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CIVIL PROCEDURE — CLASS ACTIONS — SEVENTH CIRCUIT  
HOLDS THAT DENIAL OF CLASS CERTIFICATION CANNOT BIND  
UNNAMED CLASS MEMBERS. — *Smentek v. Dart*, 683 F.3d 373 (7th  
Cir. 2012).

For years, courts and commentators have struggled to resolve the problem of the “anomalous court” in class action law.<sup>1</sup> The problem arises because a decision denying class certification binds only the named plaintiffs and cannot bind the unnamed class members, as confirmed by the Supreme Court’s recent decision in *Smith v. Bayer Corp.*<sup>2</sup> Thus, unnamed class members are free to relitigate the same motion for class certification in subsequent cases, searching for the anomalous court that will certify the class. Recently, in *Smentek v. Dart*,<sup>3</sup> the Seventh Circuit confirmed that, under *Smith*, prior denials of class certification do not preclude subsequent attempts to certify the same class, even within the same federal district.<sup>4</sup> Unfortunately, the court unnecessarily went on to affirm a decision that treated two prior denials of certification of the same class as no more than persuasive authority.<sup>5</sup> It also failed to resolve the dispute by reaching the merits of the certification question.<sup>6</sup> The court thus missed an opportunity to ameliorate the anomalous-court problem.

*Smentek* was the third in a series of fourteen nearly identical class action lawsuits filed in the federal district court in Chicago on behalf of the inmates of Cook County Jail.<sup>7</sup> In each, the plaintiffs alleged that the jail’s policy of providing only a single dentist for approximately ten thousand inmates violated their rights under the Eighth and Fourteenth Amendments.<sup>8</sup> In the first case, Judge Leinenweber denied class certification after concluding that the class failed the commonality and typicality requirements of Rule 23(a) of the Federal Rules of Civil Procedure<sup>9</sup> and the predominance and superiority requirements of Rule 23(b)(3).<sup>10</sup> In particular, the court found that it could not determine whether staffing was inadequate without considering the im-

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<sup>1</sup> See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.11 cmt. a (2009) [hereinafter ALI AGGREGATE LITIGATION]; Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1664 (2008).

<sup>2</sup> 131 S. Ct. 2368, 2380 (2011).

<sup>3</sup> 683 F.3d 373 (7th Cir. 2012).

<sup>4</sup> See *id.* at 377.

<sup>5</sup> See *id.*; *Smentek v. Sheriff of Cook Cnty.*, No. 09-cv-529, 2011 U.S. Dist. LEXIS 155473, at \*2, \*7 (N.D. Ill. Aug. 17, 2011).

<sup>6</sup> See *Smentek*, 683 F.3d at 377.

<sup>7</sup> See *id.* at 374, 377.

<sup>8</sup> See *id.*

<sup>9</sup> *Smith v. Sheriff of Cook Cnty.*, No. 07-cv-3659, 2008 U.S. Dist. LEXIS 60248, at \*1-4 (N.D. Ill. July 16, 2008).

<sup>10</sup> *Id.* at \*5-6.

fact of that staffing level on individual plaintiffs, and additionally concluded that individual issues of causation and damages would “encompass the vast majority of the time and resources necessary to judge Plaintiffs’ claims.”<sup>11</sup> In the second case, Judge Darrah found Judge Leinenweber’s analysis “instructive,” and held that the predominance and superiority requirements barred certification.<sup>12</sup> The same lawyers filed a third essentially identical motion for certification in *Smentek*, but based on the previous two cases, Judge Lefkow held their motion precluded by collateral estoppel.<sup>13</sup>

A few months after that decision, however, the Supreme Court decided *Smith*, holding that after denying class certification, a federal court could not enjoin litigation of a similar class action in state court.<sup>14</sup> In reaching that holding, the Court found that a denial of class certification could not have preclusive effect on unnamed class members.<sup>15</sup> The Court noted, however, that it “would expect federal courts to apply principles of comity to each other’s class certification decisions when addressing a common dispute.”<sup>16</sup>

