October 1974

Civil Procedure

Steven L. Bashwiner

Barbara B. Lounsbury

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THE DECISIONS OF the United States Court of Appeals for the Seventh Circuit during the past year in the field of civil procedure have produced few new developments. For the most part, the Court reiterated traditional formulations of standards for such procedures as summary judgment or dismissal of a complaint. In several cases, however,

* Partner, of Kirkland & Ellis; member of the Illinois Bar; J.D., University of Chicago.
** Associate, Kirkland & Ellis; member of the Illinois Bar; J.D., Northwestern University.

1. The following cases have procedural dimensions but it is beyond the scope of this article to discuss them: Berghoff Restaurant Co., Inc. v. Berghoff, Inc., 499 F.2d 1183 (7th Cir. 1974) (standard of proof in motion for summary judgment); Lucie v. Kleen-Leen Inc., 499 F.2d 220 (7th Cir. 1974) (standard of proof in motion for summary judgment); Chrysler Corp. v. M. Present Co., Inc., 491 F.2d 320 (7th Cir. 1974) (standard of proof in motion for summary judgment); Rota v. Brotherhood of Railway, Airline and Steamship Clerks, 489 F.2d 998 (7th Cir. 1973) cert. denied, 94 S. Ct. 896 (1974) (standard of proof on motion for summary judgment); Baker v. Chicago Fire & Burglary Detection, Inc., 489 F.2d 953 (7th Cir. 1973) (standard of proof on motion for summary judgment); Roberts v. Acres, 495 F.2d 57 (7th Cir. 1974) (construction of pleadings); Holiday Magic, Inc. v. Warren, 497 F.2d 687 (7th Cir. 1974) (construction of pleadings); John v. Hurt, 489 F.2d 786 (7th Cir. 1973) (construction of prose complaint); Washington v. Bd. of Education, School District #89, 498 F.2d 11 (7th Cir. 1974) (dismissal of a complaint); Beshear v. Weinzapfel, 474 F.2d 127 (7th Cir. 1973) (dismissal of complaint for failure to prosecute); Dear v. Rathje, 485 F.2d 558 (7th Cir. 1973) (dismissal of pro se complaint prior to issuance of summons); Vina v. Hub Electric Co., 480 F.2d 1139 (7th Cir. 1973) (dismissal of complaint for want of prosecution); Moran v. Raymond Corp., 484 F.2d 1008 (7th Cir. 1973) (motion for directed verdict); Russell v. Continental Ill. Natl. Bk. and Trust Co. of Chicago, 479 F.2d 131 (7th Cir. 1973) (standing to sue); Schlafly v. Volpe, 495 F.2d 273 (7th Cir. 1974) (standing to sue under Civil Rights Act); TRW, Inc. v. Ellipse Corp., 495 F.2d 314 (7th Cir. 1974) (standing to sue on appeal level); Herreman v. United States, 476 F.2d 234 (7th Cir. 1973) (standing to sue under Federal Tort Claims Act); Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974) (exhaustion of remedies); Nichols v. Schubert, 499 F.2d 946 (7th Cir. 1974) (issuance of summons on filing of complaint in forma pauperis); Heater v. Chesapeake & Ohio Railway Co., 497 F.2d 1243 (7th Cir. 1974) (calling of adverse witnesses); Greene v. United States, 476 F.2d 116 (7th Cir. 1973) (federal court application of state law); Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973) (federal question jurisdiction); National Family Ins. Co. v. Exchange National Bank of Chicago, 474 F.2d 237 (7th Cir. 1973) (statute of limitations); Brainerd v. Beal and Dunn, 498 F.2d 901 (7th Cir. 1974) (compliance with the time limitations in Rule 4(a) of the Federal Rules of Appellate Procedure); United States v. Hoffa, 497 F.2d 294 (7th Cir. 1974) (award of costs in appeal from criminal conviction); Airline Stewards and Stewardesses Assn. Local 550 v. American Airlines, 490 F.2d 636 (7th Cir. 1973) (class actions); Koos v. First National Bank of Peoria, 496 F.2d 1162 (7th Cir. 1974) (class actions); Kochlacs v. Local Bd. No. 92, 476 F.2d 557 (7th Cir. 1973)
the court altered its previous standards, or explained its holding in a way that may present difficulties in future litigation. Six of these specific cases will be discussed in this survey.

