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Can Defendants Use Mootness Doctrine To Buy Off Class Actions?

CAN DEFENDANTS USE MOOTNESS DOCTRINE TO BUY OFF CLASS ACTIONS?

The class action suit authorized by Federal Rule of Civil Procedure 23[1] provides a means by which many small claims, not worthy of individual pursuit, may be joined and vindicated in one suit. Class actions avoid multiple litigation and thereby reduce congestion in the courts. By avoiding multiple lawsuits, parties opposing classes are not subjected to the possibility of different, inconsistent standards of action resulting from numerous adverse judgments.[2] The "case or controversy" clause[3] of Article

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[1] The prerequisites to bringing a Rule 23 class action are that joinder of all members of the class is impracticable, that there are questions of law or fact common to all members of the class, that the claims or defenses of the representative parties are typical of the class, and that the representatives can adequately protect the interests of the class. FED. R. CIV. P. 23(a). The class action is maintainable only if separate adjudications might establish incompatible standards of conduct for the defendants, or a judgment in one action would determine as a practical matter the rights of all members of the class, or the party opposing the class has acted in such a manner as to make classwide injunctive relief necessary, or the common questions of law or fact predominate over any individual questions so that a class action is superior to separate adjudications. FED. R. CIV. P. 23(b). The rule also provides procedural details relating to certification, notice, binding effects of judgments, and dismissals. FED. R. CIV. P. 23(c), (d), & (e).

[2] *See* note 1 *supra. See generally* 3B MOORE'S FEDERAL PRACTICE ¶23.02 at 23-71 (2d ed. 1976); Comment, *Federal Appellate Review of the Grant or Denial of Class Action Status,* 18 B.C. L. REV. 101 (1976) [hereinafter cited as *Appellate Review*]. Commentators on Rule 23 have argued that the class action is a plaintiff-oriented remedy which promotes the public interest. *See* Almond, *Settling Rule 23 Class Actions at the Precertification Stage: Is Notice Required?,* 56 N.C. L. REV. 303, 303 (1978) [hereinafter cited as Almond]; Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives,* 26 BUFFALO L. REV. 83, 91 (1976) [hereinafter cited as Kane].

Several recent Supreme Court decisions have limited class actions. These cases illustrate that specific procedural requirements must be followed strictly by all litigants in class actions. In Snyder v. Harris, 394 U.S. 332 (1969), the Court held that when the plaintiff asserts diversity of citizenship as the jurisdictional basis, 28 U.S.C. § 1332 (1970), courts must apply the general rule as to aggregation of separate and distinct claims. The general rule is that each plaintiff joining in the action must exert a claim in excess of $10,000, as required by 28 U.S.C. § 1332(a) (1970). The Court held that the members of the class must each have a $10,000 claim. 394 U.S. at 336. In Zahn v. International Paper Co., 414 U.S. 291 (1973), the Court, relying on *Snyder,* ruled that even where named plaintiffs satisfied the amount in controversy requirement, the unnamed class members' claims of less than $10,000 could not be joined with those of the named plaintiffs. In Eisen v. Carlisle & Jacqueline, 417 U.S. 156 (1974), the Court ruled that the class representatives must bear the expense of providing notice of the class action, as required by Rule 23(c)(2), to the unnamed class members regardless of the size of the class. This notice requirement renders many class actions, for economic reasons, impossible for the small claimant to maintain. *See generally* Jacoby & Cherkasky, *The Effects of* Eisen IV *and Proposed Amendments of Federal Rule 23,* 12 SAN DIEGO L. REV. 1 (1974); 53 N.C. L. Rev. 409 (1974). *See also* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) (denial of class certification not appealable as collateral order; specific disapproval of the "death knell" doctrine); *see* note 66 *infra.*

Although the Supreme Court has required strict adherence to the statutory procedure governing class actions, the appealability of a grant or denial of class certification is not controlled by a specific statutory rule. The Court has taken a more flexible and equitable approach to the question of appealability. *See* United Airlines, Inc. v. McDonald, 432 U.S.

III section 2 of the Constitution limits class actions by requiring that a live controversy exist between the parties to a lawsuit. The case or controversy requirement manifests itself in the mootness doctrine,[4] which dictates that when a party to a suit no longer has a stake in the outcome of the litigation, no controversy is present and the action must be dismissed. A certified[5] class action, however, may proceed in some cases even after the class representative's claim is mooted, if a live controversy still exists between the unnamed class members and the opposing party.[6]

Recently, two circuit courts have reached opposite conclusions as to the impact of the case or controversy clause on uncertified class actions brought under Rule 23.[7] In *Winokur v. Bell Federal Savings and Loan*

385 (1977). In *McDonald,* the Court allowed an unnamed member of the putative class to intervene after a final judgment for the purpose of appealing the denial of class certification, although such intervention did not immediately seem timely and circumvented the statute of limitations. 432 U.S. at 391-94. The *McDonald* decision indicates that the issue of class certification is different from other issues upon which the Court has limited class actions. The *Snyder* and *Zahn* decisions may be characterized as part of the Court's movement to limit diversity jurisdiction, not class actions. *See* Snyder v. Harris, 394 U.S. 332, 341 (1969); 39 Mo. L. REV. 447, 447 (1974).

[3] "The judicial Power shall extend to all Cases, in Law and Equity . . . ;—to Controversies . . ." U.S. CONST. art. III, § 2. The case or controversy clause requires that a real, adversary conflict be present before the court. The requirement limits the jurisdiction of the federal courts to cases presented in an adversary context capable of judicial resolution and insures that courts will not intrude into areas reserved to other branches of government. Flast v. Cohen, 392 U.S. 83, 95 (1968).

[4] Mootness occurs when the plaintiff's claim ceases to exist either through passage of time, by operation of law, or by satisfaction. A plaintiff whose claim is mooted has no further stake in the controversy, since a favorable decision will not benefit him. Thus, no live case or controversy exists. Mootness, a traditional common law doctrine, was first given constitutional status as part of the case or controversy requirement by the Supreme Court in Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964). *See generally* Note, *The Mootness Doctrine in the Supreme Court,* 88 HARV. L. REV. 373, 375 n.12 (1974) [hereinafter cited as *Mootness Doctrine*].

[5] Rule 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." FED. R. CIV. P. 23(c)(1).

[6] *See, e.g.,* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Sosna v. Iowa, 419 U.S. 393 (1975); Dunn v. Blumstein, 405 U.S. 330 (1972). In these cases, the Court allowed the class action to continue despite the mootness of the named plaintiffs' claims because a sufficient controversy still existed between the unnamed class members and the defendants. *See* notes 24 & 25 *infra.*

[7] *Compare* Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979) (post-mootness review of denial of class certification allowed) *with* Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271, *rehearing denied,* 562 F.2d 1034 (7th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978) (post-mootness review of denial of class certification not allowed). *See also* Geraghty v. United States Parole Comm., 579 F.2d 238 (3d Cir. 1978) *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1978) (claims were nearly capable of repetition yet evading review; court did not wish to insulate denial of certification from review; adversity of suit continued by virtue of efforts of attorneys; facts were consistent across class; review allowed); Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334 (9th Cir. 1977) (denial not reviewable generally); Banks v. Multi-Family Mgt., Inc., 554 F.2d 127 (4th Cir. 1977) (court refused to review); Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), *cert.*

Association,[8] the Seventh Circuit held that the district court properly dismissed as moot a case in which class action certification was denied and defendants thereafter tendered the damages individually claimed by the named plaintiffs. The tender of damages mooted the named plaintiffs' claims and, due to the denial of certification, the claims of the unnamed class members were not before the court. Mootness precluded appellate review of the denial of class certification.[9] In a similar case, *Roper v. Consurve, Inc.,*[10] the Fifth Circuit held that the named plaintiffs could appeal the denial of certification after defendants had tendered damages and judgment was entered for plaintiffs.[11]

In *Winokur,* depositors filed a class action against their savings and loan associations that charged false advertising of interest computing methods in violation of Rule 10b-5 of the Securities and Exchange Commission.[12] The district court declined to certify the action as a class action.[13] The plaintiffs failed to obtain review of the denial of certification as either a reviewable interlocutory order[14] or a final order.[15] The defendants then tendered the claimed damages to the named plaintiffs and corrected the interest crediting practices to conform to the advertising.[16] The district court declared that the plaintiffs no longer had a stake in any controversy before the court and dismissed the action for mootness.[17] The plaintiffs sought review in the circuit court of both the dismissal and the order denying class certification. The Seventh Circuit affirmed the finding of mootness and, thus, had no jurisdiction to review the denial of certification due to the absence of a live controversy.[18] As a result of the *Winokur* decision, defendants may buy off[19] class actions by tendering damages to

denied, 429 U.S. 1049 (1977) (review available where claim "capable of repetition yet evading review").

