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SURVEY OF SEVENTH CIRCUIT DECISIONS: CLASS ACTIONS

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Last year, the Seventh Circuit Court of Appeals stated, "the class action is an awkward device, requiring careful judicial supervision."[1] Indeed it is. Few procedural rules produce more commentary and published decisions than Federal Rule of Civil Procedure 23, which governs class actions in federal court.[2] Each year the thirteen United States Courts of Appeals and the federal district courts across the country struggle with the language and requirements of Rule 23, often producing conflicting decisions.

In 2002, the United States Court of Appeals for the Seventh Circuit published six noteworthy opinions addressing class action issues. This article will address the six cases individually, describing the facts, analyses and holdings of each case, as well as addressing possible consequences resulting from the decision. Two recurring themes permeate five of the six cases. The first theme is the Court's distrust of class action counsel.[3] The second theme is that district courts have numerous, nondelegable duties they must fulfill in class action cases. In the Seventh Circuit, the Court's distrust of class action counsel drives its imposition of these duties on the district courts.

I. PAYTON V. COUNTY OF KANE

Payton v. County of Kane[4] is the most important class action decision the Seventh Circuit issued in 2002. Although the decision addresses neither the Court's distrust of class-action counsel nor the duties of the district courts, it illustrates how "[t]he class action is an awkward device."[5]

A. Facts of Payton

Before 1999, at least nineteen counties in Illinois charged a "bail fee"

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1. Culver v. City of Milwaukee, 277 F.3d 908, 910 (7th Cir. 2002).

2. FED. R. CIV. P. 23.

3. *See Culver*, 277 F.3d at 913 (noting "Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary is [sic] sheer sophistry."). *Id.*

4. 308 F.3d 673 (7th Cir. 2002) *petition for cert. filed* 71 U.S.L.W. 3709 (U.S. Apr. 25, 2003) (No. 02-1584).

5. *Culver*, 277 F.3d at 910.

to detainees released on bail or their own recognizance.[6] The fee collected above the amount of bail actually due varied by county.[7] In 1999, Illinois enacted Public Act 91-0094, which provided Illinois counties with the explicit authority to impose bail fees, labeled "bond fees."[8] After the enactment of and pursuant to the statute, every county in Illinois imposed a bond fee between one dollar and forty-five dollars.[9] Among these counties were Kane County, which charged eleven dollars, and DuPage County, which charged fifteen dollars.[10]

In *Payton*, the named plaintiffs, acting as class representatives, filed a suit against nineteen Illinois counties claiming that the counties violated the class representatives' Eighth and Fourteenth Amendment rights by requiring them to pay bond fees.[11] In 1997, two of the named plaintiffs had to post bond and a bond fee of fifteen dollars before they were released from the DuPage County Jail.[12] In 1998, the remaining named plaintiffs, had to post bond and a bond fee of eleven dollars before they were released from the Kane County Jail.[13]

But, the plaintiffs did not limit the defendants to DuPage County and Kane County.[14] Instead, they named seventeen additional counties which never incarcerated the named plaintiffs.[15] The parties did not contest that these seventeen counties never injured the named plaintiffs.[16] Rather, the named plaintiffs sought to certify a class consisting of both individuals confined in the various Counties' jails who posted bond fees and individuals who could satisfy the actual bond requirement, but not the additional bond fee.[17] The defendants moved to dismiss the entire case.[18] The district court granted the defendants' motion to dismiss the entire case and did not consider the plaintiffs' motion for the court's class certification.[19]

B. Analysis

The Seventh Circuit quickly reversed the district court on two preliminary issues. First, the Court found that the individual plaintiffs stated a claim upon which relief could be granted and had standing to bring these individual claims against Kane and DuPage Counties.[20] Second, the Court reversed the district court's determination that a class action could not

6. *Payton*, 308 F.3d at 675.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 675-76.
12. *Id.* at 675.
13. *Payton*, 308 F.3d at 675.
14. *Id.* at 675.
15. *Id.* at 678.
16. *Id.* at 676.
17. *Id.* at 675-76.
18. *Id.* at 675.
19. *Id. at* 676.
20. *Payton*, 308 F.3d at 676-77.

proceed against DuPage County and Kane County.[21] In doing so, the Seventh Circuit noted that, curiously, on the same day the district court dismissed this action, it granted class certification in two similar cases.[22]

The real issue, and the one that may lead to review by the United States Supreme Court,[23] was whether the named plaintiffs could certify a class against the seventeen other county defendants who admittedly never injured the named plaintiffs.[24] Before addressing this issue, the Seventh Circuit noted that the plaintiffs did not properly move to certify a defendant class.[25] This fact put an even finer point on the issue: how can the named plaintiffs link the seventeen other defendants, which never harmed even one of the named plaintiffs with the two defendants that allegedly may have harmed one of the putative class representatives?[26]

The Seventh Circuit initially stated that this issue presented a classic standing problem; namely, that to bring a valid cause of action, a plaintiff must allege that the defendant wronged the plaintiff.[27] Framing the issue this way quickly leads to the conclusion that no claim exists, and thus no class can be certified.

But, if the issue is framed in the context of the judicially created "juridical link" doctrine,[28] the result is much different. According to the Seventh Circuit, "[I]f all the defendants took part in a similar scheme that was sustained either by a contract or conspiracy, or was mandated by a uniform state rule, it is appropriate to join as defendants even parties with whom the *named* class representative did not have direct contact."[29] To reach the juridical link doctrine, however, the Court was required to address class action issues before standing issues.[30] The Court then avoided the question whether class certification was proper because the district court never conducted that analysis.[31]

After stating it was avoiding the issue of whether the class should have

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21. *Id.* at 677.

