April 1982

Civil Procedure: A Generally Well-Lit Path Through the Federal Courts

CIVIL PROCEDURE: A GENERALLY WELL-LIT PATH THROUGH THE FEDERAL COURTS

RICHARD J. O'BRIEN, JR.*

During the Seventh Circuit's 1980-81 term, the court decided many cases that resolved questions pertaining to civil procedure in the federal courts. The cases which are discussed below were chosen because they either resolved novel questions or rendered decisions that departed from past precedent in some fashion. Only a few of the cases selected are potentially of national note. For purposes of the following discussion, they have been grouped into five broad subject areas of civil procedure: access to the district courts, pretrial practice, trial practice, choice of law determinations and appellate jurisdiction.

ACCESS TO THE DISTRICT COURTS

Whether a federal forum will be provided for the resolution of a dispute is a question that could concern a variety of disparate issues of civil procedure. This section addresses recent Seventh Circuit cases concerning original subject matter jurisdiction, personal jurisdiction and statutes of limitations.

**Original Subject Matter Jurisdiction**

Stated simply, original subject matter jurisdiction refers to the power of a court to take cognizance of a controversy from the time of its commencement and to resolve it in the first instance. Fundamental to federalism is the principle that federal courts are courts of limited subject matter jurisdiction. Subject matter jurisdiction may not be waived or conferred by the parties, nor will it be affected by estoppel principles. Within the immutable boundaries of federal judicial power drawn by the Constitution, the contours of federal subject matter jurisdiction are shaped by Congress.

---

* Associate, Sidley & Austin, Chicago, Illinois. Former Law Clerk to Honorable Abraham Lincoln Marovitz, United States District Court for the Northern District of Illinois. B.A., St. Louis University; J.D., Georgetown University Law Center.


3. Article three of the Constitution is the source of judicial power, providing, *inter alia*, that that power shall extend only to actual cases and controversies. U.S. CONST. art. 3. Further, article
Of the few cases of note decided by the Seventh Circuit this term that raised issues concerning subject matter jurisdiction, none touched upon the constitutional limitations of that jurisdiction. Further, those decisions discussed below do not represent any significant departure from prior Seventh Circuit law with regard to the statutory limitations upon federal jurisdiction. The cases discussed are nonetheless worthy of note as indicated below.

Two of the cases indicate that statutory jurisdictional restrictions upon the exercise of federal power may be overridden by what the Seventh Circuit perceives to be the important concerns underlying the availability of class actions. The first of these cases, *Air Line Stewards & Stewardesses Association, Local 550 v. Trans World Airlines, Inc.*,\(^4\) involves a decade of class litigation brought under Title VII of the Civil Rights Act of 1964, as amended,\(^5\) challenging TWA's policy of terminating female flight attendants once they became mothers. The jurisdictional issue presented in *Air Line Stewards* was whether the district court had the power to approve a settlement of all claims after the Seventh Circuit had determined in an earlier appeal that the district court lacked subject matter jurisdiction over more than ninety percent of the claims. That issue was framed by the somewhat convoluted procedural path taken by the litigation prior to approval of the settlement by the district court. In *In re Consolidated Pretrial Proceedings in the Airline Cases*,\(^6\) the district court's grant of summary judgment to the class members was reversed because ninety-two percent of the class members had not filed their charges of discrimination with the Equal Employment Opportunity Commission\(^7\) within ninety days\(^8\) of the alleged discriminatory action, a requirement that the Seventh Circuit ruled to be jurisdictional.\(^9\) The Seventh Circuit's mandate was stayed, however, pending consideration by the United States Supreme Court of the parties' certiorari petitions. Meanwhile, the parties entered into a settle-

\(^{4}\) 630 F.2d 1164 (7th Cir. 1980), aff'd, 102 S. Ct. 1127 (1982).


\(^{6}\) 582 F.2d 1142 (7th Cir. 1978), rev'd, 102 S. Ct. 1127 (1982).

\(^{7}\) Hereinafter referred to as EEOC.

\(^{8}\) When the *Air Line Stewards* action was filed, 42 U.S.C. § 2000e-5(d) (1976) required that a Title VII claim be filed within 90 days of the allegedly discriminatory act to be subject to redress under Title VII. Subsequently, Title VII's EEOC filing requirement was amended to extend the time limit to 180 days. 42 U.S.C. § 2000e-5(e) (Supp. III 1979).

\(^{9}\) 582 F.2d at 1151.
ment of the claims before the district court. Thereafter, the labor organization representing current TWA flight attendants, the Independent Federation of Flight Attendants, filed an appeal from the settlement order, raising the jurisdictional question stated above.

The Seventh Circuit upheld the district court's order approving the settlement. The Seventh Circuit's ruling derives from its characterization of the question of whether the EEOC filing requirement is jurisdictional as an "unsettled" one and, given that characterization, its perception of the policies favoring the settlement of class actions and the weight it assigned to those policies. The court's reasoning appears to be weak in two important respects. First, the Seventh Circuit's characterization of the nature of the EEOC filing requirement as being "unsettled" is exceedingly deferential to the minority view holding that it is not jurisdictional. It is now well settled law in the Seventh Circuit that the EEOC filing requirement is jurisdictional. Moreover, while the Supreme Court has arguably never expressly held the EEOC filing requirement to be jurisdictional, it has repeatedly referred to it as such.

Beyond the question of whether the jurisdictional nature of the EEOC filing requirement is "unsettled," there is the more fundamental question of whether uncertainties over a federal court's subject matter jurisdiction should trigger the policy considerations which attend the settlement of class actions. Settlements are entered into so that litigants may avoid the "uncertainties of outcome in litigation, as well as . . . wasteful litigation and expense." For those reasons, courts generally favor the settlement of actions, particularly class actions. As previously stated, however, subject matter jurisdiction may neither be waived nor conferred by the parties. Further, a federal court is bound

10. At the parties' request, the Supreme Court deferred consideration of the certiorari petitions so that their settlement discussions could be completed. 630 F.2d at 1166.
11. Id. at 1167-69. The Seventh Circuit has in the past indicated that class action procedure is often a preferred vehicle for the resolution of Title VII issues. Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969). See also Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). For a critique of that view, see Rutherglen, Title VII Class Actions, 47 U. Chi. L. Rev. 688 (1980).
13. Patterson v. Stovall, 528 F.2d 108, 112 (7th Cir. 1976) (quoting Florida Trailer & Equip. Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960)).
14. See, e.g., Armstrong v. Board of School Directors, 616 F.2d 305, 312-13 (7th Cir. 1980).
to conclusively resolve questions pertaining to its subject matter jurisdiction whenever they arise and as soon as they arise. Therefore, it would seem to be quite a different matter to uphold a court-approved settlement predicated upon uncertainties as to the merits of an action than to uphold a court-approved settlement predicated upon uncertainties as to the court's power to entertain the action. The Seventh Circuit in *Air Line Stewards* expressly declined to draw such a distinction, stating that "the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action." 

In *Appleton Electric Co. v. Graves Truck Line, Inc.*, the Seventh Circuit was again faced with a jurisdictional question presented by a statutory filing requirement deemed to be jurisdictional. *Appleton* was an action brought under the Interstate Commerce Act seeking the recovery of certain overcharges from a defendant class on behalf of a class of plaintiffs. The Interstate Commerce Act contains certain time limitations for the filing of actions which have been determined to be jurisdictional. The issue presented in *Appleton* was whether jurisdiction existed over the claims against a particular defendant class member when that defendant did not receive notice of the action until after the expiration of the statutory time period. The Seventh Circuit held that jurisdiction does exist over such a claim.

*Appleton* clearly illuminates the importance that the Seventh Circuit often attaches to the purposes underlying class actions. Those purposes are, in short, "litigative efficiency and economy." The Seventh

---

18. 630 F.2d at 1169. In failing to make the distinction, the Seventh Circuit rejected the position of the Fifth Circuit as articulated in *McArthur v. Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978) (en banc; per curiam). While the Seventh Circuit made some attempt to distinguish *McArthur* by pointing out that in that case no member of the class had met Title VII's filing requirement, it also voiced its disapproval of *McArthur*'s holding. Therefore, the fact that some of the class members in *Air Line Stewards* had satisfied the EEOC filing requirement was apparently of no importance to the Seventh Circuit's decision. The Fifth Circuit itself has questioned its holding in *McArthur*, finding the word "jurisdictional" to have been used too loosely. *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981). The Fifth Circuit now recognizes, along with many other circuits, that the filing requirements of Title VII and similar statutes are subject to equitable tolling. See, e.g., *Oaxaco v. Roscoe*, 641 F.2d 386, 388 (5th Cir. 1981) (Title VII); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 591-92 (5th Cir. 1981) (Age Discrimination in Employment Act, 29 U.S.C. § 626(d) (Supp. III 1979)).
21. *Id.* § 11706 (formerly 49 U.S.C. § 16(3)).
23. 635 F.2d at 609.
24. *Id.* (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556 (1974)). The mod-
CIVIL PROCEDURE

Circuit's analysis in *Appleton* implicitly recognizes that, while the limitation period of the Interstate Commerce Act is deemed to be jurisdictional, its underlying purposes are basically those shared by all limitation periods, *i.e.*, that litigation must come to an end and should be conducted before evidence becomes stale. In the context of an individual civil rights action, the Seventh Circuit has ruled that a "John Doe" defendant not specifically named within the limitation period could assert the statute of limitations as a defense. However, in *Appleton*, the considerations underlying periods of limitation were directly pitted against the considerations in support of class actions, and the Seventh Circuit in that context found the latter to be paramount.

In so ruling, the Seventh Circuit relied in part upon the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*. *American Pipe* held that the filing of a class action on behalf of unnamed plaintiffs tolls the applicable statute of limitations as to each unnamed plaintiff until either class certification is denied or, if granted, he chooses to opt out of the class as certified. The Seventh Circuit viewed the teaching of *American Pipe* as support for its *Appleton* holding inasmuch as it gave preference to the effective prosecution of a class action over a rigid application of a statute of limitations. As the Seventh Circuit recognized, however, *American Pipe* was not dispositive of the question raised in *Appleton*, a question that before the Seventh Circuit's decision in *Appleton* had not been confronted by a court of appeals. *American Pipe* does not severely frustrate the purposes of limitation periods since defendants have been placed on notice within the limitation period that they will have to defend an action that may be litigated by a class of yet unnamed plaintiffs. As a result, they should endeavor to preserve and collect evidence in their defense.
Appleton, on the other hand, posed a direct and unavoidable conflict between the purposes of limitation periods and class actions.

