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CIVIL PROCEDURE: AN ACTIVE TERM FOR THE SEVENTH CIRCUIT

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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 procedure. This article reviews most of those cases. The cases have been classified under the following headings: personal jurisdiction, removal, venue, appellate jurisdiction, preliminary injunctions, interpleader jurisdiction, attorney's fees and sanctions.

PERSONAL JURISDICTION

Due process requires that a defendant establish "minimum contacts" with a forum before that forum can exercise personal jurisdiction over the defendant.[1] The court's analysis for sufficiency of contacts includes an examination of whether the defendant's conduct, in connection with the forum, was such that he could reasonably anticipate being sued in that forum.[2] The due process requirement is satisfied if the defendant has purposefully directed his activities at a plaintiff in the forum.[3] In the 1984-85 term, the Seventh Circuit closely examined the defendant's conduct to determine whether he had established sufficient contacts in the forum for jurisdiction. The court concluded that a nonresident defendant who actively seeks business in the forum will be amenable to suit there.[4] On the contrary, a defendant who has not knowingly sought the privilege of doing business in the forum cannot be forced to defend there.[5]

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1. International Shoe v. Washington, 326 U.S. 310, 316 (1945).
2. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).
3. Keeton v. Hustler, 465 U.S. 770, 774 (1984).
4. Madison Consulting Group v. South Carolina, 752 F.2d 1193, 1202 (7th Cir. 1985) (hereinafter referred to as "*MCG*").
5. Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214, 216-17 (7th Cir. 1985).

In *Madison Consulting Group ("MCG") v. South Carolina*,[6] the Seventh Circuit found the contacts sufficient for personal jurisdiction over a nonresident defendant whose sole contact with the forum was the disputed contract with the plaintiff. The court based its decision on the fact that the defendant had initiated the contact with the forum plaintiff.[7] Thus, the defendant had knowingly sought the privilege of doing business in the forum.

The court determined that the South Carolina defendant's act of phoning the Wisconsin plaintiff at its home office to discuss a service contract established the contact with the forum. This initial contact led to several meetings between the parties, none of which was in Wisconsin.[8] The parties eventually contracted for MCG to prepare a study and report on economic issues concerning a dam in South Carolina. Although the contract did not specify a place of performance, the court held the defendant to understand that most of the work would be done at plaintiff's place of business in Wisconsin.[9] The plaintiff brought suit in Wisconsin for payment under the contract which was defendant's only contact with the forum.[10]

The Seventh Circuit, as well as the district court, applied an earlier Seventh Circuit decision, *Lakeside Bridge & Steel Co. v. Mountain State Construction Co.*[11] While the district court, in applying *Lakeside*, held that there was jurisdiction over the *MCG* defendant, the Seventh Circuit reversed holding that *Lakeside* was distinguishable.[12] In *Lakeside*, a West Virginia defendant ordered goods from a Wisconsin plaintiff. Although the defendant had knowledge that the goods would be manufactured and shipped from Wisconsin, this act was insufficient to establish "minimum contacts" with the forum.[13] *Lakeside* relied on the Supreme Court's *Hanson v. Denckla*[14] standard, which requires that the defendant "purposefully avail itself of the privilege of conducting activities within the forum, thus invoking the benefits and protection of the

6. 752 F.2d 1193 (7th Cir. 1985).

7. *Id.* at 1202.

8. *Id.* at 1194. The defendant paid the travel expenses incurred by MCG in attending the meetings. The contract was eventually executed through the mail. *Id.* at 1194-95.

9. *Id.* at 1195. Since it was a "time is of the essence" contract, the defendant was held to understand that the plaintiff would be required to do most of the work in Wisconsin in order to finish the report by the contracted date. 85% of the work was actually performed in Wisconsin. *Id.*

10. *Id.*

11. 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980).

12. *MCG*, 752 F.2d at 1201. Personal jurisdiction under Wisconsin's long arm statute was not at issue. The only issue was whether jurisdiction was constitutionally permissible. *Id.* at 1195.

13. *Lakeside Bridge*, 597 F.2d at 603. *See also MCG*, 752 F.2d at 1196.

14. 357 U.S. 235 (1958).

law."[15] The Seventh Circuit held that the *Lakeside* defendant who had merely ordered goods from a forum plaintiff had not purposefully availed itself of the forum, and was thus not amenable to suit there.

Applying *Lakeside* to *MCG*, the district court compared the *MCG* defendant's act of solicitation of the plaintiff's services to the *Lakeside* defendant's act of ordering goods. The *Lakeside* defendant had not purposefully availed itself of the laws and benefits of the forum by ordering goods. Furthermore, the *MCG* defendant had not purposefully availed itself of the laws and benefits of the forum by soliciting services. Therefore, the district court concluded that jurisdiction was not constitutionally permissible.[16]

In reversing the district court, the Seventh Circuit held that while *Lakeside* was relevant, *MCG* was distinguishable. The court found the distinction in the fact that the *Lakeside* defendant had ordered goods from a plaintiff who had travelled to the defendant's place of business to offer those goods. On the contrary, the *MCG* defendant had initiated the contact with the forum plaintiff by phoning him in the forum. The court reasoned that the *MCG* defendant had actively reached into the forum to solicit the plaintiff's services, which it knew would be performed in the forum. Accordingly, unlike the *Lakeside* defendant,[17] the *MCG* defendant had purposefully availed itself of the forum by establishing contacts, which "easily satisfy the dictates of constitutional due process."[18]

The concurring opinion failed to find any significant distinction between *Lakeside* and *MCG*, and consequently would have overruled *Lakeside*.[19] This opinion reasoned that jurisdiction should not turn on the relative agressiveness of the defendant.[20] Instead, the performance of the disputed contract in the forum, when the defendant reasonably contemplated that it would be performed there, gives the forum jurisdiction over a dispute arising from that contract.[21]

In a later case, the Seventh Circuit held that a defendant who had placed an advertisement in an Illinois journal which was later reprinted

15. *Id.* at 253.

16. *MCG*, 752 F.2d at 1202.

17. In Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587 (7th Cir. 1984) (decided this term prior to *MCG*), the Seventh Circuit held jurisdiction was proper over a California defendant who had contracted for an Illinois plaintiff's services. *Id.* at 593. The court found that the defendant, who had executed the contract in the plaintiff's Illinois offices after inspecting the plaintiff's business operations, had established "minimum contacts" with the forum. *Id.* at 592. The defendant, in opposing jurisdiction, had relied on *Lakeside*. *Id.*

18. *MCG*, 752 F.2d at 1203.

19. *Id.* at 1210 (Swygert, J., concurring).

20. *Id.* at 1206 (Swygert, J., concurring).

21. *Id.* at 1210 (Swygert, J., concurring).

in an Indiana journal, had not knowingly solicited business in Indiana. The defendant's act of placing the advertisement was insufficient to establish "minimum contacts." In *Hall's Specialties v. Schupback*,[22] the Illinois defendant had placed an advertisement in the "Illinois Prairie Farmer." Without defendant's knowledge the advertisement was also printed in the "Indiana Prairie Farmer." The Indiana plaintiff, after reading the advertisement in the Indiana journal, purchased an allegedly defective tanker from the defendant. The issue was whether Indiana had jurisdiction over the Illinois defendant whose only contact with the forum was the advertisement.

Based on an analysis of the *MCG* opinion, the Seventh Circuit held that the defendant's act in placing the advertisement in the Illinois journal was insufficient for personal jurisdiction in Indiana. The defendant had not knowingly solicited the sale in Indiana and, therefore, would not have anticipated being sued there.[23] On these facts, the court determined that the defendant had not acted with the intent of soliciting the forum plaintiff's business. Consequently, he had not acted to invoke the benefits and privileges of the laws of the forum and was not amenable to suit there.[24]

Judge Flaum, who had written the very thorough analysis of the "minimum contacts" standard in the majority opinion in *MCG*, dissented in *Hall's*.[25] His dissenting opinion pointed out that this particular Illinois defendant had previously sold a tanker to this same Indiana plaintiff through a similar advertisement in the same Illinois journal. The defendant knew that his advertisement would be read in Indiana. Thus, the dissent concluded, the defendant had knowingly sought business in Indiana. Consequently, the dissent would hold that Indiana did have jurisdiction over this Illinois defendant.[26]

The Seventh Circuit analysis, in these cases, is in line with a recent Supreme Court case. Several months after the Seventh Circuit handed down the opinions discussed above, the Supreme Court held that Florida had jurisdiction over a Michigan defendant whose sole contact with the forum was a disputed contract with a forum plaintiff. In *Burger King v.*

22. 758 F.2d 214 (7th Cir. 1985). Judge Evans, writing for the majority, opined that Judge Wapner of "People's Court" fame would not last long on television if he dealt with the rather dull legal issues raised by personal jurisdiction cases. "The greater sin than dullness, however, is the confusing and contradictory body of law that has developed." *Id.* at 215.

23. *Id.* at 216-17.

24. *Id.*

25. *Id.* at 217 (Flaum, J., dissenting). Judge Flaum's dissent evidences that the "minimum contacts" definition is still very much at issue, notwithstanding the very extensive analysis in the *MCG* opinion.

26. *Hall's Specialties*, 758 F.2d at 217-18.

Rudzewicz,[27] the Court found that the defendant had known the contract was with a Florida plaintiff, although he argued that he had contracted with a Michigan representative of the plaintiff. The court reasoned that the contract at issue provided that Florida law govern the relationship and that the defendant send all payments under the contract to Florida. The defendant knew that the Florida headquarters regulated the contractual relationship. The defendant's conduct was such that he could reasonably anticipate being compelled to defend in Florida.[28] Thus, the exercise of jurisdiction by Florida over this nonresident defendant did not violate the requirements of due process.

The Supreme Court and the Seventh Circuit continue to wrestle with the due process requirements for personal jurisdiction over a nonresident defendant whose sole contact with the forum is the disputed contract with the forum plaintiff. However, it is clear that a party who purposefully reaches beyond one state and creates obligations with the citizens of another state, in a manner which makes it foreseeable that he might be subject to suit in that foreign state, cannot evade the foreign state's exercise of jurisdiction.[29] In *Burger King*, the Supreme Court stated, "The Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed."[30] A defendant who actively seeks the privilege of doing business with a forum plaintiff will be subject to suit in that forum.[31]

REMOVAL

The removal statute[32] generally provides that the defendant may remove any action in which the federal courts had "original jurisdiction." The statute also provides that where a "separate and independent" cause of action, which is removable, is joined with a nonremovable cause of action, the defendant may remove the entire case.[33] During the 1984-85

27. 105 S.Ct. 2174 (1985).
28. *Id.* at 2190.
29. Travelers Health Ass'n. v. Virginia, 339 U.S. 643, 647 (1950).
30. *Burger King*, 105 S. Ct. at 2183.
31. *Id.* at 2190.
32. 28 U.S.C. § 1441(a) (1982):
(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
33. 28 U.S.C. § 1441(c) (1982):
(c) Whenever a separate and independent claim or cause of action, which could be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may

term, the Seventh Circuit decided several issues surrounding the terms "original jurisdiction" and "separate and independent."

