No. 03-3087, 03-3140, 03-3659 and 03-3660

In The United States Court Of Appeals
For The Seventh Circuit

Wayne Smith, et al,
Plaintiffs
v.
Sprint Communications Company, L.P., et al,
Defendants

Chem-Tronics, Inc., Daniel R. Buhl, Joe C. Meighan, Jr., Charles W. Hord And Joy Pratt Hord
Intervenors-Appellants

Case Below:
Northern District Of Illinois,
No. 99 C 3844
Honorable Wayne R. Andersen, Presiding

Main Brief of Intervenors/Appellants Daniel R. Buhl, Joe C. Meighan Jr., Charles W. Hord, and Joy Pratt Hord [the *Buhl* Intervenors] (With Motion to Certify Question to the Tennessee Supreme Court)

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Disclosure Statement

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

i) Daniel R. Buhl
ii) Joe C. Meighan, Jr.
iii) Charles W. Hord
iv) Joy Pratt Hord

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

i) Vowell & Associates, Knoxville Tennessee
ii) Gilreath & Associates, Knoxville Tennessee

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

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Jurisdictional Statement

1. The case at bar is an attempted nationwide class action settlement arising out of the defendants' illegal taking of the right-of-way upon which they installed their fiber-optics cables.
2. Jurisdiction is contested in this appeal.
3. Appellants, Daniel R. Buhl, Joe C. Meighan Jr., Charles W. Hord, and Joy Pratt Hord [*Buhl* Intervenors] appeal from the entry of an injunction by the District Court on July 25, 2003 and revised on or about July 31, 2003. Jurisdiction in the Court of Appeals to review this injunction is based on 28 U.S.C. §1292(a)(1).
4. The settling parties claim subject matter jurisdiction under 28 U.S.C. §1331 (federal question), because some of the fiber-optics cable of some of the defendants was installed in the right-of-way of the Union Pacific Railroad, which was allegedly created by a federal land grant statute, 34 U.S.C. §942.
5. The settling parties also claim subject matter jurisdiction under 28 U.S.C. §1332 because they allege that the representative plaintiffs and defendants are citizens of different states and that the amount in controversy between each representative plaintiff and the defendants exceeds the value of $75,000, and that this is sufficient to establish diversity jurisdiction.

6. The settling parties claim supplemental jurisdiction over the claims of the absent class members, 28 U.S.C. §1367.

7. Citizenship of parties, as alleged in the complaint:

    a. Plaintiffs:

        i. Wayne Smith – Illinois

        ii. Lesco Enterprises, Inc. - Arizona corporation, with principal place of business in Arizona.

        iii. San Simon Gin, Inc. - Arizona corporation, with principal place of business in Arizona.

        iv. Gross-Wilkinson Ranch Company - Wyoming corporation, with principal place of business in Wyoming.

        v. Rex Dolan – Wyoming.

        vi. Everett and Joanne Chambers – Wisconsin.

    b. Defendants:

        i. Qwest Communications Corporation – Delaware corporation, with principal place of business in Denver Colorado.

        ii. Sprint Communications Company, L.P. – Delaware limited partnership, with principal place of business in Kansas.

        iii. Level 3 Communications, L.L.C. – Delaware limited liability company, with principal place of business in Broomfield, Colorado.

        iv. Williams Communications, L.L.C. – Delaware limited liability company, with principal place of business in Oklahoma.

        v. Union Pacific Railroad Company – Utah corporation, with principal place of business in Nebraska.

Issues for Review

1. Whether the class certification order should be reversed because the *Smith v. Sprint* representative plaintiffs were not adequate representatives of the certified Tennessee classes and because the settlement agreement discriminates unfairly against the certified Tennessee classes?
2. Whether the class certification order should be reversed as to the Tennessee cases because the Illinois trial court did not have jurisdiction of the subject matter of those cases?
3. Whether the takings procedure embodied in the class certification order violates due process of law?
4. Whether the class certification order and injunction should be reversed because the Illinois trial court did not have personal jurisdiction over the Tennessee class members?
5. Whether the injunction should be reversed because it is precluded by the Anti-Injunction Act?
6. Whether the class certification order and injunction should be reversed as to the Tennessee cases on grounds of abstention and comity?

Motion to Certify Question to the Tennessee Supreme Court

The *Buhl* Intervenors request the Court to certify the following question to the Tennessee Supreme Court pursuant to Circuit Rule 52 and Tennessee Supreme Court Rule 23:

Whether the procedure set out in the settlement agreement is a legal way to condemn real estate in the state of Tennessee.

Statement of the Case

The complaint was filed on June 10, 1999, by certain representative plaintiffs against Sprint and Union Pacific, claiming damages for the wrongful installation of fiber-optics cables across their land, and seeking class action status for the state of Illinois. [D-1[1]] On April 24, 2001, the parties announced that a nationwide settlement was in the works, in which all similar claims against Sprint and four other companies not yet named as defendants would be settled. [D-406, Transcript 4-24-01, p-3; D-403, Transcript 9-4-01, p-2] Thereafter, the representative plaintiffs in other cases around the country heard about the attempted settlement and intervened in order to object. These intervenors included Daniel R. Buhl, Joe C. Meighan Jr., Charles W. Hord, and Joy Pratt Hord [the *Buhl* Intervenors], the appellants herein. [D-90, 100]

After approximately six hearings in Chicago, the settling parties migrated to the United States District Court in Oregon and submitted the settlement agreement for preliminary approval there. After one hearing, the Oregon court dismissed the case on grounds of "judge shopping." *Zografos v. Qwest Communications Corp*., 225 F.Supp.2d 1217, 1223 (July 12, 2002 U.S.D.C. D. Or.).

[1] References to "D-___" are to the District Court docket entry numbers.

The settling parties then returned to Chicago where, on Sept. 4, 2002, they filed the settlement agreement [D-140] and a motion for preliminary approval, together with the Second Amended Class Action Complaint, which added Qwest, Level 3, and Williams Communications as defendants. [D-unavailable[2]] The *Buhl* Intervenors filed numerous objections to the proposed settlement. [D-186, 238, 378, 389, 390, 393, 394, 409, 427, 428, 429]. Other parties also filed objections. The court conducted a hearing on July 2, 2003, and advised the parties that the settlement agreement was not acceptable unless certain changes were made. [D-398, Transcript 7-2-03, pp. 306-29] The court then supervised negotiations, which did not result in settlement. The settling parties served their Second Amended and Restated Settlement Agreement on or about July 21, 2003. [D-unavailable] (A draft or advance copy of this document was served on the *Buhl* Intervenors on July 18, 2003.) [D-409, 389] The court conducted an additional hearing on July 22, 2003. [D-398, Transcript] The court then entered an order granting preliminary approval to the settlement agreement on July 25, 2003. [D-367 (Order); Chem-Apx-1[3]] On the same date the court also entered an order enjoining all competing class action cases. [D-369 (Order); Chem-Apx-10]

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[2] The docket numbers for these and a number of other filings are not available at this time. It is believed that the items were probably filed, but they are not listed in the docket sheets and have not been assigned a docket number. It is anticipated that the documents will be located or re-submitted to the district court clerk, and that they will then be added to the record on appeal.

[3] References to "Chem-Apx-___" are to the specified page numbers of the Chem-Tronics Appendix, which is adopted by the *Buhl* Intervenors.

The *Buhl* Intervenors timely filed their Petition for Permission to Appeal on Aug. 8, 2003, and their Notice of Appeal (as to the injunction) on Aug. 12, 2003. [D-399] The Petition for Permission to Appeal was granted by this Court on Sept. 15, 2003. The appeals of the *Buhl* Intervenors have been consolidated with the related appeals of Chem-Tronics.

Statement of Facts

1. Introduction

The story begins with the AT&T breakup in the middle 1980's, At that time Sprint's predecessor was a sleepy local phone company. However, with the break-up, the predecessor's executives realized that there was a one-time business opportunity to shoot through a rapidly closing "window of opportunity" to enter the long distance telephone business. The executives devised a plan to rapidly construct a nationwide fiber-optics network, to be built 100% on railroad rights-of-way. Acquiring railroad right-of-way property was the "critical first step" in the plan. It was expressly recognized that delay in obtaining the right-of-way would result in missing the "window of opportunity". [D-430-3, *Buhl* Exhibit 305[4] (Deposition, *Buhl/Meighan v. Sprint*, Bill Blessing, pp. 15-23), D-430-1, D-430-1, *Buhl* Exhibit 109 (Sprint Strategy Recommendation, p. 4, 31, 35, 37, 48, 56)]

However, the plan had one major problem – it called for the purchase of the right-of-way from the railroad. [D-430-1, *Buhl* Exhibit 109 (Sprint

[4] References to the "Buhl Exhibits" are to the Buhl Intervenors' seven green-bound volumes of exhibits. The referenced document, *Buhl* Exhibit 305, is the 5th document in Volume 3.

