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CIVIL PROCEDURE: ACCESS TO THE DISTRICT COURTS, SUITABILITY OF THE FORUM, AND APPELLATE JURISDICTION AND PROCEDURE

JEFFREY M. GALLAGHER*

From the many cases involving civil procedure decided by the United States Court of Appeals for the Seventh Circuit during the past year,¹ this article selects for discussion those which relate to three basic aspects of the federal court system: the access to the federal district court enjoyed by willing litigants; the suitability of the forum to the particular litigation; and the access to appellate review. Civil procedure cases decided by the Seventh Circuit this year but not discussed in the text are noted by subject throughout the article.²

ACCESS TO THE DISTRICT COURT: SUBJECT MATTER JURISDICTION

There were several cases during the 1978-79 term in which the United States Court of Appeals for the Seventh Circuit supervised the access of litigants to the district courts through the principles of subject matter jurisdiction, including diversity, federal question, amount in controversy, pendent jurisdiction, and removal. The Seventh Circuit work in balancing relations between federal and state courts through the development and application of the abstention doctrine will also be discussed.

Diversity Jurisdiction

In Betar v. DeHavilland Aircraft of Canada, Ltd.,³ the Seventh Circuit sharpened a tool for paring cases out of federal jurisdiction, en route to creating what appears to be a new rule for determining whether diversity of citizenship exists in a wrongful death action brought by a court-appointed administrator. Plaintiff, an Illinois resident who was the court-appointed administrator of the estate of a native of India, brought a wrongful death action in an Illinois court

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¹ This article discusses cases decided by the United States Court of Appeals for the Seventh Circuit between June 1978 and August 1979.

² Many decisions made during the year cannot be discussed, but are set forth by subject in note 179 infra.

³ 603 F.2d 30 (7th Cir. 1979).
against the Canadian manufacturer of the airplane in which the decedent was killed.

The action was removed to the federal district court on the basis of diversity of citizenship between the Illinois administrator and the Canadian defendant corporation, and the district court dismissed the action for lack of personal jurisdiction. Plaintiff appealed, urging that the district court lacked jurisdiction. Plaintiff argued that diversity should be determined with regard to the citizenship not of the administrator, but of the beneficiaries of the action under the Illinois Wrongful Death Act. Since the beneficiaries were all natives of India, diversity jurisdiction would not exist because the suit would be between aliens. Thus, removal would be improper and the cause would have to be remanded to the state court, rather than dismissed.

The Seventh Circuit in Betar acknowledged the general rule that the citizenship of the real party in interest determines diversity jurisdiction, and agreed that Federal Rule of Civil Procedure 17(a) provides that only the administrator may properly bring the action in federal court. However, the court stated that rule 17(a) was merely "procedural," and that the determination of subject matter jurisdiction requires instead a "substantive" analysis. Here, the analysis was based on 28 U.S.C. § 1359, the statutory proscription against collusively invoked jurisdiction. The court referred to a large number of cases where courts, under the authority of section 1359, disregarded a representative party and considered instead the actual beneficiary in order to defeat diversity jurisdiction. In most of these cases, the representative was appointed by the beneficiary rather than by the court, and was appointed for the specific purpose of establishing diversity jurisdiction. In Betar, however, the court found that there was a "most conspicuous . . . lack of an apparent motive to manufacture jurisdiction."

This lack of intent to manufacture jurisdiction forced the Seventh Circuit to refashion the rule for applying section 1359. No longer is intent to manufacture jurisdiction indispensable; instead, the Seventh

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5. 603 F.2d at 32, citing C. WRIGHT, A. MILLER & E. COOPER, 6 FEDERAL PRACTICE & PROCEDURE § 1556 at 711 (1971) [hereinafter referred to as WRIGHT & MILLER].
6. Id.
7. The statute provides:
   A district court shall not have jurisdiction of a civil action in which any party, by assign-
   ment or otherwise, has been improperly or collusively made or joined to invoke the jurisdic-
   tion of such court.
8. 603 F.2d at 35.
9. Id.
Circuit stated that "[t]he purpose of section 1359 is to limit consideration to cases that 'really and substantially' involve a dispute within the jurisdiction of the federal courts." The court decided that this case did not come within diversity jurisdiction because the named plaintiff had no vested interest in the action. The interested parties were all aliens and an action between aliens is not within the diversity jurisdiction of the federal courts. Nor would the purpose of diversity jurisdiction, which is to prevent local prejudice, be served in such an action between aliens. Therefore, since plaintiff originally could not have brought the action in federal court, removal was improper, and the case was remanded to the state court.

Besides offering a new, broader interpretation of section 1359, the Betar decision has the apparent effect, at least to the cautious litigator, of establishing the rule that when suit is brought by a court-appointed representative the court will consider both his citizenship and that of the beneficiaries to determine whether diversity jurisdiction exists.

**Federal Question Jurisdiction**

In two cases during the 1978-79 term, the United States Court of Appeals for the Seventh Circuit applied well-developed principles of federal question jurisdiction. In the first, *American Invs-Co. Country-side, Inc. v. Riverdale Bank*, the court upheld the district court's finding of subject matter jurisdiction in a declaratory judgment action to remove a cloud on title, albeit for apparently internally inconsistent reasons. The plaintiff American Invs-Co. and others had created a real estate land trust under Illinois law and agreed that transfers of interest thereunder would be subject to certain Federal Housing Administration regulations. Defendant Riverdale Bank was transferred an interest in the trust by one of the other participants, without either

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10. *Id.*
11. *Id.*
12. 596 F.2d 211 (7th Cir. 1979). Other cases involving federal question jurisdiction included: Koehring Co. v. Adams, 605 F.2d 281 (7th Cir. 1979) (ripeness of declaratory judgment action that agency definition conflicts with authorizing statutes); Clark v. United States, 596 F.2d 252 (7th Cir. 1979) (limits placed on federal question jurisdiction by exclusive jurisdiction of the Court of Claims under the Tucker Act); Blocksom & Co. v. Marshall, 582 F.2d 1122 (7th Cir. 1978) (appeal from administrative proceedings premature); Vishnevsky v. United States, 581 F.2d 1249 (7th Cir. 1978) (mandamus jurisdiction in action to pay back overtaxes under 28 U.S.C. § 1361 (1976)); Uniroyal, Inc. v. Marshall, 579 F.2d 1060 (7th Cir. 1978) (exhaustion required before review allowed from order of administrative law judge denying motion to preclude discovery in agency proceedings).
compliance with the regulations or the consent of American Invs-Co., which then brought suit to declare the bank’s interest void.

The district court held that American Invs-Co. failed to demonstrate that a construction of the FHA regulatory agreement was “basic and necessary to a decision of the case” because American Invs-Co. might prevail on the state law theories alone. The Seventh Circuit disagreed with this analysis of the jurisdictional issue because it relied on a forecast of matters which might be dispositive at trial, rather than on the four corners of the complaint, as required by the well-pleaded complaint rule. Under that rule, this bill to remove cloud on title was drafted in a manner requiring a determination of the meaning and effect of the FHA regulatory agreement. Plaintiff alleged the facts showing his title, the existence of the instrument sought to be eliminated as a cloud, its invalidity and the legal and factual basis of its invalidity.

However, the Seventh Circuit held that while it was necessary to this action to interpret the FHA regulatory agreement, doing so did not involve federal law and thus there was no federal basis for jurisdiction. Interpretation of the FHA regulatory agreement would not require resort to federal common law, as plaintiff urged. Nor does any distinct federal policy or any demonstrable congressional intent call for the courts to fashion such federal law. Even if the FHA would be bound by the outcome of this litigation, the federal interest is speculative and remote, while the state’s interest is strong and thus the court held that there is no federal basis for jurisdiction.

In Local Division 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility, a union sued the employer for specific performance of the interest arbitration provision of their contract for work on a project receiving Urban Mass Transportation Act funds. That arbitration provision was required by UMTA to be in the contract as a condition of receiving the project. The Seventh Circuit easily found that federal law was a source of an essential element of the action on the contract and that there was a need for uniformity of decisions; thus, a federal question was presented and jurisdiction existed under 28 U.S.C. § 1331.

15. 585 F.2d 1340 (7th Cir. 1978).
Amount in Controversy

The court appears to have adopted the "either viewpoint" rule for determining whether the amount in controversy jurisdictional requirement is met in a removed diversity action for an injunction. In McCarty v. Amoco Pipeline Company, McCarty brought an action in state court for an injunction requiring Amoco to remove a pipeline from his property and prohibiting Amoco from further pipeline operations thereon. The pipeline had been constructed on an easement which had been condemned and deeded to Amoco in an earlier state court action, pursuant to which McCarty was awarded compensation in the amount of the appraised value of the easement, $1,625.