1. "Original Jurisdiction"

Federal courts have "original jurisdiction" only over causes of action arising under federal law[34] and over disputes between citizens of different states.[35] The Seventh Circuit interpreted the "arising under federal law" extent of its jurisdiction in two cases this term. In both cases, the Chicago Mercantile Exchange had removed actions to federal court contending that federal law governed the plaintiffs' rights under the rules of the Exchange.

In the earlier case, *Bernstein v. Lind-Waldock & Co.*[36] the Seventh Circuit held that although the Commodities Exchange Act[37] closely regulates the Exchange, federal law does not govern all disputes between the Exchange and its members.[38] In its determination of whether federal law governed the action, the court examined the dispute between the parties. The dispute began when Bernstein rented his seat on the Exchange to Caan, who because of trading losses owed a large sum of money to Lind-Waldock. Pursuant to the rules of the Exchange, Lind-Waldock requested an auction of Bernstein's seat. Bernstein then brought suit in state court against Lind-Waldock and the Exchange to enjoin the sale of his seat.[39] The defendants removed, contending that federal law governed Bernstein's rights under the rules of the Exchange. Preferring to remain in state court, Bernstein moved to remand. When the district court denied his motion, Bernstein amended his complaint against the Exchange, charging that the Exchange had taken his seat without due process of law.

The Seventh Circuit held that federal law did not govern Bernstein's original complaint. The court reasoned that state contract law rather

> determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

34. 28 U.S.C. § 1331 (1982). "The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws and treaties of the United States."

35. 28 U.S.C. § 1332(a)(1) (1982).

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States.

36. 738 F.2d 179 (7th Cir. 1984).

37. 7 U.S.C. §§ 1 *et. seq.* (1982).

38. *Bernstein*, 758 F.2d at 184.

39. *Id.* at 181. The suit became one for restoration of Bernstein's seat on the Exchange, or for damages, when the district court denied his motion for a preliminary injunction. *Id.* at 182.

than any federal statute governed the action.[40] The internal rules of a federally regulated stock exchange do not create rights of action under federal law.[41] Accordingly, the federal court did not have "original jurisdiction" over Bernstein's original complaint, and at that time neither party could properly remove. However, federal law did govern Bernstein's amended complaint against the Exchange. When the district court refused to remand, Bernstein amended his complaint adding the unmistakably federal claim of lack of due process. Consequently, the Seventh Circuit concluded the district court had "original jurisdiction" over Bernstein's amended complaint and removal by the Exchange was proper.[42] Removal by Lind-Waldock, however, was improper.

The plaintiff in *Korach v. Chicago Mercantile Exchange*,[43] also charged that the defendant had violated his due process rights.[44] The plaintiff alleged that the International Monetary Market Division of the Chicago Mercantile Exchange had wrongly denied him membership. Allegedly, the Exchange had not given the plaintiff's application the fair and equitable consideration required by due process. The Seventh Circuit held that the Commodity Exchange Act[45] had pre-empted the area of the Exchange's rules which regulate membership in the Exchange or any of its divisions.[46] Thus, the court decided that unlike *Bernstein*, a federal statute governed this plaintiff's rights under the rules of the Exchange.[47] Consequently, the federal courts had "original jurisdiction" over the action, and the Exchange had properly removed.

2. "Separate and Independent"

The removal statute provides that where a removable cause of action is joined with a "separate and independent" nonremovable cause of action, the defendant may remove the entire case. The district court in its discretion may then hear the entire case or may remand the nonremovable action to state court.[48] In the 1984-85 term, the Seventh Circuit

40. *Id.* at 184-85.

41. *Id.* at 185.

42. *Id.*

43. 747 F.2d 414 (7th Cir. 1984).

44. *Id.* at 415. The court did not discuss *Bernstein*.

45. 7 U.S.C. §§ 1 *et seq.* (1982).

46. *Korach*, 747 F.2d at 416. The court does not analyze its pre-emption ruling. The Commodity Exchange Act, 7 U.S.C. § 12(c)(2), provides for review of an exchange's denial of membership by the Commodity Futures Trading Commission ("CFTC"). The Act further provides procedures for judicial review of the CFTC decision. *Id.*

47. *Id.* at 415.

48. 28 U.S.C. § 1441(c) (1982). For the pertinent text of the statute, *see supra* note 33.

decided two cases involving the "separate and independent" provision of the statute.

A. Removal by Third Party Defendants[49]

Issues arising under the "separate and independent" section of the removal statute usually center on what can be removed. This term, the Seventh Circuit confronted the issue of who can remove the entire case. Treating this issue as one of first impression, the court decided that the removal statute does not authorize a third party defendant's removal of the entire case. This is contrary to the Fifth Circuit which has permitted such removals.[50] The Seventh Circuit decision, however, is in accord with the commentators who have concluded that third party defendants may never remove.[51]

In the Seventh Circuit decision, *Thomas v. Shelton*,[52] the plaintiff, aged eleven, injured himself on farm machinery located on land his family rented from the Sheltons. Because Thomas' father was a member of the armed forces, the United States paid the medical expenses resulting from the injury. Both Thomas and the United States brought suit against the Sheltons. Thomas brought suit in state court on a tort theory, while the United States brought suit in federal court under the Medical Recovery Act.[53] The Sheltons, fearing double liability for the medical expenses, impleaded the United States in Thomas' state court action, making the United States a third party defendant. The United States then removed the entire state action to the federal district court where its suit against the defendants was pending. Thus, *Thomas v. Shelton* presented a case where a third party defendant had removed the entire action.

In analyzing whether removal of the entire case was proper, the court first examined the United States' claim. The threshold issue under

49. FED. R. CIV. P. 14(a) (in pertinent part):
> At any time after commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

50. *See* Carl Heck Eng'r, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133, 135-36 (5th Cir. 1980).

51. *See* 1A MOORE'S FEDERAL PRACTICE ¶ 0.163(4.-6) (2d ed. 1983); 14 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3724 at 643-45 (1983 Supp.).

52. 740 F.2d 478 (7th Cir. 1984).

53. 42 U.S.C. § 2651 (1982) (in pertinent part):
> In any case in which the United States is authorized or required by law to furnish hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages thereof, the United States shall have a right to recover from said third person the reasonable value of the care and treatment so furnished. . . .

this section of the statute is whether the "separate and independent" cause of action is removable. Here, the United States' claim was founded on a federal statute, and thus was within the original jurisdiction of the federal courts. Accordingly, the Seventh Circuit held that the United States had properly removed its claim.[54]

The issue then was whether the United States had properly removed Thomas' nonremovable claim along with its own. For proper removal, the nonremovable claim must be "separate and independent" of the removable claim. Here, however, the United States' claim was not separate from the plaintiff's tort claim. The federal claim was "parasitic" in that if Thomas' claim failed so would that of the United States.[55] Claims are not "separate and independent" if they arise from the same loss or actionable wrong.[56] In both Thomas' claim and the United States' claim, the defendants' fault was at issue. Thus, the Seventh Circuit concluded that the removable claim was not joined with a "separate and independent" claim as the statute requires. The Seventh Circuit held that the district court was required to remand Thomas' tort claim to state court, while keeping the United States' claim. The United States could not probably remove the entire action.[57]

The Seventh Circuit further reached the issue of whether third party defendants could ever remove. The court noted that third party complaints are, by nature, dependent on the success of the main claim.[58] Therefore third party claims could not be "separate and independent" of the main claim. The Seventh Circuit determined that allowing third party defendants to remove an entire case would expand the original jurisdiction of the federal judiciary.[59] The court reasoned that the federal judiciary did not have original jurisdiction over the main issue. However, defendant's impleader of the third party would permit the federal court to hear that non-federal issue. The Seventh Circuit refused to allow removal of an entire action based on a third party claim. Although the court refused to adopt a universal rule that third party defendants can never remove, there was a strong inference that this will be the rule in the Seventh Circuit.[60]

The concurring opinion agreed that in *Thomas v. Shelton* the nonremovable claim was not "separate and independent" of the removable

54. 740 F.2d at 482.
55. *Id.* at 486.
56. American Fire & Casualty Co. v. Finn, 341 U.S. 6, 14-16 (1951).
57. *Thomas*, 740 F.2d at 488.
58. *Id.* at 486. The court pointed out that most third party claims are for indemnity. *Id.*
59. *Id.*
60. *Id.* at 487.

claim. Therefore, removal of the entire action by the third party defendant was not proper. However, this opinion disagreed with the inference that third party defendants may never remove.[61] Third party defendants may properly remove when the removable and nonremovable claims are "separate and independent." *Thomas v. Shelton* did not provide the proper circumstances for removal of the entire case by a third party defendant.[62]

B. Timeliness of the Removal

In *Lewis v. Louisville & Nashville Railroad*,[63] the Seventh Circuit held that the defendant had failed to remove within the thirty day period allowed by the statute.[64] The issue before the court was the determination of when the thirty day period began. The plaintiff claimed that the period began when the defendant received the amended complaint which contained a removable claim. The defendant argued that due to the unusual nature of the plaintiff's claims, the period did not begin until after a state jury rendered a decision on the nonremovable allegations.

Plaintiff-employee brought his original complaint under the Federal Employers' Liability Act ("FELA")[65] in state court. Although the parties were diverse, defendant-employer could not remove the claim because FELA complaints are not removable.[66] The plaintiff later amended[67] his complaint to include an allegation that the defendant had harrassed him in retaliation for filing the FELA claim. The defendant did not remove the harrassment charge, and the state court tried the entire action. The jury awarded the plaintiff damages on the FELA charge, but could not reach a verdict on the harassment charge. After the jury

61. *Id.* at 489-90 (Swygert, J., concurring). *See supra* note 60 and accompanying text. For a compilation of district court decisions and a thorough analysis of when third party defendants can properly remove, *see* Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc., 563 F. Supp. 1108, 1110 nn. 6 and 8 (N.D. Ill. 1983).

62. *Thomas*, 740 F.2d at 491.

63. 758 F.2d 219 (7th Cir. 1985).

64. *Lewis*, 758 F.2d at 222. *See* 28 U.S.C. § 1446(b) (1982):

> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then not been filed in court and is not required to be served on the defendant, whichever period is shorter.

65. *Lewis*, 758 F.2d at 220. *See* 45 U.S.C. § 51 *et seq.* (1982).