[8] 560 F.2d 271, *rehearing denied,* 562 F.2d 1034 (7th Cir. 1977), *cert. denied,* 435 U.S. 932 (1978), *noted* 72 Nw. U. L. Rev. 811 (1977).

[9] *Id.* at 276.

[10] 578 F.2d 1106 (5th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979).

[11] *Id.* at 1110-11.

[12] 17 C.F.R. § 240.10b-5 (1978). Rule 10b-5 was promulgated under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1976). The plaintiffs in *Winokur* sought damages, a permanent injunction against the false advertising, and attorneys' fees. 560 F.2d at 272.

[13] *Id.* at 273. In denying certification, the court found that the questions of fact varied on an individual basis. *Id.*

[14] Under 28 U.S.C. § 1292(b) (1970), some interlocutory orders may be appealed at the discretion of the trial and appellate courts. *See* note 67 *infra.*

[15] 560 F.2d at 274. 28 U.S.C. § 1291 (1970) authorizes appeal of final orders.

[16] 560 F.2d at 275.

[17] *Id.* at 274. Plaintiffs also claimed attorneys' fees although they conceded no statutory authorization for such an award exists. The court held that there was no equitable theory under which attorneys' fees could be awarded. Thus the claim for attorneys' fees could not provide the plaintiffs with a stake in the controversy. *Id.* at 275.

[18] The court held that, absent a live controversy, an appellate court cannot exercise jurisdiction to reverse the certification determination and create a live controversy. *Id.* at 276.

[19] A "buy-off" of a class action occurs when the defendant tenders to the named plaintiff his individually claimed damages, the plaintiff rejects the tender, and the defendant subse-

the named plaintiffs and thereby escape classwide liability.[20]

In reaching its conclusion, the *Winokur* court relied on several recent Supreme Court decisions[21] which considered whether a class action may continue after the named plaintiff's claim becomes moot. In the decisions relied upon in *Winokur*,[22] whether the district court has certified the class action has been a central factor in determining whether the class has "acquired a legal status separate from the interests"[23] of the named plaintiffs and thus can survive the mooting of the named plaintiffs' claims. In *Sosna v. Iowa*[24] and *Franks v. Bowman Transportation Co.*,[25] the class actions were certified under Rule 23 and the named plaintiffs' claims later became moot. The Court held that a live controversy still existed between the unnamed class members and the defendants. The class actions were allowed to continue for appellate review of the merits of each case.[26]

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quently moves successfully for dismissal of the action for mootness. The defendant thus escapes any further liability in the action. A buy-off is distinguishable from settlement because the plaintiff acquiesces in settlement. "Buy-off" does not mean that the defendant has acted in bad faith. A defendant generally has the right to terminate litigation by satisfying the claims made against him. An effort to escape liability is justifiable as a good business decision which, if lawful, should not be criticized. Any negative connotation of the term "buy-off" should be limited to the suggestion that the possibility of buy-off produces an undesirable result where the prosecution of classwide claims is forestalled.

[20] *See* Winokur v. Bell Fed. Sav. & Loan Ass'n, 562 F.2d 1034, 1034 (7th Cir. 1977) (Swygert, J., dissenting from denial of rehearing).

[21] 560 F.2d at 276-77, *citing, inter alia,* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Weinstein v. Bradford, 423 U.S. 147 (1975); Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975); Sosna v. Iowa, 419 U.S. 393 (1975).

[22] *See* note 21 *supra.*

[23] Sosna v. Iowa, 419 U.S. 393, 399 (1975).

[24] 419 U.S. 393 (1975). In *Sosna,* the plaintiff challenged Iowa's one year residency requirement for divorce actions. *Id.* at 396. Before the case reached the Supreme Court, the named plaintiff had obtained a divorce in another state and had resided in Iowa for over one year. *Id.* at 399. Therefore, her claim was moot. Iowans of less than a year's residency might, however, still have been affected by the allegedly unconstitutional statute. Thus, a live controversy continued to exist between the unnamed class members and the defendant. Because a live controversy continued to exist, the Court allowed the class challenge of the statute to proceed with the named plaintiff remaining as representative. *Id.* at 403.

[25] 424 U.S. 747 (1976). In *Franks,* plaintiffs filed a class action alleging racially discriminatory employment practices under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (1976). 424 U.S. at 750-51. The subsequent hiring of the class representative by the defendant mooted the representative's individual claim. *Id.* at 752. The Court nonetheless allowed the class action to proceed because sufficient controversy existed with respect to the unnamed class members' claims for relief from discriminatory employment practices. *Id.* at 755-57.

[26] *Sosna* dealt with a constitutional challenge to a state statute. The *Sosna* court applied the "capable of repetition yet evading review" standard in finding a live controversy sufficient to satisfy the case or controversy requirement. 419 U.S. at 401-03. This standard provides that where the intervening mootness of plaintiff's claims repeatedly prevents the litigation of important federal claims, thus preventing judicial review, appellate review will not be denied on the basis of mootness. *Id.* at 401-02 & n.9. *See also* Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 514-16 (1911) (first statement by the Court of the repetition/evasion standard). The *Sosna* court noted that the repetition/evasion standard did not detract from the case or controversy requirement so long as the named plaintiff had a claim at the time the complaint

The Supreme Court also considered the importance of Rule 23 certification in *Board of School Commissioners v. Jacobs*[27] and *Weinstein v. Bradford*.[28] In these cases, class actions were not certified and the court found the claims of the named plaintiffs moot.[29] In both *Jacobs* and *Bradford*, the party opposing the class sought review of an adverse decision on the merits of the case. Since the party opposing the class had no reason to complain of a denial of certification, that question was not raised on appeal in either *Bradford* or *Jacobs*. The Court had no opportunity to consider whether the denial could have been reviewed.

After analyzing the four Supreme Court decisions, the *Winokur* court stated a rule based on the lack of certification in *Bradford* and *Jacobs*:

> When there is no determination that an action be maintained as

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was filed and a live controversy continued to exist as to the unnamed class members' claims, regardless of the status of the named plaintiff's claim. 419 U.S. at 402. *Franks* expanded the situations in which a class action could continue after the named plaintiff's claim became moot. *Franks* involved employment practices prohibited by federal statutes. The Court noted that "capable of repetition yet evading review" was not a condition for allowing the case to continue, because the repetition/evasion test is part of the mootness doctrine only as it applies to constitutional issues. 424 U.S. at 756 n.8. Since no constitutional issues were presented in *Winokur*, the court did not consider the "capable of repetition yet evading review" test.

[27] 420 U.S. 128 (1975). Students brought a class action charging violations of First Amendment rights in connection with an underground newspaper. The circuit court affirmed a judgment for the students. 490 F.2d 601 (7th Cir. 1973), *aff'g* 349 F. Supp. 605 (S.D. Ind. 1972). By the time the Supreme Court reviewed the case, the newspaper had ceased publication and the named plaintiffs had graduated. Although the district court treated the action as a class action, the court made only an informal class certification which did not comply with the requirements of Rule 23. The only notation of record which referred to the suit as a class action was in the reported opinion of the district court's judgment, wherein the court held that the plaintiffs "qualified as proper representatives of the class whose interest they seek to protect." 420 U.S. at 130, *citing* 349 F. Supp. at 611. The Supreme Court held that this informal certification was equivalent to no certification. Absent certification, the class claims could not survive the mootness of the named plaintiffs' claims and the Court dismissed the entire case. 420 U.S. at 130. Justice Douglas argued in dissent that the *Jacobs* certification was no less formal than the *Sosna* certification. *Id.* at 132.