Amoco removed McCarty's action to federal district court on the basis of diversity jurisdiction and pleaded the defense of res judicata. McCarty filed a motion to remand, disputing that the $10,000 amount in controversy requirement was satisfied. He argued that the value of the matter in controversy (i.e., the injunction), was its benefit to him, that this benefit was the value of the easement and that in the earlier proceeding this had been found to be $1,625. Amoco urged that the value of the injunction to itself was far greater than the jurisdictional amount and filed uncontroverted affidavits showing that the cost of removing the pipeline, as well as the value to Amoco's business of not removing it, exceeded $10,000. In affirming the district court's assumption of jurisdiction, reliance was apparently placed on the first of the values shown by the defendant. "[T]he pecuniary result to [the defendant] which the judgment prayed for would directly generate would exceed the jurisdictional amount." The Seventh Circuit reasoned that the jurisdictional amount requirement is designed to measure the substantiality of the suit, and that "either viewpoint" accurately measures the substantiality of an injunction.

The plaintiff's viewpoint, however, remains the rule for determining the value of an injunction in many cases. McCarty expressly limited the "either viewpoint" rule to removed diversity cases. While disregarding as dicta a preference for the plaintiff's viewpoint rule expressed in an earlier case, the court stated that "at least in civil rights

18. 595 F.2d 389 (7th Cir. 1979).
20. 595 F.2d at 395.
21. Id.
22. Id., citing City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976).
suits against federal officers”23 the plaintiff’s viewpoint rule may be preferable. Furthermore, the court earlier used the plaintiff’s viewpoint rule in Local Division 519, Amalgamated Transit Union v. LaCrosse Municipal Transit Utility.24 The district court’s assumption of diversity jurisdiction was affirmed in this suit by a union local to force an employer into interest arbitration pursuant to a collective bargaining agreement. In such a case, the Seventh Circuit found that “the jurisdictional amount is to be measured by the value to the complainant of the right which it seeks to protect.”25 By finding that the union local itself had an interest in a new collective bargaining contract which existed independently of its members’ interests, and which alone was greater than the jurisdictional amount, the issue of whether the jurisdictional amount requirement could be satisfied by aggregating individual members’ claims was avoided. Also avoided was the task of searching through the individual claims, as the district court did, to find those exceeding the jurisdictional amount.

Pendent Jurisdiction

In at least three cases,26 the district court’s power and discretion to hear state claims pendent to federal claims was discussed. In National Bank & Trust Co. v. United States,27 plaintiff brought a wrongful levy action based on a federal statute against the United States and brought claims based on state law against several private defendants. The district court entered summary judgment for the United States and dismissed the state claims against the other defendants for want of jurisdiction. On appeal, the Seventh Circuit found that the district court properly exercised its discretion and held that where, as here, there never was a federal claim against the remaining defendants, the district court would not have the power to accept jurisdiction unless it was clear from the federal law at issue that a wide grant of jurisdiction was intended.28

In O’Brien v. Continental Illinois National Bank & Trust Co.,29 pen-

23. 595 F.2d at 395, citing 546 F.2d at 702.
24. 585 F.2d 1340 (7th Cir. 1978).
25. Id. at 1349.
27. 589 F.2d 1298 (7th Cir. 1978). Cf. Nemekov v. O’Hare Chicago Corp., 592 F.2d 351, 353 n.1 (7th Cir. 1979) (dismissal of state claims proper where federal claims dismissed at outset).
28. 589 F.2d at 1304-05.
29. 593 F.2d 54 (7th Cir. 1979).
sion fund trustees brought an action for violation of federal securities laws and state common law against a bank which handled some of the fund's investments. Several years into the litigation, the district court dismissed the federal claims. Thereafter, the district court dismissed the pendent state claims not for lack of power, but in its discretion and in the interests of comity and justice, since in the district court's judgment the state law claims were important and novel. This decision was reversed because the Seventh Circuit concluded that the state law claims would be barred in state court by the statute of limitations. Since the plaintiffs had pursued the action diligently, dismissal was an abuse of discretion because it would result in the loss of any forum for the plaintiffs.

In *Vickers v. Quern*, the district court's exercise of jurisdiction over a pendent state claim was upheld. Plaintiff brought five claims against the defendant state officials; three were based on federal statutes, one on the federal Constitution and one on a state statute. In considering an early motion to dismiss, the district court held that the constitutional claim was not insubstantial. The district court subsequently granted summary judgment to the plaintiffs on the state law claim and one federal statutory claim, and declined to decide the other three claims. The defendants argued that exercising jurisdiction over the state claim was an abuse of discretion because the federal constitutional question was not effectively in the case and because the state claim predominated over the federal statutory claim. The Seventh Circuit rejected this argument since the federal constitutional claim, though properly not decided, was still material to the exercise of jurisdiction and pervaded the entire statutory scheme at issue, and since the state claim did not predominate over the constitutional claim.

In *U.S. General, Inc. v. City of Joliet*, the Seventh Circuit affirmed the district court's dismissal for lack of jurisdiction over a permissive counterclaim to a federal cause of action. The counterclaim alleged that the complaint constituted malicious prosecution under state law. Jurisdiction over the state claim was not found to exist because the state claim did not arise out of a common nucleus of fact with the federal claim. Moreover, the Seventh Circuit found that even if a common nucleus of fact did exist, jurisdiction would be a matter of discretion for the district court and it would not be an abuse of discre-

30. 578 F.2d 685 (7th Cir. 1978).
31. 598 F.2d 1050 (7th Cir. 1979).
tion to dismiss a permissive counterclaim which adds several new parties to the action and has no other basis of jurisdiction.

These cases evidence significant evolution in the court's view of whether a district court should dismiss pendent state claims when the contemporary federal claims are dismissed before trial. In Vickers, the court noted that: "Gibbs stated that if the federal claims are dismissed before trial, the state claims should be dismissed as well," but also that "[t]his doctrine has not been rigidly followed since Gibbs." In National Bank & Trust the court approved the district court's dismissal of the state claims after the federal claims had been dismissed. Finally, in O'Brien, the court stated that so long as the dismissed federal claim was not "insubstantial," jurisdiction exists and the district court may exercise that jurisdiction in its discretion.

Thus, federal jurisdiction over pendent state claims exists, even if the federal claim is dismissed before trial, when the federal claim "is not insubstantial." Under this test, "if there is any foundation of plausibility to the claim federal jurisdiction exists." However, if the state claim involves parties who are not involved in the federal claims, jurisdiction depends on the breadth of the particular federal claim involved and the context in which the state claim is asserted. Whether to exercise that jurisdiction remains a matter within the discretion of the district court, which is bound to consider judicial economy, convenience, and fairness to the litigants. The district court's decision cannot be set aside unless the reviewing court "has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."

Removal

In the one removal case of note during the 1978-79 term, the Seventh Circuit held that in certain circumstances a state administrative

33. 578 F.2d at 689 n.9.
34. 589 F.2d 1298 (7th Cir. 1978).
35. 593 F.2d 54 (7th Cir. 1979).
36. Id. at 63-64.
37. Id. at 63; see also 578 F.2d at 688 n.7.
38. 593 F.2d at 63, citing 13 Wright & Miller, supra note 5, at § 3564 (1975).
40. U.S. Gen., Inc. v. City of Joliet, 598 F.2d 1050, 1054 (7th Cir. 1979).
agency can be a "state court" under 28 U.S.C. § 1441(a) so that removal of an action pending therein to federal district court may be appropriate. In Floeter v. C.W. Transport, Inc., defendants petitioned to remove an action seeking to enforce a collective bargaining agreement from the Wisconsin Employment Relations Commission. The court performed an avowedly functional case-by-case analysis and allowed removal. In so doing, the court found that the action might have been brought originally in either state or federal court as well as before the WERC, the latter merely providing a more efficient way to adjudicate such claims. The Seventh Circuit further found that WERC proceedings are essentially judicial, notwithstanding the fact that the WERC cannot enforce its own orders, but must rely on the courts for enforcement.

**Abstention**

The full gamut of abstention theories was reviewed by the court of appeals during the year, and a preference for the district court assuming jurisdiction rather than abstaining was apparent. In two of the

43. The statute provides, in pertinent part:
[28 U.S.C. § 1441(a) (1976).]

44. The court expressly left open this question several years ago. Local 139, Int'l Union of Operating Engr's v. Carl A. Morse, Inc., 529 F.2d 574, 577 n.1 (7th Cir. 1976).

45. 597 F.2d 1100 (7th Cir. 1979).


47. 597 F.2d at 1102.

48. The court considered abstention in three cases not discussed in the text. In two of these, abstention under Burford v. Sun Oil Co., 319 U.S. 315 (1943) was at issue. In Hines v. Elkhart Gen. Hosp., 603 F.2d 646 (7th Cir. 1979), the Seventh Circuit held that it was proper for the district court to abstain from deciding a state constitutional challenge to a state statute when the precise issues in that challenge were pending before the state supreme court and the statute was of obvious public importance. In Local Div. 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Utility, 585 F.2d 1340 (7th Cir. 1978), the Seventh Circuit held that the district court properly declined to abstain in an action by a local union against a municipal employer seeking to enforce the contractual rights guaranteed the union by federal statute. Finally, in Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Ins. Co., 600 F.2d 671 (7th Cir. 1979), the court affirmed the district court's refusal to abstain from deciding a federal action containing claims over which the federal court had exclusive jurisdiction because of an injunction issued in a prior state insolvency proceeding prohibiting subsequent suits. The Seventh Circuit noted that even in the absence of exclusive federal jurisdiction, abstention would be improper so long as the federal proceeding was in personam rather than in rem.