ATTORNEYS' FEES AND COSTS

Three decisions of the Seventh Circuit this term on the payment of attorneys' fees and costs raise some interesting questions. In *Signorile v. Quaker Oats Co.*, the court reversed the district court's award of fees for a mistake made by the defendant's attorney in determining the defendant's principal place of business. In *L.F. Strassheim Co. v. Gold Medal Folding Furniture Co.*, the court awarded attorneys' fees as a result of a patentee's "lack of diligence in connection with its patent application and in responding to pretrial discovery requests." And in *Clarion Corp. v. American Home Products Corp.*, the court awarded double costs and damages to defendants in accordance with rule 38 of the Federal Rules of Appellate Procedure.

In *Signorile v. Quaker Oats Co.*, the plaintiff filed suit in the Northern District of Illinois alleging misappropriation of trade secrets by Quaker Oats. The plaintiff alleged that he was an Illinois resident and that the defendant was a New Jersey corporation with its principal place of business in New Jersey. Although Quaker Oats initially admitted in

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2. *Signorile v. Quaker Oats Co.*, 499 F.2d 142 (7th Cir. 1974); *L.F. Strassheim Co. v. Gold Medal Folding Furniture Co.*, 477 F.2d 818 (7th Cir. 1973); *Clarion Corp. v. American Home Products Corp.*, 494 F.2d 860 (7th Cir. 1974); *John Morrell & Co. v. Chicago, Rock Island and Pacific RR. Co.*, No. 72-2022 (7th Cir., March 13, 1974); *Barancik v. Investors Funding Corp. of N.Y.*, 489 F.2d 933 (7th Cir. 1973); *Appleton Electric Co. v. Advance-United Expressways*, 494 F.2d 126 (7th Cir. 1974).
3. 499 F.2d 142 (7th Cir. 1974).
4. 477 F.2d 818 (7th Cir. 1973).
6. 28 U.S.C., Fed.R.App.P 38. If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.
7. 499 F.2d 142 (7th Cir. 1974).
its answer that it was a New Jersey corporation with its principal place of business in that state, subsequently another attorney from the law firm that represented Quaker Oats concluded that Illinois—not New Jersey—was the principal place of business of Quaker Oats and that the district court was therefore without diversity jurisdiction.  

Quaker Oats thereupon moved to dismiss the plaintiff's complaint and offered to stipulate that all discovery previously completed in the federal court could be used in any state court proceeding. The plaintiff objected to the dismissal on the grounds that Quaker Oats was estopped to deny that its principal place of business was in New Jersey after discovery had proceeded. The plaintiff also requested costs and attorneys' fees because of the "substantial prejudice" caused by the defendant's faulty admission. The district court rejected the estoppel argument and dismissed the complaint. However, the judgment awarded the plaintiff court costs of $548.88 and attorneys' fees of $3,000 as "the result of defendant's culpable negligence in filing a false answer."  

The Seventh Circuit reversed the award of fees, the only issue before the court. The court first decided that federal, not Illinois law, governed the award since diversity jurisdiction, under which the court would apply Illinois law, never attached in the district court. By analogy to a federal statute similar to 28 U.S.C. § 1919, the only statute arguably relevant to the case, the court then reasoned that the authority to award "costs" did not encompass the authority to award fees. Finally, the court decided that the circumstances in this case, unlike those in Mills v. Electric Auto-lite Co., did not warrant an award of fees in the absence of statutory authority.

9. 499 F.2d at 143.
10. The court indicated, however, that Illinois had no applicable statute permitting the award of attorney's fees. 499 F.2d at 144.
Whenever any action or suit is dismissed in any district court for want of jurisdiction, such court may order the payment of just costs.
28 U.S.C. § 1920 (1970), an analogous statute provides:
A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk and marshal;
(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
(3) Fees and disbursements for printing and witnesses;
(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
(5) Docket fees under section 1923 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.
12. 396 U.S. 375 (1970). The extraordinary circumstances present in Mills that led the court to award fees were that the suit was a class action brought to set aside a merger based on allegedly misleading proxy solicitations and that the suit was brought
The court articulated four factors that led it to reverse the award of fees: (1) there was no showing of any financial burden or hardship to the plaintiff as a result of the incorrect answer; (2) the plaintiff's access to the state court to refile his lawsuit was unimpaired; (3) the discovery undertaken while the case was pending in the district court could be used in a subsequent state court action; and (4) there was no showing that the defendant's faulty admission was deliberate as opposed to inadvertent or negligent.

