Cleveland State Law Review

Volume 30 | Issue 2 Note

1981

Flexible Mootness in Class Certification

Enid L. Zafran

NOTES

FLEXIBLE MOOTNESS IN CLASS CERTIFICATION

CLASS ACTIONS HAVE LONG BEEN RECOGNIZED as a powerful procedural device that allows an entire class of plaintiffs to resolve their claims in a single proceeding.[1] While the purposes of class actions are easy to comprehend, the actual application and requirements of Rule 23 are complex.[2] Before the suit may proceed, it must be certified by the

---

[1] Class actions were used in English law 300 years ago. *See* 3B MOORE'S FEDERAL PRACTICE 23.01.

[2] The purposes of FED. R. CIV. P. 23 include the conservation of time, effort, and expense and the provision of a forum for claimants whose individual claims would be too small for the expense of litigation. To receive the benefits that class status brings to a suit, the rule sets up a substantial list of prerequisites in (a) and (b) and requires court certification of the class in (c)(1). These sections of the rule read as follow:

> (a) Prerequisites to a Class Action. 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.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the

trial court.[3] Although Rule 23 carefully lists the criteria for the court to consider, certification is not a predictable outcome.[4] If it is denied, the action is then litigated solely on the claims of the named plaintiffs. Under certain circumstances the denial would signal the end of the suit.[5] Such an instance would occur if the named plaintiff's claims had become moot.[6] His action would no longer satisfy the "case or controversy" requirement for adjudication in the federal courts.[7] For such a plaintiff an appeal of the denial would be vital to maintain his cause, yet it is not clear whether this plaintiff even has sufficient "case or controversy" to maintain an appeal.[8] In 1980 the Supreme Court issued two decisions[9] to address this question and extended its doctrine of "flexible mootness" in class actions.[10] This article will examine the history of this problem,

---

claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; . . .

(1) As 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. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

Id. An analysis of the problems presented to the courts by these sections appears in Miller, *An Overview of Federal Class Actions: Past, Present, and Future*, 4 JUST. SYS. J. 197 (1978) [hereinafter cited as Miller].

[3] For the text of FED. R. CIV. P. 23(c)(1), see note 2 *supra*. The importance of certification has been recognized by both the courts and commentators. *See* Miller, *supra* note 2, at 199, and note 22 *infra*.

[4] Both justices and commentators have noted that despite similar circumstances a class may be certified in one suit and not in another. *See* Bd. of School Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128, 132-133 (1974) (Douglas, J., dissenting). *See generally* Miller, *supra* note 2.

[5] *See*, *e.g.*, Eisen v. Carlisle & Jacquelin (Eisen I), 370 F.2d 119 (2d Cir. 1966). *See also* Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).

[6] The "named plaintiff" is the party who brings the suit on behalf of the class. Throughout this article the term "mooted plaintiff" will be used to refer to a "named plaintiff" whose individual claims have become moot.

[7] "Case or controversy" is required in all federal lawsuits by Art. III of the U.S. Constitution.

[8] The federal courts of appeals have been divided in their handling of such cases. Cases such as Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *aff'd sub nom*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) and Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), *aff'd*, 445 U.S. 388 (1980), found that the named plaintiff could appeal despite the mootness of his own claims, while cases such as Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) and Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977) found the opposite.

[9] The Supreme Court issued two opinions on March 19, 1980, dealing with this problem: Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980), and United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

[10] "Flexible mootness" was recognized by the Supreme Court in Flast v. Cohen, 392 U.S. 83 (1968). It first appeared in a class action context in the case of

the opinions of the Court, and possible ramifications of the Court's decisions.[11]

I. HISTORICAL BACKGROUND

A. *The* Sosna *Doctrine*

The Supreme Court began to develop its doctrine of "flexible mootness" when it issued the *Sosna v. Iowa*[12] decision in 1975. Carol Sosna moved to Iowa in August, 1972, and the following month filed for a dissolution of her marriage. The Iowa court dismissed her suit because she did not satisfy the residency requirement of one year for divorce actions under Iowa law. In response to this dismissal, Sosna brought a class action in federal district court, alleging that the Iowa durational residency requirement violated both her constitutional rights and the rights of the "class of those residents of the State of Iowa who have resided therein for a period of less than one year and who desire to initiate actions for dissolution of marriage. . . ."[13] As the suit proceeded through the federal courts, Sosna's personal claims became moot once she obtained her divorce in another state and, through the passage of time, satisified the one-year residency requirement. The issue in the federal courts then became Sosna's right to maintain a class action when she personally lacked the necessary "case or controversy" for federal justiciability.

Writing for a majority of the Supreme Court, Justice Rehnquist found the case not to be moot. "Although the controversy is no longer alive as to appellant Sosna, it remains very much alive for the class of persons she has been certified to represent."[14] Mootness in such an instance would not terminate a class proceeding so long as the action satisfied four prerequisites: (1) certification of the class; (2) active controversy between the representative plaintiff and defendant at the time of the class certification; (3) continuing controversy between the unnamed plaintiffs and defendant after the named plaintiff's claims had been mooted; and (4) a controversy "capable of repetition, yet evading

---

Sosna v. Iowa, 419 U.S. 393 (1975). In that case the Supreme Court decided that the mootness of the named plaintiff's claims was not fatal to the continuation of the class suit. Thus, for a class action the doctrine of mootness was no longer a hard and fast rule but one that could be applied flexibly. *See* notes 12-18 *infra* and accompanying text.

[11] This article will not discuss the history of mootness as it has been developed by the Supreme Court; numerous articles have already done so. *See, e.g.*, Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974); Note, *A Search for Principles of Mootness in the Federal Courts*, 54 TEX. L. REV. 1289 (1976).

[12] 419 U.S. 393 (1975).

[13] *Id.* at 397.

[14] *Id.* at 401.

review."[15] Thus, for a class that had already been certified, *Sosna* focused primarily on the claims of the class, not those of the named plaintiffs.

As for the effect of mootness on the certification process, *Sosna* had little to say. While the Court noted the importance of certification, it did not formulate a clear rule to handle these cases. In a footnote the Court stated:

> 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.[16]

With wording as nonspecific as "depend upon the circumstances of the particular case,"[17] it is not surprising how differently the lower courts could apply the little guidance which they were given here.[18]

Between 1975 and 1977 the Court issued several decisions to clarify and restate the *Sosna* holding and dicta.[19] Those cases continued to emphasize the four requirements of *Sosna*, and among the requirements class certification was considered the most basic. Without certification, a case would not be entitled to the special treatment to avoid termination due to mootness allowed by *Sosna* for class actions. Thus, in *Bd. of School Comm'rs of Indianapolis v. Jacobs*,[20] the Court readily ruled the controversy moot since the class "was never properly certified nor . . . properly identified."[21] Since the high school students who represented the class had graduated, their case was mooted and terminated by their loss of class status. It did not matter to the Court that *Jacobs* would have satisfied all the other requirements of *Sosna*; the case had failed the threshold test of certification. Certification was beginning to loom

---

[15] *Id.* at 397-403.

[16] *Id.* at 402 n.11. Throughout this article this footnote will be referred to as "the *Sosna* footnote."

[17] *Id.*

[18] *See* notes 63-64 *infra* and accompanying text.

[19] Gerstein v. Pugh, 420 U.S. 103 (1975); Bd. of School Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128 (1975). *See* East Tex. Motor Sys. Freight, Inc. v. Rodriguez, 431 U.S. 395 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

[20] 420 U.S. 128 (1975). Six named plaintiffs who at the time of filing the suit were enrolled as Indianapolis high school students were denied class certification in their action to challenge the constitutionality of school board rules and regulations that governed the publication and distribution of a newspaper produced by the students.

[21] *Id.* at 130.

as the critical step in a class action[22] and one well worth fighting for by both plaintiffs and their attorneys.

In a decision issued the same day as *Jacobs* the Court elaborated on "the *Sosna* footnote" dealing with the "relation back" doctrine.[23] The named plaintiffs in *Gerstein v. Pugh*[24] had challenged the constitutionality of pretrial detention without a preliminary hearing to determine probable cause, but prior to Supreme Court review their claims were mooted by their trial and conviction. The record, however, did not indicate whether mooting occurred before or after the class was certified.[25] While "[s]uch a showing ordinarily would be required to avoid mootness under *Sosna*, . . . this case is a suitable exception to that requirement."[26] The exception satisfied the "circumstances" that "the *Sosna* footnote" emphasized would occur when the injury was "capable of repetition, yet evading review."[27] A particular individual might not be held in pretrial custody long enough for a district judge to certify the class, but the Court felt that "the existence of a class of persons suffering the deprivation"[28] was ongoing. Thus, the Court was able to "relate back" the certification to the case and controversy that existed at the time of the filing of the suit. While this was probably just an artifice to allow the Court to review this case on its merits and to bypass any procedural problems preliminary to its substantive discussion,[29] it became the standard by which the exceptions to the *Sosna* rule were measured.[30] *Sosna* demanded certification, and mooted plaintiffs needed to satisfy a *Gerstein v. Pugh* requirement to obtain that certification.

In 1976 the Court re-examined the *Sosna* doctrine in a case named

---

[22] Writing the opinion for the Supreme Court in Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980), Chief Justice Burger stated: "A district court's ruling on the certification issue is often the most significant decision rendered in . . . class-action proceedings." *Id.* at 339.

[23] *See* note 16 *supra* and accompanying text.

[24] 420 U.S. 103 (1975). The district court certified Pugh's suit as a class action.

[25] *Id.* at 111 n.11.

[26] *Id.*

[27] The idea that cases "capable of repetition, yet evading review" should be excepted from mootness first occurred in Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911). By the time of *Gerstein v. Pugh* in 1975, it was a well accepted exception.

[28] 420 U.S. at 111 n.11.

[29] The Court did not give lengthy consideration to the "relation back" problem in this case. It is covered by only one footnote. The opinion is devoted to important constitutional and criminal law principles which the Court wanted to use this case to address. The Court ruled that pretrial hearings on probable cause were mandatory prior to jailing criminal suspects.

[30] *See* Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977); Boyd v. Justices of Special Term, 546 F.2d 526 (2d Cir. 1976).

