# YOU CAN PICK YOUR FRIENDS, BUT YOU CANNOT PICK OFF THE NAMED PLAINTIFF OF A CLASS ACTION: MOOTNESS AND OFFERS OF JUDGMENT BEFORE CLASS CERTIFICATION

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ABSTRACT

*Among all of the complexities of class actions, courts have consistently struggled with applying traditional principals of mootness to the named plaintiff of a proposed class action complaint and determining its corresponding effect class-wide. Courts have reached differing – and often irreconcilable – positions where (1) a named plaintiff's claim has been rendered moot before filing a motion for class certification, or (2) before the motion for certification has been decided. This ambiguity has generated a tactical mechanism for defendants, dubbed by the Court as "picking off" or "buying off" the named plaintiffs. "Picking off" is accomplished by submitting an offer of judgment to the named plaintiff under Federal Rule of Civil Procedure 68, thereby satisfying the plaintiff's claim in its entirety. This Note argues that in a proposed class action suit, a defendant's offer for complete satisfaction of a named plaintiff's claim – a Rule 68 offer – prior to certification should not render the entire claim moot if that offer was made with the intent to avoid class litigation of the issue by intentionally "picking off" the named plaintiff before the named plaintiff could reasonably file for class certification. This Note will suggest several elements that courts should evaluate in determining whether the proposed class action is moot prior to certification, or whether the named plaintiff possesses a live claim and maintains standing to bring the action on behalf of the class. If a court determines that a complaint is acutely susceptible to mootness in light of defendants' tactic of picking off named plaintiffs with a Rule 68 offer to avoid a class action, this Note argues that the motion for certification should "relate back" to the initial filing of the proposed class action complaint.*

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## INTRODUCTION

Class actions pose a troublesome dilemma to the doctrine of mootness, particularly arising from a mandated adherence to a multilayered array of governing laws of procedure and constitutional principles.[1] As the maintenance of a live claim is a constitutional

1. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 n.12 (1980) ("Difficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class *prior* to certification . . . ."); Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004) ("The question of mootness in the class action context is not a simple one."). Because certification is such a crucial stage in class actions, it is crucial that these questions be resolved. *See Roper*, 445 U.S. at 339.

mandate under the "Case or Controversy" requirement of Article III of the United States Constitution, courts must apply the doctrine of mootness in the class action context.[2] Among all of the complexities of class actions, courts have consistently struggled with applying traditional principals of mootness to the named plaintiff of a proposed class action complaint and determining its corresponding effect class-wide.[3] Phrased differently, the point of division among courts results from whether the mootness of the named plaintiff's claim moots the entire proposed class action. This has forced courts to apply "special mootness rules . . . in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own."[4] Whether the entire claim becomes moot has often been determined by the procedural posture of the claim.[5] Courts have reached differing—and often irreconcilable—positions where (1) a named plaintiff's claim has been rendered moot before filing a motion for certification or (2) before the motion for certification has been decided.[6]

This ambiguity has generated a tactical mechanism for defendants, dubbed by the Court as "picking off" or "buying off" the named plaintiffs.[7] "Picking off" is accomplished by submitting an offer of judgment to the named plaintiff under Federal Rule of Civil Procedure 68, thereby satisfying the plaintiff's claim in its entirety.[8] Traditional rules of mootness hold that once a plaintiff's claim has been wholly satisfied, the claim is considered moot and must be

2. U.S. CONST. art. III, § 2.

3. *See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.9.1 (3d ed. 2010) ("Although class actions have forced careful consideration of the question whether mootness principals should be adjusted to look beyond the personal interests of the present representative plaintiff, the process is not yet complete.").

4. Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992).

5. For purposes of this Note, the relevant procedural stages related to the issue of mootness, as applied to the named plaintiff of a class action, are: (1) the filing of the class action complaint, pre-motion for class certification; (2) the filing of a motion for class certification, but prior to a court's decision of class certification; (3) certification of the class; and (4) the appeal of denial of class certification.

6. *Compare Weiss*, 385 F.3d at 348 (holding that a Rule 68 offer to the named plaintiff before moving for class certification did not moot the entire claim), *with* Holstein v. City of Chicago, 29 F.3d 1145, 1147 (7th Cir. 1994) (holding that the proposed class action complaint was moot when a full offer was tendered to the named plaintiff before moving for class certification).

7. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

8. For a detailed overview of this tactic, see George J. Krueger & Kit Applegate, Commentary, *Recent Amendments to Rule 23 Provide Defendants an Opportunity to Render the Case Moot*, 19 ANDREWS DEL. CORP. LITIG. REP. 13 (2004).

dismissed for lack of subject matter jurisdiction.[9] By mooting the named plaintiff's claim, the defendant effectively evades judicial review of the issue and forgoes the expense and potentially harmful effects of litigation. Several courts have refused to apply this rule, however, where the defendant intentionally manufactures mootness by "buying off" or "picking off" named plaintiffs, effectively evading any judicial resolution or review of the underlying claims.[10]

In a proposed class action suit, a defendant's offer for complete satisfaction of a named plaintiff's claim—a Rule 68 offer—prior to certification should not render the entire claim moot if that offer was made with the intent to avoid class litigation of the issue by "picking off" the named plaintiff before the named plaintiff could reasonably file for class certification. While the circuits are split in applying this exception to the issue of mootness in the class action context, this rule preserves the purpose, philosophy, and intention of class action litigation. By allowing a defendant to successively moot small claims of a named plaintiff, that defendant could avoid litigation of the issue and continue its alleged wrongful behavior. Although this approach has been criticized for its lack of adherence to Article III, its opacity in defining a reasonable time frame for filing a certification motion, and its underdevelopment of methods to identify a defendant's ability to "pick off" the named plaintiff,[11] this Note will suggest several elements that courts should evaluate in determining whether the proposed class action is moot prior to certification, or whether the named plaintiff possesses a live claim and maintains standing to bring the action on behalf of the class.

Part I of this Note will briefly summarize the "case or controversy" requirement of Article III and the tension its application sparks between the class action mechanism under Rule 23 and Rule 68 offers of judgment. Part II summarizes the governing case law of the Supreme Court on the subject and how these holdings have been applied in the class action practice. Part III will identify the three predominate positions among the circuit courts and district courts and will develop these drastically divergent approaches to mootness

9. *Weiss*, 385 F.3d at 342; *see also* Lake Coal Co. v. Roberts & Schaefer Co., 474 U.S. 120 (1985).

10. *See, e.g.*, Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981); Susman v. Lincoln Am. Corp., 587 F.2d 866, 869–71 (7th Cir. 1978).

11. *See* Daniel A. Zariski et al., *Mootness in the Class Action Context: Court-Created Exceptions to the "Case or Controversy" Requirement of Article III*, 26 REV. LITIG. 77, 108–12 (2007).

of a class action claim, prior to certification of the class. Part IV will conclude that courts should not dismiss a proposed class action complaint as moot if there is substantial evidence that the claim is acutely susceptible to being "picked off" by the defendant.

## I. ARTICLE III AND MOOTNESS

Article III of the United States Constitution restricts the jurisdiction of federal courts to actual "cases or controversies" between the parties.[12] The "case or controversy" requirement mandates that a cause of action before any federal court present a justiciable controversy, and "no justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments . . . ."[13] In determining whether a controversy is justiciable under Article III, federal courts have implemented the doctrines of standing and mootness.[14]

The fulfillment of the standing requirement is dependent upon three necessary components. First, the plaintiff must have actually suffered "injury in fact."[15] An "injury in fact" must be a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.[16] Second, the actual injury must be causally related or fairly traceable to the challenged action of the defendant, such that the injury was not independently caused by a third party, detached from the complaint.[17] Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[18]

Along with initially demonstrating standing, the doctrine of mootness—also derived from Article III—places further restrictions upon federal court jurisdiction. The doctrine of mootness is composed of two core requirements: (1) the case or controversy must remain alive throughout the entirety of federal judicial proceedings,

12. U.S. CONST. art. III, § 2.
13. Flast v. Cohen, 392 U.S. 83, 95 (1968).
14. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").
15. *Id.*
16. *Id.*
17. *Id.* at 560–61.
18. *Id.* at 561 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)).

and (2) the parties must possess and retain a legally cognizable interest in the outcome of the proceedings.[19] If a plaintiff fails to satisfy either of these constitutional demands at any time during federal judicial proceedings, the claim is rendered moot, and the court no longer has subject matter jurisdiction.[20] Among the traditional pillars of mootness, courts have historically held that "an offer for the entirety of a plaintiff's claim will generally moot the claim."[21] The Seventh Circuit has articulated the purpose of this rule, finding that "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate[,] . . . and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake."[22]

