Civil Procedure: A Review of the Published Opinions of the United States Court of Appeals for the Seventh Circuit for the 1983-84 Term

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INTRODUCTION

During its 1983-84 term, the United States Court of Appeals for the Seventh Circuit decided a number of cases dealing with issues of federal civil procedures. This article reviews most of those cases. The cases have been classified under the following headings: Federal Jurisdiction, Voluntary Dismissal, Involuntary Dismissal, Summary Judgment, Default Judgment, Class Actions, Intervention, Res Judicata, Relief from Judgment, Appellate Review, Discovery, Costs, Fees and Sanctions.

I. FEDERAL JURISDICTION

Personal Jurisdiction

The Seventh Circuit Court of Appeals in Norton v. Bridges,1 concluded that the Wisconsin long-arm statute authorized the trial court to assert jurisdiction over a trustee who resided in Illinois, as well as the trust assets that were also present in Illinois.2 In Norton, the beneficiary of an inter vivos trust sued the trustee for a reduction of trust assets to her possession, and an accounting and termination of the trust. The district court held that it lacked both in rem jurisdiction over the trust assets, and personal jurisdiction over the trustees.3

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1. 712 F.2d 1156 (7th Cir. 1984).
2. The facts of Norton are somewhat complicated. The trust was recorded in Wisconsin, but the trustee invested the assets in his home mortgage in Illinois. The original trustee died and willed the house and trusteeship to his wife. Subsequently, the new trustee was adjudicated a disabled person, and a guardian was named for the trustee and her estate. The trustee's house was later sold for $48,501. Notice of the sale was allegedly given to the beneficiary.
3. Id. at 1158.

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In determining which forum should exercise in rem jurisdiction, the Seventh Circuit focused on the question of which forum had the authority to administer the trust. In this regard, the court distinguished the facts in Hanson v. Denkla⁴ from the present case.⁵ Unlike Hanson, the trust in this case was created and registered in the forum state. In addition, the power of appointment of successor trustees was expressly created in the forum court. Based on these facts, the court concluded that the settlor intended administration of the trust in Wisconsin,⁶ and that when the trustees accepted the trusteeship, they consented to jurisdiction in the forum state. The court held that these facts satisfied the "minimum contacts" standard of International Shoe.⁷ Therefore, the Seventh Circuit reversed the district court, and concluded that an exercise of personal jurisdiction by the Wisconsin court was consistent with due process.

In addition, the Seventh Circuit concluded that an assertion of jurisdiction was authorized under the Wisconsin long-arm statute.⁸ In order to reach this conclusion, the court examined the relevant sections of the statute. Based on this statutory analysis, the court found two alternative rationales for its conclusion: 1) an exercise of in rem jurisdiction over a trust permits a determination of the rights and liabilities of all interested parties;⁹ and 2) under Wisconsin Statute § 801.05(6), since the trustee

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5. The court explained the facts of Hanson:

In Hanson, an inter vivos trust was created by a Pennsylvania settlor. The settlor named a Delaware trust company as trustee. The trust res was placed with the trustee in Delaware. The settlor then moved to Florida and died shortly thereafter. The settlor's will was admitted to probate in Florida. An issue arose as to whether the settlor had exercised a testamentary power of appointment over the corpus of the trust. The Florida Supreme Court held that Florida could exercise jurisdiction over the non-resident trustee and the non-resident beneficiaries of the trust even though the trust assets were in Delaware. 712 F.2d at 1159 (emphasis added).

Subsequently, Delaware refused to accord the judgment full faith and credit. The Supreme Court reviewed the case and held that Florida did not have sufficient minimum contacts over the trust because the trust office was not located in Florida, and had transacted no business there. Moreover, none of the assets had ever been administered in Florida, and no solicitation of business had ever taken place in Florida. 357 U.S. at 257.

6. 712 F.2d at 1161-62. The court stated that the most important factor evidencing intent for administration in Wisconsin was the fact that the trust was registered in the state.

8. 712 F.2d at 1164.

9. The Wisconsin long-arm statute provides in relevant part that: A court of this state having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section.

(1) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief granted demanded consists wholly or partially in excluding the defendant from any interest or lien therein.

Wis. Stat. § 801.07.
assumed control of the assets in Wisconsin at the time the trust was created, personal jurisdiction may be asserted.\textsuperscript{10}

\textit{Nelson v. Park Industries, Inc.},\textsuperscript{11} presented the issue of whether a court in Wisconsin could exercise long-arm jurisdiction over two foreign corporations. Both corporations had placed goods into the "stream of commerce," but neither corporation controlled the distribution network. The district court dismissed plaintiff's complaint against the two foreign corporations, holding that it lacked personal jurisdiction because the defendant's contacts with the forum state were not such to make litigation reasonably foreseeable. The Seventh Circuit reversed, holding that the Wisconsin long-arm statute\textsuperscript{12} authorized jurisdiction over a "distributor's purchase and sale of goods in the normal course of the distribution of those goods."\textsuperscript{13}

In addition, the court held that this exercise of the long-arm statute was constitutional under the \textit{World-wide Volkswagen v. Woodson}\textsuperscript{14} "minimum contacts" standard. The court's analysis focused on the extensive distribution network which carried the goods into the forum state and caused the injury. Though the two corporations did not control the distribution network, they were aware of the network and therefore, were indirectly serving and deriving economic benefits from the national retail market established by Woolworth, and they should reasonably anticipate being subject to suit in any forum within that market where the product caused injury.\textsuperscript{15} As compared with a local distributor whose products have fortuitously entered the forum state, being subject to litigation in Wisconsin was much more foreseeable for these two defendants because they were original distributors into "the national retail market."

\textsuperscript{10} This section provides in relevant part that Wisconsin permits an assertion of personal jurisdiction in any action which arises out of:

\begin{itemize}
  \item c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this state at the time the defendant acquired possession or control over it.
\end{itemize}

\textit{Wis. Stat.} § 801.05(6)(c).

\textsuperscript{11} 717 F.2d 1120 (7th Cir. 1983).

\textsuperscript{12} The statute provides in relevant part:

\begin{quote}
  [i]n any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, providing in addition that at the time of the injury . . . [p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.
\end{quote}

\textit{Wis. Stat.} § 801.05(4)(b) (1981-82).

\textsuperscript{13} 717 F.2d at 1124.

\textsuperscript{14} 444 U.S. 286 (1980). The Supreme Court in \textit{World-Wide Volkswagen} stated that: "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should \textit{reasonably anticipate being called into court there.}" \textit{Id.} at 297 (emphasis added).

\textsuperscript{15} 717 F.2d at 1126.
Subject Matter Jurisdiction

The court faced issues of subject matter jurisdiction within the context of several substantive statutes, as well as the diversity and federal question jurisdiction statutes. For the sake of clarity, each jurisdictional provision will be discussed separately.

A. Labor Management Relations Act

The Seventh Circuit decided two cases in which the subject matter jurisdiction of the federal court was at issue under the terms of § 301 of the Labor Management Relations Act (LMRA).\(^{16}\) In *NDK Corporation v. Local 1550 UFCIUW*,\(^{17}\) the issue was whether § 301 authorized jurisdiction when the underlying dispute concerned the validity of a labor contract. Deferring to the primary jurisdiction of the NLRB over such matters, the court refused to extend the "plain language of § 301."\(^{18}\) It held that this section "provides jurisdiction for suits for violation of contracts but not for determinations of the validity of contracts where validity is the ultimate issue."\(^{19}\)

*Chicago Area Vending Association v. C.C.S. & Teamsters Local No. 761*,\(^{20}\) raised the issue of whether § 301 vests the district court with jurisdiction when the violation of a covenant in a labor contract involves both an association of employers and an employer. The individual employer had not signed the collective bargaining agreement which allegedly had been violated. Rather, the agreement was signed by an employer's association for each of the individual employers. Since only the association was a signing party to the agreement, the employer argued that the dis-

16. This section provides in relevant part that:
(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.


17. 709 F.2d 491 (7th Cir. 1983).

18. Id. at 493. The court supported this narrow interpretation of the statute by citing *Hernandez v. National Packing Co.*, 455 F.2d 1252 (1st Cir. 1972), which articulated the policy basis for such an interpretation:

While, to the extent that it could do so without infringing the NLRB's primary jurisdiction, a district court might be obliged to consider the validity of a collective bargaining agreement when asked to enforce one of its provisions at the behest of the employees. . . .

455 F.2d at 1253 (emphasis added). Thus, a court will only consider the validity of a collective bargaining agreement when necessary to enforce the contract.

The court distinguished this case from *Mogge v. District No. 8*, 387 F.2d 880, 882 (7th Cir. 1967), *cert. denied*, 391 U.S. 936 (1968), primarily on the ground that the validity of the labor contract was a threshold question not the ultimate issue as in *NDK*.

19. 709 F.2d at 493.

20. 100 CCH LC ¶10, 953 (N.D. Ill. 1983).
district court did not have subject matter jurisdiction over this dispute. However, the Seventh Circuit rejected this argument because the employer was named as a party in the agreement, and the dispute arose directly from a covenant in the agreement. The court found that even though the employer was not a signing party to the collective bargaining agreement, it actively participated in the bargaining process, and accordingly could not be considered a third person non-party. 21

B. Commodity Exchange Act

In *Tamari v. Bache & Co.*, 22 the court was presented with a difficult issue of first impression: whether the district court had subject matter jurisdiction under the Commodity Exchange Act 23 (CEA) over a dispute between nonresident aliens, when the trading of commodity futures contracts giving rise to the suit took place on United States exchanges, but the contracts between the parties occurred in Lebanon. The court found that the terms of the CEA were not dispositive of the issues because foreign agents were neither excluded nor included within its broad proscription against fraudulent commodity futures transactions.

As an alternative means of analysis, the court adopted two judicial tests: the conduct test, and the effects test. Both of these tests were originally articulated by the Second Circuit, 24 and have been employed by that court to determine whether the CEA vests district courts with subject matter jurisdiction. In applying the "conduct test," the crucial concern of the court is whether the foreign agent has used the United States as a base of operations for the successful completion of the alleged scheme to defraud. If so, the court will assert jurisdiction "based on the theory that Congress would not have intended the United States to be used as a base for effectuating the fraudulent conduct of foreign companies." 25 Under the "effects test," the court looks to whether the particular conduct occurring in foreign countries has caused foreseeable and substantial harm to interests in the United States. Jurisdiction is asserted on the underlying theory that Congress would have wished domestic

21. The court distinguished two earlier decisions, Baker v. Fleet Maintenance, 409 F.2d 551, 554 (7th Cir. 1969) and Loss v. Blankenship, 673 F.2d 942 (7th Cir. 1982), on the basis that the non-signing party to the collective bargaining agreement in these cases was not an active participant in the collective bargaining process, and therefore was a third person non-party to the contract. 100 CCH LC ¶10, 953.
22. 730 F.2d 1103 (7th Cir. 1984).
23. 7 U.S.C. §§ 6(b), (c) (1974).
25. 730 F.2d at 1108. *Psimenos* was strikingly similar to *Tamari* and arose at the same time. The court, in *Psimenos*, stated as a matter of dicta that "mere preparatory activities" would not support jurisdiction under the conduct test. 722 F.2d at 1046.
markets and investors to be protected from improper foreign transactions.\textsuperscript{26}

In \textit{Tamari}, the district court found that the foreign commodity broker's transmission of allegedly false orders to the United States satisfied the conduct test. In addition, it found that these activities affected domestic confidence in the market, and influenced the pricing and hedging functions of the market, thereby satisfying the effects test. The Seventh Circuit affirmed these findings, and accordingly held that the district court had subject matter jurisdiction under the CEA.

\section*{C. False Claims Act}

A \textit{qui tam}\textsuperscript{27} action was brought under the federal False Claims Act,\textsuperscript{28} in \textit{United States ex. rel. Wisconsin v. Dean},\textsuperscript{29} in which the State of Wisconsin sought to recover part of the fraudulent Medicaid payments that had been made to the defendant. At issue was whether Section 232(c) barred the district court from exercising subject matter jurisdiction over the claim, when the information upon which the claim was based was in the possession of the United States.\textsuperscript{30} The Seventh Circuit held that the unambiguous language of the statute barred subject matter jurisdiction over such a claim, and that there was a strong presumption against finding an exemption in the statute.\textsuperscript{31}

\section*{D. Social Security Act}

In \textit{Attorney Registration and Disciplinary Commission v.}

\begin{itemize}
\item \textsuperscript{26} 730 F.2d at 1108.
\item \textsuperscript{27} \textit{A qui tam} action is one in which the plaintiff sues for himself on behalf of the government to recover a penalty under a statute which provides that part of the penalty is awarded to the party bringing the suit and the remainder of the penalty is awarded to the government." United States \textit{ex. rel. Wisconsin v. Dean}, 729 F.2d 1100, 1102 n.1 (7th Cir. 1984).
\item \textsuperscript{28} The relevant part of the statute provided: "Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. § 232(c) (1976), quoted in, 729 F.2d at 1101.
\item \textsuperscript{29} 729 F.2d 1100 (7th Cir. 1984).
\item \textsuperscript{30} The court explained that "to exercise a private right of action" under § 232(c): [T]he \textit{qui tam} plaintiff must provide the United States Attorney General with a copy of the complaint and a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit, [citation omitted]. . . . The plaintiff may maintain this action which even though the government declines to join unless 'it shall be made to appear that such suit was based upon evidence or information in the possession of the United States. . . .' (citations omitted).
\item \textsuperscript{31} Id. at 1104. \textit{See also}, U.S. v. Aster, 275 F.2d 281 (3d Cir.), \textit{cert. denied}, 364 U.S. 894 (1960); Pettis \textit{ex. rel. United States v. Morrison-Knudsen Co.}, 577 F.2d 688 (9th Cir. 1978); 49 A.L.R. Fed. 847 (1980).
\end{itemize}
Schweicker, the district court dismissed the Commission’s complaint for lack of subject matter jurisdiction. The plaintiffs had alleged subject matter jurisdiction under §205(g) of the Social Security Act. The Act provides in relevant part that “[a]ny individual, after any final decision of the Secretary of [Health and Human Services] made after a hearing to which he was a party . . . may obtain a review in [a] district court of the United States. . . .” The Commission sought a judicial determination of its social security coverage in advance of any claims for benefits. The Seventh Circuit recognized that in order to uphold jurisdiction over the Commission’s suit, two issues would have to be resolved: (1) whether the Commission was subject to a final decision of the Secretary under the terms of §205(g); and (2) whether the Commission was an individual party to a hearing within the statutory language. The court found that the finality requirement was met when the Secretary sent a letter to the Commission saying that its employees were not covered by social security, adding that “the Commission has no formal appeal rights under the Social Security Act to [sic] this determination.” Because the Commission had exhausted its remedies within the agency, the court considered this letter a final decision within the terms of the statute.

