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Civil Procedure: A Review of the Published Opinions of the United States Court of Appeals for the Seventh Circuit for the 1981-82 Term, 59 Chi.-Kent L. Rev. 475 (1983)

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CIVIL PROCEDURE: A REVIEW OF THE PUBLISHED OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR THE 1981-82 TERM

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INTRODUCTION

During its 1981-82 term, the United States Court of Appeals for the Seventh Circuit decided a number of cases dealing with issues of federal civil procedure. This article reviews most of those cases. The cases have been classified, sometimes somewhat arbitrarily, under the headings Federal Jurisdiction, *Erie*, Relation Back of Amendments, Suits Against Officials in Their Official Capacity, Intervention, Class Actions, Preliminary Injunctions, Sanctions, Civil Contempt, Directed Verdicts, Entry of Judgments, Post-Trial Motions, Appellate Review of Factual Determinations, and Collateral Estoppel, Res Judicata and Law of the Case.***

I. FEDERAL JURISDICTION

A. Diversity Cases

In *Hamilton v. Nielsen*,[1] a case which is interesting from an *Erie*[2] standpoint as well as from a jurisdictional one, the court upheld federal jurisdiction in a diversity action where the plaintiff beneficiary of a decedent's trust brought suit against the executors of the decedent's will alleging negligence in investment decisions on the part of the defendants. The court of appeals noted that federal courts do not have the power in the exercise of diversity jurisdiction to probate wills,[3] but held that principle not to apply in this case where all that was being sought

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1. 678 F.2d 709 (7th Cir. 1982).

2. In Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), the Court held that the federal courts must apply state substantive law in diversity cases.

3. *See* Rice v. Rice Foundation, 610 F.2d 471 (7th Cir. 1979).

was an award of money damages against the executors personally for their alleged negligence.

In the course of its opinion, however, the court indicated that the result might have been different if the state had vested exclusive jurisdiction of such actions in probate courts. But since Illinois had vested the probate jurisdiction in its courts of general jurisdiction, the circuit courts[4]—the probate division and the law division of the Circuit Court of Cook County are simply subdivisions of the same court of general jurisdiction[5]—the court said that retention of federal diversity jurisdiction would "not interfere with a state policy of channeling all probate-related matters to specialized courts."[6] The implication that the federal courts might not exercise diversity jurisdiction over matters which the state has channeled to specialized courts is interesting from an *Erie* perspective because it expresses a willingness to defer to state procedural interests in such cases.[7]

Another case involving diversity jurisdiction, *American Motorists Insurance Company v. The Trane Co.*,[8] presented the issue of whether a finding that one of the defendant insurers shared an interest with the plaintiff insurance company in avoiding liability to the defendant insured required realignment of the parties and therefore dismissal for lack of subject matter jurisdiction. The district court concluded that it did because their interests in the litigation were the same since both insurers shared an interest in escaping liability. The court of appeals reversed stating that the question of realignment in such cases must turn not on whether there are points of substantial agreement between the parties but on whether there are points of substantial antagonism. Realignment was improper because substantial conflict existed between the insurers: a finding that one had no duty to defend, the court said, could put the burden on defending squarely on the other; in addition, a finding that one was liable would reduce or eliminate the liability of the other. These conflicts justified their being on opposite sides of the lawsuit. Thus diversity jurisdiction was sustained.

How to determine the amount in controversy in a diversity case where the relief sought is a declaratory judgment was the issue in *Jadair*

4. *See* ILL. CONST. art. VI, § 9; Alfaro v. Meagher, 27 Ill. App. 3d 292, 326 N.E.2d 545 (1st Dist. 1975).

5. *See* ILL. CONST. art. VI, § 7(c); Alfaro v. Meagher, 27 Ill. App. 3d 292, 326 N.E.2d 545 (1st Dist. 1975).

6. 678 F.2d at 710.

7. *Cf.* Byrd v. Blue Ridge Coop., 356 U.S. 525 (1958) (federal bias for trial by jury outweighs, in diversity case, state practice of having judge decide particular issue).

8. 657 F.2d 146 (7th Cir. 1981).

Inc. v. Walt Keeler Co.[9] The court said it was proper in such cases to consider the amount the plaintiff could possibly recover, including out-of-pocket expenses and consequential damages.

B. Pendent Jurisdiction Cases

The court considered questions of pendent jurisdiction in several cases. *By-Prod Corp. v. Armen-Berry Co.*[10] involved counterclaims in an antitrust suit in which the defendant-counterplaintiff alleged that an officer of the plaintiff-counterdefendant had tape recorded a telephone conversation in violation of Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968[11] and Article 14 of the Illinois Criminal Code.[12] The district court dismissed the Title III claim on a motion for summary judgment and held: that the Article 14 count was a permissive counterclaim which required an independent basis for federal jurisdiction; that the independent basis did not exist because it was a legal certainty that the requisite $10,000 amount in controversy could not be proved; and that pendent jurisdiction should not be exercised.

The court of appeals affirmed. As to the state law claim, the court had to decide whether it was compulsory or permissive because compulsory counterclaims come within the ancillary jurisdiction of the federal courts and require no independent basis for federal jurisdiction. According to Rule 13 of the Federal Rules of Civil Procedure [FRCP], whether a counterclaim is compulsory depends on whether it arises out of the same "transaction or occurrence that is the subject matter" of the main suit. But this formula, the court said, is a conclusion rather than a test and so requires looking at the purpose of the rule.

The principal purpose of making certain counterclaims compulsory, in the court's opinion, was judicial economy and the avoidance of multiple trials. Here, however, the district court had said it would have ordered a separate trial on the counterclaim anyway. Applying its purpose-of-the-rule test, the court of appeals concluded, "in the language of Rule 13(a), that the state-law count in Armen-Berry's counterclaim arose not out of the antitrust conspiracy, that is the subject matter of the main suit, but out of a telephone conversation that was a different transaction and occurrence from the conspiracy."[13]

9. 679 F.2d 131 (7th Cir. 1982).
10. 668 F.2d 956 (7th Cir. 1982).
11. 18 U.S.C. §§ 2510-20 (1976 & Supp. IV 1980).
12. ILL. REV. STAT. ch. 38, ¶¶ 14-1 to 14-9 (1981).
13. 668 F.2d at 961. The district court would have ordered a separate trial because it be-

The counterclaim was therefore permissive, but it would still withstand dismissal if there were an independent basis for jurisdiction. Since diversity existed between the parties, the question was amount in controversy, which turned on whether Armen-Berry could possibly obtain at least $10,000 in punitive damages. Interpreting Illinois law to be that no punitive damages may be awarded absent actual damages, the court found that there could be no independent basis for federal jurisdiction.

Finally, the court held for two reasons that the district court had not abused its discretion in refusing to exercise pendent jurisdiction over the state count in the counterclaim. First, because the federal claim had been dismissed before trial;[14] and, second, because the same considerations—of judicial economy and federalism—underlie both the compulsory-counterclaim rule and the pendent-jurisdiction doctrine. Said the court:

> [I]n a case where considerations of judicial economy do not support federal retention of a counterclaim, as is implied by a conclusion that the counterclaim is not compulsory, a federal court should not assume jurisdiction of the counterclaim in the name of pendent jurisdiction. The doctrine of pendent jurisdiction should not be used to make end runs around the limitations in Rule 13(a).[15]

Although the case involved homely facts, *Hixon v. Sherwin-Williams Co.*[16] also involved an interesting question of pendent jurisdiction. After an Indiana couple sustained water damage to their kitchen floor, their insurance company, a non-resident corporation, hired Hixon, an Indiana resident, to install a new linoleum floor. Hixon subcontracted the job to Sherwin-Williams, also a non-resident corporation. Sherwin-Williams, in turn, hired Louis Benkovich to do the linoleum installation. Benkovich used an extremely flammable glue, which exploded, and the insurance company had to indemnify the homeowners for an additional $27,000 for damages to their house.

The insurance company and Hixon brought suit against Sherwin-Williams in a federal district court in Indiana. Since the insurance company and Sherwin-Williams were corporate citizens of different states, and since there was more than $10,000 in controversy, federal

lieved that the real reason for bringing the counterclaim was to insinuate a "Watergate-type" aura about the trial and the court of appeals seemed to agree with the district court's comment. It may be that this case is best understood by recognizing that the courts regarded the counterclaim primarily as a trial tactic.

14. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

15. 668 F.2d at 962.

16. 671 F.2d 1005 (7th Cir. 1982).

diversity jurisdiction existed between them.[17] Hixon, however, although he was of diverse citizenship from Sherwin-Williams, had a claim for less than $10,000. The question was whether the doctrine of pendent party jurisdiction allowed the district court to adjudicate Hixon's claim because it was joined with the insurance company's, even though it would not have been within federal jurisdiction if sued on alone.

The court noted that in pendent party cases, unlike pendent claim cases, "there is no federal-question claimant; there is only a diversity claimant, who may not even be a member of a class intended to be protected by the diversity jurisdiction."[18] The court interpreted *Zahn v. International Paper Co.*[19] as a rejection of pendent party jurisdiction and ruled that "a pendent party must meet the amount in controversy requirement of the diversity jurisdiction."[20]

In yet another pendent jurisdiction case, *United States ex rel. Hoover v. Franzen*,[21] the court held that a state constitutional claim cannot be raised as a pendent claim in a habeas corpus action brought in federal court under the habeas grant of jurisdiction.[22] Hoover and nine other inmates of an Illinois prison brought suit in federal district court challenging their transfers from state custody to federal custody. They alleged that the transfers violated their rights under the fifth and fourteenth amendments, certain federal statutes,[23] and Article I, section 11 of the Illinois Constitution, which provides, "No person shall be transported out of state for an offense committed within the state."

The district court granted relief for eight of the petitioners, who

17. *See* 28 U.S.C. § 1332(a), (c) (1976).

18. 671 F.2d at 1008.

19. 414 U.S. 291 (1973) (holding that Rule 23 of the Federal Rules of Civil Procedure did not justify an exception in class-action cases to the usual rule that a federal district court can assume jurisdiction only over those plaintiffs whose claims are in excess of $10,000).

20. 671 F.2d at 1009. The court premised its jurisdictional holding on the alternative ground that a sound exercise of discretion would have required the district court to dismiss Hixon's claim since that claim was "too tiny to warrant a federal district court's taking upon itself the decision of a possibly difficult issue of Indiana law" which was not otherwise presented in the case, and because, since Hixon was a resident of Indiana, the policy underlying diversity jurisdiction was inapplicable to him. But Hixon must now go to state court for relief and file another lawsuit, thus creating additional burdens and causing additional expense of time and money for all parties involved, including the state court system. One cannot help but wonder if Indiana might not actually prefer to have the federal court decide Hixon's claim.

21. 669 F.2d 433 (7th Cir. 1982).

22. 28 U.S.C. § 2254(a) and § 2241(c)(3) (1976). The court was careful to limit its holding to cases brought under the habeas statute and indicated that different considerations would be involved if the case had been brought under the Civil Rights Act, 42 U.S.C. § 1983 (1976 & Supp. IV 1980); however, the court did not decide whether an action challenging transfer could be brought under section 1983 or if habeas corpus is the exclusive procedure.

23. 18 U.S.C. §§ 4001(a), 5003 (1976).

were to be transferred to federal prison outside of Illinois, on the basis of the Illinois Constitution.[24] The district court reasoned that under *United Mine Workers v. Gibbs*[25] it could take pendent jurisdiction of the state constitutional claims, and could decide those before deciding the federal constitutional claims.