49. For example, in Local Div. 519, Amalgamated Transit Union v. LaCrosse Mun. Transit Utility, 585 F.2d 1340 (7th Cir. 1978), the Seventh Circuit stated:
cases discussed below, the court upheld the district court’s decision not to abstain from exercising jurisdiction. In the third, which involved a most unusual fact setting, the Seventh Circuit affirmed the district court’s decision to stay the action pending full resolution of a parallel state proceeding.

In *Citizens Energy Coalition v. Sendak*, plaintiffs’ proposed contracts with the state for federal funds were repeatedly disapproved by the state attorney general on the grounds that plaintiffs were prohibited by state law from receiving such contracts with the state because they had a lobbyist. Plaintiffs brought action in federal court for injunctive relief and a declaration that the attorney general’s actions wrongly interpreted state law and violated federal statutes and the Constitution. The district court declined defendant’s motion to abstain, found the state statute was violated, and enjoined the attorney general from disapproving the contracts under the state statute. The attorney general argued on appeal that the district court should have abstained because the case involved difficult questions of state law bearing on substantial problems of public policy. However, the Seventh Circuit found that the district court properly exercised its discretion by refusing to abstain because the state statute was neither difficult nor complicated. The court further suggested that where there is a federal basis for jurisdiction rather than diversity, a greater justification to abstain might well be required of the district court.

In *Wynn v. Carey*, the State of Illinois appealed from an order of the district court which found part of the Illinois Abortion Parental Consent Act unconstitutional and enjoined its enforcement. The state

We begin with the rule that "the doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.”


50. *Citizens Energy Coalition v. Sendak*, 594 F.2d 1158 (7th Cir. 1979); *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978).


52. 594 F.2d 1158 (7th Cir. 1979).

53. *Id.* at 1162-63.

54. *Id.* at 1162, quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976). This suggestion is troublesome because the *raison d’être* of diversity jurisdiction is to allow the federal courts to decide questions of state law. It therefore would seem that a greater justification would be required to abstain when the district court sits with diversity, rather than federal question, jurisdiction.

55. 582 F.2d 1375 (7th Cir. 1978).

56. ILL. REV. STAT. ch. 38, §§ 81-151 (1978 Supp.).
argued that the district court abused its discretion by failing to abstain on the grounds outlined by the United States Supreme Court in Railroad Commission v. Pullman\textsuperscript{57} or Burford v. Sun Oil Co.\textsuperscript{58} The state urged that the act was unclear and had never been construed by state courts, but that the state courts might construe it so as to eliminate or materially change the federal constitutional issue involved.

The Seventh Circuit held, however, that the district court did not abuse its discretion in balancing the advantages and disadvantages of abstention, comity and the individual rights at issue. While part of the act was arguably unclear, the court found that most of the act, including its most objectionable part, was perfectly clear. Moreover, the Seventh Circuit determined that the unclear parts of the act were of such a nature that they could not be made sufficiently more clear by the decision of a single case; thus, abstention for a short period of time would be fruitless. Furthermore, repeated litigation would be necessary because there was no applicable state statute for certifying questions to the state court. Plaintiffs' pregnancy-related rights were such that they would suffer irreversible harm if the district court abstained until there was a sufficient case-by-case development of the state law. Finally, the court found that the case did not involve a traditional state interest, state expertise or special need for a coherent state policy.\textsuperscript{59}

The third case involving abstention is Calvert Fire Insurance Co. v. American Mutual Reinsurance Co.,\textsuperscript{60} which makes a major contribution to the development of a fourth ground for abstention: the wise judicial administration of the federal courts.\textsuperscript{61} In announcing this fourth ground for abstention, the Seventh Circuit stated:

> There are . . . situations where a federal court may defer to a parallel state proceeding, even when the result will be to relegate decision of questions of federal law over which the district court has jurisdiction to a state forum. The reason for such deferral is to prevent duplication of judicial effort in two separate court systems and to confine the litigation to the forum able to make the most comprehensive disposition . . . .

In making this [carefully considered] judgment, the district

\textsuperscript{57} 312 U.S. 496 (1941).
\textsuperscript{58} 319 U.S. 315 (1943).
\textsuperscript{59} 582 F.2d at 1383.
\textsuperscript{60} 600 F.2d 1229 (7th Cir. 1979). American Mutual Reinsurance Company hereafter is referred to as Amreco.
\textsuperscript{61} This is a rarely invoked ground for abstention. See generally 17 Wright & Miller, supra note 5, at § 4247. The Calvert cases rendered unclear the status of some of the prior law of the Seventh Circuit, including Aetna State Bank v. Althemeir, 430 F.2d 750 (7th Cir. 1970). See 600 F.2d at 1231 n.6. Apparently, Aetna would give to the district court a greater freedom to abstain than would Colorado River or Calvert.
A judge may take into account such factors as (1) the desirability of avoiding piecemeal litigation, (2) the order in which jurisdiction was obtained by the concurrent forums, (3) the inconvenience of the federal forum, and (4) the court first assuming jurisdiction over any property which may be involved in the suit.\textsuperscript{62}

The series of \textit{Calvert} cases\textsuperscript{63} began when Amreco brought an action in state court seeking a declaration that a contract in which Calvert had agreed to purchase participatory shares in a reinsurance pool operated by Amreco was in full force and effect. Calvert raised the affirmative defense that the participatory shares were a "security" within the meaning of state and federal securities laws and that Amreco failed to comply with those laws and defrauded Calvert in violation of those laws. Calvert asked for rescission of the contract. In addition, Calvert counterclaimed for damages based on both common law fraud and state statutes, but not on the federal securities laws. On the same day that Calvert answered and counterclaimed in state court, it also filed an action in federal district court for rescission and damages based on the same grounds pleaded in the state action. In addition, Calvert brought an action for damages under the Securities and Exchange Act of 1934\textsuperscript{64} over which the federal courts have exclusive jurisdiction. The state court ruled that the participatory interests were not "securities." Thereafter, the district court stayed all its proceedings. It was essentially this stay which was on review several years later in the present case.

The Seventh Circuit in \textit{Calvert} found that the district court's stay was a proper exercise of its discretion on grounds set forth by the United States Supreme Court in \textit{Colorado River Water Conservation District v. United States}.\textsuperscript{65} Several facts in \textit{Calvert} critical to the court's decision had become clear during the years of litigation. While Calvert once had a claim for which federal jurisdiction was exclusive, it had none at the time of this appeal because Calvert had dropped its claim for damages under the 1934 Act. Thus, the district court was no longer under the "virtually unflagging obligation"\textsuperscript{66} to retain and exercise jurisdiction which was present with a claim under exclusive federal juris-

\begin{itemize}
  \item \textsuperscript{62} 600 F.2d at 1233-34.
  \item \textsuperscript{64} Securities Exchange Act of 1934, 15 U.S.C. § 78(a) (1976) [hereinafter referred to as the 1934 Act].
  \item \textsuperscript{65} 424 U.S. 800 (1976).
  \item \textsuperscript{66} \textit{See}, e.g., Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Ins. Co., 600 F.2d 671, 674 (7th Cir. 1979).
\end{itemize}
diction. Nor was Calvert making a claim for affirmative relief under the federal statutes in the state suit.

The Seventh Circuit noted that the state court's decision that there was no "security" in effect adjudicated all the federal claims. The district court had stayed, not dismissed, the federal action only after the state court had already rendered its decision. Thus, the court of appeals concluded, it was the state court's actions, not the district court's decision to stay, which caused the state court's decision to be rendered first and thus to allow the operation of res judicata on Calvert's action in federal court. Possibly the most important aspect of the case was the district court's finding of fact that Calvert's pursuit of the federal action had been merely vexatious. The Seventh Circuit held that in such a situation staying the action was entirely appropriate.

PARTIES

Access to the federal courts is generally considered to be limited to persons with certain protected interests and to others who have a special relationship to such persons, interests or the cause of action. The following discussion and notes include cases decided by the Seventh Circuit in 1978-79 involving joinder of parties, intervention, standing, and class actions.

Joinder

In Hansen v. Peoples Bank, the Seventh Circuit addressed the problem embodied in Federal Rule of Civil Procedure 19 between

67. This issue of res judicata threatens to extend the epic even further. See 600 F.2d at 1236 n.18.

68. The standing of an association to sue on behalf of its members was discussed in Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278 (7th Cir. 1978). The plaintiff, an association of persons, firms, and corporations engaged in processing meat, whose members were subject to ordinances of the defendant city, brought an action to declare the ordinances invalid due to the pre-emption by federal statutes and regulations and because the ordinances were an unconstitutional burden on interstate commerce. The Seventh Circuit rejected defendant's challenge to the standing of the association to sue on behalf of its members, since: (1) its members would have standing to sue individually; (2) the interests it sought to protect were germane to the association's purpose; and (3) neither the claim nor the relief required the participation in the lawsuit of the individual members. Id. at 280, citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

69. 594 F.2d 1149 (7th Cir. 1979).