On the other hand, with respect to the standing requirement, the court had to broadly construe the terms of §205(g) in order to find that the Commission was a party to the hearing within the meaning of that section. The court analogized to private sector insurance disputes to find standing:

A company that paid premiums year in and year out for group life insurance for its employees and then was told by the insurance company that the policy had been cancelled would have standing to sue for a declaration that it was still in force. [citation omitted] That is the kind of interest the Disciplinary Commission has asserted in this suit. . . . In these circumstances, the presumption of judicial review-ability of administrative action, [citation omitted], argues strongly for deeming the Commission an “individual” within the meaning of Section 205(g), entitled to obtain judicial review of an administratively final decision on coverage.

Even though this interpretation of “individual” strained the usual meaning of the term, the court was willing to expand the scope of the term because of the strong possibility that without such an interpreta-

32. 715 F.2d 282 (7th Cir. 1983).
34. Id.
35. 715 F.2d at 286.
tion, the Commission would have no other avenue of judicial review. The court recognized that although arguably mandamus jurisdiction might be available, a recent decision of the Seventh Circuit has narrowed the scope of such jurisdiction.\(^{37}\) Moreover, the court concluded that it is more consonant with the Supreme Court's decision in \textit{Weinberger v. Salfi}\(^{38}\) to route judicial review through § 205(g), and not through mandamus or other avenues.

\textbf{E. Diversity Jurisdiction}

In \textit{Elston Investment, Ltd. v. David Altman Leasing Corp.},\(^{39}\) the jurisdictional issue faced by the Seventh Circuit was whether the citizenship of a limited partner is the citizenship of all partners (general and limited) or only the general partners. Since this was an issue of first impressions, the court examined the differing views of the issue taken by the Second\(^{40}\) and Third Circuits.\(^{41}\) The court rejected the Second Circuit's position that for the purposes of diversity jurisdiction, only the citizenship of the general partners should govern. Instead, the court adopted the Third Circuit's rule that the citizenship of both limited and general partners should determine the court's diversity jurisdiction. The Seventh Circuit concluded that this rule was more consistent with the Supreme Court's position that any change in the rules for determining diversity of citizenship must come from Congress.\(^{42}\)

\textbf{F. Federal Question Jurisdiction}

In \textit{Woodstock/Kenosha Health Center v. Schweiker},\(^{43}\) the Seventh Circuit held that the district court had federal question jurisdiction over a challenge to a proposed Medicaid disallowance. Previously, the Seventh Circuit had held that federal question jurisdiction does not confer subject matter jurisdiction on the district court to decide the legality of a Medicare disallowance.\(^{44}\) The court recognized that case law had "unambiguously [stated] that the Medicare review procedures are exclu-


\(^{38}\) 422 U.S. 749 (1975). In \textit{Salfi}, the Court liberally interpreted the statute to allow alternative avenues of review, not only mandamus. \textit{Id.} at 764.

\(^{39}\) 731 F.2d 436 (7th Cir. 1984).


\(^{41}\) Carlsberg Resource Corp. v. Cambria Sav. & Loan Assn., 554 F.2d 1254 (3d Cir. 1977).

\(^{42}\) See Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980).

\(^{43}\) 713 F.2d 285 (7th Cir. 1983).

sive and preclude the application of general federal jurisdiction." 45 Nevertheless, in *Woodstock*, the court found that with respect to *Medicaid* cases, there was no Congressional evidence to defeat the strong presumption in favor of judicial review. 46 Accordingly, it held that federal question jurisdiction vests the district court with subject matter jurisdiction in Medicaid, but not Medicare cases.

**Appellate Jurisdiction**

The courts of appeals have exclusive appellate jurisdiction under Sections 2321(a) and 2342(5) of the Judicial Code to review final orders of the Interstate Commerce Commission (I.C.C.). 47 However, Congress divided the review process by enacting 28 U.S.C. § 1336(a). 48 This provision gives the district courts jurisdiction to enforce or enjoin "any order of the I.C.C. for the payment of money or the collection of fines, penalties, and forfeitures." 49 This bifurcated review process gave rise to an issue of appellate jurisdiction in *Field Container Corporation v. I.C.C.* 50 In *Field Container*, the Seventh Circuit had to decide whether it had appellate jurisdiction over an I.C.C. order commanding a shipper to pay a demurrage charge of $19,000 to the C&NW railroad.

In deciding this issue, the court expressed displeasure with this division in the appellate jurisdiction of the court of appeals. The court found it anomalous that "the less important [order], the order for repayment of money, gets an extra tier of review—review by a federal district court, in addition to review by the court of appeals, and by the Supreme Court on certiorari." 51 Consequently, the court construed § 1336(a) narrowly, and found two grounds upon which to conclude that the district court did not have appellate jurisdiction over this type of I.C.C. order. First, it found the order to be within its appellate jurisdiction because the plaintiff's complaint sought a court order commanding the railroad to waive the demurrage charge, which the court construed as a request for an injunction. Alternatively, since the plaintiff's complaint also alleged that the demurrage charge was unreasonable, the court construed this allegation as a request for partial cancellation of a tariff, a matter over which

45. 713 F.2d at 289.
46. Id.
48. See C. WRIGHT, LAW OF FEDERAL COURTS § 301 (1983), for an excellent brief synopsis of the history of judicial review of ICC orders.
50. 712 F.2d 250 (7th Cir. 1983).
51. Id. at 254.
the court of appeals would have jurisdiction. Thus, the Seventh Circuit concluded that this order did not fall within the ambit of § 1336(a), and therefore the court of appeals had exclusive jurisdiction.

In *Texaco Inc. v. Cottage Hill Operating Co.* and *Rohrer, Hibler & Replogle, Inc. v. Perkins*, the court(s) had to decide whether the Enlow-Ettleson doctrine vested the court of appeals with appellate jurisdiction over two orders, one denying a motion to remand (Perkins) and the other denying a motion to dismiss or stay (Texaco). The Enlow-Ettleson doctrine is derived from two Supreme Court cases which followed the fusion of law and equity. The doctrine acts as an exception to the terms of 28 U.S.C. § 1292(a)(1), governing appellate jurisdiction over interlocutory orders. The essence of the doctrine is that a stay of proceedings, not usually appealable under § 1292(a)(1), may be appealed when both of the following conditions are met: (1) the underlying cause of action sounds in law; and (2) the stay of proceedings was sought to permit the prior determination of some equitable defense or counterclaim. The doctrine has been criticized as anachronistic, leading to inconsistency and injustice.

The Seventh Circuit refused to extend the application of the doctrine in either *Texaco* or *Perkins*. In *Texaco*, the court determined that the cause of action involved damages, and therefore sounded in law, but the stay was brought to permit the prior determination of a legal, not an equitable, defense. Therefore, the court held that the doctrine did not apply, and accordingly, held that it did not have jurisdiction over the district court's order.

In *Perkins*, the court simply concluded that the doctrine did not

52. *Id.* at 255.
53. 709 F.2d 452 (7th Cir. 1983).
54. 728 F.2d 860 (7th Cir. 1984).
55. *Id.* at 863. The *Rohrer* court evidenced a great deal of reluctance to extend the doctrine beyond the bounds approved by the Supreme Court.
57. The statute provides in relevant part:

§ 1292. Interlocutory decisions
(a) The courts of appeals shall have jurisdiction from:
(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.
58. See *Hayes v. Allstate Ins. Co.*, 722 F.2d 1332, 1337-38 (7th Cir. 1983) (Posner, J., dissenting). C. WRIGHT, § 102, writes very harshly of the rule: "If Congress were aware of the travail this obsolete and fictional distinction is causing the courts of appeals, relief would surely be forthcoming . . . A rule that causes confusion at best and injustice at worst can hardly be justified."
59. C. WRIGHT, LAW OF FEDERAL COURTS at 710.
60. 709 F.2d at 754.
apply because the plaintiff's motion was to remand the case to state
court, and that a remand was not the equivalent of a stay within the
terms of the doctrine. In addition, the court considered whether the col-
lateral order doctrine applied to this motion within the small exception
to the finality requirement of 28 U.S.C. § 1291. Under the collateral or-
der order doctrine, the appellate court will review orders "which finally deter-
mine claims or rights separable from, and collateral to, rights asserted in
the action, too important to be denied review and too independent of the
cause itself to require that appellate consideration be deferred until the
whole case is adjudicated." 61 The doctrine has been narrowly construed
to insure that the finality requirement of § 1291 is not undermined. 62
The Seventh Circuit followed the Supreme Court's application of the
doctrine 63 and concluded that since the district court's order denying
plaintiff's motion to remand was reviewable on final appeal, the collateral
order doctrine did not apply. The policy underlying this decision was
that cases should not be decided in a piecemeal fashion, and an interlocu-
tory appeal will be taken only under exceptional circumstances.

Another case concerned with this policy against "piecemeal ap-
peals" was Ivanov-McPhee v. Washington Nat. Ins. Co. 64 The plaintiff
brought an employment discrimination suit against Washington National
[WNI] and others. Ten suits were brought altogether, four naming WNI
as a defendant. On plaintiff's motion, the ten cases were consolidated for
purposes of discovery and trial, and a multiple count was filed. Never-
theless, separate docket sheets were maintained. Subsequently, the dis-
trict court dismissed all four suits against WNI. The plaintiff appealed
this dismissal without first obtaining certification under the Federal
Rules of Civil Procedure 54(b). 65 The court considered the issue of
whether the dismissal of the four WNI suits was sufficiently separate to
warrant appellate jurisdiction without 54(b) certification. The court de-

61. Rohrer v. Perkins, 728 F.2d 860, 862 (7th Cir.), cert. denied, — U.S. —, 105 S. Ct. 265
62. See Ruiz v. Estele, 609 F.2d 118, 119 (5th Cir. 1980); Minnesota v. Pickands Mather & Co.,
636 F.2d 251, 254-55 (8th Cir. 1980); Cullen v. N.Y.S. Civil Service Comm'n., 566 F.2d 846, 848 (2d
Cir. 1977); Rodgers v. U.S. Steel Corp., 541 F.2d 365, 369-71 (3d Cir. 1976).
63. Cooper & Lybrand v. Livesay, 437 U.S. 463 (1978). The Court articulated the following
three criteria: "[T]he order must conclusively determine the disputed question, resolve an important
issue completely separate from the merits of the action, and be effectively unreviewable from a final
judgment." Id. at 468.
64. 719 F.2d 927 (7th Cir. 1983).
65. FED. R. CIV. P. 54(b) provides in relevant part:
When more than one claim for relief is presented in an action, whether as a claim, counter-
claim, 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 . . . .
terminated that this issue depends on the type of consolidation that has taken place. That is, if several actions "are combined into one, lose their separate identity, and become a single action in which a single judgment is rendered," then 54(b) certification is a prerequisite to exercising appellate jurisdiction over the dismissal of any one of the suits.\textsuperscript{66} Applying this principle to the present case, the court reasoned that, while the consolidation order did not state that the cases were consolidated for all purposes, it could not "discern any purposes of substance for which they retain separate identities. Their separate existences, if any, are confined to the formalities of the docket sheets."\textsuperscript{67} Hence, the court held that when consolidated cases maintain only formal distinctions, and a party's interest will not be seriously prejudiced, Rule 54(b) certification must be obtained before an appellate court will exercise jurisdiction.\textsuperscript{68}

In \textit{Minority Police Officers Ass'n of South Bend v. City of South Bend},\textsuperscript{69} the court narrowly construed the range of issues which can be appealed with 54(b) certification. The court considered the issue of whether the district court's partial summary judgment on three issues was separate, and therefore appealable under Rule 54(b). The Seventh Circuit expressed the desire to "hold that claims were never separate for Rule 54(b) purposes if they [arise] out of the same factual setting . . . ."\textsuperscript{70} However, it recognized that the Supreme Court had rejected this mechanical judicial test for determining the separateness of claims under Rule 54(b).\textsuperscript{71} Nevertheless, the Seventh Circuit ruled that claims will not be considered separate under 54(b) if "the facts they depend on are largely the same, or, stated otherwise, if the only factual differences are minor."\textsuperscript{72} Applying this test to the issues dismissed by the district court's partial summary judgment, the court concluded that one issue was not appealable under 54(b) because it raised facts which involved

\textsuperscript{66} 719 F.2d at 929, \textit{citing}, 9 C. \textsc{Wright} \& A. \textsc{Miller}, \textsc{Federal Practice and Procedure} \textsection 2382, at 254 (1971).

\textsuperscript{67} 719 F.2d at 930.

\textsuperscript{68} The court applied the rationale of \textit{Ringwald v. Harris}, 675 F.2d 768 (5th Cir. 1982). The court in \textit{Ringwald} reasoned that:

\begin{quote}
While a consolidation may not in every respect merge separate actions into a single suit, we see no reason why a proper consolidation may not cause otherwise separate actions to thenceforth be treated as a single judicial unit for purposes of Rule 54(b) when the consolidation is clearly unlimited and the actions could originally have been brought as a single unit.
\end{quote}

\textit{Id.} at 771.

\textsuperscript{69} 721 F.2d 197 (7th Cir. 1983).

\textsuperscript{70} \textit{Id.} at 200.

\textsuperscript{71} \textit{Sears, Roebuck} \& Co. v. \textit{Mackey}, 351 U.S. 427, 436 (1956).

\textsuperscript{72} \textit{Id.} Earlier Seventh Circuit decisions have struggled with a workable test to apply when factual allegations overlap. \textit{See}, e.g., \textit{Local p.171 Amalgamated Meat Cutters v. Thompson Farms Co.}, 642 F.2d 1065, 1070 (7th Cir. 1982). The MPOA test borders on the test rejected in \textit{Sears}. \textsuperscript{71}
essentially the same facts that might be involved in a future appeal; another issue was held to be appealable because it concerned a different class of people than those involved in the remaining suit. As to the third claim, the court concluded that it was not a final determination, and therefore could not be appealed under Rule 54(b).  

**Abstention Doctrine**

Under a variety of special circumstances a federal district court will "abstain" from exercising its Congressionally mandated jurisdiction over a dispute, in deference to a parallel state court proceeding. The Seventh Circuit decided three cases involving the abstention doctrine. The apparent theme running through these three cases is a desire by the Seventh Circuit to limit the scope of the federal forum.  

**A. Younger-Type Abstention**

In *Ciotti v. County of Cook*, the Seventh Circuit concluded that abstention was appropriate because the plaintiffs' federal action was "still in an embryonic stage." The plaintiffs challenged the constitutionality of a zoning ordinance which designated their adult book store a "non-conforming use." The plaintiffs were given a one year grace period to comply with the ordinance. The plaintiff applied for a variance from the ordinance which would have permitted them to continue operating. Shortly after the Board of Zoning Appeals denied their request, the plaintiffs filed a suit in federal district court. While the plaintiffs were filing this action in federal district court, the county brought a quasi-criminal action against them in state court, alleging that the plaintiffs were still in violation of the ordinance.