Franks v. Bowman Transportation Co.[31] Since the Court had established the four requirements[32] for flexible mootness in class actions, it had restated them but never expanded them. In *Franks* the claims of the two named plaintiffs had become moot, and the defendant contended that their mootness precluded their right to appeal. The Court pointed out, however, that as in *Sosna*, once a class was certified, it "acquired a legal status separate from the interest asserted by [the named representative]."[33] The unnamed members of the class had a personal stake in the outcome of the controversy, and the appeal was justiciable. The defendant then argued that the injury must be "capable of repetition, yet evading review" to benefit from *Sosna's* flexible mootness. At this point the Supreme Court liberalized *Sosna* by declaring that *Sosna* did not require such a type of controversy. In that case the Court had "cited with approval two Courts of Appeals decisions not involving 'evading review' issues which [had] held . . . that . . . claims of unnamed class members [were] not automatically mooted merely because the named representative [was] . . . ineligible for relief for reasons particular to his individual claim."[34]

This expansion of *Sosna* was favorable to mooted plaintiffs in appealing the denial of class certification. Technically it freed them from part of the *Gerstein v. Pugh* requirement.[35] Certification could still "relate back" to the case and controversy that existed at the time of the filing of the suit, but the injury no longer had to be "capable of repetition, yet evading review." Future mooted plaintiffs such as Geraghty were to find this holding to be significant in their appeals.[36]

After relaxing the *Sosna* doctrine in *Franks*, the Court used *East Texas Motor Freight System, Inc. v. Rodriguez*[37] to restate its holding in *Jacobs*.[38] In a suit similar to Franks', Rodriguez alleged that black and Mexican-American truck drivers were discriminated against by East Texas' seniority and no-transfer policy between city and line drivers.[39]

---

[31] 424 U.S. 747 (1976). Franks and Lee, the named plaintiffs, represented a class of black truck drivers who alleged that Bowman had discriminated against them in hiring. Although the class won on that issue, it did not receive the specific relief that it had requested so it appealed in order to gain retroactive seniority status according to the date of the employment applications. By the time of the appeal neither Franks nor Lee was still employed by Bowman. *Id.*

[32] *See* note 15 *supra* and accompanying text.

[33] 424 U.S. 747, 753, *quoting* Sosna v. Iowa, 419 U.S. 393, 399 (1975).

[34] 424 U.S. at 754 n.7.

[35] *See* notes 23-30 *supra* and accompanying text.

[36] *See* Geraghty v. United States Parole Comm'n, 579 F.2d 238, 244-46 (3d Cir. 1978), *aff'd*, 445 U.S. 388, 398 n.6 (1980).

[37] 431 U.S. 395 (1977).

[38] *See* notes 20-22 *supra* and accompanying text.

[39] A line driver was not allowed to count time spent on other jobs in the com-

Unlike *Franks*, however, no class was certified by the district court in *East Texas* because the named plaintiffs did not file a motion for certification, and the court at trial found that no class existed. The named plaintiffs did not meet the qualifications to be line drivers, and therefore lost on the merits of their individual claims. On appeal the Court of Appeals for the Fifth Circuit reversed and certified the class.[40] While deferring the question of whether an appellate court could certify a class, the Supreme Court ruled that "the Court of Appeals . . . erred in certifying a class in this case, for the simple reason that . . . by the time the case reached the court . . . the named plaintiffs were not proper class representatives."[41] Since their alleged injury did not result from racial discrimination but from their lack of qualifications, they could not represent a class of racial discriminatees.

In reaching its decision, the court did not find it necessary to rely on *Sosna* or any of the *Sosna*-line of cases. Because of this decision's similarity to *Jacobs*, it was surprising that the court did not cite that case in support of its holding. Both suits, according to the court, were virtually terminated by the denial of class certification, and the mooted plaintiffs were not allowed to appeal. Thus, this case was easily distinguishable from ones like *Franks* where the class was originally certified by the trial court and could appeal as a class based on that certification. Perhaps by 1977 the Supreme Court foresaw the future split in the circuits' handling of such cases[42] and wanted to reaffirm its position in *Jacobs*. By citing other decisions, it might have tried to strengthen its holding. *Jacobs* had been merely a *per curiam* opinion, and *East Texas* which was unanimously decided by the Court could stand on its own without the buttressing of a minor opinion.

B. *Appealability of the Denial of Class Certification*

1. The "Death Knell" Doctrine

By 1978 the principles of the *Sosna* case had become established in the courts, and the Supreme Court was ready to focus on another aspect of class certification. If class status were denied, when could the issue properly be appealed? Since 1966 the "death knell doctrine" had supplied the answer.[43] Appeals to the U.S. Courts of Appeals are governed

---

pany toward his seniority, and a city driver was forced to resign his job in order to be eligible for a job as a line driver.

[40] 505 F.2d 40 (5th Cir. 1974).

[41] 431 U.S. at 403.

[42] *See* notes 85-86 *infra* and accompanying text.

[43] The "death knell doctrine" was first advanced in Eisen v. Carlisle & Jacquelin (Eisen I), 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), where the court found that if an order such as denial of class certification was issued by the trial court, it could be fatal to the plaintiff's right to maintain his ac-

by 28 U.S.C. § 1291 which stipulates that appeals can only be made from final judgments.[44] In *Eisen v. Carlisle & Jacquelin* (Eisen I)[45] the Supreme Court found that an order denying class certification was a "final judgment" within the meaning of the statute. If small-claim plaintiffs like Eisen were not allowed to appeal, their lawsuits would virtually be terminated since their individual damage claims would not merit the cost of litigation. By denying the named plaintiffs a right to appeal, the courts had assured the death of their suits. To provide a remedy, the Court allowed such plaintiffs the right to an immediate appeal under section 1291.

In class action cases after *Eisen*, such as *Bd. of School Comm'rs of Indianapolis v. Jacobs*,[46] the doctrine is suspiciously absent. For the students who lost certification in that suit, the case was over when their individual claims were held moot.[47] The Court, however, did not graciously allow them to escape "the death knell" of lost certification as it did for Eisen. To the Court the doctrine had developed into an uncontrollable waste of judicial resources,[48] and in 1978 the Court terminated the doctrine in *Coopers & Lybrand v. Livesay*.[49]

Justice Stevens, writing for the Court in *Coopers*, held that class actions are not entitled to special treatment for appeals. Prior to judgment, "orders relating to class certification are not independently appealable under section 1291 . . . ."[50] Since the named plaintiffs are able to continue the suit of their individual claims, their cause of action has not

---

tion. In Eisen's case, his personal claim of $70 did not justify the legal fees and costs of court litigation so that the court, by refusing him class certification, had denied him legal redress. To avoid terminating the suit under such circumstances, the Supreme Court allowed Eisen to appeal under 28 U.S.C. § 1291 (1958).

[44] 28 U.S.C. § 1291 (1958) reads: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the United States, . . . except where a direct review may be had in the Supreme Court." *Id.*

[45] 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). Eisen alleged antitrust violations by defendants in their real estate dealings with himself and other odd-lot traders.

[46] 420 U.S. 128 (1975).

[47] *See* notes 20, 21 *supra* and accompanying text.

[48] *See* discussion of this point in Coopers & Lybrand v. Livesay, 437 U.S. 463, 473 (1978); Note, *Immediate Appealability of Orders Denying Class Certification:* Coopers & Lybrand v. Livesay *and* Gardner v. Westinghouse Broadcasting Co., 40 OHIO ST. L.J. 441 (1979) [hereinafter cited as *Immediate Appealability*].

[49] 437 U.S. 463 (1978). Plaintiffs sued on behalf of a class of approximately eighteen hundred stockholders who, in reliance upon a prospectus and registration statement certified by the accounting firm of Coopers & Lybrand, had purchased stock in a Florida land development company and who subsequently lost almost half their investment when the company restated its earnings for two years, thereby sharply devaluing the stock.

[50] *Id.* at 470.

been terminated.[51] To the lower courts this case signalled the "death knell of the death knell doctrine."[52]

In *Coopers* the Court never considered how its disavowal of the doctrine would affect mootness cases. If the class is denied certification, "the plaintiff is free to proceed on his individual claim."[53] That rule is not true for the mooted plaintiff. The issue that his case raises will never be heard by a court, and his suit is terminated unless an appeal is allowed. While his appeal can be brought after the dismissal of his own suit, it would require an unusually dedicated plaintiff to risk the expense of continued litigation.[54]

2. Injunctive Appeals

On the same day that the Court issued *Coopers*, it also announced *Gardner v. Westinghouse Broadcasting Co.*[55] The plaintiff in the latter case had been denied class certification in her employment discrimination suit, and immediately appealed, invoking the jurisdiction of the court of appeals under 28 U.S.C. § 1292(a)(1).[56] She contended that "[t]he practical effect of the denial of class certification is . . . to refuse a substantial portion of the injunctive relief requested in the complaint."[57] The Supreme Court summarily dismissed any such notion of appealability.[58] The denial of certification was merely a pretrial procedure and not within the scope of the statute. As in *Coopers* the Court was disturbed at opening "a floodgate" of "piecemeal appeals."[59]

---

[51] *Id.* at 467.

[52] Following *Coopers*, no mention is made of the "death knell doctrine" in class action cases. For commentary on this point, see *Immediate Appealability*, *supra* note 48.

[53] 437 U.S. at 467.

[54] *See, contra*, Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 344 n.4 (Stevens, J., concurring): "Anyone who voluntarily engages in combat—whether in the courtroom or elsewhere—must recognize that some of his own blood may be spilled." *Id.* The exact extent to which Stevens feels a mooted plaintiff should extend his personal liability is not delineated, but it is fair to say that Stevens does not see any unusual amount of dedication involved.

[55] 437 U.S. 478 (1978). Gardner had unsuccessfully applied for a job as a radio talk show host at a station owned by defendant, and brought this civil rights suit "on behalf of herself and other females adversely affected by [defendant's] alleged practice of discriminating against women." *Id.*

[56] 28 U.S.C. § 1292(a)(1) (1958) reads: "The courts of appeals shall have jurisdiction of appeals from: Interlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." *Id.*

[57] 437 U.S. at 480.

[58] *Id.*

[59] *Id.* at 482.

While the *Gardner* case did not deal with mooted plaintiffs, it nevertheless had implications for them. In *Gardner* the Court stated that no "irreparable"[60] harm occurred from the denial since the plaintiff could appeal after the final judgment.[61] For a mooted plaintiff, however, the possibility of such an appeal was not guaranteed,[62] and the Court's refusal to hear such appeals under section 1292(a)(1) foreclosed another remedy to the mooted plaintiff's appeal.

