

**STANDARDS OF APPELLATE
REVIEW FOR CIVIL CASES
IN THE UNITED STATES
COURT OF APPEALS FOR THE
SEVENTH CIRCUIT
A Summary Reference For Practitioners**

2005 - 2006

TIMOTHY J. STORM

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TABLE OF CONTENTS

	<i>page</i>
I. Introduction to Standards of Review	1
II The Meaning of the Standards of Review	2
A. <i>De Novo</i>	3
B. Clear Error	4
C. Abuse of Discretion	6
III. Methodology of this Volume	7
IV. Standards of Appellate Review for Particular Issues	7
A. Federal Rules of Civil Procedure	
4(a)(5)(A)(ii) Extend Time for Filing Notice of Appeal	7
4(m) Dismissal for Failure to Serve Process	7
4(m) Extension of Time for Service	7
6(b)(2) Enlargement of Time	8
11 Sanctions	8
12(b)(1) Dismissal for Lack of Subject Matter Jurisdiction	8
12(b)(2) Dismissal for Lack of Personal Jurisdiction	8
12(b)(3) Dismissal for Improper Venue	8-9
12(b)(5) Dismissal for Insufficient Service of Process	9
12(b)(6) Dismissal for Failure to State a Claim	9
12(b)(7) Dismissal for Failure to Join a Party Under Rule 19	9
12(c) Judgment on the Pleadings	10
12(f) Striking Matter from Pleadings	10
13(f) Leave to Add Counterclaim	10
14(a) Leave to Add Third Party	10
15(a) Amendment of Pleadings	10
15(d) Leave to File Supplemental Pleading	10

TABLE OF CONTENTS
(Continued)

	<i>page</i>
16(e) Final Pretrial Order	11
16(f) Sanctions	11
19 Indispensable Party	11
20(a) Joinder of Parties	11
20(b) Separate Trials After Joinder	11
21 Dropping or Adding Parties	11
23(c) Class Certification	12
23(e) Approve Class Action Settlement	12
23(h) Class Action Attorney Fee Award	12
24(a) Intervention as of Right	12
24(b) Permissive Intervention	13
25(a) Substitution Upon Death of Party	13
25(c) Substitution Upon Transfer of Interest	13
26(a) Excluding Testimony for Noncompliance with Rule	13
26(b)(2) Limitations on Discovery	13
26(c) Protective Orders	14
30(a)(2) Leave to Take Depositions	14
35 Physical or Mental Examination	14
36(b) Withdraw Admissions	14
37(b) Discovery Sanctions	14
37(b)(2) Finding of Bad Faith	15
37(c) Exclusion of Evidence for Failure to Disclose	15
37(d) Discovery Sanctions	15
38(a) Right to Jury Trial	15
39(b) Order of Trial by Jury	15

TABLE OF CONTENTS
(Continued)

	<i>page</i>
41(a)(2) Voluntary Dismissal	16
41(b) Dismissal for Want of Prosecution	16
42(a) Consolidation	16
42(b) Separate Trials	16
45(c)(3)(A) Quashing or Modifying Subpoena	16
49(a) Special Verdicts	16-17
49(b) Verdict Interrogatories	17
50(a) Judgment as a Matter of Law	17
50(b) Setting Aside a Verdict	17
51 Jury Instructions	17
52(a) Findings of Fact by the Court	18
52(c) Judgment on Partial Findings	18
54(d) Assessment of Costs and Attorneys' Fees	18
54(d)(1) Award of Costs Other Than Attorneys' Fees	18
55(b)(2) Default Judgment	18
55(c) Setting Aside Default	19
56 Summary Judgment	19
56(f) When Affidavit Is Unavailable	19
57 Declaratory Judgment	19
59(a) New Trial	19
59(e) Alter or Amend Judgment	20
59 <i>Remittitur</i>	20
60(b) Reconsideration of Ruling	20
60(b)(1) Vacate Judgment for Mistake, etc.	20
60(b)(4) Vacate Judgment as Void	20

TABLE OF CONTENTS
(Continued)

	<i>page</i>
60(b)(5) Vacate Judgment as Satisfied, etc.	21
60(b)(6) Vacate Judgment – Catchall	21
62(c) Injunction Pending Appeal	21
62(d) Approval or Waiver of Supersedeas Bond	21
65 Permanent Injunction	22
65(a) Preliminary Injunction	22-23
65(b) Temporary Restraining Order	23
65(c) Award of Damages on Injunction Bond	23
B. Title 28, United States Code	
§144 Disqualification of Judge	23
§455 Recusal	24
§1334(c)(1) Abstention	24
§1367(c)(3) Remand	24
§1404(a) Transfer for Parties’ Convenience	24
§1406(a) Dismissal or Transfer for Improper Venue	24
§1447(c) Award of Costs and Attorneys’ Fees and Costs Upon Remand of Removed Case	24
§1631 Transfer to Cure Want of Jurisdiction	25
§1870 Peremptory Jury Challenges	25
§1915(e)(2) Dismissal of Proceedings <i>In Forma Pauperis</i>	25
§1915A Dismissal of Prisoner Claims	25
§1920 Taxation of Costs	25
§1927 Imposing Liability on Counsel for Excessive Costs	26
§2201 Declaratory Judgment	26
C. Conduct of Trial	
<i>Voir Dire</i>	26

TABLE OF CONTENTS
(Continued)

	<i>page</i>
Motion <i>in Limine</i>	26
Improper Opening Statement or Closing Argument	27
Admission and Exclusion of Evidence	27
Application of Evidentiary Privilege	27
Admission of Expert Testimony	27
Scope of Cross-Examination	28
Discharge of Juror for Misconduct	28
Answering Questions from the Jury	28
Delivering Supplemental Instruction	28
Mistrial	28
Judgment Notwithstanding the Verdict (JNOV)	28
D. Equitable Remedies and Defenses	
Accounting	29
Contract Rescission	29
Judicial Estoppel	29
Laches	29
Offensive Collateral Estoppel	30
Receiver Appointment	30
Specific Performance	30
E. Federal Arbitration Act	
Affirm or Vacate Arbitration Award	30
Stay of Proceedings	31
Compel Arbitration	31
F. Bankruptcy	
Approval of Chapter 13 Plan	31

TABLE OF CONTENTS
(Continued)

	<i>page</i>
Conclusions of Law (In General)	31
Discharge – Chapter 7	31
Dismissal of Appeal from Bankruptcy for Failure to Prosecute	32
Findings of Fact (In General)	32
Good Faith Finding in Filing Plan	32
Relief from Automatic Stay	32
G. Gallimaufry	
Amount of Attorneys’ Fee Award	32-33
Appointment of Counsel	33
Article III Standing	33
Attorney Disqualification	33
Attorney Withdrawal	33
Attorney–Client Privilege	34
Bad Faith Finding Under Fair Debt Collection Practices Act	34
Burden of Proof Assignment	34
Certify Question of State Law	34
Civil Contempt	34
<i>Colorado River</i> Abstention	35
<i>Colorado River Stay</i>	35
Constitutional Violation	35
Constitutionality of a Statute	35
Constitutionality of Punitive Damage Award	35
Construction of a Contract	35-36
Construction of a Statute	36
Construction of Court’s Own Order	36

TABLE OF CONTENTS
(Continued)

	<i>page</i>
Deficiency Judgment – Mortgage Foreclosure	36
Dismissal of Supplemental State Law Claims	36
Dismissal on Exhaustion Grounds	36
Federal Preemption	37
<i>Forum Non Conveniens</i> Dismissal	37
Immunity – Absolute	37
Immunity – Qualified	37
Lanham Act Treble Damages	37
Local District Court Rule Application	37
Mootness	38
<i>Pickering</i> Test Application	38
Prejudgment Interest Award	38
“Prevailing Party” Determination for Attorney Fee Award	38
Punitive Damage Appropriateness	38
Remand Authority	39
Remand to State Court After Removal	39
Removal to Federal Court	39
Reopen an <i>In Absentia</i> Deportation	39
Retroactivity of Statutory Enactment	39
<i>Rooker-Feldman</i> Doctrine Application	39
Settlement Agreement Enforcement	40
State Law Substantive Determinations	40
Statutory Private Right of Action Finding	40
Striking Affidavit	40
Trial Court’s Action on Remand	40

I. INTRODUCTION TO STANDARDS OF REVIEW

This summary guide identifies the standards of review that are applied by the United States Court of Appeals for the Seventh Circuit to the various types of rulings that are reviewed by that court.

The standard of review is the level of scrutiny that is applied by the appellate court to resolving claimed error by the lower court. However it may be stated or formulated, the standard of review is intended to reflect the degree of deference that the appellate court will give to the decision of the lower court — ranging from none (under the *de novo* standard) to very high (when the abuse of discretion standard is applied).

Rule 28(a)(9)(B) of the Federal Rules of Appellate Procedure requires that the appellant's brief include

for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues).

The Seventh Circuit has noted that “the court, not the parties, must determine the standard of review, and therefore, it cannot be waived.” *Worth v. Tyer*, 276 F.3d 249, 262, n. 4 (7th Cir. 2001), *citing Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1022 n. 4 (9th Cir. 1997) (en banc) (O'Scannlain, J., concurring in part and dissenting in part).

Which standard will be applied to a particular issue is vitally important and the attorney should be well aware of the standard or standards of review applicable to each of the issues of a case before drafting the appellate brief. The particular standard applied may well be outcome determinative in some cases. *See, e.g., Roy v. Austin Co.*, 194 F.3d 840, 843 (7th Cir. 1999). Even in those cases where the standard itself is not outcome

determinative, the standard that is applied will have a substantial impact upon the best approach to crafting arguments to be advanced on appeal.