After first holding that a pendent state law claim is governed in all respects by state law, making the federal remedy of habeas corpus unavailable, the court of appeals, recognizing that on remand the district court would simply impose whatever state remedy might exist, reached the pendent jurisdiction issue. The lower court erred, the higher court said, by applying only the two-pronged test of *Gibbs*—whether the federal claim is of sufficient substance to confer federal jurisdiction and whether the federal claim and the state claim arise out of a "common nucleus of operative fact."

This analysis, the court said, reached only the constitutional question of whether the exercise of pendent jurisdiction was consistent with the limitations of Article III. But even if it has the power to entertain pendent jurisdiction, the district court, under *Gibbs*, must still exercise discretion, which requires "a balancing of factors such as comity, fairness to the litigants, judicial economy, and the state's interest in administering its affairs."[26] Moreover, *Gibbs* does not end the inquiry. In *Aldinger v. Howard*,[27] the United States Supreme Court held that pendent jurisdiction did not exist over a state law claim against a county which was pended to an action under 42 U.S.C. § 1983 brought against a county official at a time when counties were deemed excluded from coverage in § 1983.[28] The Court inferred that since counties had been excluded from § 1983 they also had been excluded from the jurisdictional grant of 28 U.S.C. § 1343(3). Pendent jurisdiction could not be exercised because the intent of Congress was not to extend federal jurisdiction over counties in such cases.

In *Aldinger*, the court of appeals noted, a new party (the county) was brought before the court, which distinguished it from the instant case. However, in *Owen Equipment & Erection Co. v. Kroger*,[29] the

24. The district court also granted habeas relief to the two prisoners who were to be transferred to federal prisons in Illinois, on the basis of § 5003(a). The court of appeals reversed as to these prisoners also.

25. 383 U.S. 715 (1966).

26. 669 F.2d at 438.

27. 427 U.S. 1 (1976).

28. This interpretation of § 1983 was overruled in Monell v. New York City Dep't of Social Serv., 436 U.S. 658 (1978).

29. 437 U.S. 365 (1978).

Supreme Court extended its reasoning in *Aldinger* to exclude the exercise of ancillary jurisdiction over a claim brought under FRCP 14 by a plaintiff directly against a third-party defendant who had been impleaded by the original defendant where no diversity existed between the plaintiff and the third-party defendant. Examining the underlying statutory grant of jurisdiction—diversity in *Owen*—the Court found that Congress had by implication negated the exercise of diversity jurisdiction over the FRCP 14 claim, even though, unlike *Aldinger*, the third-party defendant in *Owen* was already properly in federal court.

Although *Owen* can easily be distinguished from *Hoover*,[30] the court of appeals went on to examine whether Congress had "spoken to the exercise of pendent jurisdiction over state law claims in the matter of habeas corpus."[31] After a fairly exhaustive historical inquiry, the court concluded that the peculiar structure of the habeas corpus statutes indicates a congressional intent to exclude state claims from federal habeas corpus jurisdiction. The *Hoover* court stressed the narrowness of the issue, the uniqueness of the federal statutory scheme, and the "incomparably unique" problems of federalism involved, and it "expressly eschew[ed] any broad principles capable of adoption for general application to questions of pendent jurisdiction."[32] Nevertheless, the court's reasoning is instructive:

> Our analysis turns on whether it can be demonstrated that Congress has intended that the particular pendent claim not be brought in federal court. . . . [S]uch congressional intent may not be demonstrated merely by negative implication from Congress' creation of jurisdiction over a certain class of claims.[33]

C. Removal Cases

The court decided several cases in which removal jurisdiction[34] was a principal issue. In *Northern Illinois Gas Co. v. Airco Industrial Gases*,[35] the issues were whether a removal petition was defective for failing to allege, as is required by case law, the nominal party status of

30. In the *Owen* situation a plaintiff who knew that one defendant would implead another could avoid the requirement of complete diversity simply by waiting until the original defendant impleaded the other defendant and then bringing a claim under Rule 14, thus accomplishing indirectly what it could not accomplish directly. Although this tactic was not present in *Owen*, the Court seemed particularly concerned about the possibility. 437 U.S. at 374-75. In *Hoover*, the plaintiffs were not using pendent jurisdiction to get into court indirectly defendants they could not otherwise sue there.

31. 669 F.2d at 441.

32. *Id.*

33. 669 F.2d at 441 n.15.

34. *See* 28 U.S.C. §§ 1441-48 (1976 & Supp. IV 1980).

35. 676 F.2d 270 (7th Cir. 1982).

a defendant who did not join in the petition; and whether an amended removal petition filed 30 days after service of the state court complaint on defendant's counsel was untimely under 28 U.S.C. § 1446(b).[36] The court held the amendment was effective to correct a technically defective initial petition because part of the state court record, attached to the removal petition as an exhibit, contained the necessary information regarding the nominal party status.

A second case involving § 1446(b), *Wilson v. Intercollegiate (Big Ten) Conference Athletic Association*,[37] presented the question:

> [I]f a case initially filed in state court is removable to federal court but the defendant waives his right to remove, under what circumstances will that right revive if the plaintiff subsequently amends his complaint to add new federal claims.[38]

Plaintiff had brought suit in Illinois state court alleging that the defendant athletic association's rules denied him equal protection and due process in violation of the United States and Illinois Constitutions. Although the case was removable to federal court, the defendants did not attempt to remove it, and the thirty-day limitation of § 1446(b) ran. The litigation was proceeding well for the plaintiff in state court—he had obtained a preliminary injunction which allowed him to play football in spite of the Big Ten rules—when he amended his complaint to include a "scattershot" of new "makeweight" federal claims which were "insubstantial."[39] The defendant, gleefully the court suggests, removed the case to the federal district court, which refused to remand it to state court and granted summary judgment for the defendants on all counts.

A judicially-created exception to the thirty-day limitation on removal of § 1446(b) exists where the plaintiff amends his complaint to the extent that the nature of his action has been changed to constitute a

36. 28 U.S.C. § 1446(b) (1976) provides:

> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

After 30 days, amendments to correct "defective allegations of jurisdiction" are permitted under 28 U.S.C. § 1653 (1976).

37. 668 F.2d 962 (7th Cir. 1982).

38. *Id* at 964.

39. *Id*. at 965.

"substantially new suit." The term substantially new suit is, said the court of appeals, not self defining; rather, one must look to the purpose of the thirty-day limitation, which is twofold:

> to deprive the defendant of the undeserved tactical advantage that he would have if he could wait and see how he was faring in state court before deciding whether to remove the case to another court system; and to prevent the delay and waste of resources involved in starting a case over in a second court after significant proceedings, extending over months or even years, may have taken place in the first court.[40]

The proper allocation of decision making between state and federal courts must also be considered.

Exceptions to the thirty-day limitation rule, according to the court, would include: where a plaintiff deliberately holds back on a strong federal claim in his original complaint, while including an insubstantial one, and then, having induced the defendant to waive his right to remove, amends the complaint to add his strong federal grounds; or where newly discovered facts cause the plaintiff to amend his complaint in a way that fundamentally alters it. In these cases the purposes of the limitation would not be violated by permitting removal. But in *Wilson* there was no deliberate misleading and the amendments did not drastically change the basic legal theory. Indeed, removal would have reduced judicial economy by interrupting active litigation and would have given the defendants an unearned tactical advantage by allowing them to get away from what had proven to be an unfavorable forum. Moreover, the removal here was an example of the danger of undue encroachment by the federal courts on the authority of the state court since the claimant, who was winning in state court, ended up losing in federal court on a state constitutional issue. The case was, therefore, remanded to state court.

Two removal cases decided by the court involved actions brought by the State of Illinois in state court to enforce the Illinois Environmental Protection Act.[41] In *Nuclear Engineering Co. v. Scott*,[42] then Attorney General William Scott sued Nuclear Engineering Company [NEC] in the Illinois Circuit Court. NEC removed the case to federal district court pursuant to 28 U.S.C. § 1441 alleging both federal question and diversity jurisdiction. The claim of federal question jurisdiction was based on the theory that questions of federal law were inextricably bound up with Illinois' claims even though the state had artfully

40. *Id.*
41. ILL. REV. STAT. ch. 111-1/2, ¶¶ 1001-51 (1981).
42. 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1622 (1982).

pleaded the claim to avoid any reference to federal law. The court of appeals held that state law incorporation of federal law did not permit the claim to be construed as essentially federal in character.[43]

The allegation of diversity jurisdiction in *Nuclear Engineering* was based on the theory that, although states are not considered "citizens" for diversity purposes, Scott in his individual capacity was the real party plaintiff. This theory had its origins in two cases. In *Ex Parte Young*,[44] the Supreme Court ruled that the eleventh amendment was not a bar to a suit seeking prospective relief from a state official where the official had exercised his authority unconstitutionally. In *Ohio ex rel. Seney v. Swift Co.*,[45] the Sixth Circuit held that an action brought by a state official to enforce a statute alleged to be unconstitutional could only be deemed to be brought by an official in his individual capacity, so the rule of law that states are not citizens for purposes of 28 U.S.C. § 1332 did not preclude assertion of diversity jurisdiction over that action. Conceding that to do so "produces the anomalous result that a state official alleged to have acted in an unconstitutional fashion may be considered a 'state actor' for some purposes and not for others," the Seventh Circuit declined to follow *Seney* on the grounds that none of the purposes underlying diversity jurisdiction compelled employing the fiction of *Ex Parte Young* in this case. Therefore the district court was ordered to remand the case to the state court.

Illinois v. Kerr-McGee Chemical Corp.[46] was the other case involving the Illinois Environmental Protection Act. There, as in *Nuclear Engineering*, the state sued in a state court alleging only claims grounded on state law, and the defendant removed pursuant to § 1441. Kerr-McGee argued federal question jurisdiction on the theory that the Atomic Energy Act[47] preempted state regulation of radioactive waste, the subject matter of the suit. The Seventh Circuit, siding with the Eighth and Ninth Circuits,[48] and against the Second Circuit,[49] held that the issue of federal preemption is merely a defense to state law claims and therefore cannot be a ground for removal.