The Seventh Circuit's tilting of the scales in favor of the purpose to be served by class actions appears to be significantly influenced by pragmatic considerations. The Seventh Circuit persuasively reasoned that actions against a defendant class would be effectively eliminated and the dockets of federal courts significantly increased if a limitation period is not tolled as to a defendant class member until he receives notice of the suit. Such a ruling would cause plaintiffs seeking to sue a class of defendants to file and prosecute numerous protective suits until a determination regarding class certification could be made. Whether the rule announced by the Seventh Circuit will ultimately gain acceptance by the other courts of appeals remains to be seen. In any event, Appleton represents an able handling of a difficult and novel question.

The final Seventh Circuit decision to be discussed concerning the area of subject matter jurisdiction is Uptown People's Community Health Services Board of Directors v. Board of Commissioners. Uptown was an action asserting both state and federal claims against state and federal defendants. After a trial in federal district court on the state claims against the state defendants, the trial court entered judgment in favor of the plaintiffs on those claims and the state defendants appealed. On appeal, the Seventh Circuit found that, because none of the federal claims asserted were substantial, the trial court erred in exercising pendent jurisdiction over the state claims.

While Uptown is largely based on settled law, it is noteworthy because of its implications with respect to the unsettled question of whether a federal court may append a state law claim against one defendant to a federal claim asserted against another defendant. Lower federal courts are divided as to whether such pendent party jurisdiction is a proper invocation of the modern doctrine of pendent jurisdiction as first articulated in United Mine Workers of America v. Gibbs. In past decisions, the Seventh Circuit has indicated, albeit equivocally, that pendent party jurisdiction is not a proper exercise of federal subject

33. 635 F.2d at 610. But see Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980) (expressing disapproval of use of class action procedure against a defendant class).
34. 647 F.2d 727 (7th Cir. 1981).
35. Id. at 739.
matter jurisdiction,\textsuperscript{37} and a recent Supreme Court decision voices unfavorable pronouncements on the exercise of pendent party jurisdiction.\textsuperscript{38}

In \textit{Uptown}, however, the Seventh Circuit, after determining that no substantial federal claim was pleaded against the state defendant, proceeded to ascertain whether a substantial federal claim was asserted against the federal defendant without ever broaching the pendent party jurisdiction question,\textsuperscript{39} a question that, logically speaking, should be addressed first. Whether \textit{Uptown} assumed the availability of pendent party jurisdiction and therefore represents a departure from the Seventh Circuit’s earlier disapproval of pendent party jurisdiction is uncertain. Its implications, however, do promise to make somewhat muddier the waters surrounding the court’s already unclear position on the propriety of pendent party jurisdiction.\textsuperscript{40}

\textbf{Personal Jurisdiction}

Personal jurisdiction is the judicial power to render a judgment against a person.\textsuperscript{41} Unlike subject matter jurisdiction, principles of waiver and estoppel do apply to personal jurisdiction.\textsuperscript{42} Two kinds of constraints are placed upon a court’s jurisdiction over persons. The outer reaches of personal jurisdiction are constitutionally defined by the due process clause which requires that a person have such “mini-


\textsuperscript{39} 647 F.2d at 738.

\textsuperscript{40} Other decisions of note pertaining to original subject matter jurisdiction that were rendered this last term by the Seventh Circuit include: McGrath v. Zenith Radio Corp., 651 F.2d 458 (7th Cir. 1981) (federal securities law claims not so insubstantial as to preclude assertion of pendent jurisdiction over state law claims); Precision Shooting Equip. Co. v. Allen, 646 F.2d 313 (7th Cir. 1981) (actual controversy exists as to declaratory judgment action filed by patent licensee challenging validity of patent because the licensee is entitled to determination as to whether it is required to continue paying patent royalties); Bread Political Action Comm. v. Federal Election Comm’n, 635 F.2d 621 (7th Cir. 1980) (actual controversy exists where plaintiff’s political conduct chilled due to the parties’ disagreement as to interpretation of Federal Election Campaign Act); City Investing Co. v. Simcox, 633 F.2d 56 (7th Cir. 1980) (abstention in action challenging Indiana Takeover Act on constitutional grounds appropriate where pending state court action may result in interpretation of the act that will render it constitutional); International Harvester Co. v. Deere & Co., 623 F.2d 1207 (7th Cir. 1980) (no actual controversy exists over a declaratory judgment action challenging the validity of a patent unless the owner of the patent has instilled in the plaintiff a reasonable apprehension of an infringement suit).


mum contacts” with a forum so that the forum’s exercise of jurisdiction over him does not offend traditional notions of fairness and substantial justice. 43 Within the limitations imposed by the due process clause, state statutory law is free to impose more stringent limitations. 44

Recent years have witnessed a slight retreat from the somewhat expansive view of preceding years with respect to the due process limitations placed upon personal jurisdiction. 45 The few decisions rendered by the Seventh Circuit this term signal no further developments in this area. The decisions noted below are nonetheless of some interest because of their application of personal jurisdiction principles to some rather unique factual circumstances.

Perhaps the most interesting personal jurisdiction question presented to the Seventh Circuit this term was that in Koster v. Automark Industries, Inc. 46 Koster was an appeal from a grant of summary judgment to the plaintiff that was based upon a default judgment obtained by the plaintiff against the defendant in a contract action commenced in the Netherlands. The record in Koster indicated that the defendant’s only contacts with the Netherlands were several letters and wire communications with the plaintiff prior to the execution of a sales contract in Milan, Italy. No delivery or payment was ever made under the contract. The Seventh Circuit reversed the order of the district court on due process grounds, finding that the defendant had insufficient contacts with the Netherlands to vest that forum with personal jurisdiction over it. 47

The Seventh Circuit in Koster recognized the salient principle of the assertion of personal jurisdiction over a defendant foreign company to be “whether the company ‘purposefully avail[ed] itself of the privilege of conducting activities within the forum State.’” 48 In making this determination in Koster, the Seventh Circuit drew heavily upon its recent opinion in Lakeside Bridge & Steel Co. v. Mountain State Construction Co. 49 In Koster, as in Lakeside, the court noted that the

---

46. 640 F.2d 77 (7th Cir. 1981).
47. Id. at 79.
48. Id. at 78 (quoting Shaffer v. Heitner, 433 U.S. 186, 216 (1977)).
49. 597 F.2d 596 (7th Cir. 1979). For a rather sharp criticism of the Lakeside decision (which seems to have lost some of its force after the Supreme Court’s decision in World-Wide Volkswagen), see Note, Lakeside Bridge & Steel Co. v. Mountain State Construction Co.: Inflexible
recognition of personal jurisdiction solely upon the basis of business communications into a forum would virtually erase the bounds placed upon personal jurisdiction by the due process clause. Further reiterating principles enunciated in Lakeside, the Koster court remarked that to give effect to the Netherlands' exercise of personal jurisdiction over the defendant would "improperly impinge upon the interests of other states by trying in its courts a case with which it has no adequate relationship." The court also noted that the exercise of personal jurisdiction over the defendant was not supportable by reference to any contacts of the defendant with the Netherlands other than those pertaining to the particular transaction underlying the suit.

In a factual setting presenting a stronger case for the assertion of personal jurisdiction, Nu-Way Systems of Indianapolis, Inc. v. Belmont Marketing, Inc., the Seventh Circuit declined to find personal jurisdiction over defendant Service Finance Company. The transaction underlying Nu-Way was a contract for Nu-Way to assign to Service Finance, in consideration for capital funds, Nu-Way's accounts receivable generated by its installment sales of retail merchandise to Indiana consumers. The contract provided that the assignments were with full recourse against Nu-Way should a customer of Nu-Way default on the sales contract. The contract was solicited, negotiated and executed in Illinois. At the time of the lawsuit, Service Finance had been assigned several hundred contracts.

On the basis of these facts, the Seventh Circuit again held that the defendant had not "purposefully avail[ed] itself of the privilege of conducting activities" in the forum state. The court rejected arguments that Nu-Way's performance under the contract was to take place in Indiana or that Service Finance derived substantial benefit from any services supplied in Indiana. The court reasoned that any service supplied by Service Finance was supplied to Nu-Way in Illinois.


50. 640 F.2d at 79.
51. Id. at 79-80 (quoting Lakeside Bridge & Steel Co. v. Mountain State Constr. Co., 597 F.2d at 603).
52. 640 F.2d at 80. In Lakeside, the Seventh Circuit had stated that where the defendant's business contacts with the forum state do not involve dangerous activity, the determination as to minimum contacts should be made in light of any contacts of the defendant with the forum other than those related to the lawsuit. 597 F.2d at 603.
53. 635 F.2d 617 (7th Cir. 1980).
54. Id. at 620 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
55. 635 F.2d at 620-21.
56. Id. at 621.
The final Seventh Circuit decision this term to be discussed in the context of personal jurisdiction is *Casas v. Royal Bank of Canada*.57 The question of personal jurisdiction presented in *Casas* was whether the activities conducted from defendant's Chicago office were sufficient to subject it to jurisdiction under Illinois' long-arm statute and the due process clause. The pertinent provision of Illinois' long-arm statute58 had been interpreted by Illinois courts to permit service upon a foreign corporation only if the activity of the corporation in Illinois giving rise to the lawsuit constituted more than the "mere solicitation" of business.59

The defendant in *Casas* was a Canadian banking corporation with an office in Chicago. While the defendant maintained that its Chicago office conducts no "banking business," the Seventh Circuit noted that the Chicago office performs a wide range of ancillary services for customers of the bank residing in the midwest.60 The Seventh Circuit noted that the record showed that the defendant's employees assigned to the Chicago office facilitate "the solicitation of new business, the expansion of present business and the retention of existing accounts."61 Given these factual findings, the Seventh Circuit concluded that the defendant's Chicago offices were engaged in more than the "mere solicitation" of business and, in addition, that its presence in Illinois satisfied due process requirements.62

**Statutes of Limitations**

This section reviews several decisions involving difficult determinations by the Seventh Circuit with respect to the availability of an applicable statute of limitations as a defense to a claim.63 Statutes of limitations are statutes of repose, intended to signal an end to litigation, and also serve to further the truth-finding process of the judicial system by helping to ensure that evidence will not have already become stale by the time it is presented.64 Statutes of limitations necessarily erect a somewhat arbitrary division between those claims that will be found

57. 625 F.2d 139 (7th Cir. 1980).
58. ILL. REV. STAT. ch. 110, § 13.3 (1979) provides, in pertinent part, that "[a] private corporation may be served (1) by leaving a copy of the process with its registered agent or any officer or agent of said corporation found anywhere in the State; . . . ."
59. See Lindley v. St. Louis-San Francisco Ry., 407 F.2d 639 (7th Cir. 1968).
60. 625 F.2d at 142-43.
61. Id. at 142.
62. Id. at 143-44.
63. Other cases concerning statutes of limitations deemed to be jurisdictional were discussed at notes 2-33 supra and accompanying text.
cognizable and those that will not. Recent Seventh Circuit decisions of note in this area largely evidence a ready willingness to eschew a formalistic interpretation of statutes of limitations when a weighing of the applicable equities argues in favor of doing so.

