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CIVIL PROCEDURE: RUMINATIONS ON SOME PARAMETERS OF PRACTICE

STEVEN F. MOLO*

Each year the Seventh Circuit decides a great many cases involving issues of federal civil procedure. The court's 1982-83 term was no exception. This article discusses some of the more important procedural cases decided during that term. The cases included in the article were selected because they either resolve novel questions; or significantly extend or depart from established precedent. The article reviews cases involving the following issues: personal jurisdiction; removal; class actions; reconsideration of judgment orders; appellate review; and attorneys' fees.

PERSONAL JURISDICTION

Personal jurisdiction is the court's power to render a judgment against a person.[1] That power is limited by the due process clause of the fourteenth amendment.[2] Due process requires that a defendant receive adequate notice of the suit[3] and maintain sufficient minimal contacts with the forum so that rendering a judgment against him would not offend traditional notions of fair play and substantial justice.[4] A judgment rendered in violation of due process is void and not entitled to full faith and credit elsewhere.[5]

In recent years courts have been more apt to find the existence of sufficient minimal contacts through the remote business activity of a non-resident defendant.[6] The focus throughout this trend has been on

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1. Shaffer v. Heitner, 433 U.S. 186, 204 (1977).
2. Kulko v. California Superior Court, 436 U.S. 84, 93 (1978).
3. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).
4. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).
5. Pennoyer v. Neff, 95 U.S. 714, 729-33 (1878).
6. The Supreme Court discussed the social and economic factors underlying this trend in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). *See also* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). Prime among those factors are the increasing nationalization of commerce, communication, and transportation over the last seventy-five years. Although inroads in those areas throughout this century have made the United States a much smaller country, courts must still consider whether it is reasonable to require a defendant to defend a particular suit in a particular forum. The reasonableness of requiring the defendant to

the reasonableness of requiring a defendant to defend the lawsuit in a particular forum. However, in *World-Wide Volkswagen Corp. v. Woodson*,[7] the Supreme Court indicated that the concept of territorial limitations on a forum's power is still very much alive.[8] Thus, courts must still consider the effect of the due process clause as an instrument of interstate federalism in determining questions of personal jurisdiction. Two decisions rendered by the Seventh Circuit this term explore this delicate balance imposed by due process.

In *Froning & Deppe, Inc. v. Continental Illinois National Bank & Trust Co.*,[9] the court held that due process would be violated by the assertion of personal jurisdiction over a non-resident defendant with de minimus business contacts with the forum. The case arose from the forged and unauthorized endorsement of six checks drawn upon an account at Continental Illinois Bank and Trust Co. of Chicago. The payee designated on the checks was Froning & Deppe, an Iowa corporation with its principal place of business in Iowa. The forger cashed the checks at South Story Bank & Trust in Slater, Iowa. South Story then remitted the checks for collection and credit to its clearinghouse bank, Valley National Bank of Des Moines, Iowa. Valley National then remitted the checks to Continental for collection and credit.[10]

Froning & Deppe, the payee, initially filed suit against South Story and Continental in Iowa state court. Continental was dismissed from the Iowa suit pursuant to the national bank exclusive venue provision of 12 U.S.C. § 94, but South Story remained a party. Froning & Deppe then sued Continental in federal district court in Chicago. Continental impleaded Valley National, alleging breach of warranty of good title under Illinois law. Valley National thereafter named South Story as a third-party defendant alleging breach of warranty of good title and conversion under Iowa law. South Story was served at its Iowa offices

defend in the forum must be balanced against: (1) the interest in the forum in adjudicating the suit; (2) the plaintiff's and the interstate judicial system's interest in expediting the litigation; and (3) the forum's interest in advancing underlying substantive policies. *See* Comment, *World Wide Volkswagen v. Woodson, A Limit to the Expansion of Long-Arm Jurisdiction*, 69 CALIF. L. REV. 611 (1981). *See also* Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569 (1958).

7. 444 U.S. 286 (1980).

8. The Court noted that "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State [or, for purposes of this article, a federal court exercising the powers granted to a State court by State law]; even if the forum State has a strong interest in applying its law to the controversy; even if the forum state is the most convenient location for litigation; the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *Id.* at 294.

9. 695 F.2d 289 (7th Cir. 1982).

10. *Id.* at 290.

pursuant to the Illinois long-arm statute. South Story entered a limited appearance to contest personal jurisdiction and moved to dismiss Valley National's third-party complaint for lack of personal jurisdiction.[11]

The extent of South Story's contacts with the forum were undisputed. It maintained its only offices in Iowa and had no agents in Illinois. None of its officers had travelled to Illinois to transact business within five years prior to the lawsuit. Further, all of South Story's activities in connection with the transaction at issue took place in Iowa. It dealt solely with Valley National and had no contact with Continental.[12]

Valley National advanced two arguments in favor of exercising personal jurisdiction over South Story in the federal district court in Chicago. First, Valley National contended that South Story knew that the final destination of the checks was Continental in Illinois. Therefore, South Story should have reasonably anticipated being haled into court in Illinois.[13] Second, Valley National argued that any possible claim South Story might have had against Continental as a result of the transaction would have had to have been filed in Illinois and would have relied upon Illinois law. Thus, South Story availed itself of the benefits and protections of Illinois law.[14]

The Seventh Circuit rejected Valley National's foreseeability argument, reasoning that South Story engaged in no conscious or systematic attempt to render services in Illinois, and there was no evidence that South Story regularly processed checks drawn on Continental accounts.[15] Accordingly, the court held South Story could not reasonably foresee being haled into court in Illinois.[16]

The court also rejected the argument that South Story availed itself of the benefits of Illinois law, reasoning that the existence of such a hypothetical possibility of an Illinois lawsuit against Continental by South Story was irrelevant to South Story's vulnerability to Valley National's lawsuit in Illinois.[17] The court noted that "[t]he logical result of Valley National's position would be to hold South Story amenable to suit in any state in which Continental did business, since the benefits and protections of that State's courts and law would be available to

11. *Id.* at 290-91.
12. *Id.* at 291.
13. *Id.*
14. *Id.*
15. *Id.* at 292.
16. *Id.* at 293.
17. *Id.*

South Story in a suit founded on a check transaction."[18]

Finally, the court considered the balance of state and federal interests and concluded that due process precluded personal jurisdiction. In weighing Iowa's interest in maintaining jurisdiction, the court noted that all the acts giving rise to the lawsuit occurred in Iowa. It stated that the Iowa courts would be more skilled in interpreting the controlling Iowa law and that there was no showing that pursuing the claim in Iowa, along with the Froning & Deppe claim against South Story, would be any less expedient.[19]

In considering the federal interests at issue, the court emphasized that maintenance of personal jurisdiction over South Story would hinder the free flow of commerce and interstate banking.[20] The court reasoned that upholding jurisdiction might subject anyone who did business with a large corporation to suit in any state in which the corporation did business, irrespective of the individual's contacts with the state. Further, it reasoned that a bank could be subject to suit in any state from which a check cashed by one of its customers could originate. The court stated that this "chilling effect" on interstate commerce weighed heavily against finding jurisdiction.[21] Accordingly, the court held that the imposition of personal jurisdiction on South Story would violate due process.

The court reached a different result in *In re Oil Spill By The Amoco Cadiz Off the Coast of France on March 16, 1978*.[22] The case arose out of the litigation concerning the well known oil spill off the French coast. The spill was caused by the break up of the supertanker Amoco Cadiz which was built in Spain by a Spanish company, Astilleros Espanoles, S.A. French citizens who alleged damages caused by the spill, sued Amoco (the owner) for negligent operation of the tanker. In addition, the French plaintiffs sued Astilleros for negligent design of the ship and breach of implied warranty. Amoco filed a cross-claim against Astilleros under FRCP 13(g)[23] and a third-party complaint

18. *Id.* In reaching its conclusion on this point the court relied on its earlier decision in Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979), *cert. denied*, 445 U.S. 907 (1980), which considered the issue and reached a similar result.

19. 695 F.2d at 294.

20. *Id.*

21. *Id.* at 294-95.

22. 699 F.2d 909 (7th Cir.), *cert. denied*, 104 S. Ct. 196 (1983).

23. Federal Rule of Civil Procedure 13(g) provides:

Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a

under FRCP 14(c),[24] alleging that Astilleros was primarily responsible for the accident and thus, should be required to indemnify Amoco for any damages it might be ordered to pay.[25]

Astilleros' motion to dismiss for lack of personal jurisdiction was denied by the district court.[26] Astilleros defaulted and the court entered judgment against Astilleros, and in favor of both Amoco and the French plaintiffs.

