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Civil Procedure: Analysis of 1977-78 Seventh Circuit Opinions Addressing Attorney-Client Relationship, Class Action Problems, Magistrates' Jurisdiction, Statute of Limitations and Indispensable Parties

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CIVIL PROCEDURE: ANALYSIS OF 1977-78 SEVENTH CIRCUIT OPINIONS ADDRESSING ATTORNEY-CLIENT RELATIONSHIP, CLASS ACTION PROBLEMS, MAGISTRATES' JURISDICTION, STATUTE OF LIMITATIONS AND INDISPENSABLE PARTIES

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A review of the 1977-78 decisions by the United States Court of Appeals for the Seventh Circuit in the area of Civil Procedure leaves the distinct impression that lawyers in the Seventh Circuit are well acquainted with the Federal Rules of Civil Procedure and are very willing to employ them in order to gain a tactical advantage. A few opinions issued this term will have national importance.[1] In addition, the court routinely ruled on numerous procedural points adding additional depth to the growing body of case law. Unfortunately, the limitations of time and space prevent comment on many of the Seventh Circuit's procedural rulings.[2] An examination of the more significant

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1. *E.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3311 (U.S. Nov. 6, 1978) (No. 78-422).

2. Other procedural decisions rendered by the Seventh Circuit during the 1977-78 term but not discussed in this article include: Ford v. Carballo, 577 F.2d 404 (7th Cir. 1978) (reimbursement of costs of producing and guarding state prisoner ordered by writ to appear in federal civil action); Allan v. SEC, 577 F.2d 388 (7th Cir. 1978) (federal subject matter jurisdiction to stay administrative sanction pending administrative appeal); Rohler v. TRW, Inc., 576 F.2d 1260 (7th Cir. 1978) (reversal of dismissal for failure to state statutory jurisdiction); Mirabel v. General Motors Acceptance Corp., 576 F.2d 729 (7th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3278 (U.S. Oct. 11, 1978) (No. 78-611) (award of attorney's fees); Chapman v. United States, 575 F.2d 147 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3244 (U.S. Oct. 10, 1978) (No. 78-108) (federal admiralty tort jurisdiction); Chicago & N.W. Transp. Co. v. United States, 574 F.2d 926 (7th Cir. 1978), *petition for cert. filed sub nom.* Chicago & N.W. Transp. Co. v. ICC; 47 U.S.L.W. 3168 (U.S. Sept. 11, 1978) (No. 78-411) (law of the case); Kurek v. Pleasure Driveway & Park Dist., 574 F.2d 892 (7th Cir.), *vacated*, 435 U.S. 992 (1978) (federal injunctive jurisdiction); Roberts v. Sears, Roebuck & Co., 573 F.2d 976 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3213 (U.S. Oct. 2, 1978)

decisions during the year follows.

ATTORNEY-CLIENT RELATIONSHIP

Westinghouse Electric Corp. v. Kerr-McGee Corp.[3] is an opinion which may dramatically affect the practice of law in large law firms for years to come. Since the decision was announced in July 1978, the conference rooms of the large and established corporate law firms have been filled with argument and debate over the holding. Additionally, the decision may have an important effect on every individual consumer of energy in the United States. Interestingly enough, the key legal issue does not involve the merits of the case. Instead the problem concerns a procedural point, *i.e.*, which lawyers can properly present the case and allegedly seek to protect the public interest.

The case was initially filed in the United States District Court for

(Nos. 78-26, 78-29) (applicability of Illinois election of remedies doctrine in federal court); Airlines Stewards & Stewardesses Ass'n v. American Airlines, 573 F.2d 960 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3210 (U.S. Oct. 2, 1978) (No. 77-1758) (district court approval of proposed settlement without decision on the merits of each plaintiff's claims); Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429 (7th Cir. 1978) (failure to state claim upon which relief may be granted under Illinois negligence law); Liberty Sav. Ass'n v. Sun Bank, 572 F.2d 591 (7th Cir. 1978) (declaratory judgment action to decide which bank's claim to savings account is superior under Illinois law); Zbaraz v. Quern, 572 F.2d 582 (7th Cir. 1978) (improper federal abstention from Social Security Act, 42 U.S.C. §§ 301-1399 (1976) and equal protection challenge to state law limiting public assistance funding of abortion); James Burrough Ltd. v. Sign of Beefeater, Inc., 572 F.2d 574 (7th Cir. 1978) (law of the case); Craft v. Economy Fire & Cas. Co., 572 F.2d 565 (7th Cir. 1978) (summary judgment); Sturgeon v. Avon Prods., Inc., 571 F.2d 5 (7th Cir. 1978) (federal remedies under Age Discrimination in Employment Act of 1967 § 3, 29 U.S.C. §§ 621-634 (1976)); Guse v. J.C. Penney Co., 570 F.2d 679 (7th Cir. 1978) (leave to amend and cost of appeal); Hospital Employees Labor Program v. Ridgeway Hosp., 570 F.2d 167 (7th Cir. 1978) (federal jurisdiction under Labor Management Relations Act, 29 U.S.C. §§ 141-562 (1976)); Lewin v. Commissioner, 569 F.2d 444 (7th Cir.), *cert. denied*, 98 S. Ct. 3090 (1978) (tax court jurisdiction when petition filed after statutory limit); Mancuso v. Indiana Harbor Belt R.R., 568 F.2d 553 (7th Cir. 1978) (per curiam) (final appealable orders); Speaker Sortation Sys. v. United States Postal Serv., 568 F.2d 46 (7th Cir. 1978) (collateral estoppel); Chicago Transit Auth. v. Flohr, 570 F.2d 1305 (7th Cir. 1977) (declaratory judgment action seeking statutory interpretation of term, "railroad"); National Comm'n on Egg Nutrition v. FTC, 570 F.2d 157 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3218 (U.S. Oct. 2, 1978) (No. 77-1551); Miller-Davis Co. v. Illinois State Tollway Highway Auth., 567 F.2d 323 (7th Cir. 1977) (abstention inappropriate before federal jurisdiction established; federal jurisdiction upheld over eleventh amendment challenge); Panther Pumps & Equip. Co. v. Hydrocraft, Inc., 566 F.2d 8 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 1887 (1978) (substitution of parties in privity under FED. R. CIV. P. 25(c)); Mathers Fund, Inc. v. Colwell Co., 564 F.2d 780 (7th Cir. 1977) (failure to state claim upon which relief may be granted under Investment Company Act of 1940, §§ 1-53, 15 U.S.C. §§ 80a-1—806-21 (1976)); Chesapeake & Ohio Ry. v. Illinois Central Gulf R.R., 564 F.2d 222 (7th Cir. 1977), *cert. dismissed*, 435 U.S. 919 (1978) (estoppel from raising theory of liability not previously raised); Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977), *cert. granted sub nom.* Quern v. Jordan, 435 U.S. 904 (1978); Barnes v. St. Catherine's Hosp., 563 F.2d 324 (7th Cir. 1977) (district court fact findings not clearly erroneous; denial of new trial not abuse of discretion); Milprint, Inc. v. Curwood, Inc., 562 F.2d 418 (7th Cir. 1977) (federal jurisdiction under patent laws when declaratory judgment plaintiff is testing defense which normally could only be raised in state court).

