to comply with pre-trial orders.[49] In *National Hockey League v. Metropolitan Hockey Club, Inc.*,[50] the Court said that dismissal of a case was a proper sanction for failure of a party to comply with a discovery order.[51] State courts have also approved broad powers of judges to control parties during pre-trial phases, sometimes invoking statutes[52] and other

38. For a brief history of the Wisconsin statutes, see *Knickerbocker v. Beaudette Garage Co.*, 209 N.W. 763, 764-65 (Wis. 1926).

39. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 665 (West Supp. 1990). This statute says, in relevant part, that "the court *may*, in any case under this subchapter, at any time refer the parties to mediation on any issues." *Id.* (emphasis added).

40. MINN. STAT. § 583.26 (1989 & Supp. 1993).

41. Chicago & N. W. Ry. v. United Transp. Union, 336 F. Supp. 1149, 1166 (N.D. Ill. 1971), *rev'd on other grounds*, 471 F.2d 366 (7th Cir. 1972), *cert. denied*, 410 U.S. 917 (1973).

42. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021.

43. Krattenstein v. G. Fox & Co., 236 A.2d 466, 469 (Conn. 1967).

44. Laue v. Production Credit Ass'n, 390 N.W.2d 823, 830 (Minn. Ct. App. 1986). *But see* Federal Land Bank v. Bott, 732 P.2d 710, 718 (Kan. 1987) (ruling mortgage moratorium statutes are unconstitutional impairments of contracts); Federal Land Bank v. Story, 756 P.2d 588, 591-93 (Okla. 1988) (same).

45. Tozer, *supra* note 11, at 991.

46. D. L. Spillman, Jr., Annotation, *Judge's Comments — Urging Settlement*, 6 A.L.R.3d 1457, 1459 (1966).

47. *See generally* Resnik, *supra* note 12.

48. 447 U.S. 752 (1980).

49. *Id.* at 764-67.

50. 427 U.S. 639 (1976) (per curiam).

51. *Id.* at 643.

52. See, e.g., *Bennett v. Bennett*, 587 A.2d 463 (Me. 1991), for its discussion of ME. REV. STAT. ANN. tit. 19, § 665.

times citing general rules of jurisprudence.[53] This supervisory power of the court has been used to compel parties to mediate.[54]

B. Ordering ADR

However, such judicial control may have its limits. The Seventh Circuit recently held in *Strandell v. Jackson County*[55] that the power of a federal court under Rule 16 of the Federal Rules of Civil Procedure[56] does not extend to compelling parties to submit to summary jury trials,[57] which are a form of ADR. It is possible that this limitation may be firmly circumscribed. A commentator argues that the holding in this case should be confined to summary jury trials, which differ significantly from other forms of ADR and settlement negotiations.[58]

Texas' statute[59] allows courts to refer pending disputes to certain authorized ADR proceedings.[60] The suggestion of ADR proceedings may come from any party to the action,[61] or from the court itself.[62] However, even if ADR is suggested by the parties, the court is not bound to refer the matter.[63] The statute does require a court to confer with the parties before choosing an appropriate method of resolving the dispute.[64]

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53. *See, e.g.*, Gardner v. Mobil Oil Co., 31 Cal. Rptr. 731, 734 (Ct. App. 1963).

54. *See, e.g.*, International Ass'n of Machinists & Aerospace Workers v. National Mediation Bd., 425 F.2d 527, 530 (D.C. Cir. 1970); International Bhd. of Elec. Workers Local No. 323 v. Coral Elec. Corp., 576 F. Supp. 1128, 1136-37 (S.D. Fla. 1983); Iron Workers Local 790 v. Bostron-Bergman, 105 L.R.R.M. (BNA) 2633 (N.D. Cal. 1980).

55. 838 F.2d 884, 888 (7th Cir. 1987).

56. The relevant portion of this rule states: "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 . . . (5) facilitating the settlement of the case." FED. R. CIV. P. 16(a). See also FED R. CIV. P. 16(c), which states that "[t]he participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."