In the final removal case, *Otto v. State Board of Elections*,[50] the

43. *Id.* at 249.
44. 209 U.S. 123 (1908).
45. 270 F. 141 (6th Cir.), *cert. denied*, 257 U.S. 633 (1921).
46. 677 F.2d 571 (7th Cir. 1982).
47. 42 U.S.C. §§ 2011-2296 (1976).
48. First Nat'l Bank v. Aberdeen Nat'l Bank, 627 F.2d 843, 853 (8th Cir. 1980); Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972).
49. Beech-Nut, Inc. v. Warner-Lambert Co., 480 F.2d 801, 803 (2d Cir. 1973).
50. 661 F.2d 1130 (7th Cir. 1981).

court held that abstention was not a basis for remand under 28 U.S.C. § 1447(c)[51] stating: "Abstention is a judicially-created doctrine; its application is discretionary. Under *Thermtron* [*Products, Inc. v. Herman*, 423 U.S. 336 (1976)] a federal court with jurisdiction over a removed case may not remand it on discretionary grounds."[52]

D. Appellate Jurisdiction

The jurisdiction of the court of appeals was at issue in a number of cases. Over a strong dissent by Judge Swygert, the court decided in *Randle v. Victor Welding Supply Co.*[53] that an order refusing to appoint counsel for an indigent civil plaintiff did not come within the narrow collateral order exception to the final order rule of 28 U.S.C. § 1291.[54] The collateral order doctrine was first enunciated in *Cohen v. Beneficial Industrial Loan Corp.*[55] and was most recently addressed by the Supreme Court in *Firestone Tire & Rubber Co. v. Risjord*,[56] where the Court held that the denial of a motion for disqualification of an attorney did not come within the exceptions. The key issue in that case, according to the Court, was whether the order was "effectively unreviewable" after a final judgment. In deciding that an order denying a motion for appointment of counsel is unappealable, the Seventh Cir-

51. 28 U.S.C. § 1447(c) (1976) provides:

> (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

52. 661 F.2d at 1134. This holding seems somewhat questionable. *Thermtron* held only that "an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason." 423 U.S. at 344. Moreover, although abstention, under *Otto*, is not a basis for remand, the district court apparently may abstain from hearing a removed case. While the court of appeals strongly suggests that abstention would not be appropriate in *Otto*, there will undoubtedly be removal cases where the abstention doctrine applies. One wonders where such cases will be heard. On the other hand, if abstention were inapplicable to removal cases defendants could easily circumvent the doctrine of abstention by removal. Although some would argue that any limitation on the judicially created doctrine of abstention is good, *Otto* raises some theoretical problems, at least in those abstention cases where the district court does not retain jurisdiction of the federal questions.

53. 664 F.2d 1064 (7th Cir. 1981) (per curiam).

54. *Id.* 28 U.S.C. § 1291 (1976) provides:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

55. 337 U.S. 541 (1949).

56. 449 U.S. 368 (1981). *See also* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); Carson v. American Brands, Inc., 450 U.S. 79 (1981).

cuit overruled a previous case[57] and adopted the minority position.[58] In another collateral order case, *Freeman v. Kohl & Vick Machine Works, Inc.*,[59] the court held that doctrine did not apply to an order denying summary judgment, even though the denial contained a conflict of law ruling which served to deny appellant's alleged immunity from suit.

Whyte v. THinc Consulting Group International[60] dealt with an appeal from an order staying judicial proceedings and compelling arbitration. The court held, first, that the order was not final within the meaning of 28 U.S.C. § 1291.[61] Plaintiff argued, nevertheless, that the court had jurisdiction under 28 U.S.C. § 1292(a)(1) because the order was, in effect, an order "granting or refusing . . . an injunction." This issue was decided against the plaintiff under the so-called "Enelow-Ettleson" rule, which "turns on whether the underlying cause of action is one which before the merger of law and equity was by its nature at law or in equity."[62] The stay is appealable only if the underlying action is legal, on the theory that the stay in such cases is analogous to an equitable restraint of legal proceedings. Whyte's complaint was for a declaratory judgment and an injunction against arbitration. These being equitable remedies, the order was not appealable because, under the theory, it was merely an order of a court of equity concerning its own proceedings. Regardless, Whyte argued, the order ought to be appealable under § 1291(a)(1) because it had the effect of refusing his request to enjoin the arbitration proceeding. Noting a conflict among the circuits,[63] the court held that even in such cases the Enelow-Ettleson rule applies and that the order was not appealable since the underlying action was equitable.

The issue of appellate jurisdiction under 28 U.S.C. § 1292(a)(1) arose again in *Miller v. Bell*,[64] a Freedom of Information Act[65] [FOIA] suit. The district court ordered the Federal Bureau of Investigation to turn over certain material excised from documents released to the

57. Jones v. WFYR Radio/RKO General, 626 F.2d 576 (7th Cir. 1980), *overruled*, 664 F.2d 1064 (1981).

58. 664 F.2d at 1068 n.3 (Swygert, S.C.J., dissenting).

59. 673 F.2d 196 (7th Cir. 1982).

60. 659 F.2d 817 (7th Cir. 1981).

61. *But see* City of Naples v. The Prepakt Concrete Co., 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974).

62. 659 F.2d at 819.

63. *Id.* at n.6. Especially given the difficulties in deciding what is legal and what is equitable, see, *e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), it would seem appropriate for the Supreme Court to decide the issue.

64. 661 F.2d 623 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 2035 (1982).

65. 5 U.S.C. § 552 (1976 & Supp. IV 1980).

plaintiff. The agency appealed. Other issues still remained before the district court. Plaintiff argued that the order was therefore not final and not appealable. The court of appeals held that a disclosure order in an FOIA suit is injunctive in nature and therefore appealable under § 1291(a)(1).

In *Nuclear Engineering Co. v. Scott*,[66] also discussed above, an interlocutory appeal was taken pursuant to 28 U.S.C. § 1292(b).[67] A jurisdictional prerequisite for appeals brought under that section is that they be filed within 10 days of the entry of the certification order. In *Nuclear Engineering* the district court entered its certification on June 25. On July 1, defendant moved to amend the order to certify an additional question. On July 3, the district court granted the motion. On July 11, within 10 days of the entry of the amended certification order but not of the original one, the plaintiff filed its request for interlocutory appeal.

The issue was whether the 10-day period should be computed from June 25 or from July 3. Finding no clear answer to that question, the court looked to the purpose behind § 1292(b)—to foster greater judicial efficiency. Weighing the delay against the benefits of materially advancing the litigation and avoiding unnecessary expense that would be gained by deciding the disputed jurisdictional question before it, and considering that no party was prejudiced by the delay, and that the district court had reentered the certification order in amended form, the court of appeals found it had jurisdiction to consider the appeal.

The court pointed out, though, the more prudent path is to file an appeal within 10 days of the certification of any order under § 1292(b), rather than seeking an amended order if the district court's framing of the question is not to one's liking, because appeals are from orders, not questions of law, and if the order is properly before the court of appeals all relevant questions can be considered. Thus, in *Nuclear Engineering*, certifying the order finding that diversity jurisdiction existed would

66. 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1622 (1982).

67. 28 U.S.C. § 1292(b) (1976) provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

have been sufficient, without amendment, to bring the issue of federal question jurisdiction before the court of appeals.

In *Central Soya Co. v. Voktas*,[68] the court held that a United States Magistrate is authorized, in certain circumstances, to certify an order for interlocutory appeal under § 1292(b).

E. Special Jurisdiction Cases

In a number of cases the court considered questions of the jurisdiction of the district courts arising under special jurisdiction statutes. *Overnite Transportation Co. v. Chicago Industrial Tire Co.*[69] involved an interstate shipment of goods where the defendant had allegedly paid the freight charges but not the contract price ($2,210) of a C.O.D. shipment and the carrier had mistakenly released the goods. The district court dismissed holding that the Interstate Commerce Act[70] [ICA] did not regulate the contract price of goods so there was no subject matter jurisdiction under 28 U.S.C. § 1337(a).[71] The court of appeals affirmed, and also said that the $10,000 amount in controversy requirement of the ICA applied also to all remedies inferable from the ICA, so the requisite amount in controversy was also lacking.

In *Village of Arlington Heights v. Regional Transportation Authority*,[72] individual plaintiffs and certain municipalities challenged, on fourteenth amendment grounds, the constitutionality of the Illinois Retailers' Occupation Tax.[73] The court held that 28 U.S.C. § 1341[74] deprived the district court of jurisdiction because the individual plaintiff had state court remedies, and the plaintiff municipalities, although they had no state court remedy, could not challenge the validity of a state statute under the fourteenth amendment because they were "creatures and instrumentalities of the state" in spite of the home-rule provision

68. 661 F.2d 78 (7th Cir. 1981).
69. 668 F.2d 274 (7th Cir. 1981).
70. 49 U.S.C. §§ 1-27 (1976 & Supp. IV 1980).
71. 28 U.S.C. § 1337(a) (1976 & Supp. V 1981) provides:
The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: *Provided, however*, That the district courts shall have original jurisdiction of an action brought under section 20(11) of part I of the Interstate Commerce Act (49 U.S.C. 20(11)) or section 219 of part II of such Act (49 U.S.C. 319), only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.
72. 653 F.2d 1149 (7th Cir. 1981).
73. ILL. REV. STAT. ch. 111-2/3, ¶ 704.03 (1981).
74. 28 U.S.C. § 1341 (1976 & Supp. IV 1980) provides:
The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

of the Illinois Constitution of 1970.[75] In another § 1341 case, *Schneider Transport, Inc. v. Cattanach*,[76] the court held that § 1341 barred a suit seeking to enjoin a Wisconsin law imposing vehicle registration fees where there was a plain, speedy and efficient remedy in the state courts.

In three cases, the court entertained appeals from district court dismissals of suits where their jurisdiction was premised on Section 405(g) of the Social Security Act,[77] which provides that "Any individual, after any final decision of the Secretary [of Health, Education and Welfare] made after a hearing to which he was a party, . . . may obtain a review . . . in [a] district court of the United States. . . ." In *Watters v. Harris*,[78] the court held that § 405(g) did not authorize judicial review of the refusal by the Secretary to extend the time period for a hearing on benefits and that plaintiff's allegation of "good cause" for the requested extension did not present a "colorable constitutional claim." The Supreme Court, in *Weinberger v. Salfi*[79] and *Mathews v. Eldridge*,[80] had recognized such a claim as an exception to § 405(g)'s requirement of exhaustion of administrative remedies. In *Giacone v. Schweiker*,[81] on the other hand, where the plaintiff alleged "that he was seriously and substantially misled by the fabian tactics of the Rockford Social Security office,"[82] which never informed him of the availability of "good cause" extensions, the court of appeals held the *Eldridge* exception applicable and directed the district court to remand the case to the agency to determine the good cause issue. But in *Northlake Community Hospital v. United States*,[83] the court, also applying an *Eldridge* analysis, found that the claim of entitlement to a pre-termination hearing in the termination of a Medicare provider agreement did not present a colorable constitutional claim, so § 405(g) did not confer subject matter jurisdiction on the district court where there had not yet been a hearing or final decision.

II. *ERIE*

In two cases decided last term, the court dealt with problems raised by the application of state law in federal cases. In the first, *Me-*

75. 653 F.2d at 1151.
76. 657 F.2d 128 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1257 (1982).
77. 42 U.S.C. § 405(g) (1976).
78. 656 F.2d 234 (7th Cir. 1980).
79. 422 U.S. 749 (1975).
80. 424 U.S. 319 (1976).
81. 656 F.2d 1238 (7th Cir. 1981).
82. *Id.* at 1244.
83. 654 F.2d 1234 (7th Cir. 1981).

morial Hospital for McHenry County v. Shadur,[84] the hospital sought the issuance of a writ of mandamus or prohibition to compel the district court to vacate a discovery order directing it to turn over certain documents. The order was entered in a civil antitrust action brought by a doctor charging the hospital and others with conspiracy in restraint of trade in that it had prevented the doctor from practicing on the hospital staff. The doctor requested production of all documents related to proceedings instituted by the hospital against the physicians who had applied for or were granted admission to its medical staff. Proceedings of this kind are privileged under the Illinois Medical Studies Act.[85] Section 5 of the Act makes the unauthorized disclosure of the information obtained in the course of such proceedings a Class A misdemeanor. The hospital argued that where the state has an important interest in maintaining the confidentiality of certain information, considerations of federalism and comity require federal judges sitting in the state to give effect to the state's policy as embodied in its criminal code.