Relying on *Smith*, Judge Lefkow granted a motion for reconsideration in *Smentek* and determined that class certification could not be barred by collateral estoppel, since the plaintiffs were only unnamed class members in the prior cases.<sup>17</sup> Treating the prior decisions as “persuasive authority,”<sup>18</sup> the judge reconsidered the predominance and superiority issues and determined that the class could be certified.<sup>19</sup> Although she expressed concern about giving plaintiffs’ counsel a third bite at the certification question, Judge Lefkow was “convinced that the common issue does predominate.”<sup>20</sup> Whereas the prior opinions determined that individual issues of causation would predominate over common issues,<sup>21</sup> Judge Lefkow found that “[t]his case is better understood as requiring the plaintiff to prove that a condition of confinement . . . is one of deliberate indifference to serious medical need.”<sup>22</sup>

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<sup>11</sup> *Id.* at \*5.

<sup>12</sup> *Wrightsell v. Sheriff of Cook Cnty.*, No. 08-cv-5451, 2009 U.S. Dist. LEXIS 14521, at \*7–10 (N.D. Ill. Feb. 19, 2009).

<sup>13</sup> *Smentek v. Sheriff of Cook Cnty.*, No. 09-cv-529, 2011 U.S. Dist. LEXIS 155473, at \*1 (N.D. Ill. Aug. 17, 2011).

<sup>14</sup> *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2373 (2011).

<sup>15</sup> *Id.* at 2380.

<sup>16</sup> *Id.* at 2382.

<sup>17</sup> *See Smentek*, 2011 U.S. Dist. LEXIS 155473, at \*1–2.

<sup>18</sup> *Id.* at \*2.

<sup>19</sup> *See id.* at \*3–17.

<sup>20</sup> *Id.* at \*7.

<sup>21</sup> *Id.* at \*6–7.

<sup>22</sup> *Id.* at \*7.

Therefore, “the principal issue of causation is the systemic one[,] . . . not the variations in the need claimed by individual inmates.”<sup>23</sup>

The Seventh Circuit affirmed, although it limited the Rule 23(f) appeal “to the question of when a district court . . . should ‘defer, based on the principles of comity, to a sister court’s ruling on a motion for certification of a similar class.’”<sup>24</sup> Writing for a unanimous panel, Judge Posner<sup>25</sup> held that, under *Smith*, a denial of class certification could not preclude subsequent motions for class certification by unnamed class members.<sup>26</sup> The court began its analysis by noting that “[t]he Court’s reference to ‘comity’ in *Smith v. Bayer Corp.* was cryptic,” since the Supreme Court did not explain what it meant by the term, and “[n]either of the two cases that the Court cited . . . discusses comity.”<sup>27</sup> Judge Posner explored other sources addressing comity, explaining that the term usually refers either to a doctrine of respect between different sovereigns,<sup>28</sup> or to a doctrine by which different courts hearing parallel suits avoid “stepping on each other’s toes.”<sup>29</sup> Neither concept applies, however, when multiple suits are filed in the same federal court.<sup>30</sup> Thus, the court concluded that “[t]he version of comity announced in dictum in *Smith v. Bayer Corp.* is novel.”<sup>31</sup>

Despite the ambiguity, the Seventh Circuit rejected the argument that *Smith*’s version of comity could preclude subsequent certification in materially identical class actions, pointing out that such a rule would be inconsistent with the result in *Smith*.<sup>32</sup> Although concerned by the policy implications of a nonpreclusive rule, the Seventh Circuit concluded that it was “left with the weak notion of ‘comity’ as requiring a court to pay respectful attention to the decision of another judge in a materially identical case, but no more than that.”<sup>33</sup> The court then “emphasize[d] . . . the qualification in ‘materially identical,’” because “[e]ven two class actions involving the same class may differ ma-

<sup>23</sup> *Id.* at \*8.

<sup>24</sup> *Smentek*, 683 F.3d at 375. The defendants had also petitioned for review of the certification question on its merits. See Defendants’ Rule 23(f) Petition for Permission to Appeal at 3–4, *Smentek*, 683 F.3d 373 (No. 11-8022).

<sup>25</sup> Judge Posner was joined by Judges Wood and Tinder.

