Washington and Lee Law Review

Volume 38 | Issue 1 Article 20

Winter 1-1-1981

Deposit Guaranty National Bank v. Roper and U.S. Parole Commission v. Geraghty: Solution for or Confusion of Class Action M ootness?

DEPOSIT GUARANTY NATIONAL BANK V. ROPER AND *UNITED STATES PAROLE COMMISSION V. GERAGHTY*: SOLUTION FOR OR CONFUSION OF CLASS ACTION MOOTNESS?

The class action is an important procedural device in the American legal system.[1] Class actions preserve judicial resources by allowing the adjudication of a large number of individual claims in a single action.[2] Class actions also provide access to the court system to claimants who, because of the cost of litigation, would find individual access economically infeasible.[3]

Rule 23 of the Federal Rules of Civil Procedure prescribes when a group may take advantage of class action procedures.[4] Upon motion for class certification, the presiding district court determines whether the action is maintainable as a class action.[5] The court's determination involves consideration of the manageability of the putative class, the nature of the claims asserted, and the ability of the named plaintiff to represent the interests of the class.[6] The district court will certify the suit as a class action if the court finds the action can be so maintained.[7]

---

[1] 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1751 (1972) [hereinafter cited as WRIGHT & MILLER].

[2] Williams v. Mumford, 511 F.2d 363, 371 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); Note, United Airlines v. McDonald: *Class Certification and the "Uncertain Sound,"* 11 J. MAR. L. REV. 635, 635-36 (1978).

[3] Williams v. Mumford, 511 F.2d 363, 371 (D.C. Cir. 1975).

[4] FED. R. CIV. P. 23. Subdivision (a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. Subdivision (b) requires a maintainable class action to fall into one of three categories. The first category consists of class actions brought to avoid individual suits that might subject the defendant to conflicting judgments or might impair the separate members of the class in protecting their rights. Under the second category, a suit brought by a group of individuals seeking injunctive or declaratory relief for the group as a whole is maintainable as a class action. The final category allows class actions in which putative class members raise common questions of law and fact. The common questions must predominate over individual matters in the case and the class action must be the best procedure to adjudicate the controversy. *Id.*

[5] FED. R. CIV. P. 23. Subdivision (c)(1) provides that as soon as practicable after commencement of an action brought as a class action, the district court must determine whether the class action is maintainable. *Id.*; *see* Weisman v. MCA, Inc., 45 F.R.D. 258, 260 (D. Del. 1968) (district court judge must determine maintainability as soon as practicable).

[6] *See* note 4 *supra*.

[7] *See* 7A WRIGHT & MILLER, *supra* note 1, § 1785.

If the district court finds the class action is not maintainable and denies certification, the fate of the putative class depends on an appeal of the ruling. Given the United States Supreme Court's holding in *Coopers & Lybrand v. Livesay*,[8] the success of an appeal of an adverse certification ruling is uncertain. In *Livesay*, the Court denied interlocutory appeal of a certification ruling.[9] The Court rejected the "death knell" doctrine,[10] which allowed the interlocutory appeal of an order when that order effectively ended the entire action.[11] While alternative methods of interlocutory appeal are available, these methods are rarely successful.[12]

Where denial of certification results in dismissal of the entire action, the ruling is final and the plaintiff can appeal immediately.[13] The ruling is not final, however, where the named plaintiffs may continue their individual claims after certification denial. When the certification ruling is not final, absent class members may intervene as plaintiffs, file private actions, or seek appeal of the certification ruling.[14] If absent class mem-

---

[8] 437 U.S. 463 (1978), *rev'g*, Livesay v. Punta Gorda Isles, Inc., 550 F.2d 1106 (8th Cir. 1977).

[9] 437 U.S. at 477; *see* 28 U.S.C. § 1291 (1976) (circuit courts have jurisdiction of appeals from all final decisions).

[10] The Second Circuit developed the "death knell" doctrine in Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 121 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). The doctrine, derived from the collateral order concept of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), is an exception to the finality requirement of § 1291. 28 U.S.C. § 1291 (1976); *see* 370 F.2d at 120. The "death knell" doctrine allows immediate appeal of the district court's denial of class certification where the ruling effectively ends the action. Until Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), the doctrine applied to groups of claimants with small claims who could not afford to pursue an appeal of their certification ruling. *See* 370 F.2d at 120. For in-depth studies of the "death knell" doctrine, see Cohen, *"Not Dead But Only Sleeping": The Rejection of the Death Knell Doctrine and the Survival of Class Actions Denied Certification*, 59 B.U.L. REV. 257 (1979); Comment, *Appealability of a Class Action Dismissal: The "Death Knell" Doctrine*, 39 U. CHI. L. REV. 403 (1972); Note, *Prejudgment Order Denying Class Action Status Is Not Appealable*, 1979 WIS. L. REV. 292.

[11] 437 U.S. at 469.