57. *See* William E. Craco, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483 (1988). The author argues that because the scope of the power of the judiciary is not specifically limited in the area of mandating alternative dispute resolution, Rule 16 should be given the broadest possible reading. *Id.* at 491-95. Coupled with the federal court's "inherent powers . . . to control their own dockets and provide for efficient management of their caseloads," the broad authority of Rule 16 does allow courts to compel some forms of ADR. *Id.* at 497. Summary jury trials are, however, distinguished from other types of settlement procedures. *Id.* at 483 n.1, 485 n.9.

58. *See id.* at 494-95.

59. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021.

60. *Id.* § 154.021(a).

61. *Downey*, 757 S.W.2d at 525.

62. *Id.*

63. *Id.*

64. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(b).

The emphasis on settling cases before trial raises some concerns from the bench over the proper role of the courts. Is a court's "encouragement" of mediation and settlement simply a euphemism for "ordering" settlement?[65] In Connecticut, the state high court says

> [i]t is a proper exercise of the judicial office to suggest the expediency and practical value of adjusting differences and compromising and settling suits at law. The efficient administration of the courts is subserved by the ending of disputes without the delay and expense of a trial, and the philosophy or ideal of justice is served in the amicable solution of controversies.[66]

But a California court, in *Rosenfield v. Vosper*,[67] has warned

> [a]lthough efforts on the part of a trial judge to expedite proceedings and to encourage settlements out of court are ordinarily to be commended, such efforts should never be so directed as to compel either litigant to make a forced settlement.[68]

In that case, the trial judge frequently admonished the attorneys that the case should be settled; he twice held conferences in his chambers in which he insisted that the defendant's attorneys impress upon their client the judge's belief that the case should be settled for $7,500.[69] The dissent admitted that the judge may have been injudicious but said that the indiscretion did not warrant reversal.[70]

Other courts appear to agree with the *Rosenfield* dissent. In *Chiappetta v. LeBlond*,[71] a Maine superior court judge sanctioned a television repair shop customer for refusing to settle.[72] The case was being heard on remand following an earlier trial in which the repair shop won.[73] The Maine Supreme Court expressly stated that a trial court not only has the authority to impose sanctions for abuse of the litigation process, but also that such a decision would be reviewed under an abuse of discretion standard.[74] Determining just when encouragement becomes coercion is such a fact-specific issue that Justice Traynor said that no judicial misconduct case of this type can ever be a controlling

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65. *See, e.g.*, Gullett v. McCormick, 421 S.W.2d 352 (Ky. Ct. App. 1967) ("the problem of the extent to which a trial court . . . may encourage settlement of an action is a delicate one").

66. *Krattenstein*, 236 A.2d at 469.

67. 114 P.2d 29 (Cal. Ct. App 1941).

68. *Id.* at 33.

69. *Id.*

70. *Id.* (Moore, P.J., dissenting).

71. 544 A.2d 759 (Me. 1988).

72. *Id.* at 760.

73. *Id.*

74. *Id.* at 760-61. However, the Maine Supreme Court dismissed the sanctions in *Chiappetta* due to the failure to show that the parties had negotiated in bad faith. *Id.* at 761.

precedent for any other case.[75] The only guidelines seemingly available in case law are general admonishments that "a trial court ought not to force a settlement on a party who wants a trial, but there is nothing wrong or irregular in a court suggesting the advisability of settlement."[76]

Indeed, parties as well as judges are forbidden from using undue pressure to force a settlement upon an opposing party. The Supreme Judicial Court of Maine in *Bennett v. Bennett*[77] was faced with a litigant who moved to compel his ex-spouse to sign an alleged "agreement" between them.[78] The court said that ordering the spouse to sign "is contrary to and would undermine the basic policy of the mediation process that parties be encouraged to arrive at a settlement of disputed issues without the intervention of the court."[79]