Under Rule 68 of the Federal Rules of Civil Procedure, defendants are granted the ability to make offers of judgment to plaintiffs, thereby allowing plaintiffs to choose between accepting the offer within fourteen days following its conveyance, or rejecting the offer.[23] If the offer is rejected, however, plaintiffs are required to pay the defendant's costs if the amount obtained at the conclusion of litigation is less than the amount contained in the initial offer.[24] Rule 68 is constructed to functionally shield defendants—who are willing to consent to judgment—from costs of further litigation, thereby allowing them to provide plaintiffs with full satisfaction of their claims.[25] This policy functions to promote settlements while avoiding unnecessary litigation.[26]

Although the doctrine of mootness is imputed to class actions, courts apply "special mootness rules . . . in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own."[27] It is well settled that when the class has been certified, the entire action is not rendered moot if a representative plaintiff's claim has been settled. Rather, the class "acquire[s] a

19. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) (citing Powell v. McCormack, 395 U.S. 486, 496 (1969)).

20. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979).

21. Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004); s*ee also* Lake Coal Co. v. Roberts & Schaefer Co., 474 U.S. 120 (1985).

22. Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991).

23. FED. R. CIV. P. 68.

24. *Id.*

25. *See* WRIGHT ET AL., *supra* note 3.

26. 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 68.02(2) (3d ed. 2004).

27. Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992).

legal status separate from the interest asserted by [the named plaintiff]."[28] If, however, the substantive claim of the named plaintiff in a proposed class action is mooted prior to certification, this generally renders the entire proposed class action moot.[29] One may intuitively assume that a named plaintiff—whose claim has become moot prior to class certification—could simply be substituted for another individual from the proposed class, but some courts forbid substitution of a named plaintiff if no class has been certified.[30] Due to an ability to render a class action complaint moot by tendering a Rule 68 offer to the named plaintiff, defendants have used this loophole as a means to successively "pick off" the named plaintiff and evade litigation of the alleged wrongdoing.[31] Recognizing the need to adapt the mootness analysis to the class action mechanism, the Supreme Court has made several attempts to construct exceptions to the doctrine. These decisions, as discussed below, have generated severe disjunction among the federal circuits and district courts.

## II. SUPREME COURT PRECEDENT ON MOOTNESS IN THE CLASS ACTION CONTEXT

The Supreme Court has attempted to reconcile the issue of mootness in the class action context in four influential opinions, and while these opinions offer some guidance to the lower courts, the interpretations of the opinions have been far from uniform. The daunting task of balancing the case or controversy requirement and its original intent with the goals of class actions has resulted in a murky picture of the constitutional requirements.[32]

The first influential case to deal with the issue of mootness in the class action context was *Sosna v. Iowa*.[33] In *Sosna*, the petitioner filed a class action complaint challenging the constitutionality of an Iowa statutory requirement that any petitioner in a divorce action must be

28. Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004) (quoting Sosna v. Iowa, 419 U.S. 393, 399 (1975)).

29. *Id.*

30. *See, e.g.*, Walters v. Edgar, 163 F.3d 430, 432 (7th Cir. 1998) (establishing two conditions for substitution of a named plaintiff: (1) the suit had been properly certified as a class action, and (2) one of the unnamed class members had standing).

31. David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 789–90 (2003).

32. *See* WRIGHT ET AL., *supra* note 3.

33. 419 U.S. 393 (1975).

a resident of Iowa for at least one year before the filing of the petition.[34] Following certification of the class, the named plaintiff had resided in Iowa for less than one year and obtained a divorce in another state.[35] Because petitioner could legally obtain a divorce under the challenged Iowa statute and had already dissolved the marriage in New York, she no longer possessed a live controversy; hence her claim was moot.[36] Although the Court held that her individual claim had become moot, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant."[37] The Court explicitly stated that the named plaintiff must possess a live controversy at the time of filing the complaint and upon certification of the class but recognized that if a claim is capable of repetition, yet evading review,[38] a "controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot."[39] In its dicta, *Sosna* also laid the foundation for an expansive application of the relation-back doctrine as a possibility to avoid these potential problems relating to mootness in class actions.[40]

Following *Sosna*, the Supreme Court addressed the issue of whether a named plaintiff could appeal the denial of class certification if the named plaintiff's individual claim was mooted following that denial. In two 1980 decisions, the Court held that if a named plaintiff's individual substantive claims have expired or become moot—subsequent to a denial of class certification—the named plaintiff may still appeal that denial, so long as the named plaintiff

34. *Id.* at 395–96.

35. *Id.* at 398 n.7.

36. *Id.* at 398.

37. *Id.* at 399.

