1-1-1981

Civil Procedure in the Seventh Circuit: A Harmonious Balance of Competing Interests, 57 Chi.-Kent L. Rev. 97 (1981)

Michael L. Closen

Robert G. Johnston
John Marshall Law School

CIVIL PROCEDURE IN THE SEVENTH CIRCUIT: A HARMONIOUS BALANCE OF COMPETING INTERESTS

MICHAEL L. CLOSEN*
ROBERT G. JOHNSTON**

A review of the decisions of the United States Court of Appeals for the Seventh Circuit in 1979-80 on the subject of civil procedure reveals several cases of interest and importance, although few of them are likely to gain national significance.[1] A review also reveals the skillful

* Associate Professor of Law, The John Marshall Law School; B.S., M.A., Bradley University; J.D., University of Illinois; Former Judicial Clerk, Illinois Appellate Court; Former Assistant State's Attorney, Cook County.

** Professor of Law, The John Marshall Law School; J.D., University of Chicago.

The authors express their appreciation to Reid Jacobson, a research assistant at The John Marshall Law School, for his assistance.

1. The bulk of the cases decided between June 1, 1979 and May 31, 1980 in the area of civil procedure were routine in nature, and therefore will not be discussed in this article. Among the cases reported were:

FED. R. CIV. P. 24: Heyman v. Exchange Nat'l Bank, 615 F.2d 1190 (7th Cir. 1980); Federal Deposit Ins. Corp. v. Hanrahan, 612 F.2d 1051 (7th Cir. 1980).

FED. R. CIV. P. 54(b): Bank of Lincolnwood v. Federal Leasing, Inc., 622 F.2d 944 (7th Cir. 1980).

FED. R. CIV. P. 56: Agustin v. Quern, 611 F.2d 206 (7th Cir. 1979); First Nat'l Bank Co. v. Insurance Co., 606 F.2d 760 (7th Cir. 1979); Cedillo v. International Ass'n of Bridge & Structural Iron Workers, 603 F.2d 7 (7th Cir. 1979); County of Milwaukee v. Northrop Data Systems, Inc., 602 F.2d 767 (7th Cir. 1979).

FED. R. CIV. P. 60(b): United States v. Walus, 616 F.2d 283 (7th Cir. 1980); Fuhrman v. Livaditis, 611 F.2d 203 (7th Cir. 1979); Pacurar v. Hernly, 611 F.2d 179 (7th Cir. 1979); Bradford Exch. v. Trein's Exch., 600 F.2d 99 (7th Cir. 1979).

ILLINOIS STATUTE OF LIMITATIONS: Perkins v. Hendrickson Mfg. Co., 610 F.2d 469 (7th Cir. 1979).

JUDGMENT N.O.V.: Lykos v. American Home Ins. Co., 609 F.2d 314 (7th Cir. 1979).

JURISDICTION: Neiman v. Rudolf Wolff & Co., 619 F.2d 1189 (7th Cir. 1980) (Illinois Long Arm Statute); Wisconsin Elec. Mfg. Co. v. Pennant Prods., Inc., 619 F.2d 676 (7th Cir. 1980) (in personam); Rice v. Rice Foundation, 610 F.2d 471 (7th Cir. 1979) (subject matter).

JURY: United States v. One 1976 Mercedes Benz 280S, 618 F.2d 453 (7th Cir. 1980) (demand for jury trial); Matthews v. Ernst Russ S.S. Co., 603 F.2d 676 (7th Cir. 1979) (jury instructions).

COUNTERCLAIMS: National Acceptance Co. of America v. Coal Producers Ass'n, Inc., 604 F.2d 540 (7th Cir. 1979).

DIRECTED VERDICT: Merit Ins. Co. v. Colao, 603 F.2d 654 (7th Cir. 1979).

PLEADINGS: Shashoua v. Quern, 612 F.2d 282 (7th Cir. 1979).

MANDAMUS: General Elec. Co. v. Byrne, 611 F.2d 670 (7th Cir. 1979).

JUSTICIABILITY: Continental Ill. Nat'l Bank & Trust Co. v. Roan, 617 F.2d 1217 (7th Cir. 1980) (standing); Koehring Co. v. Adams, 605 F.2d 280 (7th Cir. 1979) (ripeness); Brown v. Scott, 602 F.2d 791 (7th Cir. 1979) (standing).

PRELIMINARY INJUNCTION: American Dairy Queen Corp. v. Brown-Port Co., 621 F.2d 255 (7th Cir. 1980).

MISCELLANEOUS: Dual Mfg. & Eng'r., Inc. v. Burris Indus., Inc., 619 F.2d 660 (7th Cir.

treatment given such cases by the judges of the Seventh Circuit. This article will review cases involving personal jurisdiction,[2] subject matter jurisdiction,[3] compulsory counterclaims,[4] discovery[5] and trial.[6] Generally, the cases are well reasoned and reach the proper result.[7] For the most part, the decisions show a pragmatic but sensitive balancing of competing interests between individuals and government, and among governments.

PERSONAL JURISDICTION

The traditional notion of jurisdiction over a person is physical presence.[8] It requires that the defendant be served with process within the forum state's boundaries in *in personam* actions. The notion of physical presence, however, failed to satisfy the pragmatic needs of a modern, mobile society.[9] It gave way formally in *International Shoe v.*

1980) (failure to object to jury instruction as bar to later challenge); Utz v. Nationwide Mut. Ins. Co., 619 F.2d 7 (7th Cir. 1980) (joinder of insurance company as defendant under Wisconsin Direct Action Statute); United States *ex rel.* Davidson v. Wilkinson, 618 F.2d 114 (7th Cir. 1980) (review of habeas corpus proceeding under 28 U.S.C. § 2253); Roberts v. Sears, Roebuck & Co., 617 F.2d 460 (7th Cir. 1980) (jury award of damages as bar to subsequent claim for equitable relief which could have been brought in prior adjudication); Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980) (damage for frivolous appeal); American Civil Liberties Union v. Brown, 609 F.2d 277 (7th Cir. 1979) (review of district court order denying defendant state secrets privilege); Daniels v. McKay Machine Co., 607 F.2d 771 (7th Cir. 1979) (state court denial of summary judgment: effect on federal court posture after removal under 28 U.S.C. § 1450); Panko v. Rodak, 606 F.2d 168 (7th Cir. 1979) (mandamus directing clerk to file petition for certiorari where petition failed to comply with Supreme Court Rule 39); Wisconsin Packing Co. v. Indiana Refrig. Lines, Inc., 604 F.2d 1022 (7th Cir. 1979) (sufficiency of notice of claim under Interstate Commerce Act); LaSalle Nat'l Bank v. Rosewell, 604 F.2d 530 (7th Cir. 1979) (Federal Tax Injunction Act as bar to district court jurisdiction over § 1983 civil rights action); Judd v. First Sav. & Loan Ass'n, 599 F.2d 820 (7th Cir. 1979) (denial of FED. R. CIV. P. 23(c) motion on notice not reviewable as final order under 28 U.S.C. § 1291).

2. Biltmoor Moving & Storage Co. v. Shell Oil Co., 606 F.2d 202 (7th Cir. 1979).

3. Oswald v. McGarr, 620 F.2d 1190 (7th Cir. 1980); Waste Management of Wisc., Inc. v. Fokakis, 614 F.2d 138 (7th Cir. 1980); City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979); Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979); Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979).

4. Valencia v. Anderson Bros. Ford, 617 F.2d 1278 (7th Cir. 1980).

5. Socialist Workers Party v. Grubisic, 619 F.2d 641 (7th Cir. 1980); *In re* Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979); United States v. Balistrieri, 606 F.2d 216 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1850 (1980).

6. Fietzer v. Ford Motor Co., 622 F.2d 281 (7th Cir. 1980); Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980); United States v. D'Andrea, 612 F.2d 1386 (7th Cir. 1980); August v. Delta Air Lines, Inc., 600 F.2d 699 (7th Cir. 1979).

7. Unless otherwise noted, the authors concur in the reasoning and result in each of the cases discussed.

8. Pennoyer v. Neff, 95 U.S. 714 (1878).

9. Dambach, *Personal Jurisdiction: Some Current Problems and Modern Trends*, 5 U.C.L.A. L. REV. 198, 198-99 (1957).

Washington[10] to the "minimum contacts" doctrine as an alternative basis of jurisdiction over the person. The minimum contacts doctrine allows service of process beyond the forum state's boundaries if the defendant by his conduct purposefully avails himself of benefits of the forum state and if the forum is a fair and convenient place to litigate the claim. In tort cases, the necessary minimum contacts are established often by the occurrence of damages within the forum.[11] Actual physical presence within the forum is not a requisite to jurisdiction if tortious conduct outside the forum caused damages within it.[12] In breach of contract cases, minimum contacts are established often by the occurrence of any part of the negotiations, through the stage resulting in damages, within the forum state.[13] Nonetheless, the complexity of transactions at times results in the inability of a forum state to assert jurisdiction over the person of all parties.[14] In such situations the need for a single, fair and convenient forum may affect the decision as to the degree of contacts required to satisfy the minimum contacts doctrine.

Application of the Illinois Long Arm Statute[15] was the concern in *Biltmoor Moving & Storage Co. v. Shell Oil Co*.[16] The defendant Shell Oil Co., a Delaware corporation with its principal place of business in Houston, Texas, decided to relocate certain of its offices and laboratories, including those facilities located in Wood River, Illinois, to Houston. To this end, Shell contracted with the defendant Great Southwest Warehouses, Inc.,[17] a Texas corporation conducting a moving and storage business and having its principal place of business in Houston, to perform the services necessary to consummate the relocation. GSW subcontracted the relocation of the Wood River facilities to the plaintiff, Biltmoor Moving & Storage, a Missouri corporation having its principal place of business in St. Louis, and such subcontracting was expressly recognized and authorized by the Shell-GSW agreement.[18]

10. 326 U.S. 310 (1945).

11. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

12. Thill Sec. Corp. v. New York Stock Exch., 283 F. Supp. 239 (E.D. Wis. 1968); O'Donnell Chevrolet, Inc. v. Shankles, 276 F. Supp. 998 (N.D. Ill. 1967).

13. Scoville Mfg. Co. v. Dateline Elec. Co., 461 F.2d 897 (7th Cir. 1972).

14. Hanson v. Denckla, 357 U.S. 235 (1958).

15. ILL. REV. STAT. ch. 110, § 17 (1979), which provides in relevant part:

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

(a) The transaction of any business within this State; . . . .

16. 606 F.2d 202 (7th Cir. 1979).

17. Hereinafter referred to as GSW.

18. 606 F.2d at 204-05.

An agent of Biltmoor, GSW, and Shell met at the Wood River site on one day only. During this meeting, the parties discussed the mechanics and procedures for the move of the Wood River facilities.

Biltmoor performed the moving functions at the Wood River site for a period of about eight months and was paid $144,948.79 by GSW. Biltmoor, however, claimed that it was owed an additional $327,347.42 which both GSW and Shell refused to pay.