C. *The Circuits Apply the Supreme Court's Mandates*

Lacking clear-cut statements by the Court in how to deal with mootness and the appealability of denied class status, the federal courts of appeals were left to devise their own solutions. Between 1976 and 1979 seven of the circuits entered opinions on the issue,[63] and their disparate treatment eventually drew the attention of the Supreme Court.[64]

One of the first of these cases occurred in the Tenth Circuit in October, 1976, when the court decided *Napier v. Gertrude*.[65] Searching for guidance, the court found its precedents in *Sosna*, *Jacobs*, and *Franks*.[66] While the court felt that the district court had erred in refusing to certify Napier's suit, it ruled that the error was not capable of correction at this stage of the litigation.[67] Relying on "the *Sosna* footnote," it ruled that courts could grant late certification only if the plaintiffs showed that they could suffer the injury again and that the duration of the injury would be too brief to permit court litigation before becoming moot.[68] *Napier v. Gertrude* did not satisfy these requirements and, therefore, lacked the necessary "live controversy." Like the students in

---

[60] *Id.* at 480.

[61] *Id.*

[62] *See* Bd. of School Comm'rs of Indianapolis v. Jacobs, 420 U.S. 128 (1974), and Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976).

[63] The circuits involved were the second, third, fourth, fifth, seventh, ninth, and tenth.

[64] *See* Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 340 (1980) (Rehnquist, J., concurring); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 390 n.2 (1980).

[65] 542 F.2d 825 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977). Napier had been adjudged "a child in need of supervision" by an Oklahoma juvenile court and committed to a state institution. She contended that the statute under which she and others similarly situated were held in custody was unconstitutionally vague, and she sought to have her suit certified as a class action on their behalf.

[66] Prior to 1977, these three Supreme Court decisions formed the core of judicial doctrine dealing with mootness and appealability of denied class status.

[67] 542 F.2d at 827.

[68] *Id.* at 828, *quoting* Sosna v. Iowa, 419 U.S. 393, 408 n.11. *See also* note 27 *supra* and accompanying text.

Jacobs, Napier was no longer subject to the injury from which she sought relief.[69] No special treatment was accorded Jacobs, and no special treatment would be granted for Napier.

Later in 1976 the Second Circuit applied similar reasoning in *Boyd v. Justices of Special Term*.[70] Thirteen indigent plaintiffs were refused class certification in their constitutional suit for assignment of counsel in their divorce actions.[71] Since these plaintiffs had, by the time of their appeal, been assigned attorneys by the Bronx office of the Legal Aid Society, the court found their case to be moot.[72] Like the *Napier* court, the Second Circuit declared that the mooted plaintiffs did not qualify for any special treatment under *Sosna* or *Jacobs* because their class was not certified below.[73] Moreover, the court found that this case did not qualify for the "relation back" exception that *Sosna* and *Gerstein* allowed.[74] In a footnote the court wrote pointedly that "the circumstances leading to mootness occurred after the District Court had dismissed [the case] and arose as the result of independent action taken by the named plaintiffs and their counsel."[75] For the relation back exception to apply, mootness must intervene before the district court can rule on certification, not after the case is completed.

For mooted plaintiffs such as Boyd, however, it would have been difficult to know when to apply for an appeal of the denial. Boyd, according to the Second Circuit, waited too long, but if Boyd had appealed prior to final judgment, she would have had to appeal under either sections 1291 or 1292(a)(1).[76] As the *Coopers* and *Gardner* courts were to rule two years later,[77] plaintiffs seeking review of their denied class status were not eligible for such appeals but were directed to wait until after final judgment. While Boyd brought mootness on herself by her "independent action,"[78] and may have seemed undeserving of special treatment, not all mooted plaintiffs have produced their own mootness.[79]

In 1977 the appellate cases[80] that dealt with the appealability of

---

[69] 542 F.2d at 828.

[70] 546 F.2d 526 (2d Cir. 1976).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See* notes 44 and 56 *supra*.

[77] *See* notes 49-62 *supra* and accompanying text.

[78] 546 F.2d 526, 527 n.2 (2d Cir. 1976).

[79] Sosna, for instance, fulfilled the residency requirement of Iowa's divorce law merely by continuing to live in the state for three months. She did not have to take "independent action" to render her action moot.

[80] Winokur v. Bell Fed. Sav. and Loan Ass'n, 560 F.2d 271 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); Banks v. Multi-Family Management, Inc., 554 F.2d

denied class status by mooted plaintiffs continued to follow "the *Sosna* footnote" and the *Jacobs* holding. The Ninth Circuit's decision in *Vun Cannon v. Breed*[81] provided summaries of the other circuits' opinions[82] while epitomizing their holdings in its own. According to what the court called "a formidable array of post-*Sosna-Jacobs* decisions,"[83] the Ninth Circuit duly held that "unless there are present unusual facts bringing the matter within the narrow exception countenanced by footnote 11 of *Sosna* and *Gerstein v. Pugh*,"[84] the mooted plaintiff has no standing to appeal the denial of class certification. While the court had made its decision to be consistent with the Supreme Court holdings, it openly declared its dislike of their doctrine.[85] Although the Ninth Circuit would not be one of the two circuits to reject the doctrine, it had started to lay the foundation for its demise.

In 1978 the unity of the circuits was broken when the Fifth and Third Circuits held that, for the purpose of appealing denied class certification, the mootness of the named plaintiff could be overlooked under certain conditions. The Fifth Circuit showed signs of its future split from the majority rule when it issued its opinion in *Satterwhite v. City of Greenville*[86] on August 23, 1978.

Mrs. Satterwhite had applied for the position of airport manager in Greenville. She was not hired, and after a male was hired, she filed a class action alleging sex discrimination in the city's employment practices. The city countered that she was rejected because of an obvious conflict of interest since her husband's business was the primary user of the airport. Without holding an evidentiary hearing, the district court denied class certification. At trial Satterwhite lost and on appeal a panel of Fifth Circuit judges affirmed, but reversed the denial of certification,

---

127 (4th Cir. 1977); Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977); Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334 (9th Cir. 1977); Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977); Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209 (3d Cir. 1977).

[81] 565 F.2d 1096 (9th Cir. 1977). At commencement of the suit, Vun Cannon, the named plaintiff, was in the custody of the California Youth Authority. By statute the Youth Authority had the power to transfer its wards to particular vocational institutions. Vun Cannon challenged the statute on civil rights grounds and sought class certification. The district court denied certification based on plaintiff's lack of standing to represent the class since he had already been transferred to a state vocational institution. By the time of appeal for denial of class certification, he had been discharged from the custody of the Youth Authority, and the Ninth Circuit found his right to appeal moot.

[82] *Id.* at 1099 n.5.

[83] *Id.* at 1098.

[84] *Id.* at 1100.

[85] The Ninth Circuit refers to the rule established by the Supreme Court in *Sosna* and its subsequent cases as "smack[ing] . . . of metaphysics" and grudgingly says that it must "adopt such logic." *Id.* at 1099.

[86] 578 F.2d 987 (5th Cir. 1978).

remanding the case for an evidentiary hearing.[87] This panel decision for remand was vacated by the circuit sitting en banc.[88]

Judge Rubin, writing for the court, found the *East Texas*[89] case to be determinative.[90] In both cases the class was not certified at trial, and on appeal it was concluded that the named plaintiffs were not proper representatives for the class. Like Rodriguez, Satterwhite was not the victim of discrimination, but rather had been denied employment because of her conflict of interest. Thus, she was not a member of the class at the time of the appeal, and was not even a member at the time of the filing of her suit.[91] Because of this "lack of nexus"[92] she was not a proper class representative, and that defect was "fatal."[93] The Fifth Circuit had been reversed in its handling of *East Texas* on this very point,[94] and the court was not going to repeat that error.

Certification was, therefore, properly denied even though the district court erred in not holding an evidentiary hearing. The court also blamed Satterwhite for this error because "plaintiff had the opportunity to avoid that error by timely seeking a hearing."[95] Moreover, once certification was denied without a hearing, plaintiff could have moved to have the error corrected by the trial court.

Four circuit judges, however, dissented from the court's decision and pointed out the cul-de-sac into which the court had forced the plaintiff.[96] When Satterwhite tried to appeal her denied class certification, she was faced with the recent Supreme Court decision in *Coopers & Lybrand v. Livesay* which ruled that such appeals must wait until after a final judgment on the plaintiff's individual claims.[97] In keeping with *Coopers*, she withdrew her appeal and filed it following her loss on the merits. The appellate court then used her loss to deny her review. The trial court had found that she had not suffered any discrimination so she could not be a member of the class that she sought to represent. Thus, the judgment in her personal suit foreclosed her from appealing the denial of class certification. While such a determination on the merits was not supposed to enter into the certifying of the class, it was impossible after the judg-

---

[87] *Id.* at 991.

[88] *Id.*

[89] 431 U.S. 395 (1977). *See* notes 37-42 *supra* and accompanying text.

[90] 578 F.2d 987, 991.

[91] *Id.* at 992.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 995 n.10.

[96] *Id.* at 990-99.

[97] *See* notes 49-54 *supra* and accompanying text.

ment not to consider it.[98] The circuit court had deprived her of her right to appeal an obvious error on the part of the trial court. She was not given an evidentiary hearing prior to the certification decision, but that faulty procedure was to be left unremedied while she was trapped by her mooted status. Justifiably outraged, Satterwhite appealed this decision to the Supreme Court who eventually remanded it[99] for reconsideration in light of its 1980 decisions in *Roper*[100] and *Geraghty*.[101]

While the Fifth Circuit did not allow Satterwhite to appeal for the above reasons, it acknowledged that under certain circumstances appeals by mooted plaintiffs could be permitted.[102] As a prerequisite to such appeals the court required that a hearing be held on certification and that certification be improperly denied. Using the record made at the hearing, the appellate court could rule on the maintainability of the class action without speculating. Moreover, if a hearing were held, the named plaintiff would not share in the error for failure to certify the class as had happened in *Satterwhite*. Having established this criteria, Judge Rubin was ready to use it the next day as the basis for his opinion in *Roper v. Consurve, Inc.*[103]

II. *Deposit Nat'l Guaranty Bank v. Roper*

A. *The Fifth Circuit Decision*[104]

Two "Bank Americard" holders sued the bank that had issued their credit cards on behalf of themselves and all other Mississippi holders. Their action alleged that the charges on the cards were usurious.[105] The

---

[98] 578 F.2d 987, 996 n.11.

[99] On remand (445 U.S. 940 (1980)) to the Fifth Circuit Court of Appeals, the case was remanded to the district court where it is presently pending. 634 F.2d 231 (5th Cir. 1981).