[12] *See* Note, *Interlocutory Appeal From Orders Striking Class Action Allegations*, 70 COLUM. L. REV. 1292 (1970) [hereinafter cited as *Interlocutory Appeal*] (general discussion of avenues of interlocutory appeal of denial of class certification). Under § 1292(b), federal district courts may certify an order for appeal if the order involves a disputed controlling question of law that may materially advance the end of the action. 28 U.S.C. § 1292(b) (1976). Upon the district court's certification, the circuit court has discretion to permit appeal of the order. *Id.* Both district and circuit courts exercise judicial self-restraint in allowing a § 1292(b) appeal. *See Interlocutory Appeal*, *supra* at 1296. A second avenue to interlocutory review is the writ of mandamus. The All Writs Act, 28 U.S.C. § 1651 (1976), allows a circuit court to order a district court to certify a class if the district court's decision is extremely abusive. Issuance of a writ of mandamus, however, is rare. *Interlocutory Appeal*, *supra* at 1298-99.

[13] Coopers & Lybrand v. Livesay, 437 U.S. 463, 467-68 (1978).

[14] *See* Comment, *Resurrecting Claims Through Post-Judgment Appeal of Class Certification Denial*, 64 IOWA L. REV. 964, 964 (1979) (discussion of appeal of certification denial after final judgment on named plaintiff's individual claim).

bers seek appeal of the ruling, they may intervene in the action and wait for a final judgment. As an alternative the class members may await appeal by the named plaintiff after final judgment.[15]

Absent class members who wait for a post-judgment appeal of the certification ruling risk defendant induced mootness, known as "buying off."[16] "Buying off" occurs when the defendant satisfies the named plaintiff's personal claim before the successful certification of the class action.[17] The defendant seeks to avoid the multiple claims of a class by rendering the class action moot.[18]

Mootness results from a litigant's failure to meet the case or controversy limitations of article III of the United States Constitution.[19] A principal aspect of the article III limitations is the personal stake requirement. Each party to an action must have a personal stake in the outcome of the litigation.[20] An act or event that satisfies a party's personal stake eliminates that party's claim. Most class action mootness problems arise when the named plaintiff loses his personal stake.[21] Case

---

[15] *See* United Airlines, Inc. v. McDonald, 432 U.S. 385, 396 (1977) (absent class member allowed to appeal certification ruling after final judgment of named plaintiffs' action).

[16] *See* Note, *Averting Defendant-Induced Pre-Certification Mootness of Class Actions*, 55 CHI.-KENT L. REV. 793, 808 (1979) [hereinafter cited as *Defendant-Induced Mootness*].

[17] *Id.*

[18] *Id.*

[19] Historically, mootness was a common law doctrine that held courts powerless to decide nonexistent disputes. *Ex parte* Baez, 177 U.S. 378, 390 (1900). The lack of power resulted from the absence of subject matter jurisdiction. *Id.* In Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240 (1937), the Supreme Court provided the earliest indication of constitutional grounds for the mootness doctrine. In dictum, the Court distinguished a justiciable controversy from a hypothetical or moot case. *Id.* Not until 1964, however, did the Court explicitly base the mootness doctrine on article III. Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); *see* U.S. CONST. art. III, § 2 (case or controversy clause). By 1968, the mootness doctrine was a "constitutional rule." Sibron v. New York, 392 U.S. 40, 57 (1968); *see* Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 375 n.12 (1974) [hereinafter cited as *Mootness Doctrine*].

The case or controversy limitations in article III have two purposes. The case or controversy limitations seek to assure that federal courts will not infringe on an area committed to another branch of government, and that issues presented to federal courts will be in a form capable of judicial resolution in an adversary context. Flast v. Cohen, 392 U.S. 83, 95 (1968). Courts employ the mootness doctrine to ensure adverseness. *Id.* The mootness doctrine takes into consideration the viability of the controversy between the parties and the legally cognizable interest of the parties in the outcome of the action. Powell v. McCormack, 395 U.S. 486, 496 (1969). The legally cognizable interest required of the parties is referred to as the personal stake requirement. Baker v. Carr, 369 U.S. 186, 204 (1962). The general wording of the case or controversy clause of article III results in the absence of constitutional guidelines and makes incorporation of the mootness doctrine requirements an exercise in self-restraint by the Supreme Court. *Mootness Doctrine, supra* at 375 n.12; Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1672 (1970) [hereinafter cited as *Mootness on Appeal*].

[20] *See* note 19 *supra.*

[21] Comment, *A Search for Principles of Mootness in the Federal Courts* (pt. 2), 54 TEX. L. REV. 1299, 1320-21 (1976). For discussions of mootness in class actions, see Bledsoe, *Moot-*

law traditionally protected certified class actions from mootness.[22] Prior to *Deposit Guaranty National Bank v. Roper*[23] and *United States Parole Commission v. Geraghty*,[24] however, many jurisdictions found uncertified class actions moot when the named plaintiff's claim became moot.[25] The cases of *Roper* and *Geraghty* clearly extend protection to uncertified class actions.

Roper involved two credit card holders who sued a Mississippi bank for usury.[26] The complaint alleged that the bank levied usurious finance

---

ness and Standing in Class Actions, 1 FLA. ST. U.L. REV. 430 (1973); Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure?*, 8 VAL. U.L. REV. 333 (1974).

[22] *See* note 25 *infra*.

[23] 445 U.S. 326 (1980), *aff'g*, Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978).

[24] 445 U.S. 388 (1980).