66. *Lewis*, 758 F.2d at 220. *See* 28 U.S.C. § 1445(a) (1982).

> (a) A civil action in any state court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45 (Federal Employers' Liability Act), may not be removed to any district court in the United States.

67. *Lewis*, 758 F.2d at 220. The complaint was amended a total of five times. The first amendment contained the harrassment charge. *Id.*

had rendered its decision, the defendant moved to remove the harrassment charge.

Plaintiff argued that the defendant had been required to remove the harassment charge within thirty days of receiving it. Consequently, defendant could not remove now. The defendant responded that the harrassment charge was not "separate and independent" of the nonremovable FELA count until the jury decision severed the two claims. Therefore, the defendant reasoned it had thirty days after the jury decision in which to remove.

The Seventh Circuit determined that the case turned on whether the harrassment charge was "separate and independent" of the FELA claim. If the claims were separate, the statute required the defendant to have removed within thirty days of receipt of the amended complaint, and removal now was untimely. If, however, the claims were inseparable, the defendant could not properly have removed the harrassment charge earlier.

The court held that the harrassment claim was independent of the FELA claim because the two claims did not involve substantially the same facts.[68] The court reasoned that the FELA claim centered on the defendant's conduct up to the date of the plaintiff's FELA injury, while the harrassment charge concerned the defendant's conduct after the FELA charge was filed. Therefore, the court concluded that the harrassment claim alleged a different wrong based on a different set of facts. Consequently, the harrassment claim was "separate and independent" of the FELA claim, and defendant could only have removed within thirty days of receiving the amended complaint.[69]

VENUE[70]

1. Choice of Law

Choice of law rules in the area of venue are designed to prevent forum shopping for substantive law by either the defendant or the plaintiff. The *Van Dusen* rule[71] provides that when a defendant successfully moves to transfer a diversity action from one district to another on venue grounds, the transferee court must apply the substantive law of the origi-

68. *Id.* at 221-22.

69. *Id.* at 222.

70. 28 U.S.C. § 1404(a) (1982). "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

71. Van Dusen v. Barrack, 376 U.S. 612 (1964).

nal forum. In *Gonzalez v. Volvo of America Corp.*,[72] the Seventh Circuit expanded the *Van Dusen* rule. Previously the rule had applied only to transfers initiated by the defendant. *Gonzalez* expanded the rule to transfers initiated by the plaintiff.[73] Accordingly, when either the defendant or the plaintiff successfully moves to transfer on venue grounds, the new forum must apply the substantive law of the original forum. This rule is designed to prevent either party from utilizing a venue transfer to avoid the application of the law of the original forum.[74]

An exception to the *Van Dusen* rule provides that, where personal jurisdiction over the defendant was lacking in the original forum, the transferee court must apply the substantive law of the state in which it sits. This exception applies whether it is the plaintiff or the defendant who initiates the transfer. The exception prevents the plaintiff from bringing suit in a state where there is no personal jurisdiction over the defendant in order to bring that forum's law with the action when it is transferred.[75]

2. Forum Selection Clauses in Arbitration Contracts

Snyder v. Smith[76] presented a conflict between the provisions of the Federal Arbitration Act[77] and the terms of an arbitration agreement between the parties. The Seventh Circuit determined that where such a conflict exists, the district court must dismiss the action. The court first examined the Federal Arbitration Act. The Act provides that, where a party has petitioned the court for an order directing that arbitration proceed, the district court shall order such arbitration in the district in which the petition is filed. In *Snyder*, the plaintiff filed a petition for an order compelling arbitration with the United States District Court for the Northern District of Illinois. Accordingly, the statute empowered

72. 734 F.2d 1221 (7th Cir. 1984). The court, in this opinion, also discussed whether the misconduct of plaintiff's counsel during closing arguments is grounds for a new trial. *Id.* at 1225-26.

73. *Id.* at 1224.

74. *Id.* at 1223-24.

75. The Sixth and the Eleventh Circuits agree with this interpretation of the *Van Dusen* rule. *See* Martin v. Stokes, 623 F.2d 469, 472 (6th Cir. 1980); Roofing & Sheet Metal Serv., Inc. v. La Quinta Motor Inns, 689 F.2d 982, 991-93 (11th Cir. 1982).

76. 736 F.2d 409 (7th Cir.), *cert. denied*, 105 S. Ct. 513 (1984).

77. 9 U.S.C. § 4 (1982) which states in pertinent part:

> A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . (T)he court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.* The hearing and proceedings under such agreement shall be *within the district in which the petition for an order directing such arbitration is filed.* (emphasis added).

the district court to order arbitration only in its own district in Illinois. However, the arbitration agreement between the parties provided for arbitration in Houston, Texas.[78] Faced with this conflict, the district court correctly concluded that it did not have the power to order arbitration in Texas as called for in the parties' agreement. The court, however, did order arbitration in Illinois.

In reversing the district court, the Seventh Circuit held that the court must give effect to forum selection clauses worked out between the parties in arms-length negotiations.[79] Therefore, the court must order the parties to arbitrate in accordance with their agreement. Here, the parties' agreement called for arbitration in Texas. Since the district court lacked the power to order arbitration in Texas, the correct procedure was dismissal.[80] Dismissal of the petition in Illinois would cause the party seeking the order compelling arbitration to petition the district court named in its agreement for such an order.[81]

3. Venue for Disputes Over Real Property

Raphael J. Musicus, Inc. v. Safeway Stores, Inc.[82] presented technical issues involving the characterization of actions as local or transitory for venue purposes. In local actions, the plaintiff seeks *in rem* relief which directly affects the property in question. Proper venue in such actions lies only in the district in which the property is located. In transitory actions, on the other hand, the plaintiff seeks *in personam* relief, so that the court acts on the person or personal property of the defendant and only indirectly on the land involved. Proper venue for transitory action lies wherever there is personal jurisdiction over the defendant.[83]

In the instant case, the plaintiff brought suit in Illinois over properties he owned in Montana and Nebraska. The plaintiff sued for breaches of the leases on the properties and also for willful trespass and unlawful

78. *Snyder*, 736 F.2d at 412-13. The agreement at issue provided in relevant part:

> Any controversy or claim arising out of or relating to this agreement, or to the interpretation, breach or enforcement thereof, shall be submitted to three arbitrators and settled by arbitration in the City of Houston, Texas. . . .

Id.

79. *Id.* at 419. The dissent interprets the Federal Arbitration Act, 9 U.S.C. § 4, to refer to terms of the parties' agreement other than forum selection, thereby avoiding any conflict. *Snyder* at 420 (Bauer, J., dissenting).

80. *Id.* at 420. No other circuit has considered this issue in the same posture as this case presents. For a discussion of other circuits' handling of the conflict in different circumstances, *see Snyder*, 736 F.2d at 418 n.7.

81. *Id.* at 420.

82. 743 F.2d 503 (7th Cir. 1984). This case demonstrates that the arcane distinction between local and transitory actions for venue purposes is not obsolete.

83. *Id.* at 505-06.

detainer. The district court determined that the plaintiff sought to recover possession of the properties. Since the relief would act directly on the properties, the district court decided that the action was *in rem*. Consequently, the court concluded that proper venue would lie only in the district in which each property was located; therefore, the district court dismissed the action.

The Seventh Circuit reversed, holding that the main issue was the breach of the leases. An action for damages founded in contract law is traditionally characterized as transitory.[84] Consequently, proper venue for the breaches of the leases would lie wherever there is personal jurisdiction over the defendant.

However, the trespass and willful detainer charges were best characterized as local. The court reasoned that these actions directly affected the properties involved, and therefore were *in rem* actions. Proper venue for these actions would lie only in the district in which each property was located. However, in the instant case, no purpose would be served by adjudicating each of these actions separately. The court concluded that the main issue was the breach of the leases between the same parties and properties. Accordingly, proper venue for the entire action would lie in any district that had personal jurisdiction over the defendant.[85]

APPELLATE JURISDICTION

1. "Final Decisions"

The appellate jurisdiction statute[86] provides for jurisdiction over "final decisions" of the district court. Most cases arising under this statute involve construction of the term "final decisions."

In *Gilles v. Burton Construction Co.*,[87] the Seventh Circuit held that when the district court refused to enter a judgment, no "final decision" had been reached. The plaintiff brought suit under section 502 of the Employee Retirement Income Act of 1974 ("ERISA").[88] The complaint charged that the defendant-employer was delinquent in its contributions to an employee retirement fund.[89] Shortly after receiving the complaint,

84. *Id.* at 507.
85. *Id.* at 511.
86. 28 U.S.C. § 1291 (1982) (in pertinent part):
The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .
87. 736 F.2d 1142 (7th Cir. 1984).
88. 29 U.S.C. § 1132 (1982).
89. *Gilles*, 736 F.2d at 1143. *See* 29 U.S.C. § 1145 (1982):
Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the

the defendant tendered an amount to the plaintiff which included the amount of the overdue contributions, cost of an audit, and a penalty for the late contributions. The plaintiff, dissatisfied because the tendered amount did not include attorney's fees, turned to the district court seeking a judgment in its favor. The issuance of a judgment in the plaintiff's favor would invoke the mandatory relief provisions of ERISA which provide that a delinquent contributor pay reasonable costs and attorney's fees.[90]

The district court refused to enter a judgment, but did award attorney's fees. That court reasoned that because the defendant had already tendered the amount the plaintiff was demanding for late contributions, there was no need to enter a judgment. Plaintiff appealed to the Seventh Circuit, contending that the district court had erred in refusing to enter a judgment and also that the attorney's fees award was insufficient.

The Seventh Circuit held that the district court had not reached a "final decision," and therefore the appellate court lacked jurisdiction to review.[91] The court reasoned that the underlying dispute had not been adjudicated. A meaningful review of an ERISA award requires an adjudication of the merits of the dispute. There could be no review by the appellate court until the district court had decided the ERISA issue.

The Seventh Circuit also held that it lacked jurisdiction over the plaintiff's charge that the attorney's fees award was insufficient. The attorney's fees could not be separated from the merits of the case.[92] Accordingly, that award also required an adjudication of the merits of the ERISA claim. In *Gilles*, the district court had not reached a "final deci-

extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

90. 29 U.S.C. § 1132(g)(2) (1982).

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of this plan is awarded, the court shall award the plan—

(A) the unpaid contributions
(B) interest on the unpaid contributions
(C) an amount equal to the greater of—
  (i) interest on the unpaid contributions, or
  (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
(D) reasonable attorney's fees and costs the action to be paid by the defendant, and,
(E) such other legal or equitable relief as the court deems appropriate.

91. *Gilles*, 736 F.2d at 1145-46.

