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COMMENT

THE HEADLESS CLASS ACTION: THE EFFECT OF A NAMED PLAINIFF'S PRE-CERTIFICATION LOSS OF A PERSONAL STAKE

[W]e . . . have before us no one who has a continuing stake in the controversy, only a potential lawsuit searching for a sponsor . . . a headless lawsuit with, in effect, no plaintiff.¹

The dominant spirit that haunts this enchanted region, and seems to be commander-in-chief of all the powers of the air, is the apparition of a figure on horseback without a head. It is said by some to be the ghost of a Hessian trooper, whose head had been carried away by a cannon-ball, in some nameless battle during the Revolutionary War . . . [T]he body of the trooper, having been buried in the churchyard, the ghost rides forth to the scene of the battle in nightly quest of his head. . . . The spectre is known, at all the country firesides, by the name of the Headless Horseman of Sleepy Hollow.²

A procedural issue that has recurred in federal class action litigation is what effect — if any — should the pre-certification loss of a named plaintiff's personal stake in a case have on a purported class action. A great deal may hinge on a court's resolution of this problem. The possibly meritorious claims of the persons alleged to be members of the class may go unremedied, and one of the fundamental policies supporting the class action device — the conservation of judicial resources — may be disserved.³

Following a discussion of the nature of the problem, the pertinent Supreme Court decisions and the current judicial treatment of the issue will be analyzed. A rule will then be recommended to prevent the problem from arising, and a remedial procedure proposed to be employed when it does.

I. THE PROBLEM AND HOW IT ARISES

A plaintiff in federal court who alleges the existence of a class and seeks to represent it has the burden of proving that all the requirements of rule 23 have been satisfied.⁴ He must demonstrate that it is impractical to bring all the persons purported to be members of the class before the court,⁵ that there are questions of law or fact common to the entire class,⁶ that his claims or

3. See text accompanying notes 234 to 248 infra.
5. FED. R. CIV. P. 23(a)(1).
6. Id. 23(a)(2).
defenses are typical of those of the class, and that he will adequately represent the absent class members. The alleged class must also fall within one of the three categories in which a class action has been deemed to be an appropriate procedural vehicle.

If the plaintiff satisfies these requirements, the court will "certify" that a class exists, and approve the plaintiff as its representative. The Supreme Court has held that once a class is certified, it acquires "a legal status separate from the interest asserted by [the named plaintiff]." The existence of such an independent legal status is marked by the procedural consequences that certification triggers.

Either before or after the certification of a class, it may come to light that the named plaintiff has lost or never had a personal stake in the outcome of the case. This may occur for one of three reasons. First, it may be demonstrated that the plaintiff's claim is meritless, that he has not suffered a wrong for which the law will give a remedy. Second, the plaintiff's claim may be satisfied by a judicial determination in his favor or by the defendant's capitulation. And third, the plaintiff's once valid claim may become inappropriate for judicial remedy due to the passage of time, a change in the law, or the performance of the conduct requested by the plaintiff by the defendant with no design to end the action.

7. Id. 23(a)(3).
8. Id. 23(a)(4).
9. Under rule 23(b), the plaintiff must prove one of the following: (1) that a class action is necessary to avoid possible adverse effects on the opponents of the class or on the absent members of the class; (2) that the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) that questions of law or fact common to the class are present and that the class action device is superior to other available methods for the fair and efficient adjudication of the controversy. Id. 23(b)(1) to 23(b)(3). See generally 1 H. Newberg, Newberg on Class Actions § 1002 (1977); 7 C. Wright & A. Miller, supra note 4, ¶ 1759. For an excellent summary of rule 23's requirements, see Smith v. Baltimore & O.R.R., 473 F. Supp. 572, 580-82 (D. Md. 1979).
10. Although the term "certification" does not appear in rule 23, it has become the shorthand description for a judicial determination under rule 23(c)(1) that "an action brought as a class action . . . shall . . . be so maintained." See generally 7 C. Wright & A. Miller, supra note 4, ¶ 1785.
13. First, once certified, the class action may not be settled or dismissed without the court's approval. Fed. R. Civ. P. 23(e). Second, if the action results in a judgment on the merits, the decision — whether favorable or unfavorable — will bind all members of the class. Sosna v. Iowa, 419 U.S. 393, 415 (White, J., dissenting). See generally 7A C. Wright & A. Miller, supra note 4, ¶ 1789. Third, if the action is one being brought under rule 23(b)(3), certification marks the point at which notice must be given to all class members of the institution of the action, their right to enter their appearances through counsel, and their option to exclude themselves from the class by "opting out." Fed. R. Civ. P. 23(c)(2); 7A C. Wright & A. Miller, supra note 4, ¶ 1777.
15. See pp. 138-50 infra.
16. See pp. 131-38 infra.
When the named plaintiff loses his stake in the case after a class has
been properly certified, the Supreme Court has held that the action may
continue if a controversy remains between the members of the class and the
defendant.17 With little direction from the Supreme Court, judicial reaction
to the plaintiff's loss of his stake before certification, however, has been
confusing and inconsistent, and cannot be explained merely on the basis of
factual differences among the cases. Courts have alternatively held that: (1)
the demise of the plaintiff's individual claim has no effect on the
continuation of the action;18 (2) the action may continue but without further
participation by the stakeless plaintiff;19 (3) the case must be dismissed for
lack of subject matter jurisdiction because there is not the "case or
controversy" required by article III of the Constitution,20 the plaintiff no

U.S. 103 (1975); Sosna v. Iowa, 419 U.S. 339 (1975); Richardson v. Ramirez, 418 U.S. 24
(1974); Roe v. Wade, 410 U.S. 113 (1975); Dunn v. Blumstein, 405 U.S. 330 (1972). There has been considerable law review commentary on the post-certification loss of a
named plaintiff's personal stake in the outcome of a class action. E.g., Champlin,
Personal Stake and Justiciability: Application to the Moot Class Action, 27 KAN. L.
REV. 85 (1978); Kane, Standing, Mootness and Federal Rule 23 — Balancing
Perspectives, 26 BUFFALO L. REV. 83 (1976); Comment, Continuation and Representa-
lion of Class Actions Following Dismissal of the Class Representative, 1974 DUKE
L.J. 573; Comment, A Search for Principles of Mootness in the Federal Courts: Class
Actions, 54 TEX. L. REV. 1289 (1976); Note, Does Mooting of the Named Plaintiff
Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure?

18. E.g., Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973); Huff v. N.D. Cass Co., 468
F.2d 172 (5th Cir. 1972). For a collection of cases holding to this effect, see Annot., 33


20. Chief Justice Warren defined the case or controversy requirement in Flast v.
Cohen, 392 U.S. 83, 94–95 (1967):

Embodied in the words "cases" and "controversies" are two complementary
but somewhat different limitations. In part those words limit the business of
federal courts to questions presented in an adversary context and in a form
historically viewed as capable of resolution through the judicial process. And
in part those words define the role assigned to the judiciary in a tripartite
allocation of power to assure that the federal courts will not intrude into areas
committed to the other branches of government. Justiciability is the term of
art employed to give expression to this dual limitation placed upon federal
courts by the case-and-controversy doctrine.

Because its invocation is an exercise in judicial self restraint, the justiciability
discipline is "peculiarly self-regarding," L. TRIBE, AMERICAN CONSTITUTIONAL LAW 53
(1978), framing the limits of the functional competence of the federal courts as those
limits are perceived by the judiciary itself. See 13 C. WRIGHT & A. MILLER, supra note
4, § 3529, at 146–54; Brilmayer, The Jurisprudence of Article III: Perspectives on the
"Case or Controversy" Requirement, 93 HARV. L. REV. 297 (1979); Note, What
Constitutes a Case or Controversy Within the Meaning of Article III of the
Constitution, 41 HARV. L. REV. 232 (1927). As Justice Frankfurter candidly suggested,
"[w]hether 'justiciability' exists . . . has most often turned on evaluating both the
appropriateness of the issues for decision by courts and the hardship of denying
judicial relief." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 156 (1951)
(Frankfurter, J., concurring).
longer having standing, or the case having become moot; or (4) the action must be dismissed because the stakeless plaintiff can no longer meet the

21. E.g., Booth v. Prince George's County, 66 F.R.D. 466 (D. Md. 1975). Standing is one component of the article III case or controversy requirement. It focuses primarily on the party who is seeking to gain access to a court rather than on the issues he wishes to have adjudicated. Flast v. Cohen, 392 U.S. 83, 99 (1968). See generally L. Tribe, supra note 20, at 79-113; 13 C. Wright & A. Miller, supra note 4, §3531; Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816 (1969); Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971); Scott, Standing in the Supreme Court — A Functional Analysis, 86 Harv. L. Rev. 645 (1973). To have standing, a party must allege “that the challenged action has caused him injury in fact, economic or otherwise,” Association of Data Processing Serv. Org’ns, Inc. v. Camp, 397 U.S. 150, 152 (1970) (emphasis added), and must have a “sufficient stake in an otherwise justiciable controversy to obtain a judicial resolution of that controversy,” Sierra Club v. Morton, 405 U.S. 727, 731 (1972). In its most recent case on standing, Duke Power Co. v. Carolina Environmental Study Group, 98 S. Ct. 2620 (1978), the Supreme Court summarized its recent cases as establishing two constitutional requirements for standing: injury in fact to the plaintiff and a causal connection between the injury and the challenged conduct. Id. at 2630-31. The standing requirement is tested at the threshold of the lawsuit, and the mere allegation of a judicially cognizable injury is sufficient to satisfy it. Proof of the merits of the claim goes to the ultimate right to judgment, rather than to the initial standing inquiry. Association of Data Processing Serv. Org’ns, Inc. v. Camp, 397 U.S. 150, 153 (1970).

Threshold individual standing is a prerequisite for all actions, including class actions, and must be satisfied by an aspiring class representative in addition to the rule 23 requirements. See generally 1 H. Newberg, supra note 9, §§1040, 1045 & 1070. As explained by the Supreme Court:

A named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on an injury which he does not share. Standing cannot be acquired through the back door of a class action.


22. E.g., Bradley v. Housing Auth., 512 F.2d 626 (8th Cir. 1975). Mootness is another component of the case or controversy requirement. A case is “moot,” and hence non-justiciable, if the passage of time has caused it to lose “its character as a present, live controversy of the kind that must exist if [a court is] to avoid advisory opinions on abstract propositions of law.” Hall v. Beals, 396 U.S. 45, 48 (1969). See generally L. Tribe, supra note 20, at 62-69; 13 C. Wright & A. Miller, supra note 4, §3533; Note, The Mootness Doctrine in the Supreme Court, 88 Harv. L. Rev. 373 (1974) [hereinafter cited as Mootness Doctrine]; Note, Mootness on Appeal in the Supreme Court, 83 Harv. L. Rev. 1672 (1970) [hereinafter cited as Mootness on Appeal]. This may occur because a party has died, e.g., Durham v. United States, 401 U.S. 481 (1971); because the applicable law has changed, e.g., United States v. Alaska S.S. Co., 253 U.S. 113 (1920); because the defendant has tendered the relief requested by the plaintiff, e.g., California v. San Pablo & T.R.R., 149 U.S. 308, 313-14 (1893); because the alleged wrongful behavior has ceased and could not reasonably be expected to recur, e.g., SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972); or because the plaintiff could no longer be affected by a challenged statute, e.g., Atherton Mills v. Johnston, 259 U.S. 13 (1922).

Apart from the basic elements of the case or controversy requirement of article III, mootness doctrine is also shaped in large part by prudential judicial concerns. In applying the mootness label, courts seek to prevent the useless expenditure of judicial resources and to assure that they are presented with a
requirements of rule 23(a) that his claim be "typical" of those of the class and that he "fairly and adequately protect the interests of the class."\textsuperscript{23}

genuinely adversarial case, one in which all claims are likely to be presented vigorously and extensively. See Mootness Doctrine, supra, at 375; Note, Cases Moot on Appeal: A Limit on the Judicial Power, 103 U. PA. L. Rev. 772, 773-74 (1955). Indeed, the Supreme Court has evinced that elements of the mootness doctrine find their roots not only in constitutional dictates, but also in more flexible considerations of policy. See, e.g., Kremans v. Bartley, 431 U.S. 119, 127-32 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 755-57 (1976). Professor Tribe has suggested that "the public interest in efficient and flexible judicial administration cannot alone confer article III jurisdiction absent a real 'case' or 'controversy' but it can be relevant in shaping a satisfactory conception of what counts as such a 'case' or 'controversy' in an otherwise borderline situation." L. TRIBE, supra note 20, at 68 n.34 (emphasis in original).

There are two occasions on which a court will exercise this discretionary element in the mootness inquiry and depart from a strict application of article III to hear a case that appears to be moot. See generally Mootness on Appeal, supra; Comment, A Search for Principles of Mootness in the Federal Courts: Part One — The Continuing Impact Doctrines, 54 Tex. L. Rev. 1289 (1976). These situations have been erroneously characterized as "exceptions" to the mootness doctrine. See, e.g., 1 H. NEWBERG, supra note 9, § 1058, at 148-51. It is more accurate to recognize them as occasions on which courts have expanded the definition of a "case" and a "controversy" by finding that the underlying policies of article III are met despite the absence of a "live" plaintiff. See L. TRIBE, supra note 20, at 68 n.34.

The first class of seemingly moot cases over which a court will retain jurisdiction are those falling within the rubric "capable of repetition, yet evading review." In these cases, although the controversy's effect on a plaintiff is by its very nature of a limited duration and it is unlikely that any person will retain a live stake throughout the course of the litigation, the actions complained of are likely to be repeated. Such cases present the possibility of a recurring but judicially irremediable wrong unless jurisdiction is retained. See United States v. New York Tel. Co., 434 U.S. 159, 165 n.6 (1977) (pen register order of limited duration); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) ("gag order" limited to duration of trial); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115 (1974) (welfare benefits to striking workers); Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911) (short term ICC rate order); Mootness Doctrine, supra, at 383-88. The Court has held that the challenged conduct may be "capable of repetition" with respect to someone within a class of persons represented, although not with respect to the particular plaintiff himself. See Roe v. Wade, 410 U.S. 113 (1973) (other pregnant women denied abortions, even after plaintiff's term of pregnancy); Dunn v. Blumstein, 405 U.S. 330 (1972) (one year voter residency requirement applicable to others who move into voting district).

A second group of apparently moot cases over which jurisdiction has been retained are those in which the plaintiff's claim is satisfied by the defendant's voluntary cessation of the challenged conduct where it is likely the conduct will be repeated. E.g., United States v. W.T. Grant Co., 345 U.S. 629 (1953); see text accompanying notes 133 to 139 infra. Cases in which potential repetition was not found sufficiently likely include Defunis v. Odegaard, 416 U.S. 312, 319 (1974) (unlikely that plaintiff would return to law school after graduation and again be subject to allegedly unconstitutional admission policies); and SEC v. Medical Comm. for Human Rights, 404 U.S. 403, 406 (1972) ("speculative" that committee would resubmit its proposal to be included in proxy solicitation of defendant corporation and again be unlawfully denied access).

23. E.g., Banks v. Multi-Family Management, Inc., 554 F.2d 127 (4th Cir. 1977). The "typicality" requirement, Fed. R. Civ. P. 23(a)(3), focuses on whether the representative's interests are truly aligned and consistent with those of the class.
II. *Sosna v. Iowa* and its Progeny

Because rule 23 contains no provision concerning the effect of the named plaintiff's loss of his personal stake in the case before certification, several recent Supreme Court decisions provide the only real guidance on the matter. The Court has prescribed that if the named plaintiff loses his stake in the case after the class has been properly certified, the action may continue if a controversy remains between the defendant and the members of the class.\textsuperscript{24} However, despite some instructive language, the Court has not yet established the proper judicial treatment when such a loss occurs before a class is certified.\textsuperscript{25}

members. See Donelan, *Prerequisites to Class Actions Under New Rule 23*, 10 B.C. IND. & COM. L. REV. 527, 534-38 (1969); Note, *Class Actions: Defining the Typical and Representative Plaintiff Under Subsections (a)(3) and (a)(4) of Federal Rule 23*, 53 B.U.L. REV. 406 (1973). Factual differences will not necessarily render a claim atypical if the representative's claim arises from the same event, practice, or course of conduct that gives rise to the claims of the class and is based on the same legal theory. 7A C. WRIGHT & A. MILLER, *supra* note 4, § 1764, at 610-14. For example, it has been held that the typicality requirement may be satisfied even though varying fact patterns support the claims or defenses of individual class members, \textit{e.g.}, Eisen \textit{v. Carlisle & Jacquelin}, 417 U.S. 156 (1974), and even though there is a disparity between the damages claimed by the representative and those claimed by the other members of the class, \textit{e.g.}, Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480 (W.D. Pa. 1977); Robertson \textit{v. National Basketball Ass'n}, 389 F. Supp. 867 (S.D.N.Y. 1975).