[100] 445 U.S. 326 (1980).

[101] 445 U.S. 388 (1980).

[102] 578 F.2d 987, 995 n.10.

[103] 578 F.2d 1106 (5th Cir. 1978).

[104] Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), *aff'd sub nom.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

[105] The bank divided the holders into ten separate groups, called cycles, and posted their accounts on ten days a month. Each customer was allowed thirty days within which to pay his account without a service charge, but if full payment was not received, the customer was billed 1½% of the unpaid portion on his next bill. The actual finance charges paid by each customer varied because the same 1½% service charge was assessed against the unpaid balance regardless of when the actual charge slips were received. Thus, a charge slip received the last day of the billing period was subject to the same rate as an item received the first day of the billing cycle. Under these circumstances plaintiffs alleged that the monthly service charge resulted in an effective annual interest rate that was usurious under Mississippi law. 578 F.2d at 1109.

trial court declined to confer class status on the suit.[106] Subsequently the bank without admitting liability offered each representative plaintiff the full amount of damages that he could have recovered. Both plaintiffs refused to accept the payment, and the money was deposited with the court which then entered judgment over the named plaintiffs' objections.

On appeal, the bank argued that the named plaintiffs lacked standing to appeal the denied class certification. They had been compensated, and judgment had been entered so that their claims had been mooted. With an angry gruffness the court gave this idea "short shrift."[107] A defendant cannot "short-circuit a class action by paying off the class representatives either with their acquiescence or . . . against their will."[108] By filing a class action, the named plaintiffs had assumed a responsibility to the class, and they could not be "bought off" from fulfilling that responsibility.

Even if the bank were correct that the named plaintiffs' claims were moot, the court still felt that the plaintiffs could validly appeal the denied certification. It cited three instances in which courts had so ruled. In the first, a member of a putative class had appealed the certification issue despite the fact that the named plaintiffs' claims had been found without merit.[109] In the second, a plaintiff who won in the trial court was allowed to appeal denied certification.[110] Lastly, an individual plaintiff who lost on the merits could appeal concerning certification.[111] Following these cases, the court found Roper and Hudgins able appellants for certification.

The court next turned to policy reasons for allowing the mooted plaintiffs' appeal. At this point Judge Rubin referred to his opinion of the previous day, *Satterwhite*,[112] in which he had briefly outlined the circumstances under which mooted plaintiffs might appeal. Without such

---

[106] The district court ruled that putative class representatives had failed to satisfy requirements of FED. R. CIV. P. 23(b)(3). *See* note 2 *supra*.

[107] 578 F.2d at 1110.

[108] *Id.*

[109] United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) (in an employment discrimination suit after named plaintiffs were denied class certification and were awarded relief, intervention by other class members was permitted).

[110] Gelman v. Westinghouse Elec. Corp., 556 F.2d 699 (3d Cir. 1977) (plaintiff had standing to appeal denial of class action treatment as representative of the potential class even after he had prevailed in the district court).

[111] Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977) (district court denied both class certification and Horn's individual claims of discrimination; appellate court found Horn could still represent class on appeal of denied certification since he continued as employee of the defendant and had a continuing interest in the outcome of the case).

[112] 578 F.2d 987 (5th Cir. 1978). *See* notes 102-03 *supra* and accompanying text.

an exception as *Satterwhite* described, he noted, the defendant could escape liability to the class despite judicial error in the certification ruling. Then, intervention would be left as the sole means to save such a suit from terminating. Since, however, other putative class members would not be notified of the failure to certify the class,[113] they would not intervene and pursue the appeal. The court firmly declared, "[r]eview of alleged judicial error ought not be foreclosed so fortuitously."[114]

As for the Article III requirement of a live controversy, the court felt that the questioned maintainability of the class action constituted a viable issue and that the named plaintiffs had a personal stake in the resolution of that issue. Primarily, their stake arose from their objections to the settlement. They were adequate representatives for the suit, possessing that "nexus" with the class that Satterwhite had lacked.[115]

To the Fifth Circuit *Roper* appeared to satisfy all the criteria that it had established for mooted plaintiffs in *Satterwhite*.[116] Yet as Judge Thornberry wrote in his special concurrence,[117] it was not truly necessary for the court to address the mootness question in such "sweeping dicta."[118] These named plaintiffs had vigorously objected to the compromise offer and had refused to accept payment. The court could have as easily declared that their claims were therefore still "live" and justiciable. For the defendant a decision on those grounds would have equally merited an appeal. The defendant did not want to litigate a class action that would subject it to liability for 90,000 possible claims.[119] If the appellate court had ignored the mootness issue, it would have oversimplified the case for the bank's future appeal to the Supreme Court. The bank would then have only to prove the named plaintiffs' claims to be moot to overcome that issue. If the Court found the claims moot, it could stop there and choose to ignore the question of appeals by mooted plaintiffs. By expanding its decision to include the mootness issue, the Circuit was specifically drawing the Court's attention to the issue and demanding the fullest adjudication that could be given to the case.

---

[113] The court commented that under a Second Circuit ruling in Pearson v. Ecological Science Corp., 522 F.2d 171 (2d Cir. 1975), *cert. denied*, 425 U.S. 912 (1976), putative class members need not be notified of individual compromises and thus may not know that the class is without a representative plaintiff.

[114] 578 F.2d 1106, 1111.

[115] 578 F.2d 987, 991.

[116] *See id.* at 995 n.10 and at 996 n.11.

[117] *Id.* at 1116 (Thornberry, J., concurring).

[118] *Id.*

[119] During the suit period, there were approximately 90,000 credit card holders.

B. *The Supreme Court Decision*[120]

1. The Majority Opinion

On appeal the Supreme Court affirmed the decision of the Fifth Circuit. Chief Justice Burger wrote the opinion of the Court while Justices Rehnquist, Stevens, and Blackmun concurred, and Justices Powell and Stewart dissented. The Court had granted certiorari in the case to consider only one issue, "whether a tender to named plaintiffs . . . of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection, moots the case and terminates their right to appeal the denial of class certification."[121] The Court acknowledged that the split in the circuits necessitated its resolution of this issue.

As the first step in its analysis, the Court identified the three interests to be examined for justiciability in the class action context. First, the interest of the named plaintiffs must be considered in two aspects: (1) the personal stake of the named plaintiffs, and (2) their responsibility to represent the class. Second, the rights of putative class members must be viewed in their role as intervenors. Lastly, the responsibility of the district court to protect the absent class is involved since that court must monitor the actions of the parties before it. While realizing that these three interests are interrelated, the Court felt that the narrow issue required "consideration only of the private interest of the named plaintiffs."[122]

The Court then turned to the critical inquiry of whether the private interests of the named plaintiffs had in fact been mooted. Their original complaint asserted a real injury from the alleged usurious charges and satisfied the case or controversy requirement of Article III. They had chosen to present their claims in the form of a class action which was a procedural device "ancillary to the litigation of substantive claims. Should these substantive claims become moot . . . by the settlement of all personal claims . . . , the court retains no jurisdiction over the controversy of the individual plaintiffs."[123]

To resolve this question, the Court looked to the facts of the case. The named plaintiffs had never accepted the tendered settlement, and judgment had been entered without their consent.[124] So long as the named

---

[120] Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

[121] *Id.* at 327.

[122] *Id.* at 331-32.

[123] *Id.* at 332.

[124] At this point the Court noted that the district court had certain responsibilities to the putative class even before certification. In a case such as *Roper* the trial court should provide an opportunity for intervention by another member of the putative class. *Id.* at 332 n.5. The Fifth Circuit, however, had already foreseen the problem that such intervention could cause in a case like *Roper*. The

plaintiffs retained an economic interest in class certification, their private interests were not mooted. Such an interest was manifested by the plaintiffs "desire to shift to successful class litigants a portion of [the] fees and expenses . . . incurred in this litigation."[125] Moreover, the Court declared that a confession of judgment by defendants on less than all the issues could not moot an entire case.

Federal appellate practice permitted appeals from an adverse ruling collateral to the judgment on the merits by parties who had prevailed at trial as long as the parties retained a personal stake in the appeal. The judgment in this case had been rendered at "an intermediate stage of litigation"[126] which was quite different from a final judgment. The latter created "definitive mootness"[127] and ousted the case from federal jurisdiction while the former did not in all cases terminate the right to appeal. To explain this principle, the Court used a 1939 patent suit, *Electrical Fittings Corp. v. Thomas & Betts Co.*[128] In that case the defendants appealed a decision that decreed the patent valid but dismissed the infringement question. Since the original suit had concerned infringement and the adjudication of the patent's validity was immaterial to the suit's disposition, the Supreme Court had ruled that on appeal the defendants were entitled to reformation of the decree. Policy considerations dictated permitting the defendants, even though they had prevailed at trial, to appeal the judgment. The *Roper* case was similar, the Court explained, because the denial of class certification was a procedural ruling, "collateral to the merits of a litigation, that [was] appealable after the entry of final judgment."[129]

Not only could named plaintiffs appeal after the entry of final judgment, but they could seek discretionary interlocutory appeals under 28 U.S.C. § 1292(b).[130] The Court remarked that in *Coopers & Lybrand v.*

---

defendant could easily afford to settle with each intervenor and continue to moot the action until interest in the case disappeared. *Id.* at 1106, 1111.

[125] 445 U.S. 326, 334 n.6.

[126] *Id.* at 335.

[127] *Id.*

[128] 307 U.S. 241 (1939).

[129] 445 U.S. 326, 336.

[130] 28 U.S.C. § 1292(b) (1958) reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

Livesay[131] it had held that class certification rulings "did not fall within that narrow category of circumstances where appeal was allowed prior to final judgment as a matter of right under 28 U.S.C. § 1291."[132] That ruling did not, however, preclude motions under section 1292(b) which could substantially save time and resources.

Coopers maintained that a class certification question could be raised on appeal after final judgment on the merits. The Court stated that it thought *Coopers* had made that point clear although there was no extended discussion included on it. The Court had relied, in *Coopers*, on *United Airlines, Inc. v. McDonald*,[133] a case in which the named plaintiff had won on the merits. "The *McDonald* Court assumed that the named plaintiff would have been entitled to appeal a denial of class certification."[134]

In its concluding dicta the Court discussed the policy reasons behind the use of class actions and emphasized both their advantages and disadvantages. Since plaintiffs could expect certain benefits[135] from a class action, the district court's ruling on certification assumed tremendous significance. Like the Fifth Circuit, the Court felt that sound judicial administration in this case demanded that plaintiffs be granted the right to appeal. Otherwise, defendants might be encouraged to "buy off" the named plaintiffs in the hope of avoiding class suits. Moreover, without such an appeal option, plaintiffs might engage in "forum shopping," trying to locate a district judge sympathetic to class litigation. The Court wanted to discourage such conduct and strongly advocated "the wise use of judicial resources."[136] In formulating the standards that govern appeals of procedural rulings, courts must therefore have a certain latitude. Based on the facts and policy considerations that it had delineated, the Court held that the named plaintiffs were permitted to appeal the adverse ruling on certification.