C. The Good Faith Requirement

In those cases in which mediation can be ordered by a court,[80] the judge may require the parties to operate in good faith.[81] However, courts have often had trouble defining "good faith." Even a court applying a statutory standard of "good faith" has decided that it "is a term incapable of precise definition."[82] Courts agree that the standard is fact-intensive and is best determined on a case-by-case basis using the broad discretion of the trial court.[83]

Still, courts have enunciated guidelines to describe a good faith effort. Courts will require a party to engage "actively . . . in the bargaining process with an open mind and a sincere desire to reach an agreement."[84] Other opinions rely on the common usage of the term "good faith" to require litigants to have "honesty of purpose, [and] freedom from intention to defraud."[85]

It is the emphasis on fairness[86] and honest dealing which seems to be the common thread through most definitions of good faith, whether statutory or judge-made. Pennsylvania's Uniform Fiduciary Act[87] says that "[a] thing is done in 'good faith'. . . when it is in fact done honestly."[88] The Florida

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75. Weil v. Weil, 236 P.2d 159, 167 (Cal. 1951).
76. Washington v. Sterling, 91 A.2d 844 (D.C. 1952).
77. 587 A.2d 463 (Me. 1991).
78. *Id.* at 464.
79. *Id.*
80. *See supra* notes 39-79 and accompanying text.
81. *Chicago & N. W. Ry.*, 336 F. Supp. at 1168.
82. *In re* Love, 957 F.2d 1350, 1355 (7th Cir. 1992).
83. *In re* Rimgale, 669 F.2d 426, 431 (7th Cir. 1982).
84. Detroit Police Officers Ass'n v. City of Detroit, 214 N.W.2d 803, 808 (Mich. 1974).
85. Efron v. Kalmanovitz, 57 Cal. Rptr. 248, 251 (Ct. App. 1967).
86. *Love*, 957 F.2d at 1357. In its effort to define "good faith," the Seventh Circuit in this case said the standard was one of "fundamental fairness," but went on to admit that such a definition was no great improvement in clarity. *Id.*
87. 7 PA. CONS. STAT. ANN. §§ 6351-6404 (Supp. 1992).
88. *Id.* § 6351(2).

Supreme Court, reviewing a disciplinary proceeding against an attorney who refused a court order for religious reasons, defined good faith as "'an honest belief . . . and freedom from knowledge of circumstances which ought to put the holder upon inquiry. . . . [It is] that state of mind denoting honesty of purpose . . . and, generally speaking, means being faithful to one's duty or obligation.'"[89]

The fact that courts may order parties to mediate or to bargain does not require the participants to reach any agreement.[90] Such an order requires only that "the parties manifest such an attitude and conduct that will be conducive to reaching an agreement."[91] If a plan is proposed with honest intentions, a court will find that the good faith standard is satisfied so long as there is a basis to expect success.[92]

It is not a controlling factor that mediation might fail to resolve the issue.[93] Parties whose failure is accompanied by a good faith effort are held harmless. Some local federal court rules impose sanctions for bad faith efforts when a party rejects the outcome of an alternative mechanism but fails substantially to improve her position at trial.[94]

Interestingly, in the search for a definition of "good faith," some courts resort to saying it is whatever is not "bad faith," by which they mean "dishonest purpose . . . conscious doing of wrong . . . [or] breach of a known duty through some motive of interest or ill will. It partakes of the nature of fraud. It means 'with actual intent to mislead or deceive another.'"[95]

The Ohio Supreme Court has looked at good faith in the settlement context.[96] In a case involving an automobile collision, the court said a party has not failed to use good faith in settlement attempts so long as the party has fully cooperated in discovery, has rationally evaluated risks and liabilities, and has not attempted to delay the proceedings unnecessarily.[97] The court added a fourth criterion of making or responding to a "good faith monetary settlement offer."[98] This element was soundly criticized by the dissent for creating a circular definition — interpreting "good faith" by using the term "good faith."[99]

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89. Florida Bar v. Jackson, 494 So. 2d 206, 209 (Fla. 1986) (quoting BLACK'S LAW DICTIONARY 623-24 (5th ed. 1979)).