Biltmoor filed suit against GSW and Shell in the federal district court in Missouri, but that court dismissed the case for lack of personal jurisdiction over GSW.[19] The district court concluded that the Biltmoor-GSW contract was formed in Texas, that none of the contracts had any contacts with Missouri sufficient to confer jurisdiction on the court under the Missouri Long Arm Statute, and that all of the contacts were in Illinois.[20] Shell was dismissed for failure to obtain jurisdiction over GSW, an indispensable party.[21]

Biltmoor then filed suit against GSW and Shell in the federal district court in Illinois. Again, the suit was dismissed because the parties had not transacted business in Illinois and could not be reached under the Illinois Long Arm Statute.[22] The two important reasons for this conclusion by the district court were that Biltmoor was not an Illinois resident and that the agent of GSW spent only part of one day at the Wood River site in Illinois.[23] Shell was dismissed due to the failure of Biltmoor to obtain jurisdiction over an indispensable party.[24]

Because Illinois case law had interpreted the Illinois Long Arm Statute to extend jurisdiction over non-residents to the fullest extent allowed by due process of law,[25] the question on appeal to the Seventh Circuit was whether extending such jurisdiction to GSW and Shell would protect them under due process standards. The Seventh Circuit held that there was jurisdiction over GSW and Shell, and reversed and remanded the case for trial.[26]

The Seventh Circuit began its analysis by citing to *International Shoe*[27] for the proposition that "a state's jurisdiction over a foreign corporation depends upon the existence of such contact 'as makes it

19. *Id.* at 205.
20. *Id.*
21. *Id.* at 206.
22. *Id.* at 205.
23. *Id.*
24. *Id.* at 206.
25. *See* Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
26. 606 F.2d at 208.
27. 326 U.S. 310 (1945).

reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.' "[28] Finding sufficient contacts with Illinois to justify jurisdiction over Shell was an easy matter. Shell was conducting business by operating its facilities at Wood River. Furthermore, the contract with GSW provided that Shell's staff was to perform much of the packing work at the Wood River Laboratory and that Shell's staff was to train and maintain liaison with the moving contractor's supervisor.[29] With respect to the contacts of GSW with Illinois, the Seventh Circuit again emphasized the provisions of the contract:

> The primary Shell-GSW contract provided that despite the appointment of subcontractors, GSW as contractor retained complete responsibility to Shell for the Wood River project; GSW indemnified Shell for all loss or damage at Wood River; GSW maintained insurance of all kinds relating to the Wood River project; and GSW was required to take all necessary safety precautions at Wood River.[30]

GSW took the position that it had insufficient contact with Illinois because its agent spent less than one day in the state. The court, however, rejected this position, saying:

> This fact does not detract from the more important fact that GSW was primarily responsible for the performance of a contract that took more than eight months (presumably all or most of which in Illinois) to perform. In other words, the moving contract absolutely required substantial and lengthy performance within Illinois by Shell, GSW and Biltmoor.[31]

The court emphasized the distinction between the present case and a case where the contract allows the plaintiff the opportunity to determine in which state to perform. As the court pointed out, in the latter case, ". . . we have recently held that where the contract between the parties left the plaintiff in absolute control over where it could conduct the contractually required activity and where the plaintiff unilaterally decided to conduct that activity in the forum state, performance of the contract in the forum state did not give the forum jurisdiction over the defendant."[32] The contract in this case, however, "absolutely required

28. 606 F.2d at 206, *quoting* 326 U.S. at 316-17.
29. 606 F.2d at 206.
30. *Id.* at 206-07.
31. *Id.* at 207.
32. *Id.* at 206, *referring to* Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d 596 (7th Cir. 1979). After citing several Illinois cases, the court wrote that "Illinois courts have not always distinguished between situations where the contract requires performance in Illinois and situations where, although the contract is silent, the defendant knows in advance that performance will take place in Illinois." 606 F.2d at 207. *See also* Gallagher, *Civil Procedure: Access to the District Courts, Suitability of the Forum, and Appellate Jurisdiction and Procedure*, 56 CHI.-KENT L. REV. 103, 127 (1980) [hereinafter cited as GALLAGHER].

performance in Illinois."[33] Finally, the court noted that ". . . it would offend traditional notions of fair play and substantial justice if Shell, busily engaged in business in Illinois, could obtain lengthy services in Illinois from Biltmoor and then escape from Illinois by interposing a contractual intermediary between itself and Biltmoor."[34] Therefore, the court held that there was jurisdiction over GSW and Shell under the Illinois Long Arm Statute.[35]

Biltmoor exemplifies a common recurring problem in today's commercial world. Multiple corporations engage in multi-state transactions. Rules of jurisdiction (and joinder) often seem rigid and artificial when applied to the practical commercial expectations of those transactions. GSW apparently experienced little difficulty in engaging Biltmoor to handle Shell's move. Yet it apparently anticipated great difficulty in litigating a dispute stemming from that move in federal court in either Missouri or Illinois. It obviously wished to litigate the dispute, if at all, in Texas, the only other available forum under either physical presence or minimum contacts. Yet under the facts, Illinois was as fair and convenient a forum as Texas, the federal tribunal was undoubtedly as impartial in Illinois as in Texas, and the parties to the transactions could expect one would choose Illinois as a forum to litigate disputes stemming from the transactions. Although the Seventh Circuit focused on the single physical presence of GSW's agent in Illinois, the court could well have focused on GSW's overall activities outside Illinois that intruded into and had an effect in Illinois.

Although both Illinois and Texas had some interest in providing a forum for this kind of litigation, neither's interest is so overwhelming to defeat the other's interest. Both Illinois and Texas satisfy the interest of the parties to the transactions in a fair and convenient forum with an impartial tribunal that each may reasonably expect to be chosen to litigate disputes stemming from the transactions. In *Biltmoor*, the Seventh Circuit correctly identified and balanced the interests of the states and parties in light of the realities of today's commercial world. Still unaddressed, however, is whether as a matter of sound federal policy diversity cases such as this one should be imposed statutorily on federal courts with the ever increasing dockets of federal question cases, many of which involve multi-district, complex, or protracted litigation.

33. 606 F.2d at 207.
34. *Id.*
35. *Id.* at 208.

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction is a limitation imposed by a sovereign on the courts as its agents.[36] It simply limits the power of the court to hear certain kinds of cases. Within the federal judicial system the decisions dealing with subject matter jurisdiction are not entirely consistent or logical.[37] Pragmatic needs of making a forum available often affect the outcome of the decision. Factors that affect the outcome may include:

> the extent of the caseload increase for federal trial courts if jurisdiction is recognized; the extent to which cases of this class will, in practice, turn on issues of state or federal law; the extent of the necessity for an expert federal tribunal to handle issues of state law that do arise; the extent of the necessity for a sympathetic tribunal in cases of this class.[38]

Federal Question

The Seventh Circuit found subject matter jurisdiction in a somewhat unusual way, under the federal common law of nuisance, in *City of Evansville v. Kentucky Liquid Recycling, Inc.*[39] The plaintiffs were three municipal corporations that used water from the Ohio River, and the defendants included Kentucky Liquid Recycling, Inc. and two metropolitan sewage districts. The suit for damages alleged that Kentucky Recycling discharged toxic chemicals into the systems of the defendant metropolitan sewage districts, that the districts in turn discharged the chemicals into the Ohio River, that the plaintiffs drew their water from the Ohio River, and that the plaintiffs therefore sustained substantial expenses in treating such contaminated water.[40] The plaintiffs had asserted basically three grounds for jurisdiction:

> (1) jurisdiction under 28 U.S.C. § 1331[41] over implied rights of action under—

36. Cooper v. Reynolds, 77 U.S. 308, 316 (1870).

37. Currie, *The Federal Courts and the American Law Institute (Part II)*, 36 U. CHI. L. REV. 268, 276-79 (1969).

38. Cohen, *The Broken Compass: The Requirement That A Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 916 (1967).

39. 604 F.2d 1008 (7th Cir. 1979).

40. *Id.* at 1010.

41. Section 1331 at that time provided:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

The $10,000 requirement, however, was eliminated on Dec. 1, 1980 by the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (1980).

(a) the Rivers and Harbors Act;[42]
(b) the Federal Water Pollution Control Act Amendments of 1972;[43] and
(c) the Safe Drinking Water Act;[44]

(2) jurisdiction under the citizen suit provisions of the latter two statutes; and
(3) jurisdiction under 28 U.S.C. § 1331 over a right of action under the federal common law of nuisance.

The plaintiffs also sought to represent a class of similarly situated municipalities and waste treatment facilities. The federal district court dismissed the action for lack of subject matter jurisdiction. Although the Seventh Circuit found no jurisdiction on the first two grounds asserted by the plaintiffs, it did find jurisdiction under federal common law.[45] First, relying upon the recent line of cases decided by the United States Supreme Court which reasoned that "where Congress does not expressly create a private cause of action, an intent to do so is not lightly to be inferred,"[46] the Seventh Circuit concluded that a private right of action should not be inferred from Section 13 of the Rivers and Harbors Act, which does not expressly create such a right.[47]

Second, the Seventh Circuit held that the plaintiffs had not complied with the notice provisions of the Federal Water Pollution Control Act Amendments.[48] The court concluded that, even if the notice requirements had been satisfied, the Act did not authorize class actions or

42. 33 U.S.C. § 407 (1976).
43. 33 U.S.C. §§ 1251-1376 (1976 & 1979 Supp.).
44. 42 U.S.C. §§ 300f-300j-9 (1976 & 1978 Supp.).
45. 604 F.2d at 1010-11, 1016-17, 1019.
46. *Id.* at 1011. *See* Shiffrin v. Bratton, 443 U.S. 903 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cort v. Ash, 422 U.S. 66 (1975).
47. 604 F.2d 1011-12. 33 U.S.C. § 407 (1976) provides in pertinent part:

> It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged or deposited . . . from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; . . . .

See also the court's discussion of the four factors to be considered in determining whether to imply a private right of action as established in Cort v. Ash, 422 U.S. 66 (1975). 604 F.2d at 1011-12.
48. 33 U.S.C. § 1365 (1976) provides in pertinent part:

> (b) **Notice**
> No action may be commenced—
> (1) under subsection (a)(1) of this section—
> (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the state in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order or
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in

actions for damages.[49] Furthermore, because the Act contains a "savings clause,"[50] the court went on to consider the four factors established in *Cort v. Ash*,[51] for determining whether to imply a private right of action and held that they were not satisfied by the plaintiffs here.[52]

Third, because the Safe Drinking Water Act contains a notice provision similar to that of the Federal Water Pollution Control Act Amendments,[53] the court applied the same analysis as is set forth above.[54] Also, the court noted that the conduct of the defendants was not alleged to have violated the Safe Drinking Water Act, which sets forth standards for drinking water and does not attempt to regulate discharge of pollutants.[55]

Finally, the court analyzed the federal common law grounds for jurisdiction. Federal district courts have jurisdiction over civil actions where the matter in controversy "arises under the . . . laws . . . of the United States."[56] The United States Supreme Court in *Illinois v. City of Milwaukee*[57] had already decided that "laws" includes federal common law as well as statutory law. In the present case, however, both the defendants and the district court took the position that only a state could file a suit under the federal common law of nuisance.[58] Although the only plaintiff in *City of Milwaukee* was a state, the Seventh Circuit

> any such action in a court of the United States any citizen may intervene as a matter of right,
>
> (2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

49. 604 F.2d at 1014.