Strategy Recommendation, p. 37)] And it had been established since the railroads were first built that the railroad's interest is generally a mere railroad easement – the bare right to operate a railroad and nothing more. All other rights belong to the owner of the fee simple. The Tennessee Supreme Court recognized this principle in 1890:

> "An easement merely gives to a railroad company a right-of-way in the land – that is, the right to use the land for its purposes… The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company."

Railway Co. v. Telford's Executors, 14 S.W. 776, 777 (Tenn. 1890), as quoted in *Buhl v. Sprint*, 840 S.W.2d 904, 909 (Tenn. 1992) [D-426, Vowell Affidavit, Ex-2[5]]

The Tennessee Attorney General summarized the situation in a 1984 opinion:

> It is well settled in the state of Tennessee that a grant of a right-of-way to a railroad company is the grant of only an easement for railroad purposes, and the fee interest in the property over and through which that easement passes remains vested in the grantor.

[D-430-1, *Buhl* Exhibit 106 (Letter from Attorney General)]

Further, it had been specifically settled by the Tennessee Supreme Court in 1921 that the railroad had no interest whatsoever that it could sell to telegraph companies:

> In other words, a railroad company has no such title to its right-of-way as authorizes it to permit the erection thereupon of a commercial telegraph line, altogether disconnected from railroad operation, for commercial purposes. Therefore, to value a

[5] References to the "Vowell Affidavit" are to the *Buhl* Intervenors' Affidavit of Donald K. Vowell, with 24 attached exhibits (D-426).

> railroad's right to lease a right-of-way along its right-of-way to a telegraph company for such purposes would be to value something that the railroad company did not have, and which could not possibly be taken from it.

[*Western Union v. Nashville, Chattanooga & St. Louis Railway*, 237 S.W. 64, 65 (Tenn. 1921), as quoted in *Buhl v. Sprint*, 840 S.W.2d 904, 912 (Tenn. 1992), D-426, Vowell Affidavit, Ex-2]

Sprint's method of acquiring right-of-way was in complete conformity with a 1983 railroad industry study, which recognized the limitations on railroad title, and made specific recommendations for dealing with this problem. The first recommendation was as follows:

> Ignore the problem. The holders of reversionary or underlying rights are adjacent landowners, easy enough to identify through land records but usually not vigilant and perhaps not even conscious of their legal interests…It might be safe to assume that the installation of [the fiber optic cable] would not excite their interest."

[D-430-6, *Buhl* Exhibit 602 (Railinc Study, p. 18]

The study then noted that "the pattern of dealing with this problem, thus far, is to accept it as a business risk." [*Id*., p. 14]

2. The Tennessee Litigation

The Sprint crews arrived in East Tennessee in the fall of 1987. Danny Buhl found one of the crews in his yard near Clinton, Tennessee. The men said that they worked for "Sprint", and that they were going to put a "fiber-optics cable" through his yard. When Mr. Buhl questioned the men, they told him, "You can't stop us. You don't know what you're talking about. This is not your property – it belongs to the railroad." And they kept right on working. [D-430-7; *Buhl* Exhibit 706 (Buhl Affidavit)]

In nearby Knoxville, Tennessee, Joe Meighan had a similar experience. One Saturday morning in the Spring of 1988, he was awakened by the sound of bulldozers. He went outside and found a crew of fifteen men working near the railroad tracks that cross his property. After arming himself with a carbine, he asked the men what they were doing. They said they were installing a "fiber-optics cable" for "Sprint". Mr. Meighan ordered them off his property, but later relented because the men told him it was not really his property. "This is railroad property," they said, "and you don't have the right to stop us." Mr. Meighan, a former bulldozer operator in the Seabees, admits that he was "buffaloed" by these events. [D-430-1, *Buhl* Document 103 (Meighan Affidavit)]

On October 18, 1988, Mr. Buhl and other representative plaintiffs, who would later be joined by Mr. Meighan, filed a class action lawsuit against Sprint on behalf of all landowners in Tennessee. [Buhl-Apx-1[6]; D-430-1, *Buhl* Document 101 (Complaint)] This marked the beginning of a nearly 15-year legal battle that has evolved into the case now before the Court. On appeal, the Tennessee Supreme Court held that Sprint's action constituted the wrongful taking of property:

> The foregoing authorities require the conclusion that the installation of the telephone cable without the consent of the owners of the fee constituted the taking of an interest in the property for which they are entitled to compensation and such other rights as provided by law.

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[6] References to "*Buhl*-Apx-___" are to the specified document number in the *Buhl* Intervenors' appendix, which is appended to this brief.

Buhl v. Sprint, 840 S.W. 2d 904, 913 (Tenn. 1992) [Buhl-Apx-2; D-426, Vowell Affidavit, Ex-2]

That decision marked the 4-year point in the litigation.

Action in the trial court then shifted to the companion case of *Meighan v. Sprint*. On July 9, 1993, the trial court certified the case as a class action, but only for one county. At the same time, the trial court dismissed the plaintiffs' claims for trespass, but ruled that the plaintiffs were entitled to pursue claims for punitive damages. On appeal, the Tennessee Supreme Court held that the case ought to be certified as a class action, that the case was suitable for a state-wide class action, and that the plaintiffs could pursue claims for trespass and punitive damages. [*Meighan v. Sprint*, 924 S.W.2d 632 (Tenn. 1996), D-426 (Vowell Affidavit, Ex-4); Buhl-Apx-3] The Tennessee Supreme Court held that the class action was the "far superior method of resolution." *Id*., at 638. At the same time, the Tennessee Supreme Court held that the trial court could determine "an aggregate damage amount for the class as a whole" and that "[t]his case is particularly amenable to the aggregate damage approach." *Id*.

That decision marked the 7 ½-year point in the litigation.

Immediately after the Tennessee Supreme Court handed down the decision, a group of attorneys from a neighboring county copied the *Meighan* complaint, and filed it in their county. On the same date, the neighboring court certified the case as a state-wide class action, except for Knox County, thereby, at least for the moment, superseding the case of *Buhl/Meighan v.*

Sprint. The order expressly stated that the class certification was based on the Tennessee Supreme Court's just-entered order in *Meighan v. Sprint*. Mr. Meighan and Mr. Buhl then applied to the Tennessee Supreme Court for a writ of mandamus that would direct the neighboring trial court to reverse its class certification order. A sympathetic Tennessee Supreme Court noted that it was "clear" that the recently filed case should not be allowed to supercede *Buhl/Meighan v. Sprint*, and remanded to the trial court for reconsideration. *Meighan v. Sprint*, 942 S.W. 2d 476, 483 (Tenn. 1997). [D-426, Vowell Affidavit, Ex-5; Buhl-Apx-4] On receiving that direction, the neighboring court vacated its class certification order, and after a 1½ year detour, the case was moving forward again.

That decision marked the 9-year point in the litigation.

In 1997 the trial court certified *Buhl/Meighan v. Sprint* as a statewide mandatory class action for punitive damages, and as a two-county opt-out class action for compensatory damages. [D-426, Vowell Affidavit, Ex-7 (Order for Class Certification)] In 2000, the trial court expanded class certification for compensatory damages to cover all included counties in Tennessee. At the same time the Court dismissed claims relating to some segments of the cable, finding that the statute of limitation had run as to those claims. The result of this decision is that the case is now certified for all purposes as both a mandatory and opt-out class action as to all property in Tennessee east of

Nashville, a distance of approximately 310 miles in 14 counties. [D-426, Vowell Affidavit, Ex-8 (Order)]

That decision marked the 12-year point in the litigation.