3. 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3311 (U.S. Nov. 6, 1978) (No. 78-422).

the Northern District of Illinois and assigned to Judge Prentice H. Marshall in October 1976. Plaintiff Westinghouse, represented by the law firm of Kirkland & Ellis, named as defendants twenty-nine foreign and domestic uranium producing companies, alleging that they violated the antitrust laws by forming an illegal conspiracy in restraint of trade. Four of the defendant corporations moved to disqualify Kirkland & Ellis from further representation of Westinghouse. The defendants pointed out that Kirkland & Ellis also represented the American Petroleum Institute[4] of which three defendants were members. The record showed that the Chicago office of Kirkland & Ellis[5] was representing plaintiff Westinghouse while its Washington office was retained by the API as expert independent counsel to fight legislative proposals in Congress to break up various oil companies.

Judge Marshall denied all the motions to disqualify Kirkland & Ellis. In a lengthy and well-reasoned opinion, he concluded that disqualification of the firm would be a "drastic, unjustified and inequitable resolution of a minor ethical grievance."[6] On appeal, the district court's decision was reversed by the United States Court of Appeals for the Seventh Circuit.[7] The court of appeals found that Kirkland & Ellis, by virtue of its simultaneous representation of Westinghouse and the API, was counsel for both sides in the lawsuit. This situation was more than a "minor ethical grievance" according to the Seventh Circuit. Speaking for the court, Judge Sprecher commented:

> Here there exists a very reasonable possibility of improper professional conduct despite all efforts to segregate the two sizeable groups of lawyers.
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> . . . .
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> . . . [T]here is no basis for creating separate disqualification rules for large firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders.[8]

The court directed plaintiff Westinghouse to either dismiss three of the defendants from the lawsuit or discharge Kirkland & Ellis as its attorney in the case. The consequence of either of these options was dire for Kirkland & Ellis. Previously, the firm had billed over two million dollars in legal fees as a result of the litigation. If the firm chose to

4. Hereinafter referred to as API.

5. Employing 130 lawyers in Chicago and 40 lawyers in Washington, D.C., Kirkland & Ellis is one of the largest law firms in the United States. 580 F.2d at 1318.

6. Westinghouse Elec. Corp. v. Rio Algom Ltd., 448 F. Supp. 1284, 1306 (N.D. Ill.), *aff'd in part, rev'd in part sub nom.* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3311 (U.S. Nov. 6, 1978) (No. 78-422).

7. 580 F.2d at 1323. However, the Seventh Circuit did affirm the district court's refusal to disqualify Kirkland on another defendant's motion. *Id.* at 1322-23.

8. *Id.* at 1321 (footnote omitted).

remain in the case by dismissing some of the key defendants it would jeopardize millions of dollars in the event of a settlement or a successful trial and appeal. The Seventh Circuit's decision raised some obvious questions: How had Kirkland & Ellis landed in such a predicament? What lesson did the court have in mind for all private practitioners? Was the court's decision correct under the circumstances?

As the court clearly pointed out, the client is no longer simply the person who walks into a law office. Under *Westinghouse* an attorney-client relationship may arise even though there is no written or oral request, no direct payment of legal fees, no preparation of a legally binding document like a contract for services. Kirkland & Ellis' downfall in this litigation was the result of the fiduciary relationship which had developed from the work performed for the API and the circumstances under which confidential information was disclosed. Even though Kirkland & Ellis was not directly retained or paid by any of the defendants individually, the court construed a professional relationship because of the work performed indirectly for three of the defendants through their membership in the API.[9]

Unfortunately, in attempting to reach a very admirable result, the appellate court appears to have ignored the realities of the billion dollar industry involved and the role played by the various law firms and individual lawyers. As Judge Marshall noted, it was important to consider whether the public interest in reasonable electricity rates would suffer if Kirkland & Ellis was disqualified from the suit.[10] This case obviously involved a "mind boggling" and highly complex factual history. The allegations of conspiracy and price fixing concern the entire uranium industry. Kirkland & Ellis lawyers had spent years preparing the suit and the defense must have realized that forcing new counsel into the case worked only to their advantage. Further, the frequency of the filing of disqualification motions easily demonstrates how they are used solely as a litigation tactic to stall or reduce the opponents' credibility or effectiveness.[11]

9. *Id.* at 1320.

10. 448 F. Supp. at 1306.

11. *See, e.g.*, Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977) in which the Second Circuit noted their "concern . . . that disqualification motions have become 'common tools of the litigation process, being used . . . for purely strategic purposes' . . . ." (quoting Van Graafeiland, *Lawyer's Conflict of Interest—A Judge's View* (Part II), — N.Y.L.J. — (1977)). *See also* Community Broadcasting of Boston, Inc. v. FCC, 546 F.2d 1022, 1027 (D.C. Cir. 1976); W.T. Grant Co. v. Haines, 531 F.2d 631 (2d Cir. 1976); International Elec. Corp. v. Flanzer, 527 F.2d 1288, 1289 (2d Cir. 1975); Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1141 (2d Cir. 1975); Redd v. Shell Oil Co., 518 F.2d 311, 315-16 (10th Cir. 1975).