Two such cases this term concerned claims brought under the Federal Tort Claims Act. The first of these, McGowan v. Williams, was brought under the federal drivers provisions of the FTCA which contain a six-month limitation period. While the remedies provided by the federal drivers provisions are exclusively federal, the provisions anticipate that suits will be filed in state court since the provisions require the United States to defend such a suit when filed and to remove it to federal court upon a determination that the claim arose while the driver involved was acting “within the scope of his employment.” The district court interpretation of the limitation period that was challenged on appeal in McGowan provided that the period for an action originally commenced in state court was tolled only if and when it was removed to federal court.

The Seventh Circuit rejected this interpretation based upon its “practical and realistic” interpretation of the statute of limitations and upon fairness considerations. Because the FTCA contemplates that suits will be brought in state court, the Seventh Circuit reasoned that the filing of an action in state court should be effective to toll the limitation period. The court also noted that the district court’s interpretation could foster unfairness in that it would permit the United States to “sandbag” when defending actions brought in state court that were properly removable by awaiting the expiration of the limitation period before petitioning for removal.

The Seventh Circuit’s decision in McGowan appears to do nothing to frustrate the purpose of the limitation period. Because an action originally filed in state court must be filed within the limitation period, the United States will likely always receive actual notice of a claim within the limitation period. Moreover, the period is sufficiently short that any “enlargement” of it due to a rule providing that the period is

---

65. 28 U.S.C. §§ 2671-2680 (1976). Hereinafter referred to as the FTCA.
66. 623 F.2d 1239 (7th Cir. 1980).
67. The federal drivers provisions of the FTCA are found at 28 U.S.C. § 2679(b)-(e) (1976). The relevant limitation period is set forth in id. § 2401(b).
68. Id. § 2679(c)-(d).
69. 623 F.2d at 1243.
70. Id. The Seventh Circuit did so without engaging in the legal fiction used by some courts that views the filing of the state action as one against the United States even before removal. Id.
71. Id.
toll\(ed\) by the filing of a state action should not cause the United States any significant prejudice.

In another case brought under the FTCA, \textit{Stoleson v. United States},\textsuperscript{72} the emanations of the Seventh Circuit’s opinion promise to have some far-reaching consequences. In 1967, Stoleson worked at a government munitions plant and was engaged in tasks that required the handling of nitroglycerin. Shortly thereafter, she began to develop heart problems. In 1969, Stoleson acquired knowledge suggesting that her handling of nitroglycerin may have caused her heart problems; at that time, however, no such causal connection had been medically demonstrated. In 1971, a cardiologist, based in part upon his treatment of Stoleson, published an article linking the heart ailment of which Stoleson suffered to chronic exposure to nitroglycerin. Stoleson then commenced her claim under the FTCA. The provision of the FTCA under which Stoleson brought her claim is governed by a two-year limitation period.\textsuperscript{73} The district court ruled that the limitation period barred Stoleson’s action even if a discovery rule were found applicable because she discovered or should have discovered the elements of her claim as soon as 1969.

In reversing the district court, the Seventh Circuit, in a case of first impression within the circuit,\textsuperscript{74} ruled that the discovery rule is not limited in its application in FTCA cases to medical malpractice claims.\textsuperscript{75} It stated that “it is the nature of the problems faced by a plaintiff in discovering his injury and its cause, and not the occupation of the defendant that governs the applicability of the discovery rule.”\textsuperscript{76} The court went on to hold that “any plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule.”\textsuperscript{77} As to Stoleson’s claim, the Seventh Circuit found that she could not have discovered the cause of her injury until medical science had demonstrated the causal link between heart disorders and exposure to nitroglycerin.\textsuperscript{78}

The Seventh Circuit conceded that its holding would be applicable to cases where medical science recognizes conduct to be harmful long after that conduct was undertaken, and that consequently, in such

\textsuperscript{72} 629 F.2d 1265 (7th Cir. 1980).
\textsuperscript{73} 28 U.S.C. § 2401(b) (1976).
\textsuperscript{74} In Steele \textit{v. United States}, 599 F.2d 823, 827 n.7 (7th Cir. 1979), the court raised and reserved the issue.
\textsuperscript{75} 629 F.2d at 1268.
\textsuperscript{76} \textit{Id}. at 1269.
\textsuperscript{77} \textit{Id}.
\textsuperscript{78} \textit{Id}. at 1270.
cases, the purpose of the statute of limitations, which is to protect against the bringing of stale claims, would be thwarted. The decision reached by the Seventh Circuit is nonetheless a proper one. The discovery rule in any context poses the potential for the bringing of stale claims. The rule simply reflects the considered judgment that the unfairness to an injured party who through no fault of her own is unaware of the elements of her injury is greater than the unfairness of requiring a wrongdoer to defend a stale claim. Moreover, as the Seventh Circuit pointed out in *Stoleson*, the possible instances of the bringing of stale claims upon the basis of some medical advancement are, as a practical matter, likely to be few because, as in *Stoleson*, the defendant will have violated some preexisting duty to the plaintiff.

In *J.H. Cohn & Co. v. American Appraisal Associates, Inc.*, where the court invoked the doctrine of estoppel to preclude the assertion of a statute of limitations defense, the Seventh Circuit again displayed a preference toward class actions. The plaintiff in *J.H. Cohn* had filed a complaint in the United States District Court for the Southern District of New York asserting classwide allegations of violations of the federal securities laws. That action was transferred pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Eastern District of Wisconsin upon the New York district court's receipt of the defendant's assurance that the Wisconsin statute of limitations would not be asserted as a defense to the action if it were transferred. After transfer of the action, the Wisconsin district court denied the motion for class certification. Persons who had anticipated becoming class members in the action then commenced a separate action in the Wisconsin district court asserting essentially the same claims as had been asserted in the other action. That second action was dismissed upon the defendant's assertion of the Wisconsin statute of limitations. The plaintiffs in the second action appealed the district court's order dismissing the complaint.

The Seventh Circuit reversed, finding that the defendant was estopped from asserting the statute of limitations since its representation

79. *Id.* at 1271.
81. In *Stoleson*, the record disclosed that the defendant had failed to observe its own safety regulations concerning the handling of nitroglycerin—regulations promulgated because of the danger of injury other than that ultimately suffered by Stoleson. 629 F.2d at 1271 n.6.
82. 628 F.2d 994 (7th Cir. 1980).
83. 28 U.S.C. § 1404(a) (1976) provides:
For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
in the New York district court that it would not assert the Wisconsin statute of limitations misled the putative class members to their detriment. Their reliance was to their detriment because they had forfeited their opportunity to bring an action in New York district court within that state's limitation period. Further, their reliance was justifiable because the defendant was on notice at the time of its representation that it might well have to defend itself against classwide claims.

The Seventh Circuit's application of the doctrine of estoppel in *J.H. Cohn* was certainly correct given the facts of that case. The appellants' reliance was reasonable in light of the status of the class certification question at the time of the defendant's representation and its failure to limit the reach of its representation to the individual plaintiff. Moreover, as stressed by the court, the *J.H. Cohn* holding was butressed by the policies of efficient and economical administration of justice that underlie class action procedure. A contrary holding would have meant that possibly unnecessary individual suits would have to have been filed by all putative class members pending resolution of the class certification question to ensure the preservation of their claims, the very sort of result that the class action procedure seeks to avoid.

The final decision warranting discussion concerning statutes of limitations is *Slumler v. Ferry-Morse Seed Co.*, which involves Indiana's four-year statute of limitations for claims brought on express warranties arising under that state's enacted version of the Uniform Commercial Code. The statute provides that the limitation period begins to run upon delivery unless the express warranty explicitly extends to future performance. The plaintiff's claim was based upon his purchase of tomato seeds which failed to produce a harvest that conformed to representations made in the defendant's sales brochures. The district court found that the defendant's express warranties did not extend to future performance and accordingly dismissed the plaintiff's action because it was brought over four years after delivery of the seed. The Seventh Circuit affirmed the district court in a split decision, noting that its initial sympathy for the plaintiff's position was tempered by the fact that the plaintiff waited well over three years after harvest of

84. 628 F.2d at 1000.
85. For a general discussion of the doctrine of estoppel, see Saverslak v. Davis-Cleaver Produce Co., 606 F.2d 208, 213 (7th Cir. 1979), cert. denied, 444 U.S. 1078 (1980).
86. 628 F.2d at 1001.
88. 644 F.2d 667 (7th Cir. 1981) (per curiam).
89. IND. CODE §§ 26-1-1-101 to 26-1-10-106 (1976).
90. *Id.* § 26-1-2-725(2).
the non-conforming fruit before bringing his action.\textsuperscript{91}

As the dissent convincingly argued, the majority's decision seems to reach an incorrect result.\textsuperscript{92} The defendant's brochures described the seed as producing a fruit of a certain "size, maturity, shape, firmness, and color."\textsuperscript{93} Those representations would appear to extend to future performance in explicit fashion. This conclusion is also supported by common sense: defects in seed can generally only be discovered upon harvest. While the plaintiff may well have been less than diligent in bringing his claim, the rule enunciated by the majority is nonetheless incorrect for the simple reason that it cannot in any principled manner be distinguished from cases based upon similar warranty language that are more diligently prosecuted.\textsuperscript{94}

\section*{Pretrial Practice}

For purposes of the following discussion, "pretrial practice" shall mean the motion practice and discovery that takes place from the time of filing an action until it goes to trial, if indeed it does. So defined, the purposes of pretrial procedure under the Federal Rules of Civil Procedure are to facilitate the discovery of information relevant to a claim,\textsuperscript{95} to dispose of claims that are both insufficient on their face\textsuperscript{96} and claims that raise only legal issues,\textsuperscript{97} and to define and narrow the issues pertinent to those claims that are ultimately tried.\textsuperscript{98} In short, pretrial practice is intended to efficiently guide a claim to a fair resolution. Decisions of note rendered by the Seventh Circuit in its 1980-81 term concern three aspects of pretrial practice: pleading, discovery and summary judgment.