Although class certification was imperfect in *Jacobs*, it certainly was not denied by the district court. The record indicates that the district court, the class, the named plaintiffs, and the defendants treated the case as a class action. *See* 420 U.S. at 129-31; 349 F. Supp. at 611. The named plaintiffs could not raise the issue of a denial of class certification for review in the Supreme Court. Certification was decided, if at all, in their favor in the district court. *See* 420 U.S. at 129. The school board, in its petition for certiorari, did not challenge certification of the class, but challenged the substance of the lower court's finding of a First Amendment violation. 42 U.S.L.W. 3546 (No. 73-1347). The mootness question, which led to the examination of the propriety of class certification, was raised first at oral argument before the Supreme Court. 420 U.S. at 130.

[28] 423 U.S. 147 (1975). Bradford, a North Carolina prisoner, brought a class action challenging the constitutionality of parole board procedures. The district court denied class action certification and Bradford continued his suit individually. *Id.* After the Supreme Court granted certiorari to review a decision favorable to Bradford, he completed his sentence and was released from custody. *Id.* Bradford himself moved for dismissal on the ground of mootness. *Id.* at 147-48. The Court held Bradford's claim moot, and, in the absence of class certification, dismissed the action. *Id.* at 148.

[29] 420 U.S. at 129; 423 U.S. at 149.

> a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between the parties who are present or represented before the court in the action.[30]

Applying this rule to the facts, the *Winokur* court held that lack of jurisdiction prevented review of the denial of certification and affirmed the dismissal for mootness.[31]

The *Winokur* court saw no difference between review of the procedural question of denial of certification[32] and the review on the merits sought by opponents of the class in *Jacobs* and *Bradford.* Yet such a distinction is critical to the analysis of appealability.[33] In *Bradford,* the plaintiff's claims were properly held moot. If Bradford had been allowed to prevail on the merits after his release from custody, the Court could only have decided that the parole board could not use its unconstitutional procedures in considering Bradford's parole. Such relief could not benefit Bradford after his release and would benefit no others since class certification had been denied. Thus, the basis for the mootness doctrine, that courts will not waste time reaching decisions where no relief can be granted, applied in *Bradford.*

Since the denial of certification was not raised on appeal in *Jacobs* and *Bradford,* the *Winokur* court's reliance on those cases was unnecessary. Moreover, the *Sosna* and *Franks* decisions focused on the merits of the actions and the effects of mootness rather than on the issue of certification. Class certification was not essential to the appealability of those cases since they involved properly certified class actions.[34] Thus, for the limited

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[30] 560 F.2d at 277. *But see* Susman v. Lincoln Am. Corp., 587 F.2d 866 (4th Cir. 1978). The Seventh Circuit in *Susman* limited the *Winokur* rule to cases where the district court has denied certification. *See* text accompanying notes 69-95 *infra.*

[31] 560 F.2d at 277.

[32] The question of class certification has been treated as a procedural matter for purposes of denying immediate appellate review under 28 U.S.C. § 1291 (1970). *See* Jenkins v. Blue Cross Mutual Hospital Ins., Inc., 522 F.2d 1235, 1237, *rehearing* 538 F.2d 164 (7th Cir. 1975), *cert. denied,* 429 U.S. 986 (1976); note 66 *infra.*

[33] The Second and Third Circuits have recognized the distinction between appeal of a denial of class certification and appeal of the merits of the action. In Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977), the court held that a belated certification occurring after mootness cannot relate back to the filing of the complaint, *see* note 41 *infra,* where the district court "expressly denied class certification and *there was no appeal from that determination.*" *Id.* at 1136 (emphasis added). In Geraghty v. United States Parole Comm., 579 F.2d 238 (3d Cir. 1978), *cert. granted* 47 U.S.L.W. 3586 (U.S. March 6, 1979), the court distinguished *Bradford* and *Jacobs* from the case under review on the ground that review of the denial of certification was not sought in those cases. *Id.* at 249 n.43 and 250 n.48.

[34] *But see* Board of School Comm'rs v. Jacobs, 420 U.S. 128, 132 (1975) (Douglas, J., dissenting). Justice Douglas argued that the certification in *Sosna* was not wholly proper. *Id. See also* Geraghty v. United States Parole Comm., 579 F.2d 238, 249 n.43 (3d Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979), ("certified" in *Sosna* should be read as "certifiable").

Courts have recognized a presumption of class action status at the precertification stage. *See* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324, 326 (E.D. Pa. 1967); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative,* 1974 DUKE L. J. 573. If a complaint filed as a class action is entitled to

purpose of allowing such an appeal after mootness, the requirement that there exist a certified class action should not apply when the denial of certification is the issue raised on appeal. In determining justiciability, the critical issue is not certification, but the existence of a live controversy.

In a case such as *Winokur,* both the putative class members and the named plaintiffs have a stake in the review of the denial of certification despite mootness of the named plaintiffs' claims. Unnamed class members retain an interest in the vindication of their claims. Although the *Winokur* court found no live controversy,[35] depositors who may have relied to their detriment on the alleged false advertising still had claims they could bring against the defendant. The denial of certification was a procedural ruling which did not eliminate the claims of the other depositors. If that denial was error, the unnamed depositors' claims were wrongly denied consideration. Although the court said it could not "instill a live controversy into the action"[36] by reviewing the denial of certification, it might have uncovered a live controversy present from the time the action was filed.

Even if the damage claims of the unnamed class members are not before the court absent certification, the class action certification question itself could provide the requisite live controversy. Unnamed class members would benefit from a reversal of the denial of certification since such a ruling would bring their damage claims one step closer to vindication. Either the damage claims of the class or the certification question could provide the live controversy required by *Sosna* and *Franks.*[37]

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such a presumption for certain purposes, and one of those purposes is to determine the certifiability of the class, class action status could be presumed for the narrow purpose of reviewing the denial of certification. *See id.* at 576; *cf.* Susman v. Lincoln Am. Corp., 587 F.2d 866, 869 n.2 (7th Cir. 1978) (recognizes the stated argument but neither relies on nor adopts it).

[35] 560 F.2d at 277.

[36] *Id.* at 276.

[37] A claim for attorneys' fees might also provide the vehicle to avoid dismissal for mootness. Such a claim could provide the requisite live controversy. The *Winokur* court reviewed this claim and found that the plaintiffs could not recover attorneys' fees under a theory that defendants had acted in bad faith or under the common fund rule. 560 F.2d at 275. The common fund rule provides that where plaintiff recovers a fund for the benefit of a group, he may recover attorneys' fees from the fund. *See* Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 167 (1939). The rationale for the rule is that unjust enrichment results where others benefit without contributing to the plaintiff's litigation expenses. Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392 (1970). *See also* Trustees v. Greenough, 105 U.S. 527 (1882) (first Supreme Court decision recognizing the common fund rule).

The plaintiffs' common fund argument in *Winokur* asserted that defendant's revision of the interest crediting practice conferred a benefit on the unnamed class members for which plaintiffs should recover attorneys' fees. The court held that the defendant might just as easily have revised the advertising so as to avoid misleading the depositors, while the interest rate would have remained the same. 560 F.2d at 275. Nonetheless, assuming that the litigation was the cause of the revision of the interest crediting practice, the unnamed depositors benefitted from litigation financed entirely by the named plaintiffs.