<sup>26</sup> See *Smentek*, 683 F.3d at 377.

<sup>27</sup> *Id.* at 375.

<sup>28</sup> See *id.* at 375–76.

<sup>29</sup> *Id.* at 376.

<sup>30</sup> See *id.* at 375–76.

<sup>31</sup> *Id.* at 376.

<sup>32</sup> See *id.* Additionally, Judge Posner noted that since “comity” in the international law context is not binding on courts, a rule of binding preclusion here would produce the “surprising” result of “giv[ing] comity greater force between two judges of the same court than between two nations each jealous of its sovereign authority and demanding respect from other nations.” *Id.*

<sup>33</sup> *Id.* at 377.

terially, . . . and where they do the judge in the second, or third, or nth class action is on his own.”<sup>34</sup>

After holding that *Smentek* was materially identical to the previous Cook County–prison cases, the court determined that Judge Lefkow had satisfied the “respectful attention” standard: “[T]he district judge gave plausible reasons for her disagreement with the judges in the two previous Cook County dental cases. Can more be required?”<sup>35</sup> Satisfied that the district court had properly applied the principles of comity demanded by *Smith*, the court affirmed the judgment, although it reminded the parties that its review was limited to the comity question; the court expressed no opinion on which of the three judges to review this class had been correct.<sup>36</sup>

The *Smentek* court seemed to articulate an intermediate standard of deference — “respectful attention” — that district courts owe to sister courts’ decisions on materially identical motions for class certification. In applying that standard, however, the Seventh Circuit needlessly exacerbated the anomalous-court problem in two ways. First, by affirming the decision below, the court revealed that its bark was worse than its bite: the district court’s opinion does not reveal that it considered the two prior decisions with any more deference than it would have given those opinions if they had involved materially different classes. Second, even if the lower court had applied the correct standard, the existence of multiple opinions reaching different results on essentially the same motion for class certification should have caused the panel to reach the merits of the certification question — as the defendants had requested<sup>37</sup> — in order to resolve the dispute between the district judges. These problems will only encourage gamesmanship by strategic class action plaintiffs and their lawyers.

Serial relitigation of class certification motions creates the potential for an anomalous-court problem: even if most judges in the country would agree that a proposed class does not comply with the requirements of Rule 23, plaintiffs can dramatically increase the odds of finding an anomalous court willing to certify their class by relitigating the issue a few times.<sup>38</sup> Because the binding effects of the class certification decision are asymmetrical — only grants, not denials, are binding on all members — the anomalous-court problem creates a heads-the-

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *See supra* note 24.

<sup>38</sup> For example, Judge Easterbrook has explained that, even if ninety percent of judges would not certify a proposed class, plaintiffs who litigate the issue in front of only ten judges have a sixty-five percent chance of finding one willing to certify. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003), *abrogated on other grounds by Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). In *Smentek*, the plaintiffs filed fourteen identical lawsuits.

plaintiffs-win, tails-the-defendants-lose situation: if a particular court grants certification, correctly or incorrectly, the defendant is bound; but if a particular court denies certification, correctly or incorrectly, the plaintiffs are free to try again.<sup>39</sup> The problem is compounded when the different suits are filed in different circuits, which decreases the likelihood that a single appellate court will eventually review all of the disparate decisions.<sup>40</sup> On the other side of this problem, however, is the fact that in every case denying class certification, the representation of unnamed class members necessarily does not comply with Rule 23.<sup>41</sup> Courts have therefore hesitated to bind unnamed class members to decisions in which they may have been inadequately represented.

In *Smith*, the Supreme Court balanced these concerns by rejecting a rule of binding preclusion while suggesting in dicta that it intended for federal district courts to defer to other district courts' decisions on materially identical class actions. Specifically addressing the argument that its decision would exacerbate the anomalous-court problem, the *Smith* Court explained that defendants could seek relief by removing to federal court under the Class Action Fairness Act of 2005<sup>42</sup> (CAFA).<sup>43</sup> Removal, the Court explained, would help in three ways: First, it would bring all certification motions under the uniform standard of Rule 23.<sup>44</sup> Second, it might allow defendants to consolidate identical cases.<sup>45</sup> Finally, where defendants were unable to consolidate the actions, the Court explained that it "would expect federal courts to apply principles of comity to each other's class certification decisions when addressing a common dispute."<sup>46</sup> Thus, the Court implied that principles of comity would protect defendants against plaintiffs using serial relitigation to have a class certified by an anomalous court.