70. Fed. R. Civ. P. 19 states, in pertinent part:

Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii)
retaining federal jurisdiction over an action having less than all the interested parties or dismissing the action to the state court.\textsuperscript{71} Plaintiff in \textit{Hansen} was a California resident and an income beneficiary of a trust. She sued the Illinois trustee in an attempt to force the appointment of the corpus of the trust to her. Defendant trustee moved that plaintiff's children, also California residents and income beneficiaries of the trust, be joined as party defendants. The district court, in the exercise of its discretion, granted the motion and dismissed for lack of diversity jurisdiction.

On appeal, the Seventh Circuit affirmed. The court in \textit{Hansen} found that under rule 19(a) the children's interests related to the action in such a way that they would be impaired or their protection would be impeded by the children's absence from the action. The court of appeals further found, without choosing between the two standards,\textsuperscript{72} that the children were properly aligned as defendants since both their legal interests and their actual conduct appeared to oppose the plaintiff. Thus, the court in \textit{Hansen} concluded that joinder of the children was not feasible since joinder would destroy diversity jurisdiction.

The Seventh Circuit then considered rule 19(b). The court began by noting that rule 19(b) provides that when such persons cannot be joined, the action should only be dismissed if the court determines, in equity and good conscience, that it cannot proceed without the absent persons.\textsuperscript{73} The Seventh Circuit took great care to ascertain that an Illinois court could obtain personal jurisdiction over the children as beneficiaries of the Illinois trust, and was therefore a viable alternative forum for the entire action. Apparently, the existence of an alternative

leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Determination by Court Whenever Joinder Not Feasible. If a person \ldots cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.


72. There is an active dispute over which standard is appropriate. \textit{See} 594 F.2d at 1154, \textit{citing} Green \textit{v. Green}, 218 F.2d 130 (7th Cir. 1954), \textit{cert. denied}, 349 U.S. 917 (1955).

73. 594 F.2d at 1151. For the text of rule 19(b), \textit{see} note 70 \textit{supra}. 
forum was a necessary, although not sufficient, condition for dismissal.\textsuperscript{74} Next, the court determined that the children's interests were important, not remote,\textsuperscript{75} and that their interests were not identical to those of either party already before the court, in order to avoid dismissal in the usual manner where there is an identity of interest. Finally, the court determined, as it is required to do under rule 19,\textsuperscript{76} that judicial relief could not be shaped to overcome the inadequacy of representation of interests.

In \textit{Dushane v. Conlisk},\textsuperscript{77} the Seventh Circuit held that the district court could use Federal Rule of Civil Procedure 21 post-judgment to make a person a party to the action for the purpose of effectuating the relief awarded by the judgment.\textsuperscript{78} In \textit{Dushane}, plaintiff was a police officer who had been suspended from the force, but who had prevailed in a federal action declaring the suspension illegal and ordering his reinstatement on the same terms he enjoyed before suspension. The defendant police department, however, subsequently failed to award the plaintiff a promotion he would have had but for the suspension. The department explained that by law it could make such promotions only from the current list of candidates provided by the Civil Service Commission and that at the time it failed to award the plaintiff a promotion, the current list did not contain the plaintiff's name. The court held that the Civil Service Commission could be added as a party under rule 21 and would be subject to the power of the court for the purpose of effectuating the relief awarded in the original action.\textsuperscript{79}

\textit{Intervention}

In one of the several cases\textsuperscript{80} which presented an intervention issue,
the Seventh Circuit enlarged the scope of collusion which is sufficient to provide intervention as of right to a person already represented before the court by a party. In *Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Insurance Co.*, the trustees of a union employee benefit plan fund sued several defendants to recover money allegedly misappropriated in an insurance fraud conspiracy. After commencement of the suit, the trustees were forced to resign and were replaced by new trustees, who were substituted as plaintiffs. Thereafter, the beneficiaries of the fund moved to intervene as of right under Federal Rule of Civil Procedure 24(a)(2), filing an intervention complaint which asserted claims against both the former and the present trustees, and brought a separate, but identical, action in the same federal district court against all of the defendants and the former and present trustees. The beneficiaries sought intervention on the grounds that the plaintiff trustees could not adequately represent them because the former trustees were in collusion with some or all of the defendants and the former trustees exercised some influence over the present trustees. Both plaintiffs and defendants opposed intervention, arguing that direct collusion between the plaintiff and a defendant had not been shown. The district court denied intervention.

The Seventh Circuit reviewed the district court's decision as a matter of law and reversed the denial of the motion to intervene. Accepting as true all of the non-conclusory, non-frivolous allegations in support of the motion to intervene, the court found "prima facie, a case of collusion between the former trustees and the defendants, and a relationship the equal of collusion between the present and former trustees." According to the Seventh Circuit, indirect collusion such as this was sufficient to make representation inadequate and require intervention. The court further noted that, contrary to the suggestion of the district court, the existence of the beneficiaries' separate, concurrent action in the same court does not bar intervention.

stated that the only proper inquiry is whether the district court abused its discretion under Fed. R. Civ. P. 24 in allowing intervention. In Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979), the Seventh Circuit held that intervention, unless expressly limited, includes the right to question and, if necessary, to appeal from a consent decree.

81. 600 F.2d 671 (7th Cir. 1979).
82. Carpenter v. Fitzsimmons, No. 78 C 1672 (N.D. Ill., filed May 1, 1978).
83. Id.
84. 600 F.2d at 679 n.15.
85. Id. at 679.
86. Id. at 680.
87. Id. at 681.
Class Actions

Several of the class action cases which came before the Seventh Circuit this year presented procedural problems. On two occasions, the problem was whether a class action became moot when, before certification of the class, the claim of the named plaintiff ceased to exist. In response, the court adopted a new exception to the mootness doctrine.

In *Susman v. Lincoln American Corp.*, the defendants, prior to certification of the class, tendered the named plaintiff the full amount of his individual claim plus costs in an effort to moot the entire action. The district court dismissed the entire action. On appeal, the Seventh Circuit reversed. The court acknowledged the general rule that if the named plaintiff's claim is mooted prior to certification then the entire class action is moot. However, drawing on the reasoning of the United States Supreme Court in *Sosna v. Iowa*, the court in *Susman* held that necessity compels that such a tender not be allowed to moot the entire class action "if the class action device is to work." Instead, if the plaintiff class is diligently pursuing certification, the Seventh Circuit concluded that the district court first should rule on certification and then should consider the effect, if any, of the tender to the named plaintiff.

Subsequently, in *DeBrown v. Trainor*, plaintiff beneficiaries of federal food stamp, Medicaid, and other assistance programs, claimed that they suffered periodic, temporary gaps in eligibility whenever their household status changed, although the change was from one eligible status to another. At the time they commenced suit, the named plain-

88. The Seventh Circuit considered procedural class action problems in two other cases. In *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), the most complex case, the court held, with great trepidation, that the district court erred in approving a subclass settlement because subclass members were inadequately represented at the negotiations and because the settlement unjustifiably prejudiced the rights of subclass members. In *Brown v. Scott*, 602 F.2d 791 (7th Cir. 1979), the Seventh Circuit was presented with defendants' argument that class certification required an additional showing of "need" for the class device, when one of the causes of action is a challenge to the constitutionality of a law on its face. The court acknowledged case law which required "need" when a facial constitutional challenge was the sole cause of action, as well as case law not requiring "need." The Seventh Circuit held that without questioning the soundness of defendant's suggestion, in this case, where a challenge was made to the ordinance both on its face and as applied, no showing of "need" was required. *Id.* at 795.

89. 587 F.2d 866 (7th Cir. 1978).

90. *Id.* at 869, citing and limiting *Winokur v. Bell Fed. Sav. & Loan*, 560 F.2d 271 (7th Cir. 1977).

91. 419 U.S. 393 (1975).

92. 587 F.2d at 870.

93. For instance, a substitution of the named party may be required for lack of ability to fairly and adequately represent the class. *Id.*

94. 598 F.2d 1069 (7th Cir. 1979).
tiffs were suffering from such a gap; however, shortly thereafter they were declared eligible and were granted benefits retroactively. The district court dismissed the action for mootness.

Upon review, the Seventh Circuit found that although the named plaintiffs' claims had been mooted by a change of circumstances, the claim was "capable of repetition yet evading review,"\(^9\) and allowed the class action to continue. The court added that the newly announced *Susman*\(^9\) exception also might have been applicable.\(^9\) It is noteworthy that in *DeBrown*, the Seventh Circuit made no explicit finding, as it did in *Susman*, that the defendants purposefully attempted to moot the lawsuit. Thus, to the extent *DeBrown* is read not to contain such purposefulness, the court's reference to *Susman* has the effect of expanding the *Susman* exception.

**Res Judicata and Collateral Estoppel**

Several cases were decided by the Seventh Circuit during 1978-79 which presented interesting and diverse issues involving res judicata and collateral estoppel. In particular, these cases discussed the kind of prior proceeding which may invoke the operation of res judicata and the latter's interaction with the various Federal Rules of Civil Procedure.