2. The Concurring Opinions

Three concurring opinions[137] were filed to present the views of justices who did not agree fully with the dicta of Chief Justice Burger's opinion. In the first Justice Rehnquist took issue with the Court's deci-

---

[131] 437 U.S. 463 (1978). *See* notes 49-54 *supra* and accompanying text.

[132] 445 U.S. 326, 336 n.8.

[133] 432 U.S. 385 (1977). *See* note 109 *supra*.

[134] 445 U.S. 326, 338.

[135] A class action could reduce the costs of litigation by allocating them among the class members. Also, for the small claimants like Roper and Hudgins whose damages totaled jointly $1,006, it would be harder to find an attorney willing to pursue their suit without the motivation of a contingent fee based on an entire class' damages rather than on an individual's damages. *Id.* at 338 n.9.

[136] *Id.* at 340.

[137] *Id.* at 340, 342, 344.

sion in *Geraghty*,[138] which was handed down on the same day. He reluctantly agreed with the Court in *Roper* because of the precedents set in past cases.[139] For Rehnquist the Court's previous decisions concerning the issue had been "muddled and inconsistent,"[140] and the Court's present opinion did not clarify them.

The *Roper* case, Justice Rehnquist explained, could fall within the exception allowed by *Sosna*[141] and *Gerstein*[142] for cases "capable of repetition, yet evading review." If the Court required the named plaintiffs in class actions to accept a tender of their individual claims, then defendants could repeatedly moot the case before litigation. As long as the Court did not mandate and plaintiffs did not accept the offer of tender, the case was not moot since a live controversy existed. Accordingly, Justice Rehnquist joined in the Court's opinion.

Justice Stevens focused his concurrence on refuting the dissent of Justice Powell. While Justice Powell maintained that the named plaintiffs were "the only plaintiffs arguably present in court,"[143] Justice Stevens contended that "when a proper class action complaint [was] filed, the absent members of the class [were to] be considered parties to the case or controversy at least for the limited purpose of the court's Article III jurisdiction."[144] Until the certification issue had been terminated by a final determination, the members of the putative class remained parties and provided the viable controversy needed for justiciability.

Because these parties have been unnamed, it may have been thought that their claims automatically became moot with the claims of the mooted plaintiffs. While the status of unnamed members has been difficult to define accurately, the Court had labelled them as "parties in interest"[145] as long ago as 1853. This concept of absent, but interested, parties originated much earlier than the certification requirement which was added in the 1968 amendment of Rule 23.[146] Why, Justice Stevens queried, should the more recent procedural requirement even raise this

---

[138] 445 U.S. 388 (1980). Justice Rehnquist joined in Justice Powell's dissent in *Geraghty*, but he took this opportunity to highlight the differences between *Geraghty* and *Roper*. *Geraghty* did not fit within the framework of precedents that the Court had established while *Roper* satisfied the requirements of these cases.

[139] Sosna v. Iowa, 419 U.S. 393 (1975); Pugh v. Gerstein, 420 U.S. 103 (1975).

[140] 445 U.S. 326, 341.

[141] 419 U.S. 393 (1975).

[142] 420 U.S. 103 (1975).

[143] 445 U.S. 326, 342.

[144] *Id.*

[145] The Court used this phrase in Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853), one of the earliest class actions in the federal courts.

[146] Prior to 1968, Rule 23 did not require the trial court's certification in order to maintain a class action.

issue of status which the Court had for so long considered as uncontroversial?

The real question in cases such as *Roper* and *Geraghty*, Justice Stevens wrote, was "whether the named plaintiff [continued] to be a proper class representative for the purpose of appealing the adverse class determination."[147] In terms of that limited role, the Justice found that the named plaintiffs clearly remained appropriate representatives of the class. Since such a ruling conflicted with the Court's decision in *Jacobs*, he rebuffed that decision and asserted "that a remand on the class issue would have been a more appropriate resolution"[148] in that case.

In the third concurrence Justice Blackmun briefly wrote that he not only agreed with the Court, but felt that the Court's decision was too narrow. He indicated that appealability should not be limited to those cases in which the named plaintiff's personal stake consisted of the recovery of his attorney's fees. In Blackmun's view the ruling on class certification stands as a separate, litigatible issue "which [did] not become moot just because the named plaintiff's suit on the merits [was] mooted."[149]

3. The Dissenting Opinion

Justice Powell, who was joined by Justice Stewart, wrote a lengthy dissent.[150] To him the case was moot, and the Court's "attempted solution . . . [departed] from settled principles of Article III jurisprudence."[151] The tender offered by the defendant mooted the named plaintiffs' claims. At the time of the appeal no one other than these plaintiffs was present in the courtroom. The class had not been certified, and as precedents such as *Jacobs*[152] ruled, the named plaintiffs had no continuing personal stake in the outcome. As for the majority opinion's reliance on *Electrical Fittings*,[153] Justice Powell found the analogy to be totally inappropriate. In the earlier case "a limited appeal was allowed because the petitioner himself was prejudiced by the inclusion of an unnecessary and adverse finding in a generally favorable decree."[154] The effect of denied certification on the plaintiffs in this case bore no such prejudice. Moreover, policy considerations by themselves did not merit the disregarding of Article III requirements.

---

[147] 445 U.S. 326, 343-44.

[148] 420 U.S. 128 (1975). *See* notes 20-21 *supra* and accompanying text.

[149] 445 U.S. 326, 344.

[150] *Id.* at 344-59.

[151] *Id.* at 358.

[152] 420 U.S. 128 (1975). *See* notes 20-21 *supra* and accompanying text.

[153] 307 U.S. 241 (1939).

[154] 445 U.S. 326, 348.

Instead of ruling that an appeal could be permitted by mooted plaintiffs, Justice Powell offered the Court several alternative solutions. Interlocutory appeals under section 1292(b)[155] could be made, or Congress could enact legislation to permit appeals under section 1291.[156] The district court could be required to give notice to putative class members of the settlement between the named plaintiffs and defendants, thus enabling them to intervene.[157] Lastly, Congress could pass legislation providing other solutions to the problem.[158]

The ruling of the Court was especially unsatisfactory because of its repercussions.[159] It would create a situation of "one-way intervention" for class members. If the named plaintiff, after an adverse certification ruling, prevailed on the merits of his own case and then appealed and obtained a reversal of the certification ruling, the putative class members could subsequently take advantage of the favorable judgment without assuming the risk of being bound by an unfavorable judgment. In Justice Powell's opinion, the significant problem that such a policy could create militated against the Court's decision.

C. *Analysis of the Supreme Court Decision*

The Court had purposely issued *Roper* as the first of its two decisions on a mooted plaintiff's right to appeal denied class certification. *Geraghty*, which was delivered second, relied on *Roper* to give it a stronger precedential base. Yet *Roper* was not a strong decision. Both Justice Rehnquist, who concurred in *Roper*, and Chief Justice Burger, who wrote the *Roper* opinion, later joined in the dissent in *Geraghty*,[160] indicating that to them *Roper* was a narrow decision to be limited to its facts.

---

[155] *See* note 130 *supra* and accompanying text.

[156] *Coopers* prevented appeals under § 1291. *See* notes 49-62 *supra* and accompanying text.

[157] Under Rule 23(e) the district court is required to give notice of a proposed dismissal or compromise to all members of the class. In *Roper*, however, this requirement had been avoided because the class had never been certified. Instead, the court could apply Rule 68 governing offers of judgment and did not need to give notice to putative class members.

[158] For instance, at the time of this decision a bill was before Congress (H.R. 5103, 96th Cong., 1st Sess. (1979)) to create a new federal right of action for damage claims too small to justify individual lawsuits. A hearing was held on this bill in the House on April 17, 1980, and no further action has been taken by Congress.

[159] "One-way intervention" is, however, routinely permitted in class action litigation. Its repercussions were considered in cases such as Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974), and were found to be minimal. In fact, the Third Circuit favored such a procedure in *Katz* because it saved the time and expense involved in serving notice on class members until after a violation was established. *Id.* at 760.

[160] 445 U.S. 388, 409 (1980).

The circumstances that helped the plaintiffs in *Roper* overcome mootness lay in their refusal to accept the settlement offer made by the bank. When the district court entered judgment over Roper's objection, it was not the usual type of final judgment. An appeal of the judgment entry could easily find it to be erroneous. In that instance, the plaintiffs' claims would not have been mooted. Moreover, their refusal to accept the offered tender gave them a continuing personal interest in the suit. Aside from that incentive, the desire to allocate their legal costs between themselves and the putative class, if the case succeeded on the merits, provided an economic stake for a continuing "live" controversy. Yet, as the petitioners in *Geraghty* noted, this situation was different from one in which the named plaintiff's claim expired due to time. If their case was mooted, it was by the trial court's judgment, not by their satisfying a time requirement such as state residency or a prison sentence.[161] All these facts cumulated into a unique pattern which allowed the Court to rule that the plaintiffs still had a private stake in the litigation. As Justice Blackmun noted in his concurrence,[162] it was a limited holding and with the Court's emphasis on the facts, its future applicability was weakened. Courts find such narrow cases easy to distinguish because the identical facts rarely arise again. Any deviation, then, can be sufficient to merit a different ruling.

If the Court had at least used the established mootness cases in the class action area to reach its decision, its holding would have appeared broader and more firmly based. Curiously, *Sosna* was not even mentioned. The Court did not try to justify its conclusion in light of the flexible holdings in *Sosna* or *Gerstein*, nor did it try to refute cases like *Jacobs* and *East Texas* which appeared irreconcilable with its holding. Instead, it turned to a case outside the class action context and relied on *Electrical Fittings*.[163] As Justice Powell commented in his dissent,[164] the analogy was inappropriate. An appeal to reform the decree in the patent suit was allowed because the trial court had erroneously adjudicated an issue that was immaterial to the cause of litigation. The Court carefully delineated the type of appeal it was permitting in that case; it was not applicable to a party appealing from "a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous, which are not necessary to support the decree."[165] Certainly Roper's appeal fell into that category. Irrelevancy was the rationale in *Electrical Fittings*, and its holding was irrelevant to the concerns of mooted plaintiffs trying to appeal an adverse certification ruling. By using such a

---

[161] Sosna's and Geraghty's claims were both mooted by the expiration of time.