If defendant's conduct involves bad faith, attorneys' fees can be awarded under the bad faith rule. *See* F.D. Rich. Co. v. United States *ex rel* Indus. Lumber Co., 417 U.S. 116, 129 (1974). Even if the named plaintiff's damage claims are mooted, the bad faith allegations in the complaint should keep the claim for attorneys' fees sufficiently alive to present the

Moreover, the named plaintiff retains an interest in the prosecution of the class action despite the mooting of his individual claim. By filing a class action, the named plaintiff has held himself forth as the representative of the class and has accepted a fiduciary responsibility to the class.[38] As a fiduciary, the named plaintiff is obligated to press the claims of the class.[39] Although his individual claims have been satisfied, the plaintiff's duty and desire to promote the claims of the class present an interest in the review of the denial of certification which satisfies the case or controversy requirement. Thus, the named plaintiff and unnamed putative class members benefit from review of the denial of certification. If the denial is reversed, the class action can proceed to decision on the merits under the *Sosna-Franks* rule which permits a class action to continue despite mootness of the named plaintiff's claims.[40]

In dictum in *Sosna,* the Supreme Court suggested an additional means of satisfying the case or controversy requirement. The Court postulated an exception to the requirement that a certified class action must exist for the purpose of an appeal after the named plaintiff's claims are mooted.[41] If mootness occurs before the district court rules on certification of the class action, a subsequent certification may relate back to the time of filing the complaint. The exception has been applied where the district court delayed in making the certification decision.[42] The language of the exception

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requisite controversy. Thus the defendant whose conduct involves bad faith will be unable to escape classwide liability by buying off the plaintiff. In *Winokur,* however, the court found nothing in the record to support a bad faith argument. 560 F.2d at 275. Where the plaintiff had pleaded bad faith or has offered evidence tending to prove it, the attorneys' fees claim could survive the mootness of plaintiff's other claims.

Either the common fund rule or the existence of bad faith behavior will support a claim for attorneys' fees as a live controversy sufficient to prevent mootness. Such claims would give the circuit court appellate jurisdiction to review the denial of class certification.

[38] *See* Roper v. Consurve, Inc., 578 F.2d 1106, 1111 (5th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979); Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 219 (3d Cir. 1977) (Seitz, C.J., concurring), *aff'd,* 437 U.S. 478 (1978); LaSala v. American Sav. & Loan Ass'n, 5 Cal.3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971). The *Roper* court held that the named plaintiffs assumed responsibilities to the members of the putative class by the very act of filing a class action. Those responsibilities could not be terminated by taking satisfaction, voluntarily or involuntarily, of the claims. 578 F.2d at 1110. The implication is that the named plaintiffs have an unqualified duty to appeal the denial of certification.

[39] Roper v. Consurve, Inc., 578 F.2d 1106, 1111 (5th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979); *see* note 38 *supra.*

[40] *See* text accompanying notes 23-26 *supra.*

[41] 419 U.S. at 402 n.11. While stating that class certification would be necessary to avoid a finding of mootness, the *Sosna* court noted:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the *circumstances of the particular case* and especially the reality of the claim that otherwise the issue would evade review.

Id. (emphasis added).

[42] *See, e.g.,* Basel v. Knebel, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) (insufficient time for certification by district court); Zurak v. Regan, 550 F.2d 86, 91-92 (2d Cir. 1977), *cert. denied,*

indicates that it applies only to precertification mootness rather than to mootness arising after denial of certification. However, it seems unreasonable to say that where the district court is merely slow, relation back of class certification will be allowed, but where the district court erroneously denies certification, relation back will not be allowed. Relation back should be permitted in the case of a post-denial mootness. Recently, the Seventh Circuit has applied the *Sosna* relation back exception to a case where the named plaintiff's claims were mooted before the district court had ruled on certification.[43]

The *Winokur* court relied on *Sosna* but gave no consideration to relation back, which might have produced a different result.[44] The rule of *Jacobs* and *Bradford* can be limited on the facts of those cases to allow no review of the merits of a mooted case where class certification is denied and the denial is not raised on appeal. *Sosna* does not foreclose the review of the denial after the named plaintiff's claims become moot, either because the *Sosna* requirement of certification does not apply where review of that question is sought or because *Sosna* makes possible a relation back of certification where the denial is reversed on appeal.[45] *Winokur* was decided improperly insofar as the court relied on the lack of certification distinction between *Sosna-Franks* and *Jacobs-Bradford.*

In addition to improperly analyzing Supreme Court decisions applying the mootness doctrine to uncertified class actions, the *Winokur* court ig-

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433 U.S. 914 (1977) (district court delayed in ruling on certification).

[43] Susman v. Lincoln Am. Corp., 587 F.2d 866, 869 (7th Cir. 1978). *See* text accompanying notes 69-95 *infra.*

[44] *See* note 43 *supra.* Several other cases have allowed relation back of certification. *See, e.g.,* Gerstein v. Pugh, 420 U.S. 103 (1975) (the class existed continuously, but no single member ever remained in the class long enough to have its claims adjudicated; reliance on *Sosna* exception); Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979) (*see* text accompanying notes 49-66 *infra;* no reliance on *Sosna* exception); Geraghty v. United States Parole Comm., 579 F.2d 238 (3d Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979) (denial reviewable; mention of *Sosna* exception, but no reliance); Basel v. Knebel, 551 F.2d 395 (D.C. Cir. 1977) (insufficient time for certification by district court; partial reliance on *Sosna* exception); Zurak v. Regan, 550 F.2d 86 (2d Cir.), *cert. denied,* 433 U.S. 914 (1977) (district court delayed in ruling on certification; reliance on *Sosna* exception); Williams v. Wohlgemuth, 540 F.2d 163 (3d Cir. 1976) (claims for welfare payments were of "emergency" nature; reliance on *Sosna* exception). *See also* Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977); Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), *cert. denied,* 429 U.S. 1049 (1977) (courts recognized their power to review a denial of class certification after mootness and relate that certification back, but declined to do so).

Of these cases, only *Roper* and *Susman* involved what appeared to be a buy-off attempt. *See* note 43 *supra.* The purpose of relation back is applicable to the buy-off situation since no single plaintiff can ever remain in the class long enough to have the claims of the class adjudicated if the defendant continues to buy off the named plaintiffs one at a time.

[45] *See* Geraghty v. United States Parole Comm., 579 F.2d 238 (3d Cir. 1978), *cert. granted,* 47 U.S.L.W. 3586 (U.S. March 6, 1979). The *Geraghty* court considered both the relation back theory of *Sosna* and a theory that prior certification was unnecessary to review of the certification question. The court stated that relation back is merely a legal fiction and analyzed the denial of certification problem in terms of an exception to general mootness doctrine. *Id.* at 249 n.45 & 250-52; *see* note 33 *supra.*

nored strong policy considerations in favor of allowing review of the denial of certification.[46] Although the court attempted to accommodate the constitutional requirement of the case or controversy clause, the result in *Winokur* impairs the class action as an effective means of vindicating numerous small claims. A defendant can escape classwide liability, not on the merits, but by tendering damages to the named representatives[47] and thus depriving the court of jurisdiction to consider the class action. As a matter of public policy, courts should be reluctant to apply a standard of justiciability which is so restrictive that a defendant can buy off a class action by immunizing from review a denial of class action certification. The policies militating against this result fall into two groups: policies promoting class actions as an effective means of vindicating numerous small claims and protecting unnamed class members,[48] and policies involving the scope of appellate review.

The Fifth Circuit, in *Roper v. Consurve, Inc.*,[49] recently considered such policy arguments and held that a denial of certification may be reviewed subsequent to the mooting of the named plaintiffs' claims.[50] Holders of Bankamericards brought a class action charging the issuing bank with

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[46] Policy considerations apply to both the desirability of class actions and the application of the mootness doctrine. The doctrine, as applied in *Winokur*, creates the undesirable effect of allowing defendants with actual liability to escape by satisfying only a relatively small number of claims.

Strict application of the mootness doctrine may be neither necessary nor desirable in class actions. Kane, *supra* note 2, at 84. The requirements of Rule 23 regulate the same kinds of questions as does the mootness doctrine, e.g. that the adversary suit is really in the interest of the class and that the plaintiff is a proper representative. *Id.* at 109-10. Dismissing class actions for mootness applies the doctrine in such a way as to promote judicial diseconomy. Litigation of all the claims of the proposed class in one action is more efficient than a series of dismissals followed by new actions. The result in *Winokur* contravenes the policy of avoiding a multiplicity of suits. *See generally Mootness Doctrine, supra* note 4, at 376; Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L. J. 573 (while class certification is the primary line of demarcation in determining whether the class action should be allowed to continue, an exception should be made where the defendant might evade justice). A defendant who has actual liability to a class evades justice when he can buy off the class action, preclude appellate review of an improper denial of certification, and escape classwide liability.