The court of appeals held that discovery in civil actions brought in the federal courts is governed by the Federal Rules of Civil Procedure rather than state law. Because the principal claim in the case arose under the Sherman Act, state law did not apply as the rule of decision as to that claim, and thus the district court was not required to apply state law in determining whether the material sought by the doctor was privileged. Rather, pursuant to Federal Rules of Evidence 501,[86] the court had to determine the question according to the principles of common law. In doing so, federal courts should consider the law of the state in which the case arose. Federal courts should recognize state privileges where that can be accomplished at no substantial cost to federal substantive and procedural policy. Here the public interest in private enforcement of the federal antitrust law was too strong to permit the exclusion of the evidence. Thus the state interests here were outweighed by the federal interests in promoting discovery.

84. 664 F.2d 1058 (7th Cir. 1981) (per curiam).
85. ILL. REV. STAT. ch. 51 ¶¶ 101-05 (1981).
86. FED. R. EVID. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

In *Sharp v. Egler*,[87] the court was also faced with a problem raised by the *Erie* doctrine.[88] The district court there, under *Erie*, had to apply the law that would have been applied by the Indiana state court. The question then became what law would Indiana courts apply in a case where the driver had driven from Kentucky into Indiana and there hit a tree. The court discusses the problem of deciding what conflicts of law rules Indiana has adopted. A review of the applicable authorities shows that the Indiana choice of law rule may be either the significant contacts rule or *lex loci delicti*. The Seventh Circuit affirmed the lower court's analysis of the Indiana law. The case is an interesting example of the problem of determining choice of law under *Erie* where the state court has not given clear guidance on what its choice of law rule is.

III. Relation Back of Amendments

In *Stewart v. United States*,[89] the court dealt with the relation back of amendments pursuant to FRCP 15. Stewart had sued the Postal Service and its truck driver on May 26, 1980. The government moved to dismiss or for summary judgment on the ground that the United States is the only proper defendant under the Federal Tort Claims Act.[90] The district court granted the motion to dismiss, noting that a July 23 amendment of the complaint adding the United States as defendant was not effective because of a six-month limitation period which is jurisdictional in nature. The plaintiff on appeal argued that her suit against the truck driver, an employee of the United States, was in effect a suit against the United States. The court ruled that the plaintiff had no cause of action against an employee and that the amendment could not relate back to March 26, 1980 under Rule 15(c).[91]

87. 658 F.2d 480 (7th Cir. 1981).
88. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
89. 655 F.2d 741 (7th Cir. 1981).
90. 28 U.S.C. § 2401 (1976 & Supp. IV 1980).
91. Fed. R. Civ. P. 15(c) provides:

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by an amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant is named, satisfies the requirement of clauses (1) and (2) hereof with

Relation back under the rule requires that actual notice be received by the government within the period provided by law for commencing the action. No notice, formal or informal, occurred during the limitations period. The court noted that plaintiff's remedy is a malpractice suit.

IV. SUITS AGAINST OFFICIALS IN THEIR OFFICIAL CAPACITY

In *Kincaid v. Rusk*,[92] a prisoner's lawsuit, the Seventh Circuit dealt with the problem of substitution of officials sued in their official capacity. The appellant Daryl Kincaid sought declaratory and compensatory relief for damages suffered while he was a pre-trial detainee in the custody of appellee, Sheriff John Rusk. Kincaid was confined in the Tippecanoe County, Indiana jail while waiting trial on a murder charge. He claimed that the sheriff had violated certain of his constitutional rights. After the entry of judgment below but before argument in the appellate court, defendant John Rusk died. On its motion, the court ordered that Rusk's successor in office, Sheriff Harger, be added as an additional defendant. The question was whether or not Rusk's death had mooted the appeal. The court found that the damage action was not moot. Federal Rules of Appellate Procedure 43(c)(1)[93] provides that an action does not abate when a public official resigns or otherwise ceases to hold office but that a successor is automatically substituted as a party.

The court noted that this rule contemplates the automatic substitution of successors to public officers sued in their official capacity. The court stated that a demand for declaratory or injunctive relief imposes a substantial burden on the plaintiff to show survival of the controversy, the burden being on the complainant to establish the need for such relief by demonstrating that the successor in office would continue the policies of his predecessor. On the other hand, an official-capacity suit that seeks compensatory damages survives because the suit is based on alleged past misconduct. The court noted that such a suit involves

respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

92. 670 F.2d 737 (7th Cir. 1982).

93. FED. R. APP. P. 43(c)(1) provides:

(c) Public Officers; Death or Separation from Office.

(1) When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

the difficult question of personal as well as governmental liability. The Seventh Circuit stated that the Supreme Court has apparently answered this question in *Monell v. Department of Social Services*,[94] where the Court noted that official-capacity suits generally are only a way of pleading an action against an entity of which the officer is an agent. Thus the official-capacity suit directed at a named public officer is not mooted when the named officer dies or is succeeded in office because the purpose and effect of such a suit is to recover damages from the public entity only. The government and not the public officer is solely responsible for satisfying a judgment rendered against an officer sued in his official capacity.[95] Thus the court noted that the substitution was permissible under Appellate Rule 43. Note that this procedure continues the fiction of suing the public official when the real target is the government entity.

V. INTERVENTION

In *Wade v. Goldschmidt*,[96] AMPS, Inc. and others appealed a denial of their motion to intervene in a dispute relating to the construction of the Central Illinois Expressway and a bridge to carry that highway across the Illinois River. The plaintiffs in that case had filed an amended complaint against the Department of Transportation of the United States claiming that the routing of the Central Illinois Expressway violated the National Environmental Policy Act,[97] the Federal Aid Highway Act,[98] and the Federal Department of Transportation Act.[99] The district court granted a temporary restraining order and a preliminary injunction enjoining defendants from awarding a contract for construction of the proposed bridge over the Illinois River. The proposed intervenors included certain counties and cities located in central Illinois and AMPS, a not-for-profit corporation formed specifically to support construction of the proposed bridge and expressway. The district court had denied intervention. The court of appeals said the intervenor had met neither the requirements for intervention of right nor permissive intervention pursuant to FRCP 24.[100] Intervention as of right under FRCP 24(a)(2) requires a direct and significant legally protectable interest in the property or transaction sub-

94. 436 U.S. 658 (1978).
95. 670 F.2d at 742 n.7.
96. 673 F.2d 182 (7th Cir. 1982).
97. 42 U.S.C. § 4331(b) (1976 & Supp. IV 1980).
98. 23 U.S.C. §§ 109, 138 (1976).
99. 49 U.S.C. § 1653(f) (1976 & Supp. II 1978).
100. FED. R. CIV. P. 24.

ject to the action. In this case, the only issue was whether or not the governmental bodies satisfied the federal statutory procedural requirements. Thus although the intervenors had an interest in the outcome of the litigation, their interests did not relate to the property or transaction which was the subject of the action, and therefore they failed to assert an interest in the lawsuit sufficient to warrant intervention as of right.

Nor were the intervenors allowed permissive intervention under FRCP 24(b)(2). The court emphasized that the issue to be decided by the district court was whether or not the government defendants had complied with certain federal laws, therefore the court below could not consider the questions raised by applicants involving basic value judgments as to the ultimate location of the proposed construction and the priority of the various interests involved. Thus it cannot be said that any of the intervenor's claims or defenses in the present action had a question of law or fact in common so as to satisfy the requirement for permissive intervention pursuant to FRCP 24(b)(2). The trial court did not, therefore, abuse its discretion in denying appellant's motion for permissive intervention. This non-permissive view towards intervention contrasts with that of some circuits which would have allowed intervention in such cases.[101] The spirit of the holding here contradicts the court's concern for those possibly affected by the judgment in the class action suit, *Simer v. Rios*,[102] discussed below. That case held that putative class members should be notified if a settlement affects their interests—but here parties whose interests were affected were denied an opportunity to intervene.

VI. CLASS ACTIONS

The Seventh Circuit decided three interesting class action cases. In *Simer v. Rios*,[103] the court commented on many aspects of class action procedure. *Simer* was initiated as a class action by eight individuals and the Gray Panthers of Chicago.[104] They alleged several claims against the Community Services Administration (CSA) for its administration of a crisis intervention program which was designed to enable low-income individuals and families to participate in energy conserva-

101. Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967).
102. 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1773 (1982).
103. *Id.*
104. At the time the class action was filed, the class was described as "all low income persons otherwise eligible for participation in the 1979 C.I.P. who were denied 1979 C.I.P. assistance by the federal defendants or discouraged from applying for assistance because they were not delinquent in the payment of their fuel bills for 1979." *Id.* at 664.

tion programs. The problem was that the regulations adopted by the CSA conditioned the grant of assistance payments upon the production of a utility shutoff notice for the non-payment of a utility bill. Plaintiffs alleged that this regulation violated the Emergency Energy Conservation Services Program, which provided that "[e]ligibility for any of the programs authorized under this section shall not be based solely on delinquency in payment of fuel bills."[105] When the district court indicated that it would rule for the plaintiffs, counsel for CSA indicated that settlement discussion might be appropriate. The settlement eventually agreed to by the parties provided for funding of programs seeking long range solutions to the energy problems for the elderly. At no time was the issue of class certification or notice to the putative[106] class members discussed, nor was settlement conditioned upon class certification or the putative class being bound by the judgment. Thus the case was one that had been filed as a class action but had never been certified pursuant to FRCP 23.[107]

After the settlement, problems arose. A Wall Street Journal article, entitled "A Sweetheart of a Lawsuit," indicated that the settlement was the result of collusion between the CSA and plaintiffs' counsel. Certain senators, including Senator Paul Laxalt, became quite upset with the ruling. (A copy of Senator Laxalt's letter to defendant Rios was sent to the district court judge who had signed the settlement decree.) Finally the district court issued an order on its own motion calling for a status conference in the case. The court there vacated the order approving the settlement, denied the motion for class certification, and held the claims of the organizational plaintiffs non-justiciable. The trial court concluded that since the eight individual plaintiffs had received their relief and class action certification had been denied there was no case or controversy before the court and dismissed the case with prejudice.

First the court of appeals had to decide whether or not the district court properly acted within the scope of FRCP 60(b) by vacating the judgment approving the settlement decree. The court found that the settlement had not been obtained by misrepresentation or fraud and thus there were no grounds for vacating it pursuant to FRCP 60(b)(3).[108] The settlement was wrong, however, because the judgment

105. 42 U.S.C. § 2809(a)(5) (1976 & Supp. IV 1980).
106. "Putative" here means the members of the uncertified class.
107. FED. R. CIV. P. 23.
108. FED. R. CIV. P. 60(b)(3) provides:
On motion and upon such terms as are just, the court may relieve a party or his legal

was entered in violation of due process. The settlement's entry without notice to the putative class members violated their due process rights and was therefore void. The question before the court was whether notice need be given to the non-certified class members either under FRCP 23(e) or the due process clause of the fifth amendment. Firstly, FRCP 23(e) provides for approval of the court for dismissal or compromise and notice being given to all class members.[109] FRCP 23(e), however, does not cover the situation where the class has not been certified and the case is settled or dismissed. The court of appeals held, rather, that notice of the settlement to members of a certified class is necessary as a matter of constitutional due process because the settlement or dismissal of a certified class action will be res judicata as to claims of the individual class members.