In considering the disqualification motions Judge Marshall made two findings of fact which were ignored by the court of appeals. He found that:

> Kirkland's experience in the contracts litigation will be invaluable to the efficient prosecution of the antitrust phase of the dispute, and;
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> . . . .
>
> [t]o force Kirkland to give up the reins to an inexperienced driver at this stage of the journey will cause inevitable delay in the progress of the litigation and may well compromise the just resolution of a vital public issue.[12]

The most disappointing consequence of the Seventh Circuit's decision is that an attorney-client relationship can arise unilaterally even though both sides do not communicate their consent. Consider the facts in the *Westinghouse* case. Allegedly the representatives of various oil companies met and decided to take over the uranium market. One objective was to eliminate Westinghouse. Part of the plan to eliminate could conceivably be the hiring of Kirkland & Ellis to assist the API. It's a classic case of hiring the opposition's lawyers to perform work against their present client. However, in order for the plan to succeed, the lawyer must not realize he is working against his own client. In representing the API, Kirkland was not privy to the alleged plans to eliminate Westinghouse. The Seventh Circuit overlooked this point. If in fact Kirkland & Ellis lawyers in Chicago and Washington were representing adverse interests, it would have been obvious. Traditionally an attorney hired by an association, such as the API, represented only the association as a whole and not the individual members.[13] In addition, the Kirkland firm took specific steps to construct a "Chinese Wall"[14] between the eight to fourteen Chicago-based attorneys working for Westinghouse and the six Washington, D.C. lawyers working for the API.

The court specifically rejected the "Chinese Wall" contention even though there was only one time when the lawyers from each office may have improperly communicated.[15] The court strictly interpreted the

12. 448 F. Supp. at 1306.

13. *See, e.g.*, First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390, 396 (7th Cir.), *rev'd on rehearing en banc*, — F.2d — (1978); Whiting Corp. v. White Mach. Corp., 567 F.2d 713, 715 (7th Cir. 1977) (per curiam); Schloetter v. Railoc of Ind., Inc., 546 F.2d 706, 710 (7th Cir. 1976); Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 215 (N.D. Ill. 1975), *aff'd*, 532 F.2d 1118 (7th Cir. 1976).

14. The "Chinese Wall" was built on the distance between the Chicago and Washington offices and the fact that the two groups of attorneys did not communicate with each other or discuss the pending case. The wall was breached on only one occasion according to affidavits filed with the court. 580 F.2d at 1321.

15. *Id.*

Code of Professional Responsibility, Canon 9[16] which deals with the appearance of impropriety. Other courts have held that for a conflict of interest to occur "[t]here must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur;"[17] and, that the public distrust outweighs the social interest served by the lawyer's participation.[18] The trial court in *Westinghouse* relied heavily on this second factor and found that the ultimate social interest was served best by Kirkland's representation in the case.[19]

In summary the court of appeals' holding in *Westinghouse* stands for the proposition that an attorney-client relationship can occur unintentionally. If in this case the defendant oil companies became clients of the Kirkland firm, it can only be said that they came in through the back door. Certainly the disclosure of information through the API was not intended by either the oil companies nor Kirkland & Ellis to establish an attorney-client relationship. The practical effect of the decision is that all large firms should now beware of any representations of associations or institutes that could possibly jeopardize continued representation of their present clients. Acquisition of new clients by implication, as happened to Kirkland & Ellis in this case, can be a costly and embarrassing situation.[20]

RULE 23: CLASS ACTIONS

Class action problems have continued to reach the United States Court of Appeals for the Seventh Circuit despite the general rule against interlocutory appeals. The magnitude of the problems they present and the scope of the litigation they cover seems to require continuing supervision by the appellate court. Indeed the Seventh Circuit has previously recognized that questions under Rule 23[21] relating to

16. ABA CODE OF PROFESSIONAL RESPONSIBILITY CANON No. 9 states, "A lawyer should avoid even the appearance of professional impropriety."

17. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976). *See also* Note, 31 MIAMI L. REV. 1516 (1977).

18. Woods v. Covington County Bank, 537 F.2d 804, 813 n.12 (5th Cir. 1976); General Motors Corp. v. City of New York, 501 F.2d 639, 649 (2d Cir. 1974); Emile Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 575 (2d Cir. 1973).

19. 448 F. Supp. at 1306.

20. The following cases should also be reviewed to more fully measure the court's views on questions of conflict of interest and their remedies: First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390 (7th Cir.), *rev'd on rehearing en banc*, — F.2d — (1978) (permitting access by substituting counsel to "work product" of disqualified counsel); Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977) (affirming district court's order denying defendant's motion to disqualify counsel but ordering "prophylactic measures to avoid a development of the possibility of a conflict"); McDonald v. Chicago Milwaukee Corp., 565 F.2d 416 (7th Cir. 1977) (conflicts in settling class action litigation).

21. FED. R. CIV. P. 23.

class actions will continue and the court has specifically allowed some appeals on procedural points.[22]

At one point in the relatively recent history of Rule 23[23] it appeared that the federal courts were attempting to narrow the usefulness of class actions.[24] They had become a very powerful weapon in the hands of consumers, disenfranchised minority groups, and even individual stockholders. However, some recent opinions by the Seventh Circuit indicate that the court is willing to re-establish the class action suit as a means for many individuals to gain access to the federal courts. In at least two cases, the court was undaunted by the difficulties in size, manageability, and scope of divergent issues.

22. *See, e.g.*, Anschul v. Sitmar Cruises, Inc., 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976), in which the court specifically approved a method of appeal under 28 U.S.C. § 1292(b) (1970) (current version at 28 U.S.C. § 1292(b) (1976), which provides that the trial court may certify a controlling issue in the case for an immediate appeal if there is a substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. For a comprehensive discussion of *Anschul* see Comment, 53 CHI.-KENT L. REV. 462 (1976).

23. FED. R. CIV. P. 23 (as amended 1966) provides in part:

Rule 23. Class Actions

(a) Prerequisities to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

24. In the early seventies restrictive interpretations of FED. R. CIV. P. 23 were prominent. *See, e.g.*, Hackett v. General Host Corp., 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 927 (1972); Goldman v. First Nat'l Bank, 56 F.R.D. 587 (N.D. Ill. 1972), *cert. denied*, 429 U.S. 870 (1976); Garza v. Chicago Health Clubs, Inc., 56 F.R.D. 548 (N.D. Ill. 1972); Kriger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wis. 1972).