92. *Id.* at 1145. The court recognized that there may be situations in which attorney's fees are not related to the merits, and can be the subject of an immediate appeal although interlocutory. However, that was not the situation here. *Id.*

sion," and therefore the appellate court lacked jurisdiction to review.[93]

In another case, the Seventh Circuit determined that it did not have jurisdiction over an arbitration award that the district court had remanded to the arbitrator. In *Shearson Loeb Rhoades, Inc. v. Much*,[94] the arbitrator had determined that Shearson was liable to Much for a sum of money, but did not state the basis for arriving at that sum. Shearson, unhappy with the amount of the award, appealed to the district court. The district court agreed with Shearson that the arbitrator had based the award on "sheer speculation,"[95] and remanded the dispute to the arbitrator for a recalculation of the damages. Instead of returning to the arbitrator Shearson appealed to the Seventh Circuit.

The Seventh Circuit held that it lacked jurisdiction over the district court's decision to remand. The propriety of an appeal following a remand to an arbitrator depends on the purpose of the remand. Where a dispute is remanded because what is left to be done is merely "ministerial action,"[96] the appellate court would have jurisdiction. However, in a case such as this one where the district court's remand will require more than application of a mandated formula to the numbers, a "final decision" has not been reached.[97] Accordingly, the Seventh Circuit lacked jurisdiction to hear this appeal.[98]

These two cases evidence the Seventh Circuit's strict limitations on its jurisdiction. In the *Gilles* case, the court served explicit notice that appellants be prepared in every appeal to show the basis of the court's jurisdiction.[99] In *Shearson,* the court admitted that its dismissal of the appeal would be expensive to the parties who must return to the arbitrator, and perhaps would come back through the federal courts again. However, the court acted to discourage appeals when a district court remands part of a case to the arbitrator.[100] Thus, in *Shearson,* although

93. *Id.* at 1146.

94. 754 F.2d 773 (7th Cir. 1985).

95. *Id.* at 775.

96. *Id.* at 776. The court defines "ministerial action" as an action applying a mandated formula to the numbers as opposed to an action which develops the formula. *Id.* at 776-77.

97. *Id.*

98. *Id.* at 778. The Seventh Circuit decision is in accord with the Second Circuit. Stathatos v. Arnold Bernstein S.S. Corp., 202 F.2d 525 (2d Cir. 1953). The First Circuit assumed without deciding that an appeal was proper when a district court remanded a dispute over computation of lost earnings to the original board of arbitrators. Locals 2222, 2320-2327, Int'l Bhd. of Elec. Workers v. New England Tel. and Tel. Co., 628 F.2d 644, 646-47 (1st Cir. 1980). Finally, the Fifth Circuit held there was appellate jurisdiction when a new hearing was ordered before an arbitration panel. Wells v. Southern Airways, Inc., 517 F.2d 132, 134 n.3 (5th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976).

99. Gilles v. Burton Constr. Co., 736 F.2d 1142, 1147 (7th Cir. 1984).

100. Shearson Loeb Rhodes, Inc. v. Much, 754 F.2d 773, 778 (7th Cir. 1985).

judicial economy would be lost, the Seventh Circuit refused to consider a remand to the arbitrator a "final decision."

However, in another case this term, *Mazanec v. North Judson-San Pierre School Corp.*,[101] the Seventh Circuit held a district court's decision to abstain under the *Pullman* doctrine to be a "final decision" subject to immediate review. A *Pullman* abstention occurs when the court orders all federal proceedings stayed in order to allow the plaintiff to pursue his claims in state court. The Seventh Circuit determined that such abstentions invoke appellate jurisdiction.

The Supreme Court discussed two types of abstentions in *Railroad Commissioner v. Pullman Co.*[102] In the first type, the federal court dismisses the suit before it and all of the plaintiff's claims are heard in state court. Since nothing is left for the district court to decide, this type of dismissal is a "final decision" and always immediately appealable. The second type of *Pullman* abstention, on the other hand, is not a dismissal but a genuine stay. The plaintiff pursues his state claim, but elects to return to federal court with any federal issues left unresolved after the state court renders its decision.

In *Mazanec*, the Seventh Circuit decided to continue its previous policy of allowing immediate appeals of both types of *Pullman* abstentions. The court based its decision on Seventh Circuit precedent and also on the recent Supreme Court decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[103] The Seventh Circuit[104] reasoned that it is often unclear whether the plaintiff intends to reserve his right to return to federal court. If he does, the abstention is interlocutory and no "final decision" was reached. If, however, he elects not to reserve the right to return, the decision was final. The Seventh Circuit concluded that basing appellate jurisdiction on the distinction between the two types of *Pullman* abstentions is impractical. Accordingly, in the Seventh

101. 750 F.2d 625 (7th Cir. 1984).

102. 312 U.S. 496 (1941).

103. 460 U.S. 1 (1983). The Supreme Court decision upholds the appealability of a stay of a federal suit based on a parallel state proceeding. Such an action would always conclude when the state court rendered its decision. In contrast, a *Pullman* abstention is entered with the expectation that the action will resume in federal court if the plaintiff does not obtain relief for all his claims in state court. *Id.* at 10. The Supreme Court, however, refused to distinguish between a *Pullman* abstention which is a dismissal and one which is a genuine stay. *Id.* at 9 n.8. The Seventh Circuit decided to "stick with the established approach in this circuit" of allowing appeals of all *Pullman* abstentions. *Mazanec*, 750 F.2d at 628.

104. Similarly, the Third Circuit reads *Moses* as authorizing immediate appeals from stays for *Pullman* abstentions. Hovsons, Inc. v. Secretary of Interior, 711 F.2d 1208, 1211 (3d Cir. 1983). The First and Ninth Circuits hold to the contrary. Bridge Constr. Corp. v. City of Berlin, 705 F.2d 582, 584 (1st Cir. 1983); Badham v. United States Dist. Court, 721 F.2d 1170, 1171-72 (9th Cir. 1983).

Circuit, an immediate appeal can follow either type of *Pullman* abstention.[105]

2. Injunction Exception

An exception to the "final decision" requirement for appellate jurisdiction provides for interlocutory review of a district court's order granting or refusing to grant an injunction.[106] In *South Bend Consumers Club, Inc. v. United Consumers Club, Inc.*,[107] the defendant failed in an attempt to invoke the appellate court's jurisdiction based on the district court's refusal to issue an injunction. The defendant had sought an injunction which would prohibit the plaintiff from competing in violation of a restrictive covenant. The district court refused to issue the injunction and the defendant appealed.

The Seventh Circuit held that the fact that the district court refused to issue injunctive relief was insufficient to qualify the ruling as an appealable interlocutory decree. The would-be appellant must also show that the refusal to grant the injunction would have "serious, perhaps irreparable consequences" and can only be "effectually challenged" by immediate appeal.[108]

The defendant had relied on an earlier Seventh Circuit decision, *Data Cash Systems, Inc. v. JS&A Group, Inc.*[109] for the contention that the appellate court had jurisdiction over all district interlocutory orders granting or refusing to grant injunctive relief. The Seventh Circuit disagreed that the case stood for this, but added that if *Data Cash Systems* implied that irreparable consequences need not be shown, it was not good law.[110] The appellate court has jurisdiction over a district court's interlocutory order granting or refusing to grant injunctive relief only if the party seeking review shows irreparable harm requiring immediate review.[111]

105. *Mazanec*, 750 F.2d at 628.

106. 28 U.S.C. § 1292(a)(1) (1982) (in pertinent part):

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . 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.

107. 742 F.2d 392 (7th Cir. 1984).

108. *Id.* at 393 (quoting Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981)).

109. 628 F.2d 1038 (7th Cir. 1980).

110. *South Bend*, 742 F.2d at 394. The party seeking the injunction here did not attempt to meet the burden of showing irreparable harm until asked about it at oral argument. *Id.*

111. *Id.* at 393.

PRELIMINARY INJUNCTION

The Seventh Circuit, in its 1984-85 term, identified the requisite elements for a district court to grant a preliminary injunction. The Seventh Circuit changed the standard of appellate review for preliminary injunctions from an "abuse of discretion" standard to a "clear error" standard. The Seventh Circuit also held that the limitation period for filing a motion of reconsideration begins when the oral findings are issued, and not when the written findings are published.

The standards for granting preliminary injunctions, and for appellate review of such decisions, were established in *Roland v. Dressler*.[112] The case dealt with a dealership agreement between Roland Machinery and Dressler Industries, whereby Roland sold Dressler's construction equipment to third parties. The agreement did not contain an exclusive dealing clause, but did provide that either party could terminate the agreement without cause on ninety days notice. Several months later, Dressler learned that Roland had signed a similar agreement with Komatsu, a Japanese competitor of Dressler's. Dressler gave notice that it would exercise its contractual right to terminate its agreement with Roland.[113] Roland filed suit, charging that Dressler violated Section 3 of the Clayton Act, and the district court granted Roland's request for a preliminary injunction based solely on the Section 3 charges.[114]

The Seventh Circuit stated that the following are necessary to grant a preliminary injunction:[115] (1) plaintiff must show that he has "no adequate remedy at law" and that he will suffer "irreparable harm" if the preliminary injunction is not so granted;[116] (2) the district court must consider any irreparable harm that the defendant may suffer from the injunction;[117] (3) the plaintiff must show some likelihood of success on

112. 749 F.2d 380 (7th Cir. 1984).

113. *Id.* at 381.

114. *Id.*

115. Both sides cited decisions supporting their view of the appropriate appellate standard. After identifying numerous and irreconcilable tests to use to determine whether a preliminary injunction should be granted, the Seventh Circuit decided that since it was not possible to reconcile all of the distinctions made in previous holdings, the court should announce the standard that the district courts in the Seventh Circuit should apply. *Id.* at 382-86.

116. *Id.* The plaintiff needs to show both an adequate remedy at law and irreparable harm. A preliminary injunction is an equitable remedy, and an inadequate remedy at law is a requirement for any form of equitable relief. A preliminary injunction also requires the showing of irreparable harm, that is, a harm that cannot be rectified by a final judgment. Without such harm, there is no reason why the moving party cannot wait until the case is tried on the merits.

117. FED. R. CIV. P. 65(c) provides in relevant part:

> No restraining order or preliminary injunction shall issue except upon giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs found to have been wrongfully enjoined or restrained. The irreparable harm suffered by the non-

the merits, and the court must determine how likely that success is in order to balance the extent of harm to both the plaintiff and the defendant;[118] and (4) the court must also consider any public interest considerations in this balancing process.[119]

The Seventh Circuit did not state that preservation of the status quo was a requirement for granting a preliminary injunction. Many previous holdings had indicated that the purpose of a preliminary injunction was to preserve the object of controversy: that is, to maintain the status quo between the two parties until the case was tried on the merits.[120] The reason the Seventh Circuit gave for not requiring the preservation of the status quo was that the term "status quo" is ambiguous.[121] In *Roland*, the status quo was preserved to the extent that Roland continued to be a dealer of Dressler's equipment. But the status quo was also changed, for the dealership could no longer be terminated by Dressler on ninety days notice.[122]

Perhaps the Seventh Circuit rejected this element too quickly. The concept behind a preliminary injunction is that the plaintiff cannot be made whole if he waits for a decision on the merits, and the only adequate remedy is to prevent the defendant from doing what he wants to do until the case can be tried. This assumes that the plaintiff was whole before the defendant changed the situation. Therefore, the preservation of the status quo is necessary to prevent undue benefit for either party.