Many courts, however, as noted by the Seventh Circuit, have stated that once a class action is filed it must be assumed to be a class action and therefore FRCP 23(e) notice is required.[110] The court noted that the purposes served by the imposition of FRCP 23(e) requirements to putative class actions include deterring plaintiffs appending a class claim merely to strengthen their bargaining power in settlements. In addition, requiring notice to uncertified class members also insures that their interests will be protected. Even though their claims would not be barred by res judicata, a settlement of a class action could affect the putative class in several ways. The settlement may seek to achieve structural relief that putative class members may not agree with. If the relief is in the form of both structural and compensatory relief, trade-offs at the expense of the putative class may occur, and, also, the relief may be from a limited fund and thus putative class members may have been denied compensatory relief.

The court noted, however, that requiring notice in every potential

representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

109. FED. R. CIV. P. 23(e) provides:

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

110. 661 F.2d at 665. *See also* Wallican v. Waterloo Community School Dist., 80 F.R.D. 492 (N.D. Iowa 1978); Magana v. Platzer Shipyard, Inc., 74 F.R.D. 61 (S.D. Tex. 1977); Duncan v. Goodyear Tire & Rubber Co., 66 F.R.D. 615 (E.D. Wis. 1975); Rotzenburg v. Neenah Joint School Dist., 64 F.R.D. 181 (E.D. Wis. 1974); Held v. Missouri Pac. R.R. Co., 64 F.R.D. 346 (S.D. Tex. 1974); Muntz v. Ohio Screw Prods., 61 F.R.D. 396 (N.D. Ohio 1973); Washington v. Wyman, 54 F.R.D. 266 (S.D.N.Y. 1971); Rothman v. Gould, 52 F.R.D. 494 (S.D.N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481 (N.D. Ill. 1970); Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967).

class claim may harm the beneficiaries. Such notice will be time consuming and costly and the time delay involved in notice and certification determination may well delay the relief eventually provided to the class members. Therefore it would also discourage voluntary resolution and settlement. Thus the court rejected any requirement that FRCP 23(e) be applied to all settled class actions including those that have not been certified, but rather gave discretion to the district court to assess the prejudice to absent class members caused by the settlement, the costs of notice and of a certification hearing, as well as other factors, in making its determination.[111] The court noted that the approach they adopted was consistent with that of the Fourth Circuit rule in *Shelton v. Pargo, Inc.*.[112]

Here, although the settlement did not bind absent class members, there was a prejudice to their claims. The practical effect of the settlement was to distribute the $18,000,000 fund of the Crisis Intervention Program [CIP] in a manner that may have been contrary to the interests of putative class members. Assuming that the absent individuals would have chosen that the funds be spent on providing programs rather than individualized damage payments, there was no guarantee that they would decide to seek the mix of structural relief eventually agreed upon. More importantly, the absent class members could not participate in the agreements reached between plaintiffs' counsel and defendants. The court noted that notice and an opportunity to be heard are the touchstones of due process and decided that the notice to absent putative class members was required.

The court then went on to determine whether or not a class should have been certified. First, it noted that the standard of review was whether or not the district court's decision denying certification was an abuse of discretion. The court in a rather lengthy footnote,[113] determined that this would have to be a FRCP 23(b)(3) action because the final form of relief obtained would be monetary in nature. It noted that class certification under (b)(2) was not appropriate where the relief requested, or in this case obtained, was monetary in nature. It did note that an argument for (b)(1)(A) certification existed. There is a line of authority that holds where the plaintiffs seek distribution of money from a limited fund, class certification under (b)(1)(A) is appropri-

111. 661 F.2d at 666.

112. 582 F.2d 1298 (4th Cir. 1978), *see also* Moreno v. Lo-Vaca Gathering Co., 80 F.R.D. 282 (W.D. Tex. 1978); Wheeler v. American Home Products Corp., 582 F.2d 891 (5th Cir. 1977).

113. 661 F.2d at 668 n.24.

ate.[114] In this case, however, such certification was inapplicable because this case was a limited fund only because of the way that the plaintiffs had structured the settlement. The court also noted that other decisions have held the mere fact that damages would have to be paid to some plaintiffs and not to others in a subsequent action did not place the case in a (b)(1)(A) category.[115]

The court noted that the threshold question was whether a class existed. The class sought to be certified was defined as "those individuals eligible for CIP assistance but who were denied assistance or were discouraged from applying because of the existence of the invalid regulation promulgated by the CSA."[116] The problem here was that since membership in the class depended on each individual's state of mind the class was quite difficult to determine. The court would have to proceed with the Sisyphean task of identifying those individuals who not only qualified for CIP assistance but also knew of the existence of the regulation, a task which would be a burden on the court and require a huge expenditure of valuable court time. The fact that it would be so difficult to determine the class was a proper factor for the district court to consider in denying class certification.

The court also noted that FRCP 23(b)(3) provides that ". . . questions of law or fact common to the members of the class predominate over any questions affecting only individual members. . . ."[117] It noted that the "predomination" inquiry must take two steps. First, one must look at the substantive elements of plaintiffs' cause of action and the proof necessary for the various elements. Secondly, one must inquire into the form that trial of these issues would take. At this point, it becomes necessary to examine the procedural devices and alternatives available in trying class actions. Although the question of the validity of the CSA regulation was quite simple and thus would be appropriate for class determination, determining the state of the mind of each potential recipient who relied on the invalid regulation was quite difficult and not common to the entire class. The court relied in part on a New York case, *Crasto v. Estate of Kaskel*,[118] in which the New York court noted that fraud cases may be unsuitable for class treatment because of variations in the representations made or degrees of reliance thereupon.

114. *E.g.*, Cass Clay, Inc. v. Northwestern Pub. Serv. Co., 63 F.R.D. 34, 37 (E.D.S.D. 1974).

115. *In Re* Northern Dist. of Cal., 521 F. Supp. 1188 (N.D. Cal. 1981), *vacated* 693 F.2d 847 (9th Cir. 1982).

116. 661 F.2d at 669.

117. *Id.* at 672.

118. 63 F.R.D. 18 (S.D.N.Y. 1974).

(Several courts, however, have done away with individual reliance and have substituted a "generalized reliance" in class action fraud cases.) Here, as in *Crasto*, subclassing would do little to ease the burdens of the individual trials. The court thus found that the individual recoveries and individual reliance factors argued against class certification here.

The court of appeals went on to discuss the problem of "fluid recovery" or "cy pres." Several cases in class actions have utilized such a procedure in which all damages are paid into the court and devoted to some worthwhile task. One extreme would be to automatically utilize a fluid recovery mechanism as a procedural alternative to a class action disposition, while, at another extreme, is the position that any fluid recovery mechanism is unconstitutional. The Fourth Circuit in *Windham v. American Brands, Inc.*,[119] for example, rejected the use of a fluid recovery. The Seventh Circuit here, however, held that a careful case-by-case analysis of the use of the fluid recovery method is the better approach. In this approach "we focus on the various substantive policies that the use of a fluid recovery would serve in the particular case."[120] The first factor looked at by the Seventh Circuit was whether a fluid recovery is needed to deter the defendant from illegal conduct. Here there was no illegality, only the inevitable problems that arise when administrating such a complex regulation. The second factor, that of forcing the disgorging of an illegally obtained profit, also counseled against the use of fluid recovery. In this case, the CSA had not gained anything financially from its alleged illegal conduct. The final factor—whether the statute had a compensatory purpose—did weigh in favor of a fluid recovery. The act authorizing CSA to administer assistance programs had as its chief aim assisting low income individuals in dealing with the high cost of energy. This factor alone, however, did not clearly require fluid recovery. The court concluded, therefore, that the use of fluid recovery mechanism was not necessary to further the substantive policies at issue.

The court then went on to determine the question of "manageability," which is intertwined with the problem of notice. The court noted that the number of participants in the CSA programs numbered more than one million. The cost of notifying these class members was a proper factor to consider in denying class certification. These problems

119. 565 F.2d 59, 72 (4th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978).
120. 661 F.2d at 676.

led the court to conclude that the use of the class action device would have been unmanageable.

Note that here the court is saying both that the settlement was void because of its effects on the class members and that there should not be a class action because it would be unmanageable. A contradiction then appears in the Seventh Circuit's decision. The court posits the existence of a "class" yet denies the existence of a "class action." The end result of the court's concern for the class members' rights is that the action that sought to help them was dismissed. However, the court's discussion of the problems of fluid recovery, manageability and whether or not this was a FRCP 23(b)(1), (2), or (3) action gives guidance for future cases.

Judge Swygert dissented. He felt that notice should have been given of the settlement. He noted that although the Supreme Court has held that individual notice must be provided to those class members who are identifiable through reasonable effort,[121] the Court has not hesitated to approve of resort to publication in cases where it is not reasonably possible or practical to give more adequate notice.[122] Judge Swygert held that the denial of certification was an abuse of discretion. He thought that the putative class met all the prerequisites for certification imposed by FRCP 23(a) and (b)(2) and that there is a line of authority which supports the proposition that a class may include "chilled" plaintiffs.[123] Judge Swygert also disagreed with the majority's conclusion that a fluid recovery was inappropriate. He noted that the statute's purpose, to reduce the impact of high energy costs on low-income people including the elderly and poor, is served by the settlement decree. A comparison of the dissenting and majority opinions shows the debatable nature of certification under FRCP 23.

In *Curtiss-Wright Corp. v. Helfand*,[124] the court dealt with the question of whether or not a district court could deny one of the members of the class his full proportionate share of the settlement without giving him a hearing in a class action settlement. The court ruled that it could. The case was brought on behalf of a class composed of purchasers of Cenco stock during a certain period. Curtiss-Wright Corp., which was a member of the plaintiff's class, had purchased Cenco stock heavily in 1974 and within a few months had amassed 5% of the stock.

121. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 175 (1974).
122. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 317 (1950).
123. Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972); Carpenter v. Davis, 424 F.2d 257 (5th Cir. 1970).
124. 687 F.2d 171 (7th Cir. 1982).

It wanted to buy even more and did a preliminary review and audit of Cenco's operation. Curtiss-Wright learned that Cenco had poor to non-existent accounting controls but bought Cenco stock anyway—by the time the fraud was unmasked it owned 16% of the stock, far more than any stockholder. Thus, one of the plaintiffs included in the class actually had some knowledge of the fraud involved.

The district court ruled that Curtiss-Wright could share in the settlement only to the extent of its purchases prior to the business review they made of Cenco. The court of appeals affirmed. Because the class action procedure is equitable in origin, the judge can make an equitable allocation of the damages among the parties. The court held that "due process is not affronted, because a plaintiff is not required to submit his claim in the class action but can withdraw and sue separately."[125] The case is interesting because it includes members of the plaintiff class who well could have been on the defendant's side.[126] The court by implication rules that such a class action may be maintained where the court limits the rights of one of the plaintiffs in order to achieve justice. The court states that the "opt-out" right gives the person the due process protection that they need. One may query whether or not in a (b)(1) or a (b)(2) class action, in which there is no such opt-out right, such an adjustment of a settlement would be valid.

In *Tidwell v. Schweiker*,[127] the Seventh Circuit ruled on a question that concerned the standing requirements of class representatives. The case involved a lawsuit against the Director of the Illinois Department of Mental Health, the Secretary of the United States Department of Health, Education and Welfare and the Administrator of the Social Security Administration concerning the practice of Illinois mental institutions taking the social security and disability benefits of institutionalized mental patients for the payment of hospital costs. The patients were asked to sign a form allowing the state to accumulate their benefits in a trust fund to be used for payment of hospital costs. The question was whether or not Tidwell had standing to challenge the signing of the forms since neither he nor any of the named plaintiffs actually signed this form or were asked to sign the form. The court ruled that the named plaintiffs were subject to being asked to sign the form and subject to the illegal system. Thus they had standing to represent those who did sign the form as well as those who did not. The question of

125. *Id.* at 1666.