There have been approximately 45 hearings in the case, with 22 depositions taken in Knoxville, Nashville, Kansas City, Boston, Philadelphia, Houston, and Little Rock. [D-430-1, *Buhl* Exhibit 102; D-426 (Vowell Affidavit, Ex-12)] One focus of the plaintiffs' discovery is evidence relating to punitive damages. The key question is whether Sprint intentionally broke the law – whether it was aware that it was taking land that belonged to others. The evidence includes Sprint's "License Agreement" with the Norfolk Southern Railroad, in which the railroad specifically disclaimed any warranty of title. The License Agreement even included a "money back" provision, which provided that the railroad would give Sprint a full refund in the event Sprint was required to pay a "third party" for the right-of-way. [D430-1, *Buhl* Exhibit 119 (License Agreement, §3.1)] The evidence also includes the deposition of the first attorney hired at Sprint, who admitted that Sprint had a "clear view" that the rights of landowners was a "live issue" and a "somewhat unsettled question." [D-430-3, *Buhl* Exhibit 306 (Deposition, *Buhl/Meighan v. Sprint*, David Eisenberg, pp. 14-15)] The evidence also includes the letter from the Tennessee Attorney General, quoted at the beginning of this Statement of Facts, which carefully explains that the railroad's interest in Tennessee is a mere railroad easement, and

that the fee interest remains vested in the landowner. This letter landed at Sprint in 1985, long before Sprint got to Tennessee. [D-430-1, *Buhl* Exhibit 106 and 107 (Letters)] A complete summary of the *Buhl* Intervenors' evidence on punitive damages may be found in their Brief in Opposition to Preliminary Approval (Punitive Damages Issues) [D-429]

Until interrupted by the orders here on appeal, *Buhl/Meighan* was scheduled for trial in September, 2003.

* * * * *

In 1998, ten years after the Sprint build, the "second wave" of fiber-optics installation began. Qwest, the biggest player in the second wave, hired its general counsel straight from Sprint, where he had supervised the *Buhl/Meighan* litigation. But, like *Sprint*, *Qwest* did not ask permission from landowners and did not file condemnation lawsuits to obtain its right-of-way. Instead, it simply made agreements with railroads and proceeded to install its cable. Qwest tried to get the railroads to guarantee their title, but the railroad negotiators made it "vividly clear" that the railroad did not have good title, explaining that the railroad's title was like "Swiss cheese." And, in spite of repeated entreaties by Qwest, the railroad negotiators steadfastly refused to guarantee title, even telling the Qwest negotiators "Read my lips" and "N-O." [D-430-5, *Buhl* Exhibit 502 (Deposition, *Hord v. Qwest*, Bernard A. Bianchino, p. 1-50, 85); *Buhl* Exhibit 503 (Deposition, *Hord v. Qwest*,

Richard Keene, pp. 30-33); *Buhl* Exhibit 504 (Deposition, *Hord v. Qwest*, Ted Jackson, pp. 71-80)].

The Qwest crews arrived in Tennessee in April of 1998. Things went according to plan until they came to Elmwood Farms, owned by Charles (Bubba) and Joy Hord. They arrived at the Hord farm early in the morning with approximately ten trucks and bulldozers and lots of reels of conduit. But, before they had gotten very far, Joy Hord asked them to leave the property. [D-430-4, *Buhl* Exhibit 402]

The men left, but a month later, they were back, this time with a work train and a "rail plow" – a giant plow mounted on a railroad car. Before the day was over they had buried their conduit from one end of Elmwood Farms to the other. [D-430-4, *Buhl* Exhibit 402]

Seven days later, the Hords filed a class action complaint against Qwest and the CSX Railroad in Tennessee state court. [D-430-1, *Buhl* Exhibit 401] The court certified the case as a mandatory class action on June 13, 2000. [D-426, Vowell Affidavit, Document 17] The court later entered an order requiring Qwest to post bond to secure the award of compensatory damages for the class of Tennessee landowners. [D-426, Vowell Affidavit, Document 18] The plaintiffs filed the affidavit of an MAI real estate appraiser which stated that the value of the property taken from the Tennessee class members was $15-$19 per foot, for a total value of $14,720,000 - $18,400,000 for the entire Tennessee corridor. [D-426, Vowell Affidavit, Document 19] On

Feb. 28, 2003, the court set the amount of the bond at $5,030,480, or $5.25 per foot. Qwest has now paid the money to the Clerk, and it is safely on deposit, drawing interest for the class members. [D-430-4, *Buhl* Exhibit 406; Buhl-Apx-5-6]

Twenty-one depositions have been taken in Murfreesboro, Knoxville, Nashville, Denver, Kansas City, and Jacksonville. [D-426 (Vowell Affidavit, Ex-20)] A complete summary of the *Buhl* Intervenors' evidence that Qwest knew that it was acting illegally may be found in their Brief in Opposition to Preliminary Approval (Punitive Damages Issues) [D-429]

Until interrupted by the orders here on appeal, the case was expected to be tried in February of 2004. [D-430-1, *Buhl* Exhibit 703]

3. The First Chicago Proceedings and the Flight to Oregon

In 1998, ten years after the filing of *Buhl/Meighan v. Sprint*, other plaintiffs around the country began filing similar class actions. The first of these cases was *Hord v. Qwest*, filed in Tennessee in May of 1998. By the latter part of 2000 the number of cases filed against the settling defendants had grown to forty. [D-430-4, *Buhl* Exhibit 401; D-unavailable (*Smith* Counsel Memorandum, p. 3 (9-4-02)] However, only three were certified as class actions: *Buhl/Meighan v. Sprint* and *Hord v. Qwest* in Tennessee and *Chem-Tronics v. Sprint* in Kansas. Against that background, the settling defendants banded together to attempt a nationwide settlement. They chose the *Smith* counsel as their dance partner, and shot them a deal. [D-unavailable (*Smith* Counsel Memorandum, p. 3, 7 (9-4-02); D-unavailable

(*Smith* Counsel Memorandum, p. 5 (6-25-03)] The deal included three basic terms. First, the landowners could attempt to claim $.60 per foot. Second, defendants would be granted a permanent easement over the entire width of the cable side of the right-of-way. (In Tennessee this is usually 100 feet wide.) Third, the *Smith* counsel would get all the attorney fees for the entire country. [D-unavailable, Settlement Agreement, pp. 5-7, 14, 16, 18, 22-23, Ex. E; Chem-Apx-35, 115; D-426 (Vowell Affidavit, Ex- 22, Railroad Charters)]

The *Smith* counsel had filed several cases, but none were certified as class actions, and they had lost on all three class certification motions that they had argued. [D-unavailable (*Smith* Counsel Memorandum, p. 3-5 (9-4-02); D-unavailable (*Smith* Counsel Memorandum, p. 5-9 (6-25-03); *Smith v. MCI*, No. 99-3555 (N.D. Ill), transferred to N.D. Okla. and renumbered 99-CV-681-H; *Chambers v. Sprint*, No. 00-C-0348C; *Chambers v. MCI*, No. 00-C-0349C] And their first case had not been filed until the fall of 1998, eleven years after the Sprint installation. [D-unavailable (*Smith* Counsel Memorandum, p. 3 (9-4-02)]

As it happened, the *Smith* counsel jumped at the offer, and the settlement was teed up in Chicago in the case at bar. Virtually every other plaintiffs' group came to Chicago to contest the settlement. [D-112, Transcript 10-29-01, pp. 17-19] After a few hearings, Judge Andersen commented that he was "disinclined" to approve an offer that "isn't embraced by a broad range of plaintiffs". [D-117, Transcript 11-8-01, p. 19] Shortly thereafter, the settling

parties submitted the settlement in District Court in Eugene, Oregon. After one hearing, the Oregon court dismissed the case on grounds of "judge shopping." *Zografos v. Qwest Communications Corp.*, 225 F.Supp.2d 1217, 1223 (2002)

4. The Return to Chicago

Eventually the settling parties returned to Chicago and teed the settlement up again. In their papers, the *Smith* counsel took the position that after "vigorously prosecuting" their cases for a "substantial period of time" [about two years], "twelve months of complex [and arduous] negotiations", and "countless telephone negotiations", they had developed a "rationale for settlement." They feared that they could not clear three "difficult hurdles": 1) getting class certification, 2) establishing liability, and 3) proving damages. Therefore, said the *Smith* counsel, it was reasonable to accept the settlement that had been offered. [D-140; D-unavailable (*Smith* Counsel's Memorandum, pp. 1, 5, 17-18, 21-26 (9-5-02); D-unavailable (*Smith* Counsel's Memorandum, p-2, (6-25-03)]