After bringing its quasi-criminal action, the county sought dismissal of the plaintiffs' federal action. The county argued that under the "abstention doctrine" the federal district court should defer to the state court proceeding involving the same issues. The federal district court accepted this argument and dismissed the plaintiffs' action.

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73. 721 F.2d at 202.
74. *See generally* WRIGHT, supra note 48. *See also infra* note 88 and accompanying text.
75. 712 F.2d 312 (7th Cir. 1983).
76. *Id.* at 314. The Supreme Court in *Hicks v. Miranda*, 422 U.S. 332 (1975), established the formula for determining the dividing line in time for abstention: "Commencement of the federal action is not the controlling date in determining whether a state action is pending. Instead, the federal court is to make the determination when it is ready to commence 'proceedings of substance on the merits.'" *Id.* at 349.
77. 712 F.2d at 313.
78. *Id.*
On appeal, the plaintiffs argued that abstention was inappropriate because the federal action was so far advanced as to preclude abstention. In deciding this issue, the court followed the abstention doctrine as outlined in the Supreme Court's opinion in Younger v. Harris.\textsuperscript{79} Younger-type abstention deals with the situation where the plaintiff is in federal court challenging the constitutionality of a criminal statute, while the state is prosecuting the plaintiff in state court for a violation of that statute. When the state proceedings commence after the filing of the federal action, the district court will abstain only if two conditions are met: (1) the state court proceedings will provide the federal plaintiff with an adequate opportunity to raise his constitutional challenges; and (2) there have been no proceedings of substance on the merits in federal court.\textsuperscript{80}

In \textit{Ciotti}, both sides agreed that the quasi-criminal action would provide an adequate forum for the federal plaintiffs to raise their constitutional objections. With respect to the advancement of the proceedings question, the court ruled that since the district court had only decided the preliminary issue of standing in the federal action, abstention was appropriate. Accordingly, the court held that the plaintiffs' suit was not so far advanced as to prevent dismissal in deference to the state court proceeding.\textsuperscript{81}

\textit{B. Pullman-Type Abstention}

In \textit{Waldron v. McAtee},\textsuperscript{82} the Seventh Circuit abstained from deciding whether an Indianapolis loitering ordinance was unconstitutionally vague, because a construction of the statute by the state court might moot any constitutional challenge in federal court. In \textit{Waldron}, the plaintiff was threatened with arrest under an anti-loitering ordinance if he was "ever again found late at night in the vicinity of either the library or Monument Circle."\textsuperscript{83} The plaintiff sued for declaratory and injunctive relief in federal district court alleging that the application of the ordinance violated his civil rights, and that on its face the ordinance was void for vagueness under the First Amendment. The district court granted defendant's motion for summary judgment and dismissed plaintiff's complaint.

\textsuperscript{79} 401 U.S. 37 (1971).
\textsuperscript{81} 712 F.2d at 314.
\textsuperscript{82} 723 F.2d 1348 (7th Cir. 1983).
\textsuperscript{83} \textit{Id}. at 1350.
On appeal, the Seventh Circuit raised the issue of abstention for the first time.\textsuperscript{84} The court determined that this case was appropriate to apply the abstention doctrine as outlined in \textit{Railroad Comm'\textquoteleft n. v. Pullman Co.}\textsuperscript{85} Under \textit{Pullman}-type abstention, "a court abstains in order to avoid unnecessary constitutional adjudication. . . . It is not seeking to protect the rights of one of the parties; it is seeking to promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures."\textsuperscript{86}

Applying this principle to the present case, the court concluded that since the ordinance in question was not irremediably vague, and had not been construed by the Indiana state court, the federal court should abstain from ruling on the plaintiff's case. The Seventh Circuit reasoned that the state court might put a judicial gloss on the ordinance, rescuing it from a challenge on the ground of unconstitutional vagueness. Under such a construction, the ordinance might be inapplicable to plaintiff's conduct, and therefore it could not violate his civil rights.

If the state court's construction of the ordinance voided both the plaintiff's vagueness claim and his allegations of a civil rights violation, the plaintiff's federal action would be moot, further justifying abstention in this case. So as not to interfere with the state court's initial construction of its own ordinance, the Seventh Circuit concluded that abstention was proper in this case.\textsuperscript{87}

The court dismissed the plaintiff's argument that abstention would unduly burden his access to the federal courts. In this regard, the court declared that:

\begin{quote}
[A]ccess to the federal courts is by no means guaranteed when a statute or ordinance is challenged as being unconstitutionally vague; and certainly Waldron should not feel unfairly deprived by being forced to litigate merely the applicability of the Indianapolis loitering ordinance in the state courts of Indiana, being able to return if he wants to the federal district courts to litigate any federal questions there.\textsuperscript{88}
\end{quote}

In these few words, the court articulated a theme running through most of the cases involving jurisdiction. That is, unless clearly mandated by

\textsuperscript{84}. \textit{Id.} at 1351.
\textsuperscript{85}. 312 U.S. 496 (1941).
\textsuperscript{86}. 723 F.2d at 1351.
\textsuperscript{87}. \textit{Id.} See also, \textit{United States v. Thirty-Seven Photographs}, 402 U.S. 363, 369 (1971). Under this type of abstention, the Court in \textit{Babbitt v. UFWNU}, 442 U.S. 289 (1979), stated that abstention is appropriate when a state law can be "subject to an interpretation which will render unnecessary or substantially modify the federal constitutional questions." \textit{Id.} at 308.
\textsuperscript{88}. 723 F.2d at 1353; Judge Swygert dissented from the majority opinion in \textit{Waldron} primarily because the majority required the plaintiff to exhaust his state court remedies, something not required in \textit{Pullman}-type abstention. \textit{Id.} at 1356.
statute or judicial policy, the Seventh Circuit will strictly limit the range of federal jurisdiction, with little regard for the hardships this may place upon the plaintiff.

C. Colorado River Abstention

The Seventh Circuit found that "[n]one of the well-established avenues for . . . abstention" supported the district court's decision to abstain in Board of Educ. of Valley View v. Bosworth. Nevertheless, the court concluded that under Colorado River Water Conservation v. United States, there were exceptional circumstances in this case which justified staying the exercise of federal jurisdiction. The underlying dispute in Bosworth involved the failure of the county tax office to distribute revenues to certain local governmental units in Will County, Illinois. Arising out of this dispute, one suit was filed in federal district court, and simultaneously, two similar suits were filed in state court. On the defendant's motion to abstain, the district court ruled that abstention was appropriate for three reasons: (1) the state court suits could furnish complete relief on all the claims presented; (2) the federal proceedings had not progressed beyond the filing of the complaint and motions to dismiss; and (3) the case involved sensitive issues of local taxation.

On appeal, the Seventh Circuit considered the lower court's rationale for abstention that to compel distribution of collected taxes "is as disruptive to state autonomy as suspending the collection of taxes." The court rejected this reasoning. Instead, it found that if the federal district court decided this case, it would not interfere with the state's sovereign functions because the plaintiffs did not seek to challenge the tax system, but rather sought compliance with it. Nevertheless, the court determined that abstention was appropriate on other grounds. It reasoned that since a consent had been entered which mooted most of the issues in dispute and the remaining issues were close to settlement, therefore under the "exceptional circumstances" of Colorado River, abstention was appropriate.

89. 713 F.2d 1316 (7th Cir. 1983).
90. 424 U.S. 800 (1976). The Court stated that the existence of parallel proceedings may in exceptional circumstances justify staying the exercise of jurisdiction. Such exceptional circumstances include the possibility of avoiding piecemeal adjudication, the extent to which the federal proceedings have progressed, and the degree to which the rights at stake are peculiarly local. Id. at 818-20.
91. 713 F.2d at 1318-19.
92. Id. at 1319.
93. Id. at 1321-22.
In *Quad/Graphics, Inc. v. Fass*, the court dealt with the issue of when a voluntary dismissal of less than all the defendants to an action is proper. In that case, Quad/Graphics sought to recover $1.5 million due on various contracts with the corporate defendants. Quad/Graphics named the corporate entities it had contracted with, as well as two principals of those corporations. Individually named were Irving and Myron Fass. Quad/Graphics sought to pierce the corporate veil and hold Myron and Irving personally liable. Prior to the final adjudication of its lawsuit, Quad/Graphics was able to reach a voluntary settlement with Irving Fass. Over the objections of the remaining corporate and individual defendants, the district court dismissed Irving from the lawsuit. Dismissal was pursuant to Federal Rule of Civil Procedure 41(a)(2). In affirming this dismissal, the Seventh Circuit reiterated the standard to be used when assessing the propriety of a Rule 41(a)(2) voluntary dismissal. The court stated that in order to have standing to challenge the voluntary dismissal of a co-defendant, the non-settling party or parties must “demonstrate plain legal prejudice,” not merely injury in fact. The court noted that although the settlement agreement entered into between Irving and Quad/Graphics prevented him from “voluntarily participat[ing] in the litigation,” he was vulnerable to “an appropriate legal action . . . to determine the nature of his duty [to the corporate defendants] and to compel him to perform it.” Consequently, the court concluded that though this settlement agreement made the remaining defendants’ trial preparation more difficult, this difficulty did not rise to the level of plain legal prejudice.

94. 724 F.2d 1230 (7th Cir. 1983).
95. Settlement was pursuant to the district court’s Decision and Order of September 9, 1982. Id. at 1231.
96. FED. R. CIV. P. 41(a)(2) provides in relevant part: “Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff’s instance save upon order of the court and upon such terms and conditions as the court deems proper.”
97. See Stein v. Barnett, 452 F.2d 211, 213 (7th Cir. 1971), citing, 2B BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §912 (Wright ed. 1961) at 114 (“In exercising its discretion the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice.”)
98. Analytically some commentators have expressed concern over utilizing Rule 41(a)(2) to dismiss fewer than all claims or all parties. This concern is founded in the Rule’s explicit language to dismiss an action, not a claim. See 5 Moore’s Federal Practice ¶41.06-1 (1982). Compare FED. R. CIV. P. 41(b) which states in relevant part that defendants “may move for the dismissal of an action or any claim.”
99. 724 F.2d at 1233.
100. Id. at 1237.
101. Id. at 1234.
102. Id. The court noted that Irving’s disinclination to participate in the lawsuit predated the
In the 1983-84 term the Seventh Circuit handed down two decisions which can conveniently be grouped together under the category of involuntary dismissal.

Federal Rule of Civil Procedure 41(b) allows a defendant, under certain circumstances, to move to have the claims against him involuntarily dismissed. The following two cases respectively involve questions regarding the propriety of the district court's grant of a Rule 41(b) motion for: (1) failure of a plaintiff to prosecute; and (2) failure of a plaintiff to show any right to relief after the presentation of his evidence in a nonjury trial.

In *Stevens v. Greyhound Lines, Inc.*, the Seventh Circuit affirmed the district court's order dismissing plaintiff's suit under Rule 41(b) for failure to prosecute. The Seventh Circuit acknowledged that involuntary dismissal with prejudice is a severe sanction to be imposed only in extreme circumstances. However, the court emphasized that this sanction must be available to protect the interests of all litigants and to ensure that the court system operates in an efficient manner. A trial on the merits is preferred, but where the plaintiff's conduct, viewed in its entirety, demonstrates a lack of prosecutive intent, involuntary dismissal is appropriate.

In this case the plaintiff's lawsuit had been pending for over four years, and at the time of dismissal the district court had already granted three continuances, two of which were necessitated by the plaintiff's failure to secure counsel and prepare for trial. On two occasions, the district court instructed the plaintiff to secure replacement counsel. On December 14, 1981, the date the last continuance was granted, the district court warned the plaintiff that if he was not prepared by the next agreed-upon trial date, the district court would have no choice but to dismiss his suit. Two-and-a-half months later the defendant served the plaintiff with a notice to take his deposition and with a subpoena requesting the plaintiff to bring with him copies of all documents he intended to submit as trial exhibits. Two weeks before trial the plaintiff appeared at the deposition without counsel and without copies of the requested documents. The

settlement agreement. Therefore, Irving's cooperation was not assured even if the agreement had not been entered into.

103. 710 F.2d 1224 (7th Cir. 1983).
104. Id. at 1230.
105. 710 F.2d at 1228. The court relied extensively on its recent decision in Locasio v. Teletype Corp., 694 F.2d 497 (7th Cir. 1982), which involved facts similar to those of *Stevens*. See 710 F.2d at 1228-29.
next day the defendant moved to dismiss plaintiff's suit on two grounds, including failure to prosecute under Rule 41(b). The court granted the motion, and plaintiff appealed.

The Seventh Circuit ruled that, under the circumstances, the district court did not abuse its discretion in granting defendant's Rule 41(b) motion two weeks prior to the scheduled date of trial. The court found that with less than two weeks remaining before trial, the plaintiff's failure to secure counsel and refusal to cooperate in trial preparation demonstrated that it was a virtual certainty that the plaintiff would not be prepared for trial on the scheduled trial date.

Under Rule 41(b), a court may dismiss a plaintiff's claim at the close of the plaintiff's presentation of evidence if the plaintiff has shown no right to relief under the facts and the law. Ekanem v. Health Hospital Corp. of Marion City, Ind. explored the application of this ground for involuntary dismissal to Title VII actions.

In Ekanem, the district court had granted the defendants' Rule 41(b) motion thereby dismissing the plaintiffs' individual and class claims of employment discrimination. On appeal, the plaintiffs contended that they had established a prima facia case of employment discrimination and retaliation. Accordingly, they argued that they were entitled to have the defendants present their evidence so that the plaintiffs would have a full and fair opportunity to demonstrate that the defendants' reasons were merely a pretext for discrimination and retaliation. This argument was predicated on the three-step procedure for trying Title VII claims outlined in McDonnell Douglas Corp. v. Green. Under this three-step procedure, the plaintiff presents his case and describes the defendant's allegedly discriminatory acts, the defendant explains why its actions were motivated by legitimate considerations, and then the plaintiff explains why the defendant's purported reasons for its actions were merely a pretext for its discrimination. The plaintiffs' argument essentially was that they were entitled to have this three-step procedure carried out.

The Seventh Circuit noted, however, that this three-step procedure

106. The defendant also moved to dismiss under Rule 37(b)(2)(C), which the district court also granted. That rule provides that a suit may be dismissed if "a party . . . fails to obey an order to provide or permit discovery . . . ." FED. R. CIV. P. 37(b)(2)(C). On the appeal of this order, the Seventh Circuit ruled that the district court erred in dismissing plaintiff's suit on the basis of Rule 37(b)(2)(C) since that rule has no application where there has been no court discovery order. 710 F.2d at 1228. Accord 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §2289 (1978).