The "fairness and adequacy" of representation factor, *Fed. R. Civ. P. 23(a)(4)*, goes to the ability of the representative to pursue a course of conduct beneficial to the absent class members as well as to the capability of the plaintiff's attorney to serve as counsel to the class. See 7A C. WRIGHT & A. MILLER, *supra* note 4, § 1766; *Developments in the Law — Class Actions, supra* note 17, at 1471-77. To satisfy this provision of the rule, courts have held that the aspiring representative must show that he is capable of "waging a real fight," Dolgow \textit{v. Anderson}, 43 F.R.D. 472, 494 (E.D.N.Y. 1968), \textit{rev'd on other grounds}, 438 F.2d 825 (2d Cir. 1970) (quoting Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 68 (1950)), and have considered several factors to be significant in such a determination. See 1 H. NEWBERG, *supra* note 9, § 1120. The representative must have interests sufficiently similar to those of the absent class members that he will vigorously prosecute the suit on their behalf. \textit{Id.}; \textit{e.g.}, Rodriguez \textit{v. Swank}, 318 F. Supp. 289 (D. Ill. 1970), \textit{aff'd without opinion}, 403 U.S. 901 (1971); Korn \textit{v. Franchard Corp.}, 50 F.R.D. 1 (S.D.N.Y. 1970). See generally 7 C. WRIGHT & A. MILLER, *supra* note 4, § 1767. Courts have stated that the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation. \textit{E.g.}, Amos \textit{v. Board of Directors}, 408 F. Supp. 765, 774-75 (E.D. Wis. 1976). See generally 7 C. WRIGHT & A. MILLER, *supra* note 4, § 1766, at 632-35. Finally, some courts have required a showing that an aspiring representative have interests that are not antagonistic or in conflict with the objectives of those he purports to represent. \textit{E.g.}, Gonzalez \textit{v. Cassidy}, 474 F.2d 67 (5th Cir. 1973); Feliciano \textit{v. Romney}, 363 F. Supp. 656 (S.D.N.Y. 1973). See generally 7 C. WRIGHT & A. MILLER, *supra* note 4, § 1768.

\textsuperscript{24} See cases cited in note 17 supra.

\textsuperscript{25} For two excellent summaries of the Supreme Court's decisions in this area, see 13 C. WRIGHT & A. MILLER, *supra* note 4, § 3533, at 126 (Supp. 1979), and Champlin, *supra* note 17.
In the seminal case in the area of class actions and justiciability, *Sosna v. Iowa*, the Court held that once a class is certified, an action may continue even though the plaintiff's individual claim has become moot, and that the plaintiff may continue as the class representative notwithstanding the loss of a personal stake in the case. *Sosna* was a class action brought to challenge Iowa's one-year residency requirement for divorces. The district court certified the class but ruled against it on the merits. Before the Supreme Court reviewed the case, the named plaintiff satisfied the residency requirement, thus losing her personal stake in the case. The Court nonetheless found that it had jurisdiction to hear the appeal on behalf of the class. Noting that class certification sets into motion both a res judicata effect and a requirement of court approval before settlement or dismissal, the Court posited that once certified, "the class of unnamed persons described in the certification acquired a legal status separate from the interests asserted by [the named plaintiff]." Hence the class itself could satisfy the case or controversy requirement: "[A]lthough the controversy is no longer live as to [the named plaintiff], it remains very much alive for the class of persons she has been certified to represent." As a rationale for its holding, the Court pointed out that this case fell within the ambit of the "capable of repetition, yet evading review" doctrine. Because the issue sought to be litigated in the case would escape full appellate review if it were dependent upon the efforts of "any single challenger," it should not become moot by "the intervening resolution of the controversy as to the named plaintiff." Further, although the residency requirement would not again be enforced against the named plaintiff, its enforcement was "capable of repetition" against the other members of the class.

The Court placed two limitations on future applications of its holding. There must be a named plaintiff who presents "a controversy at the time the complaint is filed, and at the time the class is certified by the District Court pursuant to Rule 23 . . ." and "there must be a live controversy at the time [an appellate court] reviews the case" between either the defendant and the named plaintiff or the defendant and a member of the class.

Having found article III to be no bar to the continuation of the action, the Court reevaluated the issue of adequacy of representation under rule

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27. The parties had stipulated that the requirements of rule 23 were satisfied. *Id.* at 397-98.
28. *Id.* at 399 n.8. After certification, a judgment on the merits will bind all those found to be class members at the time of certification. See note 13 supra.
30. 419 U.S. at 399.
31. *Id.* at 401.
32. *Id.* at 399-400. See note 22 supra.
33. 419 U.S. at 401.
34. *Id.*
35. *Id.* at 402.
36. *Id.*
23(a)(4) in light of the demise of Mrs. Sosna’s personal stake in the case. This analysis, the Court stressed, was independent of the article III issue:

[The] conclusion [that article III is satisfied] does not automatically establish that appellant is entitled to litigate the interests of the class she seeks to represent, but it does shift the focus of examination from the elements of justiciability to the ability of the named representative to “fairly and adequately protect the interests of the class.”\(^{37}\)

Finding no evidence of conflicting interests among the class members and noting that “the interests of [the] class had been competently urged at each level of the proceeding” by Mrs. Sosna, the Court concluded that the requirement of rule 23(a)(4) would be satisfied by her continuation as class representative.\(^{38}\)

Although \textit{Sosna} involved a class that had already been certified, a marginal note addressed the problem of a plaintiff’s loss of a personal stake prior to certification:

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.\(^{39}\)

This rather cryptic language is the Court’s most significant contribution to the resolution of the problem of a plaintiff’s loss of a personal stake before certification; it suggests that at least some such actions may continue, but provides little help in deciding which.

The holding and the dictum of \textit{Sosna} have been clarified by subsequent Supreme Court decisions. In \textit{Franks v. Bowman Transportation Co.},\(^{40}\) the

\(^{37}\) Id. at 403 (quoting \textit{FED. R. CIV. P. 23(a)(4)}).

\(^{38}\) Id. A strong dissent by Justice White questioned Mrs. Sosna’s ability to continue as class representative after her personal stake in the case had ended:

The unresolved issue, the attorney, and a class of unnamed litigants remain. None of the anonymous members of the class is present to direct counsel and ensure that class interests are being properly served. For all practical purposes, this case has become one-sided and has lost the adversary quality necessary to satisfy the constitutional “case or controversy” requirement. A real issue unquestionably remains, but the necessary adverse party to press it has disappeared.

\textit{Id.} at 412 (White, J., dissenting).

\(^{39}\) Id. at 402 n.11.

\(^{40}\) 424 U.S. 747 (1976). \textit{Franks} involved a class challenge to allegedly discriminatory hiring and transfer practices. The Court found that although the named plaintiff, a black truck driver, had been discharged for cause during the pendency of the appeal, the action was not moot and could continue because a class had been certified before his discharge.
Court held that once a class is certified, the loss of the plaintiff's personal stake in the action does not dictate dismissal, even if the issues with which the case is concerned are not "capable of repetition, yet evading review." The statement in the Sosna opinion that the issues dealt with there were "capable of repetition, yet evading review," the Court explained, was merely a comment on the temporal nature of the issues in that case and was not meant to limit the holding to cases with issues of a similar nature.41

The dictum in the Sosna "relation back" footnote was applied in Gerstein v. Pugh,42 a class action that challenged the constitutionality of a state's rule regulating pretrial detention in criminal cases. Before the district court certified the class, the named plaintiff was convicted and removed from detention under the statute. Citing Sosna and its footnote eleven, the Court found that it had jurisdiction to hear the appeal even though the plaintiff had had no personal stake in the case at the time of certification. Because the claim was one "capable of repetition, yet evading review,"43 the Court applied the holding of Sosna to permit the action to continue. Although there was no live plaintiff at the time of certification as required by Sosna, the Court applied the "relation back" footnote of that case because it was doubtful "that any given individual named as plaintiff, would be in custody long enough for a district judge to certify the class . .."44

41. Id. at 754. The Court further stated: "Thus, the 'capable of repetition, yet evading review' dimension of Sosna must be understood in the context of mootness as one of the policy rules often invoked by the Court . . . . [These rules] find their source in policy, rather than purely constitutional, considerations." Id. at 756 n.8 (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)). The Supreme Court has also applied Sosna in the following cases: Kremens v. Bartley, 431 U.S. 119, 135 (1977) (after class certified in action assailing state statute concerning commitment to mental health institutions, statute was amended in such a way as to moot named plaintiffs' individual claims and some of those of class members; Court remanded for "reconsideration of the class definition, exclusion of those whose claims are moot, and substitution of class representatives with live claims."); Baxter v. Palmigiano, 425 U.S. 308, 310 n.1 (1976) (only stipulation for intervention of additional plaintiff saved suit challenging prison disciplinary procedures from dismissal when one named plaintiff died and the other was paroled before certification); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976) (school desegregation class action would be moot without intervention of the United States because named plaintiffs had been graduated and no class certified); Board of School Comm'rs v. Jacobs, 420 U.S. 128, 130 (1975) (per curiam) (appeal dismissed as moot because class action not "properly certified nor the class properly identified by the District Court" before named plaintiff's individual claims became moot). See generally 13 C. WRIGHT & A. MILLER, supra note 4, § 3533 (1979 Supp.).

42. 420 U.S. 103 (1975).
43. Id. at 110 n.11.
44. Id. The Court also found significant the certainty that a class of persons would continue to suffer from the challenged detention and the fact that the public defender who represented the named plaintiffs had "other clients with a continuing live interest in the case." Id. See Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978) (Sosna's "relation back" footnote applied to case involving challenge to state officials' taking exceptions before juvenile court judge to master's proposed findings of nondelinquency; although state had withdrawn its exceptions to findings on named plaintiffs before class certified, case allowed to continue because it fell within "capable of repetition, yet evading review" doctrine).
In *East Texas Motor Freight System, Inc., v. Rodriguez*, the Court addressed an issue it had cursorily examined in *Sosna* in the post-certification context, the propriety of permitting a plaintiff to serve as a class representative when, prior to certification, he loses or is shown never to have had a personal stake in the case. *Rodriguez* was an employment discrimination suit purported to be a class action. Because the named plaintiffs' counsel had not moved for certification, however, the district court considered only their individual claims. Finding the plaintiffs unqualified for the positions they sought, the district court entered judgment against them, not reaching the class issue. The Supreme Court vacated the Fifth Circuit's reversal "for the simple reason that it was evident by the time the case reached [the court of appeals] that the named plaintiffs were not proper class representatives under Fed. R. Civ. P. 23(a)." The Court based this conclusion on three factors. First, the named plaintiffs "were not members of the class of discriminatees they purported to represent..." because once it had been demonstrated at trial that they had suffered no discrimination, it was clear that their claims were meritless. Second, the plaintiffs' ability to represent the class was placed in doubt by their failure to move for certification prior to trial. And third, a vote by the members of the purported class had evidenced a disagreement between a substantial number of those persons and the named plaintiffs with respect to the kind of relief that should be sought. In a footnote, the Court distinguished the factual situation in *Sosna*, in which it had permitted the named plaintiff to continue as class representative after her claim had become moot: "Obviously a different case would be presented if the District Court had certified a class" before the named plaintiffs' claims were shown to be meritless. In a case such as *Rodriguez* in which no class had been certified "the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims."

Through *Sosna* and its progeny, the Supreme Court has established that once a class is certified, the plaintiff's loss of his personal stake in the

46. See 419 U.S. at 403; text accompanying notes 26 to 39 supra.
48. 431 U.S. at 403.
49. Id. at 404.
50. Id.
51. Id. at 405.
52. Id. at 406 n.12.
outcome of a case will not necessarily deprive a court of jurisdiction or preclude the plaintiff from continuing to serve as the class representative. A justiciable legal controversy may continue to exist between the certified class — as an independent legal entity — and the defendant. However, even if a class has not been certified, the "relation back" footnote in Sosna and its subsequent application in Gerstein indicate that an action may still continue after the termination of the plaintiff's interest in the case. The courts of appeals are divided on whether the "relation back" exception to the certification requirement may be applied to cases that, unlike Gerstein, do not fall within the "capable of repetition, yet evading review" rubric. Moreover, the lower federal courts have not been uniform in their reading of Rodriguez, some permitting a plaintiff who loses his personal stake in the case before certification to continue as class representative, and some ordering dismissal.

III. CURRENT JUDICIAL TREATMENT

A named plaintiff in a purported class action may lose his personal stake in the outcome of a case in three distinct ways. His claim may become moot through the passage of time or a change in the law, it may be satisfied either by the defendant's capitulation or by a successful invocation of the judicial process, or it may be shown to be meritless. These three recurring fact patterns and the current judicial responses to each will be discussed below.

A. The Named Plaintiff's Claim Becomes Moot Through No Deliberate Action of the Defendant

A court may label an action "moot" because there has been a change in the applicable law, the conduct which the plaintiff asks a court to command has been performed by the defendant with no design to end the action, or the time for performance of the challenged conduct has passed. The mooting event may occur before a district court has an opportunity to rule on class certification, after the district court has considered and denied a motion for certification, or after the time at which a reviewing court later determines that the district court should have reached the certification issue. Courts have demonstrated an unwillingness to distinguish these three factual settings, their reactions frequently being the same to each.

54. Indeed, Judge Friendly has opined that the "apparent force" of the general rule stated in Sosna was "largely drained" by the case's footnote 11. Frost v. Weinberger, 515 F.2d 57, 64 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976).


56. For the divergent judicial and scholarly responses to Rodriguez, see note 166 infra.
When the plaintiff's claim becomes moot before a district court has had a chance to reach the certification issue, the case may fall within footnote eleven of *Sosna v. Iowa*; a court will permit it to continue if the issues presented are "capable of repetition, yet evading review." In that footnote, the Supreme Court established an exception to its general rule that for a class action to survive the loss of the named plaintiff's personal stake in the case, the plaintiff must have had a "live" claim at the time the class was certified. The exception applies to "cases in which the controversy involving the named plaintiff is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification ...." Despite arguments that this exception should be read expansively, most courts have read the subsequent application in *Gerstein v. Pugh* as defining its limits and found it coextensive with the "capable of repetition, yet evading review" doctrine. Typical of this position is *Langson v. Simon*, in which a beneficiary brought a class action against the Social Security Administration (S.S.A.) challenging the length of time S.S.A. took in designating representative payees — persons appointed to receive checks for disabled recipients. Before the district court could rule on a motion to certify the class, a new representative payee was assigned to plaintiff and his payments were resumed. Denying the defendant's motion to dismiss on the ground of mootness, the court certified a class. It found that despite the satisfaction of plaintiff's claim, the action presented issues "capable of repetition, yet evading review" and thus fell within footnote eleven of *Sosna*. The district court read *Gerstein* as "amplifying" the *Sosna* exception by requiring that before a class could be certified the named plaintiff whose case became moot had to establish that it was certain that there existed a continuing class of persons suffering the deprivation alleged and that attorneys representing the named plaintiff were sufficiently

57. 419 U.S. 393, 402 n.11 (1975). See text accompanying notes 26 to 39 supra.
58. See note 22 supra.
59. 419 U.S. at 402 n.11.
61. 420 U.S. 103 (1975), discussed in text accompanying notes 42 to 44 supra.
62. See e.g., cases cited note 66 infra. At least one court, however, has not read footnote 11 as being limited by *Gerstein*. Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1420 (1979). See text accompanying notes 77 to 98 infra.
63. 74 F.R.D. 456 (N.D. Ill. 1977).
64. Id. at 459. The designation of the new payee occurred through the routine functioning of S.S.A.'s procedures. There was no evidence that S.S.A. had deliberately acted to moot the named plaintiff's claim before a class could be certified. On the effect of a defendant's deliberate attempt to moot a claim, see text accompanying notes 99 to 138 infra.
interested in the problems of the plaintiff and his class to insure proper representation.65

The court found that the case before it fell within the amplified exception. Due to the inherent brevity of the challenged conduct, it would be unlikely that a court could ever reach the certification issue while the plaintiff's claim was still valid. Further, there would always be a number of persons who would receive their checks late because of S.S.A.'s failure promptly to name a new payee. Finally, the court found that plaintiff's attorneys, as members of a legal aid bureau, were "experienced in welfare class action[s] . . . and . . . highly interested in and capable of adequately representing the proposed class."66

65. 74 F.R.D. at 460. There was language to this effect in Gerstein, 420 U.S. at 402 n.11, but it is unclear whether the Court was "amplifying" Sosna's footnote 11 or simply stating the facts as they existed in the case. See note 44 supra.


Several courts faced with imminent intervention by persons with "live" claims have permitted an action to continue despite the original plaintiff's claims becoming moot before certification without invoking either the "capable of repetition, yet evading review" rubric or the "relation back" doctrine from footnote 11 of Sosna. In Taylor v. Kerr, 73 F.R.D. 691 (M.D.N.C. 1977), for example, a class action was filed challenging the admission procedures of a public housing authority. The plaintiff's initial motion for certification of the class was denied, but the court stated that it would permit a renewal of the motion at a later time. Before certification could again be requested, the named plaintiff was accepted for admission to the housing unit. Id. at 693. Apparently learning of the satisfaction of the original plaintiff's claims, several other persons who sought admission to the project moved to intervene and replace her as class representative. These pending motions convinced the court that should it dismiss the case for mootness, "members of the asserted class would be ready and able to come forward with a new suit against the defendants." Id. at 694. The court therefore denied the motion to dismiss and granted the petitions to intervene. It reasoned:

With the disposal of the motions now before the Court, it appears that the case will be in proper form for a final pre-trial conference and for a determination of the definition of the class to be represented. Then it will be ready for trial. It would be unfair to the parties and a misuse of court time to terminate the present proceedings at this point and require that the process begin again on a new complaint.