A few changes were made to the settlement agreement, and Judge Andersen gave it preliminary approval on July 25, 2003. [D-367 (Order), Chem-Apx-1] At the same time, Judge Andersen issued a separate order stating that all similar class actions nationwide were enjoined, including *Buhl/Meighan v. Sprint* and *Hord v. Qwest*. [D-369 (Order), Chem-Apx-10]

The preliminary approval order directs the settling parties to identify the current landowners by reference to property records, and to then send them a

class action notice advising them that they have the right to opt-out of the class. The settling parties have advised the Court that the process of identifying these landowners will take at least one full year. [D-112, Transcript 10-29-01, p-37-38]

The settlement as approved includes the following basic provisions:

1. Landowners who hold fee simple title have the right to claim $1.60 per foot, less certain deductions. Landowners who do not hold fee simple title have the right to claim $.26 per foot, less certain deductions. [D-unavailable, Settlement Agreement, pp. 19-27 (Chem-Apx-35)]
2. The compensation amounts could be adjusted on a state-by-state basis by law professors, with no appeal. The law professors would follow artificial Rules of Deed Construction that do not follow the law of many states, including Tennessee, and that would disqualify a large number of deserving landowners. [D-unavailable, Settlement Agreement, p. 25, 34 (Chem-Apx-35)]
3. The defendants would be granted an easement 16 feet wide, with the right to relocate their system anywhere within the cable side of the right-of-way, which in Tennessee is usually 100 feet wide. In relocating the cable, the fiber-optics companies would be required to "endeavor, to the greatest extent practicable" not to interfere with any existing land use. [D-unavailable, Settlement Agreement, pp. 7-8, 28-29, Ex. E (Chem-Apx-35, 115-119); D-426 (Vowell Affidavit, Ex- 22, Railroad Charters)]
4. The settlement gives the defendants broad rights to walk away from the settlement at any time in the next year or even longer. [D-unavailable, Settlement Agreement, pp. 18, 38-39, 42-43 (Chem-Apx-35)]
5. All railroad companies nationwide would be released from liability, without their paying a cent. [D-unavailable, Settlement Agreement, pp. 7-8, 28-29 (Chem-Apx-35)]

Summary of Argument

The orders below have the effect of superceding, subsuming, and enjoining *Buhl/Meighan v. Sprint* and *Hord v. Qwest*, two class actions that pre-date *Smith v. Sprint* by as many as 12 years and that are certified in Tennessee

state courts. By this appeal the representative plaintiffs in the Tennessee cases ask the Court to reverse the orders below. The foundation of the argument is the fact that the *Smith* representatives – "disarmed" because their case is not certified as a class action and horribly handicapped because they delayed eleven years in filing suit – could not possibly serve as adequate representatives of the certified classes in *Buhl/Meighan v. Sprint* and *Hord v. Qwest*. The *Smith* representatives have settled for practically nothing because they were afraid that they could not clear "three difficult hurdles": 1) getting class certification, 2) establishing liability, and 3) proving damages. However, after fifteen years of litigation and three decisions of the Tennessee Supreme Court, the certified Tennessee classes have already cleared each of these three hurdles. Both cases are certified as mandatory class actions, the Tennessee Supreme Court has already ruled that the defendants are liable, and the Tennessee Supreme Court has already approved the use of aggregate damages. Further, the plaintiffs' proof in *Hord v. Qwest* is that compensatory damages will be $15-19 per foot, with punitive damages expected to multiply that figure by several times. The trial court has required Qwest to post a cash bond of more than $5,000,000, which is safely on deposit with the clerk of court. And trial dates were imminent in both cases. The *Smith v. Sprint* representatives may be typical representatives of people who waited eleven years to file suit, who aren't certified as a class action, who are on the wrong side of the three difficult hurdles, who don't have $5,000,000 in the bank, and

who don't have any prospect of a trial date. But they are not typical of the certified classes in the Tennessee cases and their cases are not superior to the Tennessee cases. The effect of the orders below is to unfairly discriminate against the certified Tennessee classes, dragging them down to the level of people with horribly defective cases. A worse case of conflict of interest between the representative plaintiffs and those represented would be hard to imagine.

The orders below should also be reversed for lack of subject matter jurisdiction. The key fact in this regard is that the orders have the effect of condemning a 100-foot wide floating easement from one end of the country to the other. In Judge Andersen's own words, it is the grant of "staggering property rights" by "judicial fiat." Yet, the Illinois court does not have jurisdiction to condemn property outside the state of Illinois, and particularly does not have jurisdiction to condemn land in Tennessee. Furthermore, the takings procedure violates due process of law. Similarly, the local action doctrine provides that all lawsuits, eminent domain or otherwise, that seek or claim title to land must be brought in the state where the land lies. The *Rooker-Feldman* doctrine, which prohibits federal district courts from hearing issues that have previously been decided in state court, or are "inextricably intertwined" with those issues, cements the matter further. It would be hard to deny that the issues decided below are "inextricably intertwined" with the issues that have been decided by the Tennessee courts over the last 15 years.

The claimed statutory basis for jurisdiction is diversity and federal question jurisdiction. However, the settling parties did nothing to establish that they have satisfied the amount in controversy requirement. And, the case presents ordinary state-law claims of trespass, inverse condemnation and the like, rather than federal question claims.

Furthermore, the Illinois court does not have personal jurisdiction over the Tennessee class members, who are not present within the territory of Illinois, who do not have minimum contacts with the state of Illinois, and who have not given consent to jurisdiction. The settling parties would infer consent from the opt-out procedure. Specifically, they would assume that class members who do not opt-out have consented to the court's jurisdiction and have further consented to conveying a 100-wide floating easement to the fiber-optics companies! The idea that one can lose his real estate because he does not respond to a class action notice cannot be taken seriously.

In any event, the injunction below should be reversed, because it was issued in violation of the Anti-Injunction Act, which prohibits federal courts from issuing injunctions against state court actions except in three specifically enumerated exceptions, none of which apply to the situation at hand.

Finally, the orders below might also be reversed on simple grounds of abstention and comity.

Argument

1. The Class Certification Order Should Be Reversed Because the *Smith* Representative Plaintiffs Were Not Adequate Representatives of the Certified Tennessee Classes and Because the Settlement Agreement Discriminates Unfairly Against the Certified Tennessee Classes

Standard of Review: Class certification decisions are ordinarily reviewed for abuse of discretion. *Cusack v. Bank of Texas,* 159 F.3d 1040 (7th Cir. 1998).

This case was settled before it was certified. In such cases, the proposed settlement must be subjected to "heightened scrutiny" and the court must be "even more scrupulous than usual" or "doubly careful" before approving a settlement, and in particular the court must have a "*special focus* on assuring adequate representation." *In re General Motors Corporation Pickup Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 805 (3rd Circuit 1995) (emphasis added).

The representative plaintiffs in the case at bar were totally and completely "disarmed", because their case was not certified as a class action, and, therefore, they could not use the threat of litigation to press for a better offer. [*Amchem Products v. Windsor*, 521 U.S. 591, 622, 117 S.Ct. 2231, 2248-49, 138 L.Ed.2d 689 (1997)] It has been held that counsel "not prepared to try a case" is inadequate "almost by definition":

> The *Amchem* Court also noted the problem of counsel "not prepared to try a case." Such counsel is, almost by definition, inadequate because an inabililty or unwillingness to try a case means the class loses all of the benefits of adversarial litigation.

Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1021 (9th Cir. 1998)

Perhaps in some circumstances uncertified, disarmed class representatives might be suitable, but here they are attempting to represent the classes in *Buhl/Meighan v. Sprint* and *Hord v. Qwest* that *are* certified and, therefore, armed. *What we have is a case of the disarmed representing the armed*. This realization puts into sharp and unmistakable focus the fact that the *Smith* representatives are simply not adequate representatives of the certified classes in *Buhl/Meighan* and *Hord v. Qwest*.

But the problems of the *Smith* representatives go deeper than simply being disarmed at the present time. It is apparent that *Smith v. Sprint* could never be certified as a nationwide class action for trial. See *Isaacs v. Sprint Corporation*, 261 F.3d 679 (7th Cir. 2001) Therefore, in addition to being presently disarmed, the *Smith* representatives had no capacity to arm themselves in the future. As "champions" of the certified Tennessee classes, therefore, they were pretty much worthless.