[162] 445 U.S. 326, 344. *See* note 134 *supra* and accompanying text.

[163] 307 U.S. 241 (1939).

[164] 445 U.S. 326, 348-49.

[165] 307 U.S. at 242.

poor analogy and obscure case, Chief Justice Burger had only hurt the value of his opinion.

In his discussion of *Electrical Fittings*, Chief Justice Burger spoke of the difference between "definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal."[166] "Definitive mootness," it can be assumed, refers to the strict Article III requirement of case or controversy. The other type of mootness is "flexible," insofar as it permits an appeal after the plaintiff has prevailed on the merits. Without formally acknowledging the existence of the doctrine of "flexible mootness," the Court was, nevertheless, applying a form of it in this case. In *Geraghty*, Justice Blackmun devoted great care to tracing the history of the doctrine,[167] but Chief Justice Burger chose to ignore the past judicial history. By failing to build a foundation for the mootness exception and by failing to recognize it, the Court has tried to downplay its decision. It was willing to let Roper appeal given the facts of his case, but did not want to admit openly that it was establishing a policy of "flexible mootness" in class certification appeals. If the Chief Justice's intent had been otherwise, it would not have been necessary for him to dissent in *Geraghty*.

While an appeal was to be allowed in this case, the Court, in a footnote,[168] suggested that appeals under 28 U.S.C. § 1292(b)[169] might be used by named plaintiffs for the certification question. For the Chief Justice to offer this option to named plaintiffs is startling. When Congress enacted the Interlocutory Appeals Act of 1958,[170] it had added (b) to section 1292 to handle interlocutory appeals that arose early in the course of litigation and (1) involved a controlling question of law, (2) presented substantial ground for difference of opinions, and (3) would advance the ultimate termination of the litigation. The legislative history of section 1292(b) indicated, however, that Congress did not want to encourage piecemeal appeals.[171] Therefore, it would be a truly exceptional case that would both satisfy the requirements of the statute and merit this special treatment. For the Chief Justice to state that the denial of class certification would qualify for such an appeal invited such appeals, yet their maintainability was questionable under the statute. As a solution to the mooted plaintiff's problem, it was no more certain than was his appeal under the doctrine of "flexible mootness."[172]

---

[166] 445 U.S. 326, 335.

[167] 445 U.S. 388, 395-401.

[168] 445 U.S. 326, 336 n.8.

[169] *See* note 130 *supra*.

[170] Pub. L. No. 85-919, 72 Stat. 1770 (1958).

[171] 32 AM. JUR. 2d *Federal Procedure* § 349 (1980).

[172] Moreover, the circuit courts had previously rejected the routine use of sec-

Lastly, the Chief Justice gave the policy reasons for allowing Roper's appeal. He did not want to encourage defendants to "buy off" named plaintiffs, and he did not want the named plaintiffs to engage in "forum shopping." Policy considerations such as these cannot be narrowly confined. They extend to the entire realm of class actions involving mooted plaintiffs who wish to appeal denied certification. In such a limited opinion as *Roper* they appear incongruous. Without a Court-approved "flexible mootness" exception, named plaintiffs would be careful to pick a sympathetic judge rather than risk denied certification and a subsequent loss of appeal due to mootness. *Roper* would only help them if their facts were identical to those in *Roper*. Again, if the Chief Justice truly believed in these policy considerations, he would have joined in the *Geraghty* opinion as a more effective preventative, or he would have written his holding more broadly.

III. *U.S. Parole Commission v. Geraghty*

A. *The Third Circuit Decision*[173]

According to U.S. Parole Commission guidelines, each prisoner had a predetermined time to be served before he could become eligible for parole. This time was computed by assigning a rating to each class of offenses and a "parole prognosis score" to each prisoner, and then combining these numbers on a grid which identified the time span to be served. Geraghty[174] challenged the validity of these guidelines on constitutional grounds and brought the suit as a class action on behalf of all federal prisoners who were or who would become eligible for parole.[175] At trial the class was not certified,[176] and Geraghty's individual suit was dismissed by summary judgment.[177] Geraghty then appealed from both rulings, but before oral arguments were heard, his sentence expired and he was released.

The Third Circuit delivered a well-reasoned, lengthy opinion allowing Geraghty, a mooted plaintiff, the right to appeal the refusal of class status. The Parole Commission based its contention on *Jacobs*,[178] asserting that the absence of a certified class and the mootness of the named

---

tion 1292(b) in class certification appeals. "Other overriding legal issues" must be present, according to the Third Circuit in Link v. Mercedes-Benz of N. America, Inc., 550 F.2d 860, 863 (3d Cir.), *cert. denied*, 431 U.S. 933 (1977).

[173] 579 F.2d 238 (3d Cir. 1978).

[174] Geraghty, a Chicago policeman, was convicted in 1973 of conspiracy to commit extortion and false statements to the grand jury. *Id.*

[175] 445 U.S 388, 393.

[176] The trial court denied certification because it felt that Geraghty's claims were not typical of the class that he purported to represent. Therefore, the prerequisite of FED. R. CIV. P. 23(b)(3) was not met. 579 F.2d 238, at 252.

[177] 429 F. Supp. 737 (M.D. Pa. 1977).

[178] 420 U.S. 128 (1975). *See* notes 20-22 *supra* and accompanying text.

plaintiff automatically rendered the case not justiciable for lack of a "live" controversy. The court easily brushed aside this argument, citing the Supreme Court's holdings in both prior and subsequent cases, and limiting *Jacobs'* holding to its facts.[179]

Three cases, in particular, refuted the defendant's reliance on *Jacobs*.[180] First, Geraghty's action strongly resembled *Gerstein* which had challenged pretrial detention. In both cases the named plaintiffs' claims became moot before their appeals, but the court could be assured of an ongoing class suffering the alleged injury. The Supreme Court had permitted Gerstein to continue as class representative, and Geraghty deserved similar treatment. In the earlier case, however, the class had been certified at trial, and such was not the case in *Geraghty*.[181]

Two Supreme Court cases[182] dealing with intervention in class actions resolved this problem. In both instances the named plaintiffs were denied class certification at trial. Soon thereafter the claims of these plaintiffs were mooted, yet the Court still allowed intervenors to pursue the actions. The lack of a live controversy on the part of the named plaintiffs did not terminate these suits, and similarly Geraghty's case need not be terminated by his mootness.

In all three of the above Supreme Court cases, "the lack of certification . . . [did] not inevitably require dismissal, if the elements of justiciability [were] otherwise established"[183] by the continuation of a concrete dispute and adequate representation. Likewise, in the instant case the existence of prisoners subject to the parole guidelines assured the continuation of a live controversy. Furthermore, the Third Circuit recognized that flexible mootness involved "discretionary elements"[184] to which the court could "ascribe weight to reasons of policy."[185] In this

---

[179] 579 F.2d 238, 250.

[180] 420 U.S. 103 (1975). *See* notes 24-30 *supra* and accompanying text.

[181] 579 F.2d 238, 249-51.

[182] Baxter v. Palmigiano, 425 U.S. 308 (1976) (controversy involving prison regulations was not certified as a class action and named plaintiffs died or were released prior to appeal; subsequent intervention by another prisoner was allowed); *see* United Airlines v. McDonald, 432 U.S. 385 (1977).

[183] 579 F.2d 238, 250-51.

[184] *Id.* at 251.

[185] *Id.* at 246. The court discussed in detail the contours of the mootness doctrine. The doctrine was found to consist of two parts. The first was "the mandate of Article III, which provides that the power of the judiciary is limited to cases or controversies" and the second the "more flexible considerations of policy," which encompasses three questions: (1) whether a legal controversy exists sufficient to show that the case is not hypothetical; (2) whether the controversy affects an individual in such a concrete manner as to permit reasoned adjudication; and (3) whether the parties have sufficient functional adversity to sharpen the issues for court resolution. For a more thorough discussion of the flexibility of mootness, see Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974).

case the court found four such elements.[186]

First, Geraghty's suit resembled those actions labelled "capable of repetition, yet evading review."[187] Prisoners like the named plaintiff would inevitably be discharged before they could fully litigate their challenge of the parole rules' legality. The court said: "This alone is a factor weighing heavily in favor of justiciability."[188] Second, the court confronted the problem of denied certification. In the three Supreme Court cases above, the class had been certified by the trial court, but *Geraghty* had been refused certification. Following *Gardner*,[189] the court realized that mooted plaintiffs were being denied the possibility of review of adverse class determinations. In its third consideration, the court established a requirement for such cases to qualify for the mootness exception that the court was proposing. The attorneys in the case must have continued to press the suit without "any diminution of vigor in their efforts despite the release of [the named plaintiff]."[190] Such effort in this case, combined with the attempted intervention of another class member,[191] presented "a prima facie case of functional adversity."[192] Such adversity clearly satisified the basic requirements of the mootness doctrine. Lastly, the court reasoned that the case was not tied solely to Geraghty. Even without him, the interests of the putative class remained the same, as did the procedures and regulations of the Parole Commission. While the named plaintiff functioned as a figurehead for the class, the class existed as a separate entity on its own. In the court's opinion Geraghty was, therefore, a proper party to appeal the denied class status.

The court's analysis appeared sound although it could not find much support from other circuits.[193] If the court had so desired, it could have buttressed its thinking with *Sosna*.[194] Not only did that case provide the

---

[186] 579 F.2d 238, 251-52.

[187] This case was not a perfect example of actions "capable of repetition, yet evading review" because some prisoners would have sentences sufficiently long to permit them to fully pursue a challenge to the parole rules' legality. *Id.* at 251.

[188] *Id.*

[189] 437 U.S. 478 (1978). *See* notes 55-62 *supra* and accompanying text. The Third Circuit felt responsible for this decision because it was their holding (559 F.2d 209 (3d Cir. 1977)) that the Supreme Court had affirmed in *Gardner*. Surprisingly the court did not also mention the *Coopers* decision handed down the same day as *Gardner*. In that case named plaintiffs lost their right to appeal under § 1291. *See* notes 49-54 *supra* and accompanying text.

[190] 579 F.2d 238, 252.