[25] The Supreme Court's decision in Sosna v. Iowa, 419 U.S. 393 (1975), insulated certified class actions from the named plaintiff's mooted claim. *Id.* at 402-03. *Sosna* involved a constitutional challenge of Iowa's residency requirement for divorces. *Id.* at 395; *see* IOWA CODE ANN. § 598.6 (West Supp. 1980) (divorce petitioner must be resident of Iowa for one year). Pending appeal, the named plaintiff satisfied the residency requirement thereby rendering her claim moot. *Id.* at 398. The Supreme Court held, however, that the named plaintiff's satisfaction of the residency requirement did not render the class action moot. *Id.* at 402. The Court ruled that upon proper certification, absent class members are vested with a legal right separate from the named plaintiff's right. *Id.* at 399. The separate legal right satisfies article III because a live controversy continues between the absent members and the defendant. *Id.* at 401.

Following *Sosna* the Court's support for class actions appeared limited to those certified. This appearance was due to two cases, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), and Board of School Comm'rs v. Jacobs, 420 U.S. 128 (1975). In *Spangler*, the mooted claims of the named students in an action attacking segregation rendered the entire action moot because the students were never certified as a class. 427 U.S. at 430. In *Jacobs*, the named plaintiff's mooted claim resulted in a mooted class because the district court failed to certify the class action properly. 420 U.S. at 129. In *Spangler* and *Jacobs*, the Supreme Court held uncertified class actions moot because of the named plaintiffs' mooted claims. 427 U.S. at 430; 420 U.S. at 129. *Jacobs* and *Spangler*, however, left the mootness question open in cases in which the district court specifically denied certification. The Supreme Court decisions addressed only class actions in which certification was improper. 427 U.S. at 430; 420 U.S. at 129. With no clear standard for guidance, the circuit courts took conflicting approaches to the mootness of a class action in which a district court specifically had denied certification. *Compare* Armour v. City of Anniston, 597 F.2d 46, 48-49 (5th Cir. 1979), *vacated*, 445 U.S. 940 (1980) (court's discharge of named plaintiff's suit rendered uncertified class action moot) *and* Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271, 277 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) (mooting of named plaintiff's claims deprived court of jurisdiction to hear named plaintiffs' appeal of certification ruling) *and* Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334, 1336 (9th Cir. 1977) (class action rendered moot because named plaintiff's claim was mooted before certification) *with* Susman v. Lincoln American Corp., 587 F.2d 866, 869 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980) (class action pending motion for certification remained viable after named plaintiff's claim mooted) *and* Goodman v. Schlesinger, 584 F.2d 1325, 1332-33 (4th Cir. 1978) (after named plaintiff's claim mooted case remanded to dismiss class action or to allow another class member to represent class).

In United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), the Supreme Court foreshadowed the *Roper* and *Geraghty* decisions. The *McDonald* cases concerned an interven-

charges against the named plaintiffs and some 90,000 other card holders.[27] Four years after the case began, the district court denied plaintiffs' motion to certify the class. The district court ruled that the action failed to meet all of the Rule 23(b)(3) requirements.[28]

The district court certified its finding for possible interlocutory appeal under section 1292(b) of title 28 of the United States Code.[29] The named plaintiffs appealed the ruling to the Fifth Circuit Court of Appeals. The Fifth Circuit denied appeal and the action proceeded as one for the named plaintiffs only.[30] Seven months later, the defendant tendered to the named plaintiffs the full amount of each named plaintiff's claim.[31] The named plaintiffs refused the offer and made a counteroffer, trying to reserve the right to appeal the certification ruling. The defendant bank refused the counteroffer.[32] Over the plaintiffs' objections, the district court entered judgment for the named plaintiffs in the amount of defendant's offer and dismissed the action. The named plaintiffs then sought appeal of the certification ruling in the Fifth Circuit.[33]

The Fifth Circuit reversed the district court's order denying certification.[34] The Fifth Circuit rejected the respondent bank's argument that the mooted claims of the named plaintiffs rendered the class action moot. The holding relied on what the Fifth Circuit termed the class representative's fiduciary duty to protect the interests of the putative class.[35]

The Supreme Court granted the bank's petition for certiorari on the question of the class action's mootness.[36] The Court, with Chief Justice Burger writing for the majority, affirmed the Fifth Circuit's decision.[37] The Court relied on its ruling in *Electrical Fittings Corp. v. Thomas &*

---

ing class member's ability to appeal the denial of certification. *Id.* at 393-94. Allowing the appeal, the Court stated in dictum that denial of certification removes the class action procedure from the suit. *Id.* at 394. The Court further stated that because the class action can be revived on review, the class action is not treated as nonexistent. *Id.*

[26] 445 U.S. at 327.

[27] *Id.*

[28] 445 U.S. at 329 n.2. The district court in *Roper* found Federal Rule 23(b)(1) and (b)(2) inapplicable because of the nature of the class. *See* Roper v. Consurve, Inc., 578 F.2d 1106, 1111 n.3 (5th Cir. 1978), *aff'd*, 445 U.S. 326 (1980) (district court opinion unpublished). The district court further found Rule 23(b)(3) inapplicable because of the availability of a state forum, the magnitude of the aggregated claims, the fact that Mississippi law disfavors aggregation of usury claims, and the unmanageable size of the class. 445 U.S. at 329 n.2.