Id. at 695. Similarly, in Castoe v. Amerada Hess Corp., [1977] TRADE CAS. ¶ 61,719 (S.D.N.Y. 1977), the district court permitted an action to continue despite all of the named plaintiffs' being granted voluntary dismissals before certification by granting motions to intervene brought by other members of the purported class. The court reasoned that because an alleged class is assumed to be certifiable from the filing of
When not faced with issues deemed "capable of repetition, yet evading review," the majority of the courts that have reached the issue have found that an action cannot continue if the named plaintiff's claim becomes moot before certification.\textsuperscript{67} In Kuahulu v. Employers Insurance of Wausau,\textsuperscript{68} for example, a disabled employee brought an action against his employer's workmen's compensation insurer and the State of Hawaii after his disability benefits were discontinued. He claimed a denial of due process because the payment scheme did not provide a pre-termination hearing. Plaintiff's motion to amend his complaint to allege the existence of a class of persons similarly affected was granted. The district court never reached the issue of certification, dismissing the action on jurisdictional grounds. After being informed that the state had decided that Kuahulu's benefits should not have been terminated, the court of appeals held that it could not hear the appeal. The plaintiff had been granted "all the relief that he could have received if he had won on the merits,"\textsuperscript{69} and the appeal was therefore moot. The court distinguished several cases, including Gerstein, in which the named plaintiff's loss of a stake would not have mooted the class claim. The court characterized its holding as "very narrow," and emphasized that the application of the mootness doctrine depended upon "the idiosyncrasies of each case in which it applied."\textsuperscript{70}

A named plaintiff's claim may also become moot after a district court has considered and erroneously denied a motion for certification or because the court has waited too long to reach the certification issue. In these cases, it is the action or inaction of the district court and not the natural course of events that causes the plaintiff to lose his stake in the case before a class is certified. However, most appellate courts have been insensitive to this distinction, and have generally followed the reasoning of the Kuahulu case. An example of this judicial myopia is Napier v. Gertrude,\textsuperscript{71} in which a minor found to be a "child in need of supervision" by a state juvenile court brought a habeas corpus class action challenging the statute under which she was being held. Without ruling on a pending certification motion, the district court dismissed the plaintiff's individual claim. The plaintiff appealed, seeking review of the dismissal and arguing that the district court should

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\textsuperscript{67} E.g., Kuahulu v. Employers Ins. of Wausau, 557 F.2d 1334 (9th Cir. 1977); Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977). Contra, Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1420 (1979). See text accompanying notes 77 to 98 infra.

\textsuperscript{68} 557 F.2d 1334 (9th Cir. 1977).

\textsuperscript{69} Id. at 1336.

\textsuperscript{70} Id. at 1337. A qualifying idiosyncracy would presumably be a wrong "capable of repetition, yet evading review." Accord, Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977) (plaintiff released prior to certification in action challenging the state's juvenile detention laws).

\textsuperscript{71} 542 F.2d 825 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977).
have certified the class. The court of appeals found that the case did not fall within either of the two categories in which the plaintiff's loss of her stake would not moot the action, where the wrong is "capable of repetition, yet evading review," and where the class has already been certified. Recognizing error in the district court's refusal to consider the certification motion before reaching the merits of the named plaintiff's claim, the court found itself powerless to remand the case because it had no jurisdiction to hear the appeal: "In the absence of certification, even though the absence results from district court error, technically there is no live controversy on appeal." The court acknowledged that footnote eleven of Sosna recognized a court's power "to grant late certification in an otherwise moot case," but concluded that the factual situation described in the footnote exhausted the circumstances in which that power could be used.

The reasoning employed in Napier and cases of its genre is of questionable soundness. Although admitting that a class may have been certified but for the district court's errors, these courts resort to a strict application of the mootness doctrine in order to find themselves without jurisdiction to hear the appeal. The effect is to allow a recognized instance of judicial error to go unreviewed and uncorrected. As an advisable alternative, a court could exercise its discretion under the prudential dimension of the mootness doctrine to hear the appeal despite the absence of a technical "controversy." Indeed, the Supreme Court itself has contrived the "capable of repetition, yet evading review" concept to provide a doctrinal basis for hearing cases that concededly have intervals without a live controversy. The exercise of similar judicial resourcefulness would be preferable to an appellate court's overlooking a district court's misjudgments.

One court has recognized that judicial error in certification determinations ought not be its own shield from appellate review. In Geraghty v. United States Parole Commission, the Third Circuit found that it had jurisdiction to hear the appeal of a refusal to certify a class, notwithstanding the appellant's loss of his personal stake in the case after certification had been denied. A federal prisoner who had been twice denied parole brought a class action challenging the validity of the guidelines used by the United

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72. Id. at 826 (citing Sosna v. Iowa, 419 U.S. 393 (1975)).
73. Id. at 827. Accord, Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977); Boyd v. Justices of Special Term Pt. I. of Superior Court, 546 F.2d 526 (2d Cir. 1976).
74. 542 F.2d at 828.
75. Id. The Napier court thus read footnote 11 of Sosna very narrowly. Compare Napier with Allen v. Likins, 517 F.2d 532 (8th Cir. 1975). In Allen, although affirming the dismissal of a purported class action because the named plaintiff's claims had become moot before certification, the court indicated that affirmance would have been inappropriate had "the district court failed to rule on plaintiff's motion for class action certification 'as soon as practicable after the commencement of the action.'" Id. at 535 (quoting Fed. R. Civ. P. 23(c)(1)).
76. There is a prudential as well as a constitutional dimension to the rule that courts will not hear moot cases. See note 22 supra.
States Parole Commission. The district court denied Geraghty's motion for class certification because it found his claims to be "untypical" of those of the class and because it concluded that "class certification [was] neither necessary nor appropriate." It then granted the defendant's motion for summary judgment on the plaintiff's individual claims. Geraghty appealed both rulings, but his sentence expired and he was released from prison before the court of appeals heard oral argument on the case.

Deciding that it had jurisdiction, the court undertook a lengthy discussion of the mootness doctrine. Article III requires that "a case presented for adjudication . . . be an actual, concrete dispute over legal rights" and that "at the commencement of the suit, the dispute . . . concern some individual plaintiff who is injured by the wrong in question." However, once such a suit has been initiated it is not essential that the individual personally harmed "continue to have a live dispute" throughout the course of the action. Rather, article III demands only that "a legal controversy exist sufficient to establish that the case is not hypothetical," and that the controversy affect "an individual in a concrete case sufficient to provide the factual predicate for the reasoned adjudication which is the province of the judiciary." In addition to these absolute article III concerns, a mootness issue presents the more "policy-oriented question" whether the parties to the litigation have a "sufficient functional adversity to sharpen the issues for judicial resolution."

To support its analysis of the mootness doctrine, the Geraghty court cited Supreme Court decisions that permitted an action to survive the loss of the plaintiff's claim if the issues were deemed "capable of repetition, yet evading review," or if in a class action, a class had already been certified. In those cases, the Court had found that both the constitutional prerequisites of article III and the exigencies of policy were satisfied, and had retained jurisdiction despite the absence of an individual with a continuing live stake. The Geraghty court read the Supreme Court's application of mootness doctrine in the class action context as establishing that an article III controversy could continue to exist between a class and a defendant even after the termination of the named plaintiff's claim. Moreover, a lack of

79. Id.
80. 579 F.2d at 243.
81. Id. at 246 (emphasis added).
82. Id.
83. Id.
84. Id.
85. Id. at 247-48 (citing Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911); Roe v. Wade, 410 U.S. 113 (1973); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)).
87. Id.
class certification would not necessarily require dismissal. Although a properly certified class guaranteed that the requirements of "concrete legal controversy, proper factual predicate, and functional adversity" were met, these requirements could be met in other ways.

The facts in Geraghty satisfied both components of the case or controversy requirement despite the pre-certification loss of the plaintiff's stake in the outcome of the case. The constitutional requirement was easily met in this case, the court found, because the "fate of numerous federal prisoners continues to turn in large part on the application of the guidelines in question." To satisfy the discretionary aspect of justiciability, the court pointed to four factors that compelled against dismissal. First, the case, "while not wholly congruent, shared many characteristics with the cases denominated 'capable of repetition, yet evading review,'" Second, unless the appellate court were to exercise its jurisdiction over the case, the court's rule against interlocutory appeals of class certification orders would "effectively immunize from review such adverse determinations." Third, because the named plaintiff's attorneys had shown a desire to press the class claims and had another client who sought to intervene, the court found

88. Id. at 250-51. The Parole Commission had argued that Board of School Comm'nrs v. Jacobs, 420 U.S. 128 (1975) (per curiam), required dismissal. The court disagreed, citing Gerstein v. Pugh, 420 U.S. 103 (1975), Baxter v. Palmigiano, 425 U.S. 308 (1976), and United Airlines v. McDonald, 432 U.S. 385 (1977), cases in which the Supreme Court had permitted, in one way or another, an uncertified class to survive the loss of the named plaintiffs' stakes. The court reasoned that these cases involved situations in which the underlying dispute continued, and continued to be waged by active adversaries. 579 F.2d at 251. Jacobs, which involved a first amendment challenge by students to regulation of their school newspaper, was distinguished on its facts. Id. at 250. Because the students had been graduated and the paper was no longer being published, the plaintiff class could not be precisely defined. Furthermore, the plaintiff's attorney had failed to press for class certification and could not be trusted thereafter to advance the class interests. Id. In a footnote, the Geraghty court suggested that "[t]he statements in Sosna, Franks, Gerstein, and East Texas that justiciability remains 'given a properly certified class' may simply point to certifiability, not actual certification, as the crucial question." Id. at 249 n.43. McDonald is discussed in note 127 infra.

89. 579 F.2d at 250.

90. Id. at 251. Implicit in the court's analysis was a reliance on the Gerstein, Baxter, and McDonald cases as precedent for the ability of an uncertified class to satisfy the constitutional requirements of mootness doctrine. The rationale used in Gerstein, that certification "related back," was characterized by the Geraghty court as a "legal fiction." Id. at 249 n.45. The court had looked behind the "legal fiction" to find in the factual situation those elements of concreteness and genuine adversity that it thought were the heart of the constitutional requirement. Gerstein's precedential value might have been diminished in the Geraghty court's estimation because Gerstein involved issues "capable of repetition, yet evading review." The Geraghty court, however, had characterized the "capable of repetition, yet evading review" doctrine as a factor to be considered in the policy component, not the constitutional component, of mootness. See id. at 248-49.

91. Id. at 251.

92. Id.
a "prima facie case of functional adversity." Finally, the release of the named plaintiff would not affect the continuing practices of the Parole Commission or the interests of the members of the putative class. Hence Geraghty's individual perspective would not be essential; the legal issues survived his loss intact.

Finding itself on solid jurisdictional footing, the court determined that the district court had improperly denied certification of the class. The plaintiff need not have proved that certification was "necessary," as the trial judge seemed to indicate, but only that there was a proper compliance with the prerequisites of rule 23. Moreover, although the named plaintiff's claims may not have been typical of those of all members of the class he sought to represent, the district court had a duty to divide the class into subclasses as provided in rule 23(c)(4). The court then reversed the denial of certification and remanded to the district court for proper division into subclasses.

The approach of the Geraghty decision is praiseworthy. Recognizing that the district court had erred in failing to certify at least a portion of the proposed class, the Third Circuit fashioned a convincing argument for jurisdiction. As Professor Tribe has observed, the question courts really resolve when they face a claim of mootness is "whether they would be acting appropriately if they resolved the question which the litigants press upon them." By resorting to uncompromising invocations of article III, courts have too often substituted rubric for logic.

B. The Named Plaintiff's Claim Is Satisfied

The named plaintiff in a purported class action may lose his personal stake in the outcome of a case because he has received all that he was bringing the action to acquire. This may occur either because the defendant ceases his challenged conduct or tenders to the plaintiff the claimed damages, or because the plaintiff wins on the merits of his individual claim.

93. Id. at 252, 245 n.21.
94. Id. at 252.
95. Id. at 252-53. FED. R. CIV. P. 23(c)(4) provides: "When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues, or . . . a class may be divided into subclasses and each subclass treated as a class . . . ."
97. L. Tribe, supra note 20, at 52.
98. The intellectual honesty of the Geraghty court is commendable. The facts in the case could easily have been shaded to fit the "capable of repetition, yet evading review" exception. Rather than summarily applying that label, however, the court analyzed the case as one "not wholly congruent" with that doctrine. 579 F.2d at 251.
after the denial of class certification. Because the judicial reaction may differ depending upon the manner in which the plaintiff's claim is satisfied, these situations will be analyzed independently.

1. *Tender or Voluntary Cessation by the Defendant*

When a plaintiff files a complaint with class action allegations, a defendant could conceivably protect himself from potential class-wide liability by satisfying the individual claims of that plaintiff either before a court has a chance to rule on class certification or after a court has denied certification. In the former case, if either the article III case or controversy requirement or the provisions of rule 23(a) were strictly applied, the defendant could strip the named plaintiff of the ability to litigate the class claims at trial. In the latter situation, once the district court has denied certification, a rigid application of those principles would preclude an appeal of the certification decision by the named plaintiff. Judicial reaction to these circumstances has been inconsistent.

When the defendant tenders the claimed damages or voluntarily ceases the challenged conduct before the district court has a chance to rule on certification, some courts have found that the case must be dismissed. Courts reaching this conclusion have articulated one of two bases for their decision: either that they no longer have jurisdiction, there being no article III case or controversy, or that the named plaintiff cannot be an adequate class representative because he has lost his personal stake in the outcome of the case.

Representative of the former position is *Bradley v. Housing Authority.*

Four applicants for public housing filed a class action alleging that the Department of Housing and Urban Development and the Kansas City Housing Authority had violated various statutory and constitutional provisions by giving preference in tenant selection to persons with high incomes. Before the district court ruled on the plaintiffs' motion to certify the class, the Housing Authority assigned an apartment to each of the named plaintiffs. Despite the defendants' admission that they had supplied the apartments to the plaintiffs "solely because they had filed their action," the district court dismissed the case as moot without considering certification of the class. Although it expressed dissatisfaction with the district court's delay in ruling on certification, the court of appeals affirmed the

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99. 512 F.2d 626 (8th Cir. 1975) (per curiam).
100. Id. at 627. Several persons who sought to intervene at this stage of the case were also selected for apartments. Id.
101. Id. (quoting the trial transcript).
102. Id. at 627 n.2. All discovery concerning the existence of a class had been completed before the Housing Authority satisfied the named plaintiffs' claims and the plaintiffs' motion for certification was pending. Nevertheless, the district court failed to issue a ruling on the propriety of class treatment until after the defendants had mooted the case. Id.
dismissal of the case as moot. Because the named plaintiff's claims had been satisfied, and because no class had yet been certified, the court read *Sosna v. Iowa* as commanding this result on article III grounds. The court did not consider its decision harmful to the persons in the putative class: "[W]e think it serves the interests of all concerned that the remaining class begin anew and thus avoid the legal entanglements of mootness under *Sosna . . . ."^\textsuperscript{105}

In *Banks v. Multi-Family Management, Inc.*, the Fourth Circuit found that the defendant's pre-certification satisfaction of the plaintiff's individual claim made her an inadequate class representative. A tenant in a publicly subsidized housing project, asking for an injunction to prevent her landlord from terminating her lease without notice and a hearing, sought to represent a class of all persons residing in similar housing projects. Before the district court could rule on a motion to certify the class, the defendant consented to the entry of a permanent injunction preventing eviction of the plaintiff or any other resident of the apartment complex without notice and a hearing. Despite plaintiff's objection, the district court agreed to the consent order and dismissed the complaint. The court of appeals affirmed the dismissal, finding that the delay in ruling on certification was not undue and that the landlord's intervening consent "render[ed] plaintiff an inappropriate representative for the class sought to be certified."^\textsuperscript{108}

The Seventh Circuit has held, however, that a defendant may not escape potential class-wide liability by satisfying the named plaintiff's claim before

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103. 419 U.S. 393 (1975).
104. *Id.* at 628. The court also cited *Board of School Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (per curiam). The court's task of disposing of the case on article III grounds was undoubtedly made easier by several factors it mentioned in conclusion: statutory changes had occurred that both prevented recurrence of the problem and necessitated redefinition of the potential class in any future action to redress the damage done under the old law. Consequently, resources spent defining the initial plaintiff class would have been wasted even if the claim had not been dismissed as moot.
106. 554 F.2d 127 (4th Cir. 1977).
107. *Id.* at 128.
108. *Id.* Compare *Banks with Stokes v. Bonin*, 366 F. Supp. 485 (E.D. La. 1973). In *Stokes* the district court, faced with a similar factual setting, allowed the stakeless plaintiff to continue as class representative: "The cases are legion to the effect that [the named plaintiff] personally has been afforded relief neither moots the claims of the class or disqualifies her from asserting them." 366 F. Supp. at 488. The legion of cases cited to this effect were brought under Title VII. Permitting the stakeless plaintiff to continue as representative in such cases may be explained as a judicial attempt to facilitate the perceived congressional policies underlying that statute. The validity of this liberal application of rule 23 in Title VII cases has been placed in doubt by *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977). *See* text accompanying notes 157 to 169 *infra.*
certification. In *Susman v. Lincoln American Corp.*, an action under the securities laws for individual and class damages, plaintiffs' initial motion for class certification was denied by the district court because it found that the plaintiffs could not be adequate class representatives while they and the attorney for the proposed class were members of the same law firm. After securing new counsel, the plaintiffs renewed their motion for class certification. While it was pending, the defendants proffered the plaintiffs their claimed individual damages. Citing *Winokur v. Bell Federal Savings and Loan Association*, the district court dismissed the action, holding that the satisfaction of the named plaintiffs' individual claims deprived it of jurisdiction to decide the motion for class certification.