90. *Chicago & N. W. Ry.*, 336 F. Supp at 1166.

91. *Detroit Police Officers Ass'n*, 214 N.W.2d at 808.

92. Kane v. Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988).

93. Production Credit Ass'n v. Spring Water Dairy Farm, Inc., 392 N.W.2d 15 (Minn. Ct. App. 1986), *aff'd*, 407 N.W.2d 88 (Minn. 1987).

94. A. Leo Levin & Dierdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 FLA. L. REV. 29, 55-56 (1985).

95. Slater v. Motorists Mut. Ins. Co., 187 N.E.2d 45, 48 (Ohio 1962) (quoting Spiegel v. Beacon Participations, Inc., 8 N.E.2d 895, 907 (Mass. 1937)).

96. Kalain v. Smith, 495 N.E.2d 572 (Ohio 1986).

97. *Id.* at 574.

98. *Id.*

99. *Id.* at 575 (Celebrezze, C.J., dissenting).

On the other end of the spectrum is the Texas court which defines "good faith" as the opposite of "bad faith."[100] The court said "bad faith" implied fraud, deception, or a refusal to abide by a duty owed to another, generally prompted by a "sinister motive."[101]

Statutes have also been used to impose good faith negotiating requirements on parties in mediation. The Minnesota Farm Creditor Mediation Act,[102] for example, requires a mediator to file an affidavit whenever a party operates outside the bounds of good faith.[103] It should be noted that not all farm credit mediation acts require good faith negotiation.[104]

IV. THE INSTANT DECISION

The Texas Court of Appeals put the question succinctly: "Can a party be compelled to participate in an alternative dispute resolution procedure despite its objections?"[105] The court's answer was no.

The relators in *Decker v. Lindsay* put forward six reasons why they should not be compelled to submit to mediation.[106] The trial judge overruled the relators' first three reasons, and the appellate court subsequently upheld the lower court's ruling.[107] Relators argued that their case was one of limited issues, that it would take no longer than a mediation procedure would take, and that mediation would not resolve the lawsuit.[108] The court noted discrepancies between these objections and the record, which indicated a trial of some complexity, as well as an estimated trial time of up to four days.[109] The court also pointed out that the real party in interest desired mediation.[110]

The Texas appeals court further disposed of the relators' other objections. As to the objection that they would be forced to pay for the costs of a procedure to which they objected, the court noted that the court-appointed mediator had waived her fee.[111] Therefore, the issue was moot. The court also dismissed relators contention they would sacrifice their *Stowers* rights.[112] The *Stowers* Principle is the Texas version of the doctrine that an insurer has a duty to settle

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100. Thrift v. Johnson, 561 S.W.2d 864, 867 (Tex. Ct. App. 1977).

101. *Id.*

102. MINN. STAT. §§ 583.20-583.32 (1989 & Supp. 1993).

103. *Id.* § 583.27(2).

104. *See, e.g.*, IOWA CODE § 654A (1990). For a complete look at agricultural loan mediation, see Donna L. Malter, Comment, *Avoiding Farm Foreclosure through Mediation of Agricultural Loan Disputes*, 1991 J. DISP. RESOL. 335 (1991).

105. *Decker*, 824 S.W.2d at 248.

106. *Id.* at 249.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 250.

a lawsuit when an ordinarily prudent person would do so.[113] Failure to settle under those circumstances makes the insurer liable to the insured for any damages awarded in excess of policy limits.[114] The *Decker* court pointed out that the relator's invocation of *Stowers* was premature,[115] since under Texas law, *Stowers* rights do not accrue until final judgment.[116]