The problem of the disarmed representing the armed is obviously unsatisfactory and impossible, even without consideration of additional facts, and when the additional facts are figured in, it only gets worse. The *Smith* counsel's "rationale for settlement" was the fact that they did not believe that they could clear three "difficult hurdles": 1) obtaining class certification, 2) establishing liability and 3) proving damages. However, the certified classes in *Buhl/Meighan v. Sprint* and *Hord v. Qwest* have already cleared these hurdles. As mentioned, both cases are certified as class actions, which has

been specifically approved by the Tennessee Supreme Court in *Buhl/Meighan v. Sprint*. The Tennessee Supreme Court has already ruled that the defendants are liable. As for damages, the Tennessee Supreme Court has already approved the use of aggregate damages, and the plaintiffs' proof in *Hord v. Qwest* is that compensatory damages alone will be $15-$19 per foot, just for the approximately eight inches that Qwest is actually occupying, not for the 100-foot wide floating easement that would be granted in the settlement. Punitive damages could multiply the compensatory damages figure by two or three times or even more. If punitive damages were a conservative double of compensatory damages, a likely total damages figure would be $45-$57 per foot. The settlement agreement proposes a maximum compensation of $1.60 per foot, with deductions that would reduce the figure substantially. Without even taking these deductions into account, and without taking into account the fact that the settlement takes 100 feet wide compared to the present occupation of only eight inches, the reduction from $45 to $1.60 would result in a discount of 96%. A 96% discount in a case which is already certified as a class action and in which liability is already established! And in which $5,000,000 is already in the bank!

The "State Law Adjustment" is not a solution to the problem of the 96% discount. Briefly stated, all the State Law Adjustment amounts to is a statement by the trial court of "Don't worry, we'll get some law professors to figure that out later." The trial court's constitutional and fiduciary duty to see

that class members are treated fairly is impermissibly handed off like a baton to a couple of law professors! [*See Reynolds v. Beneficial National Bank*, 288 F.3d 277, 280 (7th Cir. 2002)] The presence of the law professors is no consolation to the certified classes in *Buhl/Meighan v. Sprint* and *Hord v. Qwest*. From their negotiating position, it would be ludicrous to say "Oh, fine, we'll let a couple of law professors decide the case." There is simply no reason why they would or should subject their claims to a crapshoot involving law professors, with no right to appeal. They would have to be grotesquely reckless and stupid to do so. And no decent representative of their interests would have agreed to it.

But there are still other insurmountable problems with the State Law Adjustment. First, the law professors are directed to follow artificial Esperanto "Rules of Deed Construction" that are not the law of Tennessee, and probably not of any state, and that would disqualify a large number of deserving Tennessee landowners. [See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995)] For instance, under the Rules of Deed Construction, representative plaintiff Joe Meighan would be disqualified, because his source deed includes the words "strip of land" in the "granting clause, even though a different clause clearly limits the grant to railroad use. Under archaic rules of construction, great emphasis was given to whether certain language appeared in the "granting" clause, the "habendum" clause, or some other clause. However, that approach has long been discarded in

Tennessee, where the court simply ascertains the intent of the parties with reference to the instrument as a whole. In Tennessee, "…technical rules as to division of deeds into formal parts will not prevail against the manifest intent of the parties." *Southern Railway Co. v. Griffits*, 304 S.W.2d 508, 510 (Tenn. App. 1957). Using that approach, the Tennessee court has *already determined* that Mr. Meighan is a fee simple owner! [D-unavailable, Settlement Agreement, pp. 35-38; D-430-1, *Buhl* Exhibit 121 (Chem-Apx-35)]

Further, the law professors would be directed to take state law into account and nothing else. Of course much more than state law is involved in determining damages and bargaining strength in a given case. For instance, the fact that the Tennessee cases are certified as class actions – the most compelling factor of all – would not be taken into account. The fact that trial dates were imminent in both Tennessee cases would not be taken into account. Likewise, the Tennessee evidence that compensatory damages will be $15-$19 per foot would not be taken into account. The fact that a $5,000,000 bond is on deposit would not be taken into account. The evidence that counsel have assembled on punitive damages would not be taken into account. Last but not least, litigants like the *Smith* representatives, who waited eleven years to file suit, and therefore face obvious statute of limitation defenses, are paid the same as litigants who filed suit timely – a "downright weird" result. *In re Blood Products Litigation,* 159 F.3d 1016, 1018 (7th Circ. 1998).

The Court should also consider the credentials of the *Smith* representative plaintiffs. One was from Wisconsin, one from Arizona, one from Illinois, and three from Wyoming, each evidently intended to somehow serve as the representative of class members in all other states. Obviously, there is no representative from Tennessee. Compare *Hanlon v. Chrysler Corporation,* 150 F.3d 1011, 1020 (9th Cir. 1998) – all states and all models represented. The only representative plaintiff who testified at the hearing, Mr. Chambers, had been advised by the *Smith* counsel that he would lose if the case went forward, because he did not own the fee simple interest in the property[7]. For that reason, Mr. Chambers thought the settlement was a good idea. He reasoned like this: why not take the settlement and thereby receive $.26 per foot, because otherwise I will receive nothing? Likewise, he probably wasn't worried about giving up a 100-foot wide floating easement across his property, because he figures it wasn't his property to begin with. [D-398, Transcript 7-2-03, p. 75-76, 83-84, 88-90]

The same point can be made in terms of "typicality" or "superiority". The *Smith* representatives might indeed be typical representatives of a class of people who wait eleven years before filing suit, who aren't certified as a class action, who are on the wrong side of three difficult hurdles that they are pretty sure they can't jump, who don't really own the property to begin with and who don't have any prospect of a trial date. In short, they might be

[7] Since he is evidently not a fee simple owner, it would appear that Mr. Chambers has no "cognizable injury" and therefore no standing to sue. See *Amchem Products v. Windsor*, 521 U.S. 591, 613, 2244, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

typical representatives of people who have terrible, horrible lawsuits. But they are not typical representatives of people who filed suit timely, who are certified as a class action, who have already cleared the three difficult hurdles, who really do own the property, who have trial dates right away, and who have $5,000,000 in the bank.

Similarly, the *Smith v. Sprint* settlement might be considered superior by all the people who waited eleven years before filing suit, etc. But, for the certified Tennessee classes, getting sucked into *Smith v. Sprint* is like swapping a pretty good car that is going somewhere, for a broken down jalopy that nobody can get started. And to boot, the broken down jalopy is on the wrong side of three rivers that they have already crossed. For the certified Tennessee classes, it is hard to imagine how *Smith v. Sprint* could be considered superior to their own cases.

In summary, the settlement proposes to comply with *Amchem* by delegating the future creation of subclasses to professors on a non-appealable basis. Just as the plaintiffs in *Isaacs* could not avoid appellate review of preliminary approval by a "conditional" and "tentative" certification with changeable terms, the defendants cannot avoid appellate review of preliminary approval by refusing to identify the subclasses which will be created, what their compensation will be, and who the alleged subclass representatives are. [*Isaacs v. Sprint Corporation*, 261 F.3d at 682] The failure to identify these subclasses or their representatives is simply an

attempt to evade *Amchem's* admonition that "members of each subgroup must understand that their job is to represent solely the members of their respective subgroups." [*Amchem Products v. Windsor*, 521 U.S. at 627, 117 S.Ct. at 2251] Tennessee litigants do not know what subclass they might end up in, what their compensation will be or which of the named representatives allegedly represents them. Instead of *Amchem's* clearly defined, cohesive subclasses represented by an identified subclass representative with defined subclass compensation, the Tennessee litigants are in the Twilight Zone. Two college professors will lead them out of this darkness into the light.

2. The Class Certification Order Should Be Reversed As To the Tennessee Cases Because the Illinois Trial Court Did Not Have Jurisdiction of the Subject Matter of Those Cases

(And Because the Takings Procedure Violates Due Process of Law)

Standard of Review: The trial court's legal conclusions are reviewed *de novo*. [*In re VMS Securities Litigation*, 103 F.3d 1317, 1323 (7th Cir. 1996)]

Perhaps the most remarkable thing about Judge Andersen's order is that it would condemn real estate in almost every state in the union. In Judge Andersen's own words, it is the grant of "staggering property rights" by "judicial fiat":

> I believe that if in this case we grant this easement, it is a staggering property right that is going to be granted by judicial fiat.