For instance, in *Alliance to End Repression v. Rochford*[25] plaintiffs maintained that the class consisted of the following:

> 1. Plaintiff [I]ndividuals.
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> The class represented by plaintiff individuals consists of all residents of the City of Chicago, and all other persons who are physically present within the City of Chicago for regular or irregular periods of time, who engage or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities, have been within the last five years, are now, or hereafter may be, subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination by defendants or their agents.
>
> 2. Plaintiff Organizations.
>
> The class represented by plaintiff organizations consists of all organizations located or operating in the City of Chicago who engage or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities have been within the last five years, are now, or hereafter may be, subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination by defendants or their agents.[26]

The named defendants included people like the Chicago Chief of Police and the Attorney General of the United States. The allegation was that the government illegally spied on plaintiffs' class. Specifically plaintiffs alleged that the government's activities included "systematic dossier collection, maintenance and dissemination, use of infiltrators, informers, unlawful entries and electronic surveillance; and physical and verbal disruption and intimidation of plaintiffs' constitutionally protected speech and association."[27] Needless to say, plaintiffs' class covered a far-flung variety of persons with many diverse and conflicting interests.

Nevertheless, the district court certified the class as appropriate under Rule 23. The defendants pursued an appeal. In affirming the class certification the appellate court may have begun a new era in class litigation. It is difficult to perceive a common question of law or fact or some type of common relief available to the class in this case.[28] Ade-

25. 565 F.2d 975 (7th Cir. 1977).

26. *Id.* at 976.

27. *Id.* at 976 n.1.

28. As defined in the text, the class would include members of various groups including the John Birch Society, the American Legion, and the Neo-Nazis, as well as Students for A Democratic Society. The members of some of these groups may possibly approve of the defendants' actions. In addition, it's difficult to believe that any court could fashion relief that would satisfy such groups of divergent political interests.

quacy of representation could become a serious problem.[29] In addition, there are serious questions about the manageability of a class that theoretically could be composed of hundreds of thousands of citizens.[30] Despite these difficulties the court liberally interpreted the rule in favor of maintenance of a class action.[31]

First the court considered whether or not the definition of plaintiffs' class was too vague. The definition of the class is tremendously important, especially at the conclusion of the litigation. The entire principle of res judicata[32] depends upon a clear understanding of the issue and the parties involved. In the *Alliance to End Repression* case, the defendants contended that the class description was too vague to define an ascertainable class.[33] In support of this argument, the defendants cited cases in which the scope of the class was defined by the plaintiffs' conduct or state of mind. Rejecting the defendants' argument, the Seventh Circuit distinguished this case from those cited by finding that the scope of the class here was defined by the defendants' conduct. The class in *Alliance to End Repression* included "only those individuals and organizations . . . that have been subjected to . . . unconstitutional harassment by the defendants."[34] Therefore, the court reasoned, the class did not fail for lack of "definiteness."[35] Speaking for the court, Judge Sprecher stated:

> Thus, this court has made it clear that a class that satisfies all of the other requirements of Rule 23 will not be rejected as indefinite when its contours are defined by the defendants' own conduct.
>
> Any other conclusion in this situation would give rise to an extremely incongruous result. To hold as defendants request would permit class action certification to be avoided by a potential defendant merely by expanding the scope of his illegal conduct in order to

29. The interests of the representative plaintiffs may conflict with the interests of the absent plaintiffs. *See, e.g.*, Inmates of Attica v. Rockefeller, 453 F.2d 12, 24 (2d Cir. 1971).

30. Size alone is not a single determinative factor. Very large classes have been certified. *See* Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126 (7th Cir. 1974); Stavrides v. Mellon Bank, N.A., 69 F.R.D. 424 (W.D. Pa. 1975). However, many suits have been dismissed as unmanageable. *See In re* Hotel Tel. Charges, 500 F.2d 86 (9th Cir. 1974); Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 156 (1974); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); Dolgow v. Anderson, 53 F.R.D. 664 (E.D.N.Y. 1971), *aff'd*, 464 F.2d 437 (2d Cir. 1972).

31. Liberal interpretation of Rule 23 had been approved previously. *See* Green v. Wolf Corp., 406 F.2d 291, 298 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); Esplin v. Hirschi, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

32. Under the doctrine of res judicata, a valid final judgment on the merits precludes further litigation of the same cause of action between the same parties or those in privity with them. 1B MOORE'S FEDERAL PRACTICE ¶ 0.401 at 11 (2d ed. 1974). *See also* Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955).

33. 565 F.2d at 977.

34. *Id.* at 978.

35. *Id.* at 977-78.

> make the class of plaintiffs less well-defined. We reject any such result by holding that the classes certified by the district court are sufficiently definite to satisfy Rule 23.[36]

This ruling in effect takes the burden off the plaintiffs in attempting to narrow or define their class. One of the greatest difficulties in establishing a class is eliminated in this type of situation.

The court next confronted the issue of whether there existed a common issue of law or fact. The Seventh Circuit chose to side-step this requirement of Rule 23 and again put the onus on the defendant, stating, " 'The common question requirement should not be restrictively interpreted [when] to do so would eliminate the class action deterrent for those who engage in complicated and imaginative rather than straight-forward schemes to' violate constitutional rights."[37]

Obviously, from the very nature of the conflicting backgrounds of the members of the class,[38] there does not exist a common question of fact or law. For instance, the defendants may have acted permissibly in conducting surveillance of a terrorist group. At the same time they may have acted impermissibly in physically disrupting social and religious groups. Of course there was a tremendous variety of activities which constituted the alleged unconstitutional conspiracy among various state and federal agencies. Despite these difficulties the court allowed the action to proceed as a class. Apparently, when constitutional issues are raised, as opposed to pure monetary loss, the court is willing to stretch the rule to its outer limits.

A third difficulty in the *Alliance to End Repression* suit is the adequacy of a remedy. Defendants maintained that the court could not fashion relief sufficiently broad to take account of all potential members of the classes.[39] Admittedly, it is hard to imagine a final decision which could satisfy members with such diverse interests. Nevertheless, the court again stated that it was the defendants' alleged illegality that created the problem and that "the scope of illegality should not now shield the defendant from defending against a class action."[40]

The defendants further argued that the size of the class made it unmanageable. This argument was probably doomed from the begin-

36. *Id.* at 978.

37. *Id.* at 979 (quoting Blackie v. Barrack, 524 F.2d 891, 903 n.19 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)).

38. *See* note 28 *supra*.

39. *See* Gray v. International Bhd. of Elec. Workers, 73 F.R.D. 638 (D.D.C. 1977); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976); Stewart v. Wohlgemuth, 355 F. Supp. 1212 (W.D. Pa. 1972). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶ 23.40 at 23-292-309 (2d ed. 1978).