\textsuperscript{91} 644 F.2d at 669.
\textsuperscript{92} Id. at 669-70 (Bonsal, J., dissenting).
\textsuperscript{93} Id. at 669.
\textsuperscript{94} Another decision of the Seventh Circuit rendered this term concerning statutes of limitations is Cahill v. Ernst & Ernst, 625 F.2d 151 (7th Cir. 1980) (statute of limitations of Wisconsin securities act applicable to rule 10b-5 actions brought in Wisconsin rather than the state's limitation period for common law fraud actions).

Also deciding a question relevant to access to the district courts was the Seventh Circuit's decision in Brown v. Grimm, 624 F.2d 58 (7th Cir. 1980) (when an action is brought in a forum clearly without personal jurisdiction over the defendant, it is within the district court's discretion to deny the defendant's motion to transfer even though the limitation period of the proposed transferee forum has expired).

\textsuperscript{95} See FED. R. CIV. P. 26-37.
\textsuperscript{96} See FED. R. CIV. P. 12.
\textsuperscript{97} See FED. R. CIV. P. 56.
\textsuperscript{98} See FED. R. CIV. P. 16.
Pleading

The basic rules of pleading in the federal courts are found in rules 7 through 16 of the Federal Rules of Civil Procedure. These rules establish a system of notice pleading and are otherwise framed so as to achieve the goal of disposition of claims on their merits rather than by way of procedural default. Toward that goal, the rules provide that "[a]ll pleadings shall be so construed as to do substantial justice." This term's decisions of the Seventh Circuit concerning rules of pleading largely honor that standard of construction. None of the decisions represent either such a departure from precedent or the resolution of a novel question as to promise to become of national significance. Nonetheless, each decision selected for brief discussion below contains rulings meriting some attention.

*Maclin v. Paulson,* a civil rights action commenced under section 1983, is significant in two respects. First, it rejects the argument that civil rights claims should be held to a more stringent standard of pleading than other sorts of claims. That argument is often made by civil rights defendants. No doubt it possesses some appeal to district courts whose overcrowded dockets are increasingly composed of civil rights matters, more than a few of which are without merit. To be sure, the argument has no basis in either the federal rules or in any of the civil rights statutes. Nonetheless, it has gained acceptance by at least one court of appeals. Before *Maclin*, the Seventh Circuit had not squarely rejected the argument.

*Maclin* is also significant in that it rejects an argument to disallow the naming of "John Doe" defendants in a complaint. Indeed, the court encouraged the naming of John Doe defendants where the actual names of the defendants are unavailable to the plaintiff without the advantage of some discovery. In so holding, the Seventh Circuit rejected a contrary position held by the Ninth Circuit. The use of John Doe defendants arms civil rights plaintiffs with an important proce-
dural weapon for the prosecution of civil rights claims, particularly those arising from misconduct of law enforcement officials. Often one whose civil rights have been abridged as a result of official misconduct will not know the names of all of the officials involved. Under the rule allowing the naming of John Doe defendants, such a plaintiff is assured that he will be able to employ the courts and the discovery process to help discover the names of involved officials.108

Merrill Tenant Council v. United States Department of Housing and Urban Development109 presented the question of whether a sua sponte dismissal of a claim without notice or hearing violated either the federal rules or the due process clause.110 The court ruled that the sua sponte dismissal was reversible error because the claim dismissed was not apparently insufficient on its face,111 thereby avoiding the due process question. The court thus implied that the federal rules allow sua sponte dismissals of claims on nonjurisdictional grounds.112 That implied proposition, however, has no support in the rules.113 Rather it seems to reflect the practical judgment that to reverse the sua sponte dismissal of a claim that is plainly insufficient on its face so that notice and a hearing can be provided would foster the wasteful expenditure of judicial resources.114

Another due process challenge based upon a district court's failure to adhere to the rules of pleading presented itself in Milwaukee Typographical Union No. 23 v. Newspapers, Inc.115 There the district court construed a motion to dismiss as one for summary judgment and ruled upon the motion without affording the parties the notice required by rule 12(b).116 The court held that the proponent of the due process

108. It must be noted, however, that if a John Doe defendant is not specifically named within the limitation period, the claim will be time-barred. Sassi v. Breier, 584 F.2d 234 (7th Cir. 1978).
109. 638 F.2d 1086 (7th Cir. 1981).
110. In Tamari v. Bache & Co. (Lebanon) S.A.L., 565 F.2d 1194 (7th Cir. 1977), cert. denied, 435 U.S. 905 (1978), the Seventh Circuit held that a sua sponte dismissal of a plainly insufficient claim which was preceded by a "preliminary opinion" indicating that dismissal would be forthcoming was not violative of the due process clause. 565 F.2d at 1202.
111. 638 F.2d at 1094.
113. See Zelson v. Thomforde, 412 F.2d 56 (3d Cir. 1969); Harmon v. Superior Court, 307 F.2d 796 (9th Cir. 1962).
114. Cf. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1347 (1969) (noting that the purpose of rule 12(b) of the federal rules is to promote the expeditious and simultaneous presentation of defenses and objections).
115. 639 F.2d 386 (7th Cir. 1981).
116. Fed. R. Civ. P. 12(b) provides in pertinent part:
If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are
argument could prevail upon that argument only if the summary judgment ruling was inappropriate either because the record disclosed a factual dispute or the adverse party demonstrated that it could have raised a factual dispute if given the opportunity.\textsuperscript{117} Therefore, because the appellant did not assert on appeal the existence of any factual dispute, the Seventh Circuit refused to reverse the district court's decision based upon the appellant's due process argument.\textsuperscript{118} While the Seventh Circuit disapproved of the district court's failure to observe the notice provision of rule 12(b),\textsuperscript{119} the Seventh Circuit's decision again reflects a practical judgment that seeks to avoid the futile use of judicial resources.

The final two decisions dealing with the rules of pleading concern the "relation back" of amended pleadings to the time of filing of the original pleading to bring the amended pleading within the applicable limitation period.\textsuperscript{120} The first, \textit{Norton v. International Harvester Co.},\textsuperscript{121} was a products liability action involving a tractor-trailer manufactured by International Harvester. The plaintiff sought the relation back of an amendment which added TRW, Inc., a manufacturer-supplier of the steering wheel of the tractor-trailer, as a defendant in her action. The Seventh Circuit's settled interpretation of rule 15(c)\textsuperscript{122} imposes three requirements\textsuperscript{123} that must be met before an amendment adding a defendant will be permitted to relate back to avoid the effect of an expired limitation period: (1) the claim alleged in the amended complaint must arise out of the same occurrence set forth in the original pleadings; (2) within the period provided by law for commencing the action presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

\textsuperscript{117} 639 F.2d at 391-92.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 391. \textit{See also} Choudhry v. Jenkins, 559 F.2d 1085, 1089 (7th Cir.), \textit{cert. denied}, 434 U.S. 997 (1977).
\textsuperscript{120} \textit{See} FED. R. Civ. P. 15(c), which provides in pertinent part:
Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
\textsuperscript{121} 627 F.2d 18 (7th Cir. 1980).
\textsuperscript{122} \textit{See} note 120 \textit{supra}.
\textsuperscript{123} \textit{See} Simmons v. Fenton, 480 F.2d 133, 136 (7th Cir. 1973).
against him, the party to be substituted by amendment must have re-
ceived such "notice of the institution of the action that he will not be
prejudiced in maintaining his defense on the merits";\textsuperscript{124} and (3) the
party to be substituted by amendment knew or should have known
that, but for a "mistake" concerning the identity of the proper party,
the suit would have been brought against him. The district court al-
lowed the amendment, but the Seventh Circuit reversed because it
found that the plaintiff's amendment failed to pass muster under both
the second and third requirements.\textsuperscript{125}

Because the facts of \textit{Norton} clearly do indicate that the plaintiff's
failure to name TRW as a defendant within the limitation period was
not due to "mistake," the decision of the Seventh Circuit is ultimately
supportable. However, the Seventh Circuit's finding that TRW did not
receive notice of the action within the limitation period is not persua-
sively supported by the facts and displays a very narrow view of "no-
tice" within the meaning of rule 15(c). Within the limitation period,
TRW was aware of the claims against International Harvester, includ-
ing claims based upon the failure of the steering mechanism manufac-
tured by TRW.\textsuperscript{126} The Seventh Circuit nevertheless reasoned that the
claims made by the plaintiff were "unique" to International Harvester
and thus afforded TRW no notice as contemplated by rule 15(c).\textsuperscript{127}
However, to reiterate, the Seventh Circuit's finding in this regard is
premised upon an exceedingly narrow view of rule 15(c)'s notice
requirement.\textsuperscript{128}

\textit{Paskuly v. Marshall Field & Co.}\textsuperscript{129} involves an amendment adding
classwide claims to a Title VII action commenced in an individual ca-
pacity. Previous Seventh Circuit decisions have held that the filing of a
claim with the EEOC will toll the operation of the EEOC filing re-
quirement as to all persons similarly situated until a judicial action is
brought and that, if the action is brought on behalf of a class, the limi-
tation period will be further tolled until a determination of the class
certification question.\textsuperscript{130} Thus, because Paskuly commenced her action

\textsuperscript{124. Id.}
\textsuperscript{125. 627 F.2d at 22-23.}
\textsuperscript{126. Id. at 21.}
\textsuperscript{127. Id.}
\textsuperscript{129. 646 F.2d 1210 (7th Cir. 1981) (per curiam).}
\textsuperscript{130. See Romasanta v. United Air Lines, Inc., 537 F.2d 915, 918 n.6 (1976), aff'd mem. sub nom. United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969).}
in an individual capacity, the size of the putative class embraced by her subsequently added class allegations depended upon whether her class allegations related back to the time her action was commenced.