50. 33 U.S.C. § 1365(e) (1976) provides, "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief . . . ."

51. 422 U.S. 66 (1975). The four factors in *Cort* are (1) whether the plaintiff was a member of the class for whose especial benefit the statute was enacted, (2) whether there existed any legislative intent, implicit or explicit to either create or deny a private remedy, (3) whether implication was consistent with the underlying purpose of the legislative scheme, and (4) whether the implied cause of action was one traditionally relegated to state law. 422 U.S. at 78.

Cort may have been substantially changed by Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); and Cannon v. University of Chicago, 441 U.S. 677 (1979). Those cases indicate a less hospitable attitude by the Court than that displayed in *Cort*. *See* Carter & Cumberworth, *Implied Causes of Action: A Theory Whose Time Has Come and Gone*, 14 J. MAR. L. REV. 141 (1980).

52. 604 F.2d at 1014-16.

53. *Compare* 42 U.S.C. § 300j-8 (1976) *with* 33 U.S.C. § 1365(b) (1976).

54. 604 F.2d at 1016.

55. *Id.*

56. 28 U.S.C. § 1331(a) (1979 Supp.). For the text of § 1331(a) *see* note 41 *supra*.

57. 406 U.S. 91 (1972).

58. 604 F.2d at 1017.

relied heavily upon that case as a guide on the issue of the propriety of a private action under the federal common law of nuisance in an interstate water pollution case. In *City of Milwaukee*, the Supreme Court had commented in a footnote that it is not only the character of the parties that is to be taken into consideration and that where the controversy touches fundamental federal interests, such as a case of pollution of a body of water surrounded by a number of states, federal common law should be established.[59] Lake Michigan was the cause of concern leading to the Supreme Court's application of a federal common law of interstate water pollution in *City of Milwaukee*. Similarly, the Seventh Circuit found concern for the alleged pollution of the Ohio River in *City of Evansville*. The court stated:

> The plaintiffs are municipal or public corporations, subdivisions of the state that were required to spend public funds because of pollution of an interstate waterway by acts done in another state. The interests of the state in this interstate pollution dispute are implicated in the same way such interests were implicated in *Illinois v. Milwaukee*.[60]

Although there is very little authority on this issue, the Seventh Circuit's resolution of the question seems appropriate in view of that limited authority. The business of the federal courts should be to resolve the kind of dispute raised by *City of Evansville*. Pollution of interstate water is a matter of concern that transcends parochial state interests. It is a matter of federal concern. Despite an increase in the court dockets by finding federal question jurisdiction in cases such as *City of Evansville*, federal courts provide a sympathetic, expert tribunal in which legal disputes among non-federal entities may be resolved in a manner consistent with a growing need to control interstate pollution.

Magistrate Jurisdiction

The Seventh Circuit decided a pair of cases involving the authority of a United States Magistrate to preside over a civil trial.[61] The court concluded that United States Magistrates are authorized to conduct civil trials in circumstances where the parties consent to the procedure, where the matter is referred to the magistrate by a United States Dis-

59. 406 U.S. at 105 n.6.

60. 604 F.2d at 1018. The only direct authority available was the decision of one federal district court in Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978), which held that a municipality can maintain a suit under the federal common law of interstate water pollution.

61. Hill v. Jenkins, 603 F.2d 1256 (7th Cir. 1979); Muhich v. Allen, 603 F.2d 1247 (7th Cir. 1979).

trict Court, where the findings and the recommendations of the magistrate (as well as the objections, if any, of the parties) are filed with the district court, where the district court conducts a de novo review of the proceedings before the magistrate, and where the district court enters a final judgment supported by the evidence and the applicable law.[62]

The first case is *Muhich v. Allen*.[63] In *Muhich*, the parties agreed to the reference of their case to a United States Magistrate and such reference was ordered by the district court "for purposes of conducting all proceedings, including trial and the entry of final judgment."[64] The magistrate conducted all proceedings and presided over a jury trial of the case. At the conclusion, the magistrate, upon motion by certain of the defendants, directed verdicts as to them. The jury returned verdicts in favor of the remaining defendants.[65] The plaintiff moved for a new trial, but that motion was denied.[66] The magistrate filed a number of documents with the district court including a report and recommendation, the transcript of the proceedings, and the motions of the parties along with the disposition of each. No objections to the magistrate's report and recommendation were filed by the parties.

Thereafter, the district court reviewed the documents. The court entered an order affirming and adopting the magistrate's rulings and orders and directing the clerk of the court to enter final judgment for the defendants.[67] As the district court concluded, "[t]he court is convinced after having reviewed the entire record that the Orders of the Magistrate and the jury verdict are supported by the evidence presented and the law applicable thereto."[68]

The plaintiff appealed to the Seventh Circuit, asserting that, because a magistrate has no jurisdiction to conduct a civil trial, the district court cannot enter a final judgment and thereby cure the jurisdictional defect. The Seventh Circuit affirmed the judgment,[69] notwithstanding the vigorous dissent of Judge Swygert.[70]

The majority first noted that the authority of a United States Magistrate to conduct a civil trial would have to be founded upon article III

62. Muhich v. Allen, 603 F.2d 1247, 1252 (7th Cir. 1979).
63. 603 F.2d 1247 (7th Cir. 1979).
64. *Id.* at 1249.
65. *Id.*
66. *Id.*
67. *Id.* at 1250.
68. *Id.*
69. *Id.* at 1253.
70. *Id.* at 1253-56. *See* text accompanying note 81 *infra*.

of the United States Constitution,[71] the Magistrates Act,[72] and local court rules.[73] The majority emphasized that jurisdiction over a civil case remains vested in the district court and is not lost to the magistrate, provided that the district court conducts de novo review and enters the final judgment.[74] Therefore, the district court, an article III court, properly exercised jurisdiction over the case.[75] Furthermore, the majority pointed out that the Magistrates Act permits magistrates to undertake additional duties consistent with the Constitution and laws of the United States,[76] that the Act also requires district courts to adopt local rules governing those duties,[77] and that the district court in this case had by local rule conferred upon magistrates the authority to preside over civil trials with the consent of the parties.[78] Therefore, the majority concluded that the procedure employed in this case complied with the Magistrates Act and local court rules.[79]

Judge Swygert filed a vigorous and persuasive dissent.[80] He expressed his basic premise by reasoning, "I do not believe that Congress in the Magistrates Act intended to empower magistrates to assume an adjudicatory function otherwise performed in our Nation only by an Article III judge, and that therefore jurisdiction is lacking."[81] Judge Swygert appropriately emphasized that, although the plaintiff consented to the referral of the case to the magistrate, such consent could not vest the magistrate and thus, the district court, with jurisdiction.[82]

71. Article III, § 1 provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

72. Magistrates Act, 28 U.S.C. § 636(b)(3) (1976) provides, "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

73. Magistrates Act, 28 U.S.C. § 636(b)(4) (1976) provides, "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties."

Rule 38(b)(5)(c) of the United States District Court for the Northern District of Illinois provides in part, "[i]n addition to the other powers expressly provided by Rule 38(b), the Magistrate shall have the authority to . . . [w]ith the written consent of the parties, hear and determine all motions, conduct the trial, enter findings of fact and conclusions of law and final judgments in civil cases."

74. 603 F.2d at 1251. *See* Taylor v. Oxford, 575 F.2d 152 (7th Cir. 1978), holding that a United States Magistrate is not empowered to enter a final judgment. *Id.* at 154.

75. 603 F.2d at 1251.

76. *See* note 72 *supra*.

77. *See* note 73 *supra*.

78. *Id.*

79. 603 F.2d at 1251.

80. *Id.* at 1253-56.

81. *Id.* at 1253 (Swygert, J., dissenting).

82. *Id.* Judge Swygert explained, "[i]t is true that plaintiff's complaints on appeal challenging the adjudicatory procedure here employed do not lie well with her, inasmuch as she originally

Without reaching the constitutional issue,[83] Judge Swygert, after a substantial review of congressional history and commentary regarding the Magistrates Act,[84] concluded that it was not the intent of Congress to delegate the important judicial function of presiding over a civil trial to a magistrate. Judge Swygert maintained instead that Congress intended that magistrates would perform administrative functions in order to free district judges to conduct trials.[85] The judge added that, if Congress had wanted magistrates to conduct civil trials, the Act could have expressly so provided, rather than allowing such significant authority to be inferred from the "additional duties" language of the Act.[86] Finally, Judge Swygert made an interesting and persuasive point about the requirement for de novo review by the district court of the proceedings before the magistrate. He said, "[b]ut this allegedly de novo review actually amounted to little more than an appellate-type check for gross errors."[87] Later, Judge Swygert commented:

> The jury is factfinder in a federal trial of this sort, and its verdict once reached is not lightly set aside. But that verdict is shaped by what takes place before it, and those events are in significant part controlled by the rulings of the magistrate. Thus, unless the district court judge wishes to upset the jury verdict, he cannot substitute his judgment at a later date for that rendered by the magistrate during trial. He will, of course, be reluctant to do so, and instead will at most check to see if any of the magistrate's trial rulings are arguably supportable. *Having assigned the entire trial to the magistrate, he will be reluctant to take it back to do all over again*.[88]

consented to the reference to the magistrate. But it is equally true, indeed it is axiomatic, that parties cannot themselves confer subject matter jurisdiction." *Id.*

83. *Id.* at 1256. Judge Swygert stated:

> Thus, I would not reach the Article III concerns implicated by this practice, and accordingly I will not further lengthen this dissent with my views on them. I would state, however, that I have serious doubts as to the constitutionality of allowing a non-Article III official to perform a traditional, judicial function so central to the exercise of the judicial power of the United States as that of presiding over a federal civil jury trial.

Id.

84. *Id.* at 1253-55. *See also* T.P.O., Inc. v. McMillen, 460 F.2d 348 (7th Cir. 1972), where Judge Sprecher sets forth "[p]erhaps the most thorough analysis of the legislative history of the Magistrates Act prior to its amendments in 1976." 603 F.2d at 1253.

85. *See* 603 F.2d at 1253-55. *See especially* 603 F.2d at 1254, *quoting from* the House Report as follows:

> Rather than constituting "an abdication of the judicial function", it seems to the committee that the use of a magistrate under the provisions of S. 1283, as amended, will further the congressional intent that the magistrate assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case.

H.R. REP. NO. 1609, 94th Cong., 2d Sess. 7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6162, 6167.

86. *See* note 72 *supra*.

87. 603 F.2d at 1255.

88. *Id.* (emphasis added).