**Res Judicata**

In *Martino v. McDonald's System, Inc.*,\(^9\) the McDonald’s system brought an action for breach of contract against Martino, his franchise corporation and his brothers, all of whom were owners of a single McDonald’s franchise, when Martino’s son began to operate a nearby competing fast food restaurant. McDonald’s alleged that this was a violation of a clause in the McDonald’s franchise agreement requiring that no family member compete with the franchisee. Before defendants filed an answer, the parties reached a settlement. The district court approved the settlement and entered a consent decree, findings of fact and

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95. *Id.* at 1071.
96. 587 F.2d 866 (7th Cir. 1978).
97. 598 F.2d at 1072.
98. *Id.* at 1079 (7th Cir. 1979). Other Seventh Circuit cases involving res judicata were Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1229, 1236 n.18 (7th Cir. 1979); Chicago-Midwest Meat Ass'n v. City of Evanston, 589 F.2d 278, 281 n.3 (7th Cir. 1978) (effect of action brought by an association on subsequent actions by individual members); Kurek v. Pleasure Driveway & Park Dist., 583 F.2d 378 (7th Cir. 1978) (state court proceedings not res judicata on federal action brought under exclusive federal jurisdiction); Gilbert v. Braniff Int'l Corp., 579 F.2d 411 (7th Cir. 1978) (non-"final" judgment cannot operate as res judicata).
conclusions of law, pursuant to which Martino sold his franchise back to McDonald's. Several years later, Martino and his franchise corporation brought this action against McDonald's alleging that enforcement of the "no family competition" clause violated the antitrust laws. Plaintiffs claimed damages for being forced to sell the franchise at a low price and for the business profits which would have been realized if Martino had not been forced to sell the franchise. Defendants argued that the new suit was barred by either Federal Rule of Civil Procedure 13(a)\textsuperscript{99} or res judicata.

The Seventh Circuit held that the action was barred by res judicata, notwithstanding special treatment often accorded antitrust claims, principally because allowing the action would force inconsistent obligations on the defendants. Rule 13 was held not applicable because Martino did not make a responsive pleading in the first suit. Thus, the court avoided plaintiffs' argument that despite the strictness of rule 13(a), antitrust counterclaims are permissive\textsuperscript{100} rather than compulsory, and consequently, if not pleaded they are not barred in a subsequent suit by rule 13.

With respect to general principles of res judicata, the Seventh Circuit acknowledged that where a single matter can constitute both an affirmative defense and a distinct affirmative cause of action, the affirmative cause of action will not be barred by the failure to raise the affirmative defense in an earlier suit. However, the court explained that this general principle does not operate if it would unfairly subject the defendant to inconsistent obligations, as it would if the second suit undercuts the validity of the first judgment. The court found this case presented such a situation because Martino's second action was based on the very conduct sanctioned by the court at the end of the first action and relied on by McDonald's ever since. Res judicata therefore barred the second action.

In \textit{Chicago Sheraton Corp. v. Zaban},\textsuperscript{101} plaintiff brought an action in state court challenging a state tax collection procedure for, among other things, violating federal due process. The state trial court dis-

\textsuperscript{99} FED. R. CIV. P. 13(a) provides, in pertinent part:

\textit{Compulsory Counterclaims.} A pleading shall state as a counterclaim any claim which at the time of serving the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

\textsuperscript{100} 598 F.2d at 1082 n.3, \textit{citing} Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944).

\textsuperscript{101} 593 F.2d 808 (7th Cir. 1979).
missed the complaint for failure to state a claim. The trial court's dismissal was affirmed on appeal up to and including the state supreme court. Plaintiff then brought a section 1983 action in federal court based on the same due process theory. The district court decided the action was barred by res judicata on the state action and dismissed. The plaintiff then appealed to the Seventh Circuit. While on appeal to the Seventh Circuit, the plaintiff appealed the state supreme court decision to the United States Supreme Court. The United States Supreme Court dismissed the appeal for lack of a substantial federal question.

The Seventh Circuit affirmed the district court, albeit based on different reasoning. Contrary to the district court, the Seventh Circuit held that prior final state court proceedings do not operate as a bar to subsequent section 1983 suits in federal court; only prior federal suits do so. However, the court of appeals then held that the summary disposition for want of substantial federal question of the appeal from the state supreme court to the United States Supreme Court constituted a sufficient federal proceeding to act as a bar, since it is a review of the merits of the action. Accordingly, the district court's dismissal was erroneous at the time it was ordered since there had not yet been an appeal to the United States Supreme Court. Because such an appeal occurred before the court decided the case on appeal, the claim was barred by the prior federal adjudication and dismissal was affirmed.

In *Merit Insurance Co. v. Leatherby Insurance Co.*, defendants challenged plaintiff's ability to voluntarily dismiss its contract action under Federal Rule of Civil Procedure 41(a)(1) and argued that

102. Section 1983 provides:

Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


104. 593 F.2d at 809, citing Preiser v. Rodriguez, 411 U.S. 475, 509 n.14 (1973) (Brennan, J., dissenting). This appears to be incorrect, however, at least in the Seventh Circuit. *See* Reich v. City of Freeport, 527 F.2d 666, 671 (7th Cir. 1975); Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963). *See also* 13 WRIGHT & MILLER, supra note 5, at § 3573 n.51.


106. 581 F.2d 137 (7th Cir. 1978).

107. *Fed. R. Civ. P.* 41 provides in part:

Voluntary Dismissal: effect thereof.

By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.
under rule 41(a)(2) court approval was necessary for dismissal. Without filing either an answer or a motion for summary judgment, the defendants successfully moved for a stay and an order compelling arbitration on the basis of an express provision in the contract in suit. Defendants argued, however, that while the letter of rule 41(a)(2) requiring a responsive pleading had not been met, the issues in effect had been joined and to allow voluntary dismissal would be inequitable. The Seventh Circuit, over a dissent, construed rule 41(a)(1) strictly, restricted the equitable exceptions thereto, and affirmed the district court's order allowing voluntary dismissal. The court of appeals found that the issues were not joined by defendants' motion and order and, while considerable discovery had occurred, the efforts expended thereby could be fully utilized in the arbitration proceedings.

The dissent argued that by allowing voluntary dismissal under rule 41(a)(1) the plaintiff, having once lost on the merits of the issue of whether arbitration was compelled by the contract, could try the same issue again without prejudice. Rather, the dissent proposed to treat the defendants' motion for stay as one for summary judgment on the issue of arbitration. Another solution to the problem posed by the dissent is suggested by Martino. In that case, the Seventh Circuit allowed a proceeding which resulted in a consent decree to bar a subsequent suit, where rule 13(a) would not bar a subsequent suit, because the required responsive pleading was absent. In Merit Insurance, while the responsive pleading required by rule 41(a) was absent, the general principles of collateral estoppel might bar a future suit on arbitrability brought by the plaintiff since there would have been an adjudication of the claim on the merits with a full opportunity for the plaintiff to participate.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

108. 581 F.2d at 144 (Swygert, J., dissenting).
109. If the contract was submitted to the court and if the motion was phrased as one to dismiss for failure to state a claim, rule 12(b) would require the result suggested by the dissent, namely that the motion be treated as one for summary judgment.
110. 598 F.2d 1079 (7th Cir. 1979).
In *Cohen v. Illinois Institute of Technology*, Cohen brought an action under section 1983 against her employer, the Illinois Institute of Technology. The defendant answered and moved to dismiss for failure to state a cause of action. This motion was granted by the district court and affirmed on appeal without mention of the possibility that plaintiff might amend, and without directions to the district court to consider proposed amendments on remand. Cohen apparently wished to continue to press her claim. She was barred from beginning a new action, however, by the res judicata effect of the dismissal, unless she obtained relief from that judgment under Federal Rule of Civil Procedure 60(b). The plaintiff failed to amend under rule 15(a), but did have her appeal heard, albeit after an extended, confused litigation.

The Seventh Circuit held that Cohen was not absolutely barred from amending and that she could bring a motion for leave to amend

111. 581 F.2d 658 (7th Cir. 1978).
113. FED. R. CIV. P. 60(b) provides:

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

114. FED. R. CIV. P. 15(a) provides:

Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

115. In *Cohen*, plaintiff first directed a motion for leave to file an amended complaint to the Seventh Circuit, which denied jurisdiction, then directed it to the district court, which also denied jurisdiction. Plaintiff next petitioned the court of appeals for a writ of mandamus to force the district court to assume jurisdiction over her motion and decide the merits. The court granted the writ, the district court assumed jurisdiction and denied the motion. Plaintiff's appeal of this order denying the motion was before the court and denied in this case.
her complaint even though a final determination had been made. However, since the determination had been affirmed on appeal, the decision whether to allow leave was in the sound discretion of the court of appeals. In the Seventh Circuit, the court stated, the practice is for the district court on remand to in fact consider the motion to amend. The court further stated that while Cohen did not do this on the previous appeal, Cohen's instant petition for a writ of mandamus accomplished the same end. The Seventh Circuit further stated that while it may have been more proper for Cohen to seek relief from the final judgment directly under Federal Rule of Civil Procedure 60(b), the writ of mandamus in effect vacated the district court's earlier judgment.