The logic of the opinion and the authority supporting the court's position are quite sound. A problem, however, may arise in future application of the case to situations where one or more of the four factors listed above is absent. For example, the court left open the question of whether a party could be liable for fees in the absence of statutory authority if, through negligence, it caused the opposing party to suffer any harm by its conduct during the litigation.

Unlike the situation in Signorile, the negligence of the defendant and its attorney led to an award of attorney's fees in L.F. Strassheim Co. v. Gold Medal Folding Furniture Co. Although a statute permitted the award of fees in Strassheim, the distinguishing factor between Signorile and Strassheim appears to be the extent to which the plaintiff suffered harm.

This action involved a declaratory judgment suit filed by Strassheim in 1964 to declare invalid Gold Medal's patent for a director's chair. The district court found the patent valid and infringed. The plaintiff appealed, but the parties entered into a settlement agreement prior to oral argument pursuant to which the plaintiff paid the defendant $15,000. Less than a year later, the plaintiff moved to reopen the case on the basis of newly discovered evidence that allegedly showed that the defendant was guilty of deliberate fraud in filing and defending its patent. The plaintiff asked for a new trial, treble damages, and attorneys' fees, among other relief.
The district court found that the following circumstances did not amount to fraud, but did amount to lack of diligence sufficient to permit the court to award fees. The defendant had filed its patent application for a director's chair in December of 1953. However, because the defendant had publicly sold the chair for more than a year prior to that date, it had lost its right to patent protection. Although the defendant's executives were apparently under a mistaken impression that they had filed the application within a year, neither the defendant's executives nor the firm's attorney had attempted to determine the date of the first public sale.

In analyzing this failure to investigate, the court found:

The failure to make an appropriate investigation at that time—particularly since the critical importance of filing within one year of the first public offer was obvious to all concerned—reflects an extraordinary lack of diligence to which we consider it appropriate to attach legal significance.

The defendants also displayed what the court considered to be "lack of diligence" in discovery proceedings. Specifically, in connection with the deposition of one of the defendant's officers, the plaintiff requested the production of certain documents, including price lists and promotional articles published in 1952. Several items from 1952 that would have disclosed critical facts about the date of the defendant's public offer were improperly placed in a scrapbook for the year 1953. Neither the defendant's nor the plaintiff's counsel carefully examined the 1953 book because each accepted the express or implied representations of the defendant's officers that the 1953 book did not contain any 1952 material. The charitable conclusion was that the defendant's executives also had failed to examine the books carefully and sincerely believed them to be properly arranged.

In the court's view, as a result of both instances of negligent conduct, the plaintiff had paid the defendant $15,000 in settlement of an action it would have won, had waived its right to appeal from any finding of validity of the design patent, and had incurred expenses for fees and costs of litigation. Accordingly, it views the defendant's lack of diligence as sufficiently serious to make the case an "exceptional

17. 477 F.2d at 821.
case” under 35 U.S.C. § 285 and awarded attorney’s fees for services performed subsequent to the deposition at which the defendant failed to produce the critical 1952 documents.

This award of fees appears to represent an extension of the circumstances under which the Seventh Circuit will award fees and is disturbing in certain respects. Prior to Strassheim, the Seventh Circuit did not permit an award of fees pursuant to 35 U.S.C. § 285 except to “prevent gross injustice and where fraud and wrongdoing” were clearly proved. In practice this standard meant that the district court had to find deliberate withholding of information from the Patent Office or bad faith in instituting an infringement action with knowledge that the patent was invalid.

The single Seventh Circuit opinion cited by the court in Strassheim for the proposition that an “exceptional case” did not require proof of fraud presented circumstances very different from those present in Strassheim. In Kearney & Trecker Corp. v. Giddings & Lewis, Inc., the court awarded fees after it found that the plaintiff, suing for patent infringement, had hired a former patent examiner from the U.S. Patent Office (in violation of the spirit, if not the letter, of conflict of interest regulations) and, with the help of the examiner, was attempting to use statutory provisions on reissuance of a patent to gain control of the entire industry, a purpose which represented a calculated abuse of the patent privilege.