In a brief per curiam opinion, the Seventh Circuit affirmed the district court's order allowing the relation back of Paskuly's class allegations. The Seventh Circuit found, as did the district court, that relation back was appropriate because the defendant was on notice all along that it would have to defend against claims of a classwide nature since both Paskuly's EEOC filing and her original complaint alleged discrimination of a classwide nature. Unfortunately, however, the Seventh Circuit in Paskuly failed to capitalize on an opportunity to clearly explain what requirements are imposed by rule 15(c) for the relation back of amendments adding plaintiffs after the expiration of a limitation period, a question for which there is a dearth of authority. Rule 15(c) and the case law decided under it with respect to the addition of party defendants have little literal application to amendments adding party plaintiffs. The authority which exists provides that the general notice principles underlying rule 15(c) govern all relation back questions whether they are presented by the addition of plaintiffs or defendants. That proposition may certainly be distilled from the Paskuly opinion. However, some clearly articulated guidelines, as provided by the Seventh Circuit in the past with respect to the addition of defendants, could have made Paskuly a more useful precedent to district courts.

131. 646 F.2d 1210 (7th Cir. 1981) (per curiam).
134. See id.
136. See 646 F.2d at 1211.
137. See Simmons v. Fenton, 480 F.2d 133, 136 (7th Cir. 1973).
138. Other cases in which the Seventh Circuit decided questions relating to pleading this term include: Chicago Teachers Union v. Johnson, 639 F.2d 353 (7th Cir. 1980) (where claim to federal unemployment benefits is initially reviewed by state officials but is ultimately subject to review by responsible federal officials, the federal officials are necessary parties under rule 19(a)); Pasco Int'l (London) Ltd. v. Stenograph Corp., 637 F.2d 496 (7th Cir. 1980) (former agent of plaintiff who conspired with defendant to misappropriate plaintiff's business held not an indispensable party); Emch v. United States, 630 F.2d 523 (7th Cir. 1980) (plaintiff suing under the FTCA may not amend his complaint so as to add unexhausted claims), cert. denied, 450 U.S. 966 (1981); Zaun v. Dobbin, 628 F.2d 990 (7th Cir. 1980) (where a plaintiff seeking to file an action in forma pauperis refused to complete standardized financial form required by local rules and submitted only generalized averments of indigency, district court properly dismissed the action); McKee-Berger-Mansuetu, Inc. v. Board of Educ., 626 F.2d 559 (7th Cir. 1980) (not error to deny amendment of the complaint at trial to conform to the evidence when evidence inadmissible because not adequately plead); Juneau Square Corp. v. First Wis. Nat'l Bank, 624 F.2d 798 (7th Cir.) (not error to deny
Discovery

The federal rules governing the discovery process are found in rules 26 through 37 of the Federal Rules of Civil Procedure. These rules liberally allow a party to discover material "reasonably calculated to lead to the discovery of admissible evidence," generally creating a presumption that relevant evidence is discoverable. That presumption may be overcome only upon the assertion of some overriding and conflicting interest, such as privilege. Thus, the discovery rules operate in tandem with the rules of pleading toward the end that claims be fairly resolved on their merits.

The only case decided by the Seventh Circuit this term concerning use of the discovery process that merits attention is Wilk v. American Medical Association. In Wilk, an action was brought by several chiropractors against the American Medical Association alleging a nationwide conspiracy to injure the chiropractic profession. The Wilk appeal was brought by the State of New York in its capacity as an intervenor from a district court order denying modification of a protective order that governed certain discovery secured by the Wilk plaintiffs. While the Wilk action was pending, New York commenced a similar action against the AMA in New York in a parens patriae capacity on behalf of chiropractors licensed to practice in that state. Its subsequent intervention in the Wilk action was for the sole purpose of obtaining the use of the Wilk discovery. The modification of the protective order proposed by New York would have allowed use of the discovery on the same terms as afforded the Wilk plaintiffs under the protective order.

In reversing the district court's order, the Seventh Circuit brought its law into conformity with that of the two other federal appellate courts that had decided the question and, furthermore, clarified some misleading statements made in an earlier Seventh Circuit decision.

139. FED. R. CIV. P. 26(b)(1).
143. 635 F.2d 1295 (7th Cir. 1980).
144. Hereinafter referred to as AMA.
146. 635 F.2d at 1297.
The rule articulated by the *Wilk* court provides that a bona fide litigant is presumptively entitled to the benefit of discovery obtained in another action concerning similar claims, even though subject to a protective order, provided such discovery would be properly obtainable in his action through use of the discovery process. Once the party seeking such discovery establishes that his claims are bona fide and similar, it becomes incumbent upon the party opposing discovery to establish a valid objection to disclosure, such as irrelevancy or privilege. If such an objection is established, the final determination as to disclosure remains within the discretion of the district court and needs to be guided by a balancing of the pertinent equities.

The *Wilk* decision furnishes a clear rule that respects the goals of the discovery process. Because discovery should ordinarily take place in public, protective orders are presumptively inappropriate. The court stated that this presumption should have especial force where, as in *Wilk*, a collateral litigant seeks to use discovery covered by a protective order so as to avoid wasteful duplicative effort. Thus, the *Wilk* decision both recognizes and furthers efficiency goals. Finally, in reaching its decision, the *Wilk* court declined to be bound by language in an earlier decision, *American Telephone & Telegraph Co. v. Grady*, indicating that collateral litigants must meet a heavy burden in order to modify a protective order. That language, the Seventh Circuit noted, is not properly derived from the facts or holding of *Grady*.

---

149. 635 F.2d at 1299.
150. Id. at 1301.
151. Id. at 1299.
154. 635 F.2d at 1299. It is noteworthy that the AMA obtained the protective order in *Wilk* without objection from the plaintiffs. Id. at 1298. See *Nonparty Access*, supra note 152, at 1089-90.
155. 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).
156. Id. at 597.
157. 635 F.2d at 1300. For a valid criticism of *Grady's* apparent burden allocation, see *Nonparty Access*, supra note 152, at 1091-92.

Another decision of the Seventh Circuit rendered this term concerning the discovery process was *Town of East Troy v. Soo Line R.R.*, 653 F.2d 1123 (7th Cir. 1980) (not error to prohibit expert witness from giving opinion testimony when adverse party was not notified that the witness would be called to testify until after the passage of a reasonable discovery date set by the court), cert. denied, 450 U.S. 922 (1981).
Summary Judgment

One Seventh Circuit decision rendered this term is worthy of mention because of its apparent deviation from established notions of summary judgment procedure. Rule 56 of the Federal Rules of Civil Procedure expressly requires, and courts have consistently held, that summary judgment may only be granted when the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Stated differently, the only permissible consideration as to the availability of summary judgment is whether there exists a genuine and material factual dispute.

In Weit v. Continental Illinois National Bank & Trust Co., the Seventh Circuit, in a split decision, affirmed the district court's award of summary judgment to the defendants in a complex antitrust trial for which a jury demand had been made. While the Seventh Circuit correctly noted the standard applicable to summary judgment motions, in virtually the same breath it embarked upon a discussion of the difficulty and impracticality of trying complex antitrust cases before a jury. Thereafter, while sifting through the record of the case, the Seventh Circuit appeared at times to be weighing facts in order to support the district court's award of summary judgment.

This sort of apparent ad hoc judicial relaxation of the requirements of summary judgment for complex antitrust cases finds no support in rule 56 or applicable case law. As Chief Judge Fairchild noted in his dissent, the fact that a question may be difficult for a jury to grasp and resolve is immaterial to the propriety of summary judgment relief. Indeed, the Supreme Court long ago counseled against the availability of summary judgment in antitrust cases given the role questions of intent and motive customarily play in the resolution of those cases. Further, Weit represents not only an unauthorized circumvention of the requirements of rule 56, but also, and perhaps more im-

159. See Central Nat'l Life Ins. Co. v. Fidelity & Deposit Co., 626 F.2d 537, 539 (7th Cir. 1980).
160. 641 F.2d 457 (7th Cir. 1981).
161. Id. at 461.
162. Id. at 464.
163. See id. at 464-66.
164. Id. at 470 (Fairchild, C.J., dissenting).
portantly, poses concerns of a constitutional dimension because the plaintiff was denied his right to a trial.166

**TRIAL PRACTICE**

Three decisions of the Seventh Circuit this term relate to the trial of actions, including the disposition of posttrial motions, and deserve comment. The first of these, *Pinto Trucking Service, Inc. v. Motor Dispatch, Inc.*,167 involved the offensive use of collateral estoppel by a plaintiff to preclude a defendant from relitigating a question that the defendant has already litigated unsuccessfully.168 *Pinto Trucking* was an antitrust conspiracy action brought against six defendants. When the action was first tried, two of the defendants were granted motions for a directed verdict at the close of the plaintiff's case. The plaintiff ultimately prevailed as to the other four defendants. On appeal, the district court's grant of a directed verdict was reversed and a new trial ordered as to the two defendants who had been directed out. During the ensuing second trial, the district court granted collateral estoppel effect to the finding made in the first trial that the other four defendants had engaged in a conspiracy violative of the antitrust laws. Thus, the defendants in the second trial were not permitted to argue that no conspiracy existed, only that they were not participants in it along with the other four defendants.

On due process grounds, the Seventh Circuit reversed this use of collateral estoppel allowed by the district court, finding that the defendants directed out of the first trial did not have a "full and fair opportunity" to litigate the conspiracy determination as to the other four defendants.169 That the defendants had an opportunity in the first trial

166. The due process clause ensures the right to a fair trial, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), and the seventh amendment guarantees the right in a civil action to a jury trial of factual questions. See *Pernell v. Southall Realty*, 416 U.S. 363 (1974). The courts and commentators are locked in a debate as to whether the due process right to a fair trial or the seventh amendment right to a trial by jury is paramount when the two are arguably placed at odds due to the complexity of an action. See Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, 42 U. PITT. L. REV. 693 (1981); Note, *Has the Right to a Jury Trial As Guaranteed Under the Seventh Amendment Become Outdated in Complex Civil Litigation?*, 8 PEPPERDINE L. REV. 189 (1980); 49 U. CIN. L. REV. 506 (1980). The Seventh Circuit's apparent departure from summary judgment procedure in *Weit*, however, in no way rises to the level of intellectual integrity of that ongoing debate since the *Weit* decision simply seems to abrogate the right to any trial due to the complexity of the action, thereby denigrating both due process and seventh amendment concerns for the sake of judicial expediency.

167. 649 F.2d 530 (7th Cir. 1981).