22. *Id.* (citing Coleman v. County of Kane, 196 F.R.D. 505 (N.D. Ill. 2000) and Ringswald v. County of DuPage, 196 F.R.D. 509 (N.D. Ill. 2000)). Despite noting the fact that the defendants ultimately prevailed in these cases, the Seventh Circuit warned the district court not to consider the merits of the *Payton* plaintiffs' claims when determining class certification on remand. *Id.* at 677 (citing West v. Prudential Secs., Inc., 282 F.3d 935, 938 (7th Cir. 2002)).

23. *See supra* note 4 (noting that filing of a petition for certiorari).

24. *Payton*, 308 F.3d at 677-78.

25. *Id.* at 678.

26. *Id.*

27. *Id.*

28. *Id.* The juridical link doctrine allows plaintiffs to sue all defendants similarly situated if they can show that all their injuries arose out of the same legal rule that was binding on all of the defendants. *Id.*

29. *Id.* at 679.

30. *Id.* Indeed, the genesis of the juridical link doctrine, La Mar v. H & B Novelty & Loan Co., explicitly recognized that the juridical link doctrine was a class action analysis, not a standing analysis, even though many of the standing concepts overlap. La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 469-70 (9th Cir. 1973).

31. *Payton*, 308 F.2d at 680.

been certified, the Seventh Circuit proceeded to adopt the juridical link doctrine.[32] According to the Court, "If the defendants with whom the named representative did not interact directly are following a common statute . . . we see nothing in either standing doctrine or Rule 23 that automatically precludes use of the class action device."[33] The Seventh Circuit reversed the judgment of the district court and remanded the case for further proceedings consistent with the opinion.[34]

C. *Analysis and Possible Consequences of the Opinion*

The decision in *Payton*, relying on the juridical link doctrine, is troubling. By adopting the juridical link doctrine, the Seventh Circuit avoids fundamental standing requirements. Effectively, in the name of efficiency, the Court allowed a plaintiff to sue a defendant who did not injure the plaintiff. Moreover, in analyzing difficult class action issues, courts are often concerned about due process principles, including fundamental fairness. It seems hard to imagine a scenario more unfair than to require a defendant to defend against allegations made by a plaintiff whom the defendant never injured. By asserting that class action issues should be addressed before standing issues, the Seventh Circuit was able to bypass the standing dilemma presented by the facts of the case. But, to the extent the Seventh Circuit was concerned about providing complete relief, this concern was unnecessary.[35] When various government entities engage in similar conduct and only a subset of those entities is sued, the other entities normally closely monitor the litigation and adjust their behavior depending on the outcome of the litigation. Additionally, a desire to centralize the issue and offer complete relief conflicts with the decentralized decision making process the Seventh Circuit espoused in at least one other class action case it decided in 2002.[36]

II. REYNOLDS V. BENEFICIAL NATIONAL BANK

Perhaps because of the egregious facts, the Seventh Circuit's decision in *Reynolds v. National Bank*[37] best exemplifies the Court's distrust of class action counsel and the resulting burdens placed on district courts because of

32. *Id.* at 680.
33. *Id.* at 681-82.
34. *Id.* at 682.
35. *Id.* at 681-82.
36. *See infra* Part IV (examining In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002)). Although this article is limited to reviewing Seventh Circuit decisions, it should be noted that Illinois law would not appear to accept the juridical link doctrine. Glazewski v. Coronet Ins. Co., 108 Ill. 2d. 243 (1985); Hess v. I.R.E. Real Estate Income Fund, 629 N.E.2d 520 (Ill. App. 1st Dist. 1993). *See also* Kittay v. Allstate Ins. Co., 397 N.E.2d 200, 203 (Ill. App. 1st Dist. 1979) (stating that plaintiffs in a class action suit do not have standing against twenty defendants with whom plaintiffs had no relationship). Since plaintiffs had suffered no injury as a result of defendants' conduct, the *Kittay* court found that "plaintiffs cannot represent as a class those persons having possible actions against these 20 defendants and, thus, plaintiffs may not bring this suit against them." *Id.*
37. 288 F.3d 277 (7th Cir. 2002).

that distrust.

A. Facts of Reynolds

The facts surrounding the issue in this case relate to refund anticipation loans (RAL), which are sometimes–and for this case, erroneously–referred to as "Rapid Refunds."[38] The plaintiffs were H&R Block's (Block) customers, who could not wait a few weeks to obtain their refund checks from the Internal Revenue Service (IRS).[39] Block offered the plaintiffs RAL, a loan from the time of the filing of the return to the issuance of the refund check,[40] in the amount of the anticipated refund. Block would offer the RAL to the customers, but Beneficial National Bank (Beneficial) would actually make the loan for an annual interest rate often exceeding 100%.[41] Customers who obtained RALs through Block were not informed that Block was a part-owner of the loan and that Beneficial paid Block a fee for every loan obtained.[42]

After 1990, the defendants had more than twenty class actions filed against them alleging a variety of claims, including consumer fraud and breach of fiduciary duty.[43] Most of these suits failed. But, in the late 1990s some suits survived, including a case in Texas that was scheduled for trial.[44]

Then in 1997, two lawyers who filed two of the unsuccessful cases, along with another plaintiff's attorney named Harris, had lunch with Beneficial's lead counsel.[45] At this meeting, Beneficial's counsel discussed "a global RAL settlement" with the plaintiff attorneys, and, according to Harris, "threw out" a settlement number of $24 or $25 million.[46] Although Beneficial's counsel later denied this, the district judge found Harris' statement to be credible.[47] Despite the discussion, the parties did not reach a fruitful settlement at this lunch.[48]

In 1998, the three plaintiffs' attorneys joined forces with "a substantial law firm," many of whom were "settlement class lawyers," and filed two

38. *Reynolds*, 288 F.3d at 281. In *Reynolds*, the term "rapid refunds" was a misnomer. *Id.* at 286. Rapid refunds were at issue in two separate classes in which the plaintiffs alleged that Block would charge a separate fee for a promise that the taxpayer would quickly receive a refund from the IRS. *Id.* at 285. According to this class action, Block knew that the IRS was closely scrutinizing returns seeking an Earned Income Tax Credit and therefore, no refund would be rapid. *Id.*

39. *Id.* at 280.