The Seventh Circuit affirmed the denial of the motion to dismiss. In doing so, the court first looked to whether the cause of action in the cross-claim arose from Astilleros transacting business in Illinois, and whether application of the Illinois long-arm statute would be consistent with due process. The court noted that the contract to build the Amoco Cadiz was anchored in Chicago, as it was negotiated there. It reasoned that the third-party claims essentially arose from that contract, therefore the requirements of the Illinois long-arm act were satisfied.[27] Thus, due process was not offended by requiring Astilleros to defend against Amoco in Chicago, because Astilleros voluntarily undertook the negotiation and signing of the contract in Chicago and had the protection of Illinois laws in doing so. Accordingly, the court determined it was reasonable to require Astilleros to defend against Amoco in Chicago.[28] The court concluded that Astilleros exhibited sufficient presence in Illinois to satisfy the territorial notions emphasized in *World-Wide Volkswagen*.[29]

The court then considered whether the district court maintained personal jurisdiction over the French plaintiffs' suit against Astilleros. It first noted that the claim was not quasi-contractual, and was not being prosecuted in either the place of the wrong or the domicile of one of

claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

24. Federal Rule of Civil Procedure 14(c) provides:

Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make his defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

25. 699 F.2d at 912.

26. 491 F. Supp. 170, 178 (N.D. Ill. 1979).

27. 699 F.2d at 914-15.

28. *Id.* at 916.

29. *Id.*

the parties.[30] Accordingly, the relationship between the French plaintiffs' claim against Astilleros and Illinois was not as close as the relationship between Amoco's claim against Astilleros and Illinois. Nevertheless, the court concluded that personal jurisdiction existed.[31]

The court held that the French plaintiffs' claim could be viewed as arising from the transaction of business between Amoco and Astilleros.[32] Although the plaintiffs were outside the chain of title from Astilleros, they were still alleging damage which ultimately resulted from the contract and negotiation. The plaintiffs, "were not harmed just by the defective condition of the ship; they were harmed by Amoco's operation of the ship in its defective condition, and the negotiation and signing of the contract were critical steps in the chain of events that led to the oil spill."[33]

The court held that the exercise of personal jurisdiction complied with due process because if negotiating and signing the contract in Illinois subjected Astilleros to Illinois' territorially limited sovereignty for purposes of the cross-claim, they similarly subjected it to Illinois' sovereignty for purposes of the complaint.[34] The court reasoned that the plaintiffs were harmed by Amoco's operation of the ship in its defective condition. The negotiation and signing of the contract were critical steps in the chain of events which brought about the oil spill because that created the sale of the defective ship. Thus, the spill and its resulting damage could be viewed as arising in Illinois as a result of the transaction of business between Amoco and Astilleros in Chicago.[35]

Further, the court concluded that the interests of judicial economy were best served by litigating the French plaintiffs' suit in Chicago, given that Chicago was a reasonable site for all of the other claims.[36] Accordingly, the court held that the district court maintained personal jurisdiction, and affirmed the entry of the defaults.

Both of these decisions indicate that in deciding personal jurisdiction questions, the Seventh Circuit will continue to consider traditional territorial limitations on sovereignty, as well as the reasonableness of a

30. *Id.* at 917.

31. Judge Posner, in a style unmistakably his own, set forth the dilemma stating: "[b]ut if it seems odd for the French to be suing the Spanish in a court in Chicago because of an oil spill off the French coast, it would also be odd if, though the French can sue Amoco in Chicago and Amoco can bring in Astilleros as a third-party defendant here, the French must go to Spain to sue Astilleros." *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

particular forum. This result seems to be a consistent and logical application of *World-Wide Volkswagen.* However, the result demonstrates the continued problem of personal jurisdiction questions—how much is enough? Until the Supreme Court sets forth more specific guidelines, courts will be forced to continue this case-by-case balancing. The Seventh Circuit's analysis in these two cases provides a sound example of the proper considerations involved in that balancing.

REMOVAL

In general, a party being sued in State court in an action which originally could have been brought in federal court, may remove the suit to federal court.[37] The federal courts, however, tend to strictly construe the statutes allowing removal, and thereby limit removal jurisdiction.[38] Last term, the Seventh Circuit decided several cases which discuss issues concerning removal jurisdiction.

In *Illinois v. Kerr-McGee*[39] the court reaffirmed its view that federal preemption is merely a defense to state law claims, and not a proper basis for removal under 28 U.S.C. § 1441.[40] The case arose from a lawsuit which was filed in DuPage County Circuit Court. The suit alleged that Kerr-McGee's operation and maintenance of a plant which produced compounds derived from radioactive ore, violated var-

37. The general removal statute, 28 U.S.C. § 1441 (1982) states:

(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.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

For a thorough discussion of the nuances of removal jurisdiction, *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 148-68 (3d ed. 1976).

38. *See* 14 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3721 nn. 78-82 (1976).

39. 677 F.2d 571 (7th Cir. 1982).

40. *See supra* note 37.

ious provisions of the Illinois Environmental Protection Act and other state hazardous waste laws. The plant was located on forty-three acres within the city boundaries of West Chicago. The City of West Chicago filed suit in the same court, alleging maintenance of a public nuisance and violation of state and city regulations.

Kerr-McGee petitioned to remove both suits to federal court, contending that both cases raised a federal question and that diversity existed in the West Chicago case. The State moved to remand,[41] arguing that its complaint raised no federal question. West Chicago acquiesced to the removal.

The district court denied the State's motion for remand, reasoning that the Atomic Energy Act preempted state regulation of radioactive waste and thus, the complaint necessarily involved interpretation of federal law. Kerr-McGee then moved to dismiss both complaints and the district court granted the motions, finding that federal law conferred exclusive jurisdiction over regulation of radiation hazards upon the Nuclear Regulatory Commission.[42]

The Seventh Circuit held that the State suit was improperly removed.[43] The court began by reciting the general rule that a defendant may remove a case to federal court only if the federal court would have had original jurisdiction over the action had it been brought there initially.[44] The existence of a federal question must appear on the face of the complaint.[45] A defendant's assertion that a case raises a federal question is not enough to support removal unless the federal question is an essential element of the complaint justifying the relief sought.[46] Removal jurisdiction is derivative in that a case may be removed to federal court only if it was properly before the state court.[47] Courts

41. The procedure for remand is set forth in 28 U.S.C. §§ 1447(c) and (d) (1982) which state:

> (c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to § 1443 of this title shall be reviewable by appeal or otherwise.

42. 677 F.2d at 574.

43. *Id.* at 577.

44. *See* Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185, 189 (1901).

45. *See* Phillips Petroleum Co. v. Texaco, 415 U.S. 125, 127 (1974); Nuclear Engineering Co. v. Scott, 660 F.2d 241, 249 (7th Cir. 1981).

46. *See* Gully v. First National Bank, 299 U.S. 109, 112 (1936); Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976).

47. *See* Lambert Run Coal Co. v. Baltimore & Ohio Ry. Co., 258 U.S. 377, 382 (1922);

consistently construe the removal statute narrowly against removal.[48]

The court considered these tenets of removal and looked directly to the State's complaint. The court found that the complaint alleged violations of State law only, and that these violations rather than unalleged federal violations, served as the basis of the complaint and relief sought.[49] Accordingly, the court held that the complaint raised no federal question justifying removal.[50] Further, the court held that Kerr-McGee's allegations of preemption merely set forth a defense to the state claims and could not serve as a basis for preemption.[51] This conclusion comports with the Seventh Circuit's earlier decision in *Bailey v. Logan Square Typographers*[52] and the decisions of two other circuits that had considered the question.[53] Because the court held that the State suit was improperly removed, it found no reason to consider the question of preemption of the State's claim.[54]

A second removal case of note was *Ross v. Inter-Ocean Insurance Company*.[55] This case involved a suit by an insured against his out-of-state insurance company, alleging that it failed to provide him coverage under his policy. The plaintiff filed suit in state court. The defendant removed the case on diversity grounds under 28 U.S.C. § 1441, and later moved for summary judgment. The district court granted the mo-

Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 658 (9th Cir. 1972).

48. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941). *See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 154 (3d ed. 1976).

49. 677 F.2d at 576-77.

50. *Id.* at 577.

51. The court reiterated this view in People of the State of Illinois v. General Electric Company, 683 F.2d 206, 208 (7th Cir. 1982). The General Electric case provides an interesting discussion of the case or controversy requirement in declaratory judgment actions challenging the constitutionality of state laws prior to actual enforcement. *See* 683 F.2d at 209-12.

52. 441 F.2d 47 (7th Cir. 1971).

53. *See* First National Bank of Aberdeen v. Aberdeen National Bank, 627 F.2d 843, 853 (8th Cir. 1980); Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972).