In *Roland*, there seems to be an undue benefit. Roland argued that it would suffer irreparable harm if Dressler was able to terminate the dealership agreement.[123] But the agreement gave either party the right to terminate the agreement without cause. It seems illogical that Roland would suffer irreparable harm when Dressler only exercised a clause of the contract that both parties had agreed upon. By granting the preliminary injunction, the district court gave Roland a right it did not have before the preliminary injunction. This right was the ability to continue

moving party that the court must consider is harm that would not be cured either by the final judgment or by the injunction bond Rule 65(c) requires.

118. The Seventh Circuit did not state when the plaintiff's likelihood of succeeding on the merits would be insufficient to grant a preliminary injunction but did say the threshold would be a low one. *See* Comment, *Probability of Ultimate Success Held Unnecessary for Grant of Preliminary Injunction*, 71 COLUM. L. REV. 165 (1971). The Seventh Circuit stated that the district courts should use a "sliding scale," the greater the harm to the nonmoving party, the greater the likelihood of the plaintiff's success on the merits.

119. *See* Yakus v. United States, 321 U.S. 414 (1941).

120. *See, e.g.*, E.E.O.C. v. Janesville, 630 F.2d 1254, 1259 (7th Cir. 1980); Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. and S.S. Clerks, 188 F.2d 302, 306 (7th Cir. 1951).

121. 749 F.2d at 383.

122. *See supra* note 2 and accompanying text.

123. 749 F.2d at 382.

as a Dressler dealer for more than 90 days. For this reason alone, the request for a preliminary injunction should have been denied.

The Seventh Circuit had previously held that the standard of appellate review for preliminary injunction is abuse of discretion.[124] The Seventh Circuit could have decided *Roland* based on this standard, but instead imposed a *de novo* standard of review. The Seventh Circuit will now determine if the district court exceeded the bounds its discretion by reviewing the facts independently, and will *not* give the district court the deferential treatment that is customary with the abuse of discretion standard.[125]

The actual effect of this decision on appellate review may not be a major one. Since the Seventh Circuit reviews the facts anyway to determine if the district court abused its discretion, it is not a major extension to review the facts independently to determine if the district court clearly erred. Previously, if the Seventh Circuit wished to sustain or reverse a district court's decision, it would determine if the lower court did or did not abuse its discretion. Now, if the Seventh Circuit wishes to sustain or reverse a district court's decision, it will determine, based on an independent review of the facts, if the district court did or did not clearly err. The net effect could be minimal, but only future holdings will determine what effect *Roland* has on preliminary injunctive review.

The dissenting opinion gave four reasons why the Seventh Circuit should continue to adopt the abuse of discretion standard. First, the district court is responsible for making a final determination on the merits of the case, so the district court should have discretion to determine whether the preliminary injunction is necessary to ensure that it will be able to grant meaningful relief at the end of the trial.[126] Second, the new standard would result in the substitution of the appellate court's judgment for that of the trial court.[127] Third, the trial court has a greater knowledge, access to evidence, and "feel" of the case, and so is in a better position to decide whether a preliminary injunction is appropriate.[128] Finally, the preliminary injunction is often granted or denied based on an abbreviated hearing. In such a hearing, the parties have not developed

124. *See* Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 166 (7th Cir. 1981); Reinders Bros. Inc. v. Rain Bird E. Sales Corp., 627 F.2d 44, 49 (7th Cir. 1980); Milsen Co. v. Southland Corp., 454 F.2d 363, 369 (7th Cir. 1971); *see also* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, 2962 at 633 (1973).

125. 749 F.2d at 391.

126. *Id.* at 396.

127. *See* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778-80 (1957).

128. *Id.* at 781-82.

their arguments nor created the record which is so important for the appellate court.[129] Finding that the district court did not err or abuse its discretion, the dissent would have affirmed the lower court's decision.[130]

In *Financial Services Corp. v. Weindruch*,[131] the Seventh Circuit determined when the limitation period for appealing a preliminary injunction begins. On June 16, 1983, the district court concluded the hearing on the preliminary injunction motion, and issued oral findings of fact and conclusions of law. On June 23, the preliminary injunction was issued, and on June 30 the written findings of fact were issued.[132] On July 11, the defendants filed a motion for reconsideration, and on November 11, filed their notice of appeal.

The defendants argued that the motion for reconsideration tolled the thirty-day limitation period for appealing a private action.[133] However, such a motion must be filed within ten days of the judgment according to the Federal Rules.[134] The Seventh Circuit determined that the judgment occurred on June 23, when the preliminary injunction was orally issued, and therefore the motion for reconsideration was time-barred by the ten-day limitation period. The Rules do not allow a party who is dissatisfied with the oral judgment to wait until the written judgment is issued before he files his motion for reconsideration. The Seventh Circuit stated that such a wait may be allowed if the motion concerned a finding added to the written judgment after the oral judgment was issued,[135] but that was not the situation in *Weindruch*. The Rule states ten days from judgment, and the Seventh Circuit has conservatively interpreted the Rule to mean ten days from the first notice of the oral judgment.

INTERPLEADER JURISDICTION

Interpleader jurisdiction requires that there be two or more adverse claimants to the same stake.[136] The stake can be money, property, or

129. 749 F.2d at 397.
130. *Id.* at 402.
131. 764 F.2d 195, 197 (7th Cir. 1985).
132. *Id.* at 198.
133. The Seventh Circuit has held that a motion to alter or amend judgment, based on FED. R. CIV. P. 59(e), will toll the thirty-day limitation period for filing an appeal, and a motion to reconsider is a motion to alter or amend under FED. R. CIV. P. 59(e). *See* A.D. Weiss Lithographic Co. v. Illinois Adhesive Prod. Co., 705 F.2d 249 (7th Cir. 1983) (per curiam).
134. FED. R. CIV. P. 52(b) provides in relevant part:

> Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

135. 764 F.2d at 198.
136. FED. R. CIV. P. 22 provides in relevant part:

both.[137] The previous trend in both the Seventh Circuit and the Supreme Court has been to liberally construe this requirement.[138] However, the Seventh Circuit deviated from this liberal construction in its 1984-85 term.

The 1984-85 decision indicating this deviation was *Indianapolis Colts v. Baltimore*.[139] In *Indianapolis Colts*, the Colts, a professional football team, had signed a lease with C.I.B.,[140] the operators of the Hoosier Dome in Indianapolis, to play all their games in Indianapolis. They had previously played all their games in Baltimore, and the Maryland Senate had already passed a bill authorizing the City of Baltimore to acquire the Colts by eminent domain. The City of Baltimore began condemnation proceedings in Maryland State Court, which the Colts had removed to a federal district court in Maryland. The Colts then filed an action seeking a restraining order in the Federal District Court for the District of Southern Indiana, based on interpleader jurisdiction, claiming that the Colts' obligation under their lease with C.I.B. conflicted with Baltimore's attempt to acquire the team through eminent domain. The district court granted the Colts' request for a restraining order, and Baltimore appealed.[141]

On appeal, Baltimore contended that there was no proper interpleader jurisdiction. The Seventh Circuit agreed, vacated the order of the district court, and remanded the action with instructions to dismiss.[142] The first reason the Seventh Circuit held there was no jurisdiction was because Baltimore and the C.I.B. did not have conflicting claims to the same stake. Baltimore's claim was for ownership of the team, while the C.I.B. claim was only a lease agreement that the Colts play in Indiana. Although the lease gave C.I.B. the right to choose the new owner of the team should the present owner decide to sell,[143] this right

> (1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin, or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to all of the claimants.

137. 28 U.S.C. § 1335 provides in relevant part: "(a) The district court shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm or corporation, association or society having in his custody or possession money or property of $500 or more. . . ."

138. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533 (1967); Union Cent. Life Ins. Co. v. Hamilton Steel Prods., Inc., 448 F.2d 501, 504 (7th Cir. 1971).

139. 741 F.2d 954 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1753 (1985).

140. Capital Improvement Board of Managers of Marion County, Indiana (C.I.B.).

141. 741 F.2d at 956.

142. *Id.* at 958.

143. *Id.* at 956.

did not create a present property interest that would conflict with Baltimore's present property right to purchase the Colts by eminent domain.

This reasoning is inconsistent with previous holdings that the federal interpleader statute be liberally construed.[144] A liberal construction of the word "stake" was taken by the dissent.[145] The dissent considered the "stake" in this action to be more than the ownership of a property interest; it was the right to have a National Football League franchise, with all the attending social and economic benefits that a major city could derive from having such a franchise. Since both C.I.B. and Baltimore wanted this right, they were both claiming the same stake.

A California Supreme Court holding supports the dissent's interpretation of the property involved in an eminent domain action when procuring a professional football franchise. In *City of Oakland v. Oakland Raiders*,[146] the city of Oakland brought an eminent domain action to acquire all the property rights associated with the Oakland Raiders football team. The California Supreme Court held that such an action could be brought, because the California eminent domain statute allowed for the purchase of property "for public use."[147] Stadiums could be purchased for public use under this statute,[148] and the California Supreme Court found no substantial legal distinction between managing and owning a stadium and managing and owning the team that plays in the stadium.[149] The Seventh Circuit held to the contrary; there was such a legal distinction, and this distinction prevented the two claims from being interplead.

There was a second reason the Seventh Circuit held there was no interpleader jurisdiction. The Court held that the Colts had no real or reasonable fear of double liability.[150] A provision of the C.I.B. lease agreement stipulated that the Colts could terminate the lease at their option without further obligation should the Colts be acquired by eminent

144. *See supra* note 106.

145. 741 F.2d at 960-61.

146. 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

147. 32 Cal. 3d at 69, 646 P.2d at 841, 183 Cal. Rptr. at 679.

148. Anaheim v. Michel, 259 Cal. App. 2d 835, 837, 66 Cal. Rptr. 543, 546 (1968). The California Supreme Court has held that anything which related to "activities which promote recreation of the public constitute a public purpose." County of Alameda v. Meadowlark Dairy Corp., 227 Cal. App. 2d 80, 85, 38 Cal. Rptr. 474, 477 (1964). *See also* Los Angeles v. Superior Court, 51 Cal. 2d 423, 434, 333 P.2d 745, 753 (1959) (acquisition of land for a baseball field considered an obvious public purpose); Egan v. San Francisco, 165 Cal. 576, 582, 133 P. 294, 296 (1913) ("generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purpose.")