The chief issues in *Winokur* and *Roper* are the mootness doctrine and its effect, which are often controlled by policy issues. *Mootness Doctrine, supra* note 4, at 378. *But see* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978). The *Livesay* Court held policy arguments irrelevant in the decision to overrule the "death knell" doctrine, note 66 *infra*. However, the issue in *Livesay* involved interlocutory appeal of the denial of class certification. The disfavor with which courts look on interlocutory appeals is much stronger than any reluctance to adjust the mootness doctrine.

[47] The amount of damages claimed and tendered in *Winokur* was approximately $12.00. 560 F.2d at 274.

[48] Rule 23(e) protects the unnamed class members by providing that a certified class action cannot be dismissed or settled without leave of court and notification of the unnamed class members.

[49] 578 F.2d 1106 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979).

[50] *Id.* at 1111.

usury.[51] The district court denied class action certification.[52] The defendant then tendered the amounts of the named plaintiffs' individual damage claims.[53] Although the plaintiffs never accepted the tender, judgment for plaintiffs was entered over plaintiffs' objection.[54]

The *Roper* court did not consider the Supreme Court's decisions in *Sosna, Franks, Jacobs,* or *Bradford.* Instead of analyzing the existing case law, the *Roper* court stated the undesirability of a rule that precludes review of the denial of class certification.[55] Recognizing a number of options open to plaintiff classes in other situations, the court found no reason to preclude appeal of the denial of certification by the named plaintiffs.[56] The court emphasized "the judicial responsibility to ensure that class representatives adequately represent the interests of the class."[57] The Fifth Circuit has stated several reasons why named plaintiffs should be allowed to appeal the denial of certification. The record of the certification hearing makes review of the denial possible with no need for speculation as to the facts concerning certification. Also, the plaintiff bears no responsibility for the error below.[58] The *Roper* court particularly noted that the denial of certification would escape review under a strict application of the mootness doctrine.[59] The court found no conflict with the case or controversy requirement by holding that a viable controversy existed with respect to the certification question itself. The problem then became one of standing, not mootness. The court stated that the named plaintiffs retained a stake in the litigation because of their refusal of tendered damages and their interest in obtaining classwide relief.[60] Thus the case or controversy requirement was satisfied. Although the court did not analyze *Sosna* or related cases, a holding that the certification question is sufficient controversy is not inconsistent with the *Sosna-Franks* rule that a class action can continue after named plaintiff's claims are mooted, provided that a live controversy remains between the unnamed class members and the defendants. On the basis of the certification controversy, the Fifth Circuit reviewed the denial of class action certification.

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[51] *Id.* at 1109.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1110. The court observed that the notion that a defendant may "short circuit" a class action by buying off named plaintiffs deserved "short shrift." Few class actions could survive such buy-offs. *Id.*

[56] 578 F.2d at 1110-11. The *Roper* court noted that putative class members have been allowed to intervene and appeal the denial of certification after named plaintiffs lost on the merits. *Id.* at 1110. *See* United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). The *Roper* court also observed that the named plaintiff could appeal a denial of certification after either winning or losing on his individual claim in the district court. 578 F.2d at 1110. *See, e.g.,* Gelman v. Westinghouse Elec. Corp., 556 F.2d 699 (3d Cir. 1977); Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977).

[57] 578 F.2d at 1110-11.

[58] Satterwhite v. City of Greenville, 578 F.2d 987, 995 n.10 (5th Cir. 1978).

[59] 578 F.2d at 1111.

[60] *Id.*

The *Roper* court recognized that unnamed putative class members could intervene[61] to secure the review of the denial of certification.[62] Such intervention, if proper, would be possible at any time during a class action, even after a decision on the merits adverse to the named plaintiffs.[63] However, the protection afforded unnamed class members by allowing an intervening class member to appeal is inadequate. Unnamed class members have had no notice[64] of the class action. Therefore, such intervention would be largely fortuitous. The *Roper* court suggested that such intervenors could be paid off as easily as named plaintiffs.[65] So long as the defendants tendered damages to a limited number of intervenors, the *Winokur* reasoning would effectively insulate the denial of certification from appellate review.[66]

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[61] FED. R. CIV. P. 24(a) provides for intervention in actions by parties who have an interest in the outcome and whose rights may not be adequately protected by the parties already in the suit.

[62] 578 F.2d at 1111.

[63] United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977).

[64] Notice of the action to class members is required by FED. R. CIV. P. 23(c)(2). Where the class has not been certified, however, no notice need be sent to class members.

[65] 578 F.2d at 1111. *But see* Goodman v. Schlesinger, 584 F.2d 1325 (4th Cir. 1978). In *Goodman* the named plaintiffs had lost their individual suits on the merits after class certification was denied. The Fourth Circuit allowed the plaintiffs to appeal the denial of certification. The court held the denial improper as premature and remanded. But the named plaintiffs were forbidden to continue to represent the class on remand because the lower court judgment against them on the merits was proper. The case was to remain open for a reasonable time so that a proper plaintiff might intervene to prosecute the class action. Implicit in the ruling was the provision that if no suitable plaintiff came forward, the case would eventually be dismissed. The court did not discuss the likelihood of such an intervention.

[66] Several courts have stated that insulation of a district court decision from any appellate review is a factor compelling appellate court jurisdiction. *See, e.g.*, Geraghty v. United States Parole Comm., 579 F.2d 238, 251 (3d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979); Winokur v. Bell Fed. Sav. & Loan Ass'n, 562 F.2d 1034, 1034 (7th Cir. 1977) (Swygert, J., dissenting from denial of rehearing); Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 218 (3d Cir. 1977) (Seitz, C.J., concurring), *aff'd*, 437 U.S. 478 (1978). Insulation from appellate review occurs because other avenues of review have not been permitted by the courts. A denial of certification is not appealable as a final order under 28 U.S.C. § 1291 (1970). *See* Jenkins v. Blue Cross Mutual Hospital Ins., Inc., 522 F.2d 1235, 1237, *rehearing*, 538 F.2d 164 (7th Cir. 1975), *cert. denied*, 429 U.S. 986 (1976). For a time, some denials were appealable as final orders under the "death knell" doctrine. Under this doctrine, appellate review is permitted when a lower court order has the practical effect of termininating litigation before final judgment. *See, e.g.*, Korn v. Franchard Corp., 443 F.2d 1301 (2d Cir. 1971) ("death knell" appeal of denial of class certification). *See generally Appellate Review, supra* note 2, at 114. The "death knell" doctrine was abolished, however, by the Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 (1978). The *Livesay* court also held that denial of class certification is not appealable as a collateral order. *Id.* at 469.

Allowing review of denials of certification under § 1291 probably would lead to § 1291 review of grants of certification. Thus, defendants would be presented with a delaying tactic which outweighs the benefits derived from permitting § 1291 review of a denial of class certification on the narrow justification of preventing buy-off. *See Appellate Review, supra* note 2, at 114 (analogous problem with the "death knell" doctrine: the "reverse death knell" doctrine).

The reasoning of the *Roper* decision prevents the buy-off of possible class actions after an erroneous denial of certification. The policy considerations advanced by the *Roper* court indicate that prevention of buy-off is the preferred result and that the existence of a live controversy satisfies the case or controversy requirement. Furthermore, the undesirable result in *Winokur* is based on erroneous application of precedents. *Bradford* and *Jacobs* only prevent review of the merits of the case when class certification is not raised on appeal. *Sosna* and *Franks* allow class actions to continue after the individual claims of the named plaintiffs become moot. *Sosna* allows review of the denial and relation back of certification. To prevent the termination of proposed class actions where certification may have been denied wrongly, circuit courts should hold the action not moot and allow the class action to continue for the limited purpose of reviewing the denial of class action certification. If the denial was erroneous, the circuit court should vacate the dismissal, certify the class, and remand for litigation on the merits. Only when the denial of certification has been reviewed and affirmed should the dismissal for mootness be upheld. If defendants know the denial of certification can be reviewed, the incentive to buy off legitimate class actions will be eliminated.