169. 649 F.2d at 533. The Seventh Circuit interpreted *Parklane Hosiery* as imposing a threshold requirement for the application of collateral estoppel of a "full and fair opportunity" to lit-
to cross-examine the plaintiff's witnesses was found to be insufficient participation in that trial to support a finding that they had a "full and fair opportunity" to litigate the conspiracy issue.\textsuperscript{170} Rather, the Seventh Circuit found that minimal due process guarantees require that a defendant have an opportunity to present evidence and arguments before a subsequent offensive use of collateral estoppel would be deemed appropriate.\textsuperscript{171}

Under the Supreme Court's recent decision in \textit{Parklane Hosiery Co. v. Shore},\textsuperscript{172} federal trial courts are given broad discretion to determine the appropriate offensive uses of the doctrine of collateral estoppel.\textsuperscript{173} The Seventh Circuit's decision in \textit{Pinto Trucking} establishes some welcome and legitimate due process boundaries upon the exercise of that discretion.

\textit{Smith v. Widman Trucking & Excavating, Inc.}\textsuperscript{174} presented the question of whether relief from a final judgment, entered pursuant to stipulation, may be vacated pursuant to rule 60(b) of the Federal Rules of Civil Procedure\textsuperscript{175} if it is based upon a "mistake" in communication between a party's two attorneys. The Seventh Circuit answered that question in the affirmative based upon its earlier decision of \textit{Bradford Exchange v. Trein's Exchange}.\textsuperscript{176} \textit{Bradford} held that rule 60(b) relief from a judgment entered by consent is available to a party upon affirmative proof that his counsel was without authority to consent to entry of the judgment.\textsuperscript{177} In \textit{Smith}, the court found such "affirmative proof" in affidavits of the appellant's counsel which indicated that the appellant's consent to the judgment was entered pursuant to a misunderstanding between his two attorneys.\textsuperscript{178} The record, however, does not clearly reveal the nature of the misunderstanding between the appellant's counsel. Nor did the appellant himself submit an affidavit explaining how the judgment entered by his local counsel was contrary to his directions.

gate, which must be met before several other factors relevant to the application of collateral estoppel should be considered. \textit{Id.} at 533 n.4.

\textsuperscript{170} \textit{Id.} at 532.
\textsuperscript{171} \textit{Id.} at 533.
\textsuperscript{172} 439 U.S. 322 (1979).
\textsuperscript{173} \textit{Id.} at 331.
\textsuperscript{174} 627 F.2d 792 (7th Cir. 1980).
\textsuperscript{175} \textbf{FED. R. CIV. P. 60(b)} provides in pertinent part:

\textbf{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:}

\begin{enumerate}
\item mistake, inadvertence, surprise, or excusable neglect; . . .
\end{enumerate}

\textsuperscript{176} 600 F.2d 99 (7th Cir. 1979).
\textsuperscript{177} \textit{Id.} at 102.
\textsuperscript{178} 627 F.2d at 796-97.
As Judge Wood eloquently pointed out in his dissent, the type of "affirmative proof" required by Bradford should not have been deemed present in Smith. For obvious and important reasons, rule 60(b) permits a final judgment to be disturbed only upon narrow grounds. The rule of Bradford appears to adhere to the purpose of rule 60(b) only inasmuch as its "affirmative proof" requirement is read to impose a burden upon the movant to unequivocally demonstrate that counsel consented to entry of a judgment without the movant's authority. Ordinarily, Bradford would thus seem to mandate the production of some form of testimonial evidence given by the party himself. Otherwise, as asserted by the appellees in Smith, the rule of Bradford could be subject to abuse by a party having post hoc misgivings about his agreement to the entry of a consent judgment. The decision in Smith may well have been correct based upon facts not disclosed in the submissions accompanying the appellant's rule 60(b) motion; however, as based upon those submissions, it sets an unwise precedent for the use of rule 60(b) pursuant to the Bradford rule.

The final case addressed concerning the trial of actions is Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp. One of the issues raised on appeal in Rain Bird was whether the district court's issuance of a preliminary injunction should be reversed because it quashed, on an ex parte basis, a subpoena to compel the attendance of one of the defendant's witnesses at the preliminary injunction hearing. The basis for the witness' motion to quash was that his attendance at the hearing would be inconvenient. While acknowledging that the ex parte hearing of motions to quash is inappropriate, the Seventh Circuit declined in Rain Bird to reverse the district court's issuance of injunctive relief on that basis.

The Seventh Circuit considered several factors as support for its ruling, two of which are unconvincing. First, the Seventh Circuit found, as support for its decision, that the motion to quash was necessarily heard on the sole business day between the service of the subpoena and commencement of the hearing since the witness' inconvenience argument would be moot if heard at a later date. The

179. _Id._ at 801-03 (Wood, J., dissenting). Judge Wood also dissented from the majority holding in Bradford. 600 F.2d at 102-03 (Wood, J., dissenting).
180. _See_ 627 F.2d at 801 (Wood, J., dissenting).
181. _Id._ at 797.
182. 627 F.2d 44 (7th Cir. 1980).
183. _Id._ at 51-52.
184. _Id._ at 52.
185. _Id._
obvious defect in this rationale is that the existence of but one day in which to afford the witness' motion a meaningful hearing does not explain the district court's failure to require that notice be given the defendant and that it be given an opportunity to appear on that date.

In addition to the witness' presence, the subpoena sought the production of the same documents that the witness had refused to give the defendant pursuant to a deposition conducted months before the hearing. The Seventh Circuit also considered as support for its ruling the fact that the defendant did not seek to compel the production of those documents after the deposition by filing an appropriate rule 37 motion. The Seventh Circuit concluded that "any prejudice flowing from the district court's action was largely the result of defendant's own conduct." This reasoning, however, is also without force. Nowhere do the rules provide that once objection to a discovery request is made, the party seeking discovery must make a motion to compel or forego his right to subpoena production of the discovery material for use at a hearing.

The other factors relied upon by the Seventh Circuit in affirming the district court were: (1) because the defendant did not lodge an objection when it learned on the day of the hearing of the *ex parte* quashing of its subpoena, it "tacitly accepted the district court's disposition of the matter," and (2) evidence sought to be produced by the subpoena would likely not have significantly strengthened the defendant's defense. The first of these is of questionable validity as support for the court's decision and the second is asserted in rather conclusory fashion.

As previously stated, the federal rules are structured so as to facilitate the determination of claims on the basis of records that have been developed as completely as possible. Accordingly, a prospective witness properly served with a subpoena to appear at a hearing and to bring requested documents should be able to avoid the command of the subpoena on grounds of inconvenience only after a weighing by the district court of the prejudice attendance will cause the prospective wit-

186. *Id*. FED. R. CIV. P. 37 provides means for obtaining a court order compelling discovery as well as sanctions for failure to comply with such an order.
187. 627 F.2d at 52.
188. Indeed, such a proposition is repugnant to the spirit of the federal rules. Cf. *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (holding that it is contrary to the spirit of the federal rules to avoid a decision on the merits on the basis of a mere technicality).
189. 627 F.2d at 52.
190. *Id*
191. See text accompanying notes 95-100 *supra*. 
ness against the prejudice that his failure to attend will cause to the party that issued the subpoena. It is unfortunate that in *Rain Bird* this important principle was ignored without adequate justification for doing so.

**Choice of Law**

The Seventh Circuit this term rendered two decisions involving choice of law problems, both of which deviated from settled choice of law analysis. Choice of law problems typically present themselves in the context of a claim brought under diversity jurisdiction. Federal courts hearing claims pursuant to their diversity jurisdiction are bound to apply state substantive law and to determine which state's substantive law shall apply by looking to the choice of law principles of the forum state.

The first such case, *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, concerns the tragic May 25, 1979, air crash at Chicago's O'Hare airport involving a DC-10 aircraft. A host of wrongful death actions ensued in federal district courts in several states and were then transferred by the Judicial Panel on Multidistrict Litigation to the Northern District of Illinois for consolidation for certain pretrial purposes. The issue underlying the choice of law problems presented in *In re Air Crash* was the availability of punitive damages against the manufacturer and owner of the aircraft. A true conflict existed among those states with an interest in the resolution of the punitive damages issue.

The lengthy and at times recondite opinion of the Seventh Circuit in *In re Air Crash* is of precedential significance in a single respect: its application of the choice of law analysis of the forum states of Illinois

---


193. Other decisions of the Seventh Circuit this term addressing issues pertaining to the trial of actions include: United States v. Brown, 634 F.2d 1069 (7th Cir. 1980) (*Silvern* deadlock instruction must be given before jury retires if it is to be given upon deadlock. *See* United States v. Silvern, 484 F.2d 879 (7th Cir. 1973)); Patterson v. General Motors Corp., 631 F.2d 476 (7th Cir. 1980) (grant of involuntary dismissal pursuant to rule 41(b) of discrimination claims), *cert. denied*, 451 U.S. 914 (1981); American Equip. Corp. v. Wikoma Mfg. Co., 630 F.2d 544 (7th Cir. 1980) (consent judgment in patent infringement action must find both patent validity and infringement to be given res judicata effect); Lightsey v. Harding, Dahm & Co., 623 F.2d 1219 (7th Cir. 1980) (finding of administrative agency not made pursuant to its statutory authority not entitled to collateral estoppel effect in subsequent judicial action), *cert. denied*, 449 U.S. 1077 (1981).


196. 644 F.2d 594 (7th Cir. 1981).

197. *Id.* at 608.
CIVIL PROCEDURE

and New York. Both of those states generally embrace the choice of law principles found in the Restatement (Second) of Conflict of Laws,\(^1^{98}\) which provides that the place of injury governs tort law questions unless another state has a "more significant relationship" to the occurrence giving rise to the action.\(^1^{99}\) Whether another state has a "more significant relationship" so as to overcome the presumption in favor of the place of injury is determined by examination of certain types of interests and policy considerations as set forth in the Restatement.\(^2^{00}\)

In evaluating the pertinent Restatement factors, the Seventh Circuit determined that two other states had a "more significant relationship" to the accident than did Illinois, the place of injury.\(^2^{01}\) The Seventh Circuit further determined, however, that the relationships of the other two states were equally significant.\(^2^{02}\) Finding that no principled choice could be made between the two states with equally more significant relationships to the accident than the place of injury, the Seventh Circuit ruled that the law of the place of injury would

---

200. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969) provides:
   Choice-of-Law Principles
   (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
   (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
      (a) the needs of the interstate and international systems,
      (b) the relevant policies of the forum,
      (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
      (d) the protection of justified expectations,
      (e) the basic policies underlying the particular field of law,
      (f) certainty, predictability and uniformity of result, and
      (g) ease in the determination and application of the law to be applied.
   RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1969) provides:
   The General Principles
   (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
   (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
      (a) the place where the injury occurred,
      (b) the place where the conduct causing the injury occurred,
      (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
      (d) the place where the relationship, if any, between the parties is centered.
   These contacts are to be evaluated according to their relative importance with respect to the particular issue.
201. 644 F.2d at 616.
202. Id. at 615.
This ruling is troublesome for two reasons. First, in view of the numerous factors that the Restatement lists to be considered in determining the significance of a state’s relationship to an occurrence, the Seventh Circuit’s conclusion that two states’ relationships were exactly equal seems implausible. Second, assuming the existence of two states with equally more significant relationships to an occurrence than that of the place of injury, to then opt for application of the law of the place of injury in effect scuttles the whole choice of law analysis of the Restatement. Notwithstanding this criticism, assuming that such equality does exist among those interested states other than the place of injury, the Seventh Circuit’s ruling that the law of the place of injury shall govern seems as prudent a path out of such a dilemma as any other that suggests itself.