The result of this accommodation, however, appears to be that should a plaintiff fail to ask for or receive a direction from the court of appeals to the district court to consider an amended complaint, plaintiff's relief lies in a writ of mandamus to the court of appeals and not a motion to either the district court or the court of appeals. While the district court could vacate the judgment under rule 60(b), it could not itself grant leave to amend under rule 15(a) without direction from the court of appeals to do so, since the matter had been before the appeals court and its discretion was required for leave to amend. The result is a clumsy procedure at best.

Finally, in *Himmel v. Continental Illinois National Bank & Trust Co.*, the Seventh Circuit discussed the operation of res judicata not only as to matters which in fact were litigated, but also as to matters which might have been litigated but were not. Plaintiffs, beneficiaries of a trust, sued the trustee for mismanagement. Several years earlier, the plaintiffs had brought an action against the trustee to revise the terms of the trust so as to allow the trustees to make investments yielding higher rates of return. In this subsequent action, the district court granted the trustee's motion for partial summary judgment on claims arising from conduct which occurred prior to the entry of judgment in the earlier action on the ground that they were barred by res judicata.

The Seventh Circuit reversed, stating that the present action would be barred only if it was premised on the same cause of action, that is, if the same facts gave rise to both actions, or if plaintiffs in the exercise of due diligence might have brought the present cause of action in the earlier suit. Over a dissent, the court found that the second action

116. 581 F.2d at 662.
118. 596 F.2d 205 (7th Cir. 1979).
119. *Id.* at 210, citing *Bratchett v. Universal Life Ins. Co.*, 519 F.2d 1072 (5th Cir. 1975).
arose out of different facts than the first. The Seventh Circuit then determined that, at the very least, there was a question of material fact concerning whether at the time of the first action the plaintiffs knew or should have known the facts which gave rise to the second action. Given this fact question, summary judgment was inappropriate.\textsuperscript{120}

**Collateral Estoppel**

In the one case of note involving collateral estoppel, *Continental Can Co. v. Marshall*,\textsuperscript{121} the Seventh Circuit thoroughly discussed the operation of collateral estoppel in the setting of administrative agency adjudicative proceedings. Continental Can was a manufacturer whose eighty separate plants were probable targets of an OSHA\textsuperscript{122} administrative proceeding to enforce noise level regulations. Continental Can successfully defended the performance of its plant in the first such proceeding and attempted to bar proceedings against its other plants on the basis that the facts and issues were essentially the same at all its plants, that the agency had tried and lost one proceeding and that it ought to be collaterally estopped from trying again. When the administrative law judge refused to bar further proceedings, Continental Can brought an action in district court for a declaration that collateral estoppel should apply to bar further administrative enforcement proceedings and for an injunction prohibiting the agency from initiating such proceedings.

The Seventh Circuit thoroughly explained and applied the requirements of the doctrine of collateral estoppel,\textsuperscript{123} and held that further proceedings were barred thereby. More interesting, however, was the manner whereby the court found jurisdiction to hear the action and give injunctive and declaratory relief. The court held that the failure of the administrative law judge to allow the operation of collateral estoppel to bar the many threatened similar proceedings allowed the agency to so harass the plaintiff as to violate plaintiff's due process rights and subject the agency action to the jurisdiction of the courts.\textsuperscript{124}

\textsuperscript{120} 596 F.2d at 210-11. It is interesting to note that the court rejected defendants' invitation to invoke judicial estoppel, noting that its very existence in the Seventh Circuit is uncertain. The court went on to find that the principle was inapplicable in this case in any event, since the facts were not the same in the two suits and since plaintiffs' positions were not necessarily inconsistent.

\textsuperscript{121} 603 F.2d 590 (7th Cir. 1979). Continental Can Co. is hereafter referred to as Continental Can.

\textsuperscript{122} Occupational Safety and Health Act, 29 C.F.R. § 1910.95(b)(1) (1978).

\textsuperscript{123} 603 F.2d at 594-96.

\textsuperscript{124} Id. at 597.
PERSONAL JURISDICTION

The 1978-79 term was marked by the Seventh Circuit’s first interpretations of the “new” jurisdiction as set forth by the United States Supreme Court in *Shaffer v. Heitner* and *Kulko v. Superior Court*. In four cases, the Seventh Circuit discussed the constitutional requirements for the exercise of personal jurisdiction over a defendant. In two of three cases where the Seventh Circuit had diversity jurisdiction, the court found personal jurisdiction lacking and dismissed the action, even though in one case substantial proceedings had been conducted which had resulted in a summary judgment for the plaintiff. In the fourth case, where jurisdiction was based on a federal statute which authorized nationwide service of process, the court clarified the point at which the due process question involved in the exercise of personal jurisdiction must be considered.

In *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*, the court rendered its fullest discussion of the current law of jurisdictional due process. The court determined from *Shaffer* that the relationship among the defendant, the forum and the litigation is at the heart of the inquiry. It disposed of the United States Supreme Court decision in *McGee v. International Life Insurance Co.* as limited to its facts because of the presence of a strong state interest, and embraced the “purposefully availed” test first set forth in *Hanson v. Denckla* and later in *Shaffer*. Finding this test not met, the district court’s assumption of jurisdiction was reversed. The summary judgment entered in favor of the plaintiff was vacated and the district court was ordered to either dismiss the case or transfer it to another district in which it might have been brought.

*Lakeside Bridge* was a diversity action on a contract for the sale of goods from plaintiff, a Wisconsin corporation, to defendant, a West Virginia corporation, for use in a third state. Although the contract neither required nor specified where the goods would be manufactured, the plaintiff manufactured the goods in Wisconsin and contended on
appeal that this should have been expected. Plaintiff initiated the sale outside of Wisconsin. However, the contract was executed by the plaintiff mailing an offer from Wisconsin and the defendant sending a purchase order to Wisconsin. Furthermore, while the contract was being performed the plaintiff, in Wisconsin, and the defendant, out of state, corresponded with and telephoned one another. These were the defendant's only business dealings with Wisconsin.

The Seventh Circuit reasoned in *Lakeside Bridge* that while it may have been likely that plaintiff would manufacture the goods within Wisconsin, defendant did not intend it. Absent such intent, whether the defendant purposefully availed itself of the privilege of conducting business within Wisconsin, and thus whether the district court can constitutionally exercise jurisdiction, depends on an inquiry into the nature and quality of the effects of defendant's acts, the relationship between the state, the plaintiff and the defendant, and the inconvenience of the forum to the defendant.134 According to the Seventh Circuit, where the defendant's acts are not highly dangerous, jurisdiction further depends on the defendant's other relationships with the state.135 The court found that in this commercial contract case, the effects of defendant's acts were not highly dangerous, and that the cause of action arose only in part from such acts within the state. The court stated that the formalities of contract execution are not determinative of personal jurisdiction and that the defendants' ability to affirmatively use the forum state's court to sue the plaintiff does not constitute a meaningful relationship for the purpose of determining jurisdiction. Moreover, the court cautioned against burdening the interstate and international commercial systems by inconveniencing defendants through allowing jurisdiction in such commercial cases.

In *Telco Leasing, Inc. v. Marshall County Hospital*,136 the Seventh Circuit affirmed and adopted the decision of an Illinois district court that it would be unreasonable and violative of due process to exercise personal jurisdiction over a Mississippi hospital in a diversity action for breach of a lease agreement. The decision in *Telco Leasing* focused on the relationship among the defendant, the forum and the litigation, rather than mechanical or quantitative evaluations of the defendant's contacts with the forum, in a manner consistent with the analysis in *Lakeside Bridge*.

134. 597 F.2d at 603-04.
135. *Id.* at 602 & 602 n.11.
136. 586 F.2d 49 (7th Cir. 1978).
In *Telco Leasing*, defendant, a Mississippi hospital, began negotiations with out-of-state manufacturers for equipment to be shipped from the manufacturers to the hospital. However, these manufacturers in turn solicited leasing services from the plaintiff leasing company through its out-of-state agent. The agent mailed forms directly to the hospital which were completed and returned by the hospital to the agent. The agent forwarded these, as well as an initial payment made by the hospital to the agent, to the plaintiff in Illinois. Later, the hospital caused signed copies of equipment acceptances, purchase orders, and rental payments to be sent directly to the plaintiff in Illinois, and over an extended period of time the hospital's agents and counsel wrote and telephoned plaintiff in Illinois.

The district court found that the hospital did not initiate the transaction which led to the Illinois contract and that the hospital was not involved in substantial ongoing activity in Illinois, since its agents never visited the state or contacted the state again. The Seventh Circuit disregarded the provisions of the lease agreement itself, which provided that it became binding when accepted by the lessor in Illinois and further provided that the law of Illinois would apply. In effect, the out-of-state independent agent buffered most of the contacts between the hospital and the forum state.