In predicking the award of fees in Strassheim solely on negligence, the court has joined the Ninth Circuit and the Eastern District of Pennsylvania in holding that gross negligence evidencing disregard for the truth is sufficient to constitute an “exceptional case.” The troublesome element of Strassheim is that, notwithstanding the court's

18. Sarkes Tarzian, Inc. v. Philco Corp., 351 F.2d 557 (7th Cir. 1965); Ellipse Corp. v. Ford Motor Co., 452 F.2d 163 (7th Cir. 1971).
19. Scott Paper Co. v. Fort Howard Paper Co., 432 F.2d 1198 (7th Cir. 1970); Shelco, Inc. v. Dow Chemical Co., 466 F.2d 613 (7th Cir. 1972); Dole Valve Co. v. Perfection Equipment Co., 458 F.2d 1200 (7th Cir. 1972).
20. 452 F.2d 579 (7th Cir. 1971), cert. denied, 405 U.S. 1065 (1972).
21. 452 F.2d at 590-597.
insistence that the defendant and its attorney demonstrated an exceptional lack of diligence, and that the lack of diligence caused the plaintiff considerable harm, the facts as recited by the court do not necessarily so demonstrate. For example, the defendant's executives apparently believed in 1953 that the limitation on the time for filing would expire in early 1954. It is true that they did not investigate to learn the date of the first public offer; however, it is not necessarily true that had they investigated they would have uncovered the true facts. Because the court did not find that the defendants would have discovered their error had they investigated, it seems somewhat harsh to attach legal significance and punishment to their conduct.

The Seventh Circuit obviously believed it had applied section 285 to suit the section's compensatory purpose. Unfortunately, the opinion raises substantial doubts about the nature of the conduct that will call section 285 into force and the proof that will be acceptable to show that one party's conduct in fact caused the other party's loss.

The decision in Clarion Corporation v. American Home Products Corporation appears to be the first time the Seventh Circuit has assessed double costs and attorneys' fees under rule 38 of the Federal Rules of Appellate Procedure against an appellant appearing pro se. Since an award of double costs to an appellee is unusual even if the appellant is represented by counsel, some discussion of the facts is necessary to explain the court's action.

In 1967 the Clarion Corporation brought an action against American Home Products Corporation for a "finder's fee" of $980,000, alleged to be due as a result of Clarion Corporation's activities in effecting the merger between American Home and Ekco Products Company. The night before trial, the parties agreed to a settlement in the amount of $490,000 and the case was dismissed without prejudice. Some ten months later when the settlement documents were ready, Klein, the

25. 477 F.2d at 823-24.
26. The statute's "compensatory" purpose is noted in Mueller Brass, 352 F. Supp. at 1381.
27. 494 F.2d 860 (7th Cir. 1974).
28. See note 6.
29. In Flouro Electric Corp. v. Branford Associates, 489 F.2d (2d Cir. 1973), and West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), the court noted that an award of costs and single or double damages under rule 38 requires very unusual circumstances. See these cases where the court awarded double costs: In re Stolkin, 471 F.2d 1331 (7th Cir. 1973); Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278 (2d Cir. 1970); Renken v. Harvey Aluminum, 475 F.2d 766 (9th Cir. 1973).
On February 8, 1971, the case was reinstated on American Home's motion and dismissed with prejudice, the district court retaining jurisdiction solely for the purpose of supervising the exchange of settlement documents. At the time of the dismissal, Klein represented to the court that he was prepared to execute the documents.

Nevertheless, on March 16, 1971, when the court ordered that the parties exchange documents, that the defendants deliver the first annual payment, and that the proceeds of the payments be divided between Clarion and Clarion's attorneys, Klein proceeded to appeal the order pro se, purportedly on behalf of Clarion. The Seventh Circuit affirmed the order. Thereafter, when Clarion's former attorneys attempted to enforce their attorneys' lien, Klein, again acting without counsel purportedly on behalf of Clarion, moved to vacate the February 8, 1971, order dismissing the complaint. This motion was denied by the district court and Clarion again appealed to the Seventh Circuit. The district court in the meantime ordered that the defendants pay fees directly to Clarion's former attorneys and credit the amount against the initial installment owed to Clarion. Klein also appealed this order. These latter two appeals were the subject of the decision in the instant case.