38. The capable-of-repetition-yet-evading-review exception to mootness applies in cases where a named plaintiff had a live claim at the time a complaint was filed, and "where the claim may arise again with respect to that plaintiff; the litigation then may continue notwithstanding the named plaintiff's current lack of a personal stake." U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980). For a detailed explanation of the development of this exception, see Kenneth H. Leggett, Note, *Article III Justiciability and Class Actions: Standing and Mootness*, 59 TEX. L. REV. 297, 301–03 (1981).

39. *Sosna*, 419 U.S. at 402.

40. *Id.* at 402 n.11 ("There may be cases in which the controversy involving the named plaintiffs . . . becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. . . . [W]hether the certification . . . 'relate[s] back' to the filing of the complaint may depend upon the circumstances of the particular case . . . .").

retained a personal stake in the class certification issue.[41] In *United States Parole Comm'n v. Geraghty*, a federal prisoner who had been denied parole on two occasions brought a suit challenging the validity of the Parole Commission's Parole Release Guidelines.[42] The district court denied the plaintiff's request for class certification on behalf of all federal prisoners who "are or will become eligible for release on parole" and granted summary judgment for the Parole Commission.[43] While the plaintiff's appeal from the denial of class certification was pending, he completed his sentence and was released from prison.[44] The Parole Commission moved to dismiss the appeal as moot, arguing that the plaintiff no longer possessed a live claim.[45]

The Court noted, "A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class."[46] In determining whether a plaintiff may continue to press for class certification after his claim on the merits expires, the Court focused on the plaintiff's "personal stake" in class certification.[47] Because the plaintiff continued to vigorously advocate for his right to class certification, and had done so in a concrete and factual setting capable of judicial resolution, the Court found that he had a personal stake in obtaining class certification and, therefore, retained standing to appeal.[48]

In fashioning an exception to the mootness doctrine, the Court expressed that Article III justiciability is "not a legal concept with a fixed content or susceptible of scientific verification";[49] instead, "the justiciability doctrine is one of uncertain and shifting contours."[50] Similarly, the Court discounted the formalistic interpretation of Article III, finding that "the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with

41. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980); *Geraghty*, 445 U.S. at 404.
42. 445 U.S. at 388.
43. *Id.*
44. *Id.*
45. *Id.* at 394.
46. *Id.* at 402.
47. *Id.*
48. *Id.* at 404.
49. *Id.* at 401 (quoting Poe v. Ullman, 367 U.S. 497, 508 (1961)).
50. *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

exceptions . . . . [I]n creating each exception, the Court has looked to practicalities and prudential considerations."[51] The narrow exception to Article III in *Geraghty* was predicated on the necessity of the named plaintiff possessing an interest in the outcome of the case at the time of certification (and the denial therein).[52] In an attempt to reconcile the Article III issue of the named plaintiff's current lack of a live claim, post denial of certification, the Court found that the appeal from the denial of class certification "relates back" to that denial and preserves the named plaintiff's legally cognizable interest in challenging the denial.[53] The Court, however, explicitly limited its holding to the appeal of denial of class certification.[54]

The concern of "picking off" the named plaintiff first surfaced in *Deposit Guaranty National Bank v. Roper*.[55] In *Roper*, the Court also permitted the named plaintiffs—whose individual claims were mooted—to appeal the denial of class certification.[56] *Roper* involved a class action filed by credit card holders, individually and on behalf of those similarly situated, challenging finance charges imposed on their accounts.[57] Upon the district court's denial of the plaintiffs' Motion for Class Certification, the bank tendered to each named plaintiff the maximum amount they could have individually recovered under the Fair Debt Collections Practices Act (FDCPA).[58] Although the plaintiffs rejected the offer, the district court nevertheless entered judgment in their favor and dismissed the action as moot.[59]

In rejecting the bank's mootness argument, the Court reasoned that "[r]equiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained,

51. *Id.* at 404 n.11.
52. *Id.* at 402.
53. *Id.* The Court applied the relation-back doctrine to distinguish the hypothetical of a named plaintiff who has no personal claim at the time class certification is denied versus the individual whose claim was live at the time of the denial. In such cases, if there was a live claim at the time of denial, but the claim had become subsequently moot, standing to appeal relates back to the date of the denial.
54. *Id.* at 404 ("Our holding is limited to the appeal of the denial of the class certification motion. A named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified.").
55. 445 U.S. 326, 340 (1980).
56. *Id.*
57. *Id.* at 327–28.
58. 15 U.S.C. § 1692 (2006).
59. *Roper*, 445 U.S. at 329–30.

obviously would frustrate the objectives of class actions . . . ."[60] Not only would it limit the administration of justice by allowing defendants to evade litigation over the issue, but the Court noted that such a tactic would waste valuable judicial resources by producing a multitude of successive individual suits.[61] Furthermore, the Court reasoned, "[i]t would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs."[62]