The comity suggested by *Smith* might be understood as falling somewhere in the middle of a spectrum of deference.<sup>47</sup> At one end of

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<sup>39</sup> *See id.*

<sup>40</sup> *Smentek* was not such a case: all of the cases were filed within the Seventh Circuit. *See Smentek*, 683 F.3d at 374. As discussed below, given the Seventh Circuit's stated standard for granting interlocutory appeals, the reality is that these certification decisions were unlikely to be reviewed on the merits until after final judgment.

<sup>41</sup> *See Smith*, 131 S. Ct. at 2380–81 (2011).

<sup>42</sup> Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

<sup>43</sup> *Smith*, 131 S. Ct. at 2381–82.

<sup>44</sup> *Id.* at 2382.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> The idea that courts apply a varying degree of deference to prior decisions arises in several contexts, and many commentators have described this variation along a spectrum. *See, e.g.*, 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478.4, at 770 (2d ed. 2002) (explaining, in the context of law-of-the-case doctrine, that "[t]he reality of judicial behavior is more a matter of shadings along a spectrum of deference than a matter of choosing between deep deference and none at all"); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 795–96 (2007) (describing a "spectrum of

the deference spectrum would be binding preclusion: after determining that one decision precludes another, the subsequent court may not revisit any aspect of the earlier decision, and parties are estopped from relitigating it.<sup>48</sup> At the other end, a prior decision might be treated merely as persuasive authority, which a subsequent court can avoid simply by explaining why the court is not persuaded. Since district court decisions have no precedential weight,<sup>49</sup> this position of minimal, persuasive-authority deference is how district courts ordinarily treat prior district court opinions.<sup>50</sup> By alluding to “principles of comity,”<sup>51</sup> the *Smith* Court implied that when considering materially identical class certification motions, district courts should apply more than this ordinary level of deference to prior opinions — otherwise, what function would these principles of comity serve? At the same time, by rejecting the injunction at issue in *Smith*, the Court demonstrated that prior decisions could not have preclusive weight.<sup>52</sup>

The Seventh Circuit’s reasoning in *Smentek* suggests that it too recognized the need for some form of intermediate deference in these cases. The court settled on a level it called “respectful attention.”<sup>53</sup> It was careful to explain that respectful attention was not preclusion, which would violate *Smith*.<sup>54</sup> At the same time, the court highlighted the difference between respectful attention and the ordinary deference typically applied between district courts, stressing that respectful at-

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possibilities that exist between pure preclusion and absolute relitigation” in the habeas context and arguing that a similar framework might be useful in the class action context, *id.* at 796); Charles A. Sullivan, *On Vacation*, 43 HOUS. L. REV. 1143, 1201–03 (2006).

<sup>48</sup> See, e.g., *S. Pac. R.R. v. United States*, 168 U.S. 1, 48–49 (1897).

<sup>49</sup> *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011); *Smentek*, 683 F.3d at 377.

<sup>50</sup> See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 802 (2012) (“The common view today among district courts is that the court’s precedent should be considered only to the extent its reasoning persuades.”). A persistent source of confusion in the literature and caselaw is the distinction between authority that is persuasive only to the extent it persuades the reader, and authority that receives some weight beyond its power actually to persuade. See *id.* at 791–92. Courts have used both formulations to describe the weight owed to other district court opinions. Compare *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1124 (7th Cir. 1987) (noting that district court opinions are “entitled to no more weight than their intrinsic persuasiveness merits”), with *Bryant v. Smith*, 165 B.R. 176, 180 (W.D. Va. 1994) (noting that district court opinions are “persuasive authority entitled to substantial deference”). The two formulations are functionally the same from the perspective of a reviewing court, since under either formulation the district judge can depart from other district courts’ opinions merely by explaining why the judge was not persuaded. See, e.g., Mead, *supra*, at 802. Thus, for an appellate court meaningfully to require more than this minimal level of deference, it must demand that judges explain their departure in terms not exclusively related to the inherent persuasiveness of the original opinion.