[D-398, Judge Andersen, Transcript 7-2-03, p. 6]

The "staggering" property right that would be taken is best approached by recognizing that, at present, Sprint's Tennessee fiber-optics system consists

of a single cable that occupies a space approximately two inches wide, and that Qwest's Tennessee fiber-optics network consists of four conduits occupying a space approximately eight inches wide. However, after the settlement is approved, both Sprint and Qwest will have the right to occupy 16 feet in width, and will also have the right to relocate their system anywhere within the cable side of the right-of-way, which in Tennessee is usually 100 feet wide. In relocating the cable, the fiber-optics companies would have to "endeavor, to the greatest extent practicable" not to interfere with any existing land use. In other words, the fiber-optics companies would have the right to tear down whatever houses might lie in their way, but would have to "endeavor, to the greatest extent practicable" not to do so! [D-unavailable, Ex. E (Chem-Apx-35, 116)] [See D-410, *Buhl* Exhibit 708, Right-of-Way Study (photographic), (Buhl-Apx-7)]

The result is a "floating" or "roving" easement, which burdens the entire 100-foot width of the right-of-way:

> These easements ["floating" or "roving" easements] burden the entire servient estate and therefore tend to hamper development, limit financing possibilities, and impede alienation of the property.

Bruce & Ely*, The Law of Easements and Licenses in Land*, (Mar. 2003), §7:7 Practical Impact of Floating Easements.

The easement is indeed "staggering": 36,000 miles long, from sea to shining sea, and, at least in Tennessee, 100 feet wide! An incredible amount of real estate tied up in perpetuity! [See D-410, *Buhl* Exhibit 708, Right-of-Way Study (photographic), (Buhl-Apx-7)]

The settlement agreement accomplishes the taking by ordering each class member to execute a document that conveys the easement to the defendants. [D-unavailable, Settlement Agreement, p. 28-29 and Ex. E; Chem-Apx-35, 115-119] Of course, there will be many people who do not execute the document, including all of the people who simply discard the class action notice without reading it, or without understanding it. The settlement agreement has a solution for these people: the court will appoint an agent who will execute the document for them, pursuant to Rule 70 of the Federal Rules of Civil Procedure. This Rule allows the court to "direct a party to execute a conveyance of land" and empowers the court to appoint an agent to act for any "disobedient party" who fails to act as directed.

The result is that people who do not read or understand their class action notice would simply wake up one day and find out that Sprint or some other company has acquired a floating easement 100 feet wide from one end of their property to the other. The effect is more or less like a letter sent to the landowners that states as follows: "*If you don't respond to this notice, we get your land*." The due process impossibility of this situation is evident without further discussion.

The situation is similar to one previously dealt with by this circuit:

> …where class members are stunned to find that, although aligned as plaintiffs, they are net losers, just as if the original defendants had filed and prevailed on a counterclaim of which they received no notice and over which the state court had no jurisdiction. In effect, though not in name, this was a defendant class…

Kamilewicz v. Bank of Boston Corporation, 100 F.3d 1348, 1350 (7th Cir. 1996) (dissenting opinion).

At this point it should be obvious that the landowners, although called "plaintiffs" in the caption, are actually defendants, whose property is being condemned by the court's orders. The idea that the Illinois court might have the power to condemn land outside of Illinois is simply astounding. The power to condemn land in a given state belongs to that state and that state alone:

> When the people of the American colonies became independent of Great Britain, each colony became a sovereign state, and by the mere fact of sovereignty assumed absolute control over the persons and property within its jurisdiction…Upon the acceptance of such sovereign powers each state was vested with the general power of eminent domain…*Each one of the states of the union, by the mere fact of its being sovereign, has complete and unqualified control over the persons and property within its jurisdiction.*

[*Nichols on Eminent Domain*, Third Ed., 1-86-87 (emphasis added]

The only way land in Tennessee can be condemned is by following the procedure set out in the Tennessee eminent domain statutes:

> But it is a sound and inflexible principle of constitutional law that private property cannot be taken and appropriated to a public purpose under the power of eminent domain except in accordance with legislative regulation and in strict pursuance of statutory authority. The corporation claiming the right to appropriate must follow the proceedings authorized by law, for in no other way can it deprive a citizen of his property right.

[*Atlanta, K. & N. Ry. Co. v. Southern Ry. Co.,* 131 F. 657, 665 (6th Cir. 1904)]

The Tennessee legislature has delegated the power of eminent domain to telephone companies by means of T.C.A. §65-21-101 and §201 *et seq* and §29-

16-101 *et seq*. As one would expect, these statutes require the suit to be brought in Tennessee. The obvious rationale for this provision is to allow the landowner to defend the suit in Tennessee, rather than some far-away place such as Illinois.

The Settlement Agreement also provides for something called "Ancillary Proceedings", which are described as state court lawsuits brought "to enforce the Order and Judgment with regard to the *transfer of real property*…" [D-unavailable, p. 43-44; Chem-Apx-35] The "ancillary proceedings" would be brought by the *Smith* representative plaintiffs against the fiber-optics companies for the purpose of effectuating the "*transfer of real property*" and quieting title to "*the interest in real property acquired pursuant to this Settlement*." [*Id*.] (all emphasis added)

However, these after-the-fact "ancillary proceedings," which might be brought in Tennessee, are no answer to the problem, because they are to be brought *after* the taking has occurred, that is, after the landowner has already lost the ownership of his land. The "ancillary proceedings" are thus not brought to effectuate the taking, but merely to confirm what has already been taken. The landowner who wanted to defend title to his real estate would obviously have to do so in Illinois. A second and related problem is that the "ancillary proceedings" are not brought by the condemnor, as is required by the Tennessee statutes. Instead, they are to be brought by the *Smith* representative plaintiffs, who by pre-arrangement would "take a dive" in

order to confirm that the fiber-optics companies have acquired the landowner's former property!

If there is any doubt that the proposed procedure would not pass muster to condemn property in Tennessee, the *Buhl* Intervenors request the Court to certify the question to the Tennessee Supreme Court pursuant to Seventh Circuit Rule 52 and Tennessee Supreme Court Rule 23, as requested in the motion filed herewith.[8]

Closely related to the simple lack of power to condemn land outside of Illinois is the local action doctrine, which provides that all lawsuits – eminent domain or otherwise – that seek to claim or establish title to land must be brought in the state in which the land lies. The Fifth Circuit upheld the continuing validity of the local action doctrine as recently as 1987, noting that "overwhelming precedent" and "numerous salutary reasons" supported the rule that "a court sitting in one state cannot adjudicate title to land situated in a different state…" [*Hayes v. Gulf Oil Corporation*, 821 F.2d 285, 290 (5th Cir. 1987)]

Accordingly, the Fifth Circuit held that "federal and state courts lack jurisdiction over the subject matter of claims to land located outside the state in which the court sits." [*Id.*, at 287] The Fifth Circuit therefore concluded

[8] The taking of real estate from the landowners is also impossible under the present state of the pleadings, because the "defendant" fiber-optics companies have not filed counter-claims seeking any relief from the landowners. However, this somewhat bizarre shortcoming is a mere peccadillo compared to the want of power to condemn.

that "[a] local action involving real property can only be brought within the territorial boundaries of the state where the land is located." [*Id*.]

Although this Court has held that an action that only "indirectly" affects real estate may be considered transitory for venue purposes[9], there should be no doubt that the present case – the taking of a "staggering property right" by "judicial fiat" – is a direct local action. That being the case, it should be clear that the action may not proceed in the Illinois court, except as to property located in Illinois.

The *Rooker-Feldman* doctrine cements the matter even further. This doctrine prohibits a federal district court from either sitting in direct review of matters that have been previously adjudicated in state court, or from adjudicating claims that are "inextricably intertwined" with the merits of a judgment rendered in a state court proceeding. *Rooker v. Fidelity Trust Co*., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 486, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1982). The crux of the question is "whether there has already been actual consideration of and a decision on the issue presented." *Robinson v. Ariyoshi*, 753 F.2d 1468, 1472 (9th Cir. 1985). If so, the action in federal court is an impermissible "appeal" from the state court decision. *Id*.

This Court has recently joined the growing majority of circuits that have held that the *Rooker-Feldman* doctrine applies to interlocutory as well as final decisions of state courts. [*Schmitt v. Schmitt*, 324 F.3d 484 (7th Cir.