The court of appeals reversed and remanded for a determination of the motion for class certification. Distinguishing *Winokur* on the basis that in it tender had been made after denial of class certification, the court concluded that an article III controversy could exist between persons alleged to be members of an uncertified class and the defendant. It cited occasions on which the interests of persons claimed to be members of a class have been safeguarded even before a rule 23(c)(1) certification and pointed out

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109. 587 F.2d 866 (7th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3688 (U.S. April 17, 1979) (No. 78-1169).


111. 560 F.2d 271 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). In *Winokur*, the Seventh Circuit applied the thesis of the *Bradley* case, see text accompanying notes 99 to 105 supra, to a tender of damages made after a denial of certification. The district court dismissed an alleged class action because the defendants had offered to pay to the named plaintiffs their claimed damages and costs after the court had denied certification. The court of appeals affirmed, reasoning that the pre-certification satisfaction of the named plaintiff's individual claim had mooted the case and deprived it of jurisdiction to hear the appeal. *Id.* at 276. *Winokur* is noted in 72 Nw. U.L. Rev. 811 (1977).

112. 587 F.2d at 868.

113. *Id.* at 869. The court noted that unlike the situation in *Winokur* the defendants' actions had prevented the district court from even reaching the certification issue.

114. *Id.* The court noted that at the time the defendants had offered to pay the claimed damages, the question of certifying the class "had been freshly raised" and was thus before the district court. *Id.* The motion for certification therefore "sufficiently" though "provisionally" brought the interests of the putative class members before the court. *Id.*

115. *Id.* Several courts have recognized these persons' right to support or oppose class certification or to challenge the adequacy of representation by the named plaintiff. See, e.g., Knuth v. Erie-Crawford Dairy Coop. Ass'n, 395 F.2d 420 (3d Cir. 1968). Others have provided putative class members with notice of a proposed settlement between the named plaintiff and the defendant before certification. See, e.g., Kahan v. Rosensteil, 424 F.2d 161, 169 (3d Cir.), cert. denied, 398 U.S. 950 (1970). See generally Almond, *Settling Rule 23 Class Actions at the Pre-Certification Stage: Is Notice Required?*, 56 N.C.L. Rev. 303, 317 (1978). As a third instance the court cited a case in which the Supreme Court had held that the statute of limitations on the putative class members' individual causes of action is tolled from the date of the filing of a class action complaint. American Pipe & Constr. Co. v. Utah, 416 U.S. 538 (1974). For a discussion of this case, see note 245 infra.
that in footnote eleven of *Sosna v. Iowa*, the Supreme Court itself had established that in some situations a class could be certified after the mooting of the named plaintiff's claims. Recognizing that the footnote eleven exception had apparently been intended to apply only to "situations where the nature of the complaint was such that the mere passage of time would usually make the individual plaintiff's complaint moot before a court could reasonably be expected to rule on a certification motion," the court reasoned that "just as necessity required the development of the relation back doctrine in cases in which the underlying factual situation naturally changes so rapidly that the courts cannot keep up, so necessity compels a similar result here." The court limited its holding to cases in which "a motion for certification has been pursued with reasonable diligence and is . . . pending" when a tender is made.

The question of the effect of voluntary cessation or tender of damages by the defendant may also arise after a district court has considered and denied certification of a class. When this occurs at the trial court level, there appears to be little dispute that the plaintiff's case must be dismissed for mootness. The salient issue in this factual setting is whether a plaintiff whose claims have been satisfied by the defendant at the trial court level may appeal a district court's prior denial of class certification. Judicial reaction to this question has been divergent. One line of reasoning is typified by the *Winokur* case, in which the Seventh Circuit found that it had no jurisdiction to hear a satisfied plaintiff's appeal of the denial of class certification because an article III case or controversy no longer existed.

*Roper v. Consurve, Inc.*, in which the Fifth Circuit held that a satisfied plaintiff could continue as class representative and appeal the denial of class certification, illustrates the contrary reasoning. Two "BankAmericard" holders brought an action on behalf of all other holders of the cards in Mississippi, alleging that the issuing bank's interest charges were usurious. After the district court denied certification of the class, the

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117. 587 F.2d at 870 (emphasis added).
118. Id.
119. Id. Although recognizing that the defendant's tender may have raised a question as to the named plaintiff's ability fairly and adequately to represent the class, the *Susman* court "express[ed] no opinion" on that issue, leaving it to the district court to decide. Id.
120. This was the factual situation in the *Winokur* case, distinguished by the Seventh Circuit in *Susman*.
122. See note 108 and accompanying text supra.
123. Though somewhat limited by *Susman v. Lincoln American Corp.*, 587 F.2d 866, *petition for cert. filed*, 47 U.S.L.W. 3688 (U.S. April 17, 1979) (No. 78-1169), *Winokur* is still binding precedent in the Seventh Circuit when the defendant satisfies the named plaintiff's claim after a denial of certification by the district court.
bank — without admitting liability — tendered to the two individual plaintiffs the maximum they could have recovered had they succeeded on the merits of their claims. Although the plaintiffs did not accept the payment and objected, the district court entered judgment on their behalf. 125

The Fifth Circuit first found that it was not deprived of jurisdiction to hear the appeal, 126 partly supporting this conclusion by pointing to United Airlines, Inc. v. McDonald 127 and other cases 128 as implicitly establishing that the article III need for a viable controversy with respect to the certification determination remained between the defendant and the putative class members even after the named plaintiffs' claims had been satisfied; "The only issue is who may raise it." 129 The court determined that the plaintiffs could press the appeal because they had objected to the entering of judgment in their favor and had not accepted the tendered damages. Moreover, the court held that plaintiffs' act of filing a class action complaint placed them in a representative capacity, and they had thus assumed certain responsibilities to the members of the purported class, one such responsibility being to appeal the denial of class certification. 130 Once having donned the mantle of class representative, the plaintiffs "[could] not terminate their duties by taking satisfaction," and "a cease-fire [could] not be pressed upon them by paying their claims." 131 Permitting the named

125. Id. at 1109.
126. Id. at 1110-11.
127. 432 U.S. 385 (1977). The court read McDonald as holding that any member of the putative class could intervene at this stage of the case to appeal the denial of certification. In McDonald, several United Airlines flight attendants brought a class action challenging the airline's rule that forbade the marriage of female attendants. Class certification was denied and the trial court entered a final judgment granting recovery to the named plaintiffs on their individual claims. After learning that the original plaintiffs did not plan to appeal, Mrs. McDonald, a member of the proposed class, sought to intervene to seek review of the certification determination. The airline argued against intervention, contending that because her appeal was sought more than 30 days after the denial of certification, it was time-barred by rule 4(a) of the Federal Rules of Appellate Procedure. The Supreme Court disagreed, holding that the 30-day time limit for appeals prescribed by that rule was to begin at the entry of the final judgment and not when certification had been denied. It thus found the motion to intervene to be "timely" as required by FED. R. CIV. P. 24(b). The issue whether article III precluded the appeal was neither pressed by the appellees nor discussed by the Court.
128. The other cases were Gelman v. Westinghouse Elec. Corp., 556 F.2d 699 (3rd Cir. 1977), and Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969), which the court read as supporting the proposition that a successful named plaintiff could appeal a denial of class certification. See Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977); Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir. 1977) (allowing a named plaintiff who loses on the merits to appeal the certification denial); note 146 infra.
129. 578 F.2d at 1111.
130. Id. at 1110.
131. Id. The court further stated that "even had they been satisfied with the offer of judgment, the result would not change." Id. at 1111. Judge Thornberry filed a concurring opinion, objecting to this "sweeping dicta." He would have limited the
plaintiffs to press the appeal, the court concluded, would not make review of
the district court’s certification determination dependent upon intervention
under *McDonald* by other members of the putative class, persons who might
be unaware that the named plaintiffs’ claims had been satisfied.\(^{132}\)

The voluntary cessation of challenged conduct and the tender of
individual damages by the defendant before certification may fall within the
doctrine established by the Supreme Court in *United States v. W.T. Grant
Co.*\(^{133}\) In that case the Court held that a defendant may not ordinarily moot
a plaintiff’s claim by voluntarily ceasing allegedly unlawful conduct,
reasoning that if a defendant were given the power to moot cases in this
manner, he could “return to his old ways” once judgment was entered on his
behalf.\(^{134}\) The Court recognized a “public interest in having the legality of
the practices settled . . . .”\(^{135}\) Only when a defendant meets what the Court
characterized as “a heavy burden” to show that its change of heart is
permanent and that it will not return to its old ways will voluntary cessation
cause the case to be dismissed as moot.\(^{136}\) The application of this doctrine is
particularly compelling in cases involving class allegations. If given free
rein, a defendant could avoid potential liability to thousands of persons by
tendering a relatively small sum of money to the named plaintiff before a
district court had a chance to consider the merits of class certification.
Moreover, the policy goal recognized in *Grant* of “having the legality of
the practices settled” was expressly ascribed to the class action device by the
Advisory Committee’s Note to rule 23. The Committee stated that class
actions were intended to “achieve economies of time, effort, and expense,
and promote uniformity of decision as to persons similarly situated,” by
resolving a multiplicity of claims in one lawsuit.\(^{137}\) Whether employing as

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132. *Id.* at 1111. The court concluded that because all of rule 23’s requirements had
been satisfied, the district court had erred in failing to certify a class. *Id.* at 1116. The
court also found that the named plaintiffs could continue as class representatives
despite the satisfaction of their claims: “The defendant’s decision to confess judgment
has not affected the vigor with which the plaintiffs have pursued the class claims.”
*Id.* at 1112. See *Cameron v. E.M. Adams & Co.*, 547 F.2d 473 (9th Cir. 1976). In the
*Cameron* case, upon facts very similar to those in *Roper*, the court of appeals did not
discuss whether it had jurisdiction to hear an appeal of a refusal to certify a class
brought by a named plaintiff whose individual claims had been satisfied. The court
apparently simply assumed that jurisdiction existed. After reversing the denial of
certification, it held that the plaintiff could continue as class representative, because
otherwise, “our remand of the class action might . . . prove to be a hollow act . . . .
[T]he class action . . . might very well lie moribund for want of a champion.” *Id.* at
478 n.4. The court pointed to no authority for this action.

133. 345 U.S. 629 (1953). The cases in this area have not invoked *Grant*.

134. *Id.* at 632.

135. *Id.*

136. *Id.* at 633.

rationale the Susman court's expansive reading of Sosna's footnote eleven, or the Roper court's suggestion that a continuing "representative capacity" attaches to any person who alleges the existence of a class, the correct judicial response to a defendant's pre-certification tender or voluntary cessation is mandated by the "exception" to the mootness doctrine first articulated in the Grant case.

2. Successful Invocation of the Judicial Process

Conceptually linked to cases in which the defendant's voluntary actions satisfy the named plaintiff's claim are those in which the plaintiff prevails on the merits of his individual claim before a class is certified. This may occur either as a result of a partial summary judgment for the plaintiff on his individual cause of action before a trial court reaches the certification issue or as a result of the plaintiff's prevailing at a trial on the merits after a denial of class certification.

Illustrative of the former situation is Nelson v. United Credit Plan, Inc., in which two persons brought a class action seeking a rescission of a loan transaction on the ground that the lender's disclosure statement did not satisfy provisions of the Truth-in-Lending Act. The plaintiffs moved for class certification and for summary judgment on the rescission issue. Continuing the motion for class certification pending completion of discovery on the issue, the district court granted summary judgment on the plaintiffs' individual claim. The plaintiffs subsequently sought to renew the class certification motion, but the court denied it and dismissed the action. It reasoned that because the plaintiffs had prevailed on their claim, they no longer had a personal stake in the outcome of the case. Their ability to represent the proposed class adequately was therefore suspect. The court found particularly compelling that although these plaintiffs stood to gain no further monetary relief, they would have been required to pay the cost of providing notice had a class been certified.

138. See text accompanying notes 109 to 119 supra.
139. See text accompanying notes 124 to 132 supra.
140. 77 F.R.D. 54 (E.D. La. 1978).
142. 77 F.R.D. at 56.
143. Id. This was an action under FED. R. Civ. P. 23(b)(3). If the court had determined that a class action was to be maintained, it would have had to direct the best notice practicable to all members of the class, including individual notice to those persons whose names and addresses could have been ascertained through reasonable effort. See FED. R. Civ. P. 23(c)(2). The Supreme Court has allocated the cost of this notice to the named plaintiff as a part of the expenses of litigation. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Cf. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) (defendants may be ordered to assist in identifying the class members if the cost to them is not "substantial").

Nelson's precedential value is weakened by the alternative grounds for decision articulated by the court. It indicated that certification was inappropriate for
An order determining that a plaintiff may not maintain his suit as a class action leaves his individual claim pending. Should the plaintiff prevail on the merits of his individual claim, there arises the question whether he may then appeal the trial court's earlier certification denial. Although some courts have merely asserted that an appeal is or is not permitted in this circumstance, two opinions addressing the problem posed suggest three possible solutions.

two reasons other than the satisfaction of the named plaintiffs' claims. If the court primarily based its denial of certification on the inadequacy of the plaintiffs' representation, however, the propriety of its management of the case is highly questionable. The plaintiffs only became "inadequate" because the court granted their motion for summary judgment on the individual liability issue while delaying a decision on certification. The chronology of the court's actions may have saved the defendant from class-wide liability. To avoid granting this potential immunity, a district court should rule on a motion to certify a class either before or concurrent with its determination of the merits of the case.

Compare Nelson with Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976). In Frost a widow of a deceased insured claimed that the Social Security Administration had deprived her of benefits without a full evidentiary hearing. She purported to represent a class of "all persons who now or may in the future be entitled to survivors benefits under the Act whose benefits have been or may be reduced without a prior hearing." Id. at 61. Before it reached the certification issue, the district court, with the defendant's consent, ordered the Secretary of Health, Education & Welfare to conduct a full hearing on the plaintiff's claim. In rejecting an argument by the defendant that the case thus became moot before the district court certified a class, Judge Friendly of the Second Circuit stated:

The reason for generally requiring that the controversy be "live" as to the named plaintiff at the time of the class action designation is that otherwise the court would have no assurance that the named plaintiff will vigorously represent the class. This has little application when, as here, the court has deferred class action determination, with the agreement of all parties, pending a ruling on the merits. The Government has pointed to no respect in which this case would have proceeded differently if the court had certified this as a class action [before granting the hearing].

Id. at 64. Because the defendants had agreed to the delay in the certification determination, the court apparently considered them precluded by estoppel from later raising the mootness claim. See generally 7A C. WRIGHT & A. MILLER, supra note 4, §1785, at 133.


145. There appears to be no question that a plaintiff who loses on his individual claim may join with his appeal of that issue an appeal of the propriety of the class certification denial. In Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), for example, Judge Rubin stated: "An individual plaintiff who loses on the merits may also appeal a denial of certification." Id. at 1110. The cases he cited in support of this proposition apparently assumed that such an appeal was proper and contained no discussion of the issue. See, e.g., Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270, 276-77 (10th Cir. 1977); Donaldson v. Pillsbury Co., 554 F.2d 825, 831 n.5 (8th Cir.), cert. denied, 434 U.S. 856 (1977).

146. In Roper v. Consurse, Inc., 578 F.2d 1106 (5th Cir. 1978), cert. granted, 99 S. Ct. 1421 (1979), for example, attempting to bolster his view that a person who alleges the existence of a class in his complaint has a duty to appeal a denial of certification, Judge Rubin, writing for the majority, asserted, "An individual plaintiff who has
The Fifth Circuit in *McLaughlin v. Hoffman*,\(^{147}\) holding it had jurisdiction to hear the individually successful plaintiff's appeal of the already prevailed in the trial court may appeal the denial of class certification," id. at 1110, and cited *Gelman v. Westinghouse Elec. Corp.*, 556 F.2d 699 (3d Cir. 1977), and *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969). A close examination of those cases reveals that they provide inadequate precedent for Judge Rubin's conclusion. In *Esplin* the district court refused to certify a class but found for the plaintiff on the merits of all but one of his individual claims. The defendants appealed from the judgment against them, and the plaintiff cross-appealed both from the refusal to certify a class and from the trial court's finding that one of his claims was barred by the statute of limitations. Thus, the plaintiff had a personal interest in pressing the appeal. *Id.* at 95–97, 102. The case is therefore factually distinct from those in which the plaintiff is completely satisfied with the trial court's determination of his individual claims.