126. *Cf.* Hansberry v. Lee, 311 U.S. 32 (1940) (where such a suit was ruled to be not a proper class action).

127. 677 F.2d 560 (7th Cir. 1982).

who can represent whom in a class action is a complicated one and one which has recently been dealt with by the case of *General Telephone Co. of Southwest v. Falcon*.[128] Although the Supreme Court has tried in *Falcon* to tighten the representation standards, the standards are still loose enough to accomodate *Tidwell*. Certainly, one can represent others in a class action besides those who share exactly the same factual circumstances. The exact dimensions of one's ability to represent others, however, has never been finally determined.

VII. PRELIMINARY INJUNCTION

Lektro-Vend Corp. v. Vendo Co.,[129] a very complicated case which has been going on for 16 years through the Illinois and federal court systems (up to the supreme court of each) held that a preliminary injunction hearing does not bind the district court after a full trial on the issues. The rule, the court noted, that a preliminary injunction is by nature preliminary and does not bind the court in a subsequent trial on the merits is well settled in the Seventh Circuit and other circuits.

VIII. SANCTIONS

In several cases the Seventh Circuit dealt with the problem of what to do with recalcitrant or negligent counsel. Some of these cases were due to just pure delay, one dealt with a frivolous appeal, and others involved problems with discovery. A "delay" case was *Ruiz v. Cady*,[130] in which the district court had issued a writ of habeas corpus because the Wisconsin Attorney General had failed to comply with a court order requiring filing of copies of the state court's transcript. The court of appeals concluded that the release of Mr. Ruiz was a drastic remedy and an abuse of discretion. The court's language towards the Wisconsin Attorney General, however, was very uncomplimentary. In this case, the district court had ordered the respondent to answer the petition for habeas corpus and to file copies of the state trial transcripts within twenty days. By this time the Wisconsin Attorney General had known for more than one and a half months that it would have to file the state court's transcript. One day after they were due, counsel for the Attorney General contacted the district court by telephone and requested an extension of time. The next day, the district court issued an order granting Ruiz's writ of habeas corpus, although it did grant a 90-

128. 102 S. Ct. 2364 (1982).
129. 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982).
130. 660 F.2d 337 (7th Cir. 1981).

day stay so that they could re-try Ruiz on his first degree murder conviction. The court of appeals, in reversing, noted that a default judgment without full inquiry into the merits is especially rare when entered against a custodian in a habeas corpus proceeding:

> Although such a remedy is extreme, and may well conflict with the public's right to protection, we think it should be preserved as a sanction against a respondent's unwarranted delay. Where the respondent is guilty of long and inadequately explained delays, it may be presumed that the petitioner is being illegally confined.[131]

The court noted, however, that it was not condoning the Attorney General's negligence nor saying that the Attorney General would be allowed at least one late filing or delay in a habeas corpus case. "To the contrary, we are in complete sympathy with the district court's concern that the attorney general's staff does not live up to its obligations in prisoner cases." Although the district court's decision was reversed, the Attorney General of Wisconsin should be unhappy reading the Seventh Circuit opinion—small comfort to Ruiz, one suspects.

In *Ellingsworth v. Chrysler*,[132] the defendants appealed from the denial of their post-trial motions to set aside a default judgment. In this case, default was entered after their attorney had failed to appear at four status calls and failed to appear on the date of trial. A review of the proceedings below showed that the trial date was set in an ambiguous manner and it was quite possible that counsel could have misunderstood. Furthermore no written notice was ever sent to the attorney or the defendants to confirm the date of trial. The Seventh Circuit noted that "a default judgment, like a dismissal, is a harsh sanction which should usually be employed only in extreme situations, or when other less drastic sanctions have proven unavailing."[133] Thus it is appropriate that FRCP 60(b)(1)[134] be liberally applied in the context of default judgments, especially where those judgments result in honest mistakes rather than willful misconduct, carelessness or negligence. Because there was no willful pattern of disregard for the court orders or rules, the district court was reversed.

In *Maneikis v. Jordan*,[135] the Seventh Circuit imposed attorney's

131. *Id.* at 340.
132. 665 F.2d 180 (7th Cir. 1981).
133. *Id.* at 185 (citations omitted).
134. FED. R. CIV. P. 60(b)(1) provides:

> (b) Mistakes: Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect.

135. 678 F.2d 720 (7th Cir. 1982).

fees directly against an attorney who had appealed an order prematurely. The trial court had entered an order dismissing a counterclaim and the defendant moved for leave to reinstate the claim, which was denied. The appeal was from that order. The Seventh Circuit said that it was clear that the order was not a final one and that the appeal was therefore frivolous. The court stated that this was a proper case to impose sanctions under Federal Rules of Appellate Procedure 38. Since it was the attorney's personal fault, the order should be personally issued against the attorney for costs and fees.

Reading these three cases together does not give the negligent counsel a feeling of security. Certainly the added expenses of taking an appeal and having attorney's fees assessed against one should discourage people from indulging in such sloppy practices. In the area of sanctions for failure to comply with discovery, the court has been much harsher and has dismissed three cases. In *Charter House Insurance Brokers, Ltd. v. New Hampshire Insurance Co.*,[136] Charter House had sued New Hampshire Insurance Company [hereinafter noted as N.H.I.C.] for damages arising out of a 1978 government undercover operation. N.H.I.C. had lent its cooperation to an F.B.I. investigation of organized crime activities. Charter House claimed that it was induced by an agent acting for N.H.I.C. to broker construction security bonds that were not valid and sued N.H.I.C. for multi-million dollars worth of damages. After the filing of the complaint, interrogatories were filed by the defendant against the plaintiff Charter House. They were never answered, and the judge ruled below that if discovery had not been completed by February 22, 1980, a motion to dismiss would be granted. On February 22, he granted the motion to dismiss with prejudice under FRCP 41(b).[137] On February 29, however, the plaintiff presented a motion to vacate the order of dismissal. The judge then referred the case to a magistrate to supervise production of all documents, ruling that "Motion to vacate dismissal will be allowed in 45 days if magistrate certifies to Court that all documents have been turned over."[138] Subsequently, it was determined that the documents that were finally submitted by the plaintiff were not complete and several had not been produced. The magistrate reported back "Simply stated, this record reveals unquestionably that plaintiff has failed miserably in its attempt to persuade this court that 'all documents have been turned over.' "[139]

136. 667 F.2d 600 (7th Cir. 1981).
137. FED. R. CIV. P. 41(b).
138. 667 F.2d at 602.
139. *Id.* at 603.

The judge adopted the magistrate's findings and conclusions and dismissed.

The Seventh Circuit noted that there are two provisions under the Federal Rules of Civil Procedure for discovery sanctions. First, if discovery responses are made but are inadequate, the party seeking discovery must apply to the court for an order to compel discovery under FRCP 37(a) and sanctions cannot be invoked until this court order is disobeyed.[140] Pursuant to FRCP 37(d), however, if a "party or an officer, director, or managing agent of a party, or a person designated under FRCP 30(b)(6) or 31(a) to testify on behalf of a party" does not appear for a properly noticed deposition, does not answer or object to interrogatories properly served, or does not make a written response to a proper FRCP 34 request for production or inspection, the court may impose sanctions directly, without first issuing an order to compel discovery.[141] Charter House argued that its late and incomplete tender ended the applicability of FRCP 37(d) and set in motion instead the procedures of 37(a) and 37(b). It then argued that these procedures under 37(a) and (b) could not lead to dismissal because there had been no order under FRCP 37(a). The court ruled that even if a court order were necessary, counsel's promise that he would comply with the discovery schedule could be treated as an order. The court noted that a FRCP 37 dismissal requires a showing "of willfulness, bad faith or fault"[142] and also that the standard for review is that of abuse of discretion. Here there were findings below of willfullness and the like, and therefore the district court did not abuse its discretion. Note that in this case counsel was given more than one chance to fulfill his obligations but refused to. Given that circumstance the sanction of dismissal seems appropriate.

In *Hindmon v. National-Ben Franklin Life Insurance Corp.*,[143] another entry of default occurred against the plaintiff and again the dismissal was affirmed. There was an initial status hearing on September 16, 1980, at that time the court noted that Hindmon had failed to reply to National-Ben's affirmative defenses and was in default in responding to the counterclaim. The court ordered Hindmon to respond to defendant's counterclaim and set a further status hearing. Plaintiff failed

140. *Id.* at 604; FED. R. CIV. P. 37(b)(2).

141. FED. R. CIV. P. 37(b)(2); FED. R. CIV. P. 37(d).

142. The court cited as authority the standards of Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958) and National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640 (per curiam), *reh'g denied*, 429 U.S. 874 (1976).

143. 677 F.2d 617 (7th Cir. 1982).

to appear at the second hearing and, as of November 1, 1980, had yet to comply with any of the defendant's discovery requests. The district court set the case for trial on December 1, 1980. The district court later, on a motion to dismiss, issued a clear warning that dismissal could result if Hindmon failed to comply with the order compelling discovery and with a notice of deposition. Hindmon failed to appear that day for the taking of the deposition as required by the notice but instead appeared the day after. As for the answer to interrogatories, the client had never seen the interrogatories nor verified the answers as required by FRCP 33(a).[144] The court specifically found that Hindom had willfully and in bad faith refused to provide discovery by violating the court's October 19 discovery order. Therefore his complaint was dismissed and a default judgment entered on the counterclaim. Once again, the court affirmed the dismissal, finding that plaintiff's course of conduct clearly demonstrated a willful failure to comply with court-ordered discovery. In this case the court below had walked the extra mile with the erring counsel and party and thus the dismissal should not have come as a great surprise to them.

Loctite Corp. v. Fel-Pro, Inc.[145] was a patent infringement suit concerning the production of aerobic sealants and adhesives. Each of the patents claimed certain ingredients in specific quantities. Loctite's burden of proof, therefore, was to establish the presence of these specified quantities in Fel-Pro's products. Fel-Pro's pursuit of this information in discovery and Loctite's steadfast refusal to divulge it resulted in a three-year discovery process which ended in dismissal of the plaintiff's case. The court below dismissed the suit under FRCP 37(b) for Loctite's failure to comply with the district court's order and granted Fel-Pro attorney's fees. The plaintiff here, as in the prior cases, had complied only minimally with what was ordered and had not assisted in the resolution of the suit. "Instead, Loctite balked at every attempt to clarify the issues; it now proffers technical arguments to induce this court to believe its conduct was acceptable."[146] The appellate court noted that the trial judge, having dealt with the parties and issues in the suit for almost three years, had the best opportunity to assess the need for the desired discovery and the degree of compliance. His findings, therefore, were binding unless clearly erroneous.[147] The court affirmed the dismissal finding there was no abuse of discretion. The court also af-

144. FED. R. CIV. P. 33(a).
145. 667 F.2d 577 (7th Cir. 1981) (per curiam).
146. *Id.* at 581.
147. The court noted that an evidentiary hearing was not required prior to a Rule 37 dismissal

firmed the amount of the attorney's fees imposed against Loctite.[148]

The court of appeals did reverse a dismissal for discovery abuse in *Eggleston v. Chicago Journeymen Plumbers Local Union No. 130*.[149] In this lawsuit, the court of appeals found that both sides had abused the discovery process, asking improper questions of deponents' racial background and resisting discovery to the point of extreme recalcitrance. Because both sides were at fault, the appellate panel considered it an abuse of discretion to deny plaintiffs all opportunity for relief. However, the court stated that abuse on future discovery by any party would not be tolerated.[150]

Note that in these above cases, claims were dismissed and default judgments were entered against those recalcitrant in the discovery process. Discovery abuses have received a great deal of attention from both scholars and the practicing bar in recent years. Perhaps these three dismissals show that the Seventh Circuit and its district courts are getting serious about enforcing the discovery rules. Such seriousness can only be welcomed by attorneys who do comply with discovery and who wish to move cases along. Thus, the court is following the recommendations of many commentators who recommend a much tougher stand on discovery.[151]

IX. CIVIL CONTEMPT

In *Commodity Futures Trading Commission v. Premex, Inc.*,[152] the court dealt with a civil contempt decision brought on by a violation of a consent decree. The consent decree had enjoined the defendant, Premex from making untrue statements of material fact. After the injunction was entered, Premex sent an advertisement through the United States mail which stated that it was registered as a commodity trading advisor by the Commodity Futures Trading Commission (CFTC), when its CFTC registration had expired. The district court held Premex in civil contempt.