The second case involving magistrate jurisdiction is *Hill v. Jenkins*.[89] Hill, a state prison inmate, filed a pro se complaint in federal district court against certain prison officials alleging violations of his constitutional rights as the result of a shakedown at the prison during which some of his personal property was confiscated and not returned. He sought a jury trial, injunctive and declaratory relief, as well as damages.[90] The district court scheduled a non-jury evidentiary hearing at the prison presided over by a United States Magistrate.[91] Hill testified, put on other evidence, examined witnesses, and cross-examined opposing witnesses. The magistrate requested that both sides submit proposed findings of fact and conclusions of law.[92] Hill, however, sent a letter to the district court asking for information and assistance with respect to the material he was supposed to file. The record was silent as to any response from the district court. Hill filed no findings or conclusions, although the appellees did file findings and conclusions directly with the district court. Furthermore, no transcript of the proceedings was filed with the district court, nor did the magistrate file any findings or recommendations with the district court. As a result, the court adopted verbatim the findings and conclusions filed by the appellees. Hill appealed, challenging the adjudicatory procedure of referring his case to the magistrate for hearing.[93]

As a preliminary matter, the Seventh Circuit noted that the hearing before the magistrate amounted to a trial.[94] Relying upon the standards set forth in *Muhich*,[95] the circuit court commented that "the reference procedure in this case utterly failed to satisfy these standards."[96] Specifically, the court pointed out (1) that the matter was referred to the magistrate without the consent of the parties, (2) that there were no local court rules permitting a magistrate to preside over a civil trial, and (3) that the district court did not conduct de novo review of the proceedings.[97] As to the last point regarding de novo review, the circuit court thought it obvious that there was an absence of de novo review where no transcript was filed with the district court, where Hill had not filed proposed findings of fact or conclusions of law, where the

89. 603 F.2d 1256 (7th Cir. 1979).
90. *Id.* at 1257.
91. *Id.*
92. *Id.*
93. *Id.* at 1257-58.
94. *Id.* at 1258.
95. *See* note 62 *supra* and accompanying text.
96. 603 F.2d at 1258.
97. *Id.*

appellees filed their findings and conclusions with the district court rather than with the magistrate, where the magistrate filed no findings or recommendations, and where the district court adopted verbatim the findings and conclusions of the appellees.[98] The circuit court reversed and remanded the judgment for further proceedings.[99]

Judge Swygert concurred in the result.[100] He first pointed out that although "prisoner petitions challenging conditions of confinement" may be referred to magistrates for evidentiary hearings, this case did not involve such a situation.[101] Secondly, Judge Swygert, in keeping with his dissent in *Muhich*,[102] concluded that "Congress has not [otherwise] authorized a magistrate to accept subject matter jurisdiction over a case such as this."[103]

The results in *Muhich* and *Hill* are not unexpected. Despite Judge Swygert's concern that the decisions granted jurisdiction to magistrates beyond that contemplated by statute, federal courts which are hard-pressed to keep their dockets current are likely to devise means to reduce the pressures of case overloads. Given the procedural protections of a de novo review by the district court judge, complaints regarding the magistrate's power to hear civil cases most likely reflect a disgruntled litigant's hopes of again litigating a matter that may otherwise have been conclusively resolved between the parties and removed from the federal court's docket.

Collateral Attack

In *Waste Management of Wisconsin, Inc. v. Fokakis*,[104] the Seventh Circuit was confronted for the first time with the jurisdictional question of whether a corporation could collaterally attack a state court criminal conviction under the federal Civil Rights Act.[105] The corporation, Waste Management, was convicted and fined in a Wisconsin state court for violating that state's "Little Sherman Act."[106] The conviction was affirmed on appeal to the Wisconsin Supreme Court where the corporation argued that it had been denied its constitutional rights.[107] Certio-

98. *Id.* at 1258-59.
99. *Id.* at 1259.
100. *Id.* at 1259-60.
101. *Id.* at 1260. *See* Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1976).
102. *See* notes 80-88 *supra* and accompanying text.
103. 603 F.2d at 1260.
104. 614 F.2d 138 (7th Cir. 1980).
105. *See* 42 U.S.C. § 1983 (1976 & 1979 Supp.).
106. WIS. STAT. ANN. § 133.01 (West 1974) (current version at WIS. STAT. ANN. § 133.03 (West Supp. 1980)).
107. State v. Waste Management, 81 Wis. 2d 555, 261 N.W.2d 147 (1978).

rari was denied by the United States Supreme Court.[108] The corporation subsequently brought suit in federal district court seeking to have the state court conviction invalidated due to violation of the corporation's civil rights, but the district court dismissed the case for lack of subject matter jurisdiction.[109]

The Seventh Circuit also concluded that jurisdiction was lacking and relied heavily upon its earlier decision *Hanson v. Circuit Court*.[110] There, the Seventh Circuit had said that habeas corpus is "the exclusive federal remedy for *all* who seek to attack state court judgments of convictions,"[111] but the facts of that case limited the holding to the attempt by an "individual" to collaterally attack a state court conviction under the federal Civil Rights Act.[112] Hanson had received only a fine, rather than a sentence of imprisonment, and therefore could not satisfy the custody requirement to qualify for habeas corpus relief.[113]

Because of the fictional entity status of a corporation, it cannot be put into custody and cannot qualify for habeas corpus relief.[114] Therefore, the Seventh Circuit sought to determine whether it should treat the corporation in *Waste Management* as it had treated the individual in *Hanson* and restrict its opportunity for collateral attack to habeas corpus. With heavy emphasis upon the expressed and inferred intentions of Congress in limiting federal intrusions into state court judgments, the Seventh Circuit barred the attempt by the corporation to collaterally attack the state conviction under the Civil Rights Act.[115]

The Seventh Circuit concluded its opinion with an important policy statement supporting its result:

> The Corporation's position is untenable also because it seeks not parity with similarly situated individuals but preferential treatment. That a corporation cannot be imprisoned or otherwise placed in custody is an incident of the status conferred on it as an entity wholly distinct from its shareholders. As such, it is one of many benefits conferred on the corporate form—*e.g.*, limited liability of shareholders for corporate debts—for the purpose of facilitating capital formation. The corporate form similarly insulates shareholders from

108. Waste Management v. Wisconsin, 439 U.S. 865 (1978).
109. 614 F.2d at 139.
110. 591 F.2d 404 (7th Cir.), *cert. denied*, 444 U.S. 907 (1979).
111. *Id.* at 410 (emphasis added).
112. *See* 614 F.2d at 139-40.
113. It should be noted that other circuit courts might reach different results in cases like *Hanson*. *See, e.g.,* Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978); Shipp v. Todd, 568 F.2d 133 (9th Cir. 1978).
114. 614 F.2d at 140. *See generally* W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4942 (perm. ed. 1978).
115. 614 F.2d at 141-42.

> liability for the crimes of the corporations in which they hold stock. If our corporate system were so drastically different that we subjected shareholders to imprisonment, habeas corpus relief certainly would be available in appropriate circumstances. But to couple such a beneficial incident of the corporate form with elimination of a custody requirement for collateral attack of state court convictions would place corporations in a far more desirable position than individuals fined under state court judgments of conviction. Absent any showing of congressional authorization for such a result, and in light of possible problems posed by the equal protection guarantee of the fifth amendment, we hold that the relief the Corporation seeks is beyond the protection Congress intended and beyond the scope of benefits inhering in the corporate form. We therefore decline to limit *Hanson* and here reaffirm that habeas corpus is the exclusive federal route to collateral attack of state court convictions.[116]

The Seventh Circuit's insistence on the need for custody as a basis for habeas corpus is sound. The use of habeas corpus would be expanded to a great variety of situations by excepting individuals, and even more so corporations, from the custody requirement. Habeas corpus as a procedural device is traditionally used to protect an individual's right to liberty. To encourage federal review of state criminal proceedings involving fines only invites a substantial increase in the federal dockets with concomitant artificial distinctions being fashioned such as quasi-criminal versus criminal proceedings and the amount of the fine necessary to confer jurisdiction. It would also increase the intrusion of the federal government, albeit in the name of procedural fairness, into an area principally of state concern.

Appellate Jurisdiction

Final orders are immediately appealable; generally, interlocutory orders are not immediately appealable.[117] A "final order" is one that disposes of all issues between all parties remaining in the litigation.[118] Additionally, a "final order" is one that determines an important, disputed issue collateral to the merits of the litigation that as a practical matter is otherwise not reviewable.[119] Such an order is described as a "collateral final order." An "interlocutory order" is one that disposes of fewer than all issues between all parties remaining in the litigation.[120] It also may be a ruling on a procedural matter that does not

116. *Id.*
117. Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).
118. Collins v. Miller, 252 U.S. 364, 370 (1920).
119. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).
120. Sears Roebuck & Co. v. Mackey, 351 U.S. 427 (1956).

dispose of an issue or a party.[121] The reason for limiting appeals to final orders is to avoid piecemeal appeals which are thought to be disruptive of the litigation. Appellate review of interlocutory orders in certain circumstances, however, may expedite the litigation.[122] For that reason interlocutory orders are immediately appealable in some situations.

Two federal provisions allow immediate appeals from interlocutory orders. The first provision is Federal Rule of Civil Procedure 54(b).[123] It provides for appeals from an order that disposes of fewer than all the issues or all the parties in multiple issue or party litigation if the trial court finds there is "no just reason for delay" of immediate enforcement of the order.[124] The second provision is 28 U.S.C. § 1292(b).[125] Section 1292(b) provides for appeals from an order not otherwise appealable when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate appeal . . . may materially advance the ultimate termination of the litigation."[126]

In addition to these two provisions that allow immediate appellate review of interlocutory orders, a petition for a writ of mandamus as an original action filed in the court of appeals may allow immediate re-

121. Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955).

122. *See* note 125 *infra*.

123. FED. R. CIV. P. 54(b) provides:

> **Judgment upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

124. *Id.*

125. 28 U.S.C. § 1292(b) (1976) provides:

> 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.

(emphasis in original).