*Gelman* also fails to provide support for Judge Rubin's assertion. There, the plaintiff sought an interlocutory appeal of the district court's refusal to certify the class. After denying the appeal, the court of appeals explained that its decision would not preclude review of the district court's actions: "Implicit in our reasoning, of course, is the assumption that an individual plaintiff such as Gelman who prevails in the district court will have standing to appeal from the denial of class action treatment as a representative of the potential class." 556 F.2d at 701. To support its "assumption," the court asserted that "*Esplin v. Hirschi* . . . involved such an action." *Id.* at 702. This reliance on *Esplin* was misplaced because, as discussed above, the plaintiff there had not completely "prevailed" in the district court. The *Gelman* court also cited *Share v. Air Properties G., Inc.*, 538 F.2d 279 (9th Cir. 1976), *cert. denied*, 429 U.S. 923 (1977), which also addressed the propriety of an interlocutory appeal of a denial of class certification. As had the *Gelman* court, the court in *Share* rationalized its refusal to hear the interlocutory appeal by positing that review of the district court's action would ultimately be possible. Implicit in its statement that "[i]t is simply not true, as plaintiffs here claim, that the successful plaintiff in an individual action would have no incentive to challenge a denial of class status," *id.* at 283, is the premise that such an incentive could be acted upon. The court pointed to *Esplin* as precedent for such a challenge.

To counter an argument based on these unsupported assertions that a plaintiff who prevails on his individual claim may appeal a denial of class certification, one can cite several equally unsupported judicial declarations to the opposite effect. In *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, 429 U.S. 907 (1976), Judges Swygert and Bauer, arguing for the adoption of the "death knell" doctrine as an avenue for the interlocutory appeal of the denial of class certification, warned that "a denial of immediate appeal may represent, for the absent class members, a denial of the very right to be represented. A named plaintiff may not seek to appeal the class determination order after he has gotten a favorable verdict." *Id.* at 1371 (Swygert & Bauer, JJ., dissenting). They cited as support for their prophecy Judge Hays' dissent in *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969). Judge Hays had also urged the adoption of the "death knell" doctrine, admonishing that otherwise the district court's refusal to certify the class would be immune to judicial review, the successful plaintiff having no reason to appeal the adverse class action determination. *Id.* at 300 (Hays, J., dissenting). Judge Hays did not indicate whether he believed it would be proper for such a plaintiff to appeal, should he have the inclination to do so. It appears that Judges Swygert and Bauer read Judge Hays' observation about what a plaintiff probably would not do as a comment on what that person, in fact, could not do.

\(^{147}\) 547 F.2d 918 (5th Cir. 1977). *McLaughlin* involved a Title VII class action filed by a black employee of the General Services Administration who had been denied a promotion. He alleged discrimination both against himself and against a class of all
denial of class certification, found the live controversy requirement satisfied because plaintiff stood to benefit from class-wide injunctive relief ordering his employer to end discrimination. The reasoning employed in McLaughlin suggests that any time a plaintiff stands to benefit, perhaps even indirectly, from the awarding of class-wide relief, he can appeal a denial of class certification despite the satisfaction of his individual claims. This proposition comfortably applies to cases involving challenges to employment practices, welfare benefit allocation, housing regulations, or voting law provisions. Indeed, it could be argued that a satisfied plaintiff may always stand to benefit from the certification of a class. Should a class be certified and ultimately prevail, the attorneys' fees will be satisfied from the class award. Consequently, a much smaller portion would be paid by the plaintiff than had the fees been provided solely from his individual share.

Chief Judge Seitz of the Third Circuit, concurring in Gardner v. Westinghouse Broadcasting Co., suggested two additional arguments for allowing appeal by the individually successful plaintiff. The first, based on

“past, present, and future black and Latin American employees.” Id. at 919. The district court awarded him back pay, attorneys' fees, expenses, and injunctive relief but refused to certify the class.

148. Although the McLaughlin court did say plaintiff stood to benefit “directly” from a class-wide injunction, id. at 921, the distinction is an elusive one. McLaughlin won an injunction giving him the promotion he sought. Presumably he would benefit from a class-wide injunction against discrimination when it came time for another promotion. That benefit, however, is no less speculative and remote than the satisfaction a completely successful named plaintiff might feel knowing his co-workers enjoy a similar relief from discrimination, a benefit the McLaughlin court would likely have called indirect.

149. See also Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977), discussed in text accompanying notes 161 & 162 infra.

150. See, e.g., Share v. Air Properties G., Inc., 538 F.2d 279 (9th Cir. 1976), cert. denied, 429 U.S. 923 (1977), in which the court, in explaining its view that a named plaintiff who had prevailed on his individual claim would have an incentive to appeal a denial of class certification, said: “Presumably, a reversal of the denial would lead to a greater recovery and hence lower the proportion of plaintiff's individual recovery going to his attorney.” Id. at 283.

151. 559 F.2d 209 (3d Cir. 1977), aff'd, 437 U.S. 478 (1978). In Gardner, a woman who had applied for employment at a radio station and been rejected brought a Title VII action to obtain injunctive relief for herself and a class of other females. Upon denial of her motion to certify a class, she sought immediate review by the court of appeals. She argued that because the denial of certification had effectively limited the scope of potential injunctive relief, the appellate court had jurisdiction to hear her appeal under 28 U.S.C. §1292(a)(1) (1970), which permits immediate appeal of interlocutory orders refusing injunctions. The court, however, dismissed the appeal for lack of jurisdiction, explaining that the district court's refusal to certify a class would not permanently foreclose the granting of class-wide injunctive relief because the certification determination would always be reviewable by an appellate court after judgment had been entered. The majority's analysis of the issue rested upon an assumption that the class certification determination could be appealed by the named plaintiff whether or not she subsequently prevailed on her individual claim. Id. at 212. In his concurring opinion, Judge Seitz agreed that the refusal to certify the class could
an expansive reading of the Sosna footnote eleven, was that article III did not necessarily dictate that a live interest exist for the duration of a lawsuit. Although the "relation back" theory of the footnote was applied there only to "capable of repetition, yet evading review" cases, it was only a legal fiction devised to fulfill the continuing controversy requirement. If the requirement could be met by the use of a legal fiction, it was not a constitutional requirement but rather a consideration in the discretionary decision whether to reach the merits of the case. Such discretion ought to be exercised in favor of allowing an appeal because not doing so would insulate from review a "decision of far reaching consequence" and might frustrate interests of judicial economy by encouraging "a multiplicity of lawsuits in conditions where a class action would be the preferable mode of adjudication." 

Alternatively, Judge Seitz suggested that the plaintiff be allowed to appeal because he had a continuing personal interest in exercising his fiduciary responsibility to the class. This fiduciary responsibility attaches not upon certification but upon the filing of a class action, and permits be appealed by the plaintiff should she be granted individual relief, but thought the issue "deserve[d] greater explication than the majority ha[d] given it." Id. at 214.

The Supreme Court affirmed, reasoning that "the order denying class certification in this case did not have any . . . irreparable effect. It could be reviewed both prior to and after final judgment." Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978). In a footnote appended to this statement, id. at 480 n.6, the Court quoted FED. R. Civ. P. 23(c)(1): "An order [determining the certifiability of a class] may be conditional, and may be altered or amended before the decision on the merits . . . ." The Court apparently envisioned a 23(c)(1) motion by the plaintiff to alter or amend the denial of certification as providing an avenue for pre-judgment review. As to the availability of review after a final judgment had been entered, the Court cited United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). For a discussion of McDonald, see note 127 supra. Because only McDonald was cited, it is likely that the Court considered appeal solely through post-judgment intervention by the putative class members and did not entertain any notions about the propriety of a satisfied plaintiff pressing the appeal.

152. It has, however, been applied to other types of cases. E.g., Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), cert granted, 99 S. Ct. 1420 (1979). See text accompanying notes 77 to 98 supra. Courts have extended the use of the "relation back" fiction to cases in which the district court had unduly delayed its decision on certification, Allen v. Likins, 517 F.2d 532 (8th Cir. 1975) (dictum), and to cases in which the named plaintiffs were granted their individual relief before the district court could rule on class certification, Frost v. Weinberger, 515 F.2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976).

153. Judge Seitz pointed out that in those cases in which the Supreme Court had employed the "relation back" doctrine, once stripped of the legal fiction, there was, in fact, an interval when no live controversy existed. As an example, Judge Seitz pointed to Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975), in which all of the named plaintiffs had been released from the challenged detention before the class was certified. See text accompanying notes 42 to 44 supra.

154. 559 F.2d at 218 (footnote omitted).

155. Id. at 219. As "indicia" that such a fiduciary responsibility attaches upon the filing of a complaint with class allegations, Judge Seitz pointed to three facts: first,
class representatives to "raise matters bearing on the interests of class members even though they have no tangible personal interests in these matters."156

Judge Seitz's opinion, like those of the Susman and Roper courts, presents a sensible approach to the pre-certification satisfaction of the named plaintiff's claim. Where there are other compelling values at stake, as is the case when a district court's denial of certification may be insulated from review or when a defendant may protect himself from class-wide liability by satisfying the named plaintiff, the requirements of article III should be read flexibly. The Susman and Roper opinions, and Judge Seitz's concurring opinion in Gardner, protect these values either by reading Sosna's footnote eleven as a broad mandate to create legal fictions where necessary, or by preserving the plaintiff's "stake" in the case by ascribing to him a continuing fiduciary duty to the class. These approaches to the problem of the headless class action have emerged from what might be called "easy" cases, those in which the plaintiff loses his stake through no fault of his own, the actions of the court or defendant making creative jurisprudence particularly attractive. Ironically, the remedial procedure this Comment proposes was suggested by the much more difficult case in which the named plaintiff's claim is found to be meritless.

even before a class is certified, courts have held that there may be no settlement or dismissal without judicial approval, e.g., Kahan v. Rosensteil, 424 F.2d 161, 169 (2d Cir.), cert. denied, 398 U.S. 950 (1970); Burgener v. California Adult Auth., 407 F. Supp. 555, 560 (N.D. Cal. 1976); second, before a court certifies a class it must scrutinize the aspiring representative to assure that he will "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4); and third, under rule 23(d)(2), a court has the power to issue orders to protect the putative class members even before certification, id. 23(d)(2).

156. 559 F.2d at 219. Other courts have held that a person who brings an action on behalf of a class assumes fiduciary responsibility. In Shelton v. Pargo, 582 F.2d 1298 (4th Cir. 1978), for example, a case that mandated pre-certification notice of settlements to putative class members in certain situations, the Fourth Circuit stated:

   By asserting a representative role on behalf of the alleged class, these appellees voluntarily accepted a fiduciary obligation towards members of the putative class they thus have undertaken to represent. They may not abandon the fiduciary role they assumed at will or by agreement with the appellant, if prejudice to the members of the class they claimed to represent would result or if they improperly used the class action procedure for their personal aggrandizement.

   Id. at 1305 (footnotes omitted). See Roper v. Consurve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978), cert. granted, 99 S. Ct. 1421 (1979) ("By the very act of filing a class action, the class representatives assume responsibility to members of the class."); cf. Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) ("district court [has a] fiduciary responsibility as the guardian of the rights of the absentee class members . . ."). See generally 2 H. Newberg, supra note 9, § 2700.
C. The Named Plaintiff Has a Meritless Claim

A plaintiff may lose his personal stake in the outcome of a case because he is shown never to have suffered any legally cognizable injury.\textsuperscript{157} The absence of merit to the named plaintiff's claim may be disclosed either before a district court has an opportunity to rule on class certification or as a result of a trial on the merits of the named plaintiff's individual claims after the district court has properly or improperly denied a motion for certification. At whatever point the invalidity of the claim becomes apparent, the judicial reaction has been inconsistent, the courts having reached three distinct results. Several have permitted the action to continue with the stakeless plaintiff continuing at the helm, several have dismissed the action entirely, and at least one has taken "a middle ground," permitting the action to continue until a new class representative with a stake in the case appears.

Several courts have allowed actions brought under Title VII of the Civil Rights Act\textsuperscript{158} to continue past the demise of the named plaintiff's claim with the stakeless plaintiff being retained as class representative. In \textit{Moss v. Lane Co.},\textsuperscript{159} for example, the district court dismissed the named plaintiff's individual claim on the ground that he could not show that he had been personally discriminated against and subsequently refused to certify the class. The court of appeals affirmed the dismissal of the plaintiff's individual claim but reversed the refusal to certify, remanding the case to the district court to continue the action with the stakeless plaintiff as class representative. It reasoned:

\begin{quote}
If the plaintiff were a member of the class at the commencement of the action and his competency as a representative of the class [were] then determined or assumed, the subsequent dismissal or mootness of his individual claim, particularly in a discrimination case, will not operate as a dismissal or render moot the action of the class, or destroy the plaintiff's right to litigate the issues on behalf of the class.\textsuperscript{160}
\end{quote}


\textsuperscript{159}. 471 F.2d 853 (4th Cir. 1973), noted in 11 Hous. L. Rev. 732 (1974).

\textsuperscript{160}. 471 F.2d at 855. Accord, \textit{Long v. Sapp}, 502 F.2d 34 (5th Cir. 1974); \textit{Huff v. N.D. Cass Co.}, 485 F.2d 710, 712 (6th Cir. 1973) ("The standard for determining whether a plaintiff may maintain a class action is not whether he will ultimately prevail on his claim"). The rationale operating in \textit{Moss} can be traced to \textit{Johnson v. Georgia Highway Express, Inc.}, 417 F.2d 1122 (5th Cir. 1969), another suit challenging discriminatory action, in which the named plaintiff was permitted to represent the employees of a firm although he was not able to prove that he had been discriminated against. The \textit{Johnson} court determined that the plaintiff could serve as representative of the class despite his claim's being meritless, if his attorney was "qualified, experienced and generally able to conduct the litigation," \textit{id.} at 1125, if he was not involved in a collusive suit, and if he did not have interests antagonistic to those of the class. The court was apparently satisfied that the plaintiff's claims — albeit meritless — were typical. Noticeable by its absence from this catalog of desired
Reaching the same result as *Moss* but articulating a different rationale is *Horn v. Associated Wholesale Grocers, Inc.*\(^{161}\) There, the Tenth Circuit permitted a Title VII plaintiff with a meritless claim to continue to act as class representative because, as an employee, he had “a present, past and future interest” in eliminating discrimination by his employer.\(^{162}\) *Moss* and *Horn* can be explained as efforts to encourage the use of the class action device in Title VII litigation.\(^{163}\)

Such a permissive reading of rule 23 in Title VII actions may now be proscribed by the Supreme Court’s language in *East Texas Motor Freight System, Inc. v. Rodriguez.*\(^{164}\) After acknowledging that such suits are often by their very nature class actions, the Court stated:

[C]areful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.\(^{165}\)

qualities in a class representative is the one emphasized most strongly by many courts, the assurance that the representative would vigorously prosecute the class claims. The list of requirements for adequate representation adopted by most courts is set out in note 23 supra.

161. 555 F.2d 270 (10th Cir. 1977). In *Horn*, a black employee brought a Title VII class action against his employer, alleging racial discrimination in job promotions and employment conditions. The district court failed to rule on class certification and, after a trial on the merits of the plaintiff’s individual claim, entered judgment for the defendant. While noting that from the facts developed at trial it could be inferred that the employer had discriminated against black persons generally, the district court found that certification would be improper due to “plaintiff’s lack of standing resulting from his failure to prove his own case of discrimination.” *Id.* at 273. The court of appeals, after affirming the dismissal of the named plaintiff’s individual claim, reversed the denial of class treatment and ordered the court to grant class-wide relief. It reached this conclusion by finding that the district court had erred in delaying its decision on certification until after a trial on the merits and that certification was proper even after trial.

162. *Id.* at 277. *See also* McLaughlin v. Hoffman, 547 F.2d 918 (5th Cir. 1977), discussed at text accompanying notes 147 to 149 supra.

163. Professor Wright has recognized this trend to apply rule 23 liberally in Title VII and other civil rights litigation and devotes a section of his discussion of class actions to it. 7 C. WRIGHT & A. MILLER, supra note 4, §1771. *See generally* Note, Antidiscrimination Class Actions Under The Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2), 88 YALE L.J. 868 (1979). The rationale for liberal application of rule 23 in civil rights actions was explained in *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968), another case permitting a plaintiff without a live claim to represent a class. Pointing out that enforcement of Title VII was intentionally left by Congress to individual plaintiffs, who, in effect, would become “‘private Attorney[es] General,’” *id.* at 33 (quoting *Newman v. Piggie Park Ent., Inc.*, 390 U.S. 400, 402 (1968)), the court concluded: “The suit is therefore more than a private claim by the employee seeking the particular job which is at the bottom of the charge of unlawful discrimination . . . . [T]hat individual, often obscure, takes on the mantle of the sovereign.” *Id.* at 32.