[191] Becher, another prisoner like Geraghty, had applied to intervene in the case after Geraghty had appealed to the Third Circuit. Because the district court was then without jurisdiction in the case, it denied his request. *Id.* at 245 n.21.

[192] *Id.* at 252.

[193] *Id.* at 251 n.49.

[194] 419 U.S. 393 (1975). *See* notes 12-18 *supra* and accompanying text.

initial exception for injuries "capable of repetition, yet evading review," but it also acknowledged that the class had an existence of its own, apart from that of the mooted plaintiff. Moreover, despite the murkiness that the mootness issue brought to the case, the Third Circuit clearly saw the heart of the problem. An improper denial of class certification could become a bar to the adjudication of an otherwise constitutionally justiciable controversy. "Flexible mootness" needed to be expanded to allow mooted plaintiffs the opportunity to appeal the denial of class certification, and the Third Circuit had strongly advocated its position. Nevertheless, it was not unexpected that the Parole Commission would appeal to the Supreme Court.

B. *The Supreme Court Decision*[195]

1. The Majority Opinion

Justice Blackmun, who delivered the opinion of the Court, wholeheartedly endorsed the Third Circuit's handling of the issue. Because he knew that "the question at hand [was] one of first impression and thus . . . unprecedented,"[196] he proceeded through his analysis in a careful, step-by-step manner. First, he considered the concept of mootness itself and explained how its flexible nature was first recognized by the Court in *Flast v. Cohen*.[197] Mootness served a definite judicial function by limiting federal litigation to "live" issues or issues presented by parties with a cognizable interest in the outcome. Since the controversy over the parole guidelines was clearly "live" for members of the proposed class, the Court's analysis concentrated on the personal stake requirement.

To build his argument, Justice Blackmun traced the Court's treatment of this requirement in the class action context. Two lines of cases existed: The first, a "flexible" group, had its roots in *Sosna*[198] and *Gerstein*,[199] and the second, characterized as "less flexible,"[200] followed *Jacobs*.[201] The latter was not dispositive in this case and was distinguishable.[202] In *Sosna* and *Gerstein*, however, the Court saw a "flexible mootness" that had been extended to named plaintiffs. Neither plaintiff had a personal stake in the outcome in the traditional sense, yet

---

[195] 445 U.S. 388 (1980).

[196] *Id.* at 404 n.11.

[197] 392 U.S. 83 (1968).

[198] 419 U.S. 393 (1975). *See* notes 12-18 *supra* and accompanying text.

[199] 420 U.S. 103 (1975). *See* notes 24-30 *supra* and accompanying text.

[200] 445 U.S. 388, 400 n.7.

[201] 420 U.S. 128 (1975). *See* notes 20-22 *supra* and accompanying text.

[202] The Court found these cases distinguishable because the parties in them had not suggested "relation back" of class certification and had appealed on the merits without having first obtained class certification. 445 U.S. 388, 400 n.7.

each represented a "live" controversy which was found to be justiciable. Geraghty's interest "was precisely the same as"[203] that of the named plaintiffs in *Gerstein* and certainly merited the same treatment. Even in appeals of denied class certification the Court had established precedents "that the proposed class representative who [proceeded] to a judgment on the merits [might] appeal."[204] One such case was *United Airlines, Inc. v. McDonald*[205] which had inferred that a refusal to certify was subject to appellate review. The other leading case was *Roper*[206] which the Court had decided the same day as *Geraghty*.

The Parole Commission, however, in its appeal, sought to distinguish the case from *Roper*. In that case mootness resulted from a judgment while here it was caused by an expiration of the claim, *i.e.*, Geraghty's release. Such a distinction was firmly rejected by the Court. Geraghty's personal stake in the suit did not differ from Roper's in any practical sense. To apply mootness in a case did not require an analysis of the type of mootness but rather an issue by issue approach. In a class action a plaintiff presents two separate issues: (1) the claim on the merits and (2) the claim that he was entitled to represent the class. Thus, in determining whether a plaintiff could appeal his certification claim, the court needed to examine his personal stake in that issue alone. Basically the plaintiff had a right to certification if his action satisified the prerequisites of Rule 23.[207] The plaintiff would have desired the certification because of the benefits that class status would have brought to his suit. His interest in certification must have been manifested by "vigorous advocacy"[208] of his right. In such an instance the plaintiff's mootness did not prevent an appeal. He had maintained a claim that offered to the court "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."[209] The denial might, therefore, be appealed by the mooted plaintiff. If the appeal were successful, the district court on remand must then decide whether the mooted plaintiff or another class member would be the best representative for the class in its suit on the merits. Within the limited context of the appeal, however, the Court had declared "flexible mootness" a workable concept.

During its discourse the Court paused in a lengthy footnote[210] to

---

[203] *Id.* at 400.

[204] *Id.* at 399.

[205] 432 U.S. 385 (1977). *See* notes 109 and 182 *supra* and accompanying text.

[206] 445 U.S. 326 (1980). *See* notes 204-54 *supra* and accompanying text.

[207] Such a right was analogous to the private attorney general concept that the Court in *Roper* had called a "natural outgrowth" of class actions. 445 U.S. 326, 338.

[208] 445 U.S. 388, 404.

[209] *Id.* at 403.

[210] *Id.* at 404 n.11.

refute the arguments in Justice Powell's dissent. It did not believe that this case represented a "significant departure" from precedents, and it restated its reliance on *Flast, McDonald* and *Sosna*. While it conceded that the prior cases were "somewhat confusing . . . and perhaps . . . irreconcilable,"[211] it pointed out that the basic issue, the Article III requirement for case or controversy, was "riddled with exceptions."[212] Unlike the dissent, the Court did not fear the resulting consequences of its ruling: "Each case must be decided on its facts."[213] For instance, in *Geraghty* the plaintiff had suffered an actual injury as a result of the defendant's alleged illegal conduct, and this injury satisfied "the formalistic personal stake requirement if damages were sought."[214] If the district court had granted the motion for certification, the case would not have become moot because the class would have had an established, separate legal status. If the court had erroneously denied the certification, it must in the corrected ruling "relate back" to the date of the original denial. As *Gerstein*[215] had decided, the certification then "related back" to the case or controversy that existed at that time. This principle would provide a control mechanism on such appeals. If the named plaintiff did not have a justiciable issue when he originally asked for class certification,[216] then he could not, on appeal, escape the mootness of his situation.

2. The Dissenting Opinion

Justice Powell wrote the dissent on his own behalf and on behalf of three other justices.[217] In his opinion Powell stated that Geraghty no longer had "the slightest interest in the injuries alleged in his complaint."[218] No class had been identified or certified, so no member of the putative class could properly bring the issue before the Court. The case, therefore, lacked the requisite personal stake of a plaintiff and should have been dismissed as moot.

In particular, Justice Powell rejected two major elements of the majority decision. To create the concept of "flexible mootness" in a class

---

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] 420 U.S. 128 (1975). *See* notes 20-22 *supra* and accompanying text.

[216] For instance, if Geraghty had filed his motion for certification the day after he was released, he would have lacked the required personal stake in the outcome of the case. The "relation back" doctrine looks to the circumstances existing at the time of the original motion. No exception to the mootness doctrine can be made if no case or controversy existed at that time.

[217] Joining in J. Powell's dissent were Burger, C.J., and Stewart and Rehnquist, JJ., 445 U.S. 388, 424.

[218] 445 U.S. 388, 424.

action context, the Court had misread the cases that it used as precedents.[219] None of these cases allowed an appeal from the denial of class certification without the plaintiff's proof of a personal stake in the outcome. Thus, it was possible to distinguish *Geraghty* from *Roper* because, in the latter case, plaintiffs at least had the speculative interest in sharing legal costs with the class. Geraghty offered no such "live" interest in the present case. Moreover, the Court ignored the "controlling relevance" of cases like *Jacobs*,[220] by calling them "less flexible" holdings. To Justice Powell, these cases were "recent and carefully considered decisions . . . [which] applied long settled principles of Art. III jurisprudence."[221]

Second, Justice Powell disavowed the Court's splitting a class action into two separate claims: (1) the claim on the merits, and (2) the claim that the named plaintiff was entitled to represent the class. The second claim had no legitimate existence of its own. It was merely a procedural device with no value other than "to facilitate a favorable resolution of the case on the merits."[222] Discussion of a private stake of the plaintiff in such a claim was, therefore, centered on "a false dilemma."[223] While recognizing that the Court had found policy considerations to favor its flexible mootness doctrine, Justice Powell asserted that the Court had nevertheless violated the principles of Article III mootness to create an exception for mooted plaintiffs like Geraghty. Policy considerations alone could not provide a plaintiff when none is before the Court, and *Geraghty*, in his view, should have been remanded with instructions to dismiss the action as moot.

C. *Analysis of the Supreme Court Decision*

In his concurrence in *Roper*, Justice Stevens wrote that that for the limited purpose of appealing denied class certification the named plaintiffs in *Geraghty* and *Roper* were appropriate class representatives.[224] Justice Blackmun had elaborated on that principle and shaped it into the holding in *Geraghty*. The Court's granting of this right of appeal to mooted plaintiffs logically followed from its earlier decisions of "flexible mootness." Without such an exception, as the appellate courts had noted, an improper denial would prevent the class from adjudicating a legitimate injury and obtaining needed redress. In its holding the Court

---

[219] Justice Powell reviewed the cases of *Sosna*, *Gerstein*, *McDonald* and *Roper*. For the Court's reliance on these cases, see notes 198-201 *supra* and accompanying text.

[220] *See* note 202 *supra* and accompanying text.

[221] 445 U.S. 388, 418.

[222] *Id.* at 423.

[223] *Id.* at 422.

[224] 445 U.S. 326, 344.

had hopefully remedied the situation by giving such a class a chance to appeal by the plaintiff who had originally brought the suit.

While the opinion was carefully constructed, it nevertheless contained some questionable dicta. The two major problem areas were both attacked by Justice Powell in his dissent. While it is extremely likely that Justice Powell would have dissented from the opinion even without these weak points,[225] their existence only served to make his attack sharper. The first arose from Justice Blackmun's cursory dismissal of Supreme Court cases that did not fit into his framework, and the second from the Justice's elevation of a procedural device to the level of a separate litigable claim.