40. *Id.*

41. *Id.*

42. *Reynolds*, 288 F.3d at 280.

43. *Id.*

44. *Id.*

45. *Id.* Counsel for Block was not present. *Id.* None of the plaintiffs' attorneys had any action pending against either defendant. *Id.* at 280-81.

46. *Id.* at 280-81. Even stranger, one of the unsuccessful plaintiffs' attorneys "bought" a client from another lawyer in promise for $100,000 referral fee. *Reynolds*, 288 F.3d at 281.

47. *Id.*

48. *Id.*

suits against Beneficial, alleging claims similar to those raised previously.[49] One of the lawsuits also named Block and three Block affiliates. But, in response to a motion to dismiss, the plaintiffs voluntarily dismissed Block and two of the affiliates.[50] Settlement negotiations then began between counsel for the plaintiffs, Beneficial and Block.[51] Although no claims were pending against it, Block was included in the negotiations because Beneficial was contractually required to indemnify Block for any liability arising from the RAL.[52]

In 1999, a class represented by the settlement class lawyers entered into a settlement with Beneficial and Block, which the class submitted to the district court for approval.[53] In exchange for releases, all 17 million or so members of the class who obtained RAL between 1987 and 1999 could submit a claim for a refund, not to exceed fifteen dollars.[54] A $25 million settlement fund was created to pay all the claims. Any remaining money would revert to Beneficial and Block, who would evenly split the costs of the settlement, including class notice and the plaintiffs' attorneys' fees.[55] In addition, Beneficial and Block agreed to pay the settlement class lawyers up to $4.25 million.[56]

The district court approved all settlement terms[57] except the provisions that allowed the reversion and required a $30 refund for parties who received two or more RALs.[58] Of the millions of notices mailed, only one million persons filed claims for fifteen or thirty dollar refunds.[59] Of the remaining notices, several million were undeliverable. Six thousand persons opted out of the class.[60] In determining that $25 million was adequate, the district court relied on an unsworn report of an accountant who was not deposed or cross-examined.[61] However, others objected to the settlement and appealed the court's approval.[62]

B. Court's Analysis

The Seventh Circuit tellingly framed the issue as, "The principal issue presented by these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and

49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Reynolds*, 288 F.3d at 281. Federal Rule of Civil Procedure 23(e) requires court approval of all class action settlements. FED. R. CIV. P. 23(e).
54. *Reynolds*, 288 F.3d at 281-82.
55. *Id.* at 281-82.
56. *Id.* at 282-83.
57. *Id.* at 282.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Reynolds*, 288 F.3d at 282.
62. *Id.*

fiduciary obligations, place their pecuniary self-interest ahead of that of the class."[63] According to the appellants, the settlement agreement resulted from a "reverse auction."[64] A reverse auction occurs when "the defendants in a series of class actions picks the most ineffectual class lawyers [with whom] to negotiate a settlement [so that] the district court will approve a weak settlement that will preclude [all further] claims against defendant."[65] Under a reverse auction, nearly everybody is happy. The plaintiffs' attorneys are happy because they get a windfall without much effort. The defendants are happy because they purchase releases for all claims at a substantially discounted rate.[66] And reading between the lines of the *Reynolds* opinion, the district court is theoretically happy because a large, cumbersome case is no longer on its docket.[67] The only parties not happy in a reverse auction are the class members, who were represented by attorneys they never met nor hired, and from whom they did not receive vigorous or even adequate representation.

According to the Seventh Circuit, the district court judge did not engage in the thorough and careful analysis required by the settlement.[68] The Court found that the $25 million settlement was far too low.[69] The Court focused on the existence of the Texas action, in which the plaintiffs sought disgorgement. According to the Seventh Circuit, the Texas action raised the defendants' potential exposure to $2 billion.[70] The Seventh Circuit was also concerned that the district court permitted the class settlement lawyers to submit their fee applications *in camera*.[71] The Court referred to the settlement agreement and process as occurring under "suspicious circumstances."[72] Moreover, it was concerned that the proposed settlement swept two separate class actions into the settlement agreement.[73] The first class action brought claims against Block relating to "rapid refunds," a term that was included in the settlement agreement out of unfortunate happenstance.[74] The second asserted claims against Block based on its alleged practice of "intercepting refunds."[75]

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63. *Id.* at 279.

64. *Id.* at 282.

65. *Id.*

66. *Id.*

67. As a former clerk to a federal district court judge, the author generally has more faith in the motivations of district court judges. Although over-worked and comparatively underpaid, district court judges generally seek equitable results. The author, like any experienced litigator, has witnessed instances that test this faith, but those experiences are rare.

68. *Reynolds*, 288 F.3d at 283.

69. *See id.* (noting that proposed settlement figure would not be sufficient to pay the number of anticipated claims).

70. *Id.*

71. *Id.* at 284.

72. *Id.*

73. *Id.* at 285.

74. *Id.* at 285-86.