40. 565 F.2d at 980.

ning as the Seventh Circuit has "traditionally been tolerant of the manageability of multi-party litigation."[41] For example, in another recent decision, *Illinois Migrant Council v. Pilliod*,[42] the Seventh Circuit approved a very large class. Defendants argued that a class consisting of all persons of Mexican ancestry or of Spanish surname in the Northern District of Illinois was amorphous and ill-defined. Plaintiffs sought an injunction against the Immigration and Naturalization Service.[43] Plaintiffs alleged that INS conducted a pattern and practice of harassment (including illegal searches, seizures, arrests, interrogations, detentions and mass raids) against persons believed to be illegal aliens.[44] The court of appeals affirmed the certification of plaintiffs' class even though more than one million persons might have been included in the class.[45] The problems in *Pilliod* were not quite as enormous as the difficulties envisioned in the *Alliance to End Repression* suit.[46] The plaintiffs in *Pilliod* simply sought an injunction against future harassment. There were no problems of notice, damages or counter-claims. The court apparently considered the simplicity of remedy in allowing the case to proceed as a class. Frequently, the court will favor a class suit when egregious conduct can be corrected easily. In those instances problems of management and size are occasionally overlooked. Judge Becker considered this issue in *Technograph Printed Circuits, Ltd.* v. *Methode Electronics, Inc.*,[47] when he wrote,[48] "The difficulties likely to be encountered in the management of a class action are not important when weighed against the benefits to the class, and any subclasses thereof, and to the administration of justice."[49]

Although the courts are willing to employ class action lawsuits as vehicles to correct social inequities, the standards of Rule 23 must be observed. In the *Alliance to End Repression* suit the court gave Rule 23 the broadest interpretation possible. As the suit makes its way through the court system it will be interesting to observe how various questions are handled. For instance, what if the defendants seek to take discov-

41. *See* Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 138 (7th Cir. 1974).

42. 540 F.2d 1062 (7th Cir. 1976), *modified in part on rehearing en banc*, 548 F.2d 715 (7th Cir. 1977).

43. Hereinafter referred to as INS.

44. 540 F.2d at 1065.

45. *Id.* at 1073 n.2 (Tone, J., dissenting).

46. *See* text accompanying notes 25-32 *supra*.

47. 285 F. Supp. 714 (N.D. Ill. 1968).

48. The Honorable William H. Becker, Chief Judge of the United States District Court for the Western District of Missouri, was sitting by designation in the Northern District of Illinois.

49. 285 F. Supp. at 724-25.

ery from some of the absent class members?[50] Some radical groups may be unwilling to detail the nature of their activities. Of course the defendants will resist a great deal of the plaintiffs' attempts to discover who was spying, what type of materials were compiled, and the nature of the surveillance today.

Discovery problems[51] might again bring the *Alliance to End Repression* case to the Seventh Circuit Court of Appeals. Of course, the court will continue to consider the defendants' constitutional and statutory rights to: (1) disprove the claims of the members of the class which they are opposing; (2) establish their defenses to those claims; and (3) develop the facts necessary for an intelligent decision as to whether the prerequisites of Rule 23(a) and (b)[52] have been satisfied.

MAGISTRATES' JURISDICTION

Despite the fact that federal district courts are becoming inundated with cases, the United States Court of Appeals for the Seventh Circuit, this term, refused to allow any extension of federal magistrates' jurisdiction. In a well-reasoned opinion[53] by Judge Harlington Wood, the court commented that innovative experiments were admirable considering the district courts' heavy case loads but such experiments must remain within the statutory limitations.[54]

In *Taylor v. Oxford*[55] the parties agreed by stipulation[56] to submit all proceedings in the case, including trial and entry of final judgment, to the United States magistrate pursuant to Title 28 of the United States Code[57] and Rule 38 of the Rules of Practice for the United States District Court for the Eastern District of Illinois.[58] The case involved a

50. Information from absent class members may be necessary to either define the claims of the class members or to permit the defendants an opportunity to develop their defenses.

51. The Seventh Circuit has frequently reviewed discovery problems in class actions. *See, e.g.*, Clark v. Universal Builders, Inc., 501 F.2d 324 (7th Cir.), *cert. denied*, 419 U.S. 1070 (1974); Appleton Elec. Co. v. Advance-United Expressways, 494 F.2d 126, 138 (7th Cir. 1974); Brennan v. Midwestern United Life Ins. Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

52. FED. R. CIV. P. 23(a), (b).

53. Taylor v. Oxford, No. 77-1647 (7th Cir. May 5, 1978).

54. 28 U.S.C. § 636(b)(1)(A) (1976) states:

> [A] judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

55. No. 77-1647 (7th Cir. May 5, 1978).

56. *Id.*, slip op. at 3.

57. *See* note 54 *supra* and note 62 *infra*.

58. Rule 38(b)(12) of the United States District Court for the Eastern District of Illinois provides that a magistrate may, "[w]ith the written consent of the parties, hear and determine all

complaint against the sheriff and various other public officials for an alleged wrongful overnight detention of plaintiff in the Williamson County Jail. The magistrate reviewed the motions filed by the parties and granted the defendants' motion to dismiss for failure to state a claim upon which relief may be granted.[59]

Plaintiff filed a direct appeal to the Seventh Circuit Court of Appeals. The court directed the parties to address the question of jurisdiction since the issue was controlling to the litigation as well as a question of first impression. After hearing the arguments the court ruled that there was no jurisdiction and dismissed the appeal.[60]

However, in dismissing the appeal, the Seventh Circuit did provide some appropriate comment on the scope of powers allowed to federal magistrates. The court noted that magistrates' jurisdiction and powers cannot be widened simply by stipulation of the parties. Judge Wood stated, "The Statute makes no mention, no exception, and grants no additional power to a magistrate by reason of the consent of the parties, and in particular no otherwise excepted power to enter final judgment following the magistrate's ruling on a dispositive motion."[61]

Under the federal statute,[62] a magistrate may be assigned additional duties as are not inconsistent with the Constitution and laws of the United States. However, the court did not construe this section as a basis for extending the magistrates' jurisdiction. Under section 636(b)(3) of the statute[63] magistrates are allowed to take on such administrative duties as reviewing default judgments, accepting jury verdicts, and appointing counsel, but they are not allowed to usurp a function reserved to the district court. Nothing in the Seventh Circuit's opinion appears to limit the established practice of having magistrates conduct hearings and submit proposed findings to the district court for the final ruling and disposition.[64]

Unfortunately, the impact of *Taylor* is that the magistrates' courts cannot provide any real remedy to the tremendous problem of delay in

motions, conduct the trial, and enter findings of fact and conclusions of law and final judgments in civil cases when specifically referred by a District Court Judge." E.D. ILL. R. 38(b)(12).