In *Wisconsin v. City of Milwaukee*, the states of Illinois and Michigan brought an action under the federal common law of nuisance against the City of Milwaukee for polluting the waters of Lake Michigan within their state boundaries. Although the basis of jurisdiction was federal question rather than diversity, since there was no applicable nationwide service of process statute, jurisdiction was limited under Federal Rule of Civil Procedure 4(e) by the long arm statute of the forum state and, of course, due process. The Seventh Circuit found

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137. 599 F.2d 151 (7th Cir. 1979).
138. FED. R. CIV. P. 4(e) provides:

Same: Service upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.
that the Illinois long arm statute\textsuperscript{139} was satisfied because Milwaukee's tortious acts occurred within Illinois, since the injury occurred there. The court then found that due process was also satisfied because of the magnitude of Milwaukee's sewage disposal and the substantial threat of harm to Illinois residents which resulted therefrom.

In \textit{Fitzsimmons v. Barton},\textsuperscript{140} however, the Seventh Circuit followed a very different analysis because of the presence of a nationwide service of process statute. In \textit{Fitzsimmons}, the district court had dismissed a defendant in a federal securities fraud action for lack of personal jurisdiction under the state long arm statute and the due process clause. The Seventh Circuit reversed, explaining that the state long arm statute and the standard due process analysis simply are not applicable to federal question actions where nationwide service of process is authorized.\textsuperscript{141} Resort to the state statutes for manner of service was erroneous on the face of Federal Rule of Civil Procedure 4(e) since there was a federal securities statute\textsuperscript{142} providing for nationwide service of process. The only jurisdictional question posed, according to the Seventh Circuit, was "whether the Due Process Clause imposes any restraints on this nationwide service."\textsuperscript{143} The court held that it does not and allowed jurisdiction under the reasoning that due process "fairness" relates to the fairness of the exercise of power by a particular sovereign. In a federal question case, the sovereign is the United States and, thus, the defendant's contacts must be considered in relation to the country as a whole, not to any one forum within it.\textsuperscript{144} Since residence of the defendant in the sovereign alone is sufficient to make jurisdiction fair,\textsuperscript{145} jurisdiction over the defendant, a resident of the United States, was fair in this case.

\textsuperscript{139} ILL. REV. STAT. ch. 110, § 17 (1977).
\textsuperscript{140} 589 F.2d 330 (7th Cir. 1979).
\textsuperscript{142} 15 U.S.C. § 78aa (1976) provides, in pertinent part:

\begin{quote}
Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, . . . may be brought in any such district [wherein any act or transaction constituting the violation occurred] or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.
\end{quote}
\textsuperscript{143} 589 F.2d at 332.
\textsuperscript{144} \textit{id.} at 333.
\textsuperscript{145} \textit{id.}
The court in *Fitzsimmons*, however, emphasized the important role played by the state's interests in the defendant's contacts and activities, noting that in *Shaffer* the United States Supreme Court had "carefully delineated and discussed the various state interests which arose from the contacts present and considered whether the interests could fairly justify the exercise of jurisdiction over a non-resident defendant."\(^{146}\) This discussion of due process was unnecessary to the decision in *Fitzsimmons* and unfortunately was at odds with *Lakeside Bridge*, where the purposefully availed strain of the analysis was emphasized.

Finally, the court of appeals in *Fitzsimmons* acknowledged that even when the district court sits as a federal court and there is a nationwide service of process authorization, the defendant's relationship with a particular forum within the sovereign still may present problems.\(^{147}\) Indeed, the problems may rise to constitutional dimensions.\(^{148}\) Nonetheless, these problems are the proper concern of forum non conveniens or venue, not jurisdiction.\(^{149}\)

**APPELLATE JURISDICTION**

Several cases in 1978-79 presented to the Seventh Circuit the task of monitoring the flow of issues to the appellate level by articulating and applying standards of finality and procedures for securing appellate review, and by setting the standards to be used in reviewing the various issues which come before the court of appeals. In many instances, the court considered its own jurisdiction under sections 1291\(^{150}\) and 1292\(^{151}\) to hear the matter sought to be appealed. In several of

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146. *Id.* at 332.
147. *Id.* at 334.
148. *Id.* at 334 n.5.
149. *Id.* at 334-35. The court also considered venue in Donnelley Corp. v. FTC, 580 F.2d 264 (7th Cir. 1978).
150. 28 U.S.C. § 1291 (1976) provides in part: The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court.
151. 28 U.S.C. § 1292 (1976) provides, in pertinent part: The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, ... or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; ... When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however, That applica-*
these cases, the court examined jurisdiction on its own motion, thus re-emphasizing the fundamental rule that parties cannot confer, or waive objections to, subject matter jurisdiction. While the court noted in these cases that the United States Supreme Court has taken an "intensely practical" approach to deciding whether judgments are appealable, the Seventh Circuit also cautioned that exceptions to the statutory scheme such as the Cohen doctrine would be strictly applied, and alternate procedures such as a Federal Rule of Civil Procedure 54(b) order would be strictly enforced.

In In re General Motors Corp. Engine Interchange Litigation, the Seventh Circuit was presented with an order of the district court approving a class action settlement for the claims of one of two subclasses. The district court had refused the motion of dissatisfied members of the subclass to enter judgment pursuant to Federal Rule of Civil Procedure 54(b). Thus, the subclass members were forced to appeal the order as collateral. The court set forth at length the four traditional requirements of the "collateral" order exception: (1) the order must have been finally determined in the sense that although further consideration by the district court is possible, it is unlikely; (2) the order must be separable from the merits; (3) rights of the appellant would be irretrievably lost if review were delayed; and, (4) review of the order must present important and unresolved legal questions.

The court first found that the order in effect was final since the

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152. U.S. Gen., Inc. v. City of Joliet, 598 F.2d 1050, 1051 (7th Cir. 1979); In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1117 (7th Cir. 1979).
153. 594 F.2d at 1117, citing Levin v. Baum, 513 F.2d 92 (7th Cir. 1975).
155. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). In Cohen, the United States Supreme Court held that an order may be appealable where it is "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Id. at 546-47.
156. Fed. R. Civ. P. 54(b) provides:
Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
157. 594 F.2d 1106 (7th Cir. 1979).
158. See note 156 supra.
159. 594 F.2d at 1118-21.
district court had conducted an extensive fairness hearing and twice had refused to reconsider the order. Although the district court retained jurisdiction, it did so merely to complete the ministerial task of implementing the settlement. That the order was sufficiently separate to satisfy the second requirement was not as clear to the court. The Seventh Circuit reasoned that to properly review the fairness of the sub-class settlement, the court must in effect review the merits of the underlying cause of action. Separateness, however, in the sense "a semanticist might expect" is not required.

The court further found that upon review an appellate court does not reach the real merits of the cause of action, but rather decides only whether the district court abused its discretion when it considered the merits of the case as part of its evaluation of the appropriateness of the entire settlement. The third requirement was satisfied, according to the Seventh Circuit, because the appellants would suffer an irretrievable loss of rights if forced to delay their appeal until the conclusion of the rest of the suit. Such a delay might last several years, by which time review would be ineffective. Finally, the court found that striking the proper balance between encouraging settlements and ensuring fairness to class action litigants was a sufficiently important question of law to allow the appeal.

In *American Telephone & Telegraph Co. v. Grady*, the Seventh Circuit found that the "collateral order" exception was satisfied by an order entered by the district court in the case *MCI Communications Corp. v. American Telephone & Telegraph Co.* The order granted the motion of the government, a non-party, to modify a protective order in force between the parties and to require MCI to make available to the government information which it obtained in discovery from AT&T for use in a pending government case against AT&T.

While acknowledging that the *Cohen* rule generally is inapplicable to discovery orders, the Seventh Circuit held it was applicable in this case because the petitioner did not have the other usual options tochal-

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162. 594 F.2d at 596, citing Alexander v. United States, 201 U.S. 117, 121 (1906). Compare the Seventh Circuit's refusal to hear a discovery order in the class action in Judd v. First Fed. Sav. & Loan Ass'n, 599 F.2d 820 (7th Cir. 1979). In *Judd*, the plaintiffs appealed an order of the district court denying them the use of defendants' computer lists to identify class members in a less expensive manner. The Seventh Circuit held that the order was unreviewable under *Cohen* since it did not present either an important issue or an irretrievable burden on the plaintiffs. *Id.* at 822. According to the court, if eventual review were to conclude that plaintiffs should have had use of the
lenge the order, and because delay would cause an irretrievable loss of rights. Normally, an order allowing discovery can be challenged by refusing to produce or testify, being cited for criminal contempt and then appealing that order. While possibly quite costly, this option at least allows separate and expedited review of the discovery order without divulging the contested information. However, in this case AT&T could not prevent the release of the information ordered by the district court because the information already was in the possession of MCI which had been ordered to release it to the government.

In the other cases decided by the Seventh Circuit, however, the court discussed the requirements of Cohen in terms so strict that much of the discussion in In re General Motors Corp. Engine Interchange Litigation is misleading at best, and then refused to hear the appeals. Perhaps the best example is Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Insurance Co. In this case, the Seventh Circuit refused to review an interlocutory order in which the district court denied defendant's motion to dismiss the complaint and to abstain because of an injunction entered in a pending state suit. The court found that the order failed to satisfy two requirements of Cohen, which it interpreted quite strictly: the order did not present an unsettled question of law and it did not cause the defendant an irretrievable loss of rights.