A different problem is presented when class action certification has not been considered by the court prior to the tender of damages to the named plaintiffs. A defendant may attempt to buy off the class action before the district court has made a ruling on class certification.[67] The sweeping lan-

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Under 28 U.S.C. § 1292(b) (1970), district courts may permit interlocutory appeal of any order entered before final judgment in the action. Section 1292(b) requires the court to find that the order involves a controlling question of law. A district court confident of its ruling on the denial of certification is unlikely to allow interlocutory appeal. *But see* Susman v. Lincoln Am. Corp., 561 F.2d 86 (7th Cir. 1977) (interlocutory appeal of denial of certification; question of law involved adequacy of representation). Preventing buy-off is not one of the grounds listed for granting interlocutory appeal.

The Supreme Court recently held that 28 U.S.C. § 1292(a) (1970), which provides for interlocutory appeal of denials of injunctions, does not apply when a class seeking injunctive relief is denied class certification. Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) (Court rejected argument that denial of certification limits the injunctive relief obtained). Thus a claim for injunctive relief joined with a claim for money damages would be of no help in obtaining interlocutory review of the denial of certification.

Alternatively, notification of the putative class members would discourage defendants' attempts to buy off. Such notification has been criticized as prejudicial to the rights of defendants, who are endangered by the possibility of further vexations litigation and who are sometimes required to pay the costs of notification. *See* Almond, *supra* note 2, at 313; note 67 *infra*. The denial of certification raises a strong presumption of no class action. The defendant derives no benefit from this presumption if notification is required at the post-denial stage.

The only remaining solution is review of the denial of certification after the dismissal for mootness. Assuming that defendants will attempt to moot the case quickly after class certification is denied, final review would be nearly as speedy as interlocutory review. Dismissal for mootness would ensue and an appeal could be taken immediately.

[67] A related problem involving a precertification mooting of the plaintiff's claim arises in the context of a settlement acquiesced in or instigated by the named plaintiff. *See generally* Almond, *supra* note 2, at 317. Courts have analyzed this problem in terms of Rule 23(e)'s

guage of the *Winokur* decision[68] appears to apply to cases in which mootness occurs before a ruling on certification. The Seventh Circuit, however, has recently limited that language[69] and held specifically that the *Winokur* rule does not apply to mootness occurring before the trial court rules on the certification issue. In *Susman v. Lincoln American Corp.*,[70] the Seventh Circuit held that such a tender of damages did not render the class action moot and that the district court had jurisdiction to rule on the motion to certify.[71]

The plaintiffs in *Susman* brought a class action charging a violation of Rule 10b-5 of the Securities and Exchange Commission[72] in connection with a sale of securities.[73] After the plaintiff had moved for class action

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requirement of notification of the proposed settlement of a certified class action to class members. Relying on Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967), many courts have required notification to putative class members of precertification settlements on the basis that class action status is presumed until there has been an adverse ruling. *E.g.*, McArthur v. Southern Airways, 556 F.2d 298, 303 (5th Cir. 1977); Rotzenburg v. Neenah Joint School Dist., 64 F.R.D. 181, 182 (E.D. Wis. 1974); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970). *See generally* Almond, *supra* note 2, at 317-21 (citing cases). Lack of notice raises a due process issue if a precertification settlement affects the claims of the whole class. Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 42 F.R.D. 324 (E.D. Pa. 1967) (claims settled in such a way as to prejudice the future rights of unnamed class members; notification required on due process grounds). Where the settlement only affects the claims of the named plaintiff, however, notice is not necessary to protect unnamed class members' rights. Moreover, requiring notice abuses innocent defendants who may be exposed to greater liability through actual or threatened strike suits. A strike suit is a suit which has a settlement value to the plaintiff completely disproportionate to its chance of success on the merits. *Securities Law Developments*, 34 WASH. & LEE L. REV. 863, 885 n.9 (1977). The defendant, though perhaps innocent, would prefer to settle rather than bear the expense and business disruption of proving his lack of liability. Almond, *supra* note 2, at 304. The potential injury to defendants from notification outweighs any concern for plaintiff's rights where other potential plaintiffs would not be bound by the precertification settlement. *Id.* Recently the Fourth Circuit specifically adopted this rationale in not requiring notice of a precertification settlement. *See* Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978).

Almond's argument is valid in the context of strike suits, innocent defendants, and named plaintiffs eager to settle. The argument is less compelling where defendants wish to escape classwide liability in cases where plaintiffs are not eager to settle but wish to litigate the claims of the class. *See, e.g.*, Susman v. Lincoln Am. Corp., 587 F.2d 866 (7th Cir. 1978). *See also* Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979); Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271, *rehearing denied*, 562 F.2d 1034 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978).

The buy-off of a class action claiming money damages is not likely to involve due process problems because a buy-off in such a case has no effect on unnamed class members' claims. The buy-off or settlement of the claims resolves only the defendant's possible liability to the named plaintiff. Unnamed class members are not deprived of claims without their knowledge. Notification to putative class members is, therefore, unnecessary in such a case.

[68] *See* text accompanying note 30 *supra*.

[69] Susman v. Lincoln Am. Corp., 587 F.2d 866, 869 (7th Cir. 1978).

[70] *Id.* at 870.

[71] *Id.*

[72] 17 C.F.R. § 240.10b-5 (1978). *See* note 12 *supra*.

[73] Susman v. Lincoln Am. Corp., 561 F.2d 186 (7th Cir. 1977). The *Susman* district court denied class certification on the ground that the named plaintiff could not adequately

certification,[74] but before the court ruled on the motion, the defendant tendered the claimed money damages to the named plaintiff. The plaintiff refused to accept the tender.[75] The district court, relying on *Winokur*, dismissed the action for mootness.[76] On appeal, the Seventh Circuit refused to apply the language of *Winokur* to a precertification mootness.[77] The court stated that a pending motion for certification would "sufficiently, though provisionally" bring the interests of the unnamed putative class members before the court so that the controversy between their interests and those of the defendant would avoid "a mootness artifically created by the defendant."[78] The court held that, given the pending motion for certification, tender of the named plaintiff's damages would not moot the class action.[79] The court then remanded for consideration of the motion to certify the class action[80] and held the *Sosna* relation back excep-

represent the class because the attorney for the class was the named plaintiff's brother. *Id.* at 89. Plaintiff sought and was granted interlocutory appeal under 28 U.S.C. § 1292(b) (1970); *see* note 66 *supra*. The Seventh Circuit affirmed the denial of certification. 561 F.2d at 96. The plaintiff obtained new counsel and moved again for class action certification. 587 F.2d at 868.

[74] *Id.* Commonly, the class action plaintiff moves for certification of the class action, pursuant to Rule 23(c)(1) some time after filing the complaint. 1 NEWBERG ON CLASS ACTIONS § 1720 at 540-41 (1977). *See, e.g.*, Bradley v. Housing Auth. of Kansas City, 512 F.2d 626, 627 n.2 (8th Cir. 1975); United States v. School Bd. of Suffolk, 418 F. Supp. 639, 645 (E.D. Va. 1976); Amswiss Int'l Corp. v. Heublein, Inc., 69 F.R.D. 663, 665 (N.D. Ga. 1975); Dorfman v. First Boston Corp., 62 F.R.D. 466, 469 (E.D. Pa. 1973). Most federal courts have no time limit within which this motion must be filed. 1 NEWBERG ON CLASS ACTIONS § 1840 at 547 (1977). Generally timeliness should be judged in light of all the facts of the case. *Id.* The plaintiff's failure to move for certification of the class "bears strongly on the adequacy of the representation." East Texas Motor Freight Systems v. Rodriguez, 431 U.S. 395, 405 (1977). Commonly, the class action defendant will move to dismiss the class action allegations of the complaint. 1 NEWBERG ON CLASS ACTIONS § 1720 at 540-41 (1977). *See, e.g.*, Winokur v. Bell Fed. Sav. & Loan Ass'n, [1971-72 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,461 (N.D. Ill. 1972). On either motion, the issue decided is the same: whether a class action may properly be maintained pursuant to Rule 23. *See also* 2-PART 2 BENDER'S FEDERAL PRACTICE FORMS No. 2306.1A and 2306.1B at 553.5(1)-(2) (1978) (forms of motion to certify class action).