59. Taylor v. Oxford, No. 77-1647, slip op. at 2-3 (7th Cir. May 5, 1978).

60. *Id.* at 5.

61. *Id.* at 4.

62. 28 U.S.C. § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(4) provides that "[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties."

63. *See* note 54 *supra*.

64. 28 U.S.C. § 636(b)(1)(B) states, "[A] judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court. . . ."

the litigation of civil cases. A change in the magistrates' jurisdiction and function can only be accomplished by Congress. The Seventh Circuit recognized that broadening the magistrates' usefulness depends on congressional action and pointed out that such a bill is currently under review.[65] Presently the court calendars are choked by cases which could be adequately handled by federal magistrates. For instance, prisoner suits under titles 2254 and 2255,[66] review of Social Security benefit cases, condemnation cases, civil forfeiture proceedings, and even some diversity cases involving simply facts and minor damages could be resolved more expeditiously in a magistrate's court. Hopefully, Congress will act in the near future to resolve this dilemma.[67] In the interim, *Taylor v. Oxford*[68] will act to limit any real extension of the magistrates' jurisdiction to finally resolve litigation.

STATUTE OF LIMITATIONS

Probably one of the most significant decisions by the Seventh Circuit in 1977 was *Beard v. Robinson*.[69] The questions presented to the court were whether damage claims brought against a state officer under the Civil Rights Acts of 1964[70] and against federal officers under the fourth amendment survive the death of the injured party, and whether a relatively short two-year statute of limitations or a five-year period applies. In a very concise and logical opinion, Judge Bauer, writing for the entire court,[71] concluded that the action survived under the appropriate state and federal law and that the five-year statute of limitations was applicable. In making this determination the court overruled its previous holding in *Jones v. Jones*[72] and took a firm stand on an issue that has been dividing the various circuits for years.[73]

65. Senate Bill 1612 would greatly enhance the jurisdiction of federal magistrates by permitting them to conduct any civil proceeding with the consent of the parties. *See* Taylor v. Oxford, No. 77-1647, slip op. at 5 n.7 (7th Cir. May 5, 1978).

66. 28 U.S.C. §§ 2254, 2255 (1976).

67. Congress has already acted on the delay in criminal cases by passing the Speedy Trial Act of 1974, 18 U.S.C. § 3161 (1976). However, this Act has created a situation wherein few civil cases can actually be tried in the district court. Some federal court judges were unable to try any civil cases during 1978 due to the number of criminal trials.

68. No. 77-1647 (7th Cir. May 5, 1978).

69. 563 F.2d 331 (7th Cir. 1977).

70. 42 U.S.C. § 1981 (1976).

71. Because the *Beard* holding overruled prior Seventh Circuit cases the opinion was circulated before publication to the other members of the court. Since no other member disagreed with the decision by calling for a rehearing en banc, portions of the *Beard* decision were given tacit approval by the entire court. *See* 563 F.2d at 336.

72. 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), *overruled in* Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977).

73. 563 F.2d at 337-38 n.7.

In *Beard*, the plaintiff alleged that her son was murdered by former Chicago policeman Stanley Robinson and William O'Neal, an informant for the F.B.I. At the time of the murder the F.B.I. was conducting an undercover investigation of corruption in the Chicago Police Department. Stanley Robinson was a key subject of the investigation. After Beard was killed Robinson was convicted of murdering him. The plaintiff alleged that the F.B.I., through its informant William O'Neal, either encouraged Beard's murder or failed to take steps to prevent his death.[74]

The district court dismissed the complaint on the basis that it was time barred by the Illinois two-year statute of limitations applicable to claims for physical injury.[75] In reversing the dismissal, the Seventh Circuit was required to devise its own roadmap through a maze of conflicting decisions. Neither the Civil Rights Acts[76] nor *Bivens v. Six Unknown Named Agents*[77] (the landmark case providing the jurisdictional base for a suit against federal officers) established a time limit within which a civil rights suit must be brought. Previously, it had been established that a federal court should look to state law in applying an appropriate statute of limitations.[78] But in looking to the state law, the Seventh Circuit encountered another difficulty: Which Illinois statute was applicable?

Plaintiff urged that the court follow *Wakat v. Harlib*[79] and apply the Illinois five-year statute of limitations.[80] The defendants argued that the district court had correctly interpreted the *Jones* case and the two-year statute. The court of appeals analyzed each of the earlier decisions in detail and concluded:

> Upon reflection, it seems to us that *Wakat* and *Jones* cannot stand together, for underlying the inconsistent results reached therein are two inconsistent approaches to determining the applicable statute of limitations. The *Wakat* approach treats all claims founded on the Civil Rights Acts as governed by the five-year Illinois statute of limitations applicable to all statutory causes of action that do not contain their own limitations periods. *Jones*, on the other hand, looks beyond the fact that a statutory cause of action has been alleged and seeks to characterize the facts underlying plaintiff's claim in terms of traditional common law torts for purposes of determining the appli-

74. *Id.* at 332.
75. An Act in Regard to Limitations § 14, ILL. REV. STAT. ch. 83 § 15 (1977).
76. 42 U.S.C. §§ 1981, 1983, 1985, 1988 (1970) (amended 1976).
77. 403 U.S. 388 (1971).
78. Duncan v. Nelson, 466 F.2d 939, 941 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972); O'Sullivan v. Felix, 233 U.S. 318 (1914).
79. 253 F.2d 59 (7th Cir. 1958).
80. An Act in Regard to Limitations § 15, ILL. REV. STAT. ch. 83 § 16 (1977).