75. *Reynolds*, 288 F.3d at 286. This practice occurred when "Block would apply to the IRS for a refund [on behalf of the] customer but [would] direct that the refund be paid to

In deciding the case, the Seventh Circuit offered guidance on the process for valuing class action settlements. It suggested that the district court could order the parties to present evidence of four possible outcomes: high, medium, low and zero,[76] presumably, from which the district court could better evaluate the settlement. In light of "all things considered," the Seventh Circuit concluded that the district court judge abused its discretion in approving the settlement.[77] As a result, the Seventh Circuit reversed and remanded the case, rejecting the settlement agreement.[78] The Seventh Circuit ordered that the district court transfer the case to a different judge on remand.[79]

C. *Analysis and Possible Consequences of the Opinion*

The Seventh Circuit's opinion in *Reynolds* may result in three possible consequences. First, after the Seventh Circuit's strong criticism, district court judges may spend extraordinary resources in determining whether a class action settlement is proper. Second, district courts are now likely to require counsel to submit evidence corresponding to the four outcomes. Third, district court judges may seek to have "fairness hearings" conducted by special masters, particularly in complex cases. Using special masters may even be more cost effective in the end because it will allow a decision maker to devote substantial time to determining the fairness of the settlement, thereby increasing the likelihood of a just result.

III. UHL V. THOROUGHBRED TECHNOLOGY & TELECOMMUNICATIONS, INC.

In *Uhl v. Thoroughbred Technology. & Telecommunications., Inc.*,[80] the Seventh Circuit affirmed the district court's certification of the class and approval of a creative class settlement.[81] Although the Court reiterated that district courts have fiduciary duties to absent class members,[82] the class counsel in *Uhl* cannot be accused of self-dealing. Indeed, under the settlement, "class counsel [could] never receive compensation that [was] more advantageous than that which goes to the class members."[83]

A. *Facts of* Uhl

The case arose after Northfolk Southern Railway (Northfolk) decided to venture into the telecommunications industry by granting its subsidiary, a company called Thoroughbred Technology & Telecommunications (T-

it." *Id.* From the refund, Block would deduct any amount it thought the customer owed it. *Id.*

76. *Id.* at 285.

77. *Id.* at 286.

78. *Id.* at 289.

79. *Id.* (applying on remand Circuit Rule 36, which requires that the district court reassign a case to a different judge when a case is remanded on appeal).

80. 309 F.3d 978 (7th Cir. 2002).

81. *Uhl*, 309 F.3d at 987-88.

82. *Id.* at 985.

83. *Id.* at 982.

Cubed), the right to lay fiber optic cable in the corridors along its railway easements.[84] When T-Cubed announced it had the right to install conduits for the fiber optic cables along the corridors, Timothy Elzinga, a property owner along the right-of-way and the eventual class representative, disagreed.[85] Elzinga contended that T-Cubed would be committing slander of title and trespass if T-Cubed installed the conduit without the permission of the adjacent landowners.[86]

Before the class filed suit, Elzinga and T-Cubed negotiated a proposed class-wide settlement, presuming Elzinga would be acting as the class representative.[87] After the discussions, Elzinga filed suit, while simultaneously seeking class certification and approval of the settlement.[88] The suit sought declaratory relief proclaiming the owners' interest in the land and injunctive relief prohibiting T-Cubed from engaging in further unlawful acts.[89]

The proposed members of the class were all persons owning real estate on either side of the railroad tracks along the route T-Cubed proposed to install the cable.[90] The class was divided into two sub-classes.[91] One sub-class consisted of landowners on whose side of the tracks the cable would be laid (the Cable Side). The other sub-class consisted of landowners on the other side of the tracks where the cable would not be laid (the Non-Cable Side).[92] The division was necessary because T-Cubed did not know which side of the tracks it would lay the cable until it conducted detailed engineering surveys.[93]

The settlement provided that all class members would abandon any claims and transfer easements to T-Cubed.[94] In consideration, the class members would receive compensation, but the compensation depended on whether the class member was a Cable Side or Non-Cable Side member.[95] The settlement favored Cable-Side members.[96] Under the settlement, each Cable-Side member would receive $6,000 per linear mile and "a percentage of T-Cube's revenues from the sale, lease, and license of the conduits it installs along the corridors."[97] The Cable Side members would also receive ownership interests in a new company called Class Corridor, which would initially possess the easements.[98] T-Cubed would then provide Class

84. *Id.* at 981.
85. *Id.* at 980.
86. *Uhl*, 309 F.3d at 980.
87. *Id.*
88. *Id.*
89. *Id.* at 981.
90. *Id.*
91. *Id.* at 980.
92. *Id.*
93. *Uhl*, 309 F.3d at 980.
94. *Id.* at 982.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

Corridor with certain assets eventually transferring the easements from Class Corridor to T-Cubed.[99] The Non-Cable Side class members would not receive cash payments. Instead, they would receive similar ownership interests in Class Corridor.[100] All class members would be entitled to share in any revenues Class Corridor earned.[101]

Also under the settlement terms, class counsel would receive similar compensation as the class members.[102] Consequently, "class counsel [could] never receive compensation that [was] more advantageous than that which [went] to the class members."[103]

The appellant, an unnamed class member, sought to intervene, claiming that the settlement was unfair and failed to satisfy the requirements of Rule 23.[104] The appellant's main concern was that the benefits to the class members as it related to Class Corridor were speculative and that the class members may not receive any compensation.[105] Although the district court granted the appellant's motion to intervene, it overruled her objections and approved the class certification and settlement.[106]