54. The court, however, did discuss federal preemption of West Chicago's claim. Federal preemption of state police powers occurs only where Congress evinces a clear and mainfest intent to preempt. Courts generally find such an intent evinced in one of three ways. First, Congress may expressly state that federal authority over a particular subject is exclusive. Second, a court may infer an intent to preempt from a particular regulatory scheme or the legislative history. Finally, federal law preempts state law where it is impossible to comply with both. *See* Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

The Seventh Circuit reviewed the Atomic Energy Act and its legislative history and determined that the Act allows states to regulate non-radiation hazards, but preempts state law concerning radiation hazards unless the state enters a statutorily authorized agreement to assume some responsibility for that regulation. The court then reviewed the record and found that on the basis of the complaint it was not clear whether the sites complained of involved non-radiation hazards. Accordingly, the court remanded the case for further proceedings. 677 F.2d at 584.

55. 693 F.2d 659 (7th Cir. 1982).

tion and dismissed the complaint.[56]

The Seventh Circuit held that the case was improperly removed to the district court. The court noted that although neither party questioned subject matter jurisdiction, it maintained a responsibility to determine jurisdiction independently in every case. Upon its own motion, the court concluded that the amount in controversy did not exceed $10,000 and therefore, held that it lacked subject matter jurisdiction over the case.[57]

The *ad damenum* sought $16,454 exclusive of interest and costs. The court, however, looked beyond the *ad damenum.* It noted that the complaint alleged that the plaintiff submitted proof of loss to the defendant before filing suit. The plaintiff's pretrial statement, filed five months after the complaint, stated that medical expenses totalled $9,003. In the pretrial order, filed six weeks after the pretrial statement, the parties stipulated that the amount of the plaintiff's damages totalled $7,644. The court reasoned that the plaintiff's submission of proof to the defendant prior to filing the complaint suggested the damages could have been no more than the claimed $9,000. Further, the court reasoned that the stipulated pretrial order indicated that the defendant possessed undisputed proof that the damages totalled less than $9,000.[58]

The complaint also sought attorney's fees. Plaintiff's counsel contended that the $16,454 figure represented the addition of his estimated fee to the medical expenses. The court, however, found no statutory, contractual or other source supporting a fee claim.[59]

Thus, the court held that the case failed to meet the minimum $10,000 jurisdictional amount. The court concluded, "that when it removed this case the defendant knew with about as close an approach to certainty as one finds in these matters that the plaintiff could not prove damages, including attorney's fees, in excess of $10,000 as required by the diversity statute."[60] The court noted that a defendant's reliance on an *ad damenum* is not enough, particularly in cases such as this where the defendant was familiar with the basis for the claim.[61]

Ross points out the harshness of the potential result to a defendant who improperly removes a case. The district court dismissed the case with prejudice against the plaintiff. Because the Seventh Circuit re-

56. *Id.* at 660.
57. *Id.* at 660-61.
58. *Id.* at 661.
59. *Id.*
60. *Id.* at 662.
61. *Id.*

versed and ordered remand of the case, the plaintiff could start all over again in state court. The severity of that result should caution other litigants against taking a chance on removing a case when subject matter jurisdiction is questionable. The case also reinforces the position taken by the federal courts that the jurisdictional amount will be strictly construed.[62]

These cases indicate that the federal courts will continue to strictly construe removal jurisdiction and insist that all requirements of subject matter jurisdiction be met.

CLASS ACTION

The Seventh Circuit decided two class action cases of note. *Woods v. New York Life Insurance Company*[63] involved the proper form of notice to potential plaintiffs in class actions filed under section 16(b) of the Fair Labor Standards Act.[64] Although *Woods* concerned notice to a class created pursuant to a specific statutory cause of action rather than a class certified pursuant to FRCP 23, the case merits review in light of the recent increase in age discrimination suits brought under the Act.

The case involved the firing of one of 300 general managers of New York Life. The plaintiff alleged that as he approached age 55, an age at which his retirement benefits would have increased significantly, his employers harrassed him, demoted him and eventually fired him.[65] The plaintiff then wrote a book designed to expose the alleged unfair employment policies of New York Life. In an effort to advertise the book, the plaintiff sent mailers to a number of other former general managers inviting them to buy the book. The mailers also suggested that the managers join in a class action suit against New York Life.[66] The plaintiff eventually filed suit along with one other former manager.

The plaintiff asked the district court to mail notice to the prospective members of the class—general managers of New York Life subjected to the alleged discriminatory practices. The district court agreed to send a notice drafted by the plaintiff's counsel.[67] In substance, the

62. *See* Snyder v. Harris, 394 U.S. 332 (1969). *See also* D. CURRIE, FEDERAL COURTS 513-38 (2d ed. 1975).

63. 686 F.2d 578 (7th Cir. 1982).

64. 29 U.S.C. § 216(b), incorporated in the Age Discrimination in Employment Act by § 7(b) of that Act, 29 U.S.C. § 626(b) (1982).

65. 686 F.2d at 579.

66. The plaintiff had not yet filed suit at the time he wrote the book and sent the mailers. The mailers invited the other former managers "to get in touch with [plaintiff] regarding this suit." *Id.*

67. *Id.*

notice summarized the relevant portions of the Age Discrimination in Employment Act and the complaint. Further, it instructed the recipient on how to join the suit, warned of the possible expiration of the statute of limitations, and offered the option of retaining the plaintiff's counsel. The notice was sent on the letterhead of the district court over the Clerk's signature, and stated that the court approved the mailing.[68] The defendant challenged the district court's authority to issue such a notice in a § 16(b) class action.

The Seventh Circuit began its analysis by noting that if the suit was a class action under FRCP 23, the district court clearly would be empowered and bound to notify actual or potential members of the class. A Rule 23 class action binds all members of the class that do not expressly opt out of the suit.[69] In contrast, a section 16(b) suit does not bind a class member unless he expressly consents in writing to become a party.[70]

New York Life argued that the district court lacked the power to issue the plaintiff's notice because § 16(b) does not expressly authorize such notice, and no authorization can be inferred because a § 16(b) suit does not place unnotified class members in the same perilous position as unnotified class members in Rule 23 class actions. In other cases the Ninth Circuit accepted such an argument,[71] while the Second Circuit rejected it.[72]

The Seventh Circuit took a middle course. It held that the district court enjoyed the power to provide notice to potential class members. However, the court stated that it was "improper for the district court to direct that the notice go out on its letterhead, over the signature of the clerk of court or other judicial officer."[73]

The court looked to the language of § 16(b). It noted that the Act explicitly authorizes a representative action. Accordingly, the cause of action must carry with it a right of the representative plaintiff to notify other potential class members of the suit.[74] Further, "[i]t also follows that counsel for the representative plaintiff could seek from the district court an order approving the notice, to protect himself from being accused of stirring up litigation in violation of state law."[75] Moreover,

68. *Id.*
69. Accordingly, serious due process problems would arise if the district court did not attempt to notify all class members of the suit. *Id.*
70. 29 U.S.C. § 216(b) (1982).
71. Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977).
72. Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d 335, 336 (2d Cir. 1978).
73. 686 F.2d at 581.
74. *Id.* at 580.
75. *Id.* The court cited Wisconsin Supreme Court Rule 11.01 as an example.

the court held that plaintiff's counsel is entitled to an order requiring the defendant to furnish the names and addresses of potential class members.

The court, however, limited its holding to prevent the district court from actually issuing the notice. It reasoned that a notice sent on the court's letterhead over the Clerk's signature, "is likely to be misunderstood as a representation that the suit probably has merit."[76] The court stated that such action is tantamount to a federal judge issuing invitations to a lawsuit and reasoned that no statutory or policy basis could justify such communication with nonparties. Accordingly, the court vacated and remanded the case with instructions to the district court to authorize issuance of a notice consistent with its opinion.[77]

Woods places a logical limitation on the type of class notice a plaintiff in a 16(b) action may send. The decision ensures that potential class members receive an objective, informative notice. Thus, it discourages frivolous litigation and its unnecessary consumption of court, attorney and client time and resources.

Evans v. City of Chicago[78] involved a challenge to the district court's FRCP 23 class certification based on distinctions within a challenged state statute. The plaintiffs were judgment creditors of the City of Chicago who challenged both the city's practices in paying judgments and the state statute authorizing the payment practices. The district court designated two subclasses based upon the time the party would receive payment pursuant to the challenged statute. The plaintiffs argued that the subclassification could not be based on distinctions within the challenged statute.

The Seventh Circuit held that the subclasses could be based upon the challenged statute because each subclass represented differing arguments against the statute. It did not matter that the distinct subclasses might also advance a common argument alleging the facial unconstitutionality of a statute.[79]

RELIEF FROM JUDGMENTS

Last term, the Seventh Circuit decided several cases concerning relief from judgments which merit comment. A party seeking reconsideration or reopening of a court's judgment order bears a heavy burden. Courts maintain a strong interest in achieving finality in litigation and

76. 686 F.2d at 581.
77. *Id.* at 581-82.
78. 689 F.2d 1286 (7th Cir. 1982).
79. 689 F.2d at 1293.

must consider the hardship that reopening a judgment may cause to persons other than the party seeking relief. However, courts generally will not let procedural technicalities prevent them from remedying an injustice. For the most part, relief from judgments of the district court is available under Rules 59[80] or 60.[81] Four cases decided this term dis-

80. Federal Rule of Civil Procedure 59 states:

New Trials; Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

81. Federal Rule of Civil Procedure 60 states:

Relief from Judgment or Order.