126. *Id.*

view of interlocutory orders.[127] The writ will issue to limit a trial court to its prescribed jurisdiction or to compel it to exercise its jurisdiction when it is its duty to do so.[128] Further, the writ will issue only when the action complained of is as a practical matter otherwise not reviewable.[129]

As complex or extended litigation becomes more commonplace in modern litigation, the situations in which immediate review of interlocutory orders may expedite the litigation may increase. In 1979, the Seventh Circuit in *In re General Motors Corp. Engine Interchange Litigation* (GM I)[130] reviewed and reversed the trial court's order that approved distribution of notice of a settlement offer to a subclass of Oldsmobile buyers whose cars had other than Oldsmobile transmissions.[131] The court remanded the order for further hearings by the trial court. The Seventh Circuit determined that the order was immediately appealable as a "final collateral order."[132] Compared to other decisions, the court's interpretation of the final collateral order doctrine was broad and generous.[133] It may have encouraged those who favor immediate review of interlocutory orders in complex litigation. In 1980, the Seventh Circuit in *Oswald v. McGarr* (GM II)[134] dismissed an appeal of the trial court's order on remand from *GM I* that authorized notice of a settlement offer. The court in *GM II* determined that the order was not a final collateral order.[135] It, therefore, declined to review the order. Alternatively, it entertained but denied a petition for a writ of mandamus to review the order.[136] The court, however, warned:

> [W]e must again caution that this is not the usual procedure that will be permitted in class actions. Under most circumstances, a notice mailed to class members in the course of a class action is not reviewable under any standard. Our review was proper and necessitated solely because of our obligation to ensure compliance with our previous mandate.[137]

The court went on to rule that "Judge McGarr complied fully and ca-

127. Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Will v. United States, 389 U.S. 90 (1967).
128. Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).
129. Will v. United States, 389 U.S. 90 (1967). *But see* La Buy v. Howes Leather Co., 352 U.S. 249 (1957) in which the dissent charged the Court with departing from the requirement that the order was not otherwise reviewable.
130. 594 F.2d 1106 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979).
131. *Id.* at 1117.
132. *Id.* at 1117-21.
133. *See* GALLAGHER, *supra* note 32, at 134.
134. 620 F.2d 1190 (7th Cir. 1980).
135. *Id.* at 1193-94.
136. *Id.* at 1195-96.
137. *Id.* at 1200.

pably with that mandate."[138] It held that the trial court, therefore, had properly exercised its jurisdiction.[139]

The court in *GM I* first addressed the appealability of the order that authorized distribution of the proposed notice of settlement. It pointed out that the order would bind the entire subclass.[140] Further, the order would have ended the entire litigation as to that subclass. The court argued that the procedural history of the litigation indicated that the order conclusively determined a disputed issue. The trial court had twice refused to reconsider its initial order which it had entered only after extensive hearings. Although the court conceded that the issue was not clearly collateral to the merits of the case, the court next argued that the concept of collateral necessary for appealability was not required in a sense a "semanticist might expect."[141] It concluded that the order was sufficiently collateral for the purposes of the final collateral order doctrine. The court finally argued that the order was not reviewable as a practical matter if not appealed immediately. On that basis the court in *GM I* held the order was a final collateral order.

In *GM I*, the court concluded that the standards for reviewing settlement offers under Federal Rule of Civil Procedure 23(e) were inapplicable since the proposed offer, unlike those contemplated by that rule, would not bind the entire class.[142] It, therefore, promulgated standards[143] to assure complete and accurate disclosure to the members of the subclass of their available options. The Seventh Circuit did not require reconsideration of whether the amount offered was fair, reasonable and adequate. The court only cautioned that the amount offered should not be nominal. It left to the trial court's discretion, under the newly promulgated standards, the determination of the form and content of the notice of a settlement offer.

On remand the trial court held further hearings.[144] It found the amount offered was not merely nominal, approved a proposed notice's form and content as accurate and complete, and once again authorized

138. *Id.*
139. *Id.*
140. 594 F.2d at 1123. *See* GALLAGHER, *supra* note 32, at 134-35.
141. *Id.* at 1119.
142. *Id.* at 1138-39.
143. The court explained that an offer to settle "should contain sufficient information to enable a class member to determine (1) whether to accept the offer to settle, (2) the effects of settling, and (3) the available avenues for pursuing his claim if he does not settle." *Id.* at 1139.
144. Judge McGarr held two days of hearings on the adequacy of the proposed notice, but did not hold any additional hearings as to the value of some of the petitioner's claims. 620 F.2d at 1193.

its distribution.[145]

Some representative members of the subclass objected to the manner in which the proceedings were conducted in the trial court and to the finding of the court.[146] Once again they appealed. They claimed the order that authorized the distribution of the notice to the subclass was a final collateral order.[147] In addition, they filed a petition for a writ of mandamus. In both the appeal and the petition they claimed that the trial court unduly restricted the form and content of the notice in violation of their first amendment right to communicate to other members, and that the trial court failed to hold sufficient hearings so that the amount offered was indeed nominal.[148]

The Seventh Circuit in *GM II* first addressed its jurisdiction to review the trial court's procedures and findings. It delineated three criteria for an order to be a final collateral order. The court stated that first, the order must conclusively determine a disputed issue; second, the order must resolve an issue completely collateral to the merits of the litigation; and third, the order must be, as a practical matter, not reviewable if it is not immediately appealed.[149] The court then held that the order that authorized distribution of the notice of the proposed settlement to the subclass was not a final collateral order.[150] It summarily disposed of the claim that the trial court interfered with the subclass members' first amendment rights. It ruled that the order did not resolve an issue other than the form of the notice that was reviewable after final judgment.[151] Citing precedent, the court described this position as "settled law."[152] It disposed of the second claim that the amount offered was nominal. Applying the first criterion to the order, the court pointed out that the notice of the settlement offer did not dispose of anyone's rights.[153] Therefore, according to the court, the order did not conclusively determine a disputed issue. Applying the second criterion, the court next pointed out that whether the settlement was nominal is the "heart of the litigation."[154] It added that if the sub-

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 1193-94.
150. *Id.* at 1193-95.
151. *Id.* at 1193.
152. *Id.* at 1194.
153. *Id.* at 1193-94.
154. *Id.* at 1194. The court explained, "[t]he second criteria, [*sic*] that the order resolve an issue completely separate from the merits of the action, is also not met. The determination of the value of the claims is the very heart of the litigation, and will be at issue again if another binding settlement is proposed or if a determination of damages is required after trial." *Id.*

class members reject the offer, the amount of damages must be litigated. The court concluded, therefore, that the order did not resolve an issue collateral to the merits of the litigation. Applying the third criterion, the court pointed out that the order complained of in the appeal at hand is reviewable along with other orders after final judgment.[155] Therefore, the order was reviewable on appeal after all issues between all parties were determined.

The court in *GM II* finally addressed the petition for a writ of mandamus.[156] It again summarily disposed of the claim that the trial court interfered with the subclass members' first amendment rights to communicate with other members. It recognized that some courts allow a mandamus to correct "grievous constitutional violations" if the violation is as a practical matter otherwise not reviewable.[157] The court held that restrictions on the form of the notice did not violate constitutional provisions and were reviewable along with other rulings after final judgment.[158]

The court then disposed of the claim that the amount offered was nominal. It reviewed its instructions to the trial court in *GM I* and the trial court's action on remand. It concluded that the trial court did comply with the mandate.[159] The court therefore denied the petition for a writ of mandamus.

In *GM II* the court seemingly rejected the broad and generous interpretation of the final collateral order doctrine in *GM I.* It warned that interlocutory review of class action orders by appeals or mandamus is not a favored procedure. The court's opinion in *GM II* may discourage those who favor immediate review of interlocutory orders in complex litigation. It may also give a great deal more power to district court judges in managing complex litigation and calendars. Obviously, the relative ease by which a litigant may obtain interlocutory review affects the litigant's strategy and tactics in the trial court. It also affects the distribution of caseloads between the appellate and trial courts.

155. *Id.* at 1194-95.
156. *Id.* at 1195-96.
157. *Id.* at 1195. The Seventh Circuit reasoned, "[w]hile some courts have used mandamus as a vehicle for correcting grievous constitutional violations, the circumstances here do not warrant such an approach. First, the mere assertion of constitutional violation is not sufficient to warrant a writ of mandamus. The error must be one that cannot be adequately corrected by normal appeals process." *Id.* (citation omitted).
158. *Id.* at 1193-95.
159. *Id.* at 1199-1200.

COMPULSORY COUNTERCLAIMS

Federal Rule of Civil Procedure 13(a) generally defines a "compulsory counterclaim" as a claim against an opposing party that arises out of the same transaction or occurrence as the opposing party's claim.[160] The purpose of rule 13(a) is to prevent a multiplicity of actions in the interest of judicial economy.[161] Compulsory counterclaims are significant for two principal reasons. First, failure to bring a compulsory counterclaim bars the claim thereafter,[162] and second, for purposes of jurisdiction, a compulsory counterclaim is ancillary, that is, it may have but need not have its own independent jurisdictional basis.[163] The test most commonly used to decide whether a counterclaim is compulsory is the logical relationship between the claim and counterclaim. If the counterclaim is logically related to the claim, the counterclaim then arises out of the same transaction or occurrence as the claim.[164] Application of the logical relationship test, however, often proves difficult and spawns substantial disagreement at times.[165]

In *Valencia v. Anderson Bros. Ford*,[166] the Seventh Circuit held that a lender's claim against a borrower for money owed was not a compulsory counterclaim to the borrower's claim against the lender for improper disclosures on a contract and note under the Truth in Lending Act.[167] Since the counterclaim did not have an independent jurisdictional basis, the court affirmed the trial court's dismissal of the counterclaim.

In its opinion, the Seventh Circuit noted a conflict among the circuits and district courts on the counterclaim issue.[168] It recognized that the literal language of rule 13(a) suggests the counterclaim was compulsory. The court applied the logical relationship test, however, and concluded that the initial execution of the loan agreement was the only

160. FED. R. CIV. P. 13(a) provides in part:
A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

161. Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257, 1261 (7th Cir. 1977).

162. Kennedy v. Jones, 44 F.R.D. 52, 55 (E.D. Va. 1968).

163. Hercules, Inc. v. Dynamic Export Corp., 71 F.R.D. 101, 107 (S.D.N.Y. 1976).

164. Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961).

165. *See, e.g.*, LASA Per L'Industria del Marmo Societa Per Azioni v. Southern Builders, Inc., 45 F.R.D. 435 (W.D. Tenn. 1967), *rev'd*, 414 F.2d 143 (6th Cir. 1969).

166. 617 F.2d 1278 (7th Cir. 1980).

167. 15 U.S.C. § 1601 (1976). [Hereinafter referred to as TILA].

168. 617 F.2d at 1290-91.

link between the two claims. According to the Seventh Circuit, that link was too insignificant to satisfy the logical relationship test.

The court relied heavily on the competing purposes of rule 13(a) and the TILA. The purpose of rule 13(a) is to avoid multiplicity of actions in the interest of judicial economy,[169] whereas the purpose of the TILA is to encourage full disclosure of the terms of consumer contracts and loans.[170] The TILA provides a civil penalty as a deterrent against failure to make full disclosure.[171] A TILA claim often may be resolved in a simple, expeditious hearing on the face of the agreement.[172] The court concluded that to label the purely private state claim for money owed as a compulsory counterclaim that would likely involve an extended evidentiary hearing, would frustrate the federal policy of the TILA and fail to materially advance judicial economy.[173]

The Seventh Circuit in *Valencia* recognized the need to choose between two clearly enunciated competing federal policies: one substantive under TILA, the other procedural under rule 13. Even assuming the purpose of rule 13 in expediting litigation could be satisfied in the fact situations exemplified by *Valencia*, the substantive policy of the TILA should still dictate that the counterclaim be declared permissive. Nevertheless, it is difficult to see just how the purpose of rule 13 could be satisfied under those facts, particularly if actions such as *Valencia* were converted to class actions. In such a situation the potential for procedural abuse through the use of compulsory counterclaims is enormous.