149. 32 Cal. 3d at 73, 646 P.2d at 842, 183 Cal. Rptr. at 580.

150. 741 F.2d at 957.

domain.[151] Since this "escape clause" eliminated any fear of double liability the Colts might have, there was no basis for federal interpleader jurisdiction.

This reasoning is inconsistent with Seventh Circuit precedent set in the 1970-71 term. In *Union Central Life Insurance Co. v. Hamilton Steel Products, Inc.*,[152] an insurance company brought an interpleader action seeking a declaration of rights of various parties under a group annuity insurance policy issued to the bankrupt defendant. Two classes of employees contended that the trustee and the union representatives were not proper parties and should not be allowed to interplead. The Seventh Circuit disagreed, holding that the purpose of interpleader was two-fold: one purpose being to protect the stakeholder from the expense of double litigation, no matter how groundless the claims were, and the other purpose being to protect the stakeholder from double liability.[153]

In *Indianapolis Colts*, the Seventh Circuit did not consider affirming the interpleader jurisdiction in order to save the stakeholder the expense of double litigation. The Seventh Circuit felt that there was no possibility that the Colts would incur such an expense, even though such a possibility did exist.

The "escape clause" only allowed the Colts to terminate the lease contract if a court of final appellate jurisdiction approved the eminent domain action. Any restraining order from a lower court preventing the Colts from playing in Indiana would enable C.I.B. to sue for damages, giving rise to double litigation. This failure to consider the stakeholder's expense of double litigation as a justification for interpleader jurisdiction represents a major change in the Seventh Circuit's interpretation of the purpose of interpleader jurisdiction.

Another change occurred when the Seventh Circuit in *Indianapolis Colts* held that the C.I.B. claim was unreasonable and non-meritorious.[154] This is also inconsistent with Seventh Circuit precedent. *Union Central Life* held that interpleader jurisdiction was not dependent on the merits of the claims of the interpled parties.[155] Instead, the underlying

151. Clause 21.6(a)(ii) of the C.I.B. lease provides in relevant part:

> iii) If Club (Colts) is ordered by a final order of such court of final appellate jurisdiction to play other than at the Stadium (Hoosier Dome) or the Franchise is acquired by eminent domain, this Agreement shall terminate at Club's option, and the Parties shall have no further obligations hereunder.

741 F.2d at 958.

152. 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1758 (1985).

153. *Id.* at 504.

154. 741 F.2d at 958.

155. 448 F.2d at 504. *See also* Bierman v. Marcus, 246 F.2d 200, 202 (3d Cir. 1957), *cert. denied sub nom.* Milmar Estate, Inc. v. Marcus, 356 U.S. 933 (1958).

purpose of interpleader is to have one court decide the merits of each claim based on the proceedings. It defeats the purpose of interpleader to decide these merits prior to the proceedings, especially when the allegedly non-meritorious claim had succeeded in the district court.[156] Interpleader jurisdiction should not be denied unless the non-meritorious claim fails to pass a "minimum test of substantiality."[157]

The Seventh Circuit relied on two cases to support its decision that the C.I.B. claim failed to pass this test. In *Francis I. Dupont & Co. v. O'Keefe*,[158] the Seventh Circuit upheld the district court's decision. The district court held that only one of the claims had merit. In *Bierman v. Marcus*,[159] the Third Circuit denied interpleader jurisdiction because one of the adverse claimants solely owned and controlled the stakeholder. The Third Circuit held there was no interpleader jurisdiction because the stakeholder knew that the corporation had no meritorious claim on the stake.

Neither of these two situations existed in *Indianapolis Colts*. This case is distinguishable from *Union Central Life* and *O'Keefe* because the Seventh Circuit found a claim non-meritorious after the district court held that the claim had merit. Nor does the Third Circuit's rationale in *Bierman* apply to *Indianapolis Colts*. The Colts had no specific knowledge that the C.I.B. claim was non-meritorious, like the stakeholder in *Bierman*.[160]

In sum, the lack of fear of double liability is now sufficient to deny interpleader jurisdiction in the Seventh Circuit. The court no longer considers the element of the stakeholder's expense of double litigation. This decision indicated the Seventh Circuit's willingness to examine the merits of each claim before allowing interpleader jurisdiction. Other circuits liberally construe the interpleader statute to allow the merits of the claims to be determined based on the proceedings.

FEES AND SANCTIONS

During the 1984-1985 term, the Seventh Circuit considered various rules when imposing sanctions and attorney's fees. In this term, the court lessened the standard for imposing sanctions against attorneys. The court was also more willing to award prevailing plaintiffs their attor-

156. *Id.*
157. *See* Francis I. DuPont & Co. v. O'Keefe, 365 F.2d 141, 143 (7th Cir. 1966).
158. 365 F.2d 141 (7th Cir. 1966).
159. 246 F.2d 200 (3rd Cir. 1957) *cert. denied sub nom.* Milmer Estate, Inc. v. Marcus, 356 U.S. 933 (1958).
160. *Id.* at 203.

ney's fees than in previous terms. However, the Seventh Circuit did not lessen the standard for awarding attorney's fees to prevailing defendants. The court's readiness to impose sanctions or award attorney's fees may indicate that it is becoming aware of the need to regulate the actions of attorneys and their clients in the federal judiciary.

ATTORNEY'S FEES

1. Civil Rights Cases

The Seventh Circuit considered the award of attorney's fees to a prevailing party, other than the United States, under the Civil Rights Attorney's Fees Awards Act of 1976.[161] To award attorney's fees under 42 U.S.C. § 1988, the action must be filed as a civil rights suit.[162] This section allows a court to grant a prevailing party in a civil rights suit his attorney's fees.[163] Case law, however, distinguishes between a prevailing plaintiff and prevailing defendant.[164] The standard for a prevailing plaintiff is simply that he is the prevailing party whereas the prevailing defendant must prove that the plaintiff's claim was frivolous.[165]

The different standards for an award of attorney's fees was discussed in *Hermes v. Hein*.[166] In *Hermes*, the plaintiffs appealed the district court decision granting the defendant's motion for summary judgment and awarding the defendants over $89,000 in attorney's fees. The plaintiffs filed this case under 42 U.S.C. § 1983 and § 1985 alleging that the President of the Village of Wheeling, the Commissioners, and the Village of Wheeling falsified the results of the competitive examinations used to promote police officers to the rank of lieutenant or sergeant. The plaintiffs maintained that the falsifying of test results violated their first amendment right and their due process right to promotion. As a result, the plaintiffs claimed that they were entitled to relief under 42 U.S.C. § 1983 and § 1985.[167]

In November of 1979, the district court dismissed plaintiffs' due process claim with leave to amend stating that the plaintiffs did not allege a sufficient basis to find that they had a property interest in the promotion for purposes of due process. After plaintiffs amended their com-

161. 42 U.S.C. § 1988 provides in part: "In any action or proceeding to enforce a provision of §§ 1981, 1982, 1983, 1984, and 1986 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of his costs."

162. A civil rights suit is a claim filed under Title 42.

163. *See supra* note 161 and accompanying text.

164. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

165. *Id.* at 416-17, 421-22.

166. Hermes v. Hein, 742 F.2d 350 (7th Cir. 1984).

167. *Id.* at 352.

plaint, the district court denied defendants' motion to dismiss the amended complaint finding that the plaintiffs' allegations were sufficient to establish a due process property interest in the promotion.[168]

After two years of discovery, the district court granted defendants' motion for summary judgment. The court found that the plaintiffs failed to raise any issue of material fact or provide any factual support for their claims of political discrimination or their due process claim. In May of 1983, the district court awarded the defendants $87,326.50 in attorney's fees and $2,344.65 in costs.[169] The plaintiffs appealed this award maintaining that their action was neither frivolous nor lacking factual support. Although the Seventh Circuit held that the district court did not abuse its discretion in granting defendants' motion for summary judgment, it did find that the lower court's award of attorney's fees was an abuse of its discretion. The court based its result on both its interpretation of § 1988 and recent case law.[170]

First, the Seventh Circuit explained that § 1988 is used in cases filed under § 1983 and § 1985.[171] Second, the court noted that § 1988 allows a "prevailing party" to receive attorney's fees.[172] The court stated that according to *Christiansburg Garment Co. v. EEOC*,[173] a prevailing defendant will receive attorney's fees only if the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[174] The court went on to note that according to the *Christiansburg* court, subjective bad faith is not necessary for an award of attorney's fees. This does not mean, however, that an ultimately unsuccessful claim is unreasonable.[175]

In addition, the *Hermes* court looked to *Ekanem v. Health and Hospital Corp.*,[176] a recent Seventh Circuit case which considered a similar issue. In *Ekanem*, the Seventh Circuit relied on the *Christiansburg* rationale regarding the possibility of the plaintiffs not knowing if they would succeed on the merits of the case. In addition, the *Ekanem* court held that the nature of the case should be considered since some type of claims require that the plaintiff be given wide latitude in attempting to prove his case.[177]

168. *Id.*
169. *Id.* at 352-53.
170. *Id.* at 353-58.
171. *Id.* at 356.
172. *Id.*
173. 434 U.S. 412 (1978).
174. *Id.* at 421-22.
175. *Hermes*, 742 F.2d at 356. *See Christiansburg*, 434 U.S. at 421-22.
176. 724 F.2d 563 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 93 (1984).
177. *Id.* at 575.

The Seventh Circuit employed in *Hermes* the principles set forth in *Ekanem* and *Christiansburg* to determine whether a claim was meritless. First, the Seventh Circuit stated that the district court must consider the type of evidence to be presented along with the factual uncertainty of the outcome of the litigation. The court reasoned that even though the plaintiff's factual evidence would not survive a motion for summary judgment, it was sufficient to state a cause of action. As such, any factual uncertainty as to the outcome of the litigation should not render the plaintiff's claim meritless.

Second, consideration must be given to the plaintiff to establish evidence which may indicate that his claim is not meritless. Furthermore, this evidence should be considered by a court in determining whether a plaintiff's claims are groundless. In *Hermes*, the Seventh Circuit found that plaintiff's specific information which was the foundation of his claim was not considered by the district court when it held that the plaintiff's claim was frivolous. This two part rule is in keeping with recent Seventh Circuit decisions regarding attorney's fees under 42 U.S.C. § 1988.[178]

The *Hermes* court went on to consider when a plaintiff's claim may warrant granting defendant his attorney's fees. The court enunciated a test which would supposedly aid courts in determining at what point during the litigation a plaintiff's claim would warrant such harsh treatment. This test requires that the district court make an assessment of the conduct of the parties at the various stages of litigation.[179] Such a test is somewhat vague and does not enhance a district court's discretion. Furthermore, the Seventh Circuit's suggestions that a trial court review and note any lack of progress on a pending case does not give the district court much guidance in determining when a claim may become frivolous. Consequently, the Seventh Circuit's decision in *Hermes* does not make clear when 42 U.S.C. § 1988 can be utilized in determining when to award attorney's fees. In fact, the *Hermes* decision may make the area more confusing.