107. See 710 F.2d at 1230.


is not a rigid framework for trying Title VII actions.\textsuperscript{110} Rather, it serves as a mere model for evaluating all of the evidence in a discrimination suit.\textsuperscript{111} It is not necessarily error, therefore, for a court to grant a Rule 41(b) motion at the close of the plaintiff's case.\textsuperscript{112} The court next considered the specific application of Rule 41(b) to Title VII actions. It concluded that dismissal is proper in two situations:\textsuperscript{113} (1) where the plaintiff, at the close of his case-in-chief, has not demonstrated a prima facia case of discrimination; and (2) where the record at the close of the plaintiff's case contains the defendants' reasons for its actions and the evidence is sufficient to support a judgment for the defendants.

In \textit{Ekanem}, the trial record before the district court not only included the defendant's statements but also included the transcript from a prior hearing on whether to issue a preliminary injunction.\textsuperscript{114} Thus, the dismissal was not premature, and after reviewing all the evidence, the Seventh Circuit concluded that the district court was not clearly in error in finding that the plaintiffs had failed to sustain their burden of proof.\textsuperscript{115}

\textbf{Summary Judgment}

Two decisions in the 1983-84 term addressed issues concerning summary judgment. In \textit{Gieringer v. Silverman},\textsuperscript{116} a securities fraud case, the issue on appeal was whether summary judgment was an appropriate resolution of a statute of limitations defense where: (1) the plaintiffs' knowledge and diligence were in issue; and (2) the plaintiffs had filed a Rule 56(f)\textsuperscript{117} motion in response to the defendants' motion for summary judgment.

The Wisconsin statute of limitations required the plaintiffs to file suit within one year of the date that they either knew or, in the exercise of due diligence, should have known facts sufficient to put them on notice of possible fraud.\textsuperscript{118} From the plaintiffs' complaint and deposition, it was

\begin{footnotesize}
\textsuperscript{110} 724 F.2d at 568.
\textsuperscript{111} Davis v. Weidner, 596 F.2d 726, 730 (7th Cir. 1979).
\textsuperscript{112} 724 F.2d at 568. \textit{See also}, Gaballah v. Johnson, 629 F.2d 1191, 1200 (7th Cir. 1980).
\textsuperscript{113} 724 F.2d at 568.
\textsuperscript{114} The parties stipulated that the record from the preliminary injunction hearing was to be part of the trial record here. \textit{Id}.
\textsuperscript{115} \textit{Id} at 568-74.
\textsuperscript{116} 731 F.2d 1272 (7th Cir. 1984).
\textsuperscript{117} FED. R. CIV. P. 56(f) states that:
\begin{quote}
Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.
\end{quote}
\textsuperscript{118} \textit{See} \textit{Wis. Stats.} §551.59(5) (1979-80).
\end{footnotesize}
clear that as of September, 1979 the plaintiffs knew of facts sufficient to put them on notice of possible fraud.\(^{119}\) The plaintiffs, however, did not bring their suit until July, 1981. On the basis of the plaintiffs’ complaint and deposition, the defendants moved for summary judgment. The plaintiffs responded by filing a Rule 56(f) motion, contending that further discovery was needed in order for them to counter the defendants’ motion. Ultimately, the district court denied the plaintiffs’ Rule 56(f) motion and granted the defendants’ motion for summary judgment.\(^{120}\)

In affirming the district court decision, the Seventh Circuit rejected several arguments proffered by the plaintiffs. The court stated that summary judgment is a proper way to dispose of a statute of limitations defense where the dispositive issue is the plaintiffs’ state of mind.\(^{121}\) In addition, the court ruled that further discovery was not needed before the lower court ruled on the summary judgment motion.\(^{122}\) The plaintiffs had failed to adequately demonstrate how further discovery could help them in resisting summary judgment. The court emphasized that this was not a case where the facts needed to defeat summary judgment were in the movants’ (defendants’) possession.\(^{123}\) Rather, the plaintiffs themselves were the only parties that could possibly possess the information needed to counter a summary judgment motion predicated on the plaintiffs’ own complaint and deposition. Finally, the Seventh Circuit rejected the plaintiffs’ contention that they never had an opportunity to respond to the defendants’ summary judgment motion.\(^{124}\) The defendants’ mo-

\(^{119}\) 539 F. Supp. 498, 502 (E.D. Wis. 1982).

\(^{120}\) Id. at 498.

\(^{121}\) 731 F.2d at 1277. The plaintiffs argued that summary judgment was an improper method of disposing of statute of limitations issues in securities cases. The Seventh Circuit rejected this absolute proposition. It acknowledged that several securities cases in the Seventh Circuit had held that summary judgment was inappropriate where the defendant’s motive and intent was in issue. See, e.g., Staren v. American National Bank & Trust Co., 529 F.2d 1257, 1261 (7th Cir. 1976); Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975). However, the court explained that the rationale of these decisions rested not in the fact that they were securities cases but in the realization that issues of the defendant’s motive and intent cannot be resolved prior to complete discovery, and usually, a trial on the merits. 731 F.2d at 1277. On the other hand, the court noted that several cases in this circuit have demonstrated that summary judgment may be appropriate where the issue is the plaintiff’s due diligence in discovering facts underlying the securities claim. See, e.g., Turner v. First Wisconsin Mortgage Trust, 454 F. Supp. 899, 907 (E.D. Wis. 1978); Cahill v. Ernst & Ernst, 448 F. Supp. 84, 88 (E.D. Wis.), vacated, 588 F.2d 835 (7th Cir. 1978), on remand, 478 F. Supp. 1186, 1191 (E.D. Wis. 1979), aff’d, 625 F.2d 151 (7th Cir. 1980). See also, Ohio v. Peterson, Lowry, Rail, Barber & Ross, 472 F. Supp. 402, 410 (D. Colo. 1979), aff’d, 651 F.2d 687 (10th Cir.) (collecting cases at 692 n.9), cert. denied, 454 U.S. 895 (1981). Since the district court had determined that the dispositive factor in the statute of limitations dispute was the plaintiffs’ state of mind, the Seventh Circuit ruled that summary judgment was available to the defendants in this case. 731 F.2d at 1277.

\(^{122}\) 731 F.2d at 1278.

\(^{123}\) See Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977).

\(^{124}\) 731 F.2d at 1280.
tion had been pending before the district court for over six months, and the plaintiffs' submissions during that time, while intended to be confined to the Rule 56(f) motion, clearly also addressed the merits of the defendants' motion for summary judgment. The court noted that merely filing a Rule 56(f) motion does not automatically stay the proceedings on the underlying summary judgment motion.125

In Gracyalny v. Westinghouse Electric Corp.,126 the Seventh Circuit commented upon the availability of summary judgment in negligence and strict tort liability cases. Here appeal was taken from an order of the district court granting the defendant's motion for summary judgment. In reversing the district court's order, the Seventh Circuit expressed its view that summary judgment is rarely appropriate in tort actions.127 In negligence cases, factual issues concerning the reasonableness of parties' conduct, foreseeability and proximate cause are best resolved by a jury.128 Similarly, in strict tort liability cases, whether a product is defective and unreasonably dangerous to the user may be an issue of material fact precluding summary judgment. In Gracyalny, numerous issues of material fact were present, and therefore the Seventh Circuit concluded that the district court erred in granting the defendant's motion for summary judgment.129

**Default Judgment**

In Dundee Cement Co. v. Howard Pipe & Cement Products, Inc.,130 the Seventh Circuit considered the propriety of the district court's entry of a default judgment without a hearing.131 The default judgment was entered against four of the six remaining defendants for their repeated failure to answer the complaint. Significantly, no hearing was held prior to the entry of default. On appeal, the defendants contended that the district court's failure to hold a hearing was an abuse of discretion. Specifically, they argued that the district court should have conducted a

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125. Id.
126. 723 F.2d 1311 (7th Cir. 1983).
127. Id. at 1316, quoting Hughes v. American Jawa, Ltd., 529 F.2d 21, 23 (8th Cir. 1976). Under FED. R. CIV. P. 56(c), summary judgment for a defendant is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the . . . [defendant] is entitled to a judgment as a matter of law."
128. 723 F.2d at 1316.
129. Id. at 1322.
130. 722 F.2d 1319 (7th Cir. 1983).
131. FED. R. CIV. P. 55(b)(2) reads in pertinent part that "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary . . . to determine the amount of damages or to establish the truth of any averment by evidence . . . , the court may conduct" a hearing.
hearing to require the plaintiffs to prove: (1) the factual allegations relating to liability; and (2) the amount of damages allegedly suffered.

The court of appeals rejected the argument that the plaintiff was required to prove its factual allegations relating to liability. The court ruled that upon default the well-pleaded allegations of the complaint relating to liability are automatically taken to be true. The defendants made no specific challenge to the allegations of the plaintiff's complaint. Further, the court could not say that the allegations were not well-pleaded, that they were incapable of proof, or that they were unsupported by or in conflict with the exhibits offered as support. Given this situation, the court found that the district court did not abuse its discretion in not conducting a hearing on the plaintiffs' allegations relating to liability.

The court took a different position, however, on the allegations relating to the amount of damages suffered. These allegations are not ordinarily taken to be true without proof. Thus, the Seventh Circuit ruled that a default judgment may not be entered without a hearing on damages. There are exceptions however. A prior hearing will not be required where the amount claimed is liquidated or is capable of definite calculation from figures contained in documentary evidence or detailed affidavits. In this case, damages relating to three counts of the plaintiff's complaint were liquidated. But as for the plaintiff's fraud count, the district court should have held a hearing to require specific proof of damages. The Seventh Circuit found that the district court's failure to do so was an abuse of discretion.

The final issue raised by this case was whether default judgment against fewer than all the named defendants was proper where liability was joint and several. The Seventh Circuit ruled that it was proper, as long as a damages hearing was not required. But where a damages hearing is required, it may not be held until the liability of each defend-

132. 722 F.2d at 1323. See Breuer Electric Mfg. Co. v. Toronado Systems of America, Inc., 687 F.2d 182, 186 (7th Cir. 1982) ("default judgment establish[s], as a matter of law, that defendants [are] liable to plaintiff as to each cause of action alleged in the complaint.")

133. 722 F.2d at 1323. See Pope v. United States, 323 U.S. 1 (1944); Geddes v. United Financial Group, 559 F.2d 557 (9th Cir. 1977).

134. 722 F.2d at 1323.

135. See, e.g., United Artists Corp. v. Freeman, 605 F.2d 854, 857 (5th Cir. 1979); Geddes v. United Financial Group, 559 F.2d 557 (9th Cir. 1977); Eiser v. Stritzler, 535 F.2d 148 (1st Cir. 1976); see also, 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶55.07 (2d ed. 1983).

136. 722 F.2d at 1324.

137. Id. This ruling was a mere restatement of the court's holding in In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).
The policy behind this rule is the desirability of avoiding inconsistent damages awards on a single claim involving joint and several liability.

CLASS ACTIONS

The Seventh Circuit decided two cases of note involving class actions. Both cases focused on the prerequisites for maintaining a class action under Rule 23.139 In the first case, the plaintiffs were unable to meet all the prerequisites for maintaining a class action, and accordingly the Seventh Circuit affirmed the district court's decertification of the class.140 However, in the second case the Seventh Circuit liberally construed the class action prerequisites, and affirmed the district court's certification of the plaintiffs as a class.141

In Hewitt v. Joyce Beverages of Wisconsin, Inc.,142 the plaintiffs represented a class of wholesale distributors for defendant's soda. They brought suit against the defendant alleging that it had coerced the distributors to comply with its scheme to fix soda prices. Initially, the district court granted class certification, but on defendant's motion for a rehearing, the court decertified the class.143 The plaintiffs argued on appeal that since they could prove that Joyce had a comprehensive policing policy, pursuant to its price fixing scheme, this should suffice to demonstrate an antitrust violation with respect to each class member. However, the court rejected this argument because the plaintiffs had failed to allege that "each distributor was subjected to at least one of the alleged policing practices."144 The court concluded that without such an allegation the plaintiffs' complaint failed to satisfy the Rule 23(b)(3)145 requirement that common questions of fact

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138. 722 F.2d at 1324. See Uranium, 617 F.2d at 1262.
139. The rule reads in relevant part:
   (a) Prerequisite to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class . . .
   (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
      (3) the court finds that questions of law or fact common to members of the class predominate over any questions affecting only individual members . . .
141. La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225 (7th Cir. 1983).
142. 721 F.2d 625 (7th Cir. 1983).
143. 721 F.2d at 626.
144. Id. at 628.
145. See supra note 139.
The Seventh Circuit upheld the plaintiffs' class certification in *La Fuente v. Stokely-Van Camp.* The underlying dispute involved the failure of a farm labor contractor to make detailed disclosures to migrant workers concerning the terms and conditions of their employment at the time that they were recruited. The plaintiffs filed a four-count class action complaint alleging that this failure to make disclosures violated the terms of the Farm Labor Contractors Act (FLCA). After a brief bench trial, the district court found that the defendant's actions violated the terms of the FLCA, and ordered future compliance with the statute and compensatory money damages to the plaintiff class.

On appeal, the defendant argued that the district court had incorrectly concluded that the Rule 23 condition for class certification was met. In particular, the defendant argued that the representative's claims or defenses were not typical of the claims or defenses of the class as required by Rule 23(a)(3). In order to determine "typicality," the court recognized that it was necessary to decide whether the named representatives' claims had the same essential characteristics as the claims of the class as a whole. The court determined that this condition would be satisfied if two tests were met: (1) the claim arose from the conduct that gave rise to the claims of the other class members; and (2) the claims were based on the same legal theory. As a general matter, the court found that similarity of legal theories may control even in the face of factual differences.

Applying these tests to the case at bar, the Seventh Circuit found the named plaintiff's claim to be sufficiently "typical" of the claims of the class as a whole. Specifically, the court found that even though some of the class representatives had only worked for Stokely for a brief time, the violative practices had "remained essentially unchanged throughout the years in question," and the practices "affected in the same way anyone who came to work for [Stokely]." Accordingly, the court concluded that the district court did not abuse its discretion in certifying the class.

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146. 721 F.2d at 629.
147. 713 F.2d 225 (7th Cir. 1983).
149. See supra note 94.
150. See also, Edmundson v. Simon, 86 F.R.D. 375, 381 (N.D. Ill. 1980); Resnick v. American Dental Ass'n, 90 F.R.D. 530, 539 (N.D. Ill. 1981); H. NEWBERG, CLASS ACTIONS §§ 1110a, 1115, 1115c at 180-81, 186.
151. 721 F.2d at 232. On this point, the court liberally read the language of Tidwell v. Schweiker. 677 F.2d 560, 565 (7th Cir.), cert. denied, 461 U.S. 905 (1983).
INTERVENTION

In two cases decided by the Seventh Circuit involving intervention, the court provided a useful exposition of the law in this area. Although the two cases are similar in certain important respects, the results are directly opposite. In one case the rights and interests of the intervenor were adequately protected, and therefore, intervention was held not necessary. In the other case, the court held that, because of competing interests and inadequate judicial safeguards, the proposed intervenor's rights and interests were not protected; accordingly, the intervenor's motion was granted.