<sup>51</sup> *Smith*, 131 S. Ct. at 2382.

<sup>52</sup> See *id.*

<sup>53</sup> *Smentek*, 683 F.3d at 377.

<sup>54</sup> *Id.* at 376–77.

tention was due only in “materially identical” cases.<sup>55</sup> If there were material differences between the classes, the court emphasized, then “the judge in the second, or third, or nth class action is on his own.”<sup>56</sup> Of course the court did not mean that district judges should *ignore* the opinions of their colleagues in similar-but-materially-different cases; presumably the court understood that even judges who are supposedly “on [their] own” will look to prior decisions on similar issues as persuasive authority.<sup>57</sup> After all, judicial norms all but require courts to deal with contrary persuasive authorities (including similar-but-materially-different cases).<sup>58</sup> By expecting more deference toward materially identical class certification decisions, the Seventh Circuit implied that courts should grant more than persuasive-authority weight to such prior decisions.

Yet the Seventh Circuit’s application of this standard in *Smentek* suggests that respectful attention is really no different from ordinary persuasive-authority deference. After all, the district court explicitly stated that it considered the prior decisions “persuasive authority,”<sup>59</sup> and it granted certification because it was “convinced” that the predominance criterion of Rule 23 was satisfied.<sup>60</sup> The disagreement over predominance depended on how one characterized the primary issue at stake,<sup>61</sup> and given the choice between competing characterizations, the district court simply selected what it considered the “better underst[anding].”<sup>62</sup> True, the district court explained why its characterization of the issues was the best one — but no less would be expected even if two judges had not previously reached a different conclusion in materially identical cases. The Seventh Circuit concluded that this explanation sufficed because the district judge had given “plausible reasons for her disagreement.”<sup>63</sup> But if merely “plausible”

<sup>55</sup> *Id.* at 377.

<sup>56</sup> *Id.*

<sup>57</sup> *See, e.g.,* Colby v. J.C. Penney Co., 811 F.2d 1119, 1124 (7th Cir. 1987).

<sup>58</sup> *See* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001); Sullivan, *supra* note 47, at 1205–06.

<sup>59</sup> *Smentek v. Sheriff of Cook Cnty.*, No. 09 C 529, 2011 U.S. Dist. LEXIS 155473, at \*2 (N.D. Ill. Aug. 17, 2011).

<sup>60</sup> *Id.* at \*7.

<sup>61</sup> Essentially, the prior courts had seen this case as a series of claims by hundreds of inmates that they were each injured by a failure to render adequate dental services; because each member would need to prove that his care was inadequate and that the inadequacy had caused significant injury, individual issues would predominate. *See* Wrightsell v. Sheriff of Cook Cnty., No. 08-cv-5451, 2009 U.S. Dist. LEXIS 14521, at \*9–10 (N.D. Ill. Feb. 19, 2009); Smith v. Sheriff of Cook Cnty., No. 07-cv-3659, 2008 U.S. Dist. LEXIS 60248, at \*1–6 (N.D. Ill. July 16, 2008). By contrast, the *Smentek* court understood the primary issue as whether the prison had a dental care policy that reflected deliberate indifference to prisoners; because the policy was common to all members of the class, common issues would predominate over subsidiary individual issues of injury and causation. *See Smentek*, 2011 U.S. Dist. LEXIS 155473, at \*7–8.

<sup>62</sup> *Smentek*, 2011 U.S. Dist. LEXIS 155473, at \*7.

<sup>63</sup> *Smentek*, 683 F.3d at 377.

reasons for disagreeing suffice, then “respectful attention” does not really differ from the minimal deference that a judge would apply when supposedly “on his [or her] own,” notwithstanding the logic and language of *Smith* and *Smentek* itself.