[29] *See* note 12 *supra.*

[30] 445 U.S. at 329.

[31] *Id.*

[32] *Id. See generally* Dole, *The Settlement of Class Actions for Damages*, 71 COLUM. L. REV. 971 (1971) (detailed study of class action settlements).

[33] Roper v. Consurve, Inc., 578 F.2d 1106, 1106 (5th Cir. 1978).

[34] *Id.* at 1116.

[35] *Id.* at 1110-11; *accord, Defendant-Induced Mootness, supra* note 16, at 808. The Supreme Court affirmed the decision on constitutional grounds rather than the Fifth Circuit's fiduciary duty grounds. *See* text accompanying notes 42-45 *infra.*

[36] Deposit Guar. Nat'l Bank v. Roper, 440 U.S. 945 (1979) (mem.).

[37] 445 U.S. at 340.

Betts Co.[38] *Electrical Fittings* involved infringement of a patent. The district court found that the defendant did not infringe plaintiff's patent and that the patent was valid.[39] The defendant moved to appeal the district court's finding that the patent was valid.[40] The Supreme Court allowed the defendant to appeal because the finding was procedural, unnecessary to the judgment and could have adverse collateral estoppel consequences upon the appellant.[41]

As in *Electrical Fittings*, the *Roper* Court found the certification ruling to be procedural.[42] The Court held that a party prevailing on the merits could appeal a ruling collateral to the merits if that party retained a personal stake in the matter.[43] The named plaintiffs in *Roper* asserted that the economic interest in spreading the costs of litigation among all the class members was their personal stake.[44] The Court agreed, viewing this economic interest as a personal stake sufficient to satisfy article III.[45]

Besides holding that the named plaintiffs possessed a sufficient personal stake, the *Roper* Court further addressed the question whether a named plaintiff may appeal an adverse certification ruling after prevailing on the merits of his own claim. Chief Justice Burger commented that while the Court rejected an interlocutory appeal as a matter of right in *Livesay*,[46] the Court reaffirmed the right of appeal upon final judgment.[47] The Chief Justice suggested that the Court in *United Airlines, Inc. v. McDonald*,[48] assumed that a named plaintiff could appeal the certification ruling after prevailing on the merits.[49]

In dictum, the *Roper* Court expressed firm support for the class action plaintiff.[50] The Court stated that the class action procedure is a response to injuries for which government regulatory action does not provide adequate remedy.[51] The Court further expressed support for

---

[38] 307 U.S. 241 (1939).

[39] *Id.* at 242.

[40] *Id.*

[41] *Id.*

[42] 445 U.S. at 335 n.7. In *Roper*, the Court compared the *Electrical Fittings* patent validity ruling with the certification ruling in *Roper*. *Id.* at 334-35. The Court noted that petitioners in *Roper* and *Electrical Fittings* had the same right to appeal the collateral ruling, since both petitioners could suffer adverse consequences from the ruling. *Id.*

[43] *Id.* at 336-37.

[44] *Id.* Justice Powell dissented, in *Roper*, criticizing the majority's reasoning on the issue of the plaintiffs' personal stake in the class certification. *Id.* at 346. Justice Powell pointed out that the named plaintiffs' counsel was to receive fees only in proportion to the damages awarded. *Id.* at 346 n.2. *See* text accompanying notes 89-91 *infra* (discussing plaintiffs' obligation to pay attorney's fees).

[45] *See* 445 U.S. at 336-40; note 19 *supra*.

[46] *See* text accompanying notes 8-11 *supra*.

[47] 445 U.S. at 337-38.

[48] 432 U.S. 385 (1977).

[49] *Id.* at 390, 394.

[50] 445 U.S. at 338.

[51] *Id.*

class actions as a means of redress for persons economically unable to sustain their own, small suits.[52]

Finally, the *Roper* Court attacked "buying off" tactics. The Court stated that denying appeal of class certification where the defendant intentionally satisfies the named plaintiffs' claims is contrary to the policy of sound judicial administration.[53] The Court further condemned "buying off" as a waste of judicial resources and a frustration to class action objectives.[54]

The Court decided *United States Parole Commission v. Geraghty*,[55] the same day as *Roper*. As in *Roper*, the *Geraghty* Court allowed a named plaintiff to appeal the class certification ruling after the named plaintiff's own claim had become moot.[56] In *Geraghty*, a federal prisoner, John Geraghty, filed a complaint challenging the validity of parole guidelines. The complaint alleged that the guidelines were inconsistent with the Parole Commission and Reorganization Act.[57] Geraghty brought the action on behalf of all federal prisoners subject to the federal parole guidelines.[58] The district court denied class certification and granted the defendant's motion for summary judgment.[59] Refusing to certify the class, the district court found certification necessary only to avoid mootness. Further, the court found certification inappropriate because Geraghty's claims were not typical of the entire class.[60] Pending appeal of both the certification ruling and the summary judgment,[61] the federal penitentiary released Geraghty.[62] The Parole Commission moved to dismiss the appeal as moot, but the Third Circuit chose to consider the mootness issue with the merits of the case.[63]

---

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] 445 U.S. 388 (1980).

[56] *Id.* at 404.