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any

cuss the operation and effect of those rules.

In *A.D. Weiss Lithograph Company v. Illinois Adhesive Products Company*,[82] the Seventh Circuit settled the question of whether to characterize motions for reconsideration as motions pursuant to FRCP 59(e) or FRCP 60(b). The question is important because of the very different procedural consequences between the two rules.

The case involved the review of the district court's order dismissing the complaint upon the defendants' motion for summary judgment.[83] Judgment was entered on August 19, 1982. Within ten days of being served with the judgment order, the plaintiff filed with the district court a "motion to reconsider summary judgment," purportedly under Rule 59(e), seeking correction of what plaintiff perceived as errors of law. On September 17th, the plaintiff filed a notice of appeal from the summary judgment. On September 24th, the district court dismissed the motion to reconsider on the basis that the motion in fact was a 60(b) motion and thus, outside the district court's jurisdiction due to the filing of the notice of appeal. On October 21st, the plaintiff filed a second notice of appeal contesting the district court's dismissal of the motion to reconsider.[84]

FRCP 59(e) provides that a party may move to alter or amend a judgment within ten days of the entry of the judgment. The ten day limitation under the rule is jurisdictional and cannot be extended. A motion under Rule 59(e) tolls the thirty day period for filing a notice of appeal.[85]

FRCP 60(b) provides that a party may seek relief from a judgment due to: (1) mistake, inadvertance or excusable neglect; (2) newly discovered evidence not known within Rule 59(e)'s ten day time limitation; (3) fraud; (4) voidness; (5) satisfaction, release or discharge; or (6) any other reason justifying relief.[86] A party may file a motion under Rule 60(b) within a reasonable time, but a motion alleging any of the first three grounds for relief must be made within one year of entry of the judgment. A motion under Rule 60(b) does not affect the time for filing a notice of appeal.[87]

The Seventh Circuit held that the plaintiff's motion fell within the

relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

82. 705 F.2d 249 (7th Cir. 1983) (per curiam).

83. *Id.* at 249.

84. *Id.*

85. *See* Dove v. Codesco, 569 F.2d 807, 809 (4th Cir. 1978).

86. *See supra* note 74.

87. *See* Western Transport Co. v. E.I. DuPont de Nemours & Co., 682 F.2d 1233, 1236 (7th Cir. 1982).

parameters of Rule 59(e). It noted that although the terms "alter or amend" imply something less than "set aside," a 59(e) motion may be used to set aside a judgment in its entirety.[88] The court reasoned that such an interpretation, "minimizes ambiguity for lawyers and judges in deciding whether a motion challenging judgment is a Rule 59(e) or a Rule 60(b) motion."[89] Further, the court stated that although the plaintiff labeled his pleading a "motion to reconsider," a court must look to the body of the motion rather than relying on its caption to determine its request. Thus, the court held that a motion asking a district court to reconsider its judgment and correct errors of law is a Rule 59(e) motion.[90]

Accordingly, the court held that the original notice of appeal was filed by the plaintiff only as protection against the district court finding that the post-judgment motion was not a Rule 59(e) motion. Thus, it reversed the district court's order dismissing the motion to reconsider, and remanded for consideration of the motion under Rule 59(e).[91]

In three other cases the Seventh Circuit reaffirmed its interpretation of the general criteria for Rule 60(b) relief from a default judgment. To vacate a default judgment under 60(b), a party must: (1) file the motion within a reasonable time period; (2) satisfy one of the appropriate grounds for relief under Rule 60(b); and (3) demonstrate a meritorious defense on the merits.[92] These cases emphasize that a 60(b) motion seeks extraordinary relief and that all of the requirements of the rule must be fully satisfied.

In *Planet Corporation v. Sullivan*,[93] the Seventh Circuit held that the one-year time limitation for filing a motion which seeks relief under any of the first three grounds set forth in Rule 60(b) merely specifies the outer boundary for filing such a motion and is not a grace period during which a party may file.[94] The defaulted defendant filed a Rule 60(b) motion six months after the entry of default, alleging that the plaintiff failed to provide the three days notice of default specified by

88. *Id., citing*, 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 817 (1973). The court noted that the majority of courts considering the question have reached the same conclusion.

89. 705 F.2d at 250.

90. The court, however, cautioned that every post-judgment motion filed within ten days is not necessarily a Rule 59(e) motion. For limiting considerations *see* Textile Banking Co. v. Rentschler, 657 F.2d 844, 848-49 (7th Cir. 1981); Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1247-48 (7th Cir. 1982).

91. 705 F.2d at 250.

92. *See* Breuer v. Electric Mfg. Co. v. Toronado Systems of America, Inc., 687 F.2d 182, 187 (7th Cir. 1982).

93. 702 F.2d 123 (7th Cir. 1983).

94. *Id.* at 125-26.

FRCP 55(b)(2). Prior to the entry of default, however, defendant's counsel appeared before the district court judge on another matter and at that time the judge warned that a default would be entered for failure to appear at a scheduled pretrial conference that day. The court denied the 60(b) motion. One year after the entry of default, the defendant filed a second 60(b) motion reiterating the grounds raised in the first motion. The district court denied the second motion.[95]

The Seventh Circuit affirmed the denial of the 60(b) motion, finding that the motion was untimely.[96] According to the court, the "reasonableness" requirement of 60(b) applies to all grounds for relief and must be read together with the one year limitation on the first three grounds.[97] The court stated that what is reasonable depends on the facts of each case. Accordingly, it held that as the delay in making the 60(b) motion approaches one year, there should be a corresponding increase in the burden of showing that the delay was reasonable.[98]

In *United States v. Forty-Eight Thousand, Five Hundred, Ninety-Five Dollars*,[99] the court emphasized that a motion satisfying the first two requirements of Rule 60(b) relief still will not be granted to vacate a default if the defendant fails to set forth a valid defense to the merits. The court, however, stated that the district court must make it clear that it has reviewed the alleged defense before declining to vacate the default.

In *Forty-Eight Thousand*, a forfeiture action was brought as a result of a Customs' seizure of currency. The seizure resulted from the currency owner's failure to truthfully answer forms concerning the amount of money brought into the country. The forfeiture resulted in the defendant losing his life savings. The defendant failed to appear and the district court entered a default judgment against him. The defendant filed a 60(b) motion forty-nine weeks after entry of the default. The district court summarily held that because the defendant lacked a meritorious defense, it did not need to determine whether the motion was timely or the result of excusable neglect.[100]

The Seventh Circuit reversed, holding that the district court abused its discretion in failing to fully analyze and discuss the colora-

95. *Id.* at 125.
96. *Id.* at 127.
97. *Id.* at 125-26.
98. *Id.* In reaching its decision the court cited the Second Circuit case adopting this view, Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 656 (2d Cir. 1979).
99. 705 F.2d 909 (7th Cir. 1983).
100. *Id.* at 911-12.

ble defenses raised by the defendant in his Rule 60(b) motion to reopen the default.[101] The court found that the circumstances of the case suggested that the motion was timely filed and the result of excusable neglect. It concluded that the defendant might have had a meritorious defense to the forfeiture.[102] Accordingly, the court remanded to the district court for further consideration.

Finally, in *Inryco v. Metropolitan Engineering Co.*,[103] the Seventh Circuit discussed the use of a Rule 59(e) motion to challenge a court's ruling on a Rule 60(b) motion. *Inryco* involved an attempt to vacate a default entered after the defendants' counsel flagrantly violated numerous discovery and status orders and failed to file an answer during the twenty months after the filing of the complaint.[104]

The defendants learned of the default approximately two months after its entry. They retained new counsel who promptly appeared and filed an answer to the complaint, discovery responses, and a motion to vacate the default. The motion cited both Rules 60(b)(1) and 60(b)(6), but argued primarily for relief under Rule 60(b)(1).[105] They contended that the default was entered as a result of mistake, inadvertance, surprise or excusable neglect.[106] The district court found that viewing the record in the light most favorable to defendants, it was still "replete with inexcusable omissions, deceits and irresponsibilities" on the part of their lawyer[107] and thus, denied the 60(b) motion.

The defendants filed a Rule 59(e) motion arguing that after the court found defendants' counsel's conduct inexcusably irresponsible, it should have granted the motion to vacate on the authority of Rule 60(b)(6). Further, defendants maintained that they could not be charged with their lawyer's conduct.[108] The district court denied the Rule 59(e) motion.