> cable state statute of limitations. Faced with these two conflicting approaches that have generated inconsistent results within the Circuit we now believe it is necessary to overrule *Jones* and adopt the *Wakat* rule as the law of the Circuit. . . .
>
> We believe our choice of the *Wakat* rule is compelled by fundamental differences between a civil rights action and a common law tort.[81]

The court went on to hold further that the five-year statute of limitations would be applicable to federal defendants as well as to a state officer defendant.[82]

In opting for the longer five-year general statute of limitations period in civil rights cases, the Seventh Circuit Court of Appeals expresses a common concern that a civil rights deprivation is not a traditional tort action. This attitude is in keeping with recent decisions of the United States Supreme Court.[83] The case may put additional burdens on federal and state officers who are constantly threatened with vexatious as well as legitimate lawsuits as they perform their duties. However, decisions based on the merits as opposed to procedural dismissals based on the statute of limitations will probably be more satisfying to all potential litigants.

RULE 19: INDISPENSABLE PARTIES

During the Seventh Circuit Court of Appeals' last term, two cases considered rather interesting questions under Rule 19[84] which sets out the standards for dismissal for failure to join an indispensable party. The cases, *Bonnet v. Trustees of Schools*[85] and *Bio-Analytical Services, Inc. v. Edgewater Hospital, Inc.*,[86] present some rather novel factual situations which may not have been contemplated by the committee drafting Rule 19.

In *Bonnet*, the district court dismissed the lawsuit for failure to join an indispensable party.[87] Plaintiff Leona Bonnet was a resident of Florida. Defendants were Illinois residents and held title to certain real estate in Illinois. Plaintiff Bonnet inherited an interest in a parcel of real estate which the school board had previously taken through eminent domain. The theory of her complaint was quite simple. She alleged that since the school board had stopped using the land for school

81. 563 F.2d at 336 (footnote omitted).
82. *Id.* at 338.
83. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976).
84. FED. R. CIV. P. 19.
85. 563 F.2d 831 (7th Cir. 1977).
86. 565 F.2d 450 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3207 (U.S. Oct. 2, 1978) (No. 77-1518).
87. 563 F.2d at 832.

purposes the title reverted back to the original owner before the condemnation. Since she had inherited the original condemnee's interest she now brought suit in federal court, alleging diversity, seeking a declaratory judgment that she had title to the real estate.[88]

On the face of the complaint it appeared that jurisdiction was proper. However, the problem arose because the defendants asserted that the real plaintiff was not Leona Bonnet but rather her lawyer, Arthur M. Scheller, Jr. The defendants introduced into the record a contract between the plaintiff and her lawyer.[89] Basically, the agreement provided that the lawyer, Scheller, had the right to attempt to perfect the plaintiff Bonnet's title to the real estate. The lawyer agreed to file suit, take appeals, and pay all costs and expenses in an attempt to obtain title for Bonnet. She agreed to sell the property for $10,500 to the lawyer if he was successful in obtaining title in Bonnet's name.

In light of the contract the question was whether or not the lawyer was the real plaintiff and an indispensable party. Of course, if he was considered an indispensable party, his presence would destroy diversity of parties and the suit would be dismissed for lack of jurisdiction.[90] The district court decided that the contract worked an equitable conversion under Illinois law so that the lawyer had a real interest in property. Therefore, the court dismissed the lawsuit for failure to join an indispensable party.

The United States Court of Appeals for the Seventh Circuit vacated the dismissal in a divided opinion.[91] The majority opinion is a classic analysis of Rule 19.[92] Judge Fairchild's opinion follows the rule

88. *Id.*
89. *Id.*
90. *Id.* at 833.
91. 563 F.2d at 835.
92. FED. R. CIV. P. provides:

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; sec-

to the letter. In determining whether "in equity and good conscience the action should proceed among the parties,"[93] the court considered the factors outlined in Rule 19(b):

> [F]irst, to what extent a judgment rendered in a person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[94]

Obviously, in *Bonnet* the lawyer would suffer no prejudice by not becoming a named party. He was running the lawsuit and could fully protect his interest. Any judgment rendered by the court could be shaped by him to protect his interest. The judgment rendered would adequately protect both parties. The lawyer would be bound by the plaintiff's judgment since he is in privity with her by virtue of the contract. However, when one considers the fourth factor (other available adequate remedies), it becomes apparent that the plaintiff would have an adequate remedy in state court if the federal suit was dismissed. Nonetheless, the Seventh Circuit was reluctant to affirm a dismissal under Rule 19 simply because other forums were available.[95]

Since the court of appeals believed that the district court could fashion an adequate remedy even in the absence of the lawyer as a named party they reversed the dismissal.[96] However the only reason that the non-joined plaintiff's interest is protected is due to the unusual nature of Scheller—both a party in interest as well as the advocate.

The dissenting member of the panel in *Bonnet*, Judge Bauer, did not really take issue with the court's analysis of Rule 19. Instead, he believed that the lawyer Scheller was the real party in interest under the doctrine of equitable conversion.[97] The approach of the majority opinion was to abide strictly by the strictures of Rule 19 in reaching a decision. Judge Bauer's dissenting opinion seems to strike at the heart of the issue by passing an analysis of the rule in an attempt to reach a

ond, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.
(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

93. FED. R. CIV. P. 19(b). *See* note 92 *supra*.
94. *Id.*
95. 563 F.2d at 833.
96. *Id.* at 833, 835.
97. *Id.* at 835-36 (Bauer, J., dissenting).

common-sense solution to the problem. Both approaches to this very unique problem are noteworthy. Certainly the facts of *Bonnet* could not have been contemplated by the drafters of Rule 19 nor adequately covered in a single procedural rule.

Bio-Analytical Services, Inc. v. Edgewater Hospital, Inc.[98] was the second Rule 19 case decided by the Seventh Circuit during the last term. Chief Judge Fairchild again authored the court's opinion which reversed the district court's dismissal for failure to join an indispensable party.[99] Unlike *Bonnet* the emphasis in *Bio-Analytical Services* appears to be on the "in equity and good conscience" clause of Rule 19(b)[100] and the adoption of a pragmatic approach.