The Seventh Circuit noted that no type of scienter or intent is necessary for civil contempt. Even though a Premex employee had put out

where there has been adequate briefing on the circumstances surrounding the noncompliance. *Id.* at 583 n.6.

148. The court however did remand for further and more detailed investigation of the attorney's fee matter. *Id.* at 585.

149. 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1710 (1982).

150. *Id.* at 904.

151. *See* Nordenberg, *Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYRACUSE L. REV. 543 (1980).

152. 655 F.2d 779 (7th Cir. 1981).

the mailing without any of the company's executives being involved, the lack of bad faith did not isolate Premex from liability. Premex next argued that the proceeding was one classifiable as criminal contempt and that, therefore, intent must be proven. The court distinguished between civil and criminal contempt: criminal contempt is punitive in nature to vindicate the authority of the court, while civil contempt is remedial with its purpose being either enforcement of a prior court order or compensation for loss or damages. Inasmuch as the suggested relief involved was that Premex notify all customers who had received the wrongful literature of its inaccuracy, the relief was compensatory. The court also noted that the trial court had the discretion to order defendants to pay the aggrieved party's fees and expenses incurred in bringing the violation to the court's attention.

IX. DIRECTED VERDICTS

In *Bonner v. Coughlin*,[153] the court of appeals ruled that a judgment n.o.v. could be granted even if defendant failed to move for a directed verdict at the close of all the evidence. The plaintiff argued that FRCP 50(b) precluded the district court from granting a judgment n.o.v. to such a party. The court did note that traditionally one has to renew the motion for a directed verdict at the the close of all the evidence as a prerequisite to move for a judgment n.o.v. Although some courts adhear rigidly to the letter of the rule,[154] other courts have rejected such a strict approach. The judges here ruled that they would be flexible and allow the defendant to move for a judgment n.o.v. in the circumstances. The court stated that it is better and safer practice to renew the motion for a directed verdict at the end of all the evidence, but in this case the court was willing to waive it.

X. ENTRY OF JUDGMENTS

In *Harris v. Goldblatt Bros., Inc.*,[155] the court ruled that a judgment that had been entered by the clerk for damages was not a final judgment because equitable relief still had to be given by the judge. Because the judgment was rendered with respect to part of the relief sought, it was not final. Thus the appeal in this case was premature

153. 657 F.2d 931 (7th Cir. 1981).

154. *E.g.*, the Third Circuit in DeMarines v. KLM Royal Dutch Airlines, 580 F.2d 1193, 1195-96 n.4 (3d Cir. 1978).

155. 659 F.2d 784 (7th Cir. 1981).

and the court's subsequent refusal to consider equitable relief was erroneous.

XII. POST-TRIAL MOTIONS

A. Appeal From FRCP 60(b) Motions

In *Textile Banking Co. v. Rentschler*[156] the court dealt with a problem of the time to appeal when a FRCP 60(b)[157] motion has been filed. The appellant had filed a notice of appeal on June 16, 1980, seeking review of the April 30 judgment order and the denial on June 5, 1980 of a FRCP 60(b) motion to vacate that order. The time for filing an appeal of the April 30 judgment order had expired on May 30, 1980, and a FRCP 60(b) motion does not toll or extend the 30-day appeal period. A FRCP 59(e)[158] motion to alter or amend the judgment does suspend the 30-day appellate period when filed within 10 days of the district court's final judgment. A FRCP 60(b) motion, however, is not the equivalent of a FRCP 59(e) motion and thus cannot suspend the time.

The court of appeals found that the May 9 motion under FRCP 60(b) could not qualify as a FRCP 59(e) motion because it did not propose an alteration or amendment and stated no grounds upon which this type of relief could have been granted. Also the court held that it was well-settled that the district court lacks the power to extend the 10-day filing deadline imposed on FRCP 59(e) motions. The court

156. 657 F.2d 844 (7th Cir. 1981).

157. FED. R. CIV. P. 60(b) provides:

(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

158. FED. R. CIV. P. 59(e) provides:

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

of appeals pointed out that the majority of the circuits have now abandoned the position that filing of a notice of appeal strips the district court of jurisdiction to hear a 60(b) motion. This procedure enables litigants to pursue 60(b) relief in the district courts without running afoul of the 30-day deadline for filing a notice of appeal. The court again emphasized that FRCP 60(b) is addressed to the sound discretion of the district court, unless the underlying judgment was void.[159] Thus the sole function of the court in reviewing the denial of a FRCP 60(b) motion is to determine whether the district court failed to set aside a void judgment or abused its discretion. The court therefore affirmed. A denial of FRCP 60(b) motion, therefore, is difficult to overturn on appeal.[160]

B. FRCP 59(e)

Hairline Creations, Inc. v. Kefalas[161] involved the question of whether a post-judgment motion for attorney's fees in a trademark action is a motion to alter or amend the judgment governed by FRCP 59(e) or a motion for costs under FRCP 54(d). Some of plaintiff's claims and all of defendant's counter-claims were dismissed. Summary judgment was granted in favor of Hairline on abuse of process, and in favor of Kefalas on the federal trademark infringement claim. The judgment was entered on August 29, 1980. On September 26, the defendant filed a motion for attorney's fees under 15 U.S.C. § 1117 which provides for attorney's fees for exceptional cases in federal trademark litigation. Hairline argued that the motion for attorney's fees constituted an effort to amend the judgment and thus was governed by the strict non-extendable ten day time limit of FRCP 59(e).[162] Kefalas responded that the motion was one for costs under FRCP 54(d),[163] which imposes no time limit. The Seventh Circuit noted that the word "cost" in FRCP 54(d) is not defined but it includes such items as court fees and witness fees. The court also noted that post-judgment motions

159. *See also* Margoles v. Johns, 660 F.2d 291 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1256 (1982).

160. *E.g.*, Ackermann v. United States, 340 U.S. 193 (1950).

161. 664 F.2d 652 (7th Cir. 1981).

162. FED. R. CIV. P. 59(e), *see supra* note 158 and accompanying text.

163. FED. R. CIV. P. 54(d) provides:

> (d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

for attorney's fees have not been uniformly governed by one rule. Rather courts have accepted motions for attorney's fees under both FRCP 54(d) and FRCP 59(e). The reason for this is that the rules of procedure fail to designate explicitly a time for requesting attorney's fees. The court ruled that a motion for attorney's fees under § 1117 is actually a motion to amend the judgment and thus is governed by FRCP 59(e).

Hairline may have been overruled by *White v. New Hampshire Department of Employment Security*,[164] in which the Supreme Court held that a motion for attorney's fees under § 1988 does not have to be made within the ten day limit of FRCP 59(e). Although *White* involved § 1988,[165] the language of the Court indicates that the rejection of the ten-day limit should apply to all motions for fees. Time limits in cases other than those involving § 1988 are not definitely decided, and therefore counsel should play it safe and make motions within the limits of FRCP 59(e).

XIII. APPELLATE REVIEW OF FACTUAL DETERMINATIONS

The Seventh Circuit had several cases that reviewed the factual determinations below. They concerned summary judgments, one judgment n.o.v., and one review of a judge's findings on the clearly erroneous standard. One case involved the situation in which there were no findings of fact below, and the circuit remanded for such findings. *Landau v. J.D. Barter Construction Co.*,[166] concerned an appeal from two orders granting summary judgment in favor of defendants in a patent infringement action. The trial court granted the defendants' counterclaim that the action was based on a patent obtained by fraud on the Patent Office and thus awarded attorney's fees and costs to the defendants. The problem was that the court below had summarily decided for the defendants and did not give any reasons or make any findings of fact in order to support its decision. While it is true that FRCP 52[167]

164. 102 S. Ct. 1162 (1982).
165. 42 U.S.C. § 1988 (1976 & Supp. IV 1980).
166. 657 F.2d 158 (7th Cir. 1981).
167. FED. R. CIV. P. 52 provides in pertinent part:

> (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of deci-

does not require that findings of fact and conclusions of law be entered when the matter in question is decided by summary judgment,[168] the court found that such findings are quite helpful for appellate review and especially desirable in patent cases "where the facts are technical and complex and where the summary judgment may be grounded in several legal theories."[169] Thus, "the absence of such a statement in this case leaves us no clue as to why the district court concluded that summary judgment was appropriate."[170] The inapplicability of summary judgment to patent actions in most cases coupled with the total lack of any factual statements whatsoever resulted in a remand for further factual development.

In *Egger v. Phillips*,[171] the court reversed where an FBI agent had sued his former supervisor for transferring him, allegedly for his free speech activities. Egger had complained to his supervisor at the Indianapolis field office of the FBI that certain members there were involved with organized crime, after which Egger was transferred to the Chicago field office. In a suit claiming violation of his first amendment rights, the district court granted summary judgment for the defendant. As in the prior case, when patent cases were said to be inappropriate for summary judgment, the court stated that cases involving motive and intent are "particularly inappropriate for summary judgment:"

> A determination involving a person's state of mind is seldom susceptible to direct proof, but must be inferred from circumstantial evidence. If improper motive can reasonably be inferred from evidence properly before the court, affidavits denying such motivation do not entitle a defendant to summary judgment.[172]

In determining that the transfer was not in retaliation for free speech, the district court had to evaluate the evidence and choose to credit defendant's rather than plaintiff's interpretation of several events. According to the Seventh Circuit "such judicial weighing of the evidence is impermissible on a motion for summary judgment, especially where issues of motive are involved."[173]

In *Madyun v. Thompson*,[174] the court again reversed the granting

sion is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

168. 657 F.2d at 162.
169. *Id.*
170. *Id.*
171. 669 F.2d 497 (7th Cir. 1982).
172. *Id.* at 502.
173. *Id.* at 503.
174. 657 F.2d 868 (7th Cir. 1981).

of the summary judgment, in this case in an action involving prison conditions. The court below had dismissed several of the allegations of the plaintiffs on summary judgment because plaintiffs had filed no opposing affidavits as required by FRCP 56(e).[175] A straight-forward application of FRCP 56(e) would require that summary judgment be granted in such a case. However, in *pro se* prisoner cases a different rule applies. The Seventh Circuit, along with the District of Columbia in *Hudson v. Hardy*[176] and the Fourth Circuit in *Davis v. Zahradnick*,[177] has held that plaintiffs have to be informed of their right to file affidavits. The district court erred in granting summary judgment without first alerting plaintiffs to the need for counter-affidavits. Given a meaningful opportunity to gather affidavits the plaintiffs might be able to show that the prison official's policies were not always followed. "Technical rigor in dealing with summary judgment procedure is inappropriate where unrepresented and uninformed prisoners are involved."[178]

Sharp v. Egler[179] arose out of an automobile collision with a tree. Plaintiff, Miss Sharp, was riding with Egler after leaving a bar about 4 a.m. Egler ran into the tree and Sharp sustained serious physical injury. She sued Egler for $750,000 and included Egler's employer, Bill Hanka Auto Sales, under respondeat superior. Both defendants' motions for summary judgment were granted. After discussing the choice of law problems involved in the case, the court of appeals found that a jury could reasonably have found that Egler had been guilty of the wanton misconduct necessary for liability under the Indiana Guest Statute.[180] Summary judgment for Egler was reversed. The Seventh Circuit found, however, that the use of the car was not within the scope

175. FED. R. CIV. P. 56(e) provides:

> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

176. 412 F.2d 1091 (D.C. Cir. 1968).