In CFTC v. Heritage Capital Advisory Services, Ltd., Saelens Beverages appealed from the district court's denial of its motion to intervene, as a matter of right. Saelens sought to intervene in the underlying commodities enforcement action to impose a constructive trust on its employees' pension fund which had been delivered to the defendants for investment purposes. Prior to this motion, the court appointed a receiver to take control of all of the defendants' assets, and temporarily enjoined from continuing to invest or otherwise disburse these assets. Subsequently, by agreement of the parties, the court made this arrangement permanent.

The court considered two related issues on appeal: (1) whether disposition of the main action without Saelens as a party would impair its interest in the Heritage funds, and (2) whether the CFTC could adequately represent Saelins so that intervention would be unnecessary. With respect to the first issue, the court noted that Saelens had two alternative forums to press its constructive trust claim besides the main cause of action. First, Saelens could assert its claim under the receiver's claims procedure subject to district court supervision. Alternatively, Saelens could sue the receiver directly for wrongfully holding Saelens' assets. However, the court recognized that the availability of alternative forums for relief is not always sufficient to justify denial of an intervenor's motion. That is, if the proposed intervenor's interest might still be prejudiced without direct participation in the main action, the motion to intervene should be granted despite alternative avenues of relief.

152. 736 F.2d 384 (7th Cir. 1984).
153. Id. at 386.
154. Id. at 387.
155. Id. See also, Central States v. Old Security Life Ins. Co., 600 F.2d 671, 677 (7th Cir. 1979); Clark v. Sandusky, 205 F.2d 915, 919 (7th Cir. 1953); Brookins v. South Bend Community School Corp., 95 F.R.D. 407, 409-10 (N.D. Ind. 1982), aff'd, 710 F.2d 394 (7th Cir. 1983), cert. denied, — U.S. —, 104 S. Ct. 1707 (1984).
ertheless, the court concluded that no such prejudice would result in this case because any disbursement decision would be subject to district court approval.\textsuperscript{156}

In the alternative, Saelens argued on appeal that the CFTC could not adequately represent its interests because Schaumburg Bank had filed a motion in the district court seeking release, under an assignment theory, of most of the defendant's funds to it rather than to the receiver. The court found this argument to be without merit because Schaumburg's motion had been denied. Furthermore, even if the bank's motion had been granted, the court found that the CFTC was an adequate representative for three reasons: (1) Saelens had made no showing of collusion between the CFTC and Schaumburg; (2) the CFTC's opposition to Schaumburg's motion was not adverse to Saelens; and (3) there was no indication that the CFTC had failed to fulfill its duty in prosecuting the suit against Heritage. Hence, the court affirmed the district court's denial of Saelens' motion to intervene.\textsuperscript{157}

In \textit{Lake Investors Development Group, Inc. v. Egidi Development Group},\textsuperscript{158} the proposed intervenor, Peterson, petitioned the district court to allow him to intervene in the Lake-Egidi action; he claimed an impairable security interest in the land involved in the disputed real estate transaction. The action in \textit{Lake} involved a suit by the buyer against the seller for specific performance, and the balance still owed on the land sale contract. Peterson based his petition on a security interest that he had acquired from the bank which had financed the transaction. The district court denied Peterson's petition to intervene primarily on the ground that a security interest had not been validly assigned.\textsuperscript{159}

In order to decide whether the district court erred in denying Peterson's petition to intervene, the Seventh Circuit analyzed the facts of \textit{Lake} in light of the three criteria for intervention articulated in \textit{Meridian Homes Corp. v. Nicholas W. Prassas & Co.}:\textsuperscript{160} (1) the proposed intervenor must have an interest in the underlying cause of action; (2) this interest must be subject to a potential impairment; and (3) the plaintiff must be an inadequate representative to protect this interest. Generally, the court stated that when a court rules on a petition to intervene, all non-conclusory allegations must be accepted as true. Furthermore, the petition should not be denied unless it appears that the intervenor is not

\textsuperscript{156} 736 F.2d at 387.

\textsuperscript{157} Id.

\textsuperscript{158} 715 F.2d 1256 (7th Cir. 1983).

\textsuperscript{159} Id. at 1258.

\textsuperscript{160} 683 F.2d 201 (7th Cir. 1982).
entitled to relief under any set of facts alleged.\textsuperscript{161}

Applying this liberal standard of construction to the proposed intervenor's petition, the court found that he had a viable "interest" in the main action, and accordingly reversed the district court's finding on this point. The Seventh Circuit reasoned that under the facts alleged in the proposed intervenor's petition, it was possible to show a "significantly protectable" interest, thereby satisfying the Supreme Court's requirement for "interest" in this context.\textsuperscript{162} Moreover, since the alleged security interest arose directly from the disputed land sale contract, the interest was "direct and substantial," satisfying this additional requirement for interest under Meridian Homes.\textsuperscript{163}

With respect to the issue of impairment of right, the court followed the Meridian Homes definition. Specifically, "impairment of right exists if the decision of a legal question would, as a practical matter, foreclose rights of a proposed intervenor in a subsequent proceeding: foreclosure is to be measured in terms of stare decisis."\textsuperscript{164} Under this definition, the Seventh Circuit concluded that the proposed intervenor clearly could demonstrate impairment because final judgment on the land sale contract would extinguish his rights.\textsuperscript{165}

Finally, on the issue of the adequacy of the plaintiff's representation, the court ruled that since the plaintiff had no interest in "paying any portion [of the settlement] to Peterson,"\textsuperscript{166} he could not adequately represent Peterson's security interest. In addition, the court recognized that after the expense of litigation, the contract settlement might be inadequate to meet both the intervenor's and the plaintiff's claims. Under this scenario, the plaintiff and the proposed intervenor would be competitors for the same fund, and therefore, the plaintiff's representation would necessarily be inadequate.\textsuperscript{167}

\textsuperscript{161} See Central States, 600 F.2d at 679; accord United States v. AT&T, 642 F.2d 1285, 1291 (D.C. Cir. 1980).
\textsuperscript{163} 683 F.2d at 204.
\textsuperscript{164} Id., citing, Atlantis Development Corp. v. United States, 379 F.2d 818, 826-29 (5th Cir. 1967).
\textsuperscript{165} Lake, 715 F.2d at 1260.
\textsuperscript{166} Id. at 1261.
\textsuperscript{167} Commercial Union Insurance Co. v. City of St. Louis, 497 F.2d 957, 958 (8th Cir. 1974). The court found the plaintiff an inadequate representative for the proposed intervenor because the plaintiff's primary defense was to prove his priority to the fund in question, thus competing against the proposed intervenor's claim.
RES JUDICATA

In *Bunker Ramo Corp. v. United Business Forms, Inc.*, the Seventh Circuit held that once a court determines that it does not have subject matter jurisdiction, any other finding made by the court is superfluous and will not have res judicata consequences.

The plaintiff had brought a prior action against the same defendants. This prior action was dismissed by the district court after the defendants filed motions under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The plaintiff subsequently filed a second suit against the defendants based on the same alleged scheme. The defendants moved to dismiss the second suit on several grounds, including preclusion by res judicata. In reviewing the district court's dismissal of the plaintiff's first suit, the Seventh Circuit noted that the district court's memorandum opinion, while ultimately dismissing the suit for lack of subject matter jurisdiction, also negatively commented upon the merits of the plaintiff's Robinson-Patman Act claim. Because of this superfluous commentary, the defendants argued that the prior action's dismissal was on the merits, thereby precluding the plaintiff from bringing the second suit.

The Seventh Circuit rejected the defendants' argument. The court emphasized that in the prior suit the district court did not dismiss some counts for lack of subject matter jurisdiction and others for failure to

168. 713 F.2d 1272 (7th Cir. 1983).
169. *Id.* at 1279.
171. FED. R. CIV. P. 12(b) provides in pertinent part: "the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter. . . . [and] (6) failure to state a claim upon which relief can be granted. . . ."
172. 713 F.2d at 1276-77. The district court determined that the plaintiff was not in competition with the defendant-corporation and therefore lacked standing to sue under section 2(c) of the Robinson-Patman Act. *See* 511 F. Supp. at 534.
173. A valid final judgment on the merits is res judicata and is a complete bar to a later lawsuit between the same parties on the same cause of action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981); Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939, 943-45 (7th Cir. 1981). A dismissal for lack of subject matter jurisdiction is not a dismissal on the merits and thus will not bar a later suit. In contrast, dismissal for failure to state a claim is a dismissal on the merits and thus will bar a later suit. Castello v. United States, 365 U.S. 265, 284-88 (1961). *Federated Department Stores*, 452 U.S. at 399 n.3. In dismissing the first lawsuit, the district court assumed that the plaintiff's lack of standing meant that it lacked subject matter jurisdiction. *See* 511 F. Supp. at 534. Other courts have disposed of antitrust claims for plaintiffs' lack of standing on the ground of failure to state a claim (Rule 12(b)(6)), rather than lack of subject matter jurisdiction (Rule 12(b)(1)). *See* e.g., *Computer Statistics, Inc. v. Blair*, 418 F. Supp. 1339 (S.D. Tex. 1976); *George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266 (5th Cir. 1979). As a threshold matter, one might question whether the district court acted properly in dismissing the suit on jurisdictional grounds. However, the defendants "admitted" that the district court was correct in dismissing the suit for lack of subject matter jurisdiction. *See* 713 F.2d at 1277. Thus, the Seventh Circuit never addressed the issue.
state a claim. Rather, the district court dismissed a single claim on mixed grounds. In such a situation, a court's finding that it does not have subject matter jurisdiction will control. The court stated: "Once a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter. . . . Any finding made by a court when the court has determined that it does not have subject matter jurisdiction carries no res judicata consequences."

In *Wakeen v. Hoffman House, Inc.*, the main issue confronting the Seventh Circuit was whether the plaintiff's adverse state court decision, itself an appeal from a state administrative order, barred his Title VII claim under the Supreme Court decision of *Kremer v. Chemical Construction Corp.*

The plaintiff had filed discrimination charges against his former employer with both the Equal Employment Opportunity Commission (EEOC) and the Wisconsin Department of Industry, Labor and Human Relations (DILHR). The EEOC deferred to the DILHR for sixty days. Thereafter, the DILHR dismissed the plaintiff's complaint, and the plaintiff sought appellate review in the Circuit Court of Dane County. The state court found that the defendants' allegedly discriminatory actions were involuntary in that they were undertaken in response to a direct order from the DILHR. In affirming the DILHR's dismissal, the state court held that the involuntary nature of the defendants' actions absolved them from all liability for discrimination under the Wisconsin Fair Employment Act.

The plaintiff then brought this Title VII class action in federal district court. The court eventually granted the defendants' motion for summary judgment on the ground that, under *Kremer*, the plaintiff's federal suit was barred as res judicata.

The Supreme Court's recent decision in *Kremer* arose from a procedural background strikingly similar to that of the present action. In *Kremer*, the Supreme Court rejected an argument that Title VII created

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174. If it had, then those counts dismissed for failure to state a claim would be barred by res judicata. See Harper Plastics, Inc. v. Amoco Chemicals Corp., 657 F.2d 939 (7th Cir. 1981).
175. 713 F.2d at 1279.
176. *Id.* See also Madden v. Perry, 264 F.2d 169 (7th Cir. 1959).
177. 724 F.2d 1238 (7th Cir. 1983).
179. The DILHR order was issued pursuant to a Wisconsin protective law in effect at the time. See *Wis. Stat.* §103.02 (1971) (amended 1975); *Wis. Admin. Code* §Ind. 74.03 (1971).
an exception to 28 U.S.C. § 1738.\textsuperscript{181} The Court held that § 1738 requires a federal court in a Title VII action to give preclusive effect to a state court decision upholding a state administrative agency's rejection of an employment discrimination claim when: (1) the state's own courts would accord the decision preclusive effect; and (2) the procedures followed by the state court satisfy the requirements of due process.\textsuperscript{182}

On appeal to the Seventh Circuit, the plaintiff conceded that Wisconsin's courts would accord the circuit court's decision preclusive effect, and also admitted that he was accorded due process in the state court. Nevertheless, the plaintiff sought to escape \textit{Kremer} by arguing that it should not extend to a case where the application of state law and Title VII would yield different results on identical operative facts.\textsuperscript{183} He contended that the defense to discrimination under the Wisconsin statute was inadequate under Title VII, and thus the prior state suit should not preclude his later federal action under Title VII.

The Seventh Circuit responded by asserting that the plaintiff should have raised the Title VII issue in the state court proceeding.\textsuperscript{184} \textit{Res judicata}, said the court, extends not only to issues that were raised in the prior proceeding, but also to issues that could have been raised.\textsuperscript{185} Since both the state and federal actions involved the same operative facts, the plaintiff's federal suit was an impermissible attempt to relitigate the same cause of action. The court said that merely because a potential response to the defense was based on federal law did not mean that the plaintiff could bring a separate federal action to assert that response.\textsuperscript{186} Once having decided to litigate in state court, the plaintiff should have argued to the state court that the agency's order was incorrect because it was contrary to an applicable federal law. The court said that its result

\textsuperscript{181} 28 U.S.C. §1738 provides in pertinent part:

The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . . from which they are taken.

\textsuperscript{182} 456 U.S. at 481; \textit{accord} Unger v. Consolidated Foods Corp., 693 F.2d 703 (7th Cir. 1982), \textit{cert. denied}, 460 U.S. 1102 (1983).

\textsuperscript{183} The Seventh Circuit did note that this line of analysis has recently been followed by the Southern District of New York. \textit{See} Reynolds v. New York State Department of Correction Services, 568 F. Supp. 747 (S.D.N.Y. 1983) (holding that an adverse state court ruling should not preclude the bringing of a subsequent federal action where the federal and state laws, though facially similar, may yield different results as applied to a particular situation). While noting the existence of this decision, however, the Seventh Circuit declined to follow it.

\textsuperscript{184} 724 F.2d at 1241, 1243.

\textsuperscript{185} \textit{See}, e.g., \textit{Kremer}, 456 U.S. at 465 n.4; Allen v. McCurry, 499 U.S. 90, 94 (1980); Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982).

\textsuperscript{186} 724 F.2d at 1241. \textit{Cf.} Lee, 685 F.2d at 200; Miller-Wohl Co. v. Commissioner of Labor & Industry, 685 F.2d 1088, 1090 (9th Cir. 1982).
would not be altered even if it assumed, as the plaintiff contended, that the state court could not entertain an original Title VII complaint in reviewing the state agency’s action. 187 Citing a Wisconsin statutory provision, 188 the Seventh Circuit found that, notwithstanding that assumption, it was certainly within the state court’s power to hear a claim that the agency’s order was incorrect because it allowed a result contrary to federal law.