165. 431 U.S. at 405-06.
Although judicial and scholarly interpretations of *Rodriguez* have been inconsistent, several courts have read the case as proscribing a liberal application of rule 23(a) in Title VII actions. In *Shipp v. Memphis Area Office, Tennessee Department of Employment Security*, a black man brought a class action, alleging that the Tennessee Department of Employment Security (TDES) had violated Title VII by engaging in racial discrimination in its job referral services. The district court delayed a certification determination until after the trial of the plaintiff's individual claim. Finding that plaintiff's claims lacked merit, it dismissed his cause of action. The district court then decided against the yet uncertified class on the merits. The court of appeals affirmed the dismissal of Shipp's individual claim but reversed the determination against the "class." The trial on the merits had revealed Shipp as an improper class representative:

> [I]t is abundantly clear that plaintiff never was an employee of TDES and in fact never had applied for a job at TDES. We, therefore, fail to see how it can be said that plaintiff's claims are typical of the class of TDES employees who were, are, or will be discriminated against because of the internal hiring and promotion practices of the Department of Personnel.

Based upon *Rodriguez*, the court concluded that this finding precluded the continuation of the action. The district court should have dismissed

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One student author has argued that *Rodriguez* does not sound the "death knell" of a liberal application of rule 23 in Title VII cases, but should be read as a "response to an unusual set of facts." Comment, *The Proper Scope of Representation in Title VII Class Actions*, supra note 53, at 176. Another agrees, concluding that "[t]he conflict between the permissive and the rigorous approaches to the Rule 23(a) prerequisites was not settled by the Supreme Court's treatment of 23(a) in *Rodriguez*." Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, supra note 163, at 882. Several other responses in legal literature to *Rodriguez* have, however, reached the opposite conclusion. See, e.g., Younger & McElligott, *Defending the Employer in Title VII Litigation*, IV Va. Bar Ass'n J. 4, 6-7 (1978); *Fourth Circuit Review*, 35 Wash. & Lee L. Rev. 433, 528-29 (1978).


168. Id. at 1172.

169. Id. A similar result was reached in Walker v. World Tire Corp., 563 F.2d 918 (8th Cir. 1977), also a Title VII class action. Without either conducting an evidentiary hearing or giving notice to the parties, the district court found that certification of a
without prejudice to the putative class members, rather than deciding on the merits against them.

Satterwhite v. City of Greenville\textsuperscript{170} illustrates the difficulty courts have had in determining the effect of the named plaintiff's claims being found meritless before certification, and its various opinions reflect the spectrum of judicial viewpoints on the problem. Mrs. Satterwhite, an unsuccessful applicant for a position with the City of Greenville, Texas, filed a Title VII class action on behalf of all present and prospective female employees of the city allegedly victimized by sexual discrimination in hiring, job classification, and compensation.\textsuperscript{171} Without conducting an evidentiary hearing, the district court denied a motion to certify the class but permitted the plaintiff to press her individual claim. It refused to certify the class because Mrs. Satterwhite's claim was not typical; her application had been rejected for a peculiar reason.\textsuperscript{172} The court found after trial that the rejection of the plaintiff's employment application was not discriminatorily motivated and entered judgment for the defendant.\textsuperscript{173} Affirming the dismissal of the plaintiff's individual claim, a panel of the United States Court of Appeals for the Fifth Circuit reversed the denial of class certification because the district court had erred in allowing the city's defense to the individual claim to affect the decision whether Mrs. Satterwhite was an adequate class representative.\textsuperscript{174} Citing Huff v. N.D. Cass Co., \textsuperscript{175} the court found that the plaintiff met the requirements of rule 23 and could continue as representative should the district court certify a class and find her to be qualified after a proper evidentiary hearing.\textsuperscript{176}

The City of Greenville successfully petitioned for a rehearing, contending that because a class had not yet come into existence and because the class would be improper. After a trial on the merits of the plaintiff's individual claim, the court found that he had not been discriminated against and entered judgment for the defendant. Although noting that the district court had erred in ruling on certification without having conducted an evidentiary hearing, the court of appeals affirmed. It reasoned that because the plaintiff had not suffered any discrimination he was not a member of the class he purported to represent, and therefore, under Rodriguez, could not be an adequate representative. \textit{Id.} at 922.

\textsuperscript{170} 578 F.2d 987 (5th Cir. 1978) (en banc), \textit{petition for cert. filed}, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008).


\textsuperscript{172} \textit{Id.} at 701. Mrs. Satterwhite had applied for the job of manager of the municipal airport. Her husband was a prime tenant of the airport. The city refused to hire her, it claimed, solely because of a prohibition against such "conflicts of interest" in the city charter. \textit{Id.} at 700.

\textsuperscript{173} \textit{Id.} at 701.

\textsuperscript{174} 549 F.2d 347, 348 (5th Cir.), \textit{vacated on rehearing}, 557 F.2d 414 (5th Cir. 1977), \textit{vacated}, 578 F.2d 987 (5th Cir. 1978) (en banc), \textit{petition for cert. filed}, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008).

\textsuperscript{175} 485 F.2d 710 (5th Cir. 1973). \textit{Huff} is the Fifth Circuit's analogue to the \textit{Moss} case, discussed in text accompanying notes 159 & 160 \textit{supra}.

\textsuperscript{176} 549 F.2d at 348.
named plaintiff no longer had a personal stake in the outcome of the case, there was no case or controversy and thus no jurisdictional basis for the court of appeals to consider the action further.\(^{177}\) The second panel withdrew the part of the earlier opinion that dealt with the class because the first panel had not considered the case or controversy issue.\(^{178}\) Citing *Sosna v. Iowa*\(^{179}\) and *Franks v. Bowman Transportation Co.*,\(^{180}\) it concluded that had the district court certified a class before it became apparent that the plaintiff's claim lacked merit, "there [would have] existed a legal entity apart from her which possibly could have maintained a personal stake in the controversy,"\(^{181}\) and hence that article III would have been satisfied. It then held that the action could go on, apparently reading *Sosna* and *Franks* to permit the continuation of not only actions in which the class had been certified before the demise of the named plaintiff's claim, but also those in which a class would have been certified before the loss of the plaintiff's stake but for judicial error.\(^{182}\) Unlike the first panel, however, it did not decide the issue whether the stakeless plaintiff could continue to serve as class representative. Rather, the court remanded the case to the district court to conduct an evidentiary hearing to determine: (1) if the original denial of certification was improper under the circumstances existing at that time; (2) if so, whether the certified class retained upon the dismissal of the named plaintiff a sufficient interest in the outcome of the case to serve in its own right as an article III plaintiff; and (3) whether the stakeless plaintiff could continue as class representative under *Huff*.\(^{183}\)

Judge Gee, who had concurred in the first panel decision, was "prompted to further thought" and dissented.\(^{184}\) He argued that the remand, permitting a plaintiff shown to have no interest in the relief sought by the class to argue the existence of the class and the propriety of her

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177. 557 F.2d 414 (5th Cir. 1977), *vacated*, 578 F.2d 987 (5th Cir. 1978) (en banc), *petition for cert. filed*, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008). The first panel had not discussed the article III issue.

178. *Id.* at 423. The court adhered to the first panel's dismissal of the individual claim. *Id.* at 416 n.2.

179. 419 U.S. 393 (1975). *Sosna* is discussed in text accompanying notes 26 to 39 *supra*.


181. 557 F.2d at 422.

182. The error in the case was the district court's failure to explore the class claims before denying Mrs. Satterwhite the right to continue pursuing them: "In view of the trial court's supervisory responsibilities under Rule 23 as well as the almost presumptively class based nature of Title VII suits, we hold that some evidentiary exploration of the issues was required prior to the court's [pre-trial] ruling." *Id.* at 420.

183. *Id.* at 423. The second panel did not find that the validity of *Huff* had been placed in question by *Rodriguez*: "[W]e conclude that *Rodriguez*'s reliance upon the named plaintiff's loss on the merits does not apply to a situation where an appropriate certification would have preceded the individual plaintiff's loss on the merits." *Id.* at 422 (footnote omitted).

184. *Id.* at 424.
representation of it "countenances a contravention of Article III."\(^{185}\) The district court would have no jurisdiction to hear the reargument because the stakeless plaintiff could no longer allege proper standing. Judge Gee concluded that because certification represented the birthdate of the class as a jurisprudential entity, "the district court's denial of certification, whether correct or not, means that no class is present to carry the case . . . ."\(^{186}\) He would have affirmed the district court's dismissal of the named plaintiff's claims and expressed disapproval in dictum of that court's undue emphasis on the probability of the plaintiff's individual success in its determination of whether to certify the class.\(^{187}\)

After a rehearing en banc, the Fifth Circuit vacated the second panel's opinion except the portion affirming the district court's dismissal of the named plaintiff's individual claim.\(^{188}\) It reached this result not because it agreed with Judge Gee's contention that article III precluded continuation of the case, but because it concluded that under Rodriguez, once Mrs. Satterwhite's claim was shown to be meritless, she was not an adequate representative, and that therefore the class could not be certified.\(^{189}\) The court found it clear that Mrs. Satterwhite "is not at present a member of the class [of discriminatees], and . . . she was not a member even at the time that suit was filed. . . ."\(^{190}\) It distinguished Sosna v. Iowa\(^{191}\) by pointing out that in that case the plaintiff had suffered the same injury as the members of the class but had lost her stake in the case due to the passage of time.\(^{192}\)

\(^{185}\) Id.
\(^{186}\) Id. at 425.
\(^{187}\) Id. Judge Gee characterized "the majority's opinion allowing [Mrs. Satterwhite] to continue with class proceedings [as] a concession to the notion that a class suit belongs to no one so much as the plaintiff's lawyer." Id. at 426.
\(^{188}\) 578 F.2d 987 (5th Cir. 1978) (en banc), petition for cert. filed, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008).
\(^{189}\) Id. at 991. On the article III issue, the court stated: "Because, under these circumstances, the class action cannot meet the requirements of Rule 23 . . . we need not reach the issue whether plaintiff has the requisite standing to sue under Article III, Section 2 of the Constitution." Id. Judge Godbold, who had written the second panel opinion, dissented, chastising the majority for skirting the article III issue, "the issue on which the panel divided in its second opinion." Id. at 999.
\(^{190}\) Id. at 992. The court was, however, careful to say that it was not simply the lack of merit in Mrs. Satterwhite's claim, but the lack of a "nexus" with the class, that made her an inadequate representative. Id. This "nexus" doctrine serves to reconcile Huff and Rodriguez. Id. at 993 n.8. Sometimes a lack of merit destroys the "nexus," sometimes it does not. See text accompanying note 200 infra.
\(^{191}\) 419 U.S. 393 (1975).
\(^{192}\) 578 F.2d at 992. Sosna was also distinguished on the issue of certification: The putative class here was never certified and the class claims were never tried. Where a class is certified, and class claims tried, before the lack of merit or mootness of the representative's claim is discovered, the class representative has already assiduously asserted the claims of the constituents. The conservation of both litigants' and judicial resources makes it desirable not only to avoid abortion of the litigation but also to prevent prejudice to the
Mrs. Satterwhite, however, had never suffered any legally cognizable injury, either individually or in common with the class. The court also found significant that Mrs. Satterwhite had not sought an evidentiary hearing on the issue of class certification.  

In response to the plaintiff's argument that, as the second panel had recognized, the district court denied certification at a time when it could not have realized that her claim was meritless, the court stated that it would not engage in "academic error-correcting." It found, rather, that the issue of adequate representation would be decided "on the full record, including the facts developed at the trial of the plaintiff's individual claims." And although the en banc court agreed with the second panel that exposure of the lack of merit of the named plaintiff's claim should not moot the class claims in cases in which, but for judicial error, certification would have occurred while the named plaintiff's claim was still valid, it added that the failure to certify must occur "through no fault of the plaintiff." The court found Mrs. Satterwhite's failure to move for an evidentiary hearing on the certification issue to constitute such "fault."  

Characterizing its holding as "very narrow," the court left the door open for the continuation of actions in which, "after an appropriate certification hearing, the court, through no fault of the plaintiff, improperly denies certification and the plaintiff subsequently loses on the merits of his individual claim." In a footnote, it stated the reasons for allowing a case numbers of a certified class who, in the midst of a law suit, suddenly discover that their representative's claim is no longer viable.

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193. See 578 F.2d at 993, 995 n.10, 998. The court would not distinguish Rodriguez on the ground that in that case the plaintiffs had not moved for certification: "Whatever plausibility this suggestion might have if the plaintiff had been the victim of judicial error beyond her control, the plaintiff herself failed even to seek an evidentiary hearing, or to make any offer of proof as to the appropriateness of a class action." Id. at 993.

194. Id. at 993.


196. Id. at 995.

197. Id. In his dissent, Judge Godbold disputed the attribution of fault for the absence of a proper certification determination to Mrs. Satterwhite. She had filed interrogatories and, upon the city's refusal to respond, had moved to compel answers. She had also requested a hearing on this issue: "[P]laintiff might reasonably infer that since she had pending one motion for a hearing she need not ask for two hearings." Id. at 1001 n.6. Moreover, Judge Godbold argued that Rodriguez should be distinguished because, unlike the plaintiffs in that case, Mrs. Satterwhite had made a timely motion for certification. Id. at 1001. But see id. at 993.

198. Id. at 995. The en banc court also distinguished cases falling directly within Sosna's footnote eleven, id., and cases such as Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973), in which the district court had dismissed class claims because of a lack of merit to the named plaintiff's individual claims without considering whether, notwithstanding the lack of merit, a sufficient "nexus" remained, 578 F.2d at 996.
to continue in that situation: the hearing would provide a full record on
which an appellate court could appropriately base its review of the
certification decision; in those cases, the error of the district court would be
the sole cause of the failure of the class to be certified; and unless the case
could continue, the district court's error would go unreviewed.199

The Satterwhite en banc decision is distinct from the second panel
opinion in two respects. First, the full court read Rodriguez as mandating
that the adequacy of a stakeless plaintiff's representation be determined on
the basis of the facts known at the time of appeal, not only those facts of
which the district court was cognizant when it denied certification. Second,
although agreeing that a purported class action could continue when the
absence of certification was due to judicial error, the court added the
requirement that the denial of certification must have come through no fault
of the plaintiff. It agreed with the second panel, however, that Rodriguez
should not be read as precluding in all cases the representation of a class by
a named plaintiff whose claim had been proven meritless.200 The Satterwhite
en banc decision is best read as a response to a peculiar set of facts, and, as
the court itself pointed out, should be characterized as "very narrow."201

In Goodman v. Schlesinger,202 the Fourth Circuit employed a novel
procedural device to reach "a middle ground" between those courts that
dismiss the entire action when the named plaintiff's individual claim is
shown to be meritless and those that permit the action to continue with the
stakeless plaintiff as class representative. Three employees of the Depart-
ment of the Navy brought a Title VII class action alleging racial and sexual
discrimination in hiring, promotion, and conditions of employment. The
district court granted the government's motion to deny certification of the
class solely upon its consideration of the allegations in the complaint. After
the plaintiffs' individual claims were tried on the merits, the court found for
the defendants and dismissed the action.203

199. 578 F.2d at 995 n.10. On the issue of review, see text accompanying notes 235
to 242 infra.
200. 578 F.2d at 993 n.8. In Camper v. Calumet Petrochemicals, Inc., 584 F.2d 70,
72 (5th Cir. 1978) (per curiam), a Fifth Circuit panel construed Satterwhite as
establishing "that an adjudicated lack of merit of the individual claim is a proper
factor in determining whether" a stakeless plaintiff should continue as class
representative. See Davis v. Roadway Express, Inc., 590 F.2d 140 (5th Cir. 1979) (per
curiam) (named plaintiff whose individual claim is found to be meritless who does not
appeal that determination cannot appeal refusal to certify a class, citing Rodriguez
and Satterwhite); Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979) (citing Satterwhite as
support for permitting a plaintiff whose individual claims had been "finally
adjudicated and dismissed" before certification to continue to represent a certified
class).
201. Indeed, one day after the full Fifth Circuit announced the Satterwhite
decision, one of its panels decided a case in which it permitted a stakeless plaintiff to
continue as class representative in order to appeal a denial of class certification by the
district court. Roper v. Conserve, Inc., 578 F.2d 1106 (5th Cir. 1978), cert. granted, 99
S. Ct. 1421 (1979), discussed in text accompanying notes 124 to 132 supra.
202. 584 F.2d 1325 (4th Cir. 1978).
203. Id. at 1326-27.
The court of appeals affirmed the dismissal of the named plaintiffs' individual claims, but because it found that the district court had erred in ruling on certification without any evidence in the record, it vacated the part of the lower court's decision that concerned the class. The court then determined that the three original plaintiffs could not continue to represent the class: "[S]hould there be any revival of the class action following remand, the plaintiffs may not participate. They have had their day in court." 204

Having concluded that the original named plaintiffs had no further part to play in the case, but finding it appropriate to remand the "class action," 205 the court was faced with what Judge Gee in his dissent to the second Satterwhite panel opinion had described as "a potential lawsuit searching for a sponsor." 206 To escape this dilemma, the court remanded the case with instructions that it be retained on the docket for a reasonable time to permit a plaintiff in a similar position to prosecute the case as class representative. It added:

If such a plaintiff so comes forward, the court should then, on the whole record before it, . . . decide whether a class action is maintainable and whether the then named plaintiff should represent the class. . . . If no representative plaintiff so comes forward within a reasonable time, then the district court should strike the class action from the calendar and enter a final dismissal thereof. 207

As support for the propriety of this remand, the court relied upon its own earlier decision in Cox v. Babcock & Wilcox Co. 208 and the Supreme Court's citation of that case "with apparent approval" 209 in East Texas Motor Freight System, Inc. v. Rodriguez. 210 In Cox, a black employee brought a Title VII discrimination suit against his employer, seeking individual and class relief. After a trial on the merits of the plaintiff's individual claim, the district court found that because the plaintiff had not been discriminated against personally, he could not serve as representative and that therefore the class could not be certified. The court of appeals affirmed the dismissal of the plaintiff's individual claim, but, finding that the district court had

204. Id. at 1331. To support this conclusion, the court rather cryptically cited Huff v. N.D. Cass Co., 485 F.2d 710 (5th Cir. 1973) (en banc), and Moss v. Lane Co., 471 F.2d 853 (4th Cir. 1973). As discussed above, these decisions are the progenitors of a line of cases that do permit persons who have "had their day in court" to continue as class representatives. See text accompanying notes 158 to 165 supra.