Relators contended that Texas law premised its ADR procedures on the basis of willing participants, and that compelled ADR is not within the scope of the code.[117] But, in response, the court drew the distinction between a party's attendance at an ADR proceeding and that party's participation in the proceeding itself.[118] While a court cannot order parties to settle, or even to negotiate, it can at least order them to sit down across the table from one another.[119] While a party may oppose the order on "reasonable" grounds,[120] the trial judge determines reasonableness. Therefore, said the appeals court, *unreasonable* objections cannot be the basis for forgoing ADR proceedings.[121]

Since Texas law favors a policy of peaceable resolution of disputes,[122] trial courts have the power to order parties to attend ADR proceedings.[123] Furthermore, since the trial judge determines the reasonableness of any objections to her order, the law is satisfied when a court requires disputants to meet in a procedure designed to help them settle their differences.[124] But the appeals court drew a bright line at that point, forbidding a trial judge from ordering anything more than attendance at an ADR proceeding.[125]

The language of the trial judge's order required the parties not only to attend, but also to *participate* in mediation.[126] The order commanded the parties to "proceed in a good faith effort to try to resolve this case."[127] This, said the appeals court, "does not comport with the scheme set forth in [the code]."[128] Because of this non-conformity with the policy objectives of the applicable code sections, the appeals court ordered the trial judge to vacate those

113. *See* G.A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Ct. App. 1929).

114. *Id.*

115. *Decker*, 824 S.W.2d at 250.

116. Street v. Honorable Second Court of Appeals, 756 S.W.2d 299, 301 (Tex. 1988).

117. *Decker*, 824 S.W.2d at 250-51.

118. *Id.*

119. *Id.*

120. TEX. CIV. PRAC. & REM. CODE ANN. § 154.022(c) (1987).

121. *Decker*, 824 S.W.2d at 250.

122. TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (1987).

123. *Decker*, 824 S.W.2d at 250.

124. *Id.* at 251.

125. *Id.* at 250-51.

126. *Id.* at 249.

127. *Id.* at 248.

128. *Id.* at 251.

portions of her order requiring good faith negotiations.[129] The court indicated that whenever one party objects to ADR proceedings because it prefers to take its case to trial, that party cannot be ordered to negotiate its underlying dispute.[130]

V. COMMENT

If it were possible to determine ahead of time which disputes required litigation and which could be settled by some other means, many lawyers would go hungry. That has not stopped the search for more efficient and effective ways to determine which lawsuits should proceed to trial and which should not. At least one commentator has attempted to reduce to mathematical precision the exact point at which a party to a lawsuit will forgo litigation.[131] But not even a Posner equation can take into account all of the possible variables which go into such a decision.[132] It is left in the hands of litigants, lawyers, and judges to weigh these factors on a case-by-case basis to decide when to try, and when to settle, a case. If the decision is left to the reasoned notions of the parties, then deciding to mediate a case can overcome any number of perceived problems in the legal system.[133] But when judges alone become such a large part of the equation that the wishes of the parties are rendered meaningless, the legal system should tremble.[134]

Perhaps the greatest fear of judicial intervention is that a judge's involvement in the decision to mediate may rise to the level of coercion.[135] "Tools forged to expedite trials and eliminate abuses were being abused themselves in order to coerce settlements and bring cases to their knees."[136] And even if the bench has the best intentions, *any* entry by a judge into settlement matters can appear to be coercive;[137] "[t]o deny the existence of this coercive atmosphere is to ignore reality."[138]

Yet the mechanisms for directing would-be litigants to alternative resolution methods must often involve judicial intervention.[139] Indeed, judges have been

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129. *Id.* at 252.

130. *Id.* at 250-52.

131. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986). Judge Posner created a model for his prediction, based on the amount of a plaintiff's demand in relation to the defendant's offer of compromise. *Id.* at 369-70.

132. Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986). Schuck analyzes the results of injecting judges into the settlement process, an element which is not factored into Posner's equations. *Id.* at 348-59.

133. *See supra* notes 4-12 and accompanying text.

134. Tozer, *supra* note 11, at 987-88.

135. H. Lee Sarokin, *Justice Rushed is Justice Ruined*, 38 RUTGERS L. REV. 431, 435 (1986).

136. *Id.* at 432.