[9] *Musicus v. Safeway Stores*, 743 F.2d 503, 508 (7th Cir. 1984).

2003) (preliminary support and property orders in state court divorce action precluded party from bringing a related action in federal court.)] The Sixth Circuit has also recently joined the majority on this issue: "We…join with the majority of circuits that have concluded that the *Rooker-Feldman* doctrine does apply to interlocutory orders and to orders of lower state courts." *Pieper v. American Arbitration Association*, 336 F.3d 458, 462 (6th Cir. 2003).

The Tennessee courts have had jurisdiction of the controversy in *Buhl/Meighan v. Sprint* for almost fifteen years, and in *Hord v. Qwest* for five years. The Tennessee Supreme Court has issued three separate opinions in *Buhl/Meighan v. Sprint*, including the 1992 decision that Sprint is liable, the 1996 decision that the action should proceed as a class action in a Tennessee trial court, and the 1997 decision that affirmed, among other things, that the first decision established that "Sprint's use of the property constituted the taking of an interest therein for which the landowners were entitled to be compensated." *Buhl v. Sprint*, 840 S.W.2d 904 (Tenn. 1992), *Meighan v. Sprint*, 924 S.W.2d 632 (Tenn. 1996), *Meighan v. Sprint*, 942 S.W.2d 476, 478 (Tenn. 1997). The Tennessee Court of Appeals has issued three decisions. The Tennessee trial courts have certified both cases as mandatory class actions. The court in *Hord v. Qwest* has required Qwest to post cash bond of more than $5,000,000, which is now in the possession of the court. The Tennessee trial courts have entered other orders too numerous to

mention. And trial is imminent in both cases, or at least was imminent, until interrupted by the court's orders below.

All of these decisions by the Tennessee trial courts, the Tennessee Court of Appeals, and the Tennessee Supreme Court would be subsumed and superceded, not to mention enjoined, by the orders below. It would be hard to say, under these circumstances, that the orders below are not "inextricably intertwined" with the issues that have already been considered and decided by the Tennessee courts. For example, one interesting effect of the trial court's orders would be the forced refund of most of the $5,000,000 bond in *Hord v. Qwest*. As mentioned, this bond is based on $5.25 per foot, whereas the settlement would pay, at most, $1.60 per foot or $.26 per foot.

The final jurisdictional problem is the lack of either diversity or federal question jurisdiction. As a beginning point, it should be noted that the defendants in *Hord v. Qwest* initially removed that case to federal court, claiming diversity jurisdiction. However, the federal court remanded the case to the Tennessee state court, holding that diversity jurisdiction did *not* exist:

> …the Court finds that it *lacks diversity jurisdiction* over this case. Accordingly, the Court finds that remand to the state court is proper under 28 U.S.C. §1447(c).

Memorandum, Aug. 20, 1998, *Hord v. Qwest*, (U.S.D.C. M.D. Tenn.) (emphasis added) [D-426, Vowell Affidavit, Ex-13]

This remand judgment is a final judgment from which there is no appeal, and is now *res judicata.* [See 28 U.S.C. §1447(d) (no appeal from remand judgment for lack of subject matter jurisdiction] Thus it is settled, once and

for all, that diversity jurisdiction does not exist as to the subject matter of *Hord v. Qwest*. The effect of the decision below is to impermissibly undo or reverse this judgment.

Moreover, the rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court. The presumption is that the federal court lacks jurisdiction until it has been demonstrated that jurisdiction exists. The burden is on the party claiming jurisdiction to demonstrate that the federal court does indeed have jurisdiction. [See Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 3522 Courts of Limited Jurisdiction.] Where contested, the trial court cannot simply take an allegation that the requirements of diversity jurisdiction at "face value." [*Isaacs v. Sprint Corporation*, 261 F.3d 679, 683 (7th Cir. 2001)]

The *Buhl* Intervenors challenged the existence of diversity jurisdiction below, but the settling parties did not respond. No proof of the value of the representative plaintiffs' claims. No proof of the cost of compliance with injunctive relief. Nothing whatsoever upon which the court could make a determination of the amount in controversy.

As for federal question jurisdiction, the settling parties rely upon the flimsy grounds that some of the railroad right-of-way in question was created by federal land grant. The Third Circuit has held that regardless of how the right-of-way may have been created, the cause of action herein is simply a

state-law cause of action for trespass, inverse condemnation, etc., and that for that reason there is no federal question involved in the case, and therefore no federal question jurisdiction. *Nicodemus v. Union Pacific Corporation*, 318 F.3d 1231 (10th Cir. 2003). The correctness of this decision is underlined by considering the analogous case of a citizen who purchases a building from the federal government, and thereafter the building is taken by eminent domain. The argument that this ordinary eminent domain case would somehow result in a federal question would be laughed out of court.

Moreover, the right-of-way in question in Tennessee is 100% on state-chartered right-of-way. [D-427; D-426, Vowell Affidavit, Ex-22] For that reason, there can be no federal question jurisdiction over the case and controversy presented by either *Buhl/Meighan v. Sprint* or *Hord v. Qwest.*

3. The Class Certification Order and the Injunction Should Be Reversed Because the Illinois Trial Court Did Not Have Personal Jurisdiction Over the Tennessee Landowners

Standard of Review: The trial court's legal conclusions are reviewed *de novo*. [*In re VMS Securities Litigation*, 103 F.3d 1317, 1323 (7th Cir. 1996)]

It is a "fundament of personal jurisdiction" that a person may not be bound to a judgment unless he 1) is present within the territory of the forum, 2) has "minimum contacts" with the forum, or 3) has consented to the court's jurisdiction, either explicitly or inferentially. Otherwise, due process of law is not satisfied. [See C*arlough v. Amchem Products, Inc.*, 10 F.3d 189, 199 (3rd Cir. 1993)]

In the case at bar, the Tennessee landowners were obviously not present with the territory of Illinois, nor did they have "minimum contacts" with the state of Illinois. Tennessee landowners would simply never reasonably anticipate being haled into court in Illinois to defend title to their real estate.

That leaves the settling parties with the third and final avenue for establishing personal jurisdiction: *consent*. The settling parties' idea is that the class members will be given notice and the opportunity to opt out. Therefore, argue the settling parties, if a class member fails to opt out, the court is free to infer that he has consented to the court's jurisdiction, and has further consented to conveying a 100-foot wide floating easement to the fiber-optics companies.

This argument has its problems:

> An inference of consent to be sued from a failure to return an opt-out form is so far from the knowing, voluntary type of consent that the court usually requires to support adjudicatory jurisdiction, and so contrary to normal assumptions about human nature in lawsuits, that an argument to the contrary is *close to absurd*.

Adjudicatory Jurisdiction and Class Actions, Ind. Law Journal, Vol. 62, 1986-87 (Diane P. Wood) (emphasis added).

It is surprising that such an argument – that a person might lose his real estate because he did not respond to a class action notice – would be made in modern America! More surprising is the idea that a court would actually approve of such a procedure, but that is exactly what has happened in the case at bar. The situation is similar to those cases studied in law school where a fly-by-night company sends unsolicited merchandise, say a box of

kitchen knives, and encloses a letter that says "In the event you do not return these fine kitchen knives, we will assume that you have consented to purchase them for $150."

In the trial court's defense, it should be recognized that the United States Supreme Court has held that that sometimes in an ordinary straightforward class action, a plaintiff class member who is afforded the right to opt out, but fails to exercise that option, may be deemed to have consented to jurisdiction. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). However, in a case like the case at bar, where the class members are actually defendants, with their property being condemned, the idea that they have consented to jurisdiction would be "almost absurd."