On appeal, the Seventh Circuit discussed three primary issues: (1) whether a party may seek relief under Rule 59(e) after denial of a Rule 60(b) motion; (2) whether a party may assert the same grounds to support a Rule 60(b)(6) claim that were urged in support of an earlier 60(b)(1) claim; and (3) whether a lawyer's gross negligence satisfies the requirements for relief under Rule 60(b)(6).[109]

101. *Id.* at 914.
102. *Id.* at 914-15.
103. 708 F.2d 1225 (7th Cir. 1983).
104. *Id.* at 1227-28.
105. *Id.* at 1232.
106. *Id.* at 1229.
107. *Id.* at 1231.
108. *Id.*
109. *Id.* at 1231-32.

Because the denial of a Rule 60(b) motion is itself an appealable judgment order, a party must be given an opportunity to seek alteration or amendment of that order pursuant to Rule 59(e). Thus, the Seventh Circuit held that a party can challenge the denial of a Rule 60(b) motion with a motion to alter or amend under Rule 59(e).[110] The Rule 59(e) motion, however, may challenge only the judgment on the Rule 60(b) motion and not the validity of the underlying judgment.

The more difficult issue was whether the defendants could use the same set of circumstances to support claims under both Rules 60(b)(1) and 60(b)(6). In dicta, the Seventh Circuit has noted that the two rules are "mutually exclusive so that they both cannot apply to the same alleged factual situation."[111] This exclusivity prevents litigants from circumventing the one-year time limitation of Rule 60(b)(1) grounds for relief in a Rule 60(b)(6) motion which might be filed more than a year after judgment.

In *Inryco*, the court reasoned that the exclusivity requirement merely mandates that "Rule 60(b)(6) cannot be the basis for relief when the facts asserted fall within the purview of one of the other five subsections of Rule 60(b). Rule 60(b)(6) may apply only if Rule 60(b)(1) does not apply."[112]

Accordingly, the district court's denial of the defendants' 60(b)(1) motion did not automatically constitute denial of the 60(b)(6) claim. The district court failed to fully discuss Rule 60(b)(6) as a basis for vacating the default. Thus, the Seventh Circuit held that the defendants properly moved for reconsideration for a determination of whether the facts alleged justified relief under Rule 60(b)(6).[113]

The court next discussed the reasons advanced for the Rule 60(b)(6) relief—the grossly negligent conduct of the defendants' lawyer. The court discussed whether such conduct could justify relief under 60(b)(6), but expressly reserved the question for another day. It reasoned that in this case no ruling on that question was necessary because the defendants could be charged with the misdeeds of their lawyer due to their own failure to keep in contact with their lawyer over a two year period.[114]

110. *Id.* at 1232.

111. Ben Sager Chemicals International v. E. Targosz & Co., 560 F.2d 805, 810 (7th Cir. 1977), *quoting from*, Bershad v. McDonough, 469 F.2d 1333, 1336 n.3 (7th Cir. 1972). The *Bershad* court relied on Transit Casualty Co. v. Security Trust Co., 441 F.2d 788, 792 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971).

112. 708 F.2d at 1233.

113. *Id.*

114. *Id.* at 1234.

The court expressed its reluctance to impute the misdeeds of a lawyer to his client, noting that "[d]efault judgments are not meant for disciplining a member of the bar at the expense of a litigant's day in court."[115] However, the defendants in this case contacted their lawyer fewer than six times during a twenty month period and thus, could not escape culpability for the failure to proceed with the case.

The court noted the apparent harshness of the result but reasoned that the result was, "tempered by the fairly common knowledge that a viable avenue for relief exists for truly deserving litigants. Just as with other professionals, a remedy for an attorney's professional negligence is a suit for malpractice."[116]

These cases indicate that the Seventh Circuit will continue to approve relief from judgments only in extraordinary circumstances and where all the requirements for such relief are satisfied. These cases, however, also demonstrate the court's awareness of the confusing procedural mechanism for obtaining relief from judgments and the unfairness which may result to the parties due to an uneven or incomplete application of that mechanism. Relief from judgments lies within the discretion of the district court. These four cases provide clear guidelines for the exercise of that discretion.

Appellate Review

The Seventh Circuit decided two significant cases concerning the scope of appellate jurisdiction. In *University Life Insurance Company of America v. Unimarc Ltd.*,[117] the court considered the appealability of an order to arbitrate, issued under the United States Arbitration Act. The district court issued the arbitration order, but retained jurisdiction to provide any additional relief that might become appropriate later. The Seventh Circuit held that such an order is appealable, notwithstanding the district court's retention of jurisdiction.

The case involved a dispute over a marketing agreement between two insurance companies. The agreement provided for arbitration of any disputes arising from the agreement. The defendant refused to submit to arbitration after a dispute arose. The plaintiff filed a diversity suit to compel arbitration.[118] The district court ordered arbitration but retained jurisdiction both to resolve any future disputes over arbitrability and to enforce any awards which might result from the arbi-

115. *Id.*
116. *Id.* at 1235.
117. 699 F.2d 846 (7th Cir. 1983).
118. *Id.* at 848.

tration proceedings. The defendant appealed, and the plaintiff argued that the Seventh Circuit lacked jurisdiction, contending that the district court's retention of jurisdiction prevented the order from being final and appealable.[119]

On appeal, Judge Posner began by analogizing the arbitration order to a mandatory injunction.[120] Under 28 U.S.C. § 1292(a)(1), injunctions are appealable regardless of finality. The court acknowledged that interlocutory orders under the Arbitration Act have been held not to be mandatory injunctions, on the practical ground that otherwise § 1292(a)(1) would allow piecemeal appeals, thereby impairing a principal advantage of arbitration—expediency. The court noted that in other contexts, courts have described such orders in terms of mandatory injunctions.[121] It further noted that there was a single claim in the complaint and therefore, there was no possibility of a piecemeal appeal of the case. Thus, the court reasoned that retaining jurisdiction in this case was no different than a court retaining jurisdiction following entry of an order issuing a mandatory injunction for purposes of an appeal under § 1292(a)(1).[122]

The court, however, held that regardless of the existence of § 1292(a)(1), the district court's order could be deemed a final judgment under 28 U.S.C. § 1291.[123] The court noted that the purpose of requiring a final judgment before appeal is to limit appeals to the time when they best serve the litigation and the judicial system. Accordingly, an order is ripe for appeal, "as soon as it is apparent that subsequent rulings of the trial court are not going to moot the issues that the appellant would like to present, or raise new issues that the appellate court could most efficiently decide when reviewing the earlier ruling."[124]

Applying that test, the court concluded that the arbitration order was appealable notwithstanding the district court's retention of jurisdiction for purposes of enforcement and possible future arbitrability questions. The court noted that it was possible that no arbitration awards would be issued and enforcement might never be sought. Further, it reasoned that if the district court ordered arbitration and left it at that, the parties could still seek adjudication of arbitrability ques-

119. *Id.*

120. *Id.* at 849.

121. The court cited Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 212 (1962); Local 344 Leather Goods Union v. Singer Co. Piecework Control Systems, 84 F.R.D. 424 (N.D. Ill. 1979).

122. 699 F.2d at 849.

123. *Id.*

124. *Id.*

tions at a later date. Accordingly, the district court's order was no less final and appealable than if it had not retained the limited jurisdiction.[125]

Another case deciding a significant question of appellate jurisdiction is *Freeman v. Chicago Musical Instrument Co.*[126] In *Freeman* the court held that an order granting a motion to disqualify counsel is a collateral and appealable order under § 1291, in light of the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Risjord.*[127] Under the collateral order doctrine, a party may appeal a nonfinal order if three criteria are met. First, the order must be a determination of the collateral question in dispute. Second, the order must resolve an issue completely separate from the merits of the action. Third, the order must be effectively unreviewable on appeal from a final judgment.[128]

Historically, the Seventh Circuit has viewed both orders denying as well as orders granting motions to disqualify counsel as satisfying the collateral order doctrine.[129] In *Firestone Tire & Rubber Co. v. Risjord*, however, the Supreme Court held that an order denying a motion to disqualify counsel in a civil case is not appealable under § 1291. The Court held that such an order fails to satisfy the third requirement of the collateral order doctrine. It reasoned that if the court of appeals concluded that the order constituted prejudicial error, it could vacate the judgment and order a new trial. Further, the Court reasoned that the harm to the litigant forced to await final judgment before appealing, did not differ significantly from other interlocutory orders that may be erroneous, such as motions for reversal of the trial judge or orders requiring discovery over a work-product objection.[130]

The Seventh Circuit declined to extend the holding of *Firestone* to orders granting a motion for disqualification. The court held that disqualification orders, "have immediate, severe and often irreparable and unreviewable consequences upon both the individual who hired the disqualified attorney or law firm as well as upon the disqualified counsel."[131]

Judge Coffey set forth three reasons for the court's ruling. First, the party losing the disqualification dispute is immediately separated from the counsel of his choice and must select a new legal advisor dur-

125. *Id.* at 849-50.
126. 689 F.2d 715 (7th Cir. 1982).
127. 449 U.S. 368 (1981).
128. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).
129. *See* Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706, 709 n.5 (7th Cir. 1976).
130. 449 U.S. at 378.
131. 689 F.2d at 719.

ing the course of the litigation.[132] Second, the disqualified counsel often suffers impairment of reputation and that impairment might never be corrected on appeal if the party is satisfied with the performance of new counsel.[133] Third, a major reason for denying collateral review of the denial of disqualification motions is to prevent parties from using such an appeal for delay or harrassment.[134] The decision conforms with the decisions of other courts that have considered the issue since *Firestone.*[135]

Another case which was important for its procedural consequences was *Connecticut General Life Insurance Company v. Chicago Title and Trust Company.*[136] In *Connecticut General,* the court sent a message to all those practicing before it that the local rules of practice would be enforced. The case involved a motion for leave to file a brief instanter.