Even more basically, the applicability of particular standards of review may have significant bearing upon the decision of whether the trial court's ruling should be appealed.

In the federal system, the standard of review is governed by federal law. *In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 803 (7th Cir. 2003). Because a uniform federal law approach applies to procedural questions concerning the allocation of responsibility between the trial court and appellate court (*Mayer v. Gary Partners & Co., Ltd.*, 29 F.3d 330, 335 (7th Cir. 1994)), appellate review is governed by federal law even in those cases in which the district court is required to apply state substantive law. See *Gasperini v. Cent. for Humanities, Inc.*, 518 U.S. 415, 437 (1996).

II. THE MEANING OF THE STANDARDS OF REVIEW

Three general standards of review may be applied in appeals of civil cases in the federal appellate courts, although there are some variations to be found in various courts' terminology in stating the standards.

The three major standards of review are usually denominated as: (A) *de novo*; (B) clear error; and (C) abuse of discretion. The three standards are listed above in order from that which gives the least deference to the trial court's ruling (*de novo*) to the greatest deference (abuse of discretion). However, the Seventh Circuit (Judge Posner) has noted that both clear error and abuse of discretion are "deferential standards of review and, as a practical matter, similar or even identical in the amount of leeway they give the district

judge.” *Thomas v. Gen. Motors Acceptance Corp.*, 288 F.3d 305, 308 (7th Cir. 2002), *citing United States v. Hill*, 196 F.3d 806, 808 (7th Cir. 1999); *Cook v. City of Chicago*, 192 F.3d 693, 696 (7th Cir. 1999); and *Johnson v. Trigg*, 28 F.3d 639, 643-44 (7th Cir.1994).

The “proper standard of review depends on the character of the ruling sought to be reviewed.” *Thomas*, 288 F.3d at 307. However, even identically-phrased standards may be applied in different ways depending upon the particular issues under review. For example, the Seventh Circuit has noted that the abuse of discretion standard is used when reviewing rulings vacating a default order (Fed. R. Civ. P. 55(c)) and vacating a default judgment (Fed. R. Civ. P. 60(b)), but that the “test is more **liberally applied** in the Rule 55(c) context.” *Pretzel & Stouffer, Chtd. v. Imperial Adjusters, Inc.*, 28 F.3d 42, 45 (7th Cir. 1994) (emphasis added), *citing United States v. DiMucci*, 879 F.2d 1488, 1495 (7th Cir. 1989).

Set forth below is a brief explanation of the meaning of each standard:

A. *De Novo*

Under the *de novo* standard, the reviewing court will consider the issue anew, giving no weight to the trial court’s decision. When the *de novo* standard of review is applied, the appellate court uses the same rule of law and standard of decision as the trial court is required to use in the first instance. *In re Kmart Corp.*, 381 F.3d 709, 712 (7th Cir. 2004), *cert. denied*, 543 U.S. 1056 (2005).

Rulings on pure questions of law are subject to *de novo* (or “plenary”) review because it is important that doctrinal statements of the law not differ from district judge to district judge. *Cook*, 192 F.3d at 697.

B. Clear Error

Pure questions of fact, “a ‘who did what where when and to whom’ kind of question, ‘pure’ in the sense that no legal knowledge or instruction is necessary to answer it” are reviewed under the clear error standard. *Thomas*, 288 F.3d at 307.

In addition, “mixed” questions of law and fact – “the application of a legal standard (such as negligence) to the pure facts (what the defendant did) to yield a legal conclusion (the defendant was or was not negligent)” – generally are reviewed under the clear error standard. *Id.*

The clear error standard recognizes that the trial court finds the facts and is likely to be more familiar with them than the appellate court. *Id.* As a result, “its application of the law to the facts is likely to be more accurate.” *Id.*

The clear error standard (rather than *de novo*) is applied to such matters because it is inevitable that

application of a legal rule or standard to the particular facts of particular cases will yield different outcomes from case to case depending on the facts of the individual case. So uniformity of outcome is unattainable; and as divergent *applications* of law to fact do not unsettle the law – doctrine is unaffected – a heavy appellate hand in these cases is unnecessary to assure the law’s clarity and coherence.

Id. (emphasis in original).

“[T]he canonical formulation of the clearly-erroneous standard is that it requires for reversal that the reviewing court have ‘a definite and firm conviction that a mistake has been committed.’” *Reynolds v. City of Chicago*, 296 F.3d 524, 527 (7th Cir. 2002), quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993).

The Seventh Circuit has described the burden that must be met by an appellant to satisfy the clear error standard as “daunting.” *Jones v. Lopez*, 21 Fed.Appx. 479, 480 (7th Cir. 2001). It is not, however, “an insuperable burden on appellants.” *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1008 (7th Cir. 1994), *citing Santa Fe Pacific Corp. v. Cent. States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725, 727-28 (7th Cir. 1994), *cert. denied*, 513 U.S. 987 (1994). “Even though [clear error] is a deferential review, it is by no means a rubber stamp.” *Platinum Tech., Inc. v. Fed. Ins. Co.*, 282 F.3d 927, 931 (7th Cir. 2002).

As Judge Posner has explained, the clear error standard

requires us appellate judges to distinguish between the situation in which we *think* that if we had been the trier of fact we would have decided the case differently and the situation in which we are *firmly convinced* that we would have done so.

Carr, 32 F.3d at 1008, *citing Concrete Pipe*, 508 U.S. at 622; *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985).

“When we review a district court’s findings of fact [under the clear error standard of review], we do not ask whether there is another conclusion possible based on the evidence; rather, the inquiry is whether the finding is ‘plausible in light of the record in its entirety.’” *Boczar v. Kingen*, 6 Fed.Appx. 471, 479 (7th Cir. 2001), *cert. denied*, 534 U.S. 952 (2001), *quoting United Air Lines v. Int’l Ass’n of Machinist & Aerospace Workers, AFL-CIO*, 243 F.3d 349, 361 (7th Cir. 2001), *cert. denied*, 534 U.S. 889 (2001). Under the clear error standard, the appellate court “will not find a district court’s choice between two permissible views of the facts to be clearly erroneous.” *United States v. Huerta*, 239 F.3d

865, 871 (7th Cir.2001), *citing United States v. Hardamon*, 188 F.3d 843, 848 (7th Cir. 1999).

C. Abuse Of Discretion

Abuse of discretion is the most commonly applied standard of review. Among the standards listed here, it provides the greatest deference to the trial court's decision.

Rulings that are “judgmental, managerial, or otherwise discretionary” are reviewed for abuse of discretion. *Thomas*, 288 F.3d at 308.

The Seventh Circuit has stated that the “‘abuse of discretion standard’ means something more than our belief that we would have acted differently if placed in the circumstance confronting the district judge[.]” *Ladien v. Astrachan*, 128 F.3d 1051, 1056 (7th Cir. 1997), *quoting Anderson v. United Parcel Serv.*, 915 F.2d 313, 315 (7th Cir. 1990). Rather, the district court's decision must strike the reviewing court as “fundamentally wrong.” *Id.* To find an abuse of discretion, the court must “conclude that no reasonable person could agree with the ruling[.]” *Edie F. ex rel. Casey F. v. River Falls Sch. Dist.*, 243 F.3d 329, 333 (7th Cir. 2001), *citing Roy*, 194 F.3d at 843.

A district court abuses its discretion when it commits a clear error of fact or an error of law. *Incredible Tech., Inc. v. Virtual Tech., Inc.*, 400 F.3d 1007, 1011 (7th Cir. 2005). Thus, under the abuse of discretion standard, the reviewing court must still “scrutinize the district court's determination to ensure that it invoked the correct legal standards and that its findings of fact are not clearly erroneous.” *Chavez v. Ill. State Police*, 251 F.3d 612, 628-29 (7th Cir. 2001), *quoting Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 739 (7th Cir. 1998).

III. METHODOLOGY OF THIS VOLUME

This publication is intended to be a quick reference guide for the lawyer considering an appeal to the United States Court of Appeals for the Seventh Circuit. For each issue and type of case listed in this guide, a controlling United States Supreme Court or Seventh Circuit opinion is provided.

It should be kept in mind that this publication is intended as a summary reference, not a treatise. Accordingly, the goal is ease of use and breadth, rather than depth, of coverage.

IV. STANDARDS OF APPELLATE REVIEW FOR PARTICULAR ISSUES

A. Federal Rules of Civil Procedure

4(a)(5)(A)(ii) Extend Time for Filing Notice of Appeal

Abuse of Discretion

Garwood Packaging, Inc. v. Allen & Co., Inc., 378 F.3d 698, 700 (7th Cir. 2004).

4(m) Dismissal for Failure to Serve Process

Abuse of Discretion

Coleman v. Milwaukee Bd. of Sch. Dir., 290 F.3d 932, 934 (7th Cir. 2002).

4(m) Extension of Time for Service

Abuse of Discretion

Troxell v. Fedders of N. Am., Inc., 160 F.3d 381, 383 (7th Cir. 1998).

6(b)(2) Enlargement of Time

Abuse of Discretion

Lewis v. Sternes, 390 F.3d 1019, 1029 n. 3 (7th Cir. 2004).

11 Sanctions

Abuse of Discretion

Hartmarx Corp. v. Abboud, 326 F.3d 862, 866 (7th Cir. 2003).

12(b)(1) Dismissal for Lack of Subject Matter Jurisdiction

De Novo (as to legal conclusions)

Storm v. Storm, 328 F.3d 941, 943 (7th Cir. 2003).

– or –

Clear Error (as to factual determinations)

United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942, 946 (7th Cir. 2003), *cert. denied*, 540 U.S. 1003 (2003).