The second section of Title VII which the Seventh Circuit considered was 42 U.S.C. § 2000e-5(k).[180] Like section 1988, the language of

178. *Hermes*, 742 F.2d at 357. *See* Ekanem v. Health & Hosp. Corp., 724 F.2d 563 (7th Cir. 1983), *cert. denied*, 105 S. Ct. 93 (1984); Badillo v. Central Steel & Wire Co., 717 F.2d 1160 (7th Cir. 1983).

179. *Hermes*, 742 F.2d at 358.

180. 42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this subchapter (42 U.S.C. §§ 2000e *et seq.*) the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The award of attorney's fees under § 2000e-5(k) are applicable only to prevailing parties and cannot

section 2000e-5(k) indicates that attorney's fees can be awarded to a prevailing party. Case law, however, dictates that this award shall only be granted to a prevailing plaintiff unless the plaintiff's action was frivolous, unreasonable or without foundation.[181] The decision to award attorney's fees under 42 U.S.C. § 2000e-5(k) is usually within the court's discretion. The award of attorney's fees to a prevailing plaintiff is usually done for one of two reasons. First, a Title VII plaintiff was chosen by Congress as an example of the consequences when civil rights laws are enforced. Second, such an award is made against a violator of federal law.[182] The award of attorney's fees is given to a prevailing defendant only if the plaintiff's claim was frivolous, unreasonable or without foundation.[183]

In *Eichman v. Linden & Sons, Inc.*,[184] the Seventh Circuit considered the application of the award provision under section 2000e-5(k). Mr. Eichman filed suit under 42 U.S.C. § 2000 *et seq.* alleging that he was discriminated against by his employer who replaced him with a younger female. During discovery, the Illinois Human Rights Commission found that Mr. Eichman's allegations were false.[185] Two years later, Mr. Eichman moved for a Rule 42(a)(2) dismissal. The district court granted the dismissal but it did not award the defendant his attorney's fees. The court reasoned that Eichman's allegations were not frivolous.[186]

On appeal, the Seventh Circuit found that a prevailing defendant can recover his attorney's fees only if the plaintiff's claims are "frivolous, unreasonable, or without foundation."[187] The court found that this standard will ensure that meritless claims are filed while deterring frivolous lawsuits. The Seventh Circuit did not find Eichman's claim to be frivolous since the EEOC's finding that the plaintiff's claim was false was not based upon a detailed inspection.[188] Because a full scale inspection was not completed when the Commission issued its finding, the court chose

be imposed against an attorney. 28 U.S.C. § 1927, on the other hand, specifically allows a court to order counsel to pay excess costs caused by his vexatious behavior and multiplication of the proceeding. Because the two statutes differ in both their scope and purpose, they are applicable to different situations.

181. Eichman v. Linden & Sons, Inc., 752 F.2d at 1248 (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978)).

182. *Id.* at 1248. *See also* Glass v. Pfeiffer, 657 F.2d 252 (10th Cir. 1981).

183. *See supra* note 181 and accompanying text.

184. 752 F.2d 1246 (7th Cir. 1985).

185. *Id.* at 1247.

186. *Id.* at 1248.

187. *Id.* (quoting *Christiansburg*, 434 U.S. at 421-22).

188. *Eichman*, 752 F.2d at 1249. The court found that this investigation must be completed within 120 days. As a result, the investigation may not consider all of the factors of each case. The *Eichman* court chose not to give great weight to the Commissioner's findings. *Id.*

not to find Mr. Eichman's claim irrelevant and thereby affirmed the district court's holding denying the defendant his attorney's fees.[189]

Thus, a prevailing party is usually allowed to recover his attorney's fees under Title VII. The provisions of Title VII differentiate between a prevailing defendant and a prevailing plaintiff. The burden of proving reimbursement under section 2000e-5(k) is much greater for a defendant than for a plaintiff.

2. Rule 41(a)(2)

The Seventh Circuit also considered Rule 41(a)(2)[190] of the Federal Rules of Civil Procedure when awarding attorney's fees to the defendant. Unlike other rules, the plaintiff's claim need not be frivolous for the defendant to be awarded his attorney's fees.[191] Instead, if the plaintiff is granted a voluntary dismissal without prejudice, the court has the discretion to award the defendant his attorney's fees.[192] The courts base their discretion on the phrase "upon such terms and conditions as the court deems proper."[193] Most circuits, however, are in conflict as to whether a Rule 41(a)(2) judgment is appealable. This issue was one of first impression in the Seventh Circuit in its 1984-85 term.

In *Cauley v. Wilson*,[194] the Seventh Circuit considered two issues regarding Rule 41(a)(2). First, the court considered whether a Rule 41(a)(2) judgment is final and therefore appealable. Second, the court looked to whether a defendant may be awarded his costs under Rule 41(a)(2). In determining the appealability of a Rule 41(a)(2) judgment, the court considered both the majority and the minority approaches.[195]

The majority of circuits hold that a Rule 41(a)(2) judgment may be appealed only if the conditions of the dismissal "legally prejudice" the plaintiff.[196] The minority approach allows an appeal of a Rule 41(a)(2)

189. *Id.* at 1251.

190. FED. R. CIV. P. 41(a)(2) provides:

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

191. For example 42 U.S.C. § 1988 requires that plaintiff's claim be frivolous before granting a prevailing defendant his attorney's fees.

192. FED. R. CIV. P. 41(a)(2).

193. *Id.*

194. 754 F.2d 769 (7th Cir. 1985).

195. *Id* at 770-71.

196. *See* Bowers v. St. Louis S.W. Ry., 668 F.2d 369, 370 (8th Cir. 1981) (per curiam), *cert. denied*, 465 U.S. 946 (1982) (the Eighth Circuit did not find the lower court's restriction that the

dismissal only if the court is to review whether the district court abused its discretion in awarding attorneys' fees.[197] In *Cauley*, the Seventh Circuit chose to follow the minority approach.[198] The court reasoned that although a plaintiff may understand that implicit in a Rule 41(a)(2) dismissal is his agreement to pay the defendant's legal fees, this understanding is not equivalent to an approval on whatever sanctions the court may choose. The Seventh Circuit correctly reasoned that an unusually large award of attorney's fees may constitute an involuntary adverse judgment. Thus, the Seventh Circuit chose only to review the lower court's discretion in awarding attorney's fees.[199]

In considering the plaintiff's argument that the fees were not a "term or condition" of the dismissal, the court noted that the defendant requested attorney's fees at the same hearing that the district court granted the plaintiff its Rule 41(a)(2) motion. The court stated that if the plaintiff objected to the amount granted to the defendant, his attorney should have voiced the objection when the motion was granted. The Seventh Circuit found that the attorney should have known that fees are an implicit condition of the Rule 41(a)(2) dismissal.[200]

The *Cauley* court also considered the reasonableness of the lower court's award. The court first discussed that the purpose of awarding attorney's fees with a Rule 41(a)(2) dismissal is to compensate the defendant for any unnecessary expenses incurred in the litigation.[201] The court found that this reimbursement, however, should only apply to reasonable expenses, i.e. the expenses incurred for preparation which cannot be utilized in a subsequent trial.[202] Because the district court did not state why it found an award of $7,500 to be a reasonable term and condi-

plaintiff could only appeal the case in Arkansas or federal court to "legally prejudice" or "severely circumscribe" the plaintiff to reinitiate the suit); Scholl v. Felmont Oil Corp., 327 F.2d 697, 700 (6th Cir. 1964) (the court held that the lower court's requirement that the plaintiff pay the defendant's attorney's fees was neither unreasonable nor an involuntary adverse judgment and thus not appealable.)

197. *Cauley*, 754 F.2d at 771. *See* GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 367-68 (D.C. Cir. 1981) (the court found that the lower court did not abuse its discretion in awarding those attorney's fees which were incurred by the defendant in defending this action as a "term or condition" of Rule 41(a)(2).

198. 754 F.2d at 771. The court limited the situations when it would follow the minority approach to those when a plaintiff requests a dismissal in order to proceed in a state court.

199. *Id.*

200. *Id.* at 771. Although the Seventh Circuit did not support this condition, other circuits have ruled in the same manner. *See* GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364 (D.C. Cir. 1981); Scholl v. Felmont Oil Corp., 327 F.2d 697 (6th Cir. 1964).

201. *Id.* at 772.

202. *Id. See* GAF Corp. v. Transamerica Ins. Co., 665 F.2d 364, 369-70 (D.C. Cir. 1981); LeCompte v. Mr. Chip Inc., 528 F.2d 601, 604-05 (5th Cir. 1976); Yoffe v. Keller Indus. Inc., 580 F.2d 126 (5th Cir. 1978), *cert. denied*, 440 U.S. 915 (1979).

tion of Rule 41(a)(2), the Seventh Circuit remanded the case so that reasonable attorney's fees could be determined.[203] Thus, the Seventh Circuit followed the minority position regarding the appealability of Rule 41(a)(2), while following the majority opinion in determining that a Rule 41(a)(2) judgment has an implicit condition that requires the plaintiff to pay the defendant his attorney's fees.

SANCTIONS

In its 1984-1985 term, the Seventh Circuit employed two rules of the Federal Rules of Appellate Procedure that impose sanctions on attorneys and their clients who abuse the judicial process. Rules 38[204] and 46(c)[205] of the Federal Rules of Appellate Procedure provide methods by which a court of appeals can impose sanctions upon an attorney for his personal conduct or upon litigants for their disregard of the judicial system and its rules.

Rule 38 of the Federal Rules of Appellate Procedure provides for two types of sanctions against an appellant. First, it allows a circuit court to request the appellant to pay the opposing counsel's "just damages" and single costs.[206] Usually, singles costs are imposed against a party whose actions are either frivolous or meritless. Second, Fed. R. App. P. 38 allows a court to require that the appellant pay just damages and double costs to the appellee.[207] Generally, double costs will be awarded if an appellant's actions, or those of his attorney, go beyond frivolousness. In both cases, single or double costs can be imposed against both the appellant and his attorney. Although Fed. R. App. P. 38 does not specifically provide for attorney's fees, courts have interpreted the damages provision to include reasonable attorney's fees.[208] In the 1984-85 term, the Seventh Circuit considered the issue of imposing Fed. R. App. P. 38 sanctions against an Indiana attorney.