A. Court's Analysis

Before addressing class certification issues, the Seventh Circuit determined two jurisdictional issues.[107] First, the Court determined that the jurisdictional amount required by diversity jurisdiction[108] was satisfied.[109] In doing so, the Seventh Circuit reiterated its position on the "either viewpoint" rule.[110] Under this rule, in determining whether the jurisdictional amount is satisfied, the court will look to either the benefit to the plaintiff or the cost of the requested relief to the defendant.[111] The court, therefore, can consider the cost to the defendant in complying with an injunction. In this case, Elzinga asserted that T-Cubed would need to spend more than $75,000 to avoid the costs of injunction and condemnation even if only his land were at issue.[112] By looking at the case from T-Cubed's perspective, the court held that the jurisdictional amount required was satisfied.[113] Second, the Seventh

99. *Id.*
100. *Uhl*, 309 F.3d at 982.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 981.
105. *Id.* at 982-83.
106. *Id.* at 981.
107. *Uhl*, 309 F.3d at 983-84.
108. 28 U.S.C. § 1332(a) (2000) (requiring amount in controversy to exceed $75,000).
109. *Uhl*, 309 F.3d at 984.
110. *Id. at 983-84.* The Seventh Circuit reconfirmed its espousal of the either viewpoint rule even in class action cases, declining to follow Ninth Circuit precedent to the contrary. *Id.* It refused to follow In re Ford Motor Co./Citibank, 264 F.3d 952 (9th Cir. 2001), which held that each claim in a class action must meet the jurisdictional amount. *Uhl*, 309 F.3d at 983-84.
111. *Id.* at 983.
112. *Id.* at 984.
113. *Id.*

Circuit found that the class members' claims were justiciable.[114] Although the harm to the class members was somewhat uncertain, the court found that at the time of the settlement the harm to the title had already occurred. Thus, the slander claim was justiciable.[115]

In addressing the class certification issues, the Seventh Circuit started from the premise that the district court has fiduciary duties to the class when approving settlements. As a result, the district court must assure itself that the class representative possesses the same interest and suffered from the same injury as the class members before approving a settlement.[116]

The appellant contended that because it was uncertain whether Elzinga would be a member of the Cable-Side or Non-Cable Side, Elzinga could not act alone as a class representative.[117] According to the Court, this concern was inconsequential because at the time of the settlement, Elzinga, like all the class members, already suffered an injury by the slander.[118] The fact that Elzinga may not suffer further injury because he might be a Non-Cable Side class member did not show inadequate representation.[119]

The Seventh Circuit also rejected appellant's argument that the different compensation provided for the Cable Side and Non-Cable Side made the settlement unfair.[120] It noted that Elzinga himself did not know whether he would be a member of the Cable Side or Non-Cable Side. Therefore, he had equal incentive to adequately represent both classes.[121] The Court concluded that Elzinga possessed a real stake in all aspects of the case. Consequently, the class certification was proper.[122]

The Court then quickly dispatched with the appellant's contention that the settlement was unfair. According to the appellant, the settlement could leave the Non-Cable Side class members without any compensation.[123] The Seventh Circuit agreed that this risk existed. But it found that because of the weakness of the class members' claims and relatively minor injury they suffered or will suffer, the settlement was fair.[124] Finally, the Court found that because Class Corridor signed the settlement agreement and was under the district court's jurisdiction, the district court had not improperly delegated its authority to it.[125] As a result, the Seventh Circuit affirmed the

114. *Id.*
115. *Id.*
116. *Uhl*, 309 F.3d at 985.
117. *Id.*
118. *Id.* at 985-86.
119. *Id.* at 986.
120. *Id.*
121. *Id.*
122. *Id.* The Seventh Circuit also stressed that it was not commenting on whether differences in ownership rights, state law or other factors barred the certification because the appellant did not rely argue these issues. In finding that the appellant had waived these issues, the Court cited *Isaacs v. Sprint Corp.*, 261 F.3d 679 (7th Cir. 2001), in which the class certification was reversed despite similar facts. *Uhl*, 309 F.3d at 986.
123. *Id.* at 987.
124. *Id.*
125. *Id.* (distinguishing In re Agent Orange Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987)).

district court's judgment in all respects, upholding both the class certification and settlement.[126]

B. *Analysis and Possible Consequences of the Opinion*

The *Uhl* opinion is curious in at least two respects. First, the Court almost goes out of its way to acknowledge class counsel's creativity, which is in stark contrast to the other class action opinions issued by the Seventh Circuit in 2002. Second, despite reiterating the district courts' duties to determine that class certifications are proper and that class settlements are fair, the Seventh Circuit avoided numerous issues that could have resulted in reversal. In *Isaacs v. Sprint Corp.*,[127] decided only a year earlier, the Seventh Circuit reversed class certification in a case involving similar facts.[128] Consequently, the waiver doctrine trumped the Seventh Circuit's duty to determine the ultimate correctness of the class certification and settlement.

Hopefully, one possible positive consequence of this opinion is that class counsel will engage in creative settlements. To the extent that parties can reach a fair agreement instead of litigating, such practice should be encouraged.

IV. IN RE BRIDGESTONE/FIRESTONE, INC.

Alleged failures of Firestone tires on Ford Explorers have been highly publicized. *In re Bridgestone/Firestone, Inc.*[129] involved counsel for many plaintiffs seeking to certify a nationwide class against Bridgestone/Firestone for the alleged tire failures.[130] The Seventh Circuit's opinion in this case rejected the certification of a nationwide class-action.[131] In doing so, the Seventh Circuit espoused the use of market models to reach just results, a theory the Court based, in part, on federalism.[132] Although the opinion makes sense, it contains at least one glaring internal contradiction.