Local rule 8(a)[137] states that motions for extensions of time in which to file a brief are disfavored and must be filed five days before

132. In contrast, there is no disruption of the litigation upon the denial of a motion for disqualification. Further, the court noted that a party forced to wait to appeal would be saddled with the almost insurmountable burden of having to prove that he lost the case because of the change in counsel. *Id.*

133. Moreover, it is doubtful that disqualified counsel could find an adequate remedy for wrongful loss of fees if his former client prevails on appeal at the litigation's end. *Id.* at 720.

134. The granting of a disqualification motion indicates that a legitimate, nonfrivolous issue has been raised. The court reasoned that appellate review of disqualification orders allows courts to dispose of such a serious matter promptly and thereby facilitate and improve the system of justice. *Id.*

135. *See, e.g.,* United States v. Hobson, 672 F.2d 825 (11th Cir. 1982); United States v. Caggiano, 660 F.2d 184 (6th Cir. 1981), *cert. denied,* 455 U.S. 945 (1982); In re Coordinated Pretrial Proceedings, Etc., 658 F.2d 1355 (9th Cir. 1981), *cert. denied,* 455 U.S. 990 (1982); Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir. 1981); Duncan v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020 (5th Cir.), *cert. denied,* 454 U.S. 895 (1981).

136. 701 F.2d 62 (7th Cir.), *cert. denied,* 104 S. Ct. 502 (1983).

137. Rule 8 of THE CIRCUIT RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (1982) states:

> (a) *Extensions of Time.* Extensions of time to file briefs are not favored. A request for an extension of time shall be in the form of a motion supported by affidavit. The date the brief is due shall be stated in the motion. The affidavit must disclose facts which establish to the satisfaction of the court that with due diligence, and giving priority to the preparation of the brief, it will not be possible to file the brief on time.
>
> In addition, if the time for filing the brief has been previously extended, the affidavit shall set forth the filing date of any prior motions and the court's ruling thereon. All factual statements required by this rule shall be set forth with specificity. Generalities, such as that the purpose of the motion is not for delay, or that counsel is too busy, will not be sufficient.
>
> Grounds that may merit consideration are:
>
> (1) Engagement in other litigation, provided such litigation is identified by caption, number, and court, and there is set forth (a) a description of action taken on a request for continuance of deferment of other litigation; (b) an explanation of the reasons why other litigation should receive priority over the case in which the petition is filed; and (c) other relevant circumstances including why other associated counsel cannot either prepare the brief for filing or, in the alternative, relieve the movant's counsel of the other litigation claimed as a ground for extension.
>
> (2) The matter under appeal is so complex that an adequate brief cannot reason-

the brief is due. The court noted that it maintains the power under FRAP 46 to fine and suspend lawyers for failure to comply with the rules of the court. The court imposed no sanctions and allowed the filing of the brief instanter but cautioned, "[w]e do not take lightly the violation of our rules and having now made clear our view of such violations we shall have no hesitation in the future in imposing heavy disciplinary sanctions on violators."[138]

ATTORNEYS' FEES

Issues concerning court awarded attorneys' fees have become the subject of much litigation in recent years. Last term, the Seventh Circuit decided several important cases in this area.

The court rendered two decisions which indicate a reluctance to approve large multipliers[139] to fees which include an hourly rate that

ably be prepared by the date the brief is due, provided that the complexity is factually demonstrated in the affidavit.

(3) Extreme hardship to counsel will result unless an extension is granted, in which event the nature of the hardship must be set forth in detail.

The motion shall be filed at least five days before the brief is due, unless it is made to appear in the motion that the facts which are the basis of the motion did not exist earlier or were not, or with due diligence could not have been, known earlier to the movant's counsel. Notice of the fact that an extension will be sought must be given to the opposing counsel together with a copy of the motion prior to the filing thereof.

In criminal cases, or in other cases in which a party may be in custody (including military service), a statement must be set forth in the affidavit as to the custodial status of the party, including the conditions of the party's bail, if any.

(b) *Failure of Appellant to File Brief.* When an appellant's original brief is not filed when it is due, the procedure shall be as follows:

(1) Retained Counsel. If counsel for the appellant is retained, the clerk shall enter an order directing counsel to show cause within 14 days why the appeal should not be dismissed. If the delay is not satisfactorily explained within that time and excused by the court, the appeal will be dismissed for want of prosecution.

(2) Court-Appointed Counsel. If counsel for the appellant is court-appointed, the appeal shall not be dismissed, but the clerk shall enter an order directing counsel to show cause within 14 days why disciplinary action should not be taken. After 14 days, the court will take appropriate action.

(3) Appellant Not Represented by Counsel. If the appellant is acting pro se, the clerk shall enter an order directing the appellant to show cause within 14 days why the appeal should not be dismissed. After the 14 days, the court will take appropriate action.

(c) Failure of Appellee to File Brief. When an appellee's brief is not filed on time, the clerk shall enter an order requiring the appellee to show cause within 14 days why the case should not be treated as ready for oral argument and submission, and the appellee denied oral argument. After the 14 day period, the court will take appropriate action.

138. 701 F.2d at 62.

139. A multipler is the amount by which a court may increase a base attorneys' fee award which is known as a "lodestar". The lodestar is arrived at by multiplying the hours expended times a reasonable hourly rate determined by the court. Thus, if a lawyer spends 100 hours on a case and a reasonable fee for his time is $100 per hour, the lodestar for that case is $10,000. The court may increase the amount of the award by applying a multiplier. The factors generally considered include: the novelty and difficulty of the question involved; the results obtained; time limitations imposed by the client or circumstances; preclusion of other employment for the lawyer; experience, reputation and ability of the lawyer and; whether the fee is contingent. *See* Waters v. Wisconsin Steel Workers of International Harvester Co., 502 F.2d 1309, 1322 (7th Cir. 1974), *cert.*

already reflects a lawyer's abilities. In *Tidwell v. Schweicker*[140] the court disallowed a multiplier of 1.5 awarded to lawyers representing plaintiffs in a suit for unlawful seizure of disability benefits by state and federal authorities. The plaintiffs succeeded in releasing unlawfully withheld disability benefits and in prohibiting future withholding of benefits. The district court awarded fees pursuant to 42 U.S.C. § 1988 and added a multiplier of 1.5 based upon the importance of the result achieved by the attorneys.[141]

The Seventh Circuit reversed with respect to the multiplier. The court noted that the suit was novel when filed but not so different so as to warrant a multiplier. The court reasoned that the hourly rate used in computing the award adequately reflected the quality of the legal services rendered. Accordingly, the court disallowed the multiplier.[142]

Similarly, in *In re Illinois Congressional Districts Reapportionment Cases*,[143] the Seventh Circuit reduced the multiplier used by the district court from 3 to 1.2. The case arose from the lawsuit concerning reapportionment of the Illinois Congressional voting districts which had been rendered unconstitutional due to the population shifts reflected in the 1980 census. Several plaintiffs filed suit against the Illinois State Board of Elections, the agency charged with administering the elections. The district court ultimately found in favor of the plaintiffs representing the interests of the Democratic party. Pursuant to 42 U.S.C. § 1988, the court awarded a lodestar of $128,215 and applied a multiplier of three. The court justified its application of the multiplier based on the following factors: (1) the magnitude and complexity of the case; (2) the excellent quality of work by plaintiff's attorneys; (3) the advancement of the public interest in ensuring fair congressional representation; (4) the contingent fee basis under which plaintiff's lawyers took the case; and (5) the pursuasiveness of the plaintiff's plan.[144]

The Seventh Circuit modified the fee award. It agreed with the district court that a multiplier was appropriate but held that a multiplier of three was excessive.[145] The court emphasized that multipliers

denied, 425 U.S. 997 (1976). Accordingly, upon considering these factors, a court might apply a multiplier to increase the award. The final award is reached then by multiplying the lodestar times the multiplier. Therefore, a 1.5 or 50% multiplier applied to a $10,000 lodestar would yield a final award of $15,000.