The Seventh Circuit in Wakeen cited several negative consequences that would flow from an adoption of the plaintiff’s argument. First, it would require federal courts to conduct a much more focused inquiry before according preclusive effect to the state court decision. Federal courts would have to determine whether the state and federal laws in question, though similar on their face, are truly coextensive when applied to the point in issue. 189 This type of inquiry would effectively nullify Kremer and frustrate the purposes behind § 1738 and traditional theories of res judicata and collateral estoppel. 190 Secondly, the court suggested that allowing such an exception to Kremer would detrimentally affect the quality of adjudication at the state level. Quoting from Kremer, 191 the Seventh Circuit expressed its concern that depriving state judgments of finality would: (1) discourage full participation of the parties and searching review by state officials; (2) violate principles of comity and federalism; and (3) reduce the state’s incentive to develop effective systems to combat discrimination.

RELIEF FROM JUDGMENTS

C.K.S. Engineers, Inc. v. White Mountain Gypsum Co. 192 is the first of four decisions focusing on Federal Rule of Civil Procedure 60(b), Relief from Judgments. The issue in this case was whether the district court

187. There is some uncertainty as to whether federal courts possess exclusive jurisdiction over Title VII actions. Undoubtedly, Congress intended federal courts to be the main mechanism of judicial enforcement; however, the grant of jurisdiction in 42 U.S.C. §2000e-5(f)(1) is not, by its terms, exclusive. For different views on the matter, compare Patzer v. Board of Regents of the University of Wisconsin System, 577 F. Supp. 1553, 1558-59 (W.D. Wis. 1984), and Bennun v. Board of Governors of Rutgers University, 413 F. Supp. 1274, 1279 (D.N.J. 1976) (Title VII jurisdiction not exclusively vested in federal courts), with Dickinson v. Chrysler Corp., 456 F. Supp. 43, 47-48 (E.D. Mich. 1978) (federal courts possess exclusive jurisdiction over Title VII actions).
188. Wis. Stat. § 227.20(8) reads in pertinent part: “The court should reverse or remand the case to the agency if it finds that the agency’s exercise of discretion is . . . in violation of a constitutional or statutory provision.”
189. 724 F.2d at 1242.
190. The court cited four of those purposes as follows: “[(1)] relieving parties from the cost and vexation of multiple lawsuits; [(2)] conserving judicial resources; [(3)] fostering reliance on adjudication; and [(4)] promoting comity between state and federal courts.” 724 F.2d at 1242.
191. See 456 U.S. at 478.
192. 726 F.2d 1202 (7th Cir. 1984).
ferred in refusing to grant the defendants' Rule 60(b) motion to vacate a default judgment. The decision is significant because it clarifies how Rule 60(b) applies to default judgments in the Seventh Circuit.

The general rule in the Seventh Circuit is that relief from a judgment under Rule 60(b) is an extraordinary remedy that should be granted only in exceptional circumstances. But there also is a policy in the Seventh Circuit that a trial on the merits is favored over a default judgment. The question has thus arisen whether default judgments are to be treated more leniently under Rule 60(b) than other judgments.

In *C.K.S. Engineers* the Seventh Circuit essentially answered that question in the negative. After reviewing the case law, the court concluded that "rule 60(b) is applied liberally in the default judgment context only in the exceptional circumstance where the events contributing to the default judgment have not been within the meaningful control of the defaulting party, or its attorney." Thus, where the defaulting party's action or inaction is willful or the result of unexcused negligence or carelessness, the default judgment will not be vacated.

The court in *C.K.S. Engineers* acknowledged that a default judgment is a harsh sanction and that a trial on the merits is preferred. Yet, against these considerations, the court balanced the need to promote efficient litigation and to be fair to all litigants. Those who diligently pursue their cases should not be hindered by those who do not. In the court's view, one of the primary purposes behind the default judgment is to deter irresponsible conduct in litigation. To ensure that the default judgment is an effective deterrent, however, relief under Rule 60(b) must

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194. *United States v. An Undetermined Quantity of Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942, 946 (7th Cir. 1972); *Scarver v. Allen*, 457 F.2d 308, 310 (7th Cir. 1972).

195. Some of the Seventh Circuit's own decisions have suggested that Rule 60(b) is to be applied more liberally to default judgments. See *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (7th Cir. 1981); *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 854 (7th Cir. 1981); *Dormeyer Co. v. M.J. Sales & Distributing Co.*, 461 F.2d 40, 43 (7th Cir. 1972). *C.K.S. Engineers* gave the Seventh Circuit an opportunity to clarify its position on this issue.

196. 726 F.2d at 1206.

197. See, e.g., *Inryco, Inc. v. Metropolitan Engineering Co.*, 708 F.2d 1225, 1231 (7th Cir. 1983); *Breuer Electric Manufacturing Co. v. Toronado Systems of America*, 687 F.2d 182, 187 (7th Cir. 1982); *Ben Sager Chemicals International v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977). On the other hand, in the rare situation where the defaulting party can demonstrate that its actions were neither willful, negligent nor careless, courts will give relief from default judgments. See *United States v. $48,595*, 705 F.2d 909, 913 (7th Cir. 1983); *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (7th Cir. 1981).

198. 726 F.2d at 1206.


200. 726 F.2d at 1206.
be perceived as an exceptional remedy.\textsuperscript{201}

Applying these principles to the case at hand, the Seventh Circuit predictably upheld the district court’s order denying the defendants’ Rule 60(b) motion. Here the defendants failed to meet a twice-extended deadline for responding to the plaintiff’s interrogatories. In addition, after entry of the default judgment, the defendants waited almost two months before seeking to have it vacated. Even then they still had not answered any of the interrogatories nor did they make any other gesture of good faith. These factors weighing against the defendants were not overcome by the large amount of money at stake. Their conduct was inexcusable, and thus the large amount of the judgment was an insufficient reason to overturn the district court’s decision.\textsuperscript{202} The Seventh Circuit concluded that, under all the circumstances, the district court did not abuse its discretion in refusing to vacate the default judgment.

In \textit{McKnight v. United States Steel Corp.},\textsuperscript{203} the Seventh Circuit Court of Appeals ruled once again that a Rule 60(b) motion may not be used to correct errors of law made by the district court in the underlying decision which led to a final judgment.\textsuperscript{204} Rather, the proper way to seek review of alleged legal errors is by timely appeal.\textsuperscript{205} The court stated that a Rule 60(b) motion is neither a substitute for appeal nor a permissible method to indirectly prolong the time for appeal.\textsuperscript{206} By not filing a timely appeal, a litigant effectively waives his right to have errors of law judicially reviewed.\textsuperscript{207}

In \textit{McKnight}, the plaintiff was terminated from employment with the defendant on August 16, 1979. Plaintiff alleged that his discharge

\textsuperscript{201} \textit{Id.} The Seventh Circuit cited two considerations which mitigated any apparent harshness in its ruling. First, a Rule 60(b) motion is not the only way to obtain relief from a default. After entry of a default, but before entry of the final default judgment, a party may petition for relief under Fed. R. Civ. P. 55(c) ("For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)"). While the elements for relief under Rule 55(c) are basically the same as under Rule 60(b), the test is more liberally applied. 726 F.2d at 1206. \textit{See Breuer Electric,} 687 F.2d at 187. Secondly, the court emphasized that default judgments should be entered only when absolutely necessary, as where less severe sanctions have proven ineffective. 726 F.2d at 1206. \textit{See Inryco,} 708 F.2d at 1230.

\textsuperscript{202} 726 F.2d at 1208. The Seventh Circuit did recognize that under some circumstances the amount of money at stake might be a legitimate consideration in ruling on a Rule 60(b) motion to vacate a default judgment. \textit{Id. See De Vito v. Fidelity and Deposit Co. of Maryland,} 361 F.2d 936, 939 (7th Cir. 1966).

\textsuperscript{203} 726 F.2d 333 (7th Cir. 1984).

\textsuperscript{204} \textit{Id.} at 338. \textit{See Hahn v. Becker,} 551 F.2d 741, 745 (7th Cir. 1977); \textit{Swan v. United States,} 327 F.2d 431, 433 (7th Cir.), \textit{cert. denied,} 379 U.S. 852 (1964).

\textsuperscript{205} 726 F.2d at 337-38.

\textsuperscript{206} 726 F.2d at 338. \textit{See Peacock v. Board of School Commissioners,} 721 F.2d 210, 214 (7th Cir. 1983); \textit{Bank of California, N.A. v. Arthur Anderson & Co.,} 709 F.2d 1174, 1178 (7th Cir. 1983).

\textsuperscript{207} 726 F.2d at 338.
was racially discriminatory. The Equal Employment Opportunity Commission (EEOC) learned of plaintiff's allegations in January of 1980 but did not receive plaintiff's formal EEOC complaint until June 20, 1980. After conducting an investigation, the EEOC concluded that there was not reasonable cause to believe that plaintiff's charges were true. Thereafter, plaintiff brought his pro se Title VII complaint in district court. In addition, he requested leave to proceed in forma pauperis, and to have counsel appointed. The district court denied plaintiff's appointment-of-counsel request on the basis of incorrect criteria. The defendant then moved to have the case dismissed on the ground that the district court lacked subject matter jurisdiction. Finding that over 300 days had elapsed between the date of McKnight's discharge and the date McKnight filed a formal EEOC complaint, the district court agreed that under \textit{Moore v. Sunbeam Corp.} \cite{moore} it did not have jurisdiction. Thus, it granted defendant's motion. McKnight did not appeal his dismissal, but instead filed a motion to reinstate the case under Rule 60(b). This motion was denied, and plaintiff appealed.

The only issue on appeal was whether the district court abused its discretion in denying plaintiff's Rule 60(b) motion. Three arguments were tendered by the plaintiff. First, after the original dismissal but before consideration of the Rule 60(b) motion, the Supreme Court decided \textit{Zipes v. Trans World Airlines, Inc.} \cite{zipes} which effectively overruled \textit{Moore v. Sunbeam}. \cite{moore} In \textit{Zipes}, the Court held that filing a timely Title VII action with the EEOC is \textit{not} a jurisdictional prerequisite to bringing suit against a private employer. Rather, it is comparable to a statute of limitations and is subject to equitable tolling. The Seventh Circuit in \textit{McKnight}, however, ruled that, despite the change in applicable law, the district court did not abuse its discretion in denying plaintiff's Rule 60(b) motion. Without elaboration, the court stated that a change in the applicable law does not by itself justify relief under Rule 60(b). \cite{mcknight}

The plaintiff's second argument was that he had found newly discovered evidence that would demonstrate that his filing with the EEOC was in fact timely. \cite{mcknight} The Seventh Circuit, however, labeled McKnight's

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\begin{itemize}
  \item \textit{Moore v. Sunbeam Corp.} \cite{moore}, 459 F.2d 811 (7th Cir. 1972). Under \textit{Moore} the 300-day time limit of 42 U.S.C. §2000e-5(e) was considered jurisdictional and not subject to equitable tolling. \textit{Id.}
  \item \textit{Zipes v. Trans World Airlines, Inc.} \cite{zipes}, 445 U.S. 385 (1982).
  \item \textit{McKnight} \cite{mcknight}, 459 F.2d 811 (7th Cir. 1972).
  \item 726 F.2d at 336. The court cited De Filippis v. United States, 567 F.2d 341, 343 (7th Cir. 1977).
  \item Under \textit{FED. R. CIV. P. 60(b)(2)}, the court may relieve a party from a final judgment or order by reason of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."
\end{itemize}
allegedly “new” evidence merely cumulative to evidence already in the
record. Moreover, the court interpreted plaintiff’s argument as an at-
ttempt to correct an alleged error of law concerning the district court’s
determination of when a charge is deemed “filed” with the EEOC.213

Plaintiff’s final argument was that the denial of the Rule 60(b) mo-
tion should be reversed because the district court erroneously denied his
repeated requests for appointed counsel. The Seventh Circuit acknowled-
ged that the district court applied the wrong criteria in ruling on plain-
tiff’s request for appointment of counsel.214 Yet, said the court, the
proper way to correct this error in law is by filing a timely appeal, not by
bringing a Rule 60(b) motion. Rule 60(b) was not intended to correct
errors of law, and the court would not utilize it in that fashion.

As previously mentioned, relief under Rule 60(b) is an extraordinary
remedy available only in exceptional circumstances. Duran v. Elrod215
serves to illustrate this well-established rule in the context of a consent
decree judgment.

In Duran, pretrial detainees in a county jail had instituted a class
action suit against county officials. The plaintiffs alleged that the county
officials had violated their rights under the Eighth and Fourteenth
Amendments by failing to provide safe and humane conditions of con-
finement. After extensive negotiations, the parties agreed to a compre-
hensive consent decree that was entered by the district court. According
to the terms of the consent decree, the defendants were to implement
several measures designed to improve the conditions of confinement. To
ensure compliance, the parties appointed a Monitor who was to evaluate
the implementation of the consent decree and report its findings to the
district court at set intervals. The district court, for its part, retained
jurisdiction over the case so that it could later make whatever orders
were necessary to enforce the decree.

Six months after the entry of the consent decree, the Monitor re-
ported that the goals outlined in the decree had not been achieved. Spe-
cifically, overcrowding continued to be an acute problem with a large
number of inmates having to sleep on the floor, many without blankets or
mattresses. After holding a hearing on the matter, the district court or-
dered a “cap” on the inmate population. In response the defendants filed

213. 726 F.2d at 337.
214. Id. Appointment of counsel in Title VII actions is governed by guidelines set forth in Jones
v. WFYR Radio/RKO General, 626 F.2d 576 (7th Cir. 1980), overruled on other grounds, Randle v.
Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981) (per curiam). In denying the plaintiff’s
appointment-of-counsel request, the district court did not use the Jones guidelines; instead the court
utilized guidelines appropriate under 28 U.S.C. §1915 for cases involving prisoners. 726 F.2d at 337.
215. 713 F.2d 292 (7th Cir. 1983).
two motions—one for relief from the population "cap" order, and the second a Rule 60(b) motion to modify the consent decree to allow double-bunking of inmates. The district court denied both motions, and the defendants appealed.

The Seventh Circuit affirmed the district court's denial of both motions. In regard to the Rule 60(b) motion, the court found that the defendants had demonstrated none of the elements which would justify modification. To modify a judgment under Rule 60(b), there must have been a significant and unforeseen change in circumstance that occurred after the date of the final judgment. Furthermore, the new unforeseen condition must be shown to impose extreme hardship or a grievous wrong on the movant. Here the court noted that the defendants had failed to show an unforeseen and substantial change in circumstances after the entry of the agreed-upon consent decree. The jails had been overcrowded at the time the consent decree was entered, and they remained so since. In addition, the defendants failed to demonstrate how they would suffer extreme hardship if their modification proposal was not adopted.