A. *Facts of* Bridgestone/Firestone

As a result of the alleged failures of Firestone tires, injured parties filed numerous suits across the country.[133] The suits generally involved two types of injuries: physical injuries occurring as a result of the tire failures and "injuries" by owners of Explorers and/or Firestone tires that did not fail.[134] The Judicial Panel on Multidistrict Litigation transferred suits filed against Bridgestone/Firestone and Ford from various federal district courts in the country to the Southern District of Indiana for consolidated pretrial

126. *Id.* at 988.
127. 261 F.3d 679 (7th Cir. 2001).
128. *Uhl*, 309 F.3d at 986.
129. 288 F.3d 1012 (7th Cir. 2002).
130. *Bridgestone/Firestone*, 288 F.3d at 1015.
131. *Id.* at 1021.
132. *Id.* at 1020.
133. *Id.* at 1014.
134. *Id.* at 1014-15.

proceedings.[135] Shortly thereafter, this case was filed in Indianapolis. The plaintiffs sought to certify a nationwide class in this new consolidated suit.[136] The district court certified two nationwide class-actions: (1) the owners and lessees of certain models Ford Explorer ("car class") and (2) the owners and lessees of certain Firestone tire models ("tire class").[137]

In determining the law that would be applied to these two classes, the district court concluded that under Indiana choice-of-law jurisprudence,[138] Michigan law applied to all claims by the car class, and Tennessee law applied to all claims by the tire class.[139] Although many of the cars were manufactured in States other than Michigan, and many of the tires were designed in Ohio and manufactured in states other than Tennessee, the district court decided that the headquarters of the defendants was the determining factor in deciding which law to apply.[140] Not surprisingly, Ford and Firestone sought interlocutory review of the class certifications.[141]

B. Court's Analysis

The Seventh Circuit initially stated two reasons for accepting the petitions for interlocutory review. First, the Court stated, "the suit is exceedingly unlikely to be tried."[142] According to the Seventh Circuit, because of the nature and size of the litigation, "settlement becomes almost inevitable."[143] Consequently, the Seventh Circuit believed that review of the class certification decisions before this eventuality was required.[144] Second, the Court relied on the "important legal issues" justification in labeling the district court's decision "a novelty."[145] If the reader of the Court's opinion had any doubt how the Seventh Circuit would rule, the "novelty" label should have eliminated any uncertainty.

The Seventh Circuit rejected the district court's analysis of Indiana's choice-of-law jurisprudence.[146] According to the Court, Indiana is a lex loci delicti state, meaning Indiana applies the law of the place where the harm occurred, or more graphically, where the blood spilled.[147] From this starting point, the Court easily determined that the harm occurred in the state where each consumer-plaintiff was injured, regardless of whether the claim fell

135. *Id.* at 1015.
136. *Id.*
137. *Bridgestone/Firestone*, 288 F.3d at 1015.
138. The Court noted that "[b]ecause plaintiffs' claims rest[ed] on state law, the choice-of-law rules come from the state in which the federal court sits." *Id.* (citing Klaxon v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941)).
139. *Bridgestone/Firestone*, 288 F.3d at 1015.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 1016.
144. *Id.*
145. *Id.*
146. *Bridgestone/Firestone*, 288 F.3d at 1016.
147. *Id.*

under tort, contract or consumer fraud theory.[148] Consequently, the Seventh Circuit stated, "Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."[149]

Having determined the only issue pending before it, the Court engaged in obiter dicta as a preemptive strike to prevent any argument that the cases could be litigated as fifty State-based classes.[150] The Court found that differences in the possible claims by members of a car class and a tire class would preclude individual State-based class actions.[151] For example, there were differences in the manner and the length of time the cars were driven, as well as the pressure at which the tires were inflated and the variability of the tires.[152] These important differences precluded a finding that common questions of law and fact predominated over questions affecting individual members, a requirement of Rule 23(b)(3).[153]

Following this pre-emptive strike at certifying state-wide class actions, the Court rejected a fundamental premise of the American Law Institute's (ALI) Complex Litigation Project.[154] According to the Seventh Circuit, the ALI's model for managing complex, class-action litigation by centralizing the issues before a single court is wrong and inefficient.[155] Instead, the Court reiterated its view that a decentralized process would "get things right":

> [O]nly 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass tort claims. Once a series of decisions or settlements has produced an accurate evaluation of a subset of the claims . . . the others in that subset can be settled or resolved at an established price.[156]

The Court noted that this type of decentralized process is consistent with the principles of federalism.[157] Federalism allows, if not promotes, differences in State laws and these differences must be respected.[158] The Seventh Circuit reversed the District Court's order certifying two nationwide classes.[159]

C. Analysis and Possible Consequences of the Opinion

The Court's decision of *Bridgestone/Firestone* is interesting in at least three respects. First, the decision shows that if a United States Court of Appeals grants an interlocutory appeal under Rule 23, in all likelihood, it is

148. *Id.* at 1016-18.
149. *Id.* at 1018.
150. *Id.*
151. *Id.* at 1019.
152. *Id.*
153. *Bridgestone/Firestone*, 288 F.3d at 1019.
154. *Id.* at 1020.
155. *Id.*
156. *Id.* (citations omitted).
157. *Id.*
158. *Id.*
159. *Id.* at 1021.

doing so to reverse the district court's decision. Second, the decision contains an internal inconsistency. At the outset of the opinion, the Court states that cases such as these "inevitably" settle.[160] Then in espousing the decentralized process, the Court states that the only way to receive a truly accurate evaluation of claims is after numerous trials in numerous locales.[161] Third, one must pause when a federal court engages in pages of dicta and then bases the rationale for its dicta on federalism. Federalism counsels federal courts to determine the issues before it: no more, no less.