According to the Seventh Circuit, the question of law presented by the order was merely whether the district court abused its discretion by refusing to abstain because previously a state court had enjoined plaintiff from bringing further suits of any kind in any forum. Yet, the court stated that the settled law is that abstention probably would have been an abuse of discretion since the complaint alleged a claim over which the district court has exclusive jurisdiction. Moreover, where the question presented by the order is merely whether the district court properly exercised its discretion, the order rarely will be subject to review under Cohen. The exercise of discretion can hardly be considered an unsettled question of law, nor has the appellant lost much of a right when the district court has decided adversely to him in its discretion.

The conflict with In re General Motors is obvious. In Central

computer lists, they could recover from the defendants the additional expense incurred because of the erroneous ruling. Id. at 822-23.
163. 594 F.2d 1106 (7th Cir. 1979).
164. 600 F.2d 671 (7th Cir. 1979).
165. See note 157 supra and accompanying discussion in text.
States Fund, the fact that the question presented by the order was the review of discretion of the district court defeated appealability under Cohen. The same result did not obtain in In re General Motors although this was the sole question. Moreover, the legal questions in the two cases seem equally important and equally settled, although the court found this was not so.

Finally, the court's treatment of the appellant's loss was problematic. The appellant's loss of right—to be forced to defend itself in the federal forum—was not viewed by the court as irretrievable or different from the harm present in the denial of every motion to dismiss. Nonetheless, it is difficult to distinguish this harm from that in Cohen as readily as did the Seventh Circuit. In Cohen, the district court held that a state statute requiring plaintiffs to post a security bond for defendant's costs and attorneys fees did not apply in a diversity action in federal court, and dismissed the defendant's motion for a bond. The court heard defendant's appeal of that order in part because the defendants would experience irretrievable harm if forced to undertake litigation without the assurance provided by the bond that they would be reimbursed their costs and fees if they ultimately triumphed. Thus, in Cohen, as in Central States Fund, the harm at issue was that of being forced to bear the costs of litigation. Further, the harm in Cohen really was less; the appellant had a chance to recover full costs should the district court's decision on the bond requirement be reversed. In Central States Fund, the appellant had no hope of recovering costs or fees from the opposing party.

The Seventh Circuit also decided several cases concerning its appellate jurisdiction under rule 54(b) and sections 1291 and 1292(a)(1). In U.S. General, Inc. v. City of Joliet, the court put bench and bar on notice that the practice of certification under Federal Rule of Civil Procedure 54(b) will never be the same in the Seventh Circuit. In that case, after examining the certification on its own motion and finding it deficient, the court independently determined that certification was not improper in the case and heard the appeal. However, the court flatly warned that future rule 54(b) certifications with similar deficiencies may not be expected to survive in the Seventh Circuit.

The court explained: "A proper exercise of the trial court's

166. See note 81 supra and accompanying discussion in text.
167. See note 156 supra.
168. See notes 150-51 supra.
169. 598 F.2d 1050 (7th Cir. 1979).
170. Id. at 1051 n.1.
discretion under Rule 54(b) also requires more than a recital of the statutory formula. The considerations underlying the exercise of that discretion should be articulated.171 Furthermore, the order must expressly direct entry of judgment and judgment must be obtained in accordance with Federal Rule of Civil Procedure 58.172

With respect to section 1291173 appeals of final orders, in Sportmart, Inc. v. Wolverine World Wide, Inc.174 the Seventh Circuit assumed jurisdiction of an appeal from a denial of a motion for civil contempt for violation of a consent decree, noting that while orders denying contempt motions usually are non-final, most post-judgment orders are final under section 1291.175 The court held that the consent decree operated as a final judgment for purposes of section 1291, and since the district court had completely disposed of the matter, the order was final and appealable.

Finally, in two cases the court of appeals considered whether an interlocutory order involved injunctive relief so as to make it appealable under 28 U.S.C. § 1291(a)(1).176 In Barrett v. Grand Trunk Western Railroad,177 a railroad employee brought an action to obtain proper seniority and back pay on account of his service in the armed forces.

171. Id.
172. Id. FED. R. CIV. P. 58 provides:
   Subject to the provisions of Rule 54(b):
   (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;
   (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Compare Licek Potato Chip Co. v. Fair, 599 F.2d 181 (7th Cir. 1979), where the court also strictly enforced the rule 54(b) standards. In this case, the Seventh Circuit denied review of an order of the district court affirming an order of a bankruptcy judge dismissing a third-party complaint in a bankruptcy proceeding for want of jurisdiction. After considering special statutory provisions relating to the court's appellate jurisdiction in bankruptcy matters, the court found that the order dismissing the third-party complaint was a classic example of an interlocutory, non-final order. Virtually the only way to review such an order, the Seventh Circuit stated, was for the district court to determine that under rule 54(b) the order is final. However, the court dismissed appellant's arguments that the district court intended to and substantially did comply with rule 54(b) and refused the appeal. However, it was noted that appellants still could move the district court for such a determination.

174. 601 F.2d 313 (7th Cir. 1979).
175. Id. at 315-16. For text of 28 U.S.C. § 1291 (1976), see note 150 supra.
176. See note 150 supra.
177. 581 F.2d 132 (7th Cir. 1978).
Defendant railroad appealed from an order granting plaintiff partial summary judgment on the issue of liability, ordering the parties to proceed with the damage case and ordering the defendant to adjust its records to reflect the earlier seniority date for the plaintiff. The Seventh Circuit held that the portion of the order expressly mandating the defendant to adjust Barrett’s employment records was an injunction and brought the entire order within section 1292(a)(1). In *United States v. American Institute of Real Estate Appraisers*, however, the court dismissed for want of jurisdiction an appeal from an order approving a proposed settlement between the United States and one of the defendant associations and denying an intervenor’s petition to restrain the association from entering into the settlement. The Seventh Circuit held that opposition to a proposed settlement, even if characterized as requesting an injunction against settling, does not involve an injunction within the meaning of section 1292(a)(1).

178. 590 F.2d 242 (7th Cir. 1978).

179. Other civil procedure cases decided by the Seventh Circuit during 1978-79 are set forth below.

PLEADING: Sparkman v. McFarlin, 601 F.2d 261 (7th Cir. 1979) (strict pleading test for 42 U.S.C. § 1983 (1976) conspiracy action); Verhein v. South Bend Lathe, Inc., 598 F.2d 1061 (7th Cir. 1979) (denial of motion for leave to amend complaint; complaint proper where amended allegations insufficient); Lupia v. Stella D’Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978) (standards for summary judgment under rule 56); Sassi v. Breier, 584 F.2d 234 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) (relation back of amendment to complaint under rule 15(c)); Lamb’s Patio Theatre, Inc. v. Universal Film Exchanges, Inc., 582 F.2d 1068 (7th Cir. 1978) (refusal of summary judgment under rule 56(f) pending further discovery properly denied).

DISCOVERY: Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978) (standard of review under rule 60(b) of dismissal of complaint under rule 37(b)(2) for plaintiff’s willful failure to comply with discovery order); Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978) (rule 37(b) dismissal for failure to comply with pretrial discovery orders); First Wisconsin Mortgage Trust v. First Wisconsin Corp., 584 F.2d 201 (7th Cir. 1978) (availability of work product of previous counsel disqualified for conflict of interest).

DISQUALIFICATION OF COUNSEL: Novo Terapeutisk Laboratorium, A/S v. Baxter Travencol Laboratories, Inc., 607 F.2d 186 (7th Cir. 1979); Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978).

INJUNCTIONS: Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979) (lesser showing required for injunctive relief in favor of a sovereign); Bastian v. Lakefront Realty Corp., 581 F.2d 685 (7th Cir. 1978) (claim for injunction not moot where conduct sought to be enjoined occurs before final review); Kolz v. Board of Educ., 576 F.2d 747 (7th Cir. 1978) (standard of review of denial of preliminary injunction).


STATUTES OF LIMITATIONS: Nemkov v. O’Hare Chicago Corp., 592 F.2d 351 (7th Cir. 1979) (where exclusive remedy in action on federal right is equitable, laches applies, not statute of limi-
CONCLUSION

During the 1978-79 term, the Seventh Circuit decided many cases involving civil procedure issues. This article has attempted to select for discussion those cases which in most instances may make that critical difference in the tug-of-war we call litigation.


OTHER: August v. Delta Air Lines, 600 F.2d 699 (7th Cir. 1979) (good faith requirement read into rule 68 offer of judgment); Luria Bros. & Co. v. Piellet Bros. Scrap Iron & Metal, Inc., 600 F.2d 103 (7th Cir. 1979) (jury damage verdict did not reflect improper compromise on liability or damages); SCA Services, Inc. v. Lucky Stores, Inc., 599 F.2d 178 (7th Cir. 1979) (post-judgment award of costs should include cost of copies of depositions); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979) (timeliness of rule 50(b) motion for directed verdict); S.J. Groves & Sons Co. v. Local 627, Int'l Bhd. of Teamsters, 581 F.2d 1241 (7th Cir. 1978) (refusal of district court judge to disqualify himself under 28 U.S.C. § 455 (1976)).