[57] *Id.* at 391-92; *see* 18 U.S.C. §§ 4201-4218 (1976). The Parole Commission and Reorganization Act requires the Parole Commission to promulgate parole guidelines in the interest of public welfare. The Parole Commission continues to employ existing guidelines that use a matrix formula that takes into consideration various factors concerning the prisoner and the offense he committed. The matrix yields a time period that the prisoner must serve before being eligible for parole. *See* 445 U.S. at 390-92. Sentenced to 30 months, Geraghty's matrix indicated a range of 26 to 36 months before he would be eligible for release on parole. *See id.* at 391-92. Geraghty alleged that the matrix system was inconsistent with the purposes of the Parole Commission and Reorganization Act by requiring a prisoner to serve an excessive portion of his sentence in order to be eligible for parole. *Id.*

[58] *See* Geraghty v. United States Parole Comm'n, 429 F. Supp. 737, 740 (M.D. Pa. 1977), *rev'd*, 579 F.2d 238 (3d Cir. 1978), *aff'd*, 445 U.S. 388 (1980).

[59] *Id.* at 741, 744.

[60] *Id.* at 740-41.

[61] 579 F.2d 238 (3d Cir. 1978).

[62] 445 U.S. at 394. Geraghty served 22 months of his sentence and did not have to serve the remaining eight months because of "good-time credits." *Id.*

[63] *See* 579 F.2d at 241.

The Third Circuit found that a live controversy existed with respect to the class action and reversed and remanded the case.[64] The appellate court reasoned that the mooted claim of the named plaintiff would not have rendered the case moot if the district court had certified the class action.[65] An erroneous denial of certification by the district court, therefore, should not lead to a different result.[66] Accordingly, the Third Circuit held that when a court erroneously denies certification to a class, subsequent certification of the class relates back to the denial. The Third Circuit concluded that the possibility of relation back preserves jurisdiction over the appeal.[67]

The Supreme Court granted the Parole Commission's petition for certiorari in order to resolve both the article III issues and the conflicting approaches to class action mootness employed in the lower courts.[68] In a five to four decision, the Court approved the Third Circuit's upholding of class action viability.[69] The *Geraghty* Court held that the named plaintiff's claim of entitlement to represent the class satisfies article III and is an issue separate from the named plaintiff's claim on the merits.[70]

The *Geraghty* Court, departing from the traditional personal stake approach, based its ruling on a flexible interpretation of the mootness doctrine.[71] Justice Blackmun, writing for the majority focused on the personal stake aspect of the doctrine.[72] The majority observed that the pur-

---

[64] *Id.* at 254.

[65] *Id.* at 248-49. The Third Circuit based its reasoning on Gerstein v. Pugh, 420 U.S. 103 (1975). *See* 579 F.2d at 248-51. In *Gerstein*, the Court decided that the named plaintiff could continue representing the putative class until the district court ruled on class certification. 420 U.S. at 110 n.11. The decision relied on the "capable of repetition, yet evading review" doctrine, finding that the mootness of named plaintiffs' claims could repeatedly thwart class certification. *See id.* The United States Supreme Court created the "capable of repetition, yet evading review" exception in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). *See* 219 U.S. at 515. The exception applies when the alleged wrong can recur, but because of temporal circumstances no single plaintiff can keep his case in controversy long enough to have the issue fully adjudicated. *Gerstein* was the Court's first application of the exception to class actions. The exception protects class actions in which temporal circumstances render the named plaintiff's claim moot. *See* 420 U.S. at 110 n.11.

[66] 579 F.2d at 248-52.

[67] *Id.* The Supreme Court recognized the doctrine of relation back in Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 100-01 (1871). The relation back doctrine is a fiction by which the law treats an act done at one time as though the act were done at a previous time. *Id.* The Court in Sosna v. Iowa, 419 U.S. 393 (1975), first suggested the application of the relation back doctrine to class actions. *See* 419 U.S. at 402 n.11. The actual application of the doctrine occurred in Gerstein v. Pugh, 420 U.S. 103 (1975). The *Gerstein* Court held that certification can relate back to the time of the complaint in cases in which the district court did not have a reasonable opportunity to rule on the certification before the named plaintiff's claim became moot. *See id.* at 110 n.11.

[68] *See* 440 U.S. 945 (1979) (mem.).

[69] *See* 445 U.S. at 390, 409.

[70] *Id.* at 401-02.

[71] *See id.* at 400-01.

[72] *See id.* at 401-04; *see* note 19 *supra*.

pose of the personal stake requirement is to assure adverseness and that adverseness can be assured by means other than the traditional approach.[73] The Court developed this premise through a study of prior class actions. The prior decisions, including *Roper*, demonstrated instances in which named plaintiffs continued to represent their classes after their own claims were moot.[74] In each instance, the Court found that the named plaintiffs' lack of a traditional personal stake did not thwart adverseness.[75]

The *Geraghty* Court expanded the *Roper* issue-by-issue approach.[76] The *Geraghty* Court agreed with the *Roper* holding that the procedural ruling of certification presents a separate issue from the claim on the merits.[77] The *Geraghty* Court further held, however, that the separate issue arises from the named plaintiff's claim of entitlement to represent a class.[78]

The *Geraghty* Court held that the named plaintiff's claim of a right to represent a class supplies a personal stake sufficient to satisfy article III requirements.[79] Applying a flexible rationale to the *Geraghty* case, the Court found that the personal stake involved in the appeal of the certification ruling cannot meet traditional personal stake requirements.[80] The Court stated that a procedural claim rarely consists of a legally cognizable interest.[81] The Court found, however, that the purpose of the tradi-

---

[73] 445 U.S. at 403-04; *see* note 74 *infra*.