Justice Blackmun built his analysis slowly so that his arguments would derive strength from their precedents. First, he examined mootness and its evolution, then he turned to mootness in the class action forum, and in both instances he relied on well-known, influential cases. Unlike the *Roper* opinion where *Sosna* was mysteriously absent, *Geraghty* found *Sosna* repeatedly supportive. Other cases from the post-*Sosna* decisions, such as *Gerstein* and *Franks*, were cited for their contributions to "flexible mootness." When the Court announced in its concluding remarks that Geraghty and other similarly-situated mooted plaintiffs could qualify for this relaxed Article III treatment, it seemed to follow logically from these earlier cases.

Nevertheless, Justice Blackmun failed to clarify the "muddled and inconsistent"[226] treatment of such plaintiffs. He acknowledged that another line of cases existed that were "less flexible," but he shrugged them off after briefly trying to distinguish them. Cases like *Jacobs*[227] that did not allow for any flexibility but strictly adhered to Article III traditional mootness could not be readily distinguished. Usually defendants would argue the *Jacobs* decision and plaintiffs would refer to the more permissive cases like *Sosna*, *Gerstein* and *Franks*. Then the appellate court would pick whichever seemed more persuasive at the time, producing unpredictable and contradictory holdings. The Court needed to settle this tension, not just relegate one line of cases to "second class"[228] status. Even if *Jacobs'* usefulness was essentially diminished by its treatment here, the Court never touched on *East Texas*[229] which was a reaffirmation of the *Jacobs'* holding. Leaving such a recent precedent without comment, the Court failed to "wipe the slate clean."[230] Justice

---

[225] Justice Powell had dissented in all the Court's previous "flexible mootness" decisions as the Court noted in *Geraghty*. 445 U.S. 388, 404 n.11.

[226] 445 U.S. 326, 341.

[227] *See* notes 20-22 *supra* and accompanying text.

[228] 445 U.S. 388, 418. Justice Powell accused the Court of making these "recent and carefully considered decisions" into "second class precedents." *Id.*

[229] *See* notes 37-42 *supra* and accompanying text.

[230] In his concurrence to *Roper*, Justice Rehnquist complained that "the Court

Stevens had also seen this problem in his concurrence to *Roper*[231] and wrote that *Jacobs* had probably been decided wrongly. Yet until an opinion either overrules or disapproves these precedents, they will most likely continue to confuse the lower courts.[232]

The second weakness in the Court's opinion lay in its division of a potential class action into two separately existing claims: one on the merits and the other on the representation of the class. Justice Powell's attack of this classification was justified.[233] The second claim depended on the first for its existence and, moreover, was not an issue, but rather a procedural device. The Court went on to discuss the personal stake a named plaintiff must show in the second claim so that his suit would not be moot. He must have "vigorously" advocated his position and brought to the court "sharply presented issues in a concrete factual setting."[234] If he continued to do so through the time of his appeal, then the mootness of his personal claim on the merits would not moot his appeal. Not only was this test unnecessary since it rested on the erroneous premise that class representation was a separate issue with its own personal stake requirement, but it also placed an unwarranted burden on the mooted plaintiff.

The Court had a better test but failed to give it the comprehensive discussion that it deserved. In its footnote reply to the dissent,[235] the Court described how the "relation back" doctrine would provide a check on the appeals of mooted plaintiffs. If the Court had used this doctrine for its test, it would have avoided the problem created by the division of the claims. Only the claim on the merits would be brought to court by the named plaintiff. He would then assert his procedural motion for class certification. Following the denial of his motion and the adjudication of his individual claim, he would appeal the adverse ruling. His claim was now moot, but the Court could allow his appeal to escape mootness by permitting it to "relate back" to the case or controversy that existed when he originally filed the certification motion. If he had a legitimate Article III claim at that time, for the limited purpose of the appeal, he would be an adequate representative. Such a test would not require a separate examination by the Court of the mooted plaintiff's stake in representing the class. He does not have to allege an economic interest like the *Roper* plaintiffs nor does he have to describe how in-

---

today has not cleaned the slate or been successful in . . . [replacing] . . . the muddled and inconsistent [principles] of the past." 445 U.S. 326, 340-41.

[231] *Id.* at 342 n.1.

[232] Such a result can already be seen in the Fifth Circuit's treatment of *Satterwhite* on remand. 634 F.2d 231 (5th Cir. 1981). *See* notes 237-40 *infra* and accompanying text.

[233] 445 U.S. 388, 419-24.

[234] *Id.* at 403.

[235] *Id.* at 404 n.11.

terested he is in the other benefits of class status. The only personal interest that he needs is the one that he brought originally to his claim in the suit. As the Court noted in its footnote, *Gerstein* provided a solid precedent for this test, and the Court could have traced it back further to "the *Sosna* footnote." Using this reasoning, this case would become a direct extension of the "flexible mootness" allowed by those precedents.

While this case did not resolve all the problems of such appeals, it was a step in the right direction. It had broadened the holding in *Roper* so that a mooted plaintiff need not worry about matching facts to that case. Unlike *Roper*, it did not ignore its class action precedents. Although it had the authority that the use of such precedents commands, it did not qualify as an undisputable precedent on its own.

IV. RAMIFICATIONS AND POSSIBLE SOLUTIONS

As was noted in the above analysis of *Geraghty*, the Supreme Court has not provided the clear guidance that the lower courts would have hoped for. Conflicting precedents still exist, and it is probably just a matter of time until another case wends its way through the federal courts seeking certiorari to settle the uncertainty. The Court's obvious intent in *Geraghty* was to enlarge the scope of "flexible mootness" to allow mooted plaintiffs to appeal denied class certification. In less than a year it has become obvious that the Court did not succeed as fully as it may have thought.

As was discussed above in the *Geraghty* analysis, the Court did not negate conflicting precedents such as *East Texas*. After the Court decided these two cases, it remanded *Satterwhite*[236] to the Fifth Circuit for reconsideration. In that case the Fifth Circuit had relied on *East Texas* as the basis for its opinion. On remand the appellate court was ordered by the Supreme Court to apply the Supreme Court's decisions in *Roper* and *Geraghty*. Because of a lack of information in the record on which to base a reconsideration, the Fifth Circuit, in turn, remanded the case to the district court.[237] While the appellate court directed the lower court to "consider the factors mentioned in *Geraghty* and *Roper*,"[238] it also instructed the court to consider *East Texas* as determinative. As the dissent[239] by Judge Gee remarked, however, it was an impossible task to distinguish *East Texas* or to reconcile it. While the appellate court probably considered itself fortunate not to be the first court faced with that task, it will probably encounter it on appeal. No matter what the district court rules, there will be grounds for appeal because it did not follow all of the appellate court's instructions. It cannot, as the Fifth

---

[236] Satterwhite v. City of Greenville, 445 U.S. 940 (1980).

[237] 634 F.2d 231 (5th Cir. 1981).

[238] *Id.* at 232.

[239] *Id.* at 232-36.

Circuit well knows, comply with all of them because of the "tension between the general thrust of the Court's *Geraghty* and *Roper* decisions and its unanimous decision in *East Texas*."[240]

Under *East Texas*, Satterwhite was found not to be an appropriate class representative because she did not belong to the purported class.[241] In *Geraghty* the trial court had similarly found that the named plaintiff had not suffered an injury typical of the class and could not therefore be a class representative. Yet the Supreme Court in *Geraghty* had chosen to ignore the precedent of *East Texas* and to allow Geraghty to appeal on behalf of a class of which he had been found not to be a member. This inconsistency, as Judge Gee acknowledged, can only be resolved by the Supreme Court.[242]

While the Supreme Court has created this uncertain disposition of appeals by mooted plaintiffs, and appears reluctant or unable to "wipe the slate clean," it could resort to other solutions. This situation has partially resulted from the Court's decisions in *Coopers* and *Gardner* when it ruled that appeals of denied certification must wait until a final judgment has been rendered.[243] Boyd and Geraghty are examples of plaintiffs who were trapped without such appeals. Justice Powell in his *Roper* dissent suggested that Congress pass legislation to make class action appeals an exception to either section 1291 or section 1292(a). Most likely, Congress would feel that it was unnecessary to enact such a law because it has already provided a contingency in section 1292(b) to cover such exceptional circumstances. If the Court felt strongly that it was denying putative classes their full judicial rights, it could, when an appropriate case arose, overrule either *Coopers* or *Gardner*.

Justice Powell also suggested that the courts use section 1292(b) to handle such appeals, and Chief Justice Burger endorsed its use in the majority opinion in *Roper*. As was discussed above,[244] courts have always applied that statute sparingly. If named plaintiffs began to use it steadily, the Court may become upset by the number of piecemeal appeals that would consume court time and resources. A similar situation had caused the Court to stop the appeals of named plaintiffs under section 1291 in *Coopers*.[245]

Of all the possible solutions, the most effective would be the Court's conforming its cases into an officially approved line. Since the Court cannot effectively distinguish *Jacobs* and *East Texas*, it must either

---

[240] *Id.* at 236.

[241] *See* notes 86-99 *supra* and accompanying text.

[242] Judge Gee stated: "Perhaps the Court will now overrule, disapprove, or distinguish [*East Texas*]; the former two actions, however, are beyond our [the circuit's] powers and the latter beyond my ability." 634 F.2d 231, 236.

[243] *See* notes 43-62 *supra* and accompanying text.

[244] *See* notes 168-70 *supra* and accompanying text.

[245] *See* note 49 *supra* and accompanying text.

disapprove or overrule them. "Flexible mootness" is an established principle which the Court should extend to mooted plaintiffs who are otherwise left without recourse to appeal denied certification. It should not let this doctrine be defeated or diminished by judicial inconsistency.

V. CONCLUSION

In 1975 the Supreme Court began a policy of "flexible mootness" in class action cases. *Sosna* established a valuable precedent, and later cases such as *Gerstein* and *Franks* enlarged upon it. At the same time, however, another string of cases created by *Jacobs* and *East Texas* narrowed it. The Court never resolved the resulting conflict but moved ahead and added two more opinions in *Geraghty* and *Roper*. Those cases allowed mooted plaintiffs to benefit from "flexible mootness" and to appeal denied class certification. The Court had already revoked the right of such plaintiffs to interlocutory appeals and was now trying to find a remedy for their situation. *Geraghty*, in particular, was the sought-after solution, but the Court's poor "house-cleaning" reduced its authority. If the Court cannot distinguish the two different lines of cases in concrete, comprehensible terms, it must choose which side to follow. Since *Geraghty* has brought necessary and justifiable relief to mooted plaintiffs, it is hoped that the Court will reaffirm that decision by dispelling the inconsistencies in its next "flexible mootness" ruling for class actions.

ENID L. ZAFRAN