In this action, plaintiff Bio-Analytical, a New York corporation, alleged that it had contracted with the defendant hospital, an Illinois corporation, to provide certain services in the pathology department. The president of Bio-Analytical was Dr. Mark, an Illinois resident and the alleged indispensable party. Dr. Mark was to perform the services described in the contract between plaintiff and defendant. In addition, he gave a personal guarantee which was appended to the contract. However, no compensation was to be paid to him. Instead, the payments were to go to the plaintiff corporation of which he was president.[101] Of course, if Dr. Mark was found to be an indispensable party to the action, his presence as an Illinois resident would defeat diversity jurisdiction.[102]

As in *Bonnet*[103] the court of appeals analyzed the issue by applying the four determining factors set forth in Rule 19(b).[104] It is interesting to note that the court gave very little emphasis to the fourth factor—the availability of an alternative forum. The opinion indicates that a suit involving the same parties was also filed in state court.[105] Despite this alternative forum and the fact that historically federal courts have exercised only limited jurisdiction, the court retained jurisdiction. The court stated:

98. 565 F.2d 450 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3207 (U.S. Oct. 2, 1978) (No. 77-1518).

99. *Id.* at 455.

100. *See* note 92 *supra*.

101. 565 F.2d at 451-52.

102. *Id.* at 452-53.

103. *See* text accompanying notes 87-97 *supra*.

104. 565 F.2d at 452.

105. It is interesting that the record reflects that on July 14, 1975 Edgewater Hospital sued Bio-Analytical and Dr. Mark in state court. Approximately eighteen minutes later, Bio-Analytical sued Edgewater Hospital in federal court. *Id.* This appears to be literally a race to the courthouse. Of course in federal court the fact that one party was designated plaintiff and the other defendant has little or no bearing on the outcome of the case.

> We recognize that the pending state court action brought by Edgewater would provide an alternative forum thus arguably satisfying the fourth criteria of 19(b), the availability of an alternative remedy in the event of dismissal. We note, however, that the state court action was initiated by Edgewater and, in any event, "we do not view the availability of an alternative remedy, standing alone, as a sufficient reason for deciding that the action should not proceed among the parties before the court.[106]

In effect, the court assigned very little importance to the availability of another forum. The only authority cited for this interpretation of the rule in *Bio-Analytical* is the Seventh Circuit's earlier decision in *Bonnet*.[107] Nevertheless, the court's interpretation of the rule appears to be based on sound reasoning. First, the spirit of Rule 19 is premised on a decision which employs "equity and good conscience." Second, reliance on the availability of a forum in state court is often misplaced. Too often state courts are unable to fashion appropriate relief or are unable to review the case with total freedom from local pressures or political concerns.

In sum, the *Bio-Analytical* and *Bonnet* reversals signify a strict attitude toward dismissals under Rule 19. A case will not be dismissed under Rule 19 unless it is clearly established that the party is indispensable—not simply because another adequate forum exists or because the relief required will be difficult to fashion.

CONCLUSION

During 1977-78, the United States Court of Appeals for the Seventh Circuit made certain procedural decisions which will undoubtedly have considerable impact on civil litigation. Perhaps the case having the most dramatic consequences is *Westinghouse Electric Corp. v. Kerr-McGee Corp.*[108] in which the court found an attorney-client relationship by implication. As a result of the *Westinghouse* case, law firms will have to be more careful when representing organizations as their representation could lay the foundation for a potential conflict of interest. This article has suggested that while the court was trying to reach a very admirable result, it overlooked the realities of the situation.[109]

A second issue examined by the Seventh Circuit last term was the availability of class actions. In at least two cases, *Alliance to End Re-*

106. *Id.* at 453 (quoting Bonnet v. Trustees of Schools, 563 F.2d 831, 833 (7th Cir. 1977)).
107. *See* text accompanying notes 87-97 *supra*.
108. 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3311 (U.S. Nov. 6, 1978) (No. 78-422).
109. *See* text accompanying notes 3-20 *supra*.

pression v. Rochford[110] and *Illinois Migrant Council v. Pilliod*,[111] the court approved class certification despite manageability problems. In the *Alliance to End Repression* case, the court effectively removed the plaintiffs' burden of narrowly defining the class and indicated that the defendants would not be able to avoid a class action caused by their alleged illegality. In *Pilliod* the court quickly approved a very large class by apparently considering the simplicity of the remedy sought, *i.e.*, an injunction. Both cases represent the Seventh Circuit's willingness to use class actions to remedy social inequities, even if this requires liberally construing Rule 23.[112]

While the court was willing to give a broad interpretation to the Federal Rules of Civil Procedure in the class action cases, it strictly construed the federal statute defining magistrates' jurisdiction. In *Taylor v. Oxford*,[113] after dismissing the appeal on jurisdictional grounds, the court commented that expansion of the federal magistrates' powers was a congressional function. Because the federal courts are inundated with litigation, it is hoped that Congress will expand the magistrates' jurisdiction.[114]

In another very important decision, *Beard v. Robinson*,[115] the Seventh Circuit found that the applicable statute of limitations for actions under the Civil Rights Act[116] is five years. This holding reflects the prevailing view that civil rights actions are not traditional common law tort cases.[117]

A final issue which the Seventh Circuit analyzed during the last term involved the standards for dismissal for failure to join an indispensable party under Rule 19.[118]From *Bonnet v. Trustees of Schools*[119] and *Bio-Analytical Services, Inc. v. Edgewater Hospital, Inc.*[120] one derives the rule that unless a party can be shown to be clearly indispensable, a case will not be dismissed under Rule 19. This strict

110. 565 F.2d 975 (7th Cir. 1977).
111. 540 F.2d 1062 (7th Cir. 1976), *modified in part on rehearing en banc*, 548 F.2d 715 (7th Cir. 1977).
112. FED. R. CIV. P. 23. *See* text accompanying notes 21-52 *supra*.
113. No. 77-1647 (7th Cir. May 5, 1978).
114. *See* text accompanying notes 53-68 *supra*.
115. 563 F.2d 331 (7th Cir. 1977).
116. 42 U.S.C. § 1981 (1976).
117. *See* text accompanying notes 69-83 *supra*.
118. FED. R. CIV. P. 19.
119. 563 F.2d 831 (7th Cir. 1977).
120. 565 F.2d 450 (7th Cir. 1977), *cert. denied*, 47 U.S.L.W. 3207 (U.S. Oct. 2, 1978) (No. 77-1518).

interpretation appears to be in keeping with the policy behind Rule 19.[121]

In sum, the United States Court of Appeals for the Seventh Circuit resolved important procedural issues during the 1977-78 term. An overview of the cases indicates that attorneys in this circuit generally use the Federal Rules of Civil Procedure skillfully. In discussing the more significant cases, this article has disagreed with the court in some cases and applauded the results in others.

121. *See* text accompanying notes 84-107 *supra*.