205. Because no class had yet been certified, this was a misappellation.

206. 557 F.2d 414, 425 (5th Cir. 1977) (Gee, J., dissenting), vacated, 578 F.2d 987 (5th Cir. 1978) (en banc), petition for cert. filed, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008).

207. 584 F.2d at 1332-33.

208. 471 F.2d 13 (4th Cir. 1972).

209. 584 F.2d at 1333.

errred in delaying the certification determination until after the trial, remanded the "class action" to the district court to be "retained" should a new representative present himself within a reasonable period of time.\textsuperscript{211} It cited no precedent for its actions.\textsuperscript{212} The Goodman court recognized that the procedure employed in Cox represented a solution of the problem inconsistent with the decisions of other circuits and that "some of the language in [Rodriguez] may seem to indicate that we should simply affirm the dismissal of the class action . . . ."\textsuperscript{213} However, because the Supreme Court in Rodriguez had cited Cox with what the Goodman court read as approval, it adhered to its precedent.\textsuperscript{214}

\begin{footnotesize}
\begin{enumerate}
\item[211.] 471 F.2d at 16. The court suggested that the district court's failure to make an "interim determination" as to certification may have been error. \textit{Id.} at 15. It was moved to choose the peculiar remedy it did, however, more out of solicitude for the defendant, who apparently had changed his evil ways, than out of a desire to correct error. After noting plaintiff's argument that rule 23 contemplated an early determination of maintainability as a class action, the court said it was bound on appeal by the district court's finding against the plaintiff on his individual claims. Apparently the court was impressed with the argument that the trial had made the maintainability issue academic, and would have affirmed the dismissal of the class claims but for the fact that such a dismissal would have had no res judicata effect; the repentant defendant would not be protected from future class actions. The class claims apparently were remanded in the hope that once properly raised they could be permanently buried. \textit{See id.} at 16.
\item[212.] \textit{Id.} The court did mention that this resolution of the case had been recommended by plaintiff's counsel.
\item[213.] 584 F.2d at 1333.
\item[214.] \textit{Id.} The Supreme Court cited Cox in Rodriguez in an explanation of the proper result in a case in which the named plaintiff's claim is found to be meritless before certification:

Where no class has been certified, . . . and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims. At that point, as the Court of Appeals recognized in this case, "there [are] involved none of the imponderables that make the [class action] decision so difficult early in litigation." . . . \textit{See also} Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15-16 (CA4).
\end{enumerate}
\end{footnotesize}
In neither Cox nor Goodman did the Fourth Circuit cite any precedent for, or ever explain, the procedure it employed in those cases.\textsuperscript{215} A well-reasoned opinion by Judge Young of the United States District Court for the District of Maryland, however, sheds significant light on the doctrinal source of the Cox-Goodman device. In Booth v. Prince George's County,\textsuperscript{216} Judge Young applied Cox to retain a class action on his docket after dismissing the individual claim for failure to allege a justiciable claim. In a footnote, he offered his explanation for the propriety of this procedure.\textsuperscript{217} He viewed the question of subject matter jurisdiction as turning on whether there was an article III case or controversy between the defendant and the proposed class rather than between the defendant and the named plaintiff, Booth. Because the complaint had alleged the existence of an "injury in fact" to the class — although not to Booth himself — the class had demonstrated the requisite article III standing, and the court therefore had jurisdiction over the action. Judge Young then construed the requirements of rule 23(a) as a "real party in interest screening process,"\textsuperscript{218} meant to assure that class actions were brought by class members — persons who fit the rule 17 definition of a "real party in interest."\textsuperscript{219} Because plaintiff Booth had not alleged that he was discriminated against, he was not a member of the purported class of discriminatees, thus not a "real party in interest," and his action was accordingly dismissed. However, because the court's jurisdictional requisites were satisfied by the putative class, the action could continue. Having conceived of the dismissal of Booth as a rule 17 real party in interest problem, Judge Young found it proper to invoke the provision of the rule that requires the retention of an action to allow substitution of a real party in interest.\textsuperscript{220} It is wholly speculative whether Judge Young's mode of

\textsuperscript{215} Precedent for the Cox-Goodman remedy exists, however. In Norman v. Connecticut St. Bd. of Parole, 458 F.2d 497 (2d Cir. 1972), for example, the court of appeals, after dismissing the original named plaintiff, remanded an action to the district court "to dismiss . . . without prejudice on grounds of inadequacy of representation . . . unless within 30 days another member of the class is granted leave to intervene." Id. at 499. See LaReau v. Manson, 383 F. Supp. 214 (D. Conn. 1974) (district court retained purported class action for 30 days after original plaintiff dismissed); Taylor v. Springmeyer Shipping Co., 15 Fed. Rules Serv. 2d 1233 (W.D. Tenn. 1971) (same for six months). See generally 3B Moore's Federal Practice ¶ 23.04[2] (2d ed. 1979).

\textsuperscript{216} 66 F.R.D. 466 (D. Md. 1975).

\textsuperscript{217} Id. at 475 n.1.

\textsuperscript{218} Id.

\textsuperscript{219} Fed. R. Civ. P. 17(a) provides: "Every action shall be prosecuted in the name of the real party in interest . . . ." As used in rule 17(a), the real party in interest principle is a means of identifying the person who possesses the right sought to be enforced. The rule directs attention to whether the plaintiff has a significant interest in the particular action he has instituted. See generally 6 C. Wright & A. Miller, supra note 4, §§1541-1573.

\textsuperscript{220} Fed. R. Civ. P. 17(a) provides:

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed
analysis was also the Fourth Circuit’s in Cox or Goodman. The close similarity between the last sentence of rule 17(a) and the Cox-Goodman procedure, however, indicates that rule 17 may well have suggested the idea of the device.

Although it provides the only judicial attempt at explaining the Cox-Goodman procedure, the Booth opinion also presents a question as to its analytical soundness. In reaction to the Supreme Court’s decisions in Sosna v. Iowa221 and Board of School Commissioners v. Jacobs,222 subsequent to his initial judgment in Booth, Judge Young issued a supplemental opinion, dismissing the retained “class action.” He read Sosna and Jacobs as establishing that a purported class did not become a legal entity distinct from the named plaintiff until it had been certified under rule 23(c)(1).223 The first step in his analysis of the Cox-Goodman procedure was therefore no longer valid because the putative class could not satisfy the standing requirement separate and apart from the named plaintiff. The proper resolution of the case, upon the named plaintiff’s failure to satisfy the standing requirement, was dismissal.224

If rule 17(a) is strictly applied in this situation, however, it does not necessarily follow that Judge Young’s reading of Sosna and Jacobs precludes the use of the Cox-Goodman procedure. Despite some confusion about the relationship between the rule 17 real party in interest requirement and standing,225 it seems correct that a person who is found not to be the

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This section of rule 17 operates to allow a correction of parties even after the statute of limitations governing the action has run. See generally 6 C. Wright & A. Miller, supra note 4, §1555. Professor Wright explains this provision as reflecting “the general policy of the draftsmen of the federal rules that the choice of a party at the pleading stage ought not have to be made at the risk of a final dismissal of the action should it later appear that there had been an error.” Id. at 705–06. The provision also allows the substitution of parties to relate back to the time the original action was filed. See, e.g., Honey v. George Hyman Constr. Co., 63 F.R.D. 443, 448 (D.D.C. 1974). If the real party in interest is not joined or substituted within a reasonable time, the court should dismiss the suit. What is a “reasonable time” is a matter of judicial discretion. In American Dredging Co. v. Federal Ins. Co., 309 F. Supp. 425 (S.D.N.Y. 1970), for example, the court allowed the original plaintiff 30 days to join his insurer, who as subrogee was the real party in interest. The Advisory Committee Note to rule 17 explains this provision as having been added “simply in the interests of justice . . . . It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.” Advisory Comm. Note, 39 F.R.D. 69, 85 (1966).

221. 419 U.S. 393 (1975).
223. 66 F.R.D. at 475.
224. Id. at 476.
225. The relation of the standing doctrine to the real party in interest requirement is unclear. Professor Wright has found an “overlap” between the two concepts:

To the extent that standing . . . is understood to mean that the litigant actually must be injured by the [defendant], then it closely resembles the
"real party in interest" for rule 17 purposes, because he does not possess the right under substantive law that he is seeking to enforce, will also not have standing. Rule 17 at least implicitly sanctions the continuation of an action despite the presence of some period of time when there is no person before the court with standing. In the class action context, therefore, it is not essential that the putative class, or indeed anyone, have standing while the action is being retained in order to permit a proper representative to present himself. In purely rule 17 terms the first step in Judge Young's analysis in Booth — that the purported class must have standing to provide the court with jurisdiction — is unnecessary, and the Supreme Court's establishment of certification as the birthdate of a separate class entity is irrelevant.

IV. A PROPHYLACTIC RULE AND A SUGGESTED PROCEDURAL REMEDY

A. How to Avoid the Problem

A named plaintiff frequently loses his personal stake in the outcome of the case before certification only because the district court has been dilatory in ruling on the class action issue or because it has acted too quickly and without the benefit of an adequate evidentiary record. To remedy this problem, a certification determination should come at an early stage of the action, but after sufficient discovery has been completed to illuminate the facts adequately. Because a certification determination is "conditional," "alterable," and "amendable," a rule prescribing that it be made at a certain point would not force a judge to make hasty and irrevocable decisions.

In an early and influential discussion of the class action device, Judge Frankel observed: "It may be necessary to provide by local rule that there be a motion at some relatively early stage for at least some preliminary ruling on certification." He cautioned that if a certification determination is

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6 C. WRIGHT & A. MILLER, supra note 4, §1542, at 641. Another treatise has characterized the relationship in this manner: "[T]here is a procedural concept of the proper party plaintiff that is independent of the substantive concept of who it is that has the rights in the matter in controversy that he may enforce through a lawsuit." F. JAMES & G. HAZARD, CIVIL PROCEDURE §9.2, at 396 (2d ed. 1977) (emphasis in original).

226. He will not have an "interest . . . within the zone of interests to be protected . . . by the statute or constitutional guarantee in question." Association of Data Processing Serv. Org'ns, Inc. v. Camp, 397 U.S. 150, 153 (1970). See note 21 supra.

227. In one empirical study of class actions, it was found that in those cases examined the time between the filing of the complaint and a determination of the certification issue varied from one month to nearly four years. Note, The Rule 23(b)(3) Class Action: An Empirical Study, 62 GEO. L.J. 1123, 1141-42 (1974).

228. FED. R. CIV. P. 23(c)(1).

delayed, "members of a putative plaintiff class may be led by the very existence of the lawsuit to neglect their rights until after a negative ruling on this question . . . ." 230 Since Judge Frankel's article appeared, thirteen federal district courts have promulgated local rules prescribing that the plaintiff must move for certification within 60 to 90 days after the filing of the complaint. 231 Requiring an early ruling on certification may, however, mean that the judge's knowledge on the issue is limited to bare allegations in the pleadings or to a very limited amount of discovered information. To reconcile the advantages of an early certification decision with the necessity for adequate discovery, the adoption of a rule similar to one proposed in the Manual for Complex Litigation, which prescribes that the plaintiff move for certification within 90 days of the filing of a complaint, 232 may be advisable.

B. Resolution of the Plaintiff's Pre-Certification Loss of His Personal Stake in the Outcome of a Class Action

Courts should hesitate to bar the continuation of a purported class action because the named plaintiff has lost his personal stake in the case before certification without at least some consideration of the consequences of dismissal. Courts have all too often simply dismissed an action when the named plaintiff loses his personal stake in the case before a class is certified. A recurring rationale for these dismissals is that terminating the action will cause no harm to the putative class members, that "the slate is clear" 233 for them to commence actions on their own behalf.

Upon superficial examination, this reasoning may appear persuasive; however, the "slate" may not always be "clear." Precluding the continuation of a purported class action after the named plaintiff has lost his stake in the case may impede the operation of one of the basic tenets of our judicial structure, appellate review of trial court decisions; may preclude or delay judicial resolution of the putative class members' claims; and may disserve the underlying policy of rule 23.

In every state and in the federal system, appellate review of trial court judgments is available in some form. 234 However, as many courts have pointed out, if the plaintiff's loss of his stake in the case bars him from appealing an earlier denial of class certification, a judge's determination on

230. Id. at 40.
233. Kushulu v. Employers Ins. of Wausau, 557 F.2d 1334, 1338 (9th Cir. 1977).
234. See F. JAMES & G. HAZARD, supra note 225, § 13.6, at 673.
that issue may be effectively immune from review.\textsuperscript{235} Generally, appellate review of a trial court determination may be had only upon appeal from a final judgment in the trial court.\textsuperscript{236}

Until recently, under the so-called "death knell" doctrine, some courts permitted an exception to this rule, allowing interlocutory appeals from orders that had denied or dismissed class certification.\textsuperscript{237} However, in \textit{Coopers \\& Lybrand v. Livesay},\textsuperscript{238} the Supreme Court held that the creation of the "death knell" exception to the final judgment rule was an impermissible exercise of legislative decisionmaking by the courts. Moreover, in \textit{Gardner v. Westinghouse Broadcasting Co.},\textsuperscript{239} the Court found that a denial of class certification in an action seeking injunctive relief could not be immediately appealed under 28 U.S.C. §1292, which permits interlocutory review of the denial of injunctions.\textsuperscript{240} As a result of the Court's renewed emphasis on the final judgment rule, whether the alleged error in denying certification will be reviewed will depend upon a member of the putative class intervening after judgment to seek appeal.\textsuperscript{241} Because these persons are not entitled to notice, it is doubtful that they even know that a class action has been filed on their behalf. Even if they are informed of the existence of the lawsuit, they may be unaware that the putative class is without a representative who can maintain the appeal for them. As aptly stated by the Fifth Circuit: "Review of alleged judicial error ought not be foreclosed so fortuitously."\textsuperscript{242}

\begin{itemize}
\item \textsuperscript{236} The so-called "final judgment" rule stems from 28 U.S.C. §1291 (1970), which provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." See generally Crick, \textit{The Final Judgment as a Basis for Appeal}, 41 \textit{Yale L.J.} 539 (1932); Note, \textit{Appealability in the Federal Courts}, 75 \textit{Harv. L. Rev.} 351 (1961).
\item \textsuperscript{237} The theory underlying the doctrine was that a denial of class action status was the "death knell" of the lawsuit because the claims of the individuals were too small practically to permit the maintenance of separate suits. See generally Comment, \textit{Appealability of a Class Action Dismissal: The "Death Knell" Doctrine}, 39 U. Chi. L. Rev. 403 (1972).
\item \textsuperscript{238} 437 U.S. 463 (1978).
\item \textsuperscript{239} 437 U.S. 478 (1978). See text accompanying notes 151 to 156 supra.
\item \textsuperscript{240} See note 151 supra.
\item \textsuperscript{241} Intervention to appeal in this manner was authorized by the Supreme Court in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), discussed in note 127 supra.
\end{itemize}
There are several other compelling reasons to allow a proposed class action to continue beyond the loss of the named plaintiff's personal stake in the case. Fundamentally, unless the action is permitted to continue, a group of persons with at least arguably valid claims may lose a chance to have their day in court. It is certainly possible that the original plaintiff is the only person with sufficient time, money, or interest to press the action on behalf of the class. Moreover, when the members of the proposed class are mentally incompetent, ignorant of legal rights, or unable to assert their rights for fear of sanction, the class action sought to be litigated by the stakeless plaintiff may represent the only effective means to obtain judicial relief for these persons.

Dismissal of an action because the named plaintiff has lost his stake may be critical in actions brought under Title VII. Most courts that have ruled on the question have determined that once the class plaintiff has exhausted his administrative remedies, the absent class members are not required to go through the administrative process themselves.243 If the action is dismissed before certification, however, the judicial forum will not again become available to the class until a new representative has, like the dismissed plaintiff, gone through the lengthy process of exhausting all available administrative remedies. In light of the attitude of many courts that the maintenance of Title VII actions should be facilitated,244 this consideration may be of considerable moment.