V. WEST V. PRUDENTIAL SECURITIES, INC.

In *West v. Prudential Securities, Inc.*,[162] the Seventh Circuit reiterated that the district courts have certain duties when certifying a class. Unlike the other 2002 decisions, which primarily placed duties upon the district courts as a result of their fiduciary duties, *West* instructs the district courts not to "duck hard questions" when making class certification decisions.[163]

A. Facts of West

In *West*, the plaintiffs alleged that one of Prudential's stockbrokers, a man named James Hofman, told several customers that in the near future there would be a purchase of a financial institution named Jefferson Savings Bancorp (Jefferson Savings) at a premium price.[164] This statement was false, but Hofman continued making this statement for seven months.[165] The plaintiffs and the proposed class consisted of individuals who did not hear of this certain acquisition of Jefferson Savings but who merely purchased its stock during the seven-month period when Hofman was spreading his lie.[166] The district court certified the class relying on the fraud-on-the-market doctrine.[167] Thereafter, Prudential sought an interlocutory appeal of the certification.[168]

B. Court's Analysis

Initially, the Seventh Circuit stated it would hear the interlocutory appeal for two reasons.[169] First, the Court stated that the district court's decision "mark[ed] a substantial extension of the fraud-on-the-market approach," such that the appeal "present[ed] a novel and potentially important question of law."[170] Essentially, the Seventh Circuit expressed belief that the district court erred in its expansion of the fraud-on-the-market

160. *Bridgestone/Firestone*, 288 F.3d at 1016.
161. *Id.* at 1020.
162. 282 F.3d 935 (7th Cir. 2002).
163. *West*, 282 F.3d at 938.
164. *Id.* at 936.
165. *Id.*
166. *Id.* at 937.
167. *Id.*
168. *Id.*
169. *Id.*
170. *West*, 282 F.3d at 937.

doctrine. Second, the Court reasoned that because most securities class actions settle, an interlocutory appeal might be the only way for the Seventh Circuit to pass on this issue.[171] As a sub-justification, the Court noted that once securities class actions are certified, defendants "pay substantial sums even when the plaintiffs have weak positions."[172] Essentially, the Court recognized the view that most securities class actions are like stick-ups. For these reasons, the Court took the interlocutory appeal.

The Seventh Circuit then addressed the merits of the class certification, focusing on the lack of causation.[173] Relying primarily on secondary sources, the Court discussed how public information affects securities prices, stating the economic axiom that securities prices adjust quickly to public information.[174] But, the class certification in *West* was based upon non-public information.[175] According to the Seventh Circuit, no causal link existed between this non-public information and Jefferson Savings' stock prices; therefore, class certification was improper.[176]

In determining the lack of causation and the necessity of a remand, the Seventh Circuit rejected the testimony of the plaintiff's expert witness, who stated that the price of Jefferson Savings stock rose during the seven-month period when Hofman was allegedly spreading his lie.[177] In making this determination, the Court, *sua sponte*, engaged in an appellate, *Daubert* challenge to the expert's testimony. According to the Seventh Circuit, this was the type of analysis the district court should have conducted instead of basing its class certification on the plaintiffs' ability to obtain a competent economist to testify on their behalf.[178] The Seventh Circuit stated,

> A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification may also affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.[179]

In rejecting the plaintiffs' expert testimony, the Court engaged in a thorough economic analysis. But, the Seventh Circuit's rejection of the testimony was the classic criticism of most experts' opinions: they find relations, not causation.[180] Causation between two events, not relationship

171. *Id.*
172. *Id.*
173. *Id.* at 938.
174. *Id.*
175. *Id.*
176. *Id.* at 938-39.
177. *West*, 282 F.3d at 939-40.
178. *Id.* at 938.
179. *Id.*
180. The Court stated that "[w]hat [plaintiffs' expert] did is inquire whether the price of Jefferson Savings stock rose during the period of additional demand by Hofman's customers. He gave an affirmative answer and stopped. Yet it is not possible to prove a relation between demand and price without considering other potential reasons." *Id.* at 939.

between two events, is required of any expert's testimony.[181] Consequently, the Seventh Circuit held that the record before the district court did not support the extension of the fraud-on-the-market doctrine to Hofman's alleged statements about the acquisition of Jefferson Savings.[182]

C. *Analysis and Possible Consequences of the Opinion*

Although the main focus of *West* is the fraud-on-the-market theory, the opinion places a heavy burden on the district courts. A fundamental principle of class action certification is that the district court may not consider the merits of the plaintiff's claim.[183] In requiring district courts to decide tough questions squarely "by holding evidentiary hearings and choosing between competing perspectives,"[184] the Seventh Circuit makes a district court judge come extremely close to a merit-based determination of the plaintiff's claim. It seems likely that more district courts will now hold evidentiary hearings when determining class actions. In the past, class certification depended on either the allegations in the complaint alone or the parties' evidentiary submissions with their papers in support of, or in opposition to, the motion for class certification.

VI. CULVER V. CITY OF MILWAUKEE

In *Culver v. City of Milwaukee*,[185] the Seventh Circuit made clear its view that class actions are commonly nothing more than vehicles that class action plaintiffs' attorneys use to achieve wealth.[186] As a result of this view, the Seventh Circuit's decision in *Culver* is a good example of the Court holding the district courts accountable in fulfilling their fiduciary duties to the purported class.