The second choice of law decision of the Seventh Circuit this term was *Pittway Corp. v. Lockheed Aircraft Corp.* *Pittway* was an action brought in tort by the purchaser of an airplane seeking to recover economic losses caused by certain defects. *Pittway* also involved the application of Illinois choice of law principles. *Pittway* is of interest because the Seventh Circuit indicated in its opinion that the “place of injury” with respect to a defective product causing only economic loss is not necessarily the place the defect is discovered, but may well be considered the place where the defendant manufacturer’s business is located or the place where the product was manufactured. Lamentably, however, the *Pittway* decision does not offer a mode of analysis by which the place of injury in such cases shall be definitively determined.

*Pittway* is also of note because the Seventh Circuit presumed, without analysis or citation to authority, that Illinois tort law does not permit the recovery of purely economic loss when the only authority on the question is two Illinois appellate court decisions which reached conflicting results. Settled choice of law analysis provides that when

203. *Id.* at 616.
204. *See note 200 supra.*
205. 641 F.2d 524 (7th Cir. 1981).
206. Economic loss is defined as “damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property.” Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966).
207. 641 F.2d at 527-28.
208. *Id.* at 525.
there is a division of authority among state courts, a federal court must
in a reasoned manner "ascertain" that state's law. Thus, the Seventh
Circuit should have afforded the parties and other courts the benefit of
the analysis that led it to conclude that economic loss is not recoverable
under Illinois tort law.

APPELLATE REVIEW

With few exceptions, the rules governing the availability of appel-
late review are statutory. Generally, immediate review of a district
court order may be had in a court of appeals only if the order is a final
order within the meaning of 28 U.S.C. § 1291 or falls under the "col-
lateral order" doctrine. Also, an order finally disposing of a separate
claim within an action containing multiple claims is appealable if cer-
tified by the district court. Certain kinds of interlocutory orders may
be appealed as of right, with the most notable example being orders
granting, denying or modifying injunctions. Certain other kinds of
interlocutory orders may be appealed on a permissive basis. Most of
the rules governing the availability of appellate review are deemed to
be jurisdictional. Therefore, they may not be waived and may be
asserted at any time.

During the 1980-81 term, the Seventh Circuit decided several cases
that touched upon questions pertaining to its appellate jurisdiction.
The treatment afforded these questions indicates that the Seventh Cir-
cuit is especially sensitive where its appellate jurisdiction is concerned.
While displaying such sensitivity, however, these decisions also reveal a
pragmatic willingness to occasionally relax jurisdictional constraints in
favor of appealability, especially when a strict adherence to jurisdic-
tional constraints would make an erroneous decision at the district
court level final. To be sure, valid criticism can be leveled at such ad

210. See generally 1A Moore's Federal Practice ¶ 0.308 (2d ed. 1981). For a good dis-
cussion of the duty of a federal court to ascertain state law where the highest court in the state has not
spoken, see McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 661-63 (3d Cir.), cert. denied,

211. 28 U.S.C. § 1291 (1976) provides in pertinent 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.


213. See FED. R. CIV. P. 54(b).


215. See id. § 1292(b).

216. See Diamond Shamrock Oil & Gas Corp. v. Commissioner of Revenues, 422 F.2d 532,
534 (8th Cir. 1970).

217. See United States ex rel. Stachulak v. Coughlin, 520 F.2d 931, 933 (7th Cir. 1975).
hoc relaxation of rules of procedure in that it breeds uncertainty and is contrary to notions of finality. Nonetheless, because the Seventh Circuit’s decisions relaxing jurisdictional rules reflect either a concern for the unnecessary expenditure of judicial resources or a balancing of equitable principles, or both, one is hard-pressed to direct any vociferous criticism at any of these decisions.

A motion to reconsider a district court’s denial of a posttrial motion does not toll the running of an appeal period under the federal rules. However, in *Needham v. White Laboratories, Inc.*,218 the Seventh Circuit held, in a split decision, that where the district court assured the defendant that it did, with the result that the appeal was not timely filed, the appeal would not be dismissed for want of jurisdiction.219 Private litigants are subject to a thirty-day period for the filing of appeals.220 Pursuant to rule 4(a) of the Federal Rules of Appellate Procedure, the timely filing of certain posttrial motions will toll the running of the appeal period pending a disposition of the motion.221 A motion to reconsider the denial of a posttrial motion, however, will not toll the running of the appeal period.222 Rule 26(b)(1) of the Federal Rules of Appellate Procedure prohibits a court of appeals from enlarging an appeal period.223

*Needham* avoided a technical application of the above rules by relying upon an exception carved out by *Thompson v. Immigration and Naturalization Service*.224 In *Thompson*, the Supreme Court found appellate jurisdiction proper pursuant to an untimely filed appeal where the district court had assured the appellant that his filing of one of the posttrial motions enumerated in rule 4(a) was timely, when in fact it was not.225 The Seventh Circuit read *Thompson* for the proposition that, when a litigant relies to the detriment of his right to appeal on an improper interpretation by a district judge of the federal rules insofar as they relate to the appeal period, the policies underlying a technical application of those rules will give way to fairness concerns so that the

218. 639 F.2d 394 (7th Cir. 1981).
219. Id. at 398.
220. FED. R. APP. P. 4(a).
221. Under FED. R. APP. P. 4(a)(4), the motions which will toll the filing of the appeal period are: (1) a motion for judgment notwithstanding the verdict pursuant to rule 50(b) of the Federal Rules of Civil Procedure; (2) a motion to amend or make additional findings of fact pursuant to rule 52(b); (3) a motion to alter or amend the judgment pursuant to rule 59; and (4) a motion for a new trial pursuant to rule 59.
223. FED. R. APP. P. 26(b)(1).
224. 375 U.S. 384 (1964) (per curiam).
225. Id. at 387.
litigant's right to appeal is not forfeited.\textsuperscript{226} Accordingly, because the appellant in \textit{Needham} would have presumably timely filed his appeal, as would have the appellant in \textit{Thompson}, but for the district court's erroneous interpretation of the rules, the court found its appellate jurisdiction properly invoked.

Chief Judge Fairchild dissented from the \textit{Needham} majority's assertion of appellate jurisdiction in part because he deemed \textit{Thompson} to be inapposite since in that case the appellant did an act which "if properly done" would have tolled the running of the appeal period.\textsuperscript{227} However, the majority's fair reading of \textit{Thompson} renders this distinction immaterial. Rather, as stated, the controlling fact of \textit{Thompson} seems to be not the nature of the act performed by an appellant, but instead an appellant's reliance upon a district court's erroneous interpretation of the effect of the act upon the appellant's right to appellate review. Hence, as Chief Judge Fairchild intimates, the appellant's reliance arguably need not even be reasonable. Indeed, the unfortunate aspect of \textit{Thompson} and \textit{Needham} is that they excuse counsel's own seemingly inexcusable ignorance of the applicable federal rules.

Finally, it is noteworthy that upon reaching the substantive issues raised in the appeal, the Seventh Circuit in \textit{Needham} reversed the district judge.\textsuperscript{228} Thus, to have ruled that the appellant had not timely invoked the Seventh Circuit's appellate jurisdiction would have caused not only the appellant's loss of his right to appeal, but would have immunized an erroneous decision from appellate review.

The scope of the right to appeal under 28 U.S.C. § 1292(a)(1)\textsuperscript{229} was the subject of the appellate jurisdiction issue in \textit{Davis v. Ball Memorial Hospital Association}.\textsuperscript{230} In \textit{Davis}, classwide claims were asserted against several state defendants and the Secretary of the United States Department of Health and Human Services charging that the defendant hospital was violating the indigent care provisions of the Hill-Burton Act\textsuperscript{231} and that the federal defendant had failed to prop-

\begin{itemize}
\item \textsuperscript{226} 639 F.2d at 398.
\item \textsuperscript{227} \textit{Id.} at 404 (Fairchild, C.J., dissenting).
\item \textsuperscript{228} \textit{Id.} at 403.
\item \textsuperscript{229} 28 U.S.C. § 1292(a)(1) (1976) provides in pertinent part:
  \begin{quote}
  The courts of appeals shall have jurisdiction of appeals from:
  \begin{enumerate}
  \item Interlocutory orders of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court; . . . 
  \end{enumerate}
  \end{quote}
\item \textsuperscript{230} 640 F.2d 30 (7th Cir. 1980).
\item \textsuperscript{231} 42 U.S.C. §§ 291 to 291o-1 (1976 & Supp. III 1979). Participation in a federal funding program by a health care institution pursuant to the Hill-Burton Act requires the participant to provide "a reasonable volume of services to persons unable to pay therefor." \textit{Id.} § 291c(e) (1976). See also \textit{id.} § 300a-3(b)(1)(J) (1976) (repealed 1979).
\end{itemize}
erly discharge her duties under that act. The plaintiff requested declaratory and permanent injunctive relief. Upon the federal defendant's motion, she was dismissed from the lawsuit and thereafter the plaintiff sought to immediately appeal the district court's dismissal order.

Because dismissal of the federal defendant was not a final order within the meaning of section 1291 and the district court refused to certify the order as appealable under rule 54(b) of the Federal Rules of Civil Procedure, the plaintiff's only arguable avenue of appellate review was section 1292(a)(1). The Seventh Circuit ruled that appealability pursuant to section 1292(a)(1) of an order dismissing less than all of the defendants to an action seeking injunctive relief is determined by "an appraisal of the significance to the action of the dropped party." Since some of the injunctive relief sought by the plaintiff could either be provided only by the federal defendant or required the substantial involvement of the federal defendant, the court held that its appellate jurisdiction was properly invoked under section 1292(a)(1).