In *Merit Insurance Co. v. Leatherby Insurance Co.*, the issue was whether the district court was justified, under Rule 60(b) and the United States Arbitration Act, in setting aside an arbitration award on the ground that one of the arbitrators failed to disclose a prior business relationship with a principal of one of the arbitrating parties. After much dicta, the Seventh Circuit ultimately ruled that setting aside the arbitration award was not justified.

To set aside the arbitration award, the defendant had to meet the relevant grounds for relief under both the United States Arbitration Act and Rule 60(b). Under the statutes the only relevant ground for setting aside the award was if there was "evident partiality or corruption" in any of the arbitrators. Read literally this statutory provision would require proof of actual bias. Here the court of appeals found no actual proof of bias in the record. The court also stated that even under a more permissive statutory construction, setting aside an arbitration award

217. 286 U.S. at 119.
218. 714 F.2d 673 (7th Cir. 1983), cert. denied, 104 S. Ct. 529 (1983).
220. The court noted that even if the arbitrator's failure to disclose was a material breach of the ethical standards applicable to arbitration proceedings, it does not mean that the award may be set aside judicially. 714 F.2d at 680.
221. 9 U.S.C. §10(b) (1982).
would not be proper unless the circumstances were "powerfully suggestive of bias." The court did not view the arbitrator's nondisclosure in that light and thus concluded that the statutory grounds for setting aside the award had not been met.

The court went on to rule that the grounds for relief under Rule 60(b) had also not been met. Noting the general rule that relief under Rule 60(b) is an extraordinary remedy the court added that this principle is especially true where the motion is based on the catch-all ground of Rule 60(b), Rule 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). The Seventh Circuit identified two elements which must be demonstrated to justify setting aside an arbitration award under Rule 60(b)(6): (1) that the arbitrator had violated the ethical and legal standards for arbitrators; and (2) that the violation created a "substantial danger" that the result of arbitration was unjust. Finding that both elements had not been shown, the court concluded that the district court abused its discretion in granting defendant's Rule 60(b) motion. The court expressed a concern that if it allowed relief under these circumstances arbitration losers would be encouraged to do a post-arbitration background check on all of the arbitrators in an attempt to escape the adverse arbitration award.

**APPELLATE REVIEW**

_Capitol Indemnity Corp. v. Keller_ raised the question of whether it is proper for an appellate court to reverse a judgment on a ground not raised in the district court. In civil cases the general rule is that reversal on such grounds is not proper. However, the Seventh Circuit articulated two exceptions. First, "when a serious and sensitive issue of federalism is raised" by the appellate court, review may be allowed on grounds not raised in the district court. Second, the appellate courts can act on their own to correct plain error. However, plain error review is

222. 714 F.2d at 681.
224. 714 F.2d at 682-83.
225. Id. at 683.
226. 717 F.2d 324 (7th Cir. 1983).
228. 717 F.2d at 329.
bounded by equitable considerations. In this case, the plaintiff, a creditor, brought a diversity action to set aside an alleged fraudulent conveyance of the defendant debtor's property. The plaintiff contended that the conveyance of some of the defendant's property was a fraud against it. Plaintiff claimed that the conveyance was made without consideration and that it was undertaken while the plaintiff's original creditors suit was still pending. The Seventh Circuit held that equitable considerations precluded the granting of plain error review. The court observed that the plaintiff "has dragged seven individuals and a small bank through a federal litigation and appeal, and its case . . . borders on the frivolous, being limited to the plainly inapplicable lis pendens statute." Consequently, the court relying on equitable considerations concluded that the plaintiff is not to be permitted to put the defendants through the expense of another trial. This use of the court's equitable powers not to exercise plain error review worked justice by not penalizing the defendants with a reversal on a ground not raised by the plaintiff at trial.

In Medtronic, Inc. v. Intermedics, Inc., the plaintiff sought damages, injunctive relief and an accounting based on an alleged breach of an earlier settlement contract between the plaintiff and defendant. The plaintiff also pressed claims for conspiracy and unfair competition. The plaintiff complained that the defendant hired away three key sales representatives. This hiring allegedly breached a contract settling previous litigation between the two litigants. The defendant sought to stay this action because a similar suit was pending in the federal district court in Minnesota. The district court in the Northern District of Illinois denied the stay. On appeal the Seventh Circuit was faced with considering the appealability of orders granting or denying stays. The court observed that if the plaintiff's claim was one cognizable in law, then the district court's refusal to grant the stay would be appealable. However, if the claim was solely equitable in nature then no appeal could be immediately taken. Despite these relatively clear distinctions, this case was set in a mixed law and equity context. In this case the plaintiff sought both traditionally legal and equitable relief. The plaintiff sought: (1) to enjoin the defendant from further breaches of the earlier settlement agreement with the plaintiff (equitable relief); (2) an accounting of profits (arguably equitable relief); and (3) damages (legal relief).

To determine the appealability of stays in this mixed law and equity

229. Id.
230. Id.
231. 726 F.2d 440 (7th Cir. 1984).
context, the court looked not to whether the plaintiff's action to be stayed is predominantly equitable, "but [to] whether it is not predominantly legal." In general, an order granting or denying a stay is not appealable if the "equitable relief sought is more than merely incidental to the legal relief sought." In determining that the district court's denial of the requested stay was not appealable, the Seventh Circuit explicitly held that the plaintiff's request for injunctive relief was more than merely incidental to the requested legal relief of damages.

In *Shaffer v. Globe Protection, Inc.*, the plaintiff alleged sex discrimination and sought damages, declaratory and injunctive relief. The district court denied the plaintiff class action certification and dismissed an additional count founded in conspiracy. The plaintiff then moved for a preliminary injunction and for reconsideration of the class action and conspiracy decisions of the district court. Both of these requests were rejected. On appeal, the Seventh Circuit was faced with determining the appealability and propriety of these decisions of the trial court. The court observed that only final orders are appealable. The plaintiff argued that because interlocutory orders dealing with injunctions are reviewable under 28 U.S.C. § 1292(a)(1), both the denial of the preliminary injunction request and the connected motion to reconsider should be reviewable by the court. In determining whether to review the denial of the motion to reconsider, the court noted that the "other incidental orders or issues nonappealable in and of themselves but in fact interdependent with the order granting or denying the injunction may also be reviewed, but only to the extent they bear upon and are central to the grant or denial of the injunction." In short, the incidental issues must either directly control or be inextricably bound to the injunction order. Upon a review of the record below, the court held that the plaintiff had presented no proof that the district court's refusal to reconsider her class action or conspiracy count formed a basis of the denial of the preliminary injunction request. Consequently, the denial of the preliminary injunction and the refusal to award class action certification

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232. *Id.* at 445.
233. *Id.*
234. 721 F.2d 1121 (7th Cir. 1983).
235. See 28 U.S.C. §1291 (1980) which provides: "The courts of appeal . . . shall have jurisdiction of appeals from all final decisions."
236. 28 U.S.C. §1292 (1980) provides: "(a) The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."
237. 721 F.2d at 1124.
238. *Id.*
were held not to be inextricably tied. Thus the non-injunction issues were not appealable.

Once the issues were separated, the court was able to consider, pursuant to 28 U.S.C. §1292(a)(1), whether the district court's denial of the motion for preliminary injunction was proper. The appellate standard for review of a preliminary injunction is whether there was an abuse of discretion. The district court's exercise of discretion is assessed against four prerequisites. These prerequisites require the plaintiff to show that there is: "(1) a reasonable likelihood of success on the merits; (2) irreparable injury and absence of an adequate remedy at law; (3) that the threatened harm to the plaintiff outweighs the harm the injunction may cause the defendants; and (4) that the granting of the injunction will not disserve the public interest." The Seventh Circuit commented that the plaintiff's pro forma request for injunctive relief and her waiting to appeal the district court's denial of her request were inconsistent with a finding of irreparable harm. Therefore, the second prerequisite was lacking and the court held that there was no abuse of discretion by the district court in denying the request for injunctive relief.

DISCOVERY

This term, in the context of several cases, the Seventh Circuit examined the scope of discovery in civil cases. Two of these cases examined the discoverability of various grand jury materials. *Lucas v. Turner* involved an appeal by the State's Attorney of Cook County of an order directing him to release to the plaintiff, for use in a civil rights action, all transcripts and materials of the state grand jury investigation into the death of George Lucas. George Lucas, a 23 year old black man, died February 9, 1973. Mr. Lucas's death occurred in the Cook County Jail while he was awaiting trial. During 1975 a grand jury was convened to investigate the death of Lucas. In the interim, Lucas's widow and children initiated suit against six correctional officers, the Board of the Cook County Department of Corrections and Winston Moore, the Director of the Cook County Jail at the time of Lucas' death. The Lucas suit alleged that six jail guards beat, strangled and suffocated George Lucas. The trial court set March 22, 1982 as the discovery cut-off date. On that day, the plaintiffs filed an 'eleventh hour' motion to compel the production of the transcripts and exhibits of the 1975 grand jury investiga-

239. *Id.* at 1123.
240. *Id.*
241. 725 F.2d 1095 (7th Cir. 1984).
tion into Lucas' death. This request to compel production of the grand jury materials was made some four years subsequent to the plaintiff's last previous discovery request. The trial court directed the State's Attorney of Cook County to release the requested documents and materials.

In testing whether the requested materials were discoverable, the Seventh Circuit sought to apply the standard set out in United States v. Sells Engineering. The court observed that in Sells, the Supreme Court sought to protect the long standing policy of grand jury secrecy. The Sells' court articulated a standard that required a "strong showing of particularized need" for grand jury materials before any disclosure will be permitted.

In applying the particularized need standard, the Seventh Circuit utilized a three part analysis. First, the release of the grand jury materials must be necessary to avoid possible injustice. Second, the need for disclosure must be greater than the need for continued secrecy. And finally, if the first two elements are present, the request must be structured to cover only those materials that are necessary. All three elements must be present to uphold a request to release the materials. In applying this three part analysis to the facts of the Lucas case, the court found that the plaintiffs' request was lacking. The court reasoned that the plaintiff failed to demonstrate that the requested materials of the grand jury were absolutely necessary. The court noted that the plaintiffs had shown only that the materials would be beneficial to their case, not necessary. The court insisted, that to justify release of the materials under the Sells' standard, the plaintiffs make a very specific and concrete demonstration of their need for the materials. In addition, the need to protect those persons exonerated by the grand jury's investigation outweighed the plaintiff's claimed need for the materials. The court noted that the secrecy surrounding grand jury materials is to protect both the witnesses who appear before it as well as to protect those under investigation. The need for this protection is based on the investigative powers of the grand jury which allow it to indict or call witnesses before it on hearsay and personal knowledge. Finally, the court noted that the broad nature of the plaintiffs' discovery request was wholly lacking in the

244. 103 S. Ct. at 3148.
245. 725 F.2d at 1102.
246. Id. at 1103-06.
247. Id. at 1106-08.
248. Id. at 1108.
particularity of the materials sought. As a consequence, the court denied the plaintiffs' request for release of the grand jury materials because they had not shown a particularized need for the materials.

In the Matter of Grand Jury Proceedings, Miller Brewing Co., the court was faced with determining the scope of disclosure of grand jury materials to governmental non-prosecutors. Once again, the court merely applied the standard for release of grand jury materials established in Sells. In Miller, the government claimed that its attorneys were entitled to automatic disclosure of grand jury materials pursuant to Federal Rule of Criminal Procedure 6(e)(3)(A)(i). In rejecting this claim, the Seventh Circuit applied the particularized need test set out in U.S. v. Sells Engineering. The Sells' Court concluded that the automatic disclosure provision of Rule 6(e) was strictly limited to criminal matters wherein the governmental prosecutor performs a special role in the grand jury process. However, Miller was not a criminal case and the automatic disclosure provision of Rule 6(e) was inapplicable. Instead, the Seventh Circuit concluded that disclosure of the grand jury materials would only be proper upon a showing of particularized need and a weighing of "all the factors which compete in grand jury matters."

In the Miller case, Miller sought to prevent the disclosure to the government of the grand jury documents and transcripts of a previous grand jury investigation to which they were a party. However, the Seventh Circuit permitted the documents collected by the grand jury to be disclosed. The court reasoned that the doubt which had been cast upon the availability and existence of the documents sought, in addition to other factors considered by the district court, justified disclosure in preference to undertaking at that late date "to demonstrate by ordinary discovery means, page by page, whether the materials exist elsewhere or not."

In addition, discovery was requested by the government, not a private litigant, and the "willingness of grand jury witnesses to testify candidly would be less likely affected by subsequent disclosure to the government" than to attorneys for private litigants. However, the court found that the Sells' standard may not have been met with respect

249. 717 F.2d 1136 (7th Cir. 1983).
250. This Rule provides in pertinent part: "Disclosure otherwise prohibited by this rule of matters before the grand jury, other than its deliberations and the vote of any grand juror, may be made to (i) an attorney for the government in the performance of such attorney's duty. . . ."
251. 717 F.2d at 1138.
252. 103 S. Ct. at 3141.
253. 717 F.2d at 1138.
254. Id. at 1139.
255. Id.
to the request for release of the grand jury transcripts, because of the "failure of the government to exhaust its other discovery means." Consequently, the court purported to express no view on the merits of the request to release the transcripts and remanded that issue back to the district court.

*Marrese v. American Academy of Orthopaedic Surgeons*257 was an action that had been through both the state and federal court systems. The plaintiffs, two orthopaedic surgeons seeking admission into the defendant professional society, sought damages based on the defendant's refusal to admit them to the defendant professional society.258 The plaintiffs' application for membership was rejected by the defendant without a hearing or a statement of reasons. During pretrial discovery the plaintiffs requested the defendant to produce files relating to denials of membership applications. The defendant refused to comply even after the district court ordered discovery. The district court then found the defendant to be in criminal contempt and fined it $10,000.259 On appeal, two separate discovery issues were examined by the Seventh Circuit.

First, the court addressed whether the validity of a contempt judgment is dependent on the validity of the underlying order. The court noted that a discovery order is not a final judgment amenable to immediate appeal.260 Instead, the defendant had to suffer a contempt ruling prior to taking any appeal. Judge Posner, writing for the majority, reasoned that the only way that the defendant would be entitled to appellate review of the discovery order was if it: (1) disobeyed the district court's discovery order; and (2) suffered punishment with a judgment of criminal contempt. It was the appeal of the contempt judgment that served to bring before the court the validity of the underlying discovery order. The court concluded that the underlying discovery order should fall because the entire lawsuit was barred on res judicata grounds. In addition, because the underlying order was held to be invalid, the contempt judgment for disobeying it was also invalid.261 The court noted that the defendant disobeyed the order not out of disrespect to the court's power, but out of the reasonable belief that the underlying order was fatally defective.