140. 677 F.2d 560 (7th Cir. 1982).

141. *Id.* at 567.

142. *Id.* at 570.

143. 704 F.2d 380 (7th Cir. 1983). The author of this article argued this case on behalf of the appellant.

144. *Id.* at 381-82.

145. *Id.*

should not be applied liberally and are justified only in significant cases where the quality of the attorney's work is considerably above average.[146] The court stated that notwithstanding the significance of the case and the exceptional quality of the legal work, it could not approve an increase from $165 per hour to $495 per hour for the lead attorney. It reasoned that the lodestar reflected the attorneys' normal hourly rates and the lawyers suffered no financial penalty from taking the civil rights case because they received a rate comparable to the rates which they received in private cases. Further, the court reasoned that a multiplier viewed by itself is of little significance. "Its importance is in its effect on the basic hourly rate, and where that rate is already high, a multiplier may yield an excessive bonus."[147]

Finally, the court noted that the attorneys conducted the bulk of the legal work in less than one month's time. It reasoned that the risk of receiving no fee was much more limited than if the case had continued for a long time. A major purpose of awarding fees is as an incentive for attorneys to accept cases where the likelihood of payment from the client may be small.[148] The court reasoned that an incentive is particularly needed in lengthy cases where the attorney has little likelihood of receiving payment for a long time. "By contrast, there is less need to provide an additional incentive to compensate for the risk of undertaking uncertain litigation when the period of risk is small, because more attorneys are willing to take a case where their financial exposure is of limited duration."[149]

Both *Tidwell* and *Congressional Districts* follow the Seventh Circuit's consistent position on multipliers. The court has reduced or rejected the multiplier in each of the five cases in which it has considered the appropriateness of a multiplier.[150] The court has never allowed a

146. *Id.* at 384.
147. *Id.*
148. *See* Coop v. City of South Bend, 635 F.2d 652 (7th Cir. 1980).
149. 704 F.2d at 384.
150. In Kamberos v. GTE Automatic Electric, Inc., 603 F.2d 598 (7th Cir. 1979) the court reduced from 1.5 to 1.25, a multiplier based on the contingent fee arrangement and excellent quality of representation in a Title VII case. Similarly, in Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982), the court reduced from 1.33 to approximately 1.08, a multiplier based on the quality of representation in a Title VII case. The court reasoned that the hourly rate already reflected the quality of counsel.

In Bonner v. Coughlin, 657 F.2d 931 (7th Cir. 1981) (per curiam) the court completely eliminated a multipler awarded in a prisoner's rights suit. The court found that the factual issues were not complex, the case had little precedential value and the attorneys were not precluded from taking other employment. The court stressed that the contingent nature of a fee alone does not justify the use of a multiplier.

Interestingly, in reviewing an award of attorney fees, an appellate court is limited to an abuse of discretion standard of review. Nevertheless, the Seventh Circuit has found little difficulty in reviewing and modifying district court fee awards.

multiplier greater than 1.25. Thus, the court has sent a clear message that it will not approve excessive multipliers where the lodestar already reflects the factors properly considered in awarding fees.[151]

The right to attorneys' fees for time spent in establishing such a right to attorneys' fees was discussed in *Muscare v. Quinn.*[152] *Muscare* involved a suit against the Chicago Fire Department by a fireman who was suspended without a hearing for refusing to shave his beard. The plaintiff won reinstatement and backpay, and sought attorney's fees of $41,000. The district court awarded $25,000 and the plaintiff appealed. The Seventh Circuit reversed, holding that the plaintiff had prevailed on only one of two claims raised in the district court.[153] On remand the district court awarded $8,000. The plaintiff then sought $10,000 for time spent litigating the original claim for fees, but the district court refused to award any additional fees.

The Seventh Circuit affirmed, recognizing that the plaintiff prevailed on the merits of the underlying litigation and therefore, he could receive fees for litigating the fee issue notwithstanding the reduction of his initial request. The court, however, held that the district court properly exercised its discretion in refusing any additional award under the circumstances of the case.[154]

The court emphasized the practical result of reversing and awarding a second round of fees. It stated that "the consequence if we should reverse and remand for an award of additional fees is all too predictable: however little the plaintiff is awarded on remand he will move the district court to award him attorneys' fees for time spent in prosecuting this appeal, and if the district court denies his motion he will be back up here."[155] The court noted that the litigation on the merits took only two years. In contrast, the fee litigation continued for six years. The court considered this an apt illustration of why the district court must ultimately exercise its discretion to end the litigation. As Judge

151. Those factors are fully set forth in Judge Swygert's opinion in Waters v. Wisconsin Steel Workers of International Harvester Co., 502 F.2d 1309, 1322 (7th Cir. 1974).

152. 680 F.2d 42 (7th Cir. 1982).

153. *See* Muscare v. Quinn, 614 F.2d 577 (7th Cir. 1980).

154. 680 F.2d at 45.

155. *Id.* at 44. Judge Posner went on to explain the inevitable result (as only he could):

> Every civil rights litigation will be like a nest of Chinese boxes. The outside box is the litigation of the civil rights issue itself. Within it is the litigation over the fees incurred in the litigation over the merits—ordinarily a lesser litigation, as our metaphor implies, though in this case the stakes in each of the two rounds of fee litigation have been greater, at least in monetary terms, than the stakes in the original civil rights litigation. Within the initial fee litigation will be another litigation—usually a smaller one, here again a bigger one—over the attorneys' fees incurred by the plaintiff in the initial fee litigation. And so on without necessary end.

Id.

Posner stated, "[t]hree appeals in a case about a goatee are enough."[156] Accordingly, the court affirmed.[157]

The court discussed the propriety of interim fee awards in yet another chapter of the perpetual case of *Gautreaux v. Chicago Housing Authority*.[158] The first, rather anomolous, issue discussed was whether the suit was pending when Congress enacted the Fees Award Act in 1976 for purposes of making plaintiffs eligible to petition for fees under that Act. The defendants argued that the case was effectively completed prior to 1976 and that the parties brought the suit without an expectation of receiving fees. Prior to 1976 no remedial action had been taken as a result of the suit and the scope of the possible remedy changed. Thus, the court held that the case was pending in 1976 and came within the purview of the Fees Act.[159]

The defendants also argued that the fee application was untimely. They argued that attorneys' fees are costs governed by FRCP 54(d), and that pursuant to Rule 45 of the General Rules of the Northern District of Illinois, attorneys' fees must be petitioned for within ten days of the entry of the order giving rise to the fee award. The court rejected that argument and held that, "[a]bsent a fixed time limitation, the only constraint on when the plaintiffs file for attorneys' fees under Rule 54(d) of the Federal Rules is laches."[160] Accordingly, the court reasoned that the party opposing the fee award must demonstrate undue delay and prejudice to the nondelaying party.[161] The court found no undue delay because it viewed the case as ongoing, and the fee request *pendente lite*. The court found the award caused no prejudice to the defendants.

The defendants also argued that the court should reduce the amount of the award because plaintiffs' counsel charged a uniform rate of $125 for work done during the entire time of the case. The court refused, reasoning that plaintiffs' attorneys received no fees during an intensely inflationary period and the defendants had use of their money

156. *Id.* at 45.

157. The court also rejected an argument that the denial of second-round fees would encourage defendants to drag out litigation to make the plaintiff's victory on the merits a Pyrrhic one. The court found this case a poor example, noting that the defense on the merits ultimately saved the underlying fire department regulation and the defense of the fee claim caused it to be reduced by 80 percent. *Id.*

158. 690 F.2d 601 (7th Cir.), *cert. denied*, 103 S. Ct. 2438 (1982).

159. Judge Pell dissented from this aspect of the opinion. He reasoned that more than two-thirds of the case was completed prior to 1976, and after that date the court really only retained supervisory jurisdiction for implementation purposes. *Id.* at 614.

160. *Id.* at 612.