12(b)(2) Dismissal for Lack of Personal Jurisdiction

De Novo

Int'l Med. Group, Inc. v. Am. Arbitration Ass'n, Inc., 312 F.3d 833, 846 (7th Cir. 2002), *cert. denied*, 540 U.S. 822 (2003).

12(b)(3) Dismissal for Improper Venue

De Novo (as to interpretations of venue statutes)

Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804, 806 (7th Cir. 2002).

– or –

12(b)(3) Dismissal for Improper Venue (continued)

Abuse of Discretion (as to other issues)

Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804, 806 (7th Cir. 2002).

12(b)(5) Dismissal for Insufficient Service of Process

Abuse of Discretion

Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 340 (7th Cir. 1996) (Where good cause exists, the trial court must extend the period for service pursuant to Fed. R. Civ. P. 4(m). “If, however, good cause does not exist, the court may, in its discretion, either dismiss the action without prejudice or direct that service be effected within a specified time”).

12(b)(6) Dismissal for Failure to State a Claim

De Novo

Pugel v. Bd. of Trs. of Univ. of Ill., 378 F.3d 659, 662 (7th Cir. 2004).

12(b)(7) Dismissal for Failure to Join a Party Under Rule 19

The standard of review for this issue has not been finally determined in the Seventh Circuit. *Davis Cos. v. Emerald Casino, Inc.*, 268 F.3d 477, 481 (7th Cir. 2001). The two possible standards that have been discussed by the Court are:

De Novo

Thomas v. United States, 189 F.3d 662, 666 (7th Cir. 1999), *cert. denied*, 531 U.S. 811 (2000).

– or –

Abuse of Discretion

Sokaogon Chippewa Cmty. v. State of Wis., Oneida County, 879 F.2d 300, 303-04 (7th Cir. 1989).

12(c) Judgment on the Pleadings

De Novo

Radaszewski ex rel. Radaszewski v. Maram, 383 F.3d 599, 606 (7th Cir. 2004).

12(f) Striking Matter from Pleadings

Abuse of Discretion

Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654, 665 (7th Cir. 1992).

13(f) Leave to Add Counterclaim

Abuse of Discretion

Carroll v. Acme-Cleveland Corp., 955 F.2d 1107, 1114 (7th Cir. 1992).

14(a) Leave to Add Third Party

Abuse of Discretion

Highlands Ins. Co. v. Lewis Rail Serv. Co., 10 F.3d 1247, 1251 (7th Cir. 1993).

15(a) Amendment of Pleadings

Abuse of Discretion

Bressner v. Ambroziak, 379 F.3d 478, 484 (7th Cir. 2004) (motion to amend complaint).

Campania Mgmt. Co., Inc. v. Rooks, Pitts & Poust, 290 F.3d 843, 848 (7th Cir. 2002) (motion to amend answer).

15(d) Leave to File Supplemental Pleading

Abuse of Discretion

Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 743 (7th Cir. 1985).

16(e) Final Pretrial Order

Abuse of Discretion

Hotaling v. Chubb Sovereign Life Ins. Co., 241 F.3d 572, 578 (7th Cir. 2001).

16(f) Sanctions

Abuse of Discretion

Long v. Steepro, 213 F.3d 983, 985-86 (7th Cir. 2000).

19 Indispensable Party

Abuse of Discretion

Extra Equipamentos E Exportacao Ltda. v. Case Corp., 361 F.3d 359, 361 (7th Cir. 2004).

20(a) Joinder of Parties

Abuse of Discretion

Chavez v. Ill. State Police, 251 F.3d 612, 632 (7th Cir. 2001).

20(b) Separate Trials After Joinder

Abuse of Discretion

Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219, 1224 (7th Cir. 1995).

21 Dropping or Adding Parties

Abuse of Discretion

Rice v. Sunrise Express, Inc., 209 F.3d 1008, 1016 (7th Cir. 2000), *reh'g en banc denied*, 217 F.3d 492 (7th Cir. 2000).

23(c) Class Certification

Abuse of Discretion

Uhl v. Thoroughbred Tech. and Telecomm., Inc., 309 F.3d 978, 985 (7th Cir. 2002).

23(e) Approve Class Action Settlement

Abuse of Discretion

Uhl v. Thoroughbred Tech. and Telecomm., Inc., 309 F.3d 978, 985 (7th Cir. 2002).

23(h) Class Action Attorney Fee Award

De Novo (as to the trial court's methodology)

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 408 (7th Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001).

– or –

Abuse of Discretion (as to other matters)

Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 408 (7th Cir. 2000), *cert. denied*, 532 U.S. 1038 (2001).

24(a) Intervention as of Right

De Novo (as to all matters except timeliness)

United States v. BDO Seidman, 337 F.3d 802, 808 (7th Cir. 2003).

– or –

Abuse of Discretion (as to timeliness of motion)

United States v. BDO Seidman, 337 F.3d 802, 808 (7th Cir. 2003).

24(b) Permissive Intervention

Abuse of Discretion

Salton, Inc. v. Philips Domestic Appliances & Personal Care B.V., 391 F.3d 871, 881 (7th Cir. 2004), *cert. dismissed*, 545 U.S. 1151 (2005).

25(a) Substitution Upon Death of Party

De Novo (as to legal conclusions)

Russell v. City of Milwaukee, 338 F.3d 662, 665 (7th Cir. 2003).

– or –

Clear Error (as to factual determinations)

Russell v. City of Milwaukee, 338 F.3d 662, 665 (7th Cir. 2003).

25(c) Substitution Upon Transfer of Interest

Abuse of Discretion

FDIC v. Knostman, 966 F.2d 1133, 1142 n. 5 (7th Cir. 1992).

26(a) Excluding Testimony for Noncompliance with Rule

Abuse of Discretion

David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003).

26(b)(2) Limitations on Discovery

Abuse of Discretion

Balderston v. Fairbanks Morse Engine Div. of Coltec Indus., 328 F.3d 309, 319 (7th Cir. 2003).

26(c) Protective Orders

Abuse of Discretion

Williams v. Chartwell Fin. Serv., Ltd., 204 F.3d 748, 758 (7th Cir. 2000).

30(a)(2) Leave to Take Depositions

Abuse of Discretion

Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F. 2d 177, 183 (7th Cir. 1985), cited with respect to a request for leave to take depositions in the Court's unpublished opinion at *U.S. Election Corp. v. Microvote Corp.*, 1995 WL 156561 at *4 (7th Cir. 1995).

35 Physical or Mental Examination

Abuse of Discretion

Bucher v. Krause, 200 F.2d 576, 584 (7th Cir. 1953), *cert. denied*, 345 U.S. 997 (1953).

36(b) Withdraw Admissions

Abuse of Discretion

Banos v. City of Chicago, 398 F.3d 889, 892 (7th Cir. 2005).

37(b) Discovery Sanctions

Clear Error (as to factual determinations)

Maynard v. Nygren, 372 F.3d 890, 892 (7th Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005).

– or –

Abuse of Discretion (as to ultimate imposition of sanctions)

Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc. of the U.S., 406 F.3d 867, 878 (7th Cir. 2005).

37(b)(2) Finding of Bad Faith

Clear Error

In re Golant, 239 F.3d 931, 936 (7th Cir. 2001).

37(c) Exclusion of Evidence for Failure to Disclose

Abuse of Discretion

David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003).

37(d) Discovery Sanctions

Clear Error (as to factual determinations)

Maynard v. Nygren, 372 F.3d 890, 892 (7th Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005).

– or –

Abuse of Discretion (as to ultimate imposition of sanctions)

Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc. of the U.S., 406 F.3d 867, 878 (7th Cir. 2005).

38(a) Right to Jury Trial

De Novo

Int'l Fin. Serv. Corp. v. Chromas Tech. Canada, Inc., 356 F.3d 731, 735 (7th Cir. 2004).

39(b) Order of Trial by Jury

Abuse of Discretion

Members v. Paige, 140 F.3d 699, 703 (7th Cir. 1998).

41(a)(2) Voluntary Dismissal

Abuse of Discretion

Mother & Father v. Cassidy, 338 F.3d 704, 709 (7th Cir. 2003).

41(b) Dismissal for Want of Prosecution

Abuse of Discretion

In re Bridgestone/ Firestone, Inc., 124 Fed. Appx. 452, 455 (7th Cir. 2005).

42(a) Consolidation

Abuse of Discretion

King v. Gen. Elec. Co., 960 F.2d 617, 626 (7th Cir. 1992).

42(b) Separate Trials

Abuse of Discretion

Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117, 1121 (7th Cir. 1999).

45(c)(3)(A) Quashing or Modifying Subpoena

Abuse of Discretion

Peate v. McCann, 294 F.3d 879, 884 (7th Cir. 2002).

49(a) Special Verdicts

Abuse of Discretion

Mattson v. Schultz, 145 F.3d 937, 939 (7th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998).

49(a) Special Verdicts (continued)

See also Mootye v. Dotson, 73 Fed.Appx. 161, 170 (7th Cir. 2003) (“The role of appellate review is to ensure that questions accurately, adequately and clearly state the relevant issues. Ambiguous, biased, misleading or confusing questions may warrant reversal”).

49(b) Verdict Interrogatories

Abuse of Discretion

Cruz v. Town of Cicero, Ill., 275 F.3d 579, 591 (7th Cir. 2001).

50(a) Judgment as a Matter of Law

De Novo

Latino Food Marketers, LLC v. Ole Mexican Foods, Inc., 407 F.3d 876, 879 (7th Cir. 2005).