DISCOVERY

Within the federal system, the civil rules of discovery are fairly stable and generally accepted.[174] Concern about the rules today centers principally on improper use of discovery to frustrate its goals of expediting litigation and of disposing of litigation on the merits.[175] Three cases decided by the Seventh Circuit last term present interesting questions regarding the application of the civil rules of discovery.[176] *United*

169. Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257, 1261 (7th Cir. 1977).
170. 617 F.2d at 1282.
171. 15 U.S.C. §§ 1640(a), 1681(n), 1681(o) (1976).
172. 617 F.2d at 1291.
173. *Id.* at 1292.
174. *See* Johnston, *Discovery in Illinois and Federal Courts*, 2 J. MAR. J. OF PRAC. AND PRO. 22, 30 (1968).
175. Report of the Ad Hoc Committee to study the high cost of litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit, 86 F.R.D. 267, 271 (1980).
176. Socialist Workers Party v. Grubisic, 619 F.2d 641 (7th Cir. 1980); *In re* Folding Carton

States v. Balistrieri,[177] a case of first impression, raised the issue of whether the civil rules of discovery apply to motions in the nature of a writ of coram nobis.[178] *In re Folding Carton Antitrust Litigation*[179] addressed the application of the fifth amendment privilege against self-incrimination as a limitation on the scope of civil discovery, and *Socialist Workers Party v. Grubisic*[180] dealt with federal-state relations where a civil rights plaintiff sought disclosure of state grand jury transcripts.

In *Balistrieri*, the court ruled that in a motion in the nature of a writ coram nobis, a trial court may apply both the civil and criminal rules of procedure.[181] Relying on an historical analysis, the court concluded that coram nobis is a hybrid action—quasi-civil and quasi-criminal.[182] It noted that despite the 28 U.S.C. § 2255 provision of a statutory scheme for post-conviction relief and the Federal Rule of Civil Procedure 60 provision of a vehicle for relief from civil judgments, both of which did away with the writ coram nobis, the "ancient writ of error coram nobis [has risen] phoenix-like from the ashes of American Jurisprudence . . . ."[183] The court added that its purpose is to allow the court of first resort to correct its own errors. Now that the writ has arisen from the ashes, the question for the trial court was whether the writ was a continuation of the criminal case in which the conviction was obtained or a new action. If it was a continuation of the criminal case, the criminal rules of procedure were applicable. If it was a new action, the civil rules of procedure were applicable.

The facts in *Balistrieri* were not in dispute. Balistrieri was convicted for filing false income tax returns.[184] He learned later that a

Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979); United States v. Balistrieri, 606 F.2d 216 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1850 (1980). A fourth decision, *In re* Special September 1978 Grand Jury (II), No. 79-1218 (7th Cir. April 30, 1980), *modified*, (Dec. 19, 1980), tangentially addresses the scope of civil rules of discovery. In that case the Seventh Circuit held that a client's ongoing fraud waives the work-product privilege when asserted by either the lawyer or the client to protect information received in preparation for litigation, but that the attorney may rely upon the work-product doctrine to protect his mental impressions, conclusions or legal theories. *See* 23 ATLA J. 255, 255 (1980).

177. 606 F.2d 216 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1850 (1980).

178. Unlike appellate review, coram nobis was available at common law in both civil and criminal proceedings to bring before the court that rendered judgment errors in matters of fact which had not been put in issue or passed upon, and which were material to the validity and regularity of the legal proceeding in which the judgment was rendered, in order to modify the judgment. 7 MOORE'S FEDERAL PRACTICE ¶ 60.14, at 46-54 (2d ed. 1979).

179. 609 F.2d 867 (7th Cir. 1979).

180. 619 F.2d 641 (7th Cir. 1980).

181. 606 F.2d at 218, 221. Addressing the merits, the court also found no reason to set aside the movant's conviction. *Id.* at 222.

182. *Id.* at 221.

183. *Id.* at 219.

184. *Id.* at 218.

conversation he had had with his lawyer and others, some of whom were under surveillance, had been recorded by government agents. The government contended that the surveillance was unrelated to Balistrieri's case.[185] Balistrieri then brought a motion in the nature of a writ coram nobis to set aside the conviction. He sought to use the civil rules of discovery to obtain information for the hearing on his motion. After an in camera production of the monitoring logs of the surveillance, the trial court found that the surveillance of the others, who were the targets of the investigation, did not contribute to Balistrieri's conviction.[186] The trial court, therefore, entered a protective order under Federal Rule of Civil Procedure 26(c)[187] quashing Balistrieri's demands and motions for discovery. In affirming the trial court, the Seventh Circuit stated:

> The protective order may limit the scope or manner of discovery or limit the number of persons who see the discovered material. Coram nobis motions, insofar as they are sometimes made long after the judgment of conviction was rendered, are peculiarly appropriate candidates for the use of the district court's discretion under Rule 26(c). The district court's discretion to quash Balistrieri's discovery requests was within the discretion under the rule, especially in light of the breadth of the discovery requests in relation to the rather narrow ground of illegal surveillance upon which the coram nobis motion was based.
>
> Rule 16, F.R.Cr.P., is an unsatisfactory vehicle for discovery request in proceedings on a coram nobis motion. Facts which affect the validity of the conviction or sentence are unlikely to be found solely within the narrow scope of discovery allowed by Rule 16.[188]

The court further noted that it is "necessary to grant applicants [for a writ coram nobis] the scope of discovery under civil rules and, at the same time, assure the government and others of due protection from burdens arising from participation in old criminal proceedings."[189]

In *Folding Carton*,[190] another case raising a question with regard to federal rules of discovery, the Seventh Circuit addressed the issue of the application of the fifth amendment privilege against self-incrimination as a limitation on the scope of discovery. The court noted that although the trial court has discretion to assess the facts which underlie

185. *Id.*
186. *Id.* at 222.
187. FED. R. CIV. P. 26(c) provides in part, "for good cause shown, the court in which the action is pending . . . [m]ay make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ."
188. 606 F.2d at 221.
189. *Id.*
190. 609 F.2d 867 (7th Cir. 1979).

an asserted fifth amendment privilege, the court of appeals determines, as a matter of law, the standard to be applied in all cases.[191] In *Folding Carton*, the Seventh Circuit rejected the trial court's standard that the privilege was inapplicable when prosecution was unlikely.[192]

In *Folding Carton*, an officer of Container Corporation was indicted, pleaded nolo contendere, and was sentenced for conspiracy to fix prices in a prior criminal action.[193] The officer, Brown, served his sentence. In subsequent civil litigation Brown was deposed but refused to answer certain questions. He asserted his fifth amendment privilege against self-incrimination. The trial court ordered Brown to answer. It found that under the circumstances, further criminal prosecution of Brown by either the federal or state authorities was unlikely.[194] The court concluded that Brown had no "reasonable fear" of prosecution. Nevertheless, Brown refused to answer the questions. The trial court, therefore, held Brown in contempt of court.[195]

On appeal, the Seventh Circuit noted with approval the Ninth Circuit's standard that the right to assert the privilege rests on the possibility rather than the likelihood of prosecution.[196] It pointed out that in some situations the statute of limitations, grants of immunity, and the bar of double jeopardy provide absolute protection against subsequent prosecution.[197] The court added, however, that absent such protection, "the trial court looks to the possibility of incrimination but not the probability of the filing of an indictment in ascertaining the validity of a fifth amendment privilege."[198]

The standard adopted by the Seventh Circuit seems broader than that adopted by the Ninth Circuit. It focuses on the possibility of incrimination regardless of the potential for prosecution. The Ninth Circuit's standard focuses on the possibility of prosecution. The difference could be important in cases such as *Folding Carton* where the trial court found that even if Brown's answers were incriminating, the privilege was inapplicable as it was unlikely the government would reopen its "massive completed investigation." Unlike the Seventh Circuit's standard, the Ninth Circuit's standard may preclude the use of the

191. *Id.* at 871 n.5.
192. *Id.* at 871, 873.
193. *Id.* at 869. The district court imposed a sentence of fifteen days, a $15,000 fine and a mandatory probationary project.
194. *Id.* at 870.
195. *Id.*
196. *Id.* at 872, *referring to In re* Master Key Litigation, 507 F.2d 292 (9th Cir. 1974).
197. 609 F.2d at 872.
198. *Id.*

privilege even though the testimony is incriminating but the possibility of prosecution is remote.

In *Socialist Workers*,[199] the Seventh Circuit deferred in the first instance to the supervising state court on the issue of discoverability of state grand jury transcripts. Nevertheless, it reserved final determination of the issue to the federal trial court.[200]

The plaintiffs in *Socialist Workers* filed a civil rights action against various defendants who allegedly harrassed the plaintiffs because of their political views. Among the defendants were individual members of the Chicago Police Department and the Legion of Justice, a right-wing paramilitary organization. During the discovery process the defendants took positions contrary to a report by Cook County Grand Jury 655 on the defendants' activities and contrary to portions of testimony in Grand Jury 655's transcripts from a state criminal prosecution against the defendants. The plaintiffs sought disclosure of those transcripts but the Cook County State's Attorney objected to their production. The trial court ordered portions of the transcript disclosed and the remainder of the transcript delivered to the trial court for in camera examination.[201]

The Seventh Circuit unequivocally ruled that federal law ultimately controls discovery in a federal action in federal court.[202] It recognized that both state and federal law limit access to grand jury transcripts. The court stated that state policy is based on the need "to prevent escape of those under indictment, to ensure free deliberations, to prevent subornation of perjury, to encourage disclosure by witnesses, and to protect the innocent from unwarranted exposure."[203] It added that federal policy is based on similar concerns. The court noted, however, that federal grand jury transcripts may be disclosed to private parties in another judicial proceeding to avoid a possible injustice. Nonetheless, the Seventh Circuit felt the "strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy."[204] Under the circumstances the court concluded that the federal trial court should defer in the first instance to the supervising state court.[205] It reasoned that this

199. 619 F.2d 641 (7th Cir. 1980).
200. *Id.* at 644.
201. *Id.* at 643.
202. *Id.* at 643-44.
203. *Id.* at 643.
204. *Id.* at 644.
205. *Id.*

procedure would allow the state court, familiar with state policy and the need for continuing secrecy, to rule on the discoverability of the transcripts and also would avoid needless disruption of state criminal proceedings. The court ruled, however, that if the transcripts were not discoverable, according to the state court, the federal court then would consider whether the transcripts were discoverable under federal law based on the state court proceedings.[206]

Balistrieri, Folding Carton and *Socialist Workers* all demonstrate a sensitive balance of competing interests. The unique nature of a writ coram nobis when used to collaterally attack a criminal conviction does not lend itself to an easy solution to the question of what information should be available. The writ is of little value if the petitioner is limited to the relatively restrictive rules of criminal procedure. Yet, unlimited use of civil rules of procedure fails to fully protect the often overwhelming need to protect the government's sources of confidential information needed to successfully investigate and prosecute conspiracies, or the difficulty imposed on the government to defend against stale claims. *Folding Carton* decides between the competing interests of the individual against self-incrimination and the government's need to prosecute cases in which a substantial federal policy is at stake. The court correctly opted in favor of the individual's vital right against self-incrimination. The option is compatible with the continuing policy underlying the right against self-incrimination. Finally, *Socialist Workers* shows a sensitivity to the tension between the state's need to prosecute criminal conduct and to protect sources of information and the strong federal policy to protect an individual's civil rights. Overall, the three cases are a comforting balance of an individual's rights against arbitrary governmental action and a government's need to prosecute criminal activity.