[75] 578 F.2d at 868.

[76] *Id.*

[77] *Id.* at 869.

[78] *Id.*

[79] *Id.* at 870. The *Susman* court noted that its decision conflicted with that of the Eighth Circuit in Bradley v. Housing Auth. of Kansas City, 512 F.2d 626 (8th Cir. 1975). 587 F.2d at 870. In *Bradley* applicants for low income housing filed a class action which charged that discrimination in rentals based on income level was a denial of equal protection. 512 F.2d at 627. The Housing Authority mooted the plaintiffs' claims by placing them in apartments. *Id.* The court relied on *Sosna* and *Jacobs* to hold that the district court properly dismissed the action at the precertification stage since the plaintiffs could no longer meet the case or controversy requirement. *Id.* at 628. Subsequent changes in the law prevented any further such abuses, *id.* at 627, so that the repetition/evasion standard had no application. Although the *Bradley* decision appears inconsistent with *Susman*, several factors militated against permitting the trial court in *Bradley* to rule on the issue of class certification after the claims of the named plaintiffs had been mooted. First, after the plaintiffs had filed an appeal with the Eighth Circuit, subsequent enactment of 42 U.S.C. § 1437(c)(4)(A) (1976) corrected the defect in the statute so that income discrimination of the kind alleged could no longer occur,

tion[81] applicable to the precertification tender. Despite the mooting of the named plaintiff's claims, the certified class action would be allowed to proceed under the *Sosna-Franks* rule.[82]

In applying the *Sosna* exception allowing relation back of class certification,[83] the *Susman* court recognized that a precertification tender of damages could prevent adjudication of claims in the same way as would mootness arising through passage of time.[84] A defendant who expeditiously attempts a precertification buy-off may succeed in mooting the plaintiff's claims before the district court has had time to consider certification. The language of the *Sosna* exception, on its face, does not preclude the exception's direct application to the precertification tender. Courts have allowed relation back when the district court has had insufficient time to consider certification prior to mootness,[85] as well as when the abuse complained of could repeat itself, although the claims may not meet the stringent "capable of repetition yet evading review" standard.[86] The defendant who would buy off named plaintiffs at the precertification stage would continue to do so as other class actions were filed, thus forestalling indefinitely any determination on the merits.[87] The district court could prevent this result by making the certification determination after mootness and relating certification, if proper, back to the time of filing the complaint.[88] The *Susman*

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thus eliminating the "capable of repetition yet evading review" problem. Second, the amendments to the statute would have required substantial amendments to the complaint to redefine the purported class. 512 F.2d at 629. As a matter of simplicity, the court preferred to permit unnamed putative class members to begin the action anew, rather than allowing the named plaintiff to continue the action saddled with the problems of redefinition and mootness. *Id.* Although this holding ignores the danger that unnamed class members, through ignorance, might never bring these actions, *see* text accompanying notes 62-66 *supra*, that danger is more than balanced by the fact that changes in the housing law would prevent such abuses in the future.

[80] 587 F.2d at 868.

[81] *See* text accompanying notes 41-43 *supra*.

[82] *See* text accompanying notes 23-26 *supra*.

[83] 587 F.2d at 870.

[84] *Id.* The *Susman* court noted that relation back in *Sosna* was intended to apply in situations where mootness occurred with the natural passage of time. *Id.*

[85] *See, e.g.*, Basel v. Knebel, 551 F.2d 395 (D.C. Cir. 1977) (insufficient time for certification by district court); Zurak v. Regan, 550 F.2d 86 (2d Cir.), *cert. denied* 433 U.S. 914 (1977) (district court delayed in making certification determination).

[86] *E.g.*, Geraghty v. United States Parole Comm., 579 F.2d 238 (3d Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979); Zurak v. Regan, 550 F.2d 86 (2d Cir.), *cert. denied*, 433 U.S. 914 (1977). *See* note 26 *supra*.

[87] *Cf.* Roper v. Consurve, Inc., 578 F.2d 1106, 1111 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979) (court noted that unnamed class members who intervene to appeal a denial of certification can be paid off in the same way as the named plaintiff).

[88] In determining whether to rule on class certification after mootness, a court should balance several factors including whether the defendant has acted affirmatively to cause the mootness and whether the named plaintiff has done the same. One commentator suggests that relation back of class certification should never be allowed in the case of a precertification mootness. However, he relies heavily on *Sosna* and *Gerstein* in which mootness arose through natural passage of time or by operation of law, situations in which neither plaintiff nor defendant caused the mootness. No consideration is given to cases where mootness has

court implied that the relation back doctrine is a product of the necessity for a legal rule that will permit adjudication when factual situations change rapidly.[89] The court ruled that the trial court could refuse to dismiss for mootness until a certification decision could be made. If the class were certifiable, certification could relate back to the time of filing under the *Sosna* exception.[90]

Thus, the *Susman* decision suggests that the effect of the mootness doctrine can be avoided by either of two theories, each giving the same result. The district court could certify the class action after mootness of the named plaintiff's claim and relate the certification back under *Sosna* or delay ruling on mootness until after reaching a decision on certification.[91] Either theory allows the class action to continue under the *Sosna*-

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been forced on the plaintiff by the defendant's actions. Comment, *A Search for Principles of Mootness in the Federal Courts*, 54 TEX. L. REV. 1289, 1328-31 (1976). Dismissal for mootness may also be appropriate in the situation where both defendant and plaintiff have contributed to mootness. *See* Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978). The *Shelton* court held that a certification hearing was not necessary once a settlement was reached if the rights of the unnamed putative class members were not prejudiced by the settlement. *Id.* at 1314. The holding addresses the situation where both parties, named plaintiff and defendant, seek to end the class action by settlement. *See also* Arriaza v. Crocket Nat'l Bank, 577 F.2d 750 (9th Cir. 1978), *cert. denied*, 47 U.S.L.W. 3364 (U.S. November 28, 1978). The plaintiffs in *Arriaza* accepted a court approved settlement after class action certification was denied. The Ninth Circuit dismissed the appeal of the denial of certification as moot with respect to the named plaintiffs. *Id. See generally* Almond, note 2 *supra*.

The case where the defendant seeks to end the action by precertification buy-off while the plaintiff tries to press the class claims falls between these extremes. The simplest solution may be to permit mootness which occurs naturally or through collusion but to prevent the defendant from asserting a mootness he has created with a tender of damages designed to avoid liability to the entire class. The *Susman* court noted that the defendant had artificially created the mootness. 587 F.2d at 869. To avoid precertification dismissal for mootness, the plaintiff should be required to show expeditious pursuit of class action certification, a willingness to continue the action, and rejection of defendant's tender. The *Susman* court found these requirements satisfied by limiting its holding to the "situation where a motion for certification has been pursued with reasonable diligence." *Id.* at 871 n.4.

[89] *Id.* at 870. The *Sosna* court also stated that relation back "may depend upon the circumstances of the particular case." 419 U.S. at 402 n.11. The *Susman* court recognized and approved of the *Sosna* court's emphasis on examining the individual facts of each case. 587 F.2d at 870, *citing* Geraghty v. United States Parole Comm., 579 F.2d 238 (1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979), *see* notes 7, 33, & 45 *supra*; Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334 (1977), *see* note 7 *supra*. The *Susman* court applied the relation back exception, arguing that "courts must have a reasonable opportunity to consider and decide a motion for certification." 587 F.2d at 870.