50(b) Setting Aside a Verdict

De Novo

Harrison v. Dean Witter Reynolds, Inc., 79 F.3d 609, 613 (7th Cir. 1996), *cert. denied*, 519 U.S. 825 (1996).

51 Jury Instructions

Abuse of Discretion

Fine v. Ryan Int'l Airlines, 305 F.3d 746, 753 (7th Cir. 2002) (Reviewing court “will not reverse unless the instruction inadequately states the law and was likely to have misled the jurors” (citing *Susan Wakeen Doll Co. v. Ashton Drake Galleries*, 272 F.3d 441, 452 (7th Cir. 2001))).

52(a) Findings of Fact by the Court

Clear Error

Sullivan v. Bornemann, 384 F.3d 372, 375 (7th Cir. 2004).

52(c) Judgment on Partial Findings

De Novo (as to legal conclusions)

Fillmore v. Paige, 358 F.3d 496, 503 (7th Cir. 2004).

– or –

Clear Error (as to factual determinations)

Fillmore v. Paige, 358 F.3d 496, 503 (7th Cir. 2004).

54(d) Assessment of Costs and Attorneys' Fees

De Novo (as to whether costs and fees should be awarded)

Mother & Father v. Cassidy, 338 F.3d 704, 708 (7th Cir. 2003).

54(d)(1) Award of Costs Other Than Attorneys' Fees

Abuse of Discretion

Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926, 945 (7th Cir. 1997).

The district court's discretion is "narrowly confined" because of the strong presumption created by the rule that the prevailing party will receive costs.
Contreras v. City of Chicago, 119 F.3d 1286, 1295 (7th Cir. 1997).

55(b)(2) Default Judgment

Abuse of Discretion

Davis v. Hutchins, 321 F.3d 641, 646 (7th Cir. 2003).

55(c) Setting Aside Default

Abuse of Discretion

Robinson Eng'g Co. Pension Plan & Tr. v. George, 223 F.3d 445, 448 (7th Cir. 2000).

56 Summary Judgment

De Novo

Moser v. Ind. Dept. of Corrections, 406 F.3d 895, 900 (7th Cir. 2005).

56(f) When Affidavit Is Unavailable

Abuse of Discretion

Davis v. G. N. Mortgage Corp., 396 F.3d 869, 885 (7th Cir. 2005).

57 Declaratory Judgment

De Novo

Vanliner Ins. Co. v. Sampat, 320 F.3d 709, 711-12 (7th Cir. 2003).

Although the district court's decision to grant declaratory relief is discretionary (*Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994)), it is "discretion hardened by experience into rule" (*Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) quoting 6A J. Moore, *Moore's Federal Practice*, ¶57.08[2] at 57-36 to 57-37 (2nd Ed. 1982), quoting Borchard, *Declaratory Judgments* 293 (2nd Ed. 1941)) and for that reason, appellate courts must be able to review decisions of the district courts *de novo*. *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 577 n. 4 (7th Cir. 1994).

59(a) New Trial

Abuse of Discretion

Billy-Bob Teeth, Inc. v. Novelty, Inc., 329 F.3d 586, 590-91 (7th Cir. 2003). "A new trial may be granted only when the verdict is against the manifest weight of the evidence." *Id.*, citing *Mathur v. Bd. of Trs. of S. Ill. Univ.*, 207 F.3d 938, 944 (7th Cir. 2000).

59(e) Alter or Amend Judgment

Abuse of Discretion

Trs. of AFTRA Health Fund v. Biondi, 303 F.3d 765, 773 (7th Cir. 2002).

59 Remittitur

De Novo (punitive damages – where a constitutional violation is alleged)

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001)
(punitive damages).

– or –

Abuse of Discretion (where no constitutional violation is alleged)

Lampley v. Onyx Acceptance Corp., 340 F.3d 478, 483 (7th Cir. 2003) (punitive damages).

Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 734 (7th Cir. 2004)
(presumed damages).

60(b) Reconsideration of Ruling

Abuse of Discretion

DeBoer v. Vill. of Oak Park, 267 F.3d 558, 565 n. 4 (7th Cir. 2001).

60(b)(1) Vacate Judgment for Mistake, etc.

Abuse of Discretion

In re Hanson, 397 F.3d 482, 484 (7th Cir. 2005).

60(b)(4) Vacate Judgment as Void

De Novo

United States v. Tittjung, 235 F.3d 330, 335 (7th Cir. 2000), *cert. denied*, 533 U.S. 931 (2001).

60(b)(5) Vacate Judgment as Satisfied, etc.

Abuse of Discretion

United States v. Krilich, 303 F.3d 784, 789 (7th Cir. 2002), *cert. denied*, 538 U.S. 977 (2003).

60(b)(6) Vacate Judgment – Catchall

Abuse of Discretion

Neuberg v. Michael Reese Hosp. Found., 123 F.3d 951, 955 (7th Cir. 1997).

62(c) Injunction Pending Appeal

De Novo (as to legal conclusions)

Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 761 (7th Cir. 2001).

– or –

Clear Error (as to factual determinations)

Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 761 (7th Cir. 2001).

– or –

Abuse of Discretion (as to ultimate grant or denial)

Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757, 761 (7th Cir. 2001).

62(d) Approval or Waiver of Supersedeas Bond

Abuse of Discretion

In re Carlson, 224 F.3d 716, 719 (7th Cir. 2000).

65 Permanent Injunction

De Novo (as to legal conclusions)

Christ Universal Mission Church v. City of Chicago, 362 F.3d 423, 425-26 (7th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

– or –

Clear Error (as to factual determinations)

Christ Universal Mission Church v. City of Chicago, 362 F.3d 423, 425-26 (7th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

– or –

Abuse of Discretion (as to ultimate grant or denial)

Dupuy v. Samuels, 397 F.3d 493, 502 (7th Cir. 2005).

65(a) Preliminary Injunction

De Novo (as to legal conclusions)

Kiel v. City of Kenosha, 236 F.3d 814, 815 (7th Cir. 2000) (entering injunction).

Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs, 367 F.3d 675, 678 (7th Cir. 2004) (dissolving injunction).

– or –

Clear Error (as to factual determinations)

Kiel v. City of Kenosha, 236 F.3d 814, 815 (7th Cir. 2000) (entering injunction).

Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs, 367 F.3d 675, 678 (7th Cir. 2004) (dissolving injunction).

– or –

65(a) Preliminary Injunction (continued)

Abuse of Discretion (as to ultimate grant or denial)

Incredible Tech., Inc. v. Virtual Tech., Inc., 400 F.3d 1007, 1011 (7th Cir. 2005).

65(b) Temporary Restraining Order

De Novo (as to legal conclusions)

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214-15 (7th Cir. 1993).

– or –

Clear Error (as to factual determinations)

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214-15 (7th Cir. 1993).

– or –

Abuse of Discretion (as to ultimate grant or denial)

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211, 214-15 (7th Cir. 1993).

65(c) Award of Damages on Injunction Bond

Abuse of Discretion

Henco, Inc. v. Brown, 904 F.2d 11, 13 n.2 (7th Cir. 1990).

B. Title 28, United States Code

§144 Disqualification of Judge

De Novo

Hoffman v. Caterpillar, Inc., 368 F.3d 709, 713 (7th Cir. 2004).

§455 Recusal

De Novo

Grove Fresh Dist., Inc. v. John Labatt, Ltd., 299 F.3d 635, 641-42 (7th Cir. 2002),
cert. denied, 538 U.S. 907 (2003).

§1334(c)(1) Abstention

Abuse of Discretion

Good v. Voest-Alpine Indus., Inc., 398 F.3d 918, 920 (7th Cir. 2005).

§1367(c)(3) Remand

Abuse of Discretion

Baker v. Kingsley, 387 F.3d 649, 656 (7th Cir. 2004).

§1404(a) Transfer for Parties' Convenience

Abuse of Discretion

Cote v. Wadel, 796 F.2d 981, 985 (7th Cir. 1986).

§1406(a) Dismissal or Transfer for Improper Venue

Abuse of Discretion

Willis v. Caterpillar, Inc., 199 F.3d 902, 904 (7th Cir. 1999).

§1447(c) Attorneys' Fees and Costs Upon Remand of Removed Case

Abuse of Discretion

Sirotzky v. N.Y. Stock Exch., 347 F.3d 985, 987 (7th Cir. 2003).

§1631 Transfer to Cure Want of Jurisdiction

Abuse of Discretion

Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1999).

§1870 Peremptory Jury Challenges

Abuse of Discretion

Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719, 725 (7th Cir. 2000) (allocation of peremptory challenges in multiparty case).

But see Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281, 1286 (7th Cir. 1990), *cert. denied*, 501 U.S. 1205 (1991) (a trial judge has no discretion to refuse to strike a venireman when a peremptory challenge is used, but the requirements of *Batson v. Kentucky*, 476 U.S. 79 (1986) apply).

§1915(e)(2) Dismissal of Proceedings *In Forma Pauperis*

Clear Error (as to factual determinations)

Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 308 (7th Cir. 2002).

– or –

Abuse of Discretion (as to ultimate dismissal)

Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 308 (7th Cir. 2002).

§ 1915A Dismissal of Prisoner Claims

De Novo

Wynn v. Southward, 251 F.3d 588, 591 (7th Cir. 2001).

§1920 Taxation of Costs

Abuse of Discretion

Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 428 (7th Cir. 2000).

§1927 Liability for Excessive Costs

Abuse of Discretion

U. S. Bank Nat'l Ass'n, N.D. v. Sullivan-Moore, 406 F.3d 465, 469 (7th Cir. 2005).

§2201 Declaratory Judgment

De Novo

Vanliner Ins. Co. v. Sampat, 320 F.3d 709, 711-12 (7th Cir. 2003).