TRIAL

Jury Selection

The issue of the propriety of the voir dire proceedings was raised in *Fietzer v. Ford Motor Co*.[207] *Fietzer* is an unusual case because it is one of the rare instances where a trial court judgment is reversed due to fatal flaws in the jury selection procedure.[208] The diversity suit in this case stemmed from an automobile accident in Wisconsin in 1969. The

206. *Id.* at 644-45.
207. 622 F.2d 281 (7th Cir. 1980).
208. *Id.* at 284-86. There are two other grounds for reversal as well: First, improper exclusion

plaintiff, Fietzer, was driving a Mercury Comet manufactured by the defendant Ford Motor Co. and was struck from behind by a car driven by the defendant Hilker. The plaintiff's car burst into flames and the plaintiff sustained burn injuries to 80% of her body. The plaintiff sued Hilker and Ford. Fietzer alleged that Ford was negligent for the unreasonably dangerous design of the fuel tank of the Comet automobile.[209] The action against Hilker was settled, but the issue of Hilker's degree of negligence remained important for the purpose of reducing the amount of Ford's liability since Ford had lost its right to contribution from Hilker.

At the first trial, the jury found Hilker guilty of negligence but concluded that his negligence was not a cause of the injury to the plaintiff.[210] The jury decided that the sole cause of the injuries to the plaintiff was the defective design of the fuel tank by Ford.[211] Ford appealed. The circuit court reversed the judgment on the jury verdict, holding that Hilker's negligence was a cause of the plaintiff's injuries as a matter of law.[212] The case was remanded for a new trial limited to the issue of the comparative negligence of Hilker and Ford.

In the second trial, the jury apportioned the negligence as follows: 15% to Hilker and 85% to Ford. Ford appealed and argued that the district court committed prejudicial error due to its unreasonable restriction of voir dire examination.[213]

The factual setting was critical to the case. It was presented by the Seventh Circuit in the following manner:

> The trial court chose to conduct voir dire in this case. In addition to asking the prospective jurors certain stock questions such as name, age, address, occupation, spouse's occupation, level of education, and acquaintance with the attorneys involved in the case, the extent of the court's interrogation of the jurors was as follows.
> 1. Would the juror be available for a trial lasting one week or more?
> 2. Were any jurors hard of hearing?
> 3. Did they work for or have close dealings with Ford?
> 4. Whether the juror had had a claim for personal injuries either as the result of an automobile accident or any other kind of an incident?
> 5. Whether there was any reason whatsoever why the person could

of evidence on the issue of comparative negligence and second, assessment of interest on the amount of damages. *Id.* at 286-90. *See* notes 221-25 *infra* and accompanying text.

209. 622 F.2d at 283.
210. *Id.*
211. *Id.*
212. Fietzer v. Ford Motor Co., 590 F.2d 215 (7th Cir. 1978).
213. 622 F.2d at 283.

not sit as a juror and decide the case fairly and impartially based upon the evidence submitted?

6. Whether any juror worked on a swing shift or the night shift?

Additionally, the parties pursuant to local rules received questionnaires filled out by the jurors. The questionnaires revealed information concerning the juror's job, education, health, criminal record, and vital statistics.

Ford requested the trial court to ask the jurors several additional questions which focused on the particular facts of the case. Those included whether any juror had been in a rear-end collision, whether any juror had been a witness to an accident involving fire, and whether any juror or member of his or her family had ever suffered burn injuries, whether any juror or member of his or her family had been involved in an automobile accident producing injury, whether any juror ever owned a Mercury Comet and his or her experiences with it, whether any juror had experience in engineering or automotive maintenance, and whether any juror was employed on a swing shift. With the exception of the last question, the court refused to inquire into those areas. The trial court also denied Ford's request to ask the jurors whether they were aware of a newspaper article which appeared three days before the trial in *The Milwaukee Journal*, the newspaper with the largest circulation in Wisconsin. The article, which ran on the front page of the paper bearing the headline, "Fuel Tank Peril Cited in Mavericks, Comets," concerned findings announced by the National Highway Traffic Safety Administration in regard to fuel tank defects in Comets and Mavericks.[214]

Although the trial court is given wide discretion in the jury selection process, the Seventh Circuit found this jury selection procedure too restrictive, and therefore, prejudicial to Ford.[215]

With respect to the examination of prospective jurors, the Federal Rules of Civil Procedure provide that the court may conduct the examination but that ". . . the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall by itself submit to its prospective jurors such additional questions of the parties or their attorneys as it deems proper."[216] The Seventh Circuit pointed out that the courts have recognized a right to "reasonably extensive examination of prospective jurors so that the parties have a basis for an intelligent exercise of the right to challenge," both for cause and peremptory.[217] Such was not the case here, however. As the Seventh Circuit wrote:

> We believe minimal inquiry into such areas as the juror's or his family's involvement in rear-end collisions and collisions that resulted in

214. *Id.* at 285.
215. *Id.* at 286.
216. FED. R. CIV. P. 47(a).
217. 622 F.2d at 284.

> burn injuries, in addition to questions concerning ownership of a Mercury Comet—all of which go to the nature of the case and the identity of the parties—was essential to producing disclosure by the jurors of possible prejudice against Ford.[218]

Apparently, these failures alone were enough to warrant reversal. Nevertheless, the court went on to address the pre-trial publicity concern as well:

> Additionally, we believe that the better practice in this case could have been for the trial court to question the jurors about the pre-trial publicity rather than to ignore it. Specifically, the court should have asked the jurors if any of them had read or had heard about the article and, if so, whether anything read or heard stood out in his or her mind. After determining the juror's degree of exposure to and interest in the article, the court then would have been able to inquire whether he or she had formed an opinion about Ford's relative negligence in the case.[219]

Therefore, the Seventh Circuit concluded that there was no assurance that prejudice among the prospective jurors would be discovered if present under the procedure employed by the district court.[220] Although the flaws in the jury selection procedure were the basis for reversal, the case is not an indication that the Seventh Circuit is likely to open up voir dire to the former practices in which lawyers tried to condition jurors and to unduly extend voir dire.

Damages

In *Fietzer v. Ford Motor Co.*,[221] the Seventh Circuit also addressed the issue of whether interest should be assessed on a damage award from the date of the first trial or from the date of the second trial. The total amount of damages was determined at the first trial,[222] but the case was reversed on appeal and remanded for a new trial solely as to the question of the comparative negligence of the defendants Ford Motor Co. and Hilker, the driver of the vehicle which collided with the plaintiff's automobile.[223] The district court reasoned that "since the total damages were fixed by the first trial and the second trial did not involve the issue of damages, the damages were liquidated by the first

218. *Id.* at 286.

219. *Id.*

220. *Id. See* United States v. Dellinger, 472 F.2d 340, 367 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), where the test was stated to be not whether members of the jury were in fact prejudiced, but "whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present."

221. 622 F.2d 281 (7th Cir. 1980).

222. *Id.* at 288. Damages were set at $469,303.19.

223. 622 F.2d at 290. Fietzer v. Ford Motor Co., 590 F.2d 215 (7th Cir. 1978).

jury verdict."[224] Therefore, the district court assessed interest from the time of the verdict in the first trial, rather than the second. The effect of this approach was to increase Ford's liability by about $60,000. Ford appealed, arguing that interest should have been awarded from the time of the verdict in the second trial, and the Seventh Circuit agreed with Ford.[225]

Cases in Wisconsin had held that interest on damages can be awarded from the date of the first trial in cases in which the amount of damages is determined or liquidated as a result of that first trial and are not subject to change due to later trials.[226] Ford contended that such was not the case here, because although the total amount of damages was determined at the first trial, Ford did not know the exact amount of its liability until the outcome of the second trial, which established the comparative negligence of Ford and Hilker.[227] Ford relied upon a series of pre-judgment interest cases, with emphasis upon *City of Franklin v. Badger Ford Truck Sales*.[228] In *City of Franklin*, the Supreme Court of Wisconsin refused to allow pre-judgment interest against multiple defendants since prior to judgment the individual defendants could not have determined the necessary amount of money to tender in order to avoid the interest. As the Seventh Circuit said:

> We believe . . . that the policy underlying those cases should apply also to this case. It is simply unfair to allow recovery for interest from the date of the first trial when it was impossible for Ford at that date to determine the portion of claimed damages for which it would be liable so that the amount could be tendered and the interest thereon stopped from accruing.[229]

Offer of Settlement

According to Federal Rule of Civil Procedure 68,[230] where an offer

224. 622 F.2d at 289.
225. *Id.* at 290.
226. Fehrman v. Smirl, 25 Wis. 2d 645, 131 N.W.2d 314 (1964); Ziedler v. Goelzer, 191 Wis. 378, 211 N.W. 140 (1926).
227. 622 F.2d at 289.
228. 58 Wis. 2d 641, 207 N.W.2d 866 (1973).
229. 622 F.2d at 289-90.
230. FED. R. CIV. P. 68 provides:

> *At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued.* If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. *If the judgment finally obtained by the offeree is not more favorable than the offer the offeree must pay the costs incurred after the making of the offer.*

of judgment is rejected and the judgment finally obtained is not more favorable than the offer, the offeree must pay the costs incurred after the offer has been made. The language of the rule appears mandatory in requiring the offeree to pay costs. Nevertheless, the question which arose before the Seventh Circuit in *August v. Delta Air Lines, Inc.*[231] was "whether the awarding of costs under Rule 68 . . . is mandatory or discretionary if the final judgment obtained by plaintiff is not more favorable than the defendant's offer."[232] The Seventh Circuit ruled that the language is discretionary.

The plaintiff, August, after receiving a right to sue letter from the Equal Employment Opportunity Commission, filed suit under the federal Civil Rights Act[233] against the defendant Delta Air Lines, Inc. The plaintiff asserted that she was dismissed from her employment as a flight attendant solely because she was black. After discovery had commenced, and pursuant to rule 68, Delta made an offer of judgment of $450 including costs and fees accrued to date.[234] August rejected the offer, and a twenty-five-day bench trial was conducted. Although the district court found that August had presented some evidence of racial discrimination, the court held for Delta and ordered each party to bear its own costs.[235] Delta moved for costs under rule 68, but the motion was denied.[236] The district judge concluded that a rule 68 offer must be a reasonable offer made in good faith, that the sum of $450 was unlikely to have covered even the attorneys' fees incurred by the plaintiff, and that, therefore, the offer here could have been effective only if the plaintiff's claim totally lacked merit or if additional factors mitigating in favor of the defendant were present.[237]

The Seventh Circuit agreed with the district court's reasoning and

> The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(emphasis added).

231. 600 F.2d 699 (7th Cir. 1979), *aff'd*, 49 U.S.L.W. 4241 (U.S. Mar. 9, 1981).

232. *Id.* at 699-700.

233. Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000(e) to 2000(e)-17. (1976 & 1978 Supp.).

234. Suit was filed in January, 1977, and the offer of judgment was made on May 12, 1977. 600 F.2d at 700.

235. *Id.*

236. *Id.*

237. *Id.* at 700 n.3.

affirmed.[238] The court pointed out two policy reasons in support of this result. First, the court noted that to allow minimal or nominal rule 68 offers to suffice would encourage bad faith, routine offers as "cheap insurance against costs" and that the "useful vitality of Rule 68 would be damaged."[239] Second, because the Civil Rights Act embodies a national policy of high congressional priority and contains an attorneys' fees provision to encourage individuals to seek redress for civil rights violations, the Seventh Circuit would not "permit a technical interpretation of a procedural rule to chill the pursuit of that high objective."[240] Therefore, the court limited its holding to cases under the Civil Rights Act.[241]

It should be noted that there is very little law on the issue involved here. Two cases have been cited for the proposition that the language of rule 68 allows no discretion.[242] The Seventh Circuit, however, attempted to distinguish those cases.[243] A major concern is that the Seventh Circuit's holding that rule 68 is discretionary seems to cause overlap with Federal Rule of Civil Procedure 54(d),[244] which provides that costs should be allowed to the prevailing party unless the court directs otherwise.[245]

238. *Id.* at 700-01.

239. *Id.* at 701.

240. *Id.*

241. *Id.* at 702. The court explained:

> In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.

Id. Reviewing the Seventh Circuit's decision, the Supreme Court held that by reading a reasonableness requirement into rule 68, the circuit court had failed to confront "the threshold question" of whether rule 68 applies at all in the situation where judgment is rendered for the defendant-offeror. 48 U.S.L.W. 4241 (U.S. March 9, 1981). The Court held that such a judgment was *not* one "obtained by the offeree," so rule 68 had no application to Delta's offer to August. *Id.* at 4242.

242. Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974). *See also* Waters v. Heublein, Inc., 485 F. Supp. 110, 115 n.2 to 116 n.4 (N.D. Cal. 1979), *citing August* as requiring the offer to be made in good faith and to be a reasonable amount. At one point *Waters* states that "Rule 68 allows the court no discretion . . ." 485 F. Supp. at 113, but at another point the court states that "Rule 68 is designed to prevent needless litigation by punishing a party that chooses to reject a reasonable settlement offer." 485 F. Supp. at 114.

243. The court stated that although the court in *Mr. Hanger, Inc.* considered the rule mandatory, the defendant's offer was clearly made in good faith since it afforded the plaintiff substantially the relief he requested. The Seventh Circuit added that in *Dual*, the issues of good faith and reasonableness in the settlement offer were not considered by the court. 600 F.2d at 702.

244. FED. R. CIV. P. 54(d) provides in part, "[e]xcept 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. . . ."

245. The defendant did raise this point in *August*. 600 F.2d at 701.

Attorneys' Fees

In *Muscare v. Quinn*,[246] the Seventh Circuit held that the plaintiff, Muscare, was entitled to an award of reasonable attorneys' fees on the successful portion of his civil rights action, but not upon his unsuccessful claim.[247] In 1974, Lieutenant Francis Muscare of the Chicago Fire Department filed suit in federal district court challenging the constitutionality of the Fire Department's regulation which restricted facial hair. The plaintiff claimed that the regulation was violative of his civil rights,[248] and further alleged that he was denied due process of law by the disciplinary procedure which resulted in his suspension for twenty-nine days for violating the regulation. Muscare had not received a hearing prior to his suspension, but had been offered a post-suspension hearing, which he declined.

The district court ruled that the regulation was constitutional, but did not rule on the procedural due process claim.[249] An appeal was taken, and the circuit court reversed the district court. Although the Seventh Circuit did not decide the constitutionality of the regulation, it held that there had been a denial of due process.[250] The court found that Muscare had been entitled to a hearing prior to his suspension.[251] The United States Supreme Court granted the defendant's petition for a writ of certiorari, but later dismissed the writ as improvidently granted.[252] The reasons for the dismissal were that the Supreme Court had upheld a similar facial hair regulation of a police department[253] and that the Civil Service Commission of the City of Chicago had revised its procedure to provide for pre-suspension hearings in cases such as the one involving Muscare.

On remand, the district court entered judgment for Muscare on the due process violation for failure to hold a hearing prior to suspension. It ordered payment of one month's salary with interest, and took under advisement Muscare's request for costs and attorneys' fees.[254] Muscare requested $41,012.50 in attorneys' fees (820.25 at $50 per hr.), but the court denied that amount on the belief that the 820.25 hours claimed was excessive. The court, however, allowed $50 per hr. for 500 hours

246. 614 F.2d 577 (7th Cir. 1980).
247. *Id.* at 581.
248. *See* 42 U.S.C. § 1983 (1976 & 1979 Supp.).
249. 614 F.2d at 578.
250. 520 F.2d 1212 (7th Cir. 1975).
251. *Id.* at 1215.
252. 425 U.S. 560 (1976).
253. Kelly v. Johnson, 425 U.S. 238 (1976).
254. 614 F.2d at 578-79.

($25,000) plus $4,935.40 in expenses for a total of $29,935.40.[255] After denial of his motion to reconsider, Muscare filed an appeal from the district court's order with respect to fees.

The award of attorneys' fees in *Muscare* is governed by 42 U.S.C. § 1988, entitled "Proceedings in Vindication of Civil Rights," and provides in pertinent part that "the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs." The circuit court began its analysis by quoting from its earlier decision in *Waters v. Wisconsin Steel Works of International Harvester, Inc.*,[256] in which the court rejected a formula based solely on the hours spent multiplied by the billing rate. As a matter of fact, the court in *Waters* had suggested that the formula of hours spent times the billing rate should constitute only the "starting point from which adjustments can be made for various other elements."[257] According to the court, those other elements are the eight factors set out in the Code of Professional Responsibility of the American Bar Association, as factors to consider in determining the reasonableness of an attorney's fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.[258]

255. *Id.* at 579.
256. 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).
257. *Id.* at 1322.
258. *Id.* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-106. These eight enumerated elements are virtually identical to twelve factors established by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), and subsequently approved by the First Circuit for use in attorneys' fees cases under 42 U.S.C. § 1988 (1976 & 1979 Supp.). King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). The twelve factors established in *Johnson* are as follows:

(1) The time and labor required.
(2) The novelty and difficulty of the questions.
(3) The skill requisite to perform the legal services properly.
(4) The preclusion of other employment by the attorney due to acceptance of a case.

The *Muscare* court then held that ". . . attorneys' fees should only be awarded on plaintiff's successful claim that he was denied due process and not on his unsuccessful claim that the Fire Department's grooming regulation was unconstitutional."[259] Apparently, however, the Seventh Circuit concluded that the district court had not followed this principle,[260] for the circuit court reversed and remanded with direction that the district court award a reasonable attorney's fee for the claim upon which Muscare had prevailed.[261] As the Seventh Circuit wrote, ". . . plaintiff did not prevail on his substantive claim and it would be an injustice to award him fees for time his attorneys spent pursuing it."[262]

Another case involving the subject of attorneys' fees is *United States v. D'Andrea*.[263] There, the Seventh Circuit addressed the question of its jurisdiction to review en banc awards of attorneys' fees in excess of the amount which is ordinarily the limit for services rendered to court appointed appellate counsel in a criminal case. The Criminal Justice Act[264] governs the award of attorneys' fees to court appointed counsel and limits compensation to certain maximum amounts ($1,000 in felony cases). The Act, however, permits payment in excess of the maximum amounts for complex or extended cases "whenever the court in which the representation was rendered . . . certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit."[265] The Act is silent on the subject of review of allowances of less than the compensation requested.

In *D'Andrea*, which was the consolidated appeal of three defendants, one attorney requested compensation of $6,859.23. A circuit judge acting for the court certified $3,710.23, but the chief judge ap-

(5) The customary fee.
(6) Whether the fee is fixed or contingent.
(7) Time limitations imposed by the client or the circumstances.
(8) The amount involved and the results obtained.
(9) The experience, reputation and ability of the attorneys.
(10) The "undesirability" of the case.
(11) The nature and length of the professional relationship with the client.
(12) Awards in similar cases.

488 F.2d at 717-19.

259. 614 F.2d at 580.

260. *See id.* at 580-81, where the court pointed out that the substantive constitutional claim was the main part of the case rather than the procedural issue.

261. *Id.* at 581.

262. *Id.*

263. 612 F.2d 1386 (7th Cir. 1980).

264. 18 U.S.C. § 3006A (1976 & 1977 Supp.).

265. *Id.* § 3006A(d)(3) (1976).

proved only $2,210.23. Counsel sought en banc review of the denial of part of his requested compensation. Relying heavily upon the cases involving the role of the chief judge in designating three-judge courts,[266] the Seventh Circuit held that it did not have jurisdiction to review the decision of the chief judge in approving less compensation than certified by the court and went on to explain the proper procedure for review of the chief judge's decision:

> [W]hen the chief judge of the circuit has approved compensation or reimbursement less than that amount certified by the court in which the representation was rendered, counsel may request reconsideration by motion. However, this motion is addressed solely to the chief judge. Upon disposition of the request for the chief judge to review his decision, further review of the chief judge's decision is not available from this court and any counsel's further remedy lies in a mandamus action in the United States Supreme Court.[267]

Another attorney requested $7,142.73 in compensation. A circuit judge certified $2,213.70, and the chief judge approved that amount. The Seventh Circuit concluded that this situation presented a different jurisdictional setting. The Seventh Circuit concluded that in this circumstance a petition for rehearing, with or without en banc request, is appropriate to review the certification of the court as to amount of compensation. The court stated:

> The $2,213.70 approved by the chief judge was the amount certified by this court. Unless the court certified a greater amount, the chief judge had no power to approve a larger payment, and conceivably might have done or might do so if the amount certified were increased. The court accordingly does have jurisdiction to reconsider its certification, although if a greater amount were certified, such certification would have to be submitted to the chief judge for possible approval.[268]

The court, however, concluded that the amount awarded was proper and denied the petition for reconsideration.

CONCLUSION

Most of the cases chosen for review in this article show a sensitivity by the Seventh Circuit in balancing competing interests between individuals and governments, among individuals, or among governments. The court avoided rigid or artificial application of rules to the

266. Hobson v. Hansen, 256 F. Supp. 18 (D.D.C. 1966); Kirk v. Board of Educ., 236 F. Supp. 1020 (E.D. Pa. 1964); Miller v. Smith, 236 F. Supp. 927 (E.D. Pa.), *mandamus refused*, 382 U.S. 805 (1965). *But see* Smith v. Ladner, 260 F. Supp. 918 (S.D. Miss. 1966).

267. 612 F.2d at 1387-88.

268. *Id.* at 1388-89.

facts and expressed concern for the policies and rationale of the rules. Furthermore, the court's decisions reflect a realistic and functional approach to law in modern society. The results protect individual rights while facilitating government tasks, which is perhaps what one reasonably may expect of the courts.