137. *Id.* at 435.

138. *Id.*

139. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a).

encouraged to explore ADR mechanisms. Justice Anthony Kennedy says alternatives to traditional litigation must be studied if for no other reason than that their existence implies deficiencies in the present legal system.[140] Who better than an impartial observer to assess the merits of a referral to mediation? But what should be the scope of that referral?

In *G. Heileman Brewing Co. v. Joseph Oat Corp.*,[141] the court approved an action by a magistrate judge which ordered a litigant to provide a representative at settlement conferences with "full authority to settle." Under the facts of *Heileman,* this apparently meant "the power to write a check."[142] The power thus granted to the magistrate judge in *Heileman* has been criticized as well beyond the traditional role of the judiciary.[143] Commentators have also said that this newly created "*Heileman* Power" is a troubling step into coercion.[144]

A much different situation is encountered under the facts of *Decker v. Lindsay*. In *Decker*, the trial court required attendance and participation in a mediation session.[145] It also required that the parties "proceed in a good faith effort to try to resolve this case."[146] There was nothing of *Heileman's* thinly veiled order to compromise, merely a requirement of good faith negotiation. Where in *Heileman* the parties had been in litigation for some time and, in fact, had appealed the case twice, the *Decker* litigants had yet to have their day in court. While the *Heileman* court never specified what it required of the litigant's "authorized representative,"[147] Judge Lindsay clearly required the litigants to act in "good faith."[148]

One clear purpose of promoting mediation and other forms of ADR is to relieve courts of overcrowding.[149] Whether mediation is accomplished by "farming out" the process,[150] or as part of a "multi-door courthouse" approach

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140. *News in Brief: Alternative Dispute Resolution*, 58 U.S.L.W. 2129, 2130 (Aug. 29, 1989). The comments by Justice Kennedy were made at an ADR program held during the 1989 ABA meeting. *Id.*

141. 871 F.2d 648.

142. Tozer, *supra* note 11, at 981 n.13.

143. *Id.* at 987-88.

144. *See id.* at 996 (stating that the argument that "an order compelling a represented litigant to appear with full authority to settle is not the same as an order to settle . . . is a merely semantic distinction"); *see also* Eric D. Bender, Note, *So It's Settled Then — Rule 16 and Courts' Power to Order Represented Parties to Attend Pretrial Settlement Conferences*, 58 U. CIN. L. REV. 1421 (1990).

145. *Decker*, 824 S.W.2d at 248.

146. *Id.*

147. Tozer, *supra* note 11, at 981.

148. *Decker*, 824 S.W.2d at 248.

149. Warren E. Burger, *Agenda for 2000 A.D. — A Need for Systematic Anticipation*, 70 F.R.D. 79, 94 (1976).

150. The Texas courts' procedure illuminated in *Decker* is a prime example of a system which "farms out" the dispute resolution process. The court has no personnel on staff to handle such duties, so an independent mediator is chosen to handle the dispute. The mediator usually charges a fee, although in this case the fee was waived. *See supra* note 111 and accompanying text.

to ADR,[151] it is expected to ease our backlog of litigation.[152] What possible purpose, then, is served by allowing a judge to order *attendance* at mediation, but not *participation*? This simply adds one superfluous level of activity to an already crowded system. It allows the parties to take up the valuable time of a trained (and probably court-appointed) mediator, while all the time simply postponing what the recalcitrant party desires as the inevitable — his day in court.

Such a system overload is costly and inefficient and can create a two-tiered backlog — one in traditional litigation, the other in alternative dispute methods. Efforts directed toward settlement of a case may be no less a drain on the system than is litigation.[153] Posner, in fact, complains that "subsidizing" settlement through court-sponsored ADR is likely to increase the costs incurred in the system while it decreases the litigation caseload.[154]

In the first *Heileman* decision,[155] the district court said that it was a "misuse of [an expensive public resource] for any party to refuse even to meet personally with the opposing party or its counsel to attempt to resolve their disputes prior to trial."[156] Use of this expensive resource is a privilege, say proponents of ADR, which carries with it certain obligations, including the efficient use of the resource.[157] If the referral to mediation is designed to protect the litigation system from abuse and overuse, then the mediation system must be granted the same protections. Otherwise we simply move, and do not remove, the problem. It is patently inefficient to command, or even to allow, a party to attend mediation without a parallel directive to make efficient use of this alternative resource.