Although the district court's decision to grant declaratory relief is discretionary (*Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994)), it is "discretion hardened by experience into rule" (*Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) quoting 6A J. Moore, *Moore's Federal Practice*, ¶57.08[2] at 57-36 to 57-37 (2nd Ed. 1982), quoting Borchard, *Declaratory Judgments* 293 (2nd Ed. 1941)) and for that reason, the appellate courts must be able to review decisions of the district courts *de novo*. *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 577 n. 4 (7th Cir. 1994).

C. Conduct of Trial

Voir Dire

Abuse of Discretion

Gardner v. Barnett, 199 F.3d 915, 920 (7th Cir. 1999), *cert. denied*, 529 U.S. 1079 (2000).

Motion in Limine

Abuse of Discretion

Sauzek v. Exxon Coal USA, Inc., 202 F.3d 913, 919 (7th Cir. 2000).

Improper Opening Statement or Closing Argument

Abuse of Discretion

Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries, 272 F.3d 441, 455 (7th Cir. 2001).

Admission and Exclusion of Evidence

Abuse of Discretion

Young v. James Green Mgmt., Inc., 327 F.3d 616, 621 (7th Cir. 2003).

Application of Evidentiary Privilege

Clear Error (as to factual determinations)

Rehling v. City of Chicago, 207 F.3d 1009, 1019 (7th Cir. 2000).

– or –

Abuse of Discretion (as to balancing factors)

Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997).

Admission of Expert Testimony

De Novo (as to whether the trial court followed *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) in determining whether evidence is admissible)

Deputy v. Lehman Bros., Inc., 345 F.3d 494, 505 (7th Cir. 2003).

– or –

Abuse of Discretion (if the court properly followed the *Daubert* analysis)

Deputy v. Lehman Bros., Inc., 345 F.3d 494, 505 (7th Cir. 2003).

Scope of Cross-Examination

Abuse of Discretion

Mercado v. Ahmed, 974 F.2d 863, 872-73 (7th Cir. 1992).

Discharge of Juror for Misconduct

Abuse of Discretion

United States v. Machi, 811 F.2d 991, 1006 (7th Cir. 1987).

Answering Questions from the Jury

Abuse of Discretion

Vukadinovich v. Zentz, 995 F.2d 750, 756 (7th Cir. 1993).

Delivering Supplemental Jury Instruction

Abuse of Discretion

Boyd v. Ill. State Police, 384 F.3d 888, 894 (7th Cir. 2004).

Mistrial

Abuse of Discretion

Stancil v. Gramley, 267 F.3d 575, 580 (7th Cir. 2001).

Judgment Notwithstanding the Verdict (JNOV)

De Novo

Hall v. Gary Cmty. Sch. Corp., 298 F.3d 672, 675 (7th Cir. 2002).

D. Equitable Remedies and Defenses

Accounting

Abuse of Discretion

ABM Marking, Inc. v. Zanasi, Fratelli, S.R.L., 353 F.3d 540, 544-45 (7th Cir. 2003).

Contract Rescission

Abuse of Discretion

Deckard v. Gen. Motors Corp., 307 F.3d 556, 562 n. 4 (7th Cir. 2002).

Judicial Estoppel

Abuse of Discretion

Commonwealth Ins. Co. v. Titan Tire Corp., 398 F.3d 879, 887 (7th Cir. 2004).

Laches

Clear Error (when the court finds facts)

Cook v. City of Chicago, 192 F.3d 693, 696 (7th Cir. 1999).

– or –

Abuse of Discretion (where the facts are undisputed)

Smith v. Caterpillar, Inc., 338 F.3d 730, 733 (7th Cir. 2003).

But see Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 935-41 (7th Cir. 1984) (J. Posner, concurring) (discussing proper application of differing standards of review).

Offensive Collateral Estoppel

Abuse of Discretion

Ross-Berger Cos., Inc. v. Equitable Life Assurance Soc'y of the U.S., 872 F.2d 1331, 1337 (7th Cir. 1989).

Receiver Appointment

Abuse of Discretion

Matter of McGaughey, 24 F.3d 904, 908 (7th Cir. 1994).

See also Gaskill v. Gordon, 27 F.3d 248, 251 (7th Cir. 1994) (allocating costs of receivership).

Specific Performance

Abuse of Discretion

Medcom Holding Co. v. Baxter Travenol Labs., Inc., 106 F.3d 1388, 1403 (7th Cir. 1997).

E. Federal Arbitration Act

Affirm or Vacate Arbitration Award

De Novo (as to legal conclusions)

Advance Cast Stone Co. v. Bridge, Structural & Reinforcing Iron Workers, Local Union No. 1, 376 F.3d 734, 740 (7th Cir. 2004).

– or –

Abuse of Discretion (as to factual determinations)

Advance Cast Stone Co. v. Bridge, Structural & Reinforcing Iron Workers, Local Union No. 1, 376 F.3d 734, 740 (7th Cir. 2004).

Stay of Proceedings

De Novo

Ernst & Young LLP v. Baker O'Neal Holdings, Inc., 304 F.3d 753, 755 (7th Cir. 2002).

Compel Arbitration

De Novo

Livingston v. Assoc. Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003).

F. Bankruptcy

Approval of Chapter 13 Plan

Abuse of Discretion

In re Crawford, 324 F.3d 539, 542 (7th Cir. 2003).

Conclusions of Law (In General)

De Novo

In re Midway Airlines, Inc., 383 F.3d 663, 668 (7th Cir. 2004).

Discharge – Chapter 7

Abuse of Discretion

Union Planters Bank, N.A. v. Connors, 283 F.3d 896, 901 (7th Cir. 2002).

Dismissal of Appeal from Bankruptcy Court for Failure to Prosecute

Abuse of Discretion

Telesphere Communications, Inc. v. 900 Unlimited, Inc., 177 F.3d 612, 616 (7th Cir. 1999).

Findings of Fact (In General)

Clear Error

In re Midway Airlines, Inc., 383 F.3d 663, 668 (7th Cir. 2004).

Good Faith Finding in Filing Plan

Clear Error

In re Smith, 286 F.3d 461, 465 (7th Cir. 2002).

Relief from Automatic Stay

Abuse of Discretion

Colon v. Option One Mortgage Corp., 319 F.3d 912, 916 (7th Cir. 2003).

G. Gallimaufry

Amount of Attorneys' Fee Award

Clear Error

Palmetto Prop., Inc. v. County of DuPage, 375 F.3d 542, 547 (7th Cir. 2004), *cert. denied*, 543 U.S. 1089 (2005).

– or –

Amount of Attorneys' Fee Award (continued)

Abuse of Discretion

Cooke v. Stefani Mgmt. Servs., Inc., 250 F.3d 564, 570 (7th Cir. 2001).

Appointment of Counsel

Abuse of Discretion

Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995) (denial of appointed counsel reversed only when a due process violation results).

Article III Standing

De Novo (as to legal conclusions)

Wis. Right to Life, Inc. v. Schober, 366 F.3d 485, 489 (7th Cir. 2004).

– or –

Clear Error (as to factual determinations)

Wis. Right to Life, Inc. v. Schober, 366 F.3d 485, 489 (7th Cir. 2004).

Attorney Disqualification

Abuse of Discretion

Hutchinson v. Spanierman, 190 F.3d 815, 822 (7th Cir. 1999), *cert. denied*, 529 U.S. 1068 (2000).

Attorney Withdrawal

Abuse of Discretion

Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 310 F.3d 537, 541 (7th Cir. 2002).

Attorney–Client Privilege

Clear Error (as to factual determinations)

Bland v. Fiatallis N. Am., Inc., 401 F.3d 779, 787 (7th Cir. 2005).

Bad Faith Finding Under Fair Debt Collection Practices Act

Clear Error

Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769, 774 (7th Cir. 2003), *cert. denied*, 540 U.S. 985 (2003).

Burden of Proof Assignment

De Novo

Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894, 898 (7th Cir. 2005).

Certify Question of State Law

Abuse of Discretion

Brown v. Argosy Gaming Co., L.P., 384 F.3d 413, 417 (7th Cir. 2004).

Civil Contempt

Abuse of Discretion

Grove Fresh Dist., Inc. v. John Labatt, Ltd., 299 F.3d 635, 641-42 (7th Cir. 2002), *cert. denied*, 538 U.S. 907 (2003). *See also Tranzact Tech., Inc. v. 1 Source Worldsite*, 406 F.3d 851, 855 (7th Cir. 2005) (dismissal of contempt motion reversed for abuse of discretion).

Colorado River Abstention

Abuse of Discretion

AXA Corp. Solutions v. Underwriters Reinsurance Corp., 347 F.3d 272, 278 (7th Cir. 2003).

Colorado River Stay

Abuse of Discretion

Clark v. Lacy, 376 F.3d 682, 685 (7th Cir. 2004).

Constitutional Violation

De Novo

Terry v. Richardson, 346 F.3d 781, 784 (7th Cir. 2003).

Constitutionality of a Statute

De Novo

United States v. Bass, 325 F.3d 847, 849 (7th Cir. 2003), *cert. denied*, 540 U.S. 998 (2003).

Constitutionality of Punitive Damage Award

De Novo

Kapelanski v. Johnson, 390 F.3d 525, 534 (7th Cir. 2004).

Construction of a Contract

De Novo (where the contract is unambiguous)

Platinum Tech., Inc. v. Fed. Ins. Co., 282 F.3d 927, 931 (7th Cir. 2002).

– or –

Construction of a Contract (continued)

Clear Error (where is contract is ambiguous)

Platinum Tech., Inc. v. Fed. Ins. Co., 282 F.3d 927, 931 (7th Cir. 2002).