Although essentially the same matters had previously been before the court and Klein had not complied with various limitations on the timeliness of appeals, the Seventh Circuit, in an opinion by Judge Sprecher, patiently investigated the entire record to discover the legal basis, if any, for Klein's appeals. The court decided that Klein's appeals were premised on two arguments: first, that his consent to the settlement was given without full knowledge of the facts, and second, that the attorneys' lien must be invalidated if the settlement was invalidated. The court found that Klein had been fully informed about the merits

31. The court stated: "We have already in our previous opinion dealt with Klein's unpersuasive complaints that Clarion's case had somehow not been properly handled. Nevertheless, we have carefully read through all of Klein's writings to attempt to fathom his grievances and we have also gone through the entire record in this case to try to determine whether anything he has said has any basis in fact or whether something appears in the record which he has not alluded to but which bears the slightest trace of unfairness or overreaching of Clarion or Klein. We find nothing of that nature." 494 F.2d at 865.
and weaknesses of his case and about the advantages of settlement, and that his case had been handled very competently by all of Clarion's and Klein's former counsel. In essence, the court found Klein alleged a vague "conspiracy among the trial judge, all of Clarion's and [Klein's] former attorneys, and most of the local bar (for failing to represent him in one case where the time to appeal has long since passed and another case where appeal was taken and lost). . . ."32 The court found his position frivolous and assessed damages of $2,500 for each appellee and double costs.

Unquestionably the court took cognizance of Klein's status as a layman and endeavored to give him the benefit of the doubt in judging the merits of his appeal;33 the patience and good will of the court can only be fully appreciated after a perusal of the entire opinion. The opinion in all likelihood has limited precedential value because the circumstances of the case were extreme and unlikely to be repeated with any frequency.

ANTI-INJUNCTION STATUTE:

In Barancik v. Investors Funding Corp.,34 the Seventh Circuit held that the anti-injunction statute, 28 U.S.C. § 2283,35 did not prohibit the district court from staying proceedings in a state court that had not commenced until after a motion to enjoin the institution of such proceedings had been filed. The decision appears to be one of first impression although it carefully follows the logic of previous cases interpreting the statute.

In April of 1972 the plaintiffs filed an action in the federal court alleging fraud in a high-rise residential building sale-lease-back transaction between the plaintiffs, their mortgage broker and one lender. The defendants then served a notice of default in payment on the plaintiffs. In July of 1972 the plaintiffs filed a motion to restrain the de-

32. 494 F.2d at 865.
33. The court stated: "In assessing a penalty we have taken into account the fact that Klein is a layman but that nevertheless he should have understood that the refusal of many attorneys to represent him was not a conspiracy but instead a recognition of the frivolity of his position." 494 F.2d at 866. In another case this term, John v. Hurt, 489 F.2d 786 (7th Cir. 1973), the Seventh Circuit affirmed the principle that pleadings of a layman appearing pro se should be judged by more lenient standards than pleadings written by an attorney.
34. 489 F.2d 933 (7th Cir. 1973).
35. 28 U.S.C. § 2283 (1948) provides:
A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments,
fendants from commencing any separate legal action arising out of the subject matter of the pending case, or taking any other action to the detriment of the building's reputation as a luxury high-rise dwelling. For the next six months, the parties filed motions and attempted to negotiate a settlement.

Thereafter, in January of 1973, the defendants filed a forcible entry and detainer action in the Circuit Court of Cook County. Trial was set for two weeks later. The day before the state court trial was due to commence, the district court enjoined the defendants from proceeding with the state court action. The district court held that 28 U.S.C. § 2283 was not applicable, or, if applicable, that the statute permitted the district court to grant an injunction which was "necessary in aid of its jurisdiction." 36

The Seventh Circuit affirmed the district court's order, but its holding was carefully circumscribed. The court noted that the district court might have been able to enter an injunction when the federal case was first filed and no state action was pending 37 because the anti-injunction statute would not apply. At the same time, the district court did not necessarily have the power to enter an injunction merely because the federal action was commenced first. 38 The question in the present case was whether the anti-injunction statute applied after the defendants had begun a state court action while a motion for injunction restraining such action was pending in the federal court.

The court concluded that the anti-injunction statute absolutely prohibited the federal court from issuing an injunction unless one of the three statutory exceptions applied. 39 Because none of the three exceptions applied, the federal court could only issue an injunction if the statute did not apply. The court decided that at the time the plaintiffs first asked for an injunction, the district court had power to act because the defendants had not filed their state court action. The court reasoned that jurisdiction could not be lost by the subsequent filing of the state court action and that the statute did not apply. The Seventh Circuit correctly interpreted the statute in this sensible manner; obviously the federal court needs time to deliberate the merits of issuing an injunction without fear that defendants will initiate a subsequent