Under Texas law, a party may make its own motion to refer a case to mediation.[158] Absent reasonable objections from the other side, the case is usually referred as a matter of course.[159] The Texas appeals court in *Decker* would apparently allow an opposing party, even without reasonable objections, to frustrate the mediation process through failure to exercise good faith.[160] Such an approach is inimical to the idea that mediation should be based on the building

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151. First proposed by Professor Frank E.A. Sander, this concept views "the courthouse of the future as a dispute resolution center offering an array of options for the resolution of legal disputes. Litigation would be one option among many including conciliation, mediation, arbitration, and ombudspeople." Gladys Kessler & Linda J. Finkelstein, *The Evolution of a Multi-Door Courthouse*, 37 CATH. U. L. REV. 577, 577 (1988).

152. Lambros, *supra* note 7, at 465.

153. Posner, *supra* note 131, at 373.

154. *Id.*

155. G. Heileman Brewing Co. v. Joseph Oat Corp., 107 F.R.D. 275 (W.D. Wis. 1985), *rev'd*, 848 F.2d 1415 (7th Cir. 1988).

156. *Id.* at 277.

157. *See* Tozer, *supra* note 11, at 980 n.11.

158. TEX. CIV. PRAC. & REM. CODE ANN. § 154.021(a); *Downey*, 757 S.W.2d at 525.

159. Richard Connelly, *Mediation Law Loses Some Leverage*, TEX. LAW., Jan. 20, 1992, at 1.

160. *Decker*, 824 S.W.2d at 251 ("Chapter 154 contemplates mandatory referral only, not mandatory negotiation.").

of trust among the parties.[161] It is likely to cause both sides to expend more money[162] and to get less for it. The moving party in such a scenario is more likely to harden her stance after encountering the lack of good faith, and there is no incentive for the recalcitrant party to adjust her position if good faith is not required.

The *Decker* court apparently believes that a judge may never require good faith. Other courts disagree and see nothing wrong with requiring parties to conduct themselves in such a way that agreement is possible.[163] By the same token, it is clear that courts cannot make agreement of the parties a condition of an order to mediate.[164] The *Decker* court apparently concluded that requiring good faith meant requiring agreement, but this conclusion is countered by the very words of Judge Lindsay's order: "[r]eferral to mediation is not a substitute for trial, and the case *will be tried if not settled.*"[165]

The requirement of "good faith" may be a nebulous standard,[166] but there are guideposts by which to travel. Participants must approach the mediation with an open mind, not hardened to the point where the process becomes worthless.[167] The recalcitrant party is only required to consider the possibility of reaching agreement. Participants must attend without any attempt to defraud the other party;[168] they must be fundamentally fair in their dealings with the opposing side.[169] The *Decker* court appears to believe that such requirements are antagonistic to the concept of justice and that Judge Lindsay's order did more than require parties to meet fairly, with open minds, devoid of fraudulent intent.[170]

Good faith negotiation is not the equivalent of agreement, is not a synonym for settlement, and does not require any particular outcome.[171] Courts readily admit that referral to mediation carries no guarantee of settlement.[172] All that they can require is that parties make an effort to reach agreement.[173]

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161. Levin & Golash, *supra* note 94, at 40 (defining mediation as "conciliation of a dispute"); *see also* Lieberman & Henry, *supra* note 8, at 428-29; Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-48 (1982).

162. In this case, however, the mediator waived her standard fee. *Decker*, 824 S.W.2d at 249. The court in *Decker* points out that fee waiver is a standard procedure whenever one of the parties objects to the referral or the payment of fees. *Id.* at 251.