Construction of a Statute

De Novo

Frey v. Env'tl. Prot. Agency, 403 F.3d 828, 833 (7th Cir. 2005).

Construction of Court's Own Order

Abuse of Discretion

In re Consol. Indus., 360 F.3d 712, 716 (7th Cir. 2004).

Deficiency Judgment – Mortgage Foreclosure

Abuse of Discretion

Mortgage Elec. Regis. Sys., Inc. v. Estrella, 390 F.3d 522, 525 (7th Cir. 2004).

Dismissal of Supplemental State Law Claims

Abuse of Discretion

O'Grady v. Vill. of Libertyville, 304 F.3d 719, 725 (7th Cir. 2002).

Dismissal on Exhaustion Grounds

Abuse of Discretion

Zhou v. Guardian Life Ins. Co. of Am., 295 F.3d 677, 679 (7th Cir. 2002).

Federal Preemption

De Novo

Baker v. Kingsley, 387 F.3d 649, 657 (7th Cir. 2004).

Forum Non Conveniens Dismissal

Abuse of Discretion

Zelinski v. Columbia 300, Inc., 335 F.3d 633, 642-43 (7th Cir. 2003).

Immunity – Absolute

De Novo

Manning v. Miller, 355 F.3d 1028, 1031 (7th Cir. 2004).

Immunity – Qualified

De Novo

Sullivan v. Bornemann, 384 F.3d 372, 375 (7th Cir. 2004).

Lanham Act Treble Damages

Abuse of Discretion

Zelinski v. Columbia 300, Inc., 335 F.3d 633, 642 (7th Cir. 2003).

Local District Court Rule Application

Abuse of Discretion

Borcky v. Maytag Corp., 248 F.3d 691, 697 (7th Cir. 2001).

Mootness

De Novo

Fed'n of Adver. Indus. Reps, Inc. v. City of Chicago, 326 F.3d 924, 928-29 (7th Cir. 2003), *cert. denied*, 540 U.S. 879 (2003).

Pickering Test Application

De Novo

McGreal v. Ostrov, 368 F.3d 657, 676 (7th Cir. 2004).

Prejudgment Interest Award

Abuse of Discretion

Ameritech Info. Sys., Inc. v. Bar Code Res., Inc., 331 F.3d 571, 574 (7th Cir. 2003) (prejudgment interest pursuant to 815 ILCS 205/2).

McRoberts Software, Inc. v. Media 100, Inc., 329 F.3d 557, 572 (7th Cir. 2003) (prejudgment interest for willful federal law violation).

“Prevailing Party” Determination for Attorney Fee Award

De Novo (as to legal conclusions)

Southworth v. Bd. of Regents of Univ. of Wis. Sys., 376 F.3d 757, 767 (7th Cir. 2004).

– or –

Clear Error (as to factual determinations)

Southworth v. Bd. of Regents of Univ. of Wis. Sys., 376 F.3d 757, 767 (7th Cir. 2004).

Punitive Damage Appropriateness

De Novo

Parks v. Wells Fargo Mortgage, Inc., 398 F.3d 937, 942 (7th Cir. 2005).

Remand Authority

De Novo

Ill. Mun. Ret. Fund v. Citigroup, Inc., 391 F.3d 844, 850 (7th Cir. 2004).

Remand to State Court After Removal

De Novo

Fedor v. Cingular Wireless Corp., 355 F.3d 1069, 1071 (7th Cir. 2004).

Removal to Federal Court

De Novo

Boyd v. Phoenix Funding Corp., 366 F.3d 524, 529 (7th Cir. 2004).

Reopen an *In Absentia* Deportation

Abuse of Discretion

Ursachi v. I.N.S., 296 F.3d 592, 594 (7th Cir. 2002).

Retroactivity of Statutory Enactment

De Novo

Faiz-Mohammed v. Ashcroft, 395 F.3d 799, 801 (7th Cir. 2005).

Rooker-Feldman Doctrine Application

De Novo

Crestview Vill. Apartments v. U. S. Dep't of Hous. & Urban Dev., 383 F.3d 552, 556 (7th Cir. 2004).

Settlement Agreement Enforcement

Abuse of Discretion

Sims-Madison v. Inland Paperboard & Packaging, Inc., 379 F.3d 445, 448 (7th Cir. 2004).

State Law Substantive Determinations

De Novo

Hinc v. Lime-O-Sol Co., 382 F.3d 716, 720 (7th Cir. 2004).

Statutory Private Right of Action Finding

De Novo

Miller Aviation v. Milwaukee County Bd. of Sup'rs, 273 F.3d 722, 728 (7th Cir. 2001).

Striking Affidavit

Abuse of Discretion

Balderston v. Fairbanks Morse Engine Div. Of Coltec Indus., 328 F.3d 309, 318 (7th Cir. 2003).

Trial Court's Actions on Remand

De Novo

Pennington v. Doherty, 110 F.3d 502, 506 (7th Cir. 1997), *vacated on other grounds*, 522 U.S. 909 (1997).

TABLE OF CASES

	<i>page</i>
ABM Marking, Inc. v. Zanasi, Fratelli, S.R.L., 353 F.3d 540 (7 th Cir. 2003)	29
Advance Cast Stone Co. v. Bridge, Structural & Reinforcing Iron Workers, Local Union No. 1, 376 F.3d 734 (7 th Cir. 2004)	30
Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc. of the U.S., 406 F.3d 867 (7 th Cir. 2005)	14, 15
Ameritech Info. Sys., Inc. v. Bar Code Res., Inc., 331 F.3d 571 (7 th Cir. 2003)	38
Anderson v. City of Bessemer City, 470 U.S. 564 (1985)	5
Anderson v. United Parcel Serv., 915 F.2d 313 (7 th Cir. 1990)	6
Avitia v. Metro. Club of Chicago, Inc., 49 F.3d 1219 (7 th Cir. 1995)	11
AXA Corp. Solutions v. Underwriters Reinsurance Corp., 347 F.3d 272 (7 th Cir. 2003)	35
Baker v. Kingsley, 387 F.3d 649 (7 th Cir. 2004)	24, 37
Balderston v. Fairbanks Morse Engine Div. of Coltec Indus., 328 F.3d 309 (7 th Cir. 2003)	13, 40
Banos v. City of Chicago, 398 F.3d 889 (7 th Cir. 2005)	14
Batson v. Kentucky, 476 U.S. 79 (1986)	25
Billy-Bob Teeth, Inc. v. Novelty, Inc., 329 F.3d 586 (7 th Cir. 2003)	19

TABLE OF CASES

(Continued)

	<u>page</u>
Bland v. Fiatallis N. Am., Inc., 401 F.3d 779 (7 th Cir. 2005)	34
Boczar v. Kingen, 6 Fed.Appx. 471 (7 th Cir. 2001), <i>cert. denied</i> , 534 U.S. 952 (2001)	5
Borcky v. Maytag Corp., 248 F.3d 691 (7 th Cir. 2001)	37
Boyd v. Ill. State Police, 384 F.3d 888 (7 th Cir. 2004)	28
Boyd v. Phoenix Funding Corp., 366 F.3d 524 (7 th Cir. 2004)	39
Bressner v. Ambroziak, 379 F.3d 478 (7 th Cir. 2004)	10
Brown v. Argosy Gaming Co., L.P., 384 F.3d 413 (7 th Cir. 2004)	34
Bucher v. Krause, 200 F.2d 576 (7 th Cir. 1953), <i>cert. denied</i> , 345 U.S. 997 (1953)	14
Burlington N. & Santa Fe Ry. Co. v. Bhd. of Locomotive Eng'rs, 367 F.3d 675 (7 th Cir. 2004)	22
Campania Mgmt. Co., Inc. v. Rooks, Pitts & Poust, 290 F.3d 843 (7 th Cir. 2002)	10
Carr v. Allison Gas Turbine Div., Gen. Motors Corp., 32 F.3d 1007 (7 th Cir. 1994)	5
Carroll v. Acme-Cleveland Corp., 955 F.2d 1107 (7 th Cir. 1992)	10
Cefalu v. Vill. of Elk Grove, 211 F.3d 416 (7 th Cir. 2000)	25

TABLE OF CASES
(Continued)

	<u>page</u>
Chavez v. Ill. State Police, 251 F.3d 612 (7 th Cir. 2001)	6, 11
Chicago Prime Packers, Inc. v. Northam Food Trading Co., 408 F.3d 894 (7 th Cir. 2005)	34
Christ Universal Mission Church v. City of Chicago, 362 F.3d 423 (7 th Cir. 2004), <i>cert. denied</i> , 543 U.S. 1081 (2005)	22
Clark v. Lacy, 376 F.3d 682 (7 th Cir. 2004)	35
Coleman v. Milwaukee Bd. of Sch. Dir., 290 F.3d 932 (7 th Cir. 2002)	7
Colon v. Option One Mortgage Corp., 319 F.3d 912 (7 th Cir. 2003)	32
Commonwealth Ins. Co. v. Titan Tire Corp., 398 F.3d 879 (7 th Cir. 2004)	29
Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993)	4, 5
Contreras v. City of Chicago, 119 F.3d 1286 (7 th Cir. 1997)	18
Cook v. City of Chicago, 192 F.3d 693 (7 th Cir. 1999)	3, 29
Cooke v. Stefani Mgmt. Servs., Inc., 250 F.3d 564 (7 th Cir. 2001)	33
Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001)	20
Cote v. Wadel, 796 F.2d 981 (7 th Cir. 1986)	24

TABLE OF CASES

(Continued)