[74] 445 U.S. at 398-402; *see, e.g.*, Gerstein v. Pugh, 420 U.S. 103 (1975); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). In *Gerstein*, the Court held that the named plaintiff could continue representing the putative class until the district court ruled on class certification. *See* 420 U.S. at 110 n.11; note 67 *supra*. In *McDonald*, the Court allowed an intervening putative class member to appeal the certification ruling after final judgment on the named plaintiff's claim. 432 U.S. at 396. The statute of limitations ostensibly mooted the putative member's claim before her intervention. *See id.* at 391-92. The Court sustained the class member's intervention, however, by relating back the class certification to when the district court originally denied certification. *Id.* at 392. *See* note 67 *supra*.

[75] 445 U.S. at 400.

[76] *See* 445 U.S. at 334-35.

[77] 445 U.S. at 401-02. The *Geraghty* Court held that a class action raises two separate issues. The separate issues are the claim on the merits and the claim by the named plaintiff of entitlement to represent the class. *Id.*

[78] *Id.*

[79] *Id.* at 404.

[80] *Id.* at 402-03.

[81] The *Geraghty* Court pointed out that a named plaintiff's right to represent the class might amount to a legally cognizable interest when the class members are indispensable parties. *Id.* at 402 n.8. An indispensable party is a person whose presence is needed for the just adjudication of the claim. *See* FED. R. CIV. P. 19(b); C. WRIGHT, FEDERAL COURTS § 70, at 300 (2d ed. 1970).

The *Geraghty* Court reasoned that a named plaintiff's procedural claim is closely analogous to the private attorney general concept. 445 U.S. at 402-03. The term "private attorney general" is a label applied to actions brought on behalf of the public interest rather than the private interest of the named party. *See generally* Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343 (1974) (in-depth

tional personal stake requirement is fulfilled when a live controversy continues to exist and the named plaintiff vigorously pursues appeal.[82] Accordingly, the *Geraghty* Court held that the named plaintiff's assertion of his right to represent the class establishes a personal stake sufficient to allow the named plaintiff to appeal the certification ruling.[83]

Roper and *Geraghty* both addressed the issue of a class action's viability when the named plaintiff's claim is rendered moot. The holdings, however, upheld that viability through two constitutionally conflicting rationales. The *Roper* Court attempted to meet the traditional personal stake requirements of article III by asserting an economic interest.[84] The *Geraghty* Court's flexible doctrine deviates sharply from the strict personal stake requirements.[85]

The Court's holding in *Geraghty* is preferable to the *Roper* holding. The *Roper* holding directly attacks "buying off," but the analysis is unsound. In an attempt to conform to the traditional personal stake requirements,[86] the Court created a fictional economic interest. The named plaintiffs' desire to spread the litigation expenses among the class was not an economic interest of the named plaintiffs. As Justice Powell pointed out in his dissent, the Court failed to demonstrate any expenses for which the named plaintiffs were responsible.[87] Since the attorney's fees were to be twenty-five percent of the damages awarded, the named plaintiffs' share of the fee would have been the same regardless of any award to other class members.[88]

The *Roper* holding actually benefits the named plaintiffs' counsel since he is the only person to benefit from class certification other than the absent class members. While the class members' claims are definite, the attorney's fees are proportional to the judgment awarded.[89] If the class receives all its aggregated claims, counsel's fees will be substantially higher. The *Roper* holding aids class action attorneys by preventing the attorneys' loss of time and fees because of mootness.[90] The

---

discussion of private actions in the public interest). The justifications for the class action procedure are the prevention of inconsistent rulings, judicial economy, and the protection of absentees' interests. 445 U.S. at 402-03. The Court found the justifications of the private attorney general concept analogous to those of a class action. *Id.* at 403.

[82] 445 U.S. at 403-04.

[83] *Id.* The *Geraghty* Court limited Geraghty's stake to the appeal of the certification ruling. *Id.* The named plaintiff's claim of entitlement to represent a class is in controversy only until the certification ruling is final. If class certification is successful, the adequacy of the class representative no longer is in controversy. *See* FED. R. CIV. P. 23(a)(4). If the district court's denial of certification is upheld on appeal, the adjudication of the named plaintiff's claim of entitlement will be complete. 445 U.S. at 404-05.

[84] *See* note 19 and text accompanying notes 43-45 *supra.*

[85] *See* text accompanying notes 71-83 *supra.*

[86] *See* note 19 *supra.*

[87] 445 U.S. at 351-52 (Powell, J., dissenting).

[88] *Id.* at 350 & n.8 (Powell, J., dissenting).

[89] *Id.*

[90] Class actions are large and expensive cases. *See Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318, 1353-59 (1976) [hereinafter cited as *Developments*] (compre-

holding, however, rests the personal stake requirement on an economic interest of the named plaintiffs' counsel.[91] Any economic interest attributed to the named plaintiffs is fictional.