177. 600 F.2d 458 (4th Cir. 1979).

178. 657 F.2d at 877.

179. 658 F.2d 480 (7th Cir. 1981).

180. IND. CODE § 9-3-3-1 (1976).

of the employment. Therefore summary judgment was affirmed on the respondeat superior claim.

In yet another case, *Enquip, Inc. v. Smith-McDonald Corp.*,[181] the court reversed the granting of a summary judgment motion. The trial court had granted summary judgment against one defendant because that defendant had pled in a related state case that certain oil water separator tanks had met specifications. In his third-party action that defendant was alleging that the tanks did not meet specifications. The Seventh Circuit ruled that an admission in a pleading in a state court case is admissible, in support of a summary judgment motion, but it cannot be used as the sole basis for summary judgment. Opposing memoranda and exhibits can raise an issue of material fact: "When a statement or plea from another case is sought to be used as an admission in a second suit, courts are therefore careful to allow the opposing party a full opportunity to explain the purported admission to demonstrate that there is an issue of material fact."[182]

In every case dealing with summary judgment, the Seventh Circuit ruled that summary judgment was inappropriate. District courts should be wary of granting it.[183]

Klockner, Inc. v. Federal Wire Mill Corp.[184] involved an appeal from the trial court's findings of fact under the clearly erroneous standard of FRCP 52(a).[185] The court of appeals states:

> Such findings will not be set aside unless the reviewing court, after reviewing the evidence, is left with the definite and firm conviction that a mistake has been committed. . . . When such findings turn heavily upon issues of credibility, the trial court's ability to view the witnesses' demeanor and assess their credibility heightens the reluctance of the appellate court to substitute its judgment on the cold record for that of the trier of fact, and the burden of establishing error is commensurately increased.[186]

The court noted in a footnote that a less exacting application of the clearly erroneous standard might be appropriate in a "paper case" where the evidence presented to the court is primarily documentary.[187] In the case at bar, however, the determination turned heavily upon the trial court's credibility assessment of the live testimony and thus would

181. 655 F.2d 115 (7th Cir. 1981).
182. *Id*. at 118.
183. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).
184. 663 F.2d 1370 (7th Cir. 1981).
185. FED. R. CIV. P. 52(a).
186. 663 F.2d at 1375.
187. *Id*. at 1375 n.1. The court cited City of Mishawaka v. American Electric Power Co., 616 F.2d 976, 979-80 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

not be an appropriate instance for such a heightened review.[188] The court therefore affirmed the judgment against the defendant.

XIV. COLLATERAL ESTOPPEL, RES JUDICATA AND LAW OF THE CASE

In several cases, the Seventh Circuit decided issues arising under collateral estoppel, res judicata and law of the case. In *Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.*,[189] the court in a complicated antitrust suit affirmed a dismissal of Ohio-Sealy's motion to award it supplemental damages. Under the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff. At the time of accrual, the plaintiff is entitled to recover all damages caused by the antitrust conduct including damages that will be suffered during and after trial. However, where damages that might be suffered after trial are speculative or where they are unprovable at the time of trial, the cause of action for these damages is not yet accrued and the plaintiff may thereafter sue the defendant to recover these future damages when they accrue. Res judicata bars the plaintiff from splitting his cause of action, forcing him to seek all the damages that have been accrued as a result of the defendant's antitrust conduct. Those damages that Ohio-Sealy sought that were caused by antitrust conduct accruing after the verdict in this case created an independent cause of action. Ohio-Sealy had to pursue these damages in another lawsuit; it could not seek them in a supplemental procedure in the present case.

In *Harper Plastics, Inc. v. Amoco Chemicals Corp.*,[190] the lower court decided that res judicata barred a litigant from bringing a contract claim in state court following a dismissal on the merits of his federal antitrust claim where the litigant did not join the contract claim as an alternative theory of recovery in the federal action.[191] Because the Seventh Circuit found that appellant had split his cause of action, it affirmed.

188. *See also* the recent Seventh Circuit case discussed above, Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982).

189. 669 F.2d 490 (7th Cir.), *reh'g denied*, (1982).

190. 657 F.2d 939 (7th Cir. 1981).

191. The district court had enjoined a state court proceeding litigating some of the issues that had not been litigated in the federal court procedures. The appellant objected claiming that the district court erred in enjoining the state court proceedings pursuant to the relitigation exception of the Federal Anti-Injunction Statute, 28 U.S.C. § 2283 (1976). The court of appeals disagreed, finding the relitigation exception applicable to allow injunction of a state proceeding in order to protect and effectuate the federal court judgments, which includes enforcing the principle of res judicata.

In the federal action the district court dismissed the third count of plaintiff's complaint for failing to state a cause of action. While the appeal from the district court's decision was pending, plaintiff filed a three-count complaint in the Circuit Court of Cook County. The second count there alleged the same facts as were in count three of the federal action. The Seventh Circuit held that the question was whether or not the decision in the first suit was one based on legal rights as distinguished from a ruling on matters of practice, procedure, jurisdiction or form. If the former, the case would be barred. The district court had to deal with the substance of Harper's allegations and not merely with jurisdiction. Therefore it had reached the merits of the claim and barred a further state court litigation under the doctrine of res judicata.

In *Gasbarra v. Park-Ohio Industries, Inc.*,[192] summary judgment was granted against the plaintiff on the grounds that he had already litigated the issue in a prior lawsuit. In a prior lawsuit it had been determined that the defendant had wrongfully attempted to terminate the employment agreement between the parties, that the attempted termination was ineffectual, and that the defendant was liable for salary that had accrued under the contract. In this lawsuit, the plaintiff was suing for fringe benefits. The court decided that since res judicata applies not only to matters actually determined in the prior case but also to matters that properly could have been raised in the prior suit, the lawsuit was barred. One interesting point in this case is that the Seventh Circuit assumed that Illinois law applied on the issue of res judicata. Some circuits disagree with this, holding that the scope of res judicata and collateral estoppel is a matter of federal law, even in diversity litigation.[193]

In two cases, the court of appeals discussed issues of collateral estoppel. In *Madyun v. Thompson*,[194] the court held that certain issues brought by prisoners incarcerated in Pontiac State Prison were not barred by collateral estoppel. The district court had ruled that one set of allegations duplicated questions resolved by remedial order in *Preston v. Thompson*.[195] The Seventh Circuit ruled that the instant plaintiffs were neither represented nor had participated in *Preston*, and thus they were not barred by collateral estoppel. In *Pinto Trucking Service,*

192. 655 F.2d 119 (7th Cir. 1981).

193. *E.g.*, Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *reh'g denied*, 423 U.S. 1026 (1975).

194. 657 F.2d 868 (7th Cir. 1981).

195. 589 F.2d 300 (7th Cir. 1978).

Inc. v. Motor Dispatch, Inc.,[196] the court also held that the defendants there had not participated in the prior lawsuit to a degree that would bind them by res judicata. In the prior case the appellants were dismissed out at the end of plaintiff's case. Thus they had not had a chance to participate fully in the trial and therefore could not be collaterally estopped by the jury findings in that case.

In *Johnson v. Board of Education of the City of Chicago*,[197] the Seventh Circuit applied the doctrine of the law of the case and stated that the law embodied in a prior judgment should apply where there was no intervening conflicting Supreme Court precedent. The case involved the student assignment plan based on racial quotas for two high schools in Chicago, Gage Park and Morgan Park. The district court and the court of appeals had held the Board's use of quotas to be constitutional. It was then appealed to the Supreme Court and the Supreme Court remanded it for a determination of whether a consent decree imposing quotas or any plan implementing that decree had mooted the controversy. The district court determined that the case was not moot, a determination with which the court of appeals agreed. The Seventh Circuit further ruled that according to the law of the case doctrine a prior determination of law will be upset only under "unusual and compelling circumstances." Since no such circumstances existed in this case there was no warrant for a departure from the law of the case doctrine. On certiorari, however, the Supreme Court stated that since it had vacated the judgment of the court of appeals in this case, the law of the case doctrine no longer applied.[198]

CONCLUSION

Even in reviewing the decisions of just one court of appeals in only one area of the law, the reviewer cannot fail to be impressed by the volume of cases the court is required to decide. Many of the cases with which the court is presented are mundane; others raise important issues of far-reaching consequence. Unlike the Supreme Court, the court of appeals has little control over its caseload; it must decide the routine cases as well as the novel ones.

When an appellate court with a large caseload decides the vast majority of its cases in written opinions it faces a bit of a dilemma. On the one hand, if opinions are less than exhaustively researched, care-

196. 649 F.2d 530 (7th Cir. 1981).
197. 664 F.2d 1069 (7th Cir. 1981), *vacated*, 102 S. Ct. 2223 (1982).
198. 102 S. Ct. at 2224.

fully considered and painstakingly drafted, those opinions are nevertheless precedent for future cases. On the other hand, if full and detailed opinions are rendered in every case a goodly amount of time is spent on cases which are routine and proportionately less, one suspects, on the truly significant.

One solution is to decide cases by unpublished orders, and the Seventh Circuit's local rules provide for so doing.[199] However, when unpublished orders look like full opinions, as they do in many cases, one cannot help but feel uncomfortable that such pronouncements are not circulated and cannot be cited as authority. First amendment and equal protection considerations aside, the appearance is that the court is trying to hide something, either poor scholarship or special treatment.

An alternative solution might be to decide routine cases, and non-routine ones where the issues are not adequately presented, by means of truly summary orders. Where the court of appeals affirms the district court, it could be understood that summary affirmance has no precedential value. When the district court is reversed, the reasons for reversal and any necessary directions to the lower court could be embodied in a perfunctory order, although the summary procedure would seem to lend itself more easily to affirmance than to reversal.

It might be objected that the use of summary orders could too easily be abused. But a litigant always has the right to seek rehearing en banc and Supreme Court review in any particular case, and frequent abuse would certainly be noticed by the bar and the press. It seems highly unlikely that a wider use of summary or perfunctory orders in routine or poorly presented cases would dilute the quality of justice in individual cases. And having to produce fewer opinions ought to promote the full, thoughtful, careful, scholarly consideration of significant issues that have been properly presented for decision.[200]

199. Circuit Rule 35 provides for unpublished orders.

200. *See generally*, Reynolds and Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981); Reynolds and Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L. J. 807 (1979); Reynolds and Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978); *see also*, D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983).