36. 489 F.2d at 935.
37. 489 F.2d at 936, n.8. See also, J. Moore, Federal Practice ¶ 0.208(3).
38. 489 F.2d at 936 n.7. See also, J. Moore, Federal Practice ¶ 0.208(3).
39. 489 F.2d at 937 and n.9, 10 therein. The mandatory character of the statute has been disputed (J. Moore, Federal Practice ¶ 0.208(3)), but it is the prevailing view.
state action that could deprive the federal court of authority to issue the injunction.40

The Seventh Circuit's rationale is a logical extension of prior cases,41 although some problems appear if the case is taken one step further. An interesting issue will arise, for example, if the Seventh Circuit is confronted with a situation where a defendant, anticipating or knowing that a plaintiff intends to ask for an injunction in a pending federal action, files a state court action before the plaintiff seeks an injunction. If the fact that the motion is on file with the federal court in one case and that the motion is about to be filed with the knowledge of all parties in the other affords a basis for distinguishing the cases—so that the court has power to act in the former situation and not in the latter—then the court, instead of discouraging a race to the courthouse,42 may have in fact encouraged a defendant to file a state court action as soon as he suspects the plaintiff may seek an injunction in the federal court.

STATUTE OF LIMITATIONS:

In *John Morrell & Co. v. Chicago, Rock Island and Pacific Railroad Co.*,43 the Seventh Circuit decided that the plaintiff's contract action on a Uniform Bill of Lading was timely filed. In reaching its conclusion, the majority interpreted a series of correspondence between the plaintiff and the defendant in a manner that raises substantial questions about the method of disallowing a claim under a Uniform Bill of Lading Contract.

In September of 1967, Armour and Company refused a shipment of pork bellies shipped by John Morrell & Co. because the shipment was allegedly in a damaged condition. In February of 1968, the carrier (defendant) sent the shipper (plaintiff) a letter that stated:

40. "Unless the applicability of the statutory bar is determined by the state of the record at the time the motion for an injunction is made, a litigant would have an absolute right to defeat a well-founded motion by taking the very step the federal court was being urged to enjoin. Under a defendant's reading of the statute, if a federal court took time for fair consideration of the merits of a request for an injunction, the court would deliberate at its peril; its authority to rule on the pending motion could be terminated by the action of one of the litigants. We consider this possibility unseemly. For, as Mr. Justice Frankfurter stated in another context: 'Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.' United States v. United Mine Workers, 330 U.S. 258, 310 (concurring opinion)." 489 F.2d at 937.

41. For example, Mitchum v. Foster, 407 U.S. 225; United States v. United Mine Workers, 330 U.S. 258.

42. In *Barancik* the court mentioned a race to the courthouse as one situation to be avoided. 489 F.2d at 935, n.5.

43. No. 72-2022 (7th Cir., March 13; 1974).
The loading method used was the sole cause of the inadequate refrigeration of this load and the resulting deterioration and loss. Inasmuch as loading was done by the shipper, no liability for improper loading rests with the carriers.

In the circumstances, we have no option but to hereby disallow the claim.\(^44\)

Subsequently, other correspondence was exchanged between the parties in which the carrier conceded that some part of the damage was due to its delay and later offered to settle the claim. The parties were unable to reach a settlement.

On August 31, 1970, the claimant shipper made another counter offer. The carrier responded on September 14, 1970, stating that the claim was barred by the statute of limitations. The shipper filed suit against the carrier in September of 1971.

The only issue before the district court was whether suit was barred by a provision in the Uniform Bill of Lading Contract that requires suit to be instituted against a carrier within two years and a day from the date notice in writing has been given to the claimant that the carrier has disallowed the claim.\(^45\) The district court interpreted the words “in the circumstances” in the railroad’s letter of February, 1968 as a disallowance of the claim; however, since these “circumstances” were not true and since the court believed that subsequent correspondence showed the parties considered the February letter only a qualified disallowance, the court held that the limitations period did not begin to run until sometime later. The district court granted summary judgment to the plaintiff based on the pleadings and stipulated facts.

Presumably, the district court agreed with the defendant that once disallowance had been made, subsequent negotiations did not toll the limitations period.\(^46\) However, the district court stated that the disallowance was not clear because no reference was made to the February letter until September of 1970 when the carrier wrote that the claim was barred.