The flexible doctrine espoused in *Geraghty* recognizes the shortcomings of the strict, formalistic view of the personal stake requirement. The *Geraghty* majority acknowledged that the requirement is riddled with exceptions.[92] The Supreme Court has rationalized the exceptions to the mootness doctrine on the basis of various continuing aspects of the named plaintiffs' claims.[93] These continuing aspects include interests that the plaintiffs retain after their claims on the merits are moot. As in *Roper*, the interests remaining in these continuing aspects of the claims largely are fictional.[94]

The *Geraghty* Court harmonized the mootness doctrine with the doctrine's exceptions. As the majority pointed out, the Court always has viewed the mootness doctrine with some flexibility.[95] The Court arrived at the exceptions to the mootness doctrine through practical and prudent considerations.[96] The *Geraghty* holding rejected attempts to fic-

---

hensive discussion of class actions). Many class actions are brought on behalf of persons with small individual claims. *Id.* at 1354-55. In order to pay the costs of litigation, class action attorneys often operate under a contingency fee arrangement. *Id.* at 1604-22. The *Roper* Court's holding will provide incentive to class action attorneys by preventing class action mootness before appeal. The risk of losing the attorney's fee thus is reduced. *See* Schwartz, *The Class Action: Mootness and Decision*, N.Y.L.J., April 15, 1980, at 1, col. 1 [hereinafter cited as Schwartz] (projecting the positive impact of *Roper* and *Geraghty* on class actions).

[91] Even though the named plaintiffs in *Roper* have received the full amount of their claim, their attorney can gain from certification. If the class prevails on the merits on remand, the attorney's fee could be 25% of $12,000,000. *See* 445 U.S. 359 n.22 (Powell, J., dissenting).

[92] 445 U.S. at 404 n.11; *see* 1 H. NEWBERG, NEWBERG ON CLASS ACTIONS § 1088 (1977) [hereinafter cited as NEWBERG] (detailed discussion of exceptions to mootness doctrine); note 25 *supra*.

[93] NEWBERG, *supra* note 91, § 1090. In some instances an action will survive a challenge for mootness on the ground that some facet of the original harm suffered continues despite intervening events. *Id.* § 1088.

[94] *See id.* § 1088. When a named plaintiff's claim does not meet traditional personal stake requirements, the avoidance of mootness through an exception is based upon the speculation of future adverse effects or of the recurrence of the alleged wrong. *See Mootness on Appeal, supra* note 19, at 1678. In United States v. W.T. Grant Co., 345 U.S. 629 (1953), the Court found that to sustain injunctive relief the proponent must show more than the "mere possibility" of recurrence of the alleged wrong. 345 U.S. at 633. Subsequent decisions, however, have cited the standard established in *Grant* for the proposition that the "mere possibility" of recurrent violation keeps a case from becoming moot. *Mootness on Appeal, supra* note 19, at 1683. Exceptions to the mootness doctrine based on the "mere possibility" standard can become fictional because of the attenuated possibility of recurrence. *See* Roe v. Wade, 410 U.S. 113, 125 (1973) (challenge to anti-abortion laws in which Court found plaintiff's terminated pregnancy did not moot action because pregnancy can happen more than once).

[95] 445 U.S. at 404 n.11.

[96] *Id.*

tionalize a situation to meet the formalistic controversy standards or to create another fictional exception to the mootness doctrine. The Court, however, did adopt the practical and prudent approach employed in earlier decisions that created the exceptions to the mootness doctrine.[97] Through the flexible approach, the *Geraghty* Court placed more emphasis on satisfying the purposes of the formalistic requirements than on meeting the requirements themselves.

In addition, the *Geraghty* holding better resolves the problem of "buying off" than does the *Roper* holding. *Roper* attempted to eliminate the possibility of the defendant mooting the claim of the plaintiff class.[98] The *Roper* holding, however, continues to allow defendants to render class actions moot by tendering the actual or potential expenses of litigation in addition to the amount of the named plaintiffs' claims.[99] While tendering of the expenses usually is impractical,[100] the *Geraghty* rationale eliminates the possibility of that variety of "buying off." The personal stake in *Geraghty* can be mooted only by a district court's determination that the named plaintiff cannot represent the class adequately.[101] Thus, the putative class members in *Geraghty* are invulnerable to the defendant's "buying off" tactics.

Commentators expect the holdings in *Roper* and *Geraghty* to have a positive impact on class action plaintiffs. The Supreme Court's supportive position should foster the increased use of the class action procedure.[102] *Roper* and *Geraghty*, however, may create more problems than they resolve. While lower courts now have a clear indication of the

---

[97] *See id.*

[98] *See* text accompanying notes 36-54 *supra.*

[99] The holding in *Roper* allowed the named plaintiffs to appeal the certification ruling because of a personal stake in the spreading of litigation costs among the members of the class. If the defendant tendered the litigation costs, the personal stake of the named plaintiffs would be eliminated. *See* 445 U.S. at 339-40.