[90] *Id.*

[91] The *Susman* court seems to prefer the simplicity of delaying a ruling on mootness until after ruling on certification. *Id.* at 870. This sequence, certification followed by a finding of mootness, would not necessitate relation back of certification since the action would be certified before mootness officially arose. However, since the *Susman* court went to some length to show how the relation back exception applied, the court must have attached some importance to the relation back of the certification. This suggests that despite the sequence of the findings of the court, mootness really arises at the time of the tender of damages, regardless of when the court rules on mootness. Thus, under the alternative sequence of mootness followed by class certification which is related back, the result is the same and the court can rule on the issues in the order presented.

Franks rule that a certified class action may proceed despite the mootness of the named plaintiff's claims.

The policy arguments for preserving class actions recognized by the *Roper* court support even more strongly the result in *Susman.* At the precertification stage, no adverse determination has been made on the certification issue. Allowing defendants to buy off a class action before a ruling on certification makes possible the buy-off of all class actions brought solely for money damages.[92] Such a result would mean the end of the class action as an effective device for vindication of multiple small claims. Every class action defendant would tender named plaintiff's damages and move for dismissal for mootness immediately upon learning that a class action had been filed. No class action recovery would ever again be achieved. The *Susman* decision prevents such a result.

A post mootness certification hearing does not prejudice severely the defendant's rights, as would, for example, a requirement that the defendant give precertification notice to class members.[93] If the class is certified by the district court after mootness, the defendant's argument that relation back of certification results in exposure to classwide liability is outweighed by the finding that a proper class exists which has claims against the defendant. Thus, the solution to possible precertification buy-off is district court determination of whether the class should be certified.[94] Assuming that *Winokur* is still good law after *Susman,*[95] the Seventh Circuit allows buy-off at the post-denial stage but not at the precertification stage if a motion for certification is pending.

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[92] *See* Winokur v. Bell Fed. Sav. & Loan Ass'n, 562 F.2d 1034, 1034 (7th Cir. 1977) (Swygert, J., dissenting from denial of rehearing). The *Susman* court quoted with approval language from *Roper* which decries the possibility of buy-off and recognizes fiduciary duties in the named plaintiff. 587 F.2d at 870-71, *quoting* 578 F.2d 1106, 1110 (5th Cir. 1978). Although the *Susman* court did not discuss the direct conflict between *Roper* and the law of the Seventh Circuit in *Winokur,* the court qualified its approval of the *Roper* language by asserting that the *Susman* holding was limited to the precertification stage. 587 F.2d at 871 n.4. *See* note 94 *infra.*

[93] *See* note 67 *supra.*

[94] Whether *Susman* overrules *Winokur* by implication remains an open question. Both decisions rely heavily on *Sosna.* The *Susman* court held that the case or controversy requirement was satisfied because the pending motion for certification "sufficiently, though provisionally" brought the interests of the unnamed class members before the court to avoid a finding of mootness. 587 F.2d at 869. The proviso is that certification must be held proper when ruled upon. In *Winokur,* certification was ruled improper and whatever provisional status the unnamed class members had was eliminated by that ruling. Thus, on the narrowest grounds of each decision, *Susman* and *Winokur* proposed rules which are not inconsistent.

One cannot ignore, however, the *Susman* court's citation of *Geraghty* with approval. *Geraghty* may be inconsistent with *Winokur.* Neither can one ignore the *Susman* court's reliance on *Roper,* which is diametrically opposed to *Winokur.* The arguments advanced in *Susman* would seem to support overruling *Winokur.* Why a pending motion for certification is sufficient to bring the interests of the unnamed class members before the court while an attempted appeal of a denial of class certification is not does not seem apparent. A Seventh Circuit plaintiff faced with a post denial buy-off could quite justifiably argue from *Susman* that *Winokur* should be overruled in favor of the rule in *Roper.*

[95] *See* note 94 *supra.*

The *Susman* decision, however, does not prevent all precertification buy-offs. The *Susman* court limited its holding to the case where a motion for certification is pending but recognized that the same arguments could support a similar holding at the pre-motion stage based on class action allegations in the complaint.[96] The *Susman* court recognized the requirement of *Sosna* that the interests of the unnamed class members must be sufficiently before the court to raise a controversy. The *Sosna* court did not elaborate on the conditions that must be met to satisfy this requirement. The *Susman* court held that the timely filing and diligent pursuit of a motion for class certification brought the interests of the class before the court.[97] The implication is that the plaintiff's diligent prosecution of the class action, in whatever form, would bring those interests sufficiently before the court. Class action allegations in the complaint could be sufficient where the defendant tenders damages before the plaintiff reasonably could have moved for class action certification.

A buy-off will moot a claim for damages only if there is a tender of the full amount of the damages. A defendant that offers less than the full amount is not buying off but is negotiating for settlement. If the defendant attempts to negotiate, and negotiations prove futile due to plaintiff's recalcitrance, the court could still apply the relation back exception of *Sosna* to a buy-off attempt that has been delayed by negotiations. The critical issue in applying the exception is whether the buy-off attempt occurs before the court has had time to consider class certification. However, if the plaintiff agrees to negotiate a settlement, and therefore is partially responsible for the delay, relation back would not be allowed.[98] Failing to move timely for certification is one example of delay caused by plaintiff.[99] Thus, when the plaintiff is without fault, opposes the tender of damages, and timely files a motion for certification, the district court could certify the class after the mooting of named plaintiff's claims, regardless of whether the plaintiff filed the motion for certification before or after the tender.

Proponents of the fiduciary theory argue that even though the individual claim has been satisfied, the named plaintiff still has an interest in the certification of the class.[100] The named plaintiff has a fiduciary duty to the unnamed class members which arises when the plaintiff files the class action.[101] One of the plaintiff's duties is to seek certification of the class. This interest of the plaintiff should be a sufficient Article III controversy to avoid mootness, apart from the interests of the unnamed class members and the timing of the motion in relation to the tender.[102] The *Susman* court

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[96] 587 F.2d at 869 n.2.

[97] *Id.* at 869.

[98] Satterwhite v. City of Greenville, 578 F.2d 987, 995 n.10 (5th Cir. 1978).

[99] *Id.*

[100] *See* Roper v. Consurve, Inc., 578 F.2d 1106, 1110-11 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979). *See also* text accompanying notes 38-40 *supra.*

[101] Roper v. Consurve, Inc., 578 F.2d 1106, 1110-11 (5th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3586 (U.S. March 6, 1979).

[102] If the named plaintiff fails to move for certification of the class within a reasonable

quoted language from *Roper* which supports this fiduciary theory,[103] but did not rely on the theory. Even if the fiduciary theory is applied, the plaintiff must be a member of the class at the time the class is certified.[104] Relation back of class certification, therefore, is still necessary.

In neither the precertification nor the post-denial buy-off situation is the case or controversy clause offended by allowing consideration or review of the certification after the defendants have tendered damages to the named plaintiffs. A strict application of the mootness doctrine would allow defendants with actual liability to escape classwide liability. Numerous small claims would go unredressed, and other class members would file new class actions, thereby clogging the courts and creating judicial diseconomy. The promotion of the class action as a device to vindicate small claims encourages courts to allow consideration or review of class certification issues. Only when class action certification is denied and that denial affirmed after full appellate review should the action be dismissed for mootness of the named plaintiff's claim.

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time and tender occurs, then the plaintiff should not be able to rely on the fiduciary theory to avoid mootness. In failing to timely move for certification he has breached his fiduciary duty before any mootness arose. *See* East Texas Motor Freight Systems v. Rodriguez, 431 U.S. 395, 405 (1977). Thus, the fiduciary theory gives the same result as the theory based on the interests of the unnamed class members being sufficiently before the court. The class action, then, can survive mootness if either a motion for certification is pending but the court has had insufficient time to rule, or mootness occurs before the plaintiff has had a reasonable time in which to move for certification.

[103] 587 F.2d at 870-71.

[104] Sosna v. Iowa, 419 U.S. 393, 402 (1975). *See* East Texas Motor Freight Systems v. Rodriguez, 431 U.S. 355, 403 (1977).