Judges Knoch and Campbell affirmed the district court’s order and its reasoning. Chief Judge Swygert dissented,\(^47\) arguing that the February letter did possess clear finality (contrary to the majority view) and even if the letter were a “qualified” disallowance, it met

\(^{44}\) Id. at 2.
\(^{46}\) No. 72-2022 at 4.
\(^{47}\) Id. at 6.
the notice requirements of the Interstate Commerce Act. In addition, he stated that the February letter provided an "objective benchmark" from which to measure timeliness and a more suitable benchmark than an attempt by the court to determine subjective intent. The majority's amorphous distinction between qualified and unequivocal disallowances would, in his opinion, lead to arbitrary and inconsistent treatment of the parties in future disputes.

CLASS ACTIONS

For several years after rule 23 was amended in 1966, courts of appeals held that the new rule should be liberally interpreted and that if error were to be made, it should be in favor of and not against the maintenance of a class action. The resulting willingness of district courts to certify class actions encouraged suits that were increasingly ambitious in size and complexity. Many alleged classes contained millions of persons.

By 1970, it was apparent that mammoth class actions could raise serious problems of manageability, especially if they proceeded to trial. Accordingly, the pendulum began to swing back and courts began to refuse to entertain mammoth class actions on the grounds that their mere size and complexity made them unmanageable, while other courts limited the size or scope of alleged classes to make actions manageable. In Appleton Electric Co. v. Advance-United Expressways the Seventh Circuit showed how premature were the rumors of the death of the earlier attitude sanctioning mammoth class actions despite burdensome damages calculations, difficulties of administration, and the large commitment of judicial resources.

50. See, for example, the antitrust class action cases discussed in 9 A.L.R. Fed. 118.
51. E.g., Hackett v. General Host Corp., 453 F.2d 618 (3rd Cir. 1972). In addition, there is a series of cases under the Truth in Lending Act in which courts defeated classes on the basis that potential damages were too great, that there were too many individual questions of fact, and that defendants should not be punished for the technical violations of the statute. These cases are couched in language designed to make the problems with the maintenance of class actions appear peculiar to Truth in Lending cases, but the rationale does not hold up under rigorous analysis and the problems could easily be applied to other types of class actions. E.g., Goldman v. First National Bank of Chicago, 56 F.R.D. 56 (N.D. Ill. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972); Garza v. Chicago Health Clubs, Inc., 56 F.R.D. 548 (N.D. Ill. 1972).
52. 494 F.2d 126 (7th Cir. 1974).
In 1968, the Middlewest Motor Freight Bureau, Inc., an organization of motor carriers, published proposed rate increases to go into effect on April 1, 1968. The Interstate Commerce Commission [hereinafter referred to as I.C.C.] permitted the rates to go into effect but began investigating the lawfulness of the rates. The I.C.C. ordered the production of certain information and set a hearing date for May 20, 1968. The carriers requested a 90-day postponement for the production of documents and the Commission granted the request on the condition that the carriers make refunds to the shippers on any shipments moving after May 20, 1968, to the extent that the increases or any portion thereof were not approved by the I.C.C.

In June of 1969, the Commission issued its report finding that the increases were not just and reasonable and ordering a refund in accordance with its 1968 order. Subsequently, the commission imposed the burden for supporting claims for refunds on the shippers who paid the charges. The I.C.C. refused a request for reconsideration of the refund order. Accordingly, the carriers cancelled the rate increases. However, they simultaneously filed new and higher increases to become effective as soon as the others were cancelled. After the Commission denied a second request for reconsideration, the carriers sought judicial review of the orders in Colorado. The district court in Colorado dismissed the carriers' complaint and upheld the Commission order. The Supreme Court affirmed this order.53

Fifty cases in twenty state and federal jurisdictions were thereafter filed by shippers to collect refunds. Each case consisted of one to twenty separate complaints; each complaint involved claims of one to two hundred plaintiffs against one to several dozen defendants. Several of these actions were filed in the district courts in Illinois.

After preliminary proceedings commenced, the Seventh Circuit affirmed summary judgment in favor of the shippers in eleven of these cases, holding that the I.C.C.'s refund orders were enforceable as orders for the payment of money; that the defense of invalidity of the refund order was not available since the district court in Colorado had already held the refunds valid; and that the refund orders were enforceable.54 In another case, the Seventh Circuit reversed a district court order dismissing the case as barred by the statute of limitations.55

The *Appleton* case, a class action, was yet another case where shippers sued to collect refunds. As certified by the district court, the case consisted of a plaintiff shipper class and a defendant carrier class. The 17 named defendants and the unnamed defendants appealed pursuant to 28 U.S.C. § 1292(b). The named defendants contended that the action should not be maintained as a plaintiff class action because of its unmanageability and that the defendants should not be compelled to prepare lists of shippers as the district court required because the I.C.C. had placed the burden for supporting refund claims on shippers. The unnamed defendants argued that the case was not appropriate as a class action of either plaintiff shippers or defendant carriers and that class action treatment of defendants "without minimal contacts with the State of Illinois will deny them their rights to due process of law under the Fifth Amendment to the United States Constitution."  