	<i>page</i>
Crestview Vill. Apartments v. U. S. Dep't of Hous. & Urban Dev., 383 F.3d 552 (7 th Cir. 2004)	39
Cruz v. Town of Cicero, Ill., 275 F.3d 579 (7 th Cir. 2001)	17
David v. Caterpillar, Inc., 324 F.3d 851 (7 th Cir. 2003)	13, 15
Davis v. G. N. Mortgage Corp., 396 F.3d 869, 885 (7 th Cir. 2005)	19
Davis v. Hutchins, 321 F.3d 641 (7 th Cir. 2003)	18
Davis Cos. v. Emerald Casino, Inc., 268 F.3d 477 (7 th Cir. 2001)	9
DeBoer v. Vill. of Oak Park, 267 F.3d 558 (7 th Cir. 2001)	20
Deckard v. Gen. Motors Corp., 307 F.3d 556 (7 th Cir. 2002)	29
Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122 (7 th Cir. 1997)	27
Deputy v. Lehman Bros., Inc., 345 F.3d 494 (7 th Cir. 2003)	27
Deveraux v. City of Chicago, 14 F.3d 328 (7 th Cir. 1994)	19, 26
Dunham v. Frank's Nursery & Crafts, Inc., 919 F.2d 1281 (7 th Cir. 1990), <i>cert. denied</i> , 501 U.S. 1205 (1991)	25
Dupuy v. Samuels, 397 F.3d 493 (7 th Cir. 2005)	22

TABLE OF CASES

(Continued)

	<u>page</u>
Eddie F. <i>ex rel.</i> Casey F. v. River Falls Sch. Dist., 243 F.3d 329 (7 th Cir. 2001)	6
Ernst & Young LLP v. Baker O’Neal Holdings, Inc., 304 F.3d 753 (7 th Cir. 2002)	31
Extra Equipamentos E Exportacao Ltda. v. Case Corp., 361 F.3d 359 (7 th Cir. 2004)	11
Faiz-Mohammed v. Ashcroft, 395 F.3d 799 (7 th Cir. 2005)	39
FDIC v. Knostman, 966 F.2d 1133 (7 th Cir. 1992)	13
Fed’n of Adver. Indus. Reps, Inc. v. City of Chicago., 326 F.3d 924 (7 th Cir. 2003), <i>cert. denied</i> , 540 U.S. 879 (2003)	38
Fedor v. Cingular Wireless Corp., 355 F.3d 1069 (7 th Cir. 2004)	39
Fid. Nat’l Title Ins. Co. of N.Y. v. Intercounty Nat’l Title Ins. Co., 310 F.3d 537 (7 th Cir. 2002)	33
Fillmore v. Paige, 358 F.3d 496 (7 th Cir. 2004)	18
Fine v. Ryan Int’l Airlines, 305 F.3d 746 (7 th Cir. 2002)	17
Frey v. Env’tl. Prot. Agency, 403 F.3d 828 (7 th Cir. 2005)	36
Gardner v. Barnett, 199 F.3d 915, 920 (7 th Cir. 1999), <i>cert. denied</i> , 529 U.S. 1079 (2000)	26
Garwood Packaging, Inc. v. Allen & Co., Inc., 378 F.3d 698 (7 th Cir. 2004)	7

TABLE OF CASES
(Continued)

	<u>page</u>
Gaskill v. Gordon, 27 F.3d 248 (7 th Cir. 1994)	30
Gasperini v. Cent. for Humanities, Inc., 518 U.S. 415 (1996)	2
Good v. Voest-Alpine Indus., Inc., 398 F.3d 918 (7 th Cir. 2005)	24
Grove Fresh Dist., Inc. v. John Labatt, Ltd., 299 F.3d 635 (7 th Cir. 2002), <i>cert. denied</i> , 538 U.S. 907 (2003)	24, 34
Hall v. Gary Cmty. Sch. Corp., 298 F.3d 672 (7 th Cir. 2002)	28
Harrison v. Dean Witter Reynolds, Inc., 79 F.3d 609 (7 th Cir. 1996), <i>cert. denied</i> , 519 U.S. 825 (1996)	17
Hartmarx Corp. v. Abboud, 326 F.3d 862 (7 th Cir. 2003)	8
Henco, Inc. v. Brown, 904 F.2d 11 (7 th Cir. 1990)	23
Highlands Ins. Co. v. Lewis Rail Serv. Co., 10 F.3d 1247 (7 th Cir. 1993)	10
Hinc v. Lime-O-Sol Co., 382 F.3d 716 (7 th Cir. 2004)	40
Hoffman v. Caterpillar, Inc., 368 F.3d 709 (7 th Cir. 2004)	23
Horkey v. J.V.D.B. & Assoc., Inc., 333 F.3d 769 (7 th Cir. 2003), <i>cert. denied</i> , 540 U.S. 985 (2003)	34
Hotaling v. Chubb Sovereign Life Ins. Co., 241 F.3d 572 (7 th Cir. 2001)	11

TABLE OF CASES
(Continued)

	<u>page</u>
Houseman v. U.S. Aviation Underwriters, 171 F.3d 1117 (7 th Cir. 1999)	16
Hutchinson v. Spanierman, 190 F.3d 815 (7 th Cir. 1999), <i>cert. denied</i> , 529 U.S. 1068 (2000)	33
Ill. Mun. Ret. Fund v. Citigroup, Inc., 391 F.3d 844 (7 th Cir. 2004)	39
In re Abbott Labs. Derivative S'holders Litig., 325 F.3d 795 (7 th Cir. 2003)	2
In re Bridgestone/ Firestone, Inc., 124 Fed. Appx. 452 (7 th Cir. 2005)	16
In re Carlson, 224 F.3d 716 (7 th Cir. 2000)	21
In re Consol. Indus., 360 F.3d 712 (7 th Cir. 2004)	36
In re Crawford, 324 F.3d 539 (7 th Cir. 2003)	31
In re Golant, 239 F.3d 931 (7 th Cir. 2001)	15
In re Hanson, 397 F.3d 482 (7 th Cir. 2005)	20
In re Kmart Corp., 381 F.3d 709 (7 th Cir. 2004), <i>cert. denied</i> , 543 U.S. 1056 (2005)	3
In re Midway Airlines, Inc., 383 F.3d 663 (7 th Cir. 2004)	31, 32
In re Smith, 286 F.3d 461 (7 th Cir. 2002)	32

TABLE OF CASES

(Continued)

	<i>page</i>
Incredible Tech., Inc. v. Virtual Tech., Inc., 400 F.3d 1007 (7 th Cir. 2005)	6, 23
Indianapolis Colts v. Mayor & City Council of Baltimore, 775 F. 2d 177 (7 th Cir. 1985)	14
Int'l Fin. Serv. Corp. v. Chromas Tech. Canada, Inc., 356 F.3d 731 (7 th Cir. 2004)	15
Int'l Med. Group, Inc. v. Am. Arbitration Ass'n, Inc., 312 F.3d 833 (7 th Cir. 2002), <i>cert. denied</i> , 540 U.S. 822 (2003)	8
Johnson v. Trigg, 28 F.3d 639 (7 th Cir.1994)	3
Jones v. Lopez, 21 Fed.Appx. 479 (7 th Cir. 2001)	5
Kapelanski v. Johnson, 390 F.3d 525 (7 th Cir. 2004)	35
Kiel v. City of Kenosha, 236 F.3d 814 (7 th Cir.2000)	22
King v. Gen. Elec. Co., 960 F.2d 617 (7 th Cir. 1992)	16
Ladien v. Astrachan, 128 F.3d 1051 (7 th Cir. 1997)	6
Lampley v. Onyx Acceptance Corp., 340 F.3d 478 (7 th Cir. 2003)	20
Latino Food Marketers, LLC v. Ole Mexican Foods, Inc., 407 F.3d 876 (7 th Cir. 2005)	17
Lewis v. Sternes, 390 F.3d 1019 (7 th Cir. 2004)	8

TABLE OF CASES
(Continued)

	<u>page</u>
Linnemeir v. Bd. of Trs. of Purdue Univ., 260 F.3d 757 (7 th Cir. 2001)	21
Livingston v. Assoc. Fin., Inc., 339 F.3d 553 (7 th Cir. 2003)	31
Long v. Steepro, 213 F.3d 983 (7 th Cir. 2000)	11
Manning v. Miller, 355 F.3d 1028 (7 th Cir. 2004)	37
Mathur v. Bd. of Trs. of S. Ill. Univ., 207 F.3d 938 (7 th Cir. 2000)	19
Matter of McGaughey, 24 F.3d 904 (7 th Cir. 1994)	30
Mattson v. Schultz, 145 F.3d 937 (7 th Cir. 1998), <i>cert. denied</i> , 525 U.S. 963 (1998)	16
Mayer v. Gary Partners & Co., Ltd., 29 F.3d 330 (7 th Cir. 1994)	2
Maynard v. Nygren, 332 F.3d 462 (7 th Cir. 2003), <i>cert. denied</i> , 543 U.S. 1049 (2005)	14, 15
McGreal v. Ostrov, 368 F.3d 657 (7 th Cir. 2004)	38
McRoberts Software, Inc. v. Media 100, Inc., 329 F.3d 557 (7 th Cir. 2003)	38
Medcom Holding Co. v. Baxter Travenol Labs., Inc., 106 F.3d 1388 (7 th Cir. 1997)	30
Members v. Paige, 140 F.3d 699 (7 th Cir. 1998)	15

TABLE OF CASES
(Continued)