Second, the Seventh Circuit addressed the authority of the district

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256. *Id.* at 1140.
257. 726 F.2d 1150 (7th Cir. 1984).
258. This action was brought under the Sherman Act, 15 U.S.C. § 1 (1980).
260. 726 F.2d at 1158.
261. *Id.*
court to control pretrial discovery under Rule 26 of the Federal Rules of Civil Procedure. The court observed that the district court should closely control the pretrial discovery aspects of cases. It noted that "the effective management of complex litigation requires that the district judge be allowed a broad discretion in guiding the discovery process . . . and hence in deciding whether to limit discovery." Rule 26 provides for the issuance of sequence and timing orders and protective orders to control and manage the discovery process. However, the use of these judicial devices of litigation management is not unlimited. The standard to be used in assessing the propriety of their use is to compare the hardship to the party against whom discovery is sought against the hardship to the other party if discovery is not permitted or limited.

The Marrese court concluded that the district court could have issued Rule 26 protective orders or sequence and timing orders. The issuance of these orders would have served to alleviate the hardships caused by the plaintiffs' request to view the defendant's membership decision files. The court ended by commenting that the district court should have been more closely involved in the pretrial aspects of this case. This level of greater involvement could have resulted in the use of the Rule 26 devices. The use of these devices would have prevented the plaintiffs from allegedly abusing the discovery process by requesting a general release of the sensitive membership decision files of the defendant.

COSTS, FEES AND SANCTIONS

Fees and Costs as Sanctions

In Textor v. Board of Regents, the awarding of attorney's fees was recognized as being within the inherent power of the district court. In Textor, the plaintiff was employed by the defendant as women's athletic director and coach of the women's basketball and tennis teams. The plaintiff filed a class action suit alleging both constitutional and statutory causes of action. Specifically, she claimed that men's and women's athletics received disparate treatment in violation of the civil rights laws. At trial, the district court found that the plaintiff had filed a defective complaint. The court refused to grant the plaintiff leave to amend her complaint. Instead, the district court "found that the complaint lacked any

262. Id. at 1159.
263. Id.
264. FED. R. CIV. P. 26(c).
265. FED. R. CIV. P. 26(d).
266. 726 F.2d at 1162.
267. 711 F.2d 1387 (7th Cir. 1983).
colorable basis for jurisdiction or venue, that the plaintiff's attorneys failed to respond to the defendant's motions adequately, and that [the plaintiff's] counsel's failure to sign the complaint after that omission had been brought to . . . [their] attention amounted to a wilful abuse of the judicial process."

This wilful abuse justified, to the district court, the awarding of fees and costs against the plaintiff. The Seventh Circuit noted that the district court's power to award fees was to be exercised to: (1) punish litigants and their attorneys for abuse of the judicial process; and (2) to protect the orderly administration of justice.

On appeal, the Seventh Circuit held that the district court erred in refusing the plaintiff leave to amend her defective complaint. However, the court noted that the granting of leave to amend does not necessarily provide relief from blame for filing an originally defective complaint. The mere fact that this action was unsuccessful as originally plead does not give a "basis for assuming counsel acted in bad faith."

The district court's power to award attorney's fees is not to be exercised against losing counsel but rather against counsel who are guilty of abusing the judicial process.

At trial, the district court did not afford the plaintiff's counsel the opportunity to explain their actions prior to its assessing fees against the plaintiff. The Seventh Circuit held that "[a]lthough truly egregious conduct by counsel may support a finding of wilful abuse without inquiry . . . in a case such as this in which counsel's conduct is as indicative of incompetence as it is of bad faith[,] the [district] court was not justified in placing the burden of justification on counsel." In short, notions of procedural due process require that notice and a hearing be provided prior to the awarding of fees for abuse of judicial process. Accordingly, the Seventh Circuit remanded the case for a hearing. However, it expressed no opinion as to whether the plaintiff's counsel were guilty of wilful abuse of the judicial process.

In a related matter in Textor, the Seventh Circuit overturned the district court's refusal to award fees to one of the defendants who was represented by its own salaried in-house counsel. It rejected the reasoning that fees are awarded to compensate and that reliance on in-house counsel incurs no additional compensable expense. In support of its

268. Id. at 1394.
270. 711 F.2d at 1393.
271. Id. at 1395.
272. Id.
273. Id. at 1397.
274. Id.
holding, the court noted that a party's decision as to how to engage counsel should have no bearing on the question of fees. The court stated that the relevant determination is whether fees are reasonable, rather than a determination of the amount of fees actually paid or the manner in which they were paid. The amount and manner of payment for legal counsel is only to be used as a guide for the court, it is not to be determinative.\textsuperscript{275} In addition to a district court's inherent power to award fees against a litigant for abuse of the judicial process, there is authority in the Federal Rules of Civil Procedure for such awards. Federal Rule of Civil Procedure 37(b) authorizes the courts to impose sanctions, including the awarding of attorney fees, against disobedient parties.\textsuperscript{276} In \textit{Tamari v. Bache & Co. (Lebanon) SAL},\textsuperscript{277} the district court awarded fees to the defendant. The award was pursuant to Rule 37(b). This case, which began in 1975, was punctuated by the plaintiffs' continued non-compliance with discovery requests. Finally in 1983, the district court set a discovery deposition cut-off date. After the plaintiffs failed to meet the cut-off date, defendant filed a motion for expenses incurred as a result of the plaintiffs' failure to meet the deadline set by the court. The district court held the plaintiff and its counsel jointly liable under Rule 37(b). Only the plaintiffs' counsel appealed the court's decision. The counsel contended that the imposition of sanctions under Rule 37(b) was not appropriate.

The counsel argued that the imposition of sanctions under Rule 37(b), was appropriate only when a "party violates a court order because of wilfulness, bad faith or fault."\textsuperscript{278} He noted that no court order to compel discovery had been violated. The court rejected this reasoning and held that culpability determines only the type of sanctions that should be imposed, not whether sanctions are appropriate. In addition, the court noted that formal motions to compel discovery are not a condition precedent to sanctions if the party against whom the sanctions eventually issue had adequate notice and an opportunity to explain their actions.\textsuperscript{279} Also, the defendant requested that the appellate costs associated with the plaintiffs' appeal of the sanctions be awarded to it. In reviewing the case, the court determined that the awarding of appellate

\textsuperscript{275} \textit{Id.} at 1396.
\textsuperscript{276} \textit{Fed. R. Civ. P.} 37(b) provides in relevant part that: "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure."
\textsuperscript{277} 729 F.2d 469 (7th Cir. 1984).
\textsuperscript{278} \textit{Id.} at 473.
\textsuperscript{279} \textit{Id.} at 472; \textit{accord} Stevens v. Greyhound Lines, Inc., 710 F.2d 1224 (7th Cir. 1983).
costs is consistent with the purpose underlying Rule 37(b).\textsuperscript{280} Basically, the court reasoned that if sanctions awarded by the district court could be lost on appeal, even if they were upheld, by the expenditure of additional monies to protect the award, there would exist a disincentive to seek sanctions at trial. In general, the court implicitly noted that appellate costs, including the payment of attorneys' fees, should not be permitted to outweigh the sanction that is awarded at trial.

In addition to the district court's ability to award fees under Rule 37(b) there may also be awards of sanctions when frivolous appeals are prosecuted. \textit{Reid v. United States}\textsuperscript{281} investigated the grounds that may support an award of costs and fees for an improper appeal. In \textit{Reid}, the plaintiff-appellants alleged that the federal government was guilty of trespass. The plaintiffs alleged that the government had trespassed on its land by maintaining the Ohio River at an artificially high level. They sought an injunction requiring the defendant to lower the river's level. The district court rejected the plaintiffs' complaint on the ground that it was barred by sovereign immunity and dismissed the action. The plaintiffs appealed this dismissal. The government requested an assessment of costs and fees against the plaintiff for what it termed a frivolous appeal. The court held that costs and fees for a frivolous appeal may be recovered under Federal Rule of Appellate Procedure 38.\textsuperscript{282} The test for determining when sanctions under this rule are appropriate is (1) whether the appeal is frivolous; and (2) whether the case is appropriate for sanctions.\textsuperscript{283} The court noted that to reach a determination that an appeal is frivolous, the appellee must have shown more than a mere lack of success. Frivolous appeals are those in which the law involved is so well established that persistence by the appellant is evidence of bad faith. The court also noted that when the appellant can show no reasonable expectation of altering the district court decision, and appeals only for the purpose of delay, harassment or obstinancy, sanctions are then appropriate.\textsuperscript{284} In assessing the requested fees and costs against the plaintiff-appellant, the court \textit{sua sponte} raised the issue in three additional actions that had been consolidated for appeal. In each of these actions, based on the same claims, the court awarded double costs under Rule 38 against each of the four separate appellants.\textsuperscript{285}

\textsuperscript{280} \textit{729 F.2d} at 475. \\
\textsuperscript{281} \textit{715 F.2d} 1148 (7th Cir. 1983). \\
\textsuperscript{282} \textit{FED. R. APP. P.} 38 provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." \\
\textsuperscript{283} \textit{715 F.2d} at 1154-55. \\
\textsuperscript{284} \textit{Id.} at 1155. \\
\textsuperscript{285} \textit{Id.}
Attorney Disqualification

The balance between the privacy of the attorney-client privilege and the right to select counsel of one's choice was at issue in Schiessle v. Stephens. The plaintiff selected the law firm of Ross, Hardies, O'Keefe, Babcock & Parsons (Ross, Hardies) to represent her. A partner in this firm filed an appearance on her behalf. Thereafter and prior to filing an official appearance on behalf of the defendant, attorney Michael King, on behalf of the defendants, asked the plaintiffs to dismiss their action against the defendant. King, at the time, was associated with the law firm of Antonow & Fink. Approximately two months later, having never filed an official appearance in the case, King left Antonow & Fink and joined the firm of Ross, Hardies. Two years later, Antonow & Fink demanded dismissal of this action or threatened to move to disqualify Ross, Hardies. Plaintiff refused to dismiss the lawsuit. Consequently, the defendant moved to disqualify Ross, Hardies from representing the plaintiff in this action. Disqualification was premised on the ground that King had participated in the defense of the defendant and therefore should not be allowed to be associated with representation of the plaintiff. Ross, Hardies disagreed with this argument and sought a declaration of qualification. However, the district court granted the defendant's cross-motion to disqualify Ross, Hardies.

On appeal, the Seventh Circuit sought to determine whether the disqualification of Ross, Hardies was proper. The court held that disqualification would be proper if: (1) there existed a "substantial relationship between the subject matter of the prior and present representations"; and (2) the presumption of shared confidences with respect to the prior representation is not rebutted, or the presumption of shared confidences with respect to the present relationship is not rebutted. As is evident from this analytical framework, the presumption of shared confidences is rebuttable. However, the court noted that this presumption can be rebutted only upon a showing of specific institutional mechanisms that have been put in place to prevent shared confidences. In Schiessle the subject matter of both representations was the same antitrust suit. Also, the court found that Ross, Hardies put no formal institutional mechanisms in place to stop the sharing of confidential information. Consequently, the disqualification of Ross, Hardies was affirmed.

286. 717 F.2d 417 (7th Cir. 1983).
287. Id. at 420.
288. Id. at 421.
Collateral Claims

In many civil actions more than one claim for relief is plead. It is possible, of course, for a plaintiff to be successful on some but not all the claims plead. In *Mary Beth G. v. City of Chicago*, the plaintiff brought thirteen separate claims stemming out of a Chicago Police Department strip search rule. This rule required that all women arrested and detained in Chicago Police lock-ups were to be subjected to a strip and body cavity search regardless of the charges upon which they were being held. The rule did not apply to men. As a result of being arrested and subjected to the above described search, the plaintiff brought several separate claims based on civil rights violations, excessive force and false arrest. The plaintiff prevailed on her civil rights claim only. Due to her success on only one of her claims, the district court denied the plaintiff attorneys' fees. The plaintiff argued that she was entitled to fees for the entire case because the claims on which she eventually did not prevail were intertwined with the one on which she was successful. The Seventh Circuit noted that fees are awarded at the discretion of the trial judge. However, the trial court was not without guidance. In *Hensley v. Eckherart* the Supreme Court held that when a plaintiff is successful on only a portion of her claims, fees cannot be recovered for time expended on unsuccessful and unrelated claims. By implication, the Seventh Circuit held that fees may not be recovered for time expended on unsuccessful related claims. In an analogous manner, when claims are brought against several defendants and not all are found liable, the total time expended in taxing this action to court is recoverable if the non-liable defendants were not frivolously named. In *Mary Beth G.*, the plaintiff was successful only on her civil rights claim. However, because the court determined her other claims, which were unsuccessful, to be both independent of and unrelated to the course of conduct complained of in the civil rights action, recovery was limited to the fees incurred in support of the civil rights claim. As a result, the court awarded the plaintiff fees under §1988.

Costs Under Rule 54(d)

As a general rule, at common law each party to a lawsuit was re-

289. 723 F.2d 1263 (7th Cir. 1983).
291. *Id.* at 1940.
292. 723 F.2d at 1279.
293. The plaintiff also brought claims for recovery for false arrest and for excessive force. *Id.* at 1267.
sponsible for his own costs and attorneys fees. Only bad faith litigation shifted the burden of costs and fees to the losing party.\textsuperscript{294} However, Federal Rule of Civil Procedure 54(d) alters this common law rule. Rule 54(d) provides that “costs shall be allowed as of course to the prevailing party unless the court otherwise directs.”\textsuperscript{295} In \textit{Bittner v. Sadoff and Rudoy Industries},\textsuperscript{296} the Seventh Circuit noted that the prevailing party was entitled to an award of costs and fees unless the opponent’s position was substantially justified or unless there were special circumstances.

In \textit{Badillo v. Central Steel and Wire Co.},\textsuperscript{297} the court articulated one of these special circumstances. It held that it was within the discretion of the district court to consider indigency when acting under Rule 54(d). In \textit{Badillo}, the plaintiff’s indigency, was sufficient to overcome the presumption under Rule 54(d) that costs will be awarded to the prevailing party.

\textbf{CONCLUSION}

Even in reviewing the decisions of just one court of appeals in only one area of the law, the reviewer cannot fail to be impressed by the variety of cases the court is required to decide. Rather than drawing artificial conclusions from such a varied body of cases, the reviewers express the desire that this article will serve as useful guide and research tool for the practicing attorney as he or she confronts issues of federal civil procedure.

\textsuperscript{294} See Benner v. Negley, 725 F.2d 446 (7th Cir. 1984).
\textsuperscript{295} \textsc{Fed. R. Civ. P.} 54(d).
\textsuperscript{296} 728 F.2d 820 (7th Cir. 1984).
\textsuperscript{297} 717 F.2d 1160 (7th Cir. 1983).