161. *Id., citing*, Advanced Hydraulics, Inc. v. Otis Elevator Co., 525 F.2d 477, 479 (7th Cir. 1975).

throughout that time. Accordingly, the court held that it was appropriate to award the current hourly rate rather than historical rates.[162]

Finally, the court rejected the argument that fee awards should be reduced where they are paid to not-for-profit organizations. Thus, the court followed the holdings of every other court of appeals that has considered this question.[163]

The issue of the district court's inherent authority to supervise litigation and fee contracts was discussed in *Rosquist v. Sooline Railroad*.[164] The fee question arose out of an accident case tried in district court under diversity jurisdiction. The suit was brought by the husband of a woman who was killed when her automobile was struck by a train. Her two children were injured seriously and were plaintiffs to the suit. The plaintiffs agreed to a contingent fee representation contract which provided that the lawyers would receive one-third of the award in the event they settled or won the case.[165]

The parties reached an agreement to end the case through a structured settlement. The settlement provided that the plaintiffs would receive a small initial sum and periodic payments thereafter. The total present value of the settlement was approximately $305,000. Further, the agreement provided that attorneys' fees would be paid separately by the defendant. The total amount in fees was $250,000 to be paid in five annual installments of $50,000.[166]

Judge Grady rejected the settlement, stating that it was unclear whether the interests of one of the children were adequately protected by the agreement. Accordingly, the district court appointed a guardian *ad litem* to investigate the case and advise the court on the child's behalf.[167]

The case eventually went to trial. The jury awarded plaintiffs a total of $628,000. Judge Grady entered judgment on the verdict and ordered the guardian *ad litem* and plaintiffs' counsel to submit petitions for fees and expenses. Plaintiffs' lawyers requested $209,333 (one-third of the total recovery less claimed costs). The district court awarded $90,950 in fees, somewhat less than 15 percent of the verdict.[168]

The Seventh Circuit affirmed, holding that the district court retained jurisdiction over the fund provided by the defendant's payment

162. 690 F.2d at 612-13.
163. *See* Copeland v. Marshall, 641 F.2d 880, 896-900 (D.C. Cir. 1980) and cases cited therein.
164. 692 F.2d 1107 (7th Cir. 1982).
165. *Id.* at 1109.
166. *Id.*
167. *Id.*
168. *Id.*

of the award until all claims against that fund were settled. The court found that this was a matter of the district court's equitable jurisdiction.[169]

Courts often oversee fee issues when a client is unable to fully protect his own interests.[170] The court noted that the district court retains inherent authority to supervise members of the bar. It reasoned that in this case the children could not effectively protect their interests. One of the children was severely injured, their mother was dead and their father had effectively abandoned them due to his emotional problems resulting from mother's death. Accordingly, the court held that Judge Grady's intervention into the fee question was appropriate.

The court cautioned, however, that this decision does not imply that courts should *sua sponte* review every attorneys' fee contract. It stated that where the parties appear to be competent and freely consenting, the fee agreement, "will *most often* be controlling."[171]

The Seventh Circuit held that Judge Grady did not abuse his discretion in determining the amount of the fee.[172] It applied a reasonableness standard in reviewing the award. The court noted that the district court properly considered the submitted hours, the complexity of the case and the skill of counsel.[173]

The court then turned to the district court's consideration of the "customary fee."[174] Plaintiffs' counsel argued that the one-third arrangement is the usual contract in personal injury cases. The court acknowledged that, but held that it was not error to consider customary fixed rates in calculating what is reasonable. Thus, it approved the district court's method of consideration of the requested fee, in which the district court divided the fee by the tabulated hours.[175]

The court, however, stated that a fixed fee may not be compared

169. *Id.* at 1110, *citing*, Cappel v. Adams, 434 F.2d 1278, 1281 (5th Cir. 1970).

170. *See, e.g.*, Schlesinger v. Teitelbaum, 475 F.2d 137 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973) (seamen); Dunn v. H.K. Porter, 602 F.2d 1105, 1109 (3d Cir. 1979) (parties to a class action); Cappel v. Adams, 434 F.2d 1278 (5th Cir. 1970) (children).

171. 692 F.2d at 1111 (emphasis added).

172. Plaintiffs' counsel also argued that Judge Grady should not have decided the fee issue because he is prejudiced on the subject. They contended that through his writings, lectures and other judicial pronouncements, Judge Grady exhibited a strong predisposition against contingent fee agreements. The court rejected that argument. It expressed some doubt as to whether specific views previously expressed outside of court could disqualify a judge. Further, it held that Judge Grady's general tenets are not so case-specific that they would predetermine his views and the outcome in this particular case. *Id.* at 1112.

173. The court noted that the performance of counsel was generally good, but that certain proof of damages was actually produced through the defendant's case. Further, it noted that counsel kept no precise hourly records but estimated his time at 257 hours. *Id.* at 1113.

174. *Id.* at 1114.

175. This method of evaluation yielded $813.57 per hour. *Id.*

directly to the contingent award without considering the attorney's risk based on the likelihood of success.[176] Liability and damage appeared fairly clear cut, and the ability of the defendant to pay was never at issue. Accordingly, the court held that the resultant $350 per hour allowed by the district court was reasonable.[177]

The Seventh Circuit decided several other attorneys' fee cases which deserve brief mention. In *Larsen v. Sielaff*,[178] the court held that a prisoner suit, which is nominally filed under 42 U.S.C. § 1983, but which provides relief only available in a habeas corpus proceeding, cannot serve as the basis for a fee request under 42 U.S.C. § 1988.

In *Sanchez v. Schwartz*,[179] the court again declined to adopt the "bright prospects" rule of the Second and Ninth Circuits. The defendants argued that the court should refuse to award fees to counsel in cases likely to result in substantial monetary awards, because a contingent contract alone should attract competent counsel.[180] The court rejected that argument and reiterated its view that a prevailing civil rights plaintiff is ordinarily entitled to fees as a matter of course.[181]

The court, however, reduced the fees awarded in *Sanchez*. It began by noting that the award of fees is reviewable only for abuse of discretion.[182] Nevertheless, it reduced the $46,000 award by $9,200, reasoning that the district court failed to adequately scrutinize and make specific factual findings on the petition. The court disallowed hours it deemed excessive for trial preparation and for preparation of four amended complaints. Further, the court specifically held that each side should bear their own costs on appeal and in accordance with *Muscare v. Quinn*,[183] no additional fee award would be made.[184]

In *Pigeaud v. McLaren*,[185] the Seventh Circuit affirmed the district court's denial of fees to a civil rights plaintiff whose case was disposed of pursuant to acceptance of an offer of judgment under Rule 68. The offer explicitly stated that it would not be construed as an admission of

176. *Id.*
177. *Id.* at 1115.
178. 702 F.2d 116 (7th Cir.), *cert. denied*, 104 S. Ct. 372 (1983).
179. 688 F.2d 503 (7th Cir. 1982).
180. The court also refused to hold that where a contingent fee contract is awarded, it serves as an automatic ceiling on the amount of a statutory award. It found no support for such a rule in applicable case law or the legislative history. *Id.* at 505.
181. *See* Busche v. Burkee, 649 F.2d 509 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981); Dawson v. Pastrick, 600 F.2d 70 (7th Cir. 1979).
182. *See* Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982).
183. 680 F.2d 42 (7th Cir. 1982).
184. 688 F.2d at 507.
185. 699 F.2d 401 (7th Cir. 1983).

liability and thus, the plaintiff could not be considered a prevailing party for purposes of a fee request under 42 U.S.C. § 1988.[186] The court rejected plaintiff's argument that his fees were part of his "costs" under Rule 68. It held that for an offer of judgment to serve as the basis of a fee award, it must specifically include language to that effect.[187]

Finally, in *McCandless v. Great Atlantic and Pacific Tea Company*,[188] the court affirmed a district court's assessment of fees against a lawyer for bad faith pleading. The plaintiff had filed suit alleging violations of § 301 of the Labor-Management Relations Act of 1947[189] and several constitutional provisions, without first complying with the explicit requirement of exhaustion of internal union remedies. The district court dismissed the suit as untimely and frivolous. The defendant sought fees and costs incurred in the defense of the suit.[190]

Judge Aspen awarded $1,000 in fees based on four factors: (1) the obvious meritlessness of the § 301 claim; (2) failure to provide any factual or legal support for the constitutional claims; (3) counsel's omission of a key sentence from a quotation; and (4) failure to respond to the defendant's motion for fees and costs.[191] In affirming the award, the Seventh Circuit stated that the case was neither one in which a lawyer was unable to establish the factual basis of the suit at the time of filing but reasonably hoped that discovery would reveal it, nor one in which a lawyer was legitimately urging that prior holdings be reexamined. Accordingly, the court affirmed and doubled the district court's assessment of fees directly against plaintiff's counsel.[192]

These decisions indicate that the Seventh Circuit will closely scrutinize awards of attorneys' fees notwithstanding a rather limited standard of review in such cases. Further, they send a message to the judges of the district court encouraging them to exercise their inherent power of supervision of the bar to ensure conformance with the reasonableness standard of the Code of Ethics in filing for fees and in entering fee contracts with clients.

186. *Id.* at 402.
187. *Id.* at 403-04.
188. 697 F.2d 198 (7th Cir. 1983).
189. 29 U.S.C. § 185 (1976).
190. 697 F.2d at 199.
191. *Id.* at 199.
192. *Id.* at 199-200.