A. *Facts of* Culver

In 1993, Culver, the plaintiff class representative, claimed that he requested a job application from the Milwaukee police department but was told he could not receive one because the department would not accept

181. *See* Daniel L. Rubinfeld, *Reference Guide on Multiple Regression*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 179, 184 (2000) (stating "A correlation between two variables does not imply that one event causes the second.").

182. *West*, 282 F.3d at 940.

183. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

184. *Id.* at 938.

185. 277 F.3d 908 (7th Cir. 2002).

186. The Court reasoned that:

> Often the class representative has a merely nominal stake . . . and the real plaintiff in interest is then the lawyer for the class, who may have interests that diverge from those of the class members. The lawyer for the class is not hired by the members of the class and his fee will be determined by the court rather than by contract with paying clients. The cases have remarked the danger that the lawyer will sell out the class in exchange for the defendant's tacit agreement not to challenge the lawyer's fee request.

Culver, 277 F.3d at 910.

applications from white males that year.[187] Shortly after filing the suit, the plaintiff obtained a different job, with which he was content.[188] In 1995, the district court certified a single class consisting of white males who had been refused job applications and white males who had applied yet were not hired.[189] Over the next six years, plaintiff's counsel did very little to advance the case.[190] Then in 1999, a different district court judge, to whom the case had been reassigned, decertified the class.[191] In doing so, the district court found that the class was improper and that the plaintiff was not an adequate class representative for any possible sub-class.[192] The district court then dismissed the entire suit as moot.[193]

B. Court's Analysis

The Seventh Circuit initially noted that Rule 23 possesses two related requirements that attempt to prevent class action abuse.[194] First, Rule 23 requires that the class be reasonably homogeneous. Second, Rule 23 requires a class representative to be an adequate representative of the class.[195]

In deciding the case, the Court found that the proposed class was heterogeneous.[196] The Court relied on three differences between the class members who did not receive applications and those who received them and completed them, but were not hired.[197] The Court concluded that the class members who did not even receive an application would be difficult to identify and would also have to prove that they had the minimum qualifications required for employment with the police department.[198] In addition, these class members, unlike the class members who received the applications, would not need to show that their entrance exams were scored in a discriminatory manner.[199] Consequently, at best, the class should have been divided into sub-classes,[200] but plaintiff's counsel refused to have the class divided.[201] Furthermore, plaintiff's counsel made no attempt to find a more suitable class representative for the second subclass.[202] These inactions provided the Court with a justification to support the de-certification of the class.[203] Consequently, the Seventh Circuit had little difficulty in affirming

187. *Id.* at 910.
188. *Id.* at 912.
189. *Id.* at 910.
190. *Id.* at 912.
191. *Id.* at 910.
192. *Id.*
193. *Culver*, 277 F.3d at 910.
194. *Id.*
195. *Id.*
196. *Id.* at 911.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Culver*, 277 F.3d at 911.
201. *Id.* at 912.
202. *Id.*
203. *Id.* at 913.

the district court's decision to decertify the class.[204]

However, despite finding that the de-certification was proper and that the class representative's claim was moot, the Seventh Circuit remanded the case and announced a rule that imposes an additional burden on the district courts in the Circuit.[205] In remanding, the Court stated that Rule 23(e) requires the district court to give notice of the dismissal to all class members.[206] The Seventh Circuit imposed this duty on the district court in all cases of dismissal, regardless of whether the dismissal results from a settlement or judicial decision and regardless of whether the dismissal occurs before or after certification.[207] The justification for this imposition was the potential danger that the statute of limitations for other class members' claims may expire without their knowledge.[208] The only exception the Court gave to this notice requirement was when there is no risk of prejudice to the class absent notice of the dismissal.[209] In requiring that notice of dismissal be given to class members, the Seventh Circuit stated:

> Rule 23(e) should therefore be understood as imposing a duty on the district judge that is nondelegable, he being himself a fiduciary of the class. The judge's duty is to order notice unless the risk of prejudice to absent class members is nil and to review for adequacy the form of notice proposed by class counsel in response to the order.[210]

The Seventh Circuit affirmed the de-certification of the class and dismissal of the class representative's suit, but remanded the case to the district court to require that notice be provided to all absent class members.[211]

C. Analysis and Possible Consequences of the Opinion

Defense counsel will likely quote the colorful language in *Culver* at any opportunity. *Culver* will also be cited by those individuals who share the view that class action counsel are often the real parties in interest. More importantly, *Culver* mandates yet another burden on district courts saddled with class actions. Most district courts require notice to class members when the parties settle. *Culver* expands this obligation by requiring district judges in the Seventh Circuit to now require district courts to give notice of all dismissals of all class actions, particularly when the classes had not been certified. The plaintiffs' counsel, who likely has little incentive to expend time and money publicizing a recently lost case, must provide such notice. To counteract this lack of incentive, district courts will need to be vigilant if they are to fulfill their duty under *Culver*.

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204. *Id.*
205. *Id.* at 913-14.
206. *Id.* at 913.
207. *Culver*, 277 F.3d at 914.
208. *Id.*
209. *Id.*
210. *Id.* at 915 (citations omitted).
211. *Id.*

VII. ANALYSIS OF SEVENTH CIRCUIT'S NOTABLE CLASS-ACTION DECISIONS

The Seventh Circuit's class action decisions were rough on plaintiff class action attorneys and district court judges, primarily because the Court is skeptical of the motivations of plaintiffs' class counsel. As a result of this skepticism, the Seventh Circuit now requires district courts to thoroughly exercise the fiduciary duties it placed upon them. Additionally, with the defendants in *Payton* seeking review by the United States Supreme Court, the juridical link doctrine will likely be analyzed further in the future, regardless of whether the Supreme Court grants *certiorai*.