	<u>page</u>
Mercado v. Ahmed, 974 F.2d 863 (7 th Cir. 1992)	28
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Salvano, 999 F.2d 211 (7 th Cir. 1993)	23
Miller Aviation v. Milwaukee County Bd. of Sup'rs, 273 F.3d 722 (7 th Cir. 2001)	40
Montgomery v. Aetna Plywood, Inc., 231 F.3d 399 (7 th Cir. 2000), <i>cert. denied</i> , 532 U.S. 1038 (2001)	12
Mootye v. Dotson, 73 Fed.Appx. 161 (7 th Cir. 2003)	17
Mortgage Elec. Regis. Sys., Inc. v. Estrella, 390 F.3d 522 (7 th Cir. 2004)	36
Moser v. Ind. Dept. of Corrections, 406 F.3d 895, 900 (7 th Cir. 2005)	19
Mother & Father v. Cassidy, 338 F.3d 704 (7 th Cir. 2003)	16, 18
Neuberg v. Michael Reese Hosp. Found., 123 F.3d 951 (7 th Cir. 1997)	21
NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V., 28 F.3d 572 (7 th Cir. 1994)	19, 26
O'Grady v. Vill. of Libertyville, 304 F.3d 719 (7 th Cir. 2002)	36
Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738 (7 th Cir. 1985)	10
Palmetto Prop., Inc. v. County of DuPage, 375 F.3d 542 (7 th Cir. 2004), <i>cert. denied</i> , 543 U.S. 1089 (2005)	32

TABLE OF CASES
(Continued)

	<u>page</u>
Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338 (7 th Cir. 1996)	9
Parks v. Wells Fargo Mortgage, Inc., 398 F.3d 937 (7 th Cir. 2005)	38
Peate v. McCann, 294 F.3d 879 (7 th Cir. 2002)	16
Pennington v. Doherty, 110 F.3d 502 (7 th Cir. 1997), <i>vacated</i> , 522 U.S. 909 (1997)	40
Phillips v. Seiter, 173 F.3d 609 (7 th Cir. 1999)	25
Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925 (7 th Cir. 1984)	29
Platinum Tech., Inc. v. Fed. Ins. Co., 282 F.3d 927 (7 th Cir. 2002)	5, 35, 36
Pretzel & Stouffer, Chtd. v. Imperial Adjusters, Inc., 28 F.3d 42 (7 th Cir. 1994)	3
Pugel v. Bd. of Trs. of Univ. of Ill., 378 F.3d 659 (7 th Cir. 2004)	9
Radaszewski <i>ex rel.</i> Radaszewski v. Maram, 383 F.3d 599 (7 th Cir. 2004)	10
Rehling v. City of Chicago, 207 F.3d 1009 (7 th Cir. 2000)	27
Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717 (7 th Cir. 2004)	20
Reynolds v. City of Chicago, 296 F.3d 524 (7 th Cir. 2002)	4

TABLE OF CASES

(Continued)

	<u>page</u>
Rice v. Sunrise Express, Inc., 209 F.3d 1008 (7 th Cir. 2000), <i>reh'g en banc denied</i> , 217 F.3d 492	11
Robinson Eng'g Co. Pension Plan & Tr. v. George, 223 F.3d 445 (7 th Cir. 2000)	19
Ross-Berger Cos., Inc. v. Equitable Life Assurance Soc'y of the U.S., 872 F.2d 1331 (7 th Cir. 1989)	30
Roy v. Austin Co., 194 F.3d 840 (7 th Cir. 1999)	1, 6
Russell v. City of Milwaukee, 338 F.3d 662 (7 th Cir. 2003)	13
Salgado by Salgado v. Gen. Motors Corp., 150 F.3d 735 (7 th Cir. 1998)	6
Salton, Inc. v. Philips Domestic Appliances & Personal Care B.V., 391 F.3d 871, 881 (7 th Cir. 2004), <i>cert. dismissed</i> , 545 U.S. 1151 (2005)	13
Santa Fe Pacific Corp. v. Cent. States, S.E. & S.W. Areas Pension Fund, 22 F.3d 725 (7 th Cir. 1994), <i>cert. denied</i> , 513 U.S. 987 (1994)	5
Sauzek v. Exxon Coal USA, Inc., 202 F.3d 913 (7 th Cir. 2000)	26
Sims-Madison v. Inland Paperboard & Packaging, Inc., 379 F.3d 445 (7 th Cir. 2004)	40
Sirotzky v. N.Y. Stock Exch., 347 F.3d 985 (7 th Cir. 2003)	24
Smith v. Caterpillar, Inc., 338 F.3d 730 (7 th Cir. 2003)	29
Sokaogon Chippewa Cmty. v. State of Wis., Oneida County, 879 F.2d 300 (7 th Cir. 1989)	9

TABLE OF CASES
(Continued)

	<u>page</u>
Southworth v. Bd. of Regents of Univ. of Wis. Sys., 376 F.3d 757 (7 th Cir. 2004)	38
Stancil v. Gramley, 267 F.3d 575 (7 th Cir. 2001)	28
Storm v. Storm, 328 F.3d 941 (7 th Cir. 2003)	8
Sullivan v. Bornemann, 384 F.3d 372 (7 th Cir. 2004)	18, 37
Susan Wakeen Doll Co. v. Ashton Drake Galleries, 272 F.3d 441 (7 th Cir. 2001)	17, 27
Talbot v. Robert Matthews Distrib. Co., 961 F.2d 654 (7 th Cir. 1992)	10
Telesphere Communications, Inc. v. 900 Unlimited, Inc., 177 F.3d 612 (7 th Cir. 1999)	32
Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746 (7 th Cir. 1987)	19, 26
Terry v. Richardson, 346 F.3d 781 (7 th Cir. 2003)	35
Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305 (7 th Cir. 2002)	3, 4, 6, 25
Thomas v. United States, 189 F.3d 662 (7 th Cir. 1999), <i>cert. denied</i> , 531 U.S. 811 (2000)	9
Tidemann v. Nadler Golf Car Sales, Inc., 224 F.3d 719 (7 th Cir. 2000)	25
Tranzact Tech., Inc. v. 1 Source Worldsite, 406 F.3d 851 (7 th Cir. 2005)	34

TABLE OF CASES
(Continued)

	<u>page</u>
Troxell v. Fedders of N. Am., Inc., 160 F.3d 381 (7 th Cir. 1998)	7
Trs. of AFTRA Health Fund v. Biondi, 303 F.3d 765 (7 th Cir. 2002)	20
Uhl v. Thoroughbred Tech. and Telecomm., Inc., 309 F.3d 978 (7 th Cir. 2002)	12
Union Planters Bank, N.A. v. Connors, 283 F.3d 896 (7 th Cir. 2002)	31
United Air Lines v. Int'l Ass'n of Machinist & Aerospace Workers, AFL-CIO, 243 F.3d 349 (7 th Cir. 2001), <i>cert. denied</i> , 534 U.S. 889 (2001)	5
United Phosphorus, Ltd. v. Angus Chem. Co., 322 F.3d 942 (7 th Cir. 2003), <i>cert. denied</i> , 540 U.S. 1003 (2003).	8
United States v. BDO Seidman, 337 F.3d 802 (7 th Cir. 2003)	12
United States v. Bass, 325 F.3d 847 (7 th Cir. 2003), <i>cert. denied</i> , 540 U.S. 998 (2003)	35
United States v. DiMucci, 879 F.2d 1488 (7 th Cir. 1989)	3
United States v. Hardamon, 188 F.3d 843 (7 th Cir. 1999)	6
United States v. Hill, 196 F.3d 806 (7 th Cir. 1999)	3
United States v. Huerta, 239 F.3d 865 (7 th Cir. 2001)	5
United States v. Krilich, 303 F.3d 784, 789 (7 th Cir. 2002), <i>cert. denied</i> , 538 U.S. 977 (2003)	21

TABLE OF CASES

(Continued)

	<i>page</i>
United States v. Machi, 811 F.2d 991 (7 th Cir. 1987)	28
United States v. Tittjung, 235 F.3d 330 (7 th Cir. 2000), <i>cert. denied</i> , 533 U.S. 931 (2001)	20
U. S. Bank Nat'l Ass'n, N.D. v. Sullivan-Moore, 406 F.3d 465 (7 th Cir. 2005)	26
U.S. Election Corp. v. Microvote Corp., 1995 WL 156561 (7 th Cir. 1995)	14
Ursachi v. I.N.S., 296 F.3d 592 (7 th Cir. 2002)	39
Vanliner Ins. Co. v. Sampat, 320 F.3d 709 (7 th Cir. 2003)	19, 26
Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9 th Cir. 1997)	1
Vukadinovich v. Zentz, 995 F.2d 750 (7 th Cir. 1993)	28
Waeltz v. Delta Pilots Ret. Plan, 301 F.3d 804 (7 th Cir. 2002)	8, 9
Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926 (7 th Cir. 1997)	18
Williams v. Chartwell Fin. Serv., Ltd., 204 F.3d 748 (7 th Cir. 2000)	14
Willis v. Caterpillar, Inc., 199 F.3d 902 (7 th Cir. 1999)	24
Wis. Right to Life, Inc. v. Schober, 366 F.3d 485 (7 th Cir. 2004)	33

TABLE OF CASES
(Continued)

	<i>page</i>
Worth v. Tyer, 276 F.3d 249 (7 th Cir. 2001)	1
Wynn v. Southward, 251 F.3d 588 (7 th Cir. 2001)	25
Young v. James Green Mgmt., Inc., 327 F.3d 616 (7 th Cir. 2003)	27
Zarnes v. Rhodes, 64 F.3d 285 (7 th Cir. 1995)	33
Zelinski v. Columbia 300, Inc., 335 F.3d 633 (7 th Cir. 2003)	37
Zhou v. Guardian Life Ins. Co. of Am., 295 F.3d 677 (7 th Cir. 2002)	36