A pre-certification dismissal may also harm those persons in the putative class who had relied upon the class action to adjudicate their personal claims. They might otherwise have pursued actions on their own behalf but may now be barred from doing so by the running of the statute of limitations. Although the Supreme Court has held that the filing of a class action tolls the running of the statute of limitations,245 the statute begins to run again if the case is dismissed. If a person in the putative class has

243. See, e.g., Eastland v. Tennessee Valley Auth., 553 F.2d 364 (5th Cir. 1977); Williams v. Tennessee Valley Auth., 552 F.2d 691 (6th Cir. 1977). See generally 4 H. Newberg, supra note 9, § 7970a; 7A C. Wright & A. Miller, supra note 4, § 1776.

244. For a discussion of Title VII cases, see notes 158 to 169 and accompanying text supra.

245. In American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), the Court ruled that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." Id. at 554. However, this rule appears to be applicable only to cases in which the members of the purported class seek to intervene after the class has been disallowed. It is uncertain whether the rule would allow a class member to bring an individual action after the statute of limitations has run. Moreover, there is language in American Pipe that suggests that the statute may not be tolled when maintenance of the class action is denied "for failure of the complaint to state a claim on behalf of the members of the class...[or] for lack of standing of the representative, or for reasons of bad faith or frivolity." Id. at 553. See generally 3B Moore's Federal Practice ¶ 23.90 (2d ed. 1979); 7A C. Wright & A. Miller, supra note 4, § 1795.
learned through informal publicity about the filing of the class suit but is not aware of its subsequent termination, he may lose his claim due to the passage of time. Even if the putative class member learns of the dismissal in time to overcome the statute of limitations, the intervening delay may make difficult the gathering of evidence and the preparation of a case. A judicial failure to recognize the pre-certification reliance by persons in a proposed class may compel these persons to file overlapping class or individual suits in order to protect themselves.246

Dismissing a proposed class action because the named plaintiff has lost his stake in the case may force the members of the putative class to relitigate in a later proceeding issues that had already been fully adjudicated. Therefore, continuation of the action would further one of the major policy goals underlying rule 23, the avoidance of a multiplicity of lawsuits and the fostering of an attendant increase in court efficiency in the administration of litigation. These policies were recognized in Taylor v. Kerr.247 in which the district court permitted intervention by members of a proposed class after the named plaintiff had lost his stake in the case: “It would be unfair to the parties and a misuse of court time to terminate the present proceedings at this point and require that the process begin again on a new complaint.”248

If, for one of the reasons described above, a court finds it prudent to allow a purported class action to continue beyond the demise of the named plaintiff’s personal stake in the case, it certainly should not be at a loss for a rationale to justify its decision. It could rely on an expansive reading of the “relation back” theory set out in footnote eleven of Sosna v. Iowa.249 Alternatively, it could ascribe to any person who files a complaint with class allegations an interest in exercising fiduciary responsibilities to the members of the class he has sought to represent, an interest that would continue beyond the loss of his individual claim.250 If faced with a claim for injunctive relief, the court could determine that, despite the loss or

246. Indeed, many courts have recognized the reliance interests of putative class members by prescribing pre-certification notice of settlements between defendants and the individual purporting to represent the class. For a collection of cases holding to this effect, see Almond, supra note 115, at 317-21.
248. Id. at 695.
249. 419 U.S. 393, 402 n.11 (1975); see text accompanying notes 30 to 43 supra. This position was advocated by Judge Seitz in his concurring opinion in Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 214-18 (3d Cir. 1977) (Seitz, J., concurring), aff’d, 437 U.S. 478 (1978); see text accompanying notes 151 to 156 supra, as well as by the Third Circuit in Geraghty v. United States Parole Comm’n, 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1421 (1979); see text accompanying notes 77 to 98 supra. See also Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3688 (April 17, 1979) (No. 78-1169), discussed in text accompanying notes 109 to 120 supra.
250. This theory was also proposed by the imaginative Judge Seitz. Gardner v. Westinghouse Broadcasting Co., 559 F.2d 209, 219 (3d Cir. 1977) (Seitz, J., concurring), aff’d, 437 U.S. 478 (1978).
satisfaction of his individual claim, the plaintiff would benefit from the granting of the class-wide relief and thus continues to have a stake in the outcome of the case.\footnote{251} All of these positions have merit, and, especially in light of the Supreme Court's own advocacy of the "relation back" theory, none would appear to affront either the prudential or constitutional aspects of the justiciability doctrine.

After having determined that an action may continue despite the pre-certification demise of the named plaintiff's stake in the case, many courts have permitted that plaintiff to continue serving as class representative.\footnote{252} However, when rule 23 and the judicial interpretation of its terms are closely examined, it becomes apparent that a person with no personal stake in the outcome of a lawsuit can never adequately represent a class of persons whose interests are at stake. One of the major criteria for determining satisfaction of the adequacy of representation requirement in rule 23(a)(4) is whether an aspiring representative will vigorously prosecute the litigation on behalf of the class.\footnote{253} When a person has a personal stake in the outcome of a controversy and will be harmed or rewarded by its resolution, it may be assumed that he will prosecute both his own and the class' claims with vigor. As explained by Professor Homburger, one of the implicit assumptions in allowing class actions to be maintained is that the representative will stand or fall with the class:

The basic philosophy of class actions has remained unchanged through the centuries. Self-interest, the motivating force that sparks the adversary system, also sustains the doctrine of class actions. We may trust man to help his fellow man if by doing so he helps himself — particularly if only by helping others will he be able to protect and promote his own interests. Building on that simple premise, the device provides for the use of man's natural instinct to act in his own best interest in order to achieve justice and procedural efficiency in mass litigation.\footnote{254}

Many courts have felt particularly compelled to allow stakeless plaintiffs to continue in a representative role in actions filed under Title VII of the Civil Rights Act. These courts theorize that because Congress intended the statute to be enforced by private parties through the judicial forum, no roadblocks should be created by strict adherence to procedural niceties.\footnote{255} However, this

\footnote{251. This concept was relied upon in Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977). See notes 161 & 162 and accompanying text supra.}
\footnote{252. See text accompanying notes 158 to 162 supra.}
\footnote{253. The requirements for an adequate class representative are described in note 23 supra.}
\footnote{255. See text accompanying notes 158 to 163 supra.}
liberal application of rule 23 may cause serious harm to a class of persons with valid Title VII claims. The absent class members are held to the judgment in the case whether it is favorable or not. If a stakeless plaintiff loses the action — perhaps because he had not acted as arduously as one with a live stake in the case — because of the operation of res judicata, the members of the class will be bound. Consequently, the defendant will have escaped liability, possibly as a direct result of the court's eagerness to permit an unqualified person to represent the class.

A strict application of rule 23 does not, however, dictate termination of the action whenever the plaintiff loses his personal stake in the case before certification. Rather, even should the court bar the stakeless plaintiff from continuing as representative, it may be able to elicit a new champion from the ranks of the putative class members. A procedural scheme to achieve this result was suggested by the United States Court of Appeals for the Fourth Circuit in Goodman v. Schlesinger. There, perhaps borrowing a concept from the federal rule on real party in interest, the court permitted an action to be "retained" on the docket of the district court until another member of the putative class stepped forward to take over as class representative. Use of this device would solve the dilemma of courts that find it appropriate to allow a proposed class action to continue beyond the demise of the named plaintiff's claim but do not wish to allow that plaintiff to continue as representative.

There are, however, several shortcomings in the Goodman procedure. First, it is doubtful that it is proper to permit the retention on a district court's docket of a case that, despite the Fourth Circuit's misappellation, is not yet a class action. Even if the analogue to rule 17's retention device immunizes the Goodman procedure from attack as not satisfying the constitutional aspects of the justiciability doctrine, the prudential...
dimension of that doctrine ordinarily demands two adverse parties in every action. Second, because attorneys are generally forbidden to solicit clients,\textsuperscript{260} if the attorney for the stakeless plaintiff — assuming that he will continue as counsel for the proposed class — follows the rules of his profession, the members of the putative class will have no way of knowing that an action is being "retained" on their behalf.\textsuperscript{261}

The deficiencies in the Goodman procedure may easily be corrected by modifying the device in two respects. In order to ensure that the retained action has the adverseness demanded by the justiciability doctrine, a court could appoint a guardian ad litem to represent the putative class during the interim between the dismissal of the original plaintiff's claim and the appearance of another member of the proposed class. The court should select someone who would — at least provisionally — be an adequate class representative.\textsuperscript{262} A federal district court could find the power to appoint such a guardian in rule 23(d)(5), which gives the court authority to issue orders relating to "procedural matters" not specifically provided for in the other provisions of rule 23(d).\textsuperscript{263} It could also invoke rule 17(c), which mandates that "[t]he court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action . . .,"\textsuperscript{264} arguing that the headless class is analogous to an incompetent person. Indeed, there is decisional precedent for the appointment of a guardian ad litem in a class action. In \textit{Haas v. Pittsburgh National Bank},\textsuperscript{265} after the defendant agreed to pay a lump sum settlement, counsel for the class filed a petition for


\textsuperscript{261} Indeed, beyond the proscriptions of the ABA's \textit{Code of Professional Responsibility}, many federal district courts have promulgated local rules forbidding communication between attorneys and members and potential members of a class without court approval. See, e.g., D. Md. R. 20. In a case in which he employed the Goodman procedure, Judge Young of the District of Maryland invoked this rule in warning the class attorney not to solicit a new representative without court approval. See \textit{Booth v. Prince George's County,} 66 F.R.D. 466, 473 n.5 (1975).

\textsuperscript{262} It is possible that the attorney who had served as counsel to the original plaintiff could fill this role, but it need not be that person.

\textsuperscript{263} \textit{Fed. R. Civ. P.} 23(d)(5). See \textit{generally} 7A C. Wright & A. Miller, \textit{supra} note 4, §1796. Invocation of rule 23(d)(5) would, of course, require an argument that appointment of a guardian ad litem is a procedural matter "similar" to those dealt with in clauses (1) through (4) of rule 23(d); streamlining the presentation of evidence, notice, "imposing conditions on the representative parties or on intervenors," and amendment of the pleadings to eliminate allegations of the representation of absent persons.


\textsuperscript{265} 77 F.R.D. 382 (W.D. Pa. 1977).
attorney's fees. The district court appointed another attorney to serve as guardian *ad litem* to represent the interests of the class with respect to the amount of fees the class counsel should receive. The original class attorney moved to vacate the appointment, arguing that the court had overstepped its authority. The court denied the motion, noting that without the guardian, there would be no one to dispute the proper amount of fees to be paid from the class fund. The appointment of the guardian assured that the issues would be """presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."

Although the judge in the *Haas* case simply assumed that he had the power to appoint the guardian, in *Miller v. Mackey International, Inc.*, a district court judge found a source of appointive power inherent within rule 23(d).

The *Goodman* procedure should also be modified to provide notice to the putative class members for whom the action is being retained. Rule 23 furnishes ample authority to a district court to prescribe notice at all stages of a proposed class action. Notice to putative class members has frequently been ordered in cases in which the original named plaintiff was revealed to be an inadequate representative before certification. In *Rothman v. Gould*, for example, the named plaintiff in a purported class action, after having been offered a settlement by the defendant, moved for a determination that the class should not be certified. The court suggested that because the motion was made nearly two years after the complaint had been filed, some persons in the putative class may have relied upon the action in lieu of filing their own claims. Even if the original named plaintiff was unwilling to go forward with the case, other members of the proposed class might be prepared to carry on as representatives. Rather than dismiss the action, therefore, the court ruled that """"some decent notice be given to those [persons] plaintiff purported to represent so that such members of what was once said to be a 'class' may appear, if they wish, to . . . seek to be substituted as representatives or take other steps appropriate for protection of their interests.""

The court ordered that notice of the pendency of the action appear for one day in the *New York Times* and one day in the *Wall Street Journal*.

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266. *Id.* at 383 n.1 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)).
268. *Id.* at 535. The court went on to say: """"In addition the court, under its equity powers, possesses the duty to ensure that justice is done."""* *Id.*
269. FED. R. Civ. P. 23(d)(2). Rule 23(d)(2) provides that a court may order: that notice be given . . . as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .
See generally 7A C. WRIGHT & A. MILLER, supra note 4, § 1786.
271. *Id.* at 496.
272. *Id.* at 501. Professor Wright characterized the *Rothman* court's approach as """"sound."""* *7C. WRIGHT & A. MILLER, supra note 4, § 1768, at 654. One student author
Should notice to putative class members be ordered after the original named plaintiff's case is dismissed, who should pay for that notice? In the Rothman case, the district court ordered the defendant to pay. However, Rothman was decided before Eisen v. Carlisle & Jacquelin, in which the Supreme Court held that the cost of the mandatory notice to the members of the class in actions brought under rule 23(b)(3) must initially be borne by the plaintiff as a part of the ordinary burden of financing his own suit. Once the original plaintiff in a proposed class action is out of the case, however, there is no real "plaintiff" as that term was applied in the Eisen case. A solution was suggested in Lowenschuss v. C. G. Bluhdorn. The district court required the disqualified plaintiff in a purported class action to pay the cost of notice to the putative class members, reasoning that he "owed a fiduciary duty to the class." Requiring that anyone who files a class action undertake a duty to pay notice costs would not seem to present a significant inhibition to the use of the device, at least if the extent of the required notice were as limited as that prescribed in Rothman — two days in two newspapers.

Once a putative class member receives notice that an action is being retained on his behalf, he may intervene under rule 24 and seek to become the class representative. Intervention to bolster class representation has been liberally allowed, and many courts have permitted putative class members to intervene in order to continue an action after the named plaintiff has lost his stake in the case. Indeed, the right of any putative class member to intervene in this situation should be absolute under the language of rule 24(a).

V. Conclusion

The Supreme Court has thus far failed to establish a firm doctrinal basis for resolution of issues stemming from a named plaintiff's pre-certification loss of a personal stake in the outcome of a class action. The Court has argued for a "prophylactic rule requiring notice in all cases" in which the named plaintiff is shown to be an inadequate representative before certification. Developments in the Law — Class Actions, supra note 20, at 1544; cf. Shelton v. Fargo, 582 F.2d 1298 (4th Cir. 1978) (pre-certification notice of settlements required only if the district court finds evidence of collusion).
granted certiorari in two cases discussed above; it may shortly provide additional guidance to federal courts grappling with the issues this Comment has explored. In the absence of further direction from the Court, this Comment has argued for an open-minded judicial approach to cases in which a named plaintiff loses his stake before certification. In deciding such cases, courts should look to the consequences of terminating the action. If a court finds that the persons alleged to form the class will not be harmed, then dismissal may be warranted. However, should it become apparent that dismissal will either cause injury to these persons or effectively immunize the district court's conduct from review, continuation of the action is appropriate. It has been further posited that if such an action is permitted to proceed, the stakeless plaintiff should not be permitted to continue as the class representative. Rather, a procedural device through which the proposed class is retained under the management of a guardian ad litem until the putative class members have an opportunity to receive notice and to determine if intervention is prudent should be adopted. Whether or not this proffered remedy is accepted, courts faced with the issues here addressed should strive to resolve them, in Justice Cardozo's words, “not by metaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet . . . but by considerations of convenience, of utility, and of the deepest sentiments of justice.”

protect his interests] unless [that] interest is adequately represented by existing parties.”

281. Geraghty v. United States Parole Comm'n, 579 F.2d 238 (3d Cir. 1978), cert. granted, 99 S. Ct. 1420 (1979), discussed in text accompanying notes 77 to 98 supra; Roper v. Consurve, Inc., 578 F.2d 1106 (6th Cir. 1978), cert. granted, 99 S. Ct. 1421 (1979), discussed in text accompanying notes 124 to 132 supra. Petitions for certiorari have also been filed in Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3465 (U.S. Jan. 9, 1979) (No. 78-1008), discussed in text accompanying notes 170 to 201 supra, and Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3688 (U.S. April 17, 1979) (No. 78-1169), discussed in text accompanying notes 109 to 120 supra.


ADDENDUM

After this Comment went to press, the Supreme Court decided Deposit Guaranty National Bank v. Roper, 48 U.S.L.W. 4279 (Mar. 18, 1980), aff'g Roper v. Consurve, Inc., 578 F.2d 1106 (5th Cir. 1978), and United States Parole Commission v. Geraghty, 48 U.S.L.W. 4296 (Mar. 18, 1980), aff'g in part and vacating in part 579 F.2d 238 (3d Cir. 1978). In Roper, the Court affirmed the Fifth Circuit's decision on the narrower ground that the named plaintiffs had a continuing personal interest in having the class certified so that they could shift part of the costs of litigation to the members of the class. 48 U.S.L.W. at 4283; see text accompanying notes 124 to 132 supra. In Geraghty, the Court affirmed the aspects of the Third Circuit's decision pertinent to this Comment, 48 U.S.L.W. at 4301; see text accompanying notes 77 to 98 supra, but vacated the lower court decision to the extent that it placed the burden of identifying and constructing subclasses on the trial court. See 48 U.S.L.W. at 4301. Certiorari was denied in Susman v. Lincoln American Corp., 587 F.2d 866 (7th Cir. 1978), discussed in the text accompanying notes 109 to 120 supra, 48 U.S.L.W. 3612 (Mar. 25, 1980), and Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), discussed in the text accompanying notes 170 to 201 supra, was vacated and remanded for reconsideration in light of Roper and Geraghty.