Davis thus reflects the Seventh Circuit's view that section 1292(a)(1) should be afforded a practical interpretation. In this regard Davis is significant because the Seventh Circuit declined to extend the reasoning of the Supreme Court's decision in Gardner v. Westinghouse Broadcasting Co. to find that it was without jurisdiction to hear the appeal in Davis. Gardner held that a denial of class certification in an action seeking classwide permanent injunctive relief was not reviewable under section 1292(a)(1). As to the argument that the denial of class certification substantially denied the injunctive relief sought, the Gardner Court reasoned that no ruling had been made on the merits of the requested injunctive relief. In addition, the Court suggested that because no preliminary injunctive relief was sought, interlocutory review was not necessary to avoid any irreparable injury. Arguably, the Gardner holding constricts the scope of section 1292(a)(1) so as to

232. 437 U.S. at 480. In so holding, the Supreme Court rejected the position of a majority of courts of appeals that had decided the question. See Note, The Limits of Section 1292(a)(1) Redefined: Appealability of the Class Determination as an Order "Refusing an Injunction," 9 U. Tol. L. REV. 488, 515 (1978) [hereinafter cited as Limits Redefined].

233. 437 U.S. at 480-81.
234. See id. at 479 n.3.

239. 437 U.S. at 478 (1978).
240. See id. at 479 n.3.
allow appeals only from orders that directly grant, deny or modify an injunction. This interpretation of Gardner would serve to foreclose interlocutory appeals in cases such as Davis. The Seventh Circuit was careful in Davis, however, to limit the reach of Gardner precisely to the class certification question decided in Gardner.

The Seventh Circuit’s reading of Gardner was appropriate. To read section 1292(a)(1) as generally applicable only to orders directly affecting a request for injunctive relief, rather than to orders substantially affecting a request for injunctive relief, would seem, by exalting form over substance, not to give full effect to Congress’ intention in enacting section 1292(a)(1). Gardner does to a certain extent embrace such a narrow view of section 1292(a)(1). However, it does so because the Court was principally concerned about the flood of appeals that would result if immediate appeal were allowed from class certification determinations based upon the presence of a request for permanent injunctive relief. Class certification determinations are not otherwise immediately appealable and are considered within the discretion of the district court. Despite its concern with the proliferation of appeals, the Court reserved the question of whether a class certification is appealable pursuant to section 1292(a)(1) where a request for preliminary injunctive relief is involved.

Other interesting questions concerning appellate jurisdiction were considered in Amalgamated Meat Cutters v. Thompson Farms Co. In Thompson Farms, the plaintiff filed an appeal, purportedly as of right, from the district court’s entry of summary judgment on certain claims of the plaintiff. Apparently realizing that its appeal was defective—because not from a final order within the meaning of section 1291 or from an order affecting any claim for injunctive relief within the meaning of section 1292(a)(1)—the plaintiff subsequently obtained an order certifying the district court’s entry of summary judgment for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The plaintiff, however,

---

241. See Limits Redefined, supra note 238, at 515-16.
242. 640 F.2d at 35-36. Again, it is interesting to note that the Seventh Circuit, after deciding that it had appellate jurisdiction, reversed in part the district court's order. Id. at 43.
243. See Limits Redefined, supra note 238, at 515-16.
244. Id. at 515.
245. 437 U.S. at 481-82.
246. 640 F.2d at 35-36.
247. 437 U.S. at 479 n.3.
248. 642 F.2d 1065 (7th Cir. 1981).
249. 28 U.S.C. § 1292(b) (1976) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an
did not then file a new notice of appeal, but relied upon its previously filed notice as its asserted basis for appellate jurisdiction.\(^\text{250}\)

The first problem pertaining to appellate jurisdiction presented in Thompson Farms arose from the fact that, while appeal from the summary judgment order was sought pursuant to section 1292(b), the order was properly appealable only pursuant to rule 54(b) of the Federal Rules of Civil Procedure.\(^\text{251}\) Because the summary judgment order finally disposed of claims separate from the plaintiff's other claims, it was the proper subject of a rule 54(b) appeal.\(^\text{252}\) On the other hand, because no notice of appeal was filed within ten days of the section 1292(b) certification, that statute could not confer appellate jurisdiction.\(^\text{253}\)

Courts of appeals have generally demanded that a district court order finally disposing of a separate claim within the meaning of rule 54(b) contain language expressly directing the entry of judgment on that claim before an appeal from the disposition of that claim will be allowed pursuant to rule 54(b).\(^\text{254}\) The purpose of the requirement is to afford litigants a clear signal as to the commencement of the effects of a formal entry of judgment.\(^\text{255}\) Such language was not contained in the district court's order in Thompson Farms. Nonetheless, while recognizing the merit of requiring that rule 54(b) certification orders set forth the language contained in the rule and, furthermore, recognizing that 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. \(\text{Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.}\)

\(^{250}\) 642 F.2d at 1068.
\(^{251}\) FED. R. Civ. P. 54(b) provides:

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

\(^{252}\) 642 F.2d at 1069. Thompson Farms offers a detailed discussion of "separateness" for rule 54(b) purposes. \(\text{Id. at 1070.}\)

\(^{253}\) \(\text{Id. at 1069. Moreover, as noted by the Seventh Circuit, there is a certain inconsistency to viewing an order that is "final" within the meaning of rule 54(b) as "interlocutory" Within the meaning of § 1292(b). \text{Id. at 1069 n.4.}\)

\(^{254}\) \(\text{E.g., In re Licek Potato Chip Co., 599 F.2d 181, 185 (7th Cir. 1979). See generally 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2660 (1973).}\)

\(^{255}\) \(\text{See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950).}\)
the specific focuses of rule 54(b) and section 1292(b) are distinct, the 
Seventh Circuit with a pragmatic eye viewed the district court's section 
1292(b) certification order as a rule 54(b) certification for purposes of 
the plaintiff's appeal. The Seventh Circuit reasoned that the primary 
purposes of section 1292(b) and rule 54(b) are identical—i.e., “to accel-
erate appellate review of select portions of litigation” —and that no 
prejudice would result if the appeal were allowed.

Another obstacle to the Seventh Circuit's appellate jurisdiction in 
Thompson Farms was erected by the fact that the district court's certifi-
cation order was not entered until after the filing of the notice of ap-
peal. The order was therefore arguably entered after the district court 
had been divested of its jurisdiction over the claims appealed from. 
Ordinarily, the filing of a notice of appeal divests a district court of 
jurisdiction over the matter appealed from. As the Seventh Circuit 
noted, however, that rule "has always been shot through with excep-
tions where a fair construction of the Federal Rules of Civil Procedure 
so requires." On concededly pragmatic grounds, the Seventh Circuit 
ruled that a district court has jurisdiction to certify an order for a rule 
54(b) appeal after a notice of appeal from the order has already been 
filed. To do otherwise, by dismissing the appeal and requiring the 
appellant to refile, would in the words of the court result in "empty 
paper shuffling." Upon reaching the merits, the Seventh Circuit va-
cated the district court's entry of summary judgment.

In sum, recent decisions of the Seventh Circuit display an ap-
proach to questions of appellate jurisdiction that favors appellate re-
view over a formalistic construction of rules of appellate procedure 
whenever the conduct of the defaulting party has not been egregious 
and no undue prejudice will result. This seems to be particularly true 
whenever a formalistic construction of its appellate jurisdiction would 
shield an erroneous decision at the district court level from appellate 
review.

256. 642 F.2d at 1071.
257. Id. at 1071-72.
258. See, e.g., In re Federal Facilities Realty Trust, 227 F.2d 651 (7th Cir. 1955).
259. 642 F.2d at 1073.
260. Id. at 1075.
261. Id. at 1074.
262. Id. at 1076.
263. Other cases concerning appellate jurisdiction decided by the Seventh Circuit this term 
are: Bradford Exchange v. Trein's Exchange, 644 F.2d 682 (7th Cir. 1981) (in a non-common 
fund trademark infringement action, an order awarding attorney's fees is nonappealable until 
entry of final judgment on the merits); Hampton v. City of Chicago, 643 F.2d 478 (7th Cir. 1981) 
(order granting motion to recuse not appealable as a final order or pursuant to mandamus); 
United States v. Elrod, 627 F.2d 813 (7th Cir. 1980) (order staying district court proceedings pendent-
To discern any specific policy or trend in the area of civil procedure based upon the above decisions would be a difficult task. This is so, in part, because civil procedure issues are always infused with the consideration and resolution of the particular substantive issues involved.

Broadly speaking, the aim of civil procedure should be to achieve a fair harmony between the primary goal of the disposition of claims on their merits and the secondary goal of certainty and efficiency in judicial administration. For the most part, the chords struck by the decisions of the Seventh Circuit in the 1980-81 term in the area of civil procedure achieve such a harmony.*

In exhaustion of primary jurisdiction vested in administrative body is a final order within the meaning of 28 U.S.C. § 1291 (1976); Terket v. Lund, 623 F.2d 29 (7th Cir. 1980) (a decision with respect to a claim for attorney's fees under 42 U.S.C. § 1988 (1976) (amended 1980) is one distinct from a decision on the merits and therefore may be reviewed only by a notice of appeal specifying an appeal from the order deciding the fee question).

* On February 24, 1982, the United States Supreme Court in Zipes v. Trans World Airlines, Inc., 102 S. Ct. 1127 (1982), affirmed Air Line Stewards & Stewardesses Ass'n, Local 550 v. Trans World Airlines, Inc., 630 F.2d 1164 (7th Cir. 1980), and reversed In re Consolidated Pretrial Proceedings in the Airline Cases, 582 F.2d 1142 (7th Cir. 1978). Both cases are discussed in text accompanying notes 4-18 supra. Zipes held that a timely filing with the EEOC is not a jurisdictional prerequisite to bringing a Title VII suit. 102 S. Ct. at 1132. Rather, the EEOC filing requirement is like a statute of limitations and is, therefore, subject to waiver, estoppel and equitable tolling. Id. at 1133-35. The Supreme Court acknowledged, but in no way felt bound by, its repeated references to the EEOC filing requirement as "jurisdictional." Id. at 1133. See also text accompanying note 14 supra. The Court's holding is certainly correct, however, given the remedial scheme of Title VII, the relatively short EEOC filing period (180 days), and the fact that EEOC charges are typically filed by lay persons. 102 S. Ct. at 1134.