The Seventh Circuit systematically rejected all of these contentions. It attempted to distinguish the *Appleton* situation from most other class actions, and from the *Eisen* case in particular. First, the court observed that this class action was brought to obtain money refunds; that many of the problems in managing a class action case would not be present in a refund case (presumably because of the ease with which notice could be sent to the defendants' customers); that the difficulties the defendants complained of were of their own making—they had not set aside any funds, nor kept adequate records of customers and necessary documents; and that the district court had already ruled on the substantive merits of the suit. Second, the court noted that class members showed interest in the subject matter of the lawsuit;

56. 494 F.2d at 133. The court rejected this contention by stating that the Interstate Commerce Act, 49 U.S.C. § 16(4) (1970), authorized one district court to accept jurisdiction.

57. The *Eisen* case to which the Seventh Circuit constantly referred was *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) (Eisen III). The *Appleton* case was decided before the United States Supreme Court rendered its decision in this case. 417 U.S. 156 (1974).

58. 494 F.2d at 135. There are several problems with the court's rationale on this point. The carriers were not necessarily like public utility companies which send out monthly bills to regular customers; it is conceivable that many shippers were occasional customers only on whom the carriers would not ordinarily maintain files. Yet the court indirectly analogized the carriers to public utility corporations. In addition, the court chastised defendants for not maintaining adequate records for easy identification of their customers, when the I.C.C. order had placed the burden for proving claims for refunds on the shippers.
many shippers had already filed actions and others had attempted to intervene in the class action. Third, the plaintiff never indicated that it would refuse to pay the cost of notice if ordered to do so, a plaintiff need not agree to bear costs which the court could assess against defendants, and the Interstate Commerce Act provided that a plaintiff should not be liable for costs in the district court. Fourth, if costs turned out to be higher than they would have been had the defendants kept better records, then the defendants should bear the costs. In addition, the court noted that the district judge had employed only procedures that were clearly permissible in making the class manageable. Lastly, the court stated that Congress had provided for the class action remedy in suits based on orders of the I.C.C.

The court affirmed the district court's orders establishing the classes and managing initial problems of notice. In so doing, the court displayed some anger with the carriers for protracting the litigation and attempting to prevent the maintenance of a class action.

The real question in any analysis of this case is whether the unique factual circumstances alone caused the Seventh Circuit to approve the class action or whether the Seventh Circuit displayed a predisposition to favor the class action even in circumstances less extreme. The latter is more likely. If the court had wished to avoid a class action, it could have found sufficient authority to do so. Instead, the court cited with approval a number of earlier class action cases.

59. 494 F.2d at 136. As articulated by the court, this rationale would seem to lead to the opposite results. If parties plaintiff are interested enough in the subject matter of the lawsuit to file separate action and defendants are willing to defend a multitude of such actions, then why is the class action necessary? The court did indicate, however, 494 F.2d at 136 n.18, that lack of interest due to the size of the amounts claimed did not necessarily mean that a class action was inappropriate.

60. 494 F.2d at 136.
61. Id. at 137.
62. Id. at 137.
63. Id. at 137. Interstate Commerce Act, 49 U.S.C. § 16(4) (1970), provides: In such suits all parties in whose favor the commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants.
64. The court stated: "The time has come for the carriers to stop spending money to defeat these rightful refunds and to begin spending money to accomplish them. Manageability will be greatly assisted once the carriers' attitude is one of cooperation rather than opposition." 494 F.2d at 139.
65. The court could have used some of the reasons given in the Truth in Lending cases for avoiding the class action. See supra note 51.
66. 494 F.2d at 138-139.
CONCLUSION

The decisions of the Seventh Circuit in the area of Civil Procedure during the past years have been soundly reasoned and provide no immediately visible breakthroughs or flat rejections of previous authority. It is possible, however, that certain of the above decided cases may foreshadow changes which are not currently apparent.