In *Lepucki v. Van Wormer, Pazdur v. Blaw-Know Foundry and Mill Machinery*,[209] the court imposed sanctions on the plaintiff's attorney Mr.

203. *Cauley*, 754 F.2d at 772-73. The district court did not award the defendant the $14,500 that he requested. *Id.* at 772.

204. 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."

205. *Id.*

206. *Id.* The term "just damages" seems to be used by the court as a term of art though the court did not define it.

207. *See infra* notes 225-229 and accompanying text.

208. *See* Cummings v. United States, 648 F.2d 289, 293 (5th Cir. 1981); Werch v. City of Berlin, 673 F.2d 192, 196 (7th Cir. 1982).

209. 765 F.2d 86 (7th Cir.) (per curiam), *cert. denied*, 106 S. Ct. 6 (1985). Two appeals were consolidated into one opinion since both cases involved the same attorney.

John Hyde for continuously filing frivolous or vexatious claims. In *Lepucki*, the plaintiff claimed that he was exempt from withholding taxes when he filed his W-4 form with his employer Inland Steel. After investigating the claim, the Internal Revenue Service ordered Inland to resume withholding taxes from the plaintiff's checks. This information was given to the plaintiff, Mr. Lepucki, by a supervisor of Inland Steel Co., Richard Smulevitz, who also informed Mr. Lepucki about the penalty imposed on him for submitting false information to the IRS. Mr. Smulevitz also informed the plaintiff that this penalty was to be deducted from his wages.[210] The plaintiff then retained Mr. Hyde who filed a complaint in Indiana state court alleging that both the IRS officials and Mr. Smulevitz defamed the plaintiff when they accused him of submitting false information on his W-4 form. The claim also alleged that both defendants wrongfully withheld the plaintiff's wages.[211]

The defendants removed this action to the federal district court where the defamation action was dismissed against the IRS officials and Mr. Smulevitz. The district court also dismissed the claim for wrongfully withheld wages. After dismissing all of the plaintiff's claims, the district court imposed defendants' costs and fees against the plaintiff Mr. Lepucki and his attorney Mr. Hyde because the action was not instituted in good faith. Instead, the district court found that this action was a device by which plaintiff's attorney could discuss his beliefs and opinions regarding the tax laws of the United States of America.[212]

In considering this appeal, the Seventh Circuit held that the district court did not abuse its discretion when it awarded costs and fees to the defendants. The court found that plaintiff's suit was frivolous and his appeal consisted solely of Mr. Hyde's opinion concerning the "evils of federal reserve notes." The court also stated that this action was brought in bad faith.[213] The Seventh Circuit, however, did not distinguish between the standard of frivolousness and that of bad faith. Instead, it used the two standards interchangeably when imposing single costs against a party or an attorney.[214]

In *Pazdur v. Blaw-Know Foundry and Mill Machinary*,[215] Mr. Hyde once again represented plaintiffs who sought a return of their withheld wages and an injunction barring federal notes. After removing the case

210. *Id.* at 88.
211. *Id.*
212. *Id.*
213. *Id.* at 89.
214. *Id.*
215. *Id.* at 87.

to federal district court, the defendants moved to dismiss the action and claimed costs and fees. Because the plaintiffs failed to respond within the extension of time granted to them, the district court dismissed the complaint with prejudice. At a hearing on the motion to award fees and costs, Mr. Hyde's clients appeared without him. Because Mr. Hyde failed to appear in court to represent his clients, fees and costs were imposed against him and the six party plaintiffs.[216]

Only Mr. Hyde appealed the judgment assessing $2,139.97 in costs against him. Mr. Hyde argued that because " 'there are no dollars and a court can enter judgment only in dollars, no court can enter a valid judgment for money today.' "[217] The Seventh Circuit rejected this argument finding it to be a meritless and outrageous contention. The court awarded single costs and reasonable attorney's fees pursuant to Fed. R. App. P. 38, against Mr. Hyde as the appellant. Furthermore, the Seventh Circuit planned to refer Mr. Hyde to state disciplinary bodies so that they may conduct an investigation of his abuse of the judicial process.[218]

In imposing such sanctions, the Seventh Circuit discussed the fact that frivolous or vexatious claims thwart the purpose and the need of judicial economy. The court also stated that attorneys will be held to the minimum standard of professional responsibility.[219] Although the court did not explain the requirements of the standard, the court correctly stated the consequences when the standard is not met. First, the court noted that failure to meet this standard exhibits disdain for the public whose meritorious claims lie dormant since judicial resources have been exhausted by frivolous claims. Second, the court also stated that such frivolous claims exhibit disdain for adversaries and clients who must expend time and funds to litigate such frivolous claims.[220]

Fed. R. App. P. 38 also allows a court to award double costs to the appellee.[221] This application of the rule was considered in *Gilles v. Burton Construction Co.*,[222] where the plaintiffs attempted to appeal a non-appealable order. The court found this appeal to be frivolous under Fed. R. App. P. 38 for two reasons. First, the court noted that the judgment was not yet final and therefore not appealable. Second, the court found that the plaintiffs did not attempt to justify their claim concerning the court's

216. *Id.*
217. *Id.* at 88.
218. *Id.* at 89.
219. *Id.* at 87.
220. *Id.*
221. *See supra* notes 204-207 and accompanying text.
222. 736 F.2d 1142 (7th Cir. 1984).

jurisdiction.[223] The court did not, however, award attorney's fees and double costs because the bad faith requirement of Fed. R. App. P. 38 was not fulfilled. The court reasoned that even though the appeal was premature, the plaintiff's substantive arguments were not frivolous. Consequently, double costs and attorney's fees were not awarded under Fed. R. App. P. 38.[224]

In reaching this conclusion, the court relied on *Reid v. United States*[225] where the Seventh Circuit set forth a two part test which must be met before Fed. R. App. P. 38 sanctions may be imposed.[226] The *Reid* court noted that it is less difficult to impose sanctions under 28 U.S.C. § 1927 since that provision requires only that a party create needless delay.[227] The two requirements of the *Reid* test are: a) the appeal must be frivolous;[228] and b) the appellant must have instituted the appeal in bad faith with no reasonable expectation that the district court's judgment would be changed and with intent to delay the proceedings or harass the appellee.[229] When the court applied this two part test to the facts of *Gilles*,[230] it found that although the appeal was frivolous, the appellants did not institute the appeal in bad faith. Instead, the court stated that the appellants arguments on the merits of the case were justifiable. Furthermore, the court found that the appellants did not want to merely delay or harass the appellees since they would not gain anything by doing so.[231] Hence, because the two part test set forth in *Reid* was not met, the *Gilles* court refused to impose Fed. R. App. P. 38 sanctions of double costs against the appellants.[232]

The Seventh Circuit's application of Fed. R. App. P. 38 is in keeping with other circuits. For example, the Ninth Circuit,[233] the Fourth Cir-

223. *Id.* at 1145-46.

224. *Id.* at 1146-47.

225. 715 F.2d 1148 (7th Cir. 1983).

226. *Id.* at 1154-55.

227. *Id.* at 1154.

228. *Id.* The *Reid* court found that this first portion of the two part test would not be fulfilled if the appeal was merely unsuccessful. An example of a frivolous appeal is one in which controlling precedents indicate that the appellant does not have a justifiable basis for the appeal. *Id.*

229. *Id.* at 1155. By appealing a claim in bad faith, the case becomes one in which an imposition of sanctions would be appropriate. Not only must there be no reasonable expectation of altering the district court's judgment, but the appellant must intend to delay or harass the appellee. The actions of both the appellant and his attorney shall be considered.

230. *See supra* note 222 and accompanying text.

231. 736 F.2d at 1146-47.

232. *Id.*

233. Alhambra Foundry Co. Ltd v. General Warehousemen's Union, Local 598, 687 F.2d 287, 290 (9th Cir. 1982) (the court found that the appeal was not frivolous as required by FED. R. APP. P. 38 and thus sanctions were not imposed).

cuit,[234] the Fifth Circuit,[235] and the Sixth Circuit[236] all look to whether the appeal was frivolous before awarding single costs and attorney's fees as damages. The Ninth Circuit[237] and the Fifth Circuit[238] also follow a two part test when imposing double costs on the appellant. Application of Fed. R. App. P. 38 is seemingly uniform throughout the circuits.

CONCLUSION

The Seventh Circuit reviewed a variety of decisions involving issues of civil procedure in its 1984-85 term. This review indicated a tendency by the court to closely examine the individual facts and merits of each case. The Seventh Circuit no longer seems satisfied with a mere deferral to the discretionary decisions of the district courts. Instead, the court is more willing to make an independent judgment in applying the appropriate law.

This willingness has been shown in such areas as personal jurisdiction, preliminary injunction, interpleader jurisdiction, attorney's fees, sanctions, removal and appellate jurisdiction. For example, in *Indianapolis Colts*, while the district court used its discretion in deciding that jurisdiction did exist, the Seventh Circuit reversed based on a stricter application of the requirements of such jurisdiction. Similarly, in *Hermes*, the court found that the district court abused its discretion in awarding attorney's fees because the district court did not correctly apply the appropriate standard. Although the Federal Rules of Civil Procedure are specific, if the district court misapplies the Rule by using an inappropriate standard, the Seventh Circuit, in 1984-85, was willing to reverse, holding that the district court abused its discretion.

234. Harman v. Pauley, 678 F.2d 479, 482 n.3 (4th Cir. 1982) (the court found that appellant's appeal was not frivolous so as to require FED. R. APP. P. 38 damages or attorney's fees).

235. Campbell v. Teledyne Movible Offshore, Inc., 714 F. 2d 429, 431 (5th Cir. 1983) (the court held that sanctions would not be imposed against the appellant since the appeal was not patently frivolous or without any reasonable basis).

236. TIF Instruments, Inc., v. Colette, 713 F.2d 197, 201 (6th Cir. 1983) (the court found that because the appellant's position regarding discovery was frivolous, justifiable costs and attorney's fees were awarded).

237. Star-Kist Foods, Inc. v. P.J. Rhodes & Co., 735 F.2d 346, 350 (9th Cir. 1984) (the court held that the first part of the two part FED. R. APP. P. 38 test requiring a frivolous appeal was not fulfilled).

238. Pegues v. Morehouse Parish School Bd., 706 F.2d 735 (5th Cir. 1983) (the court held that the second requirement of the two part FED. R. APP. P. 38 test that a case be appropriate for the award of double costs and attorney's fees was not fulfilled since the appeal was not patently frivolous); Ratcliff v. Texas, 714 F.2d 24 (5th Cir. 1983) (the court held that double costs would be imposed upon an appellant if the purpose of the appeal was to harass the appellee).