A better approach, and one more faithful to *Smentek*'s own reasoning, would have been to require the district court to give greater deference to the prior opinions than it would have given to the opinions of district courts in materially different cases. Such deference (or “respectful attention”) could take several forms, representing various points along a spectrum of deference. For example, one court has adopted the fairly deferential approach of section 2.11 of the American Law Institute's *Principles of the Law of Aggregate Litigation*<sup>64</sup> (*ALI Aggregate Litigation*), which recommends that after one court denies class certification, subsequent courts should apply a rebuttable presumption against certifying materially identical classes.<sup>65</sup> The presumption could be rebutted on grounds not exclusively related to the persuasiveness of the prior opinions.<sup>66</sup> Interestingly, the ALI advocates applying the presumption as a matter of “comity,” which may have inspired the use of that term in *Smith*.<sup>67</sup>

Less deferential approaches are available as well. For example, subsequent courts might apply something analogous to *Skidmore* deference, deferring to the prior opinion unless it exhibits a lack of thoroughness, completely invalid reasoning, or other factors that deprive it of authority.<sup>68</sup> Under such a standard, district courts might also con-

<sup>64</sup> ALI AGGREGATE LITIGATION, *supra* note 1, § 2.11.

<sup>65</sup> *Id.* In *Baker v. Microsoft Corp.*, 851 F. Supp. 2d 1274, 1278–80 (W.D. Wash. 2012), for example, the later plaintiffs argued that a change in controlling law since an earlier denial of class certification sufficed to rebut the presumption; after determining that the law had not actually changed, the court held that the plaintiffs had failed to rebut the presumption and denied their motion.

<sup>66</sup> Most obviously, any showing that would suffice to defeat preclusion, such as a demonstration that an inadequate class representative litigated the prior case, should suffice to defeat the presumption. See *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940). In addition, the presumption could be rebutted on other grounds that would be considered irrelevant in the face of a preclusive judgment; for example, plaintiffs could rebut the presumption by showing that the controlling law had changed since the previous case was decided, see *Baker*, 851 F. Supp. 2d at 1278, or that the reason for denying class certification no longer exists, see ALI AGGREGATE LITIGATION, *supra* note 1, § 2.11 cmt. c.

<sup>67</sup> See *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2381 n.11 (2011). The *Smith* Court relied on a comment in the Reporters' Notes to section 2.11 of *ALI Aggregate Litigation* for the idea that a prior court's refusal to certify a class could not preclude subsequent certification decisions. *Id.* That comment explains why the ALI recommended a comity-based presumption rather than outright preclusion. See ALI AGGREGATE LITIGATION, *supra* note 1, § 2.11 cmt. b. The Supreme Court's similar rejection of preclusion in favor of comity may suggest that it was persuaded by section 2.11 of *ALI Aggregate Litigation*.

<sup>68</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (outlining a framework for deferring to agency interpretations of statutes). This approach assumes that *Skidmore* deference differs from the persuasive-authority deference that district courts ordinarily apply to opinions of other

sider the number of courts that have already denied certification on a materially identical motion: if multiple judges have consistently denied certification after thorough consideration, courts might apply the same deference as when reviewing an agency interpretation that has remained consistent over time.<sup>69</sup> Alternatively, subsequent courts could adopt a standard that comes closer to reviewing the merits, such as deferring to the prior decision unless it constituted an abuse of discretion.<sup>70</sup> Courts might also grant less deference in the face of evidence that defendants had the opportunity to consolidate the prior and subsequent cases but failed to do so, in order to prevent defendants from strategically using respectful-attention deference to accomplish more than they could by litigating before a single judge.<sup>71</sup> Likewise, courts should grant no deference if there is any evidence that the prior case was not adequately litigated, or if there is evidence of collusion between the defendants and a prior plaintiff.<sup>72</sup> Applying any of these standards would reduce the anomalous-court problem — since courts would need to express more than a basic disagreement with prior decisions before departing from them — without giving prior denials of certification preclusive weight in subsequent certification attempts. In this way, all of these approaches would have been more consistent with the logic and expectations of the Supreme Court in *Smith* than was the Seventh Circuit's approach in *Smentek*.