Furthermore, the Third Circuit has held that any inferential consent to jurisdiction does not take place until the class member has actually been given notice and the right to opt out has actually been extended. *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 199 (3rd Cir. 1993). For that reason, the Third Circuit held that an injunction issued before notice had been given, and before the right to opt out had been extended, violated the due process of law and was therefore invalid. *Id.*, 199-200. In reaching this conclusion, the Third Circuit stated as follows:

> …we find no precedent for assuming consent prior to notice and the commencement of the opt out period…(at 200)
>
> In short, the district court's pre-notice, pre-opt out period injunction was premature…(at 200)

> We do not believe that the mere promise, even certain eventuality, that the opportunity to opt out of the class will be offered to absent class members satisfies the requirements of due process as defined by *Shutts*... (at 200)
>
> Because of this emphasis by the Supreme Court on the *receipt* of the opt out forms, we reject the district court's implication here that the opt out requirement is satisfied in all cases where a class action will provide for the opportunity to opt out…(at 200)
>
> Thus, prior to notice and the opt out period, and absent minimum contacts with the Pennsylvania forum or consent to its jurisdiction, a federal injunction enjoining state actions would violate due process. (at 201)

Applying these principles to the case at bar, we see that notice has not yet been given and the class members have not been extended the opportunity to opt out. Indeed the notice is not expected to be sent for at least a year. Yet an injunction has been issued! Ironically, but for the injunction, the trials in both *Buhl/Meighan v. Sprint* and *Hord v. Qwest* would both have been completed long before the notice would be sent.

4. The Injunction Is Precluded by the Anti-Injunction Act and Should Not Have Been Issued In Any Event As a Matter of Equity

Standard of Review: The question of whether the injunction is precluded by the Anti-Injunction Act is a matter of law and is reviewed *de novo*. The question of whether the court should have issued the injunction, as a matter of equity, is reviewed for abuse of discretion. [*In re VMS Securities Litigation*, 103 F.3d 1317, 1323 (7th Cir. 1996)]

This Court is well familiar with the Anti-Injunction Act, 28 U.S.C. §2283, its three exceptions, the fact that the Act "in part rests on the fundamental constitutional independence of the States and their courts," the fact that "the

exceptions should not be enlarged by loose statutory construction," the fact that "any doubts as to the propriety of a federal injunction against state proceedings should be resolved in favor of permitting the state courts to proceed…," the fact that the dual system "could not function if state and federal courts were free to fight each other for control of a particular case," and the fact that it is "clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286, 287, 297, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970); *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 514, 75 S.Ct. 452, 99 L.Ed. 600 (1955).

The injunction in the case at bar purports to be based on the third exception: "where necessary in aid of its jurisdiction." As this Court has observed, "[h]istorically, this exception applied only to *in rem* rather than *in personam* proceedings…the general rule being that parallel *in personam* proceedings should be allowed to continue concurrently." *Zurich American Insurance Company v. Superior Court for the State of California*, 326 F.3d 816, 825 (7th Cir. 2003). As this court noted in *Zurich*, the Supreme Court has made it unmistakably clear that a simultaneous *in personam* state court action does not interfere with the jurisdiction of a federal court in a suit involving the same subject matter: "We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court…" *Vendo*

Co. v. Lektro-Vend Corp., 433 U.S. 623, 630-31, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977).

The Court explained the reasoning behind this rule as follows:

> But a controversy is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending.

Kline v. Burke Const. Co., 260 U.S. 226, 229, 43 S.Ct. 79, 81, 260 L.Ed. 226 (1922).

The Supreme Court has also noted that if the case is in *rem*, the local action doctrine would apply with full force and effect, as discussed above:

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court…*The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising jurisdiction over the same res to defeat or impair the state court's jurisdiction.* (emphasis added)

Kline v. Burke Const. Co., 260 U.S. 226, 229, 43 S.Ct. 79, 81, 260 L.Ed. 226 (1922).

This situation leaves the settling parties on the horns of a dilemma. If the action is *in rem*, the Illinois court might have the power to issue an injunction to protect its jurisdiction, but only if it was the first court to acquire jurisdiction. Here, where the Tennessee courts acquired jurisdiction as many as twelve years before the Illinois case got started, the Illinois court is obviously "precluded from exercising jurisdiction," because of the prior attachment of jurisdiction of the state court.

If, on the other hand, the action is *in personam*, the court would be precluded from issuing an injunction to protect its jurisdiction, because the mere existence of another *in personam* case would not interfere with the court's jurisdiction.

We are aware that some federal courts, including this one, have attempted to expand the third exception beyond the historical limits set by the Supreme Court, and have allowed injunctions in ordinary *in personam* class actions for damages. These cases generally proceed on the theory that an *in personam* class action for damages may be so far advanced that it is the "virtual equivalent of a res" and that therefore an injunction may issue under the third exception. This "judicial improvisation" has never been reviewed by the Supreme Court, which has strictly held the line against injunctions in *in personam* cases.

But assuming, for the sake of argument, that it is true that the *Smith v. Sprint* case became a "virtual res" after "eleven months of arduous negotiations", it would likewise be true that the Tennessee cases each became a "virtual res" after fourteen and five years, numerous appellate court decisions, mandatory class certification, and the posting of $5,000,000 bond. And, that being the case, it would be true that the Tennessee courts therefore acquired jurisdiction over the "virtual res" long before the Illinois court, and that the Illinois court would thereby be precluded from acquiring jurisdiction.

The court below specifically rested the injunction on three cases that are cited in the Order. However, the cases do not support the granting of the injunction. The first, *United States v. Silva*, 140 F.3d 1098 (7th Cir. 1998), is not a class action case, and it is difficult to understand why it is cited. In the second, *In re VMS Securities Litigation*, 103 F.3d 1317 (7th Cir. 1996), the Seventh Circuit held that the District Court had the power to "remove and enjoin the prosecution of *subsequent* state court claims in order to enforce its ongoing orders…" *Id*., at 1325. (Emphasis added) Obviously, *VMS* does not support the issuance of an injunction of a *prior* state action, particularly ones in which the state courts have invested as much as fifteen years and six appellate decisions. In the third, *In re Mexico Money Transfer Litigation*, 1999 WL 1011788 (N.D. Ill. 1999), the court likewise enjoined state court actions that were filed *after* the federal court action. And likewise, the case does not support the issuance of an injunction of a *prior* state action. In short, no Federal court has ever before entered an injunction in the circumstances presented by this case: state law causes of action filed in state court as many as eleven years before the subject Federal case, with three decisions of the state supreme court, etc.

5. The Class Certification Order and the Injunction Should Be Reversed as to the Certified Tennessee Classes on Grounds of Abstention and Comity

Standard of Review: The question of whether a particular grounds for abstention is available is a question of law that is reviewed *de novo*. The question of whether the court should have abstained, as a matter of equity, is

reviewed for abuse of discretion. [*In re VMS Securities Litigation*, 103 F.3d 1317, 1323 (7th Cir. 1996)]

The orders below might also be reversed on principles of abstention and comity. In *Quackenbush v. Allstate Insurance Company*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), the United States Supreme Court explained that the abstention doctrines are based on the equitable principles of *comity and federalism*:

> Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of *comity and federalism*.

Id., 517 U.S. at 723. (Emphasis added)

The abstention doctrines are derived from "equity jurisdiction," with the key rationale being to avoid "needless friction" with state policies and to promote "harmonious relations" between the two court systems. *Id.*, at 717-718, quoting *Railroad Commission of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The court should exercise a "wise discretion" that will maintain a "scrupulous regard for the rightful independence of the state governments." *Id.* Abstention would certainly seem to be appropriate in the case at bar with respect to the certified Tennessee classes, in light of the history discussed above.

Conclusion

Wherefore, the *Buhl* Intervenors respectfully request the Court to grant relief as follows:

1. To reverse the trial court's class certification order and injunction.

2. In the alternative, to direct the trial court to carve the Tennessee cases out of the class certification order and injunction.

Respectfully submitted,

_____

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_____

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Dated: Oct. 14, 2003

Certificate of Service

Counsel certifies that a copy of this brief has been served as stated on the following service list on the day set forth above:

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Seventh Circuit Rule 30(b) Appendix

1. *Complaint*, *Buhl v. Sprint* (Oct. 18, 1988)
2. *Buhl v. Sprint*, 840 S.W.2d 904 (Tenn. 1992)
3. *Meighan v. Sprint*, 924 S.W.2d 632 (Tenn. 1996)
4. *Meighan v. Sprint*, 942 S.W.2d 476 (Tenn. 1997)
5. Order Setting Amount of Bond, *Hord v. Qwest* ($5,030,480.00)
6. Wire Transfer, *Hord v. Qwest* ($5,033,284.24)
7. Right-of-Way Study, excerpts (photographic)

All of the materials required by Seventh Circuit Rule 30(a) are included in the Appendix of Intervenor/Appellant Chem-Tronics, and are adopted by the Buhl Intervenors/Appellants. All of the materials required by Seventh Circuit Rule 30(b) are included in this Appendix.