[100] The tendering of litigation costs is impractical for several reasons. First, the actual costs of litigation in complex class actions usually are high. *See Developments, supra* note 90, at 1353-59. Thus, "buying off" may become economically infeasible because of the amount that the defendant must tender in order to moot the named plaintiffs' personal stake. Second, the *Roper* holding may require the defendant to tender not just the actual costs of litigation, but the maximum amount of litigation costs. Since the personal stake in *Roper* was the desire to spread the litigation costs among the class members, a defendant may have to tender the potential amount of litigation costs in order to moot completely the named plaintiffs' alleged personal stake. *See* 445 U.S. at 336-37. The potential litigation costs could be substantial. If in *Roper* the district court had certified the class action and the class had prevailed on the merits, the litigation costs would have been at least $3,000,000. *See id.* at 359 n.22 (Powell, J., dissenting); note 91 *supra.* Finally, the defendant may have to tender the litigation costs more than once if other class members bring suits on the same issues and attempt to certify the class. The chance is doubtful, therefore, that a defendant would tender high litigation costs under the risk of having to tender the same amount in a second suit.

[101] *See* 445 U.S. at 403-07; *see* note 83 *supra.*

[102] *See* [1980] 6 CLASS ACT. REP. (Plus Publications) 81, 96; Schwartz, *supra* note 90, at 2, col. 1.

Supreme Court's support for class actions, the attempt to apply the conflicting rationales of *Roper* and *Geraghty* to future class actions may result in contradictory holdings among the circuits.[103] The application of *Roper* and *Geraghty* also will be of great concern to class action attorneys. Depending upon the rationale applied, a different result could occur in identical cases.[104]

The employment of different rationales in *Roper* and *Geraghty* apparently stems from a split in the Supreme Court over the application of the article III mootness doctrine. Justices Powell and Stewart stand fast in their support of the traditional requirements.[105] In contrast, Justice Blackmun espouses the flexible approach.[106] The remaining members of the Court oscillate between the two extremes.[107]

The *Roper* case was a compromise holding. Some members of the Court were reluctant to adopt the flexible doctrine in a situation where a traditional rationale could be employed.[108] The economic interest in *Roper* appeared to the Court to satisfy the traditional rationale.[109] Geraghty, however, sought declaratory relief rather than damages.[110] Since no damages are awarded in a declaratory action, the contingency arrangement was not used in *Geraghty*. The named plaintiff in *Geraghty*, therefore, could not assert the same economic interest asserted in *Roper*.[111]

While the named plaintiff in *Geraghty* could not assert the economic interest asserted in *Roper*, the named plaintiffs in *Roper* could not meet the flexible standards of the *Geraghty* holding. An important aspect of the *Geraghty* holding was that an actual controversy continued to exist between the members of the class and the defendant.[112] The Court demonstrated the controversy's existence in *Geraghty* through the intervention of an absent member of the putative class.[113] In *Roper*, how-

---

[103] The Court in *Geraghty* granted the petition for certiorari to resolve confusion in the circuits over class action mootness. *See* 440 U.S. 945 (1970) (mem.); *see* note 25 *supra*.

[104] *See* text accompanying notes 98-99 *supra*.

[105] Justice Powell, joined by Justice Stewart, dissented in both *Roper* and *Geraghty*. 445 U.S. at 344; 445 U.S. at 409.

[106] *See* text accompanying notes 71-83 *supra*.

[107] Justices Brennan, Marshall, and White joined the majority view in both *Roper* and *Geraghty*. 445 U.S. at 327; 445 U.S. at 389. Only Chief Justice Burger and Justice Rehnquist switched from the majority in *Roper* to the dissent in *Geraghty*. 445 U.S. at 327; 445 U.S. at 389.

[108] Based on their positions in *Roper* and *Geraghty*, Justices Brennan, Marshall, and White apparently are willing to support the flexible doctrine only when traditional requirements are inapplicable. The Justices considered *Roper* to be a case in which a traditional personal stake existed. 445 U.S. at 336-37. The *Geraghty* case, however, did not fit the traditional mold. *See* text accompanying notes 112-15 *infra*.

[109] *See* text accompanying notes 42-45 *supra*.

[110] Geraghty v. United States Parole Comm'n, 429 F. Supp. 737, 739 (M.D. Pa. 1977).

[111] *See* 445 U.S. at 336.

[112] 445 U.S. at 396.

[113] *Id.* In an attempt to save the class action in *Geraghty* from mootness, a prisoner named Becher moved to intervene in the appeal of the certification ruling. 445 U.S. at 394.

ever, no absent class member intervened.[114] The *Roper* Court had no overt indications of a live controversy between the absent members and the defendant.[115]

Despite the disparity in the two holdings, *Roper* and *Geraghty* will have a positive impact on class actions. While both decisions directly support class actions, the degree of their impact will depend much on how the lower courts apply the decisions. In a practical sense, however, a defendant will not be able to "buy off" named plaintiffs to avoid class action liability. In addition, the holdings will foster the increased use of class actions by preventing class action mootness resulting from the named plaintiff's mooted claim.

GLENN S. THOMAS

The district court denied the petition to intervene. *Id.* Becher appealed the denied petition and the Third Circuit consolidated his appeal with Geraghty's. *Id.*

[114] 445 U.S. at 352 (Powell, J., dissenting).

[115] *See id.*