Even if district courts apply a heightened standard of deference, however, a significant possibility remains that district courts will reach conflicting results on identical class certification decisions. In such circumstances, appellate courts should decide the merits of the certification question on Rule 23(f) review. The Seventh Circuit typically

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district courts, which is not clear. See Ryan C. Morris, Comment, *Substantially Deferring to Revenue Rulings After Mead*, 2005 BYU L. REV. 999, 1032–33 (exploring different tests that courts have developed under *Skidmore*).

<sup>69</sup> See *Skidmore*, 323 U.S. at 140.

<sup>70</sup> Appellate courts review certification decisions for abuse of discretion. See *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 4 (1st Cir. 2005). Under this standard, pure issues of law are reviewed de novo, while factual determinations are reviewed for clear error; mixed questions of law and fact are reviewed along a spectrum of deference. See *id.* Applying this standard in the context of materially identical class certification motions would allow subsequent district judges to depart if the prior court made a purely legal error, but it would require far more deference toward a prior court's characterization of an identical fact pattern.

<sup>71</sup> This potential requirement is analogous to the rule that plaintiffs may not benefit from nonmutual offensive collateral estoppel if they “could easily have joined in the earlier action.” *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). It seems likely that the *Smentek* defendants could have consolidated these cases, since they were all filed in the same district court and most of them were pending at the same time. See *Smentek*, 683 F.3d at 374–75, 377. This failure to consolidate might have supported a decision not to accord deference to the prior cases, if the district court had so justified its departure from those cases.

<sup>72</sup> Cf. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (noting the potential for fraud and collusion if parties are bound by decisions in which they were not adequately represented).

grants Rule 23(f) review in limited circumstances, such as when the appeal involves a novel and important question that will contribute to the “development of the law.”<sup>73</sup> The comity issue in *Smentek* was just such a question. By contrast, resolving the certification question itself was less likely to further the development of the law, since the conflict between the certification decisions was less about how to resolve novel legal questions than about how to apply relatively settled law to the same fact pattern.

Circuit courts, however, have “unfettered discretion” to grant a Rule 23(f) appeal on any ground they find persuasive,<sup>74</sup> and they should use this discretion to resolve situations like that in *Smentek* where district courts issue conflicting certification decisions on the same proposed class. The availability of Rule 23(f) appeals in such cases would lessen the potential for abuse, by reducing the expected benefits of relitigating class certification decisions in cases where most courts would deny certification: even if plaintiffs successfully identify an anomalous court willing to certify their class, the certification decision would likely be appealed and reversed before they could benefit from it.<sup>75</sup> Moreover, such cases represent the district-court equivalent of a clear circuit conflict, since multiple courts would have reached conflicting results on precisely the same question and fact pattern.<sup>76</sup> The circuit court’s review will thus be assisted by the reasoning and factfinding of at least two different judges, allowing it to concentrate on the disputed legal question.

*Smentek* unnecessarily exacerbated the anomalous-court problem in two ways: first, it affirmed an opinion that failed to apply meaningful deference to materially identical prior certification decisions; and second, it failed to resolve the interdistrict dispute over the certification question. Fortunately, these problems can be avoided in the future. The reasoning of *Smentek*, after all, supports applying intermediate deference to materially identical previous decisions. And because circuit courts retain “unfettered discretion” to grant Rule 23(f) appeals on any grounds, they remain free to reach the merits in future cases resembling *Smentek*. Future courts’ attention to these issues may ameliorate the anomalous-court problem threatened by *Smith* and exacerbated by *Smentek*.

<sup>73</sup> Blair v. Equifax Check Servs., Inc., 181 F.3d 832, 834 (7th Cir. 1999); see *id.* at 834–35.

<sup>74</sup> FED. R. CIV. P. 23(f) advisory committee’s note to 1998 amendment.

<sup>75</sup> At the same time, if the initial denial of certification was the anomalous, erroneous decision, then the subsequent certification will likely be affirmed, with no prejudice to the plaintiffs.

<sup>76</sup> Cf. Carter G. Phillips, *Providing Strategies for Success: Petitioning the Supreme Court for Certiorari*, FOR THE DEFENSE, Apr. 2004, at 22, 22–23 (explaining that the Supreme Court prefers to grant review in cases where there is a clear circuit conflict).