163. *Detroit Police Officers Ass'n*, 214 N.W.2d at 808.

164. *Chiappetta*, 544 A.2d at 761.

165. *Decker*, 824 S.W.2d at 248 (emphasis added).

166. *See supra* notes 80-104 and accompanying text.

167. *Detroit Police Officers Ass'n*, 214 N.W.2d at 808.

168. *Efron*, 57 Cal. Rptr. at 251.

169. *Love*, 957 F.2d at 1357.

170. *Decker*, 824 S.W.2d at 251.

171. *Chicago & N. W. Ry.*, 336 F. Supp. at 1166.

172. *Spring Water Dairy*, 392 N.W.2d at 17.

173. NLRB v. General Elec. Co., 418 F.2d 736, 756 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

But what effect does such a requirement have on the *other* party — the one who prefers trial to the alternative? This is a fair question. Non-judicial, off-the-record methods of settlement are problematic for a party who unwillingly must submit. Even if some sort of agreement is reached, there is little likelihood of appeal.[174] Certainly, the mediated settlement may have come cheaper and quicker than a trial, but for the unwilling party "speedy injustice is not an improvement over slow justice."[175]

The saving grace for the unwilling is that consent is voluntary. In mediation the parties take advantage of the "*non-coercive* intervention of a third party."[176] Some critics disagree and have disparaged alternative methods and settlement in general as inherently coercive. "Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised."[177] In essence, a good-faith requirement does nothing more than expose the unwilling party to an alternative; she loses nothing and may gain considerably by active participation. The Posner models indicate that anything which closes the gap between the defendant's and the plaintiff's assessment of a victory for the plaintiff is likely to aid in settlement.[178] The process of mediation, in which a neutral facilitates a shared solution, allows the parties to assess virtually all of the variables in the equation *without being bound to the outcome*. As even the unwilling party puts only the chance for success on the line, and not the chance for failure, she loses nothing through a good faith approach to negotiation.

VI. CONCLUSION

Access to alternative dispute resolution mechanisms should be as jealously guarded as access to the courts. If not, the overcrowding crisis which faces some

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174. Tozer, *supra* note 11, at 989 n.54.

175. *Id.* at 979.

176. Levin & Golash, *supra* note 94, at 40 (emphasis added).

177. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Such an assessment is perhaps too harsh. While Professor Fiss' analysis might be pertinent to the class of cases about which he was particularly concerned, such as corporate litigation, it seems out of place in the context of the *Decker* case. Fiss complains that proponents of ADR view every case as a "quarrel[] between neighbors." *Id.* at 1075. But *Decker* fits nicely into that mold -- an automobile accident between parties of relatively equal economic strength, with no real problems of imbalance of power or lack of authority. *See id.* at 1076-82.

178. The formulae are:

$$PpJ - C+S < PdJ + C-S$$

or, equivalently, if

$$(Pp - Pd)J < 2(C - S).$$

Pp is the probability of the plaintiff's victory as the plaintiff perceives it; Pd the probability of the plaintiff's victory as the defendant perceives it; J the judgment for the plaintiff if he wins; C the cost of trial (assumed to be the same for both parties); and S the cost of settlement (also assumed to be the same for both parties)." Posner, *supra* note 131, at 369-70.

courthouses will be simply moved down the hall or around the block. In addition, requiring parties to attend mediation without also requiring them to participate meaningfully in the process does nothing to alleviate the stresses on our courts that trigger ADR. Litigious parties, grudgingly attending mediation sessions, need only bide their time to return to their preferred forum. The courtroom crowding may go away, but only for a short while.

If we accept that mediation and other forms of ADR are useful, then we must encourage meaningful participation. While courts cannot be allowed to coerce settlement, requirements of good faith negotiation do nothing of the sort. Rather, they make possible the efficient and effective use of our alternative procedures, while at the same time allowing those procedures to assist in the efficient and effective use of our courts.

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