Ultimately, the Court held that an appeal from a denial of class certification "may be permitted from an adverse ruling collateral to the judgment on the merits, so long as the party retains a stake in the appeal satisfying the requirements of Art. III."[63] The Court found that the named plaintiffs retained such a stake in the appeal despite complete satisfaction of their monetary claims because the named plaintiffs had a "desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation."[64]

In its most recent dealings with the issue of mootness in class action suits, the Court expanded upon the rationales of *Roper* and *Geraghty*.[65] In *County of Riverside v. McLaughlin*, the Court held that in cases where the named plaintiff's claim is "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification[,]"[66] the proposed class action may proceed despite the plaintiff's current lack of a live claim. The rationale behind applying the inherently transitory exception to mootness—prior to certification—was that the issue would never reach trial before any member of the proposed class's claim became moot, and the ongoing alleged injury would never reach adjudication.[67]

60. *Id.* at 339.
61. *Id.*
62. *Id.*
63. *Id.* at 334.
64. *Id.* at 344 n.6.
65. *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991).
66. *Id.* at 52.
67. *See* Dennis Lueck, *The Third Circuit Adopts the Relation-Back Doctrine to Prevent Defendants from "Picking Off" Representative Plaintiffs of Putative Class Actions in* Weiss v. Regal Collections, 50 VILL. L. REV. 1285, 1295–96 (2005).

## III. DRAWING LINES WITHIN THE EXCEPTION: DIVERSE STANDARDS AMONG LOWER COURTS

While the Supreme Court has created several exceptions to the doctrine of mootness, it has explicitly restricted those holdings to appeals of denials of certification and post-certification litigation,[68] or rare cases of inherently transitory claims.[69] In *Roper*, the Court foreshadowed the current fracture among the lower courts on the issue of pre-certification mootness, noting that "[d]ifficult questions arise as to what, if any, are the named plaintiffs' responsibilities to the putative class prior to certification; this case does not require us to reach these questions."[70] As predicted, the lower courts have split on this issue, and the differing outcomes regarding the mootness of a named plaintiff have resulted from courts applying various temporal cut-off points in class action litigation.[71]

In drawing lines, many of the circuit courts have been influenced by the Supreme Court's concerns of "picking off" the named plaintiff as an attempt to avoid class action litigation.[72] Similarly, courts tend to weigh whether the tendered offer to the named plaintiff was accepted voluntarily and whether the filing of the motion for certification was timely. Based upon these considerations, three general approaches have been applied to the temporal and procedural position of the complaint.[73] The first approach focuses on the point of certification, holding that if a named plaintiff's claim is moot at any time prior to a judicial determination on the issue, the entire class complaint is moot.[74] The second approach has drawn the line at the filing of a motion for class certification, holding that if a named plaintiff's claim is moot after the motion for class certification has been filed, then the claim need not be dismissed even if the issue of certification has yet to be decided.[75] The third and most expansive

68. *See Roper*, 445 U.S. 326; U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Sosna v. Iowa, 419 U.S. 393 (1975).

69. *See Riverside*, 500 U.S. 44.

70. *Roper*, 445 U.S. at 340 n.12.

71. *See* cases cited *infra* notes 72–74.

72. *See Roper*, 445 U.S. at 339.

73. *See generally* Zariski et al., *supra* note 11.

74. *See, e.g.*, Potter v. Norwest Mortg., Inc., 329 F.3d 608, 613–14 (8th Cir. 2003).

75. *See, e.g.*, Lusardi v. Xerox Corp., 975 F.2d 964, 983–84 (3d Cir. 1992); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981); Susman v. Lincoln Am. Corp., 587 F.2d 866, 870 (7th Cir. 1978).

approach draws the line at the filing of the class action complaint, refusing to dismiss some complaints even if the named plaintiff's claim has been mooted before filing a motion for certification.[76] The following Section will describe each approach in detail and illustrate their application through case law.

### *A. Dismissal of Any Class Action Complaint Where the Named Plaintiff's Claim Is Mooted Prior to Certification Ruling and Does Not Fall Under the Inherently Transitory Exception*

While the strict approach constitutes the minority application of judicial evaluations of mootness in class actions, it nevertheless remains unturned in several circuits.[77] This approach essentially construes *Roper* and *Geraghty* narrowly,[78] dismissing a named plaintiff's class action claim as moot if, at anytime before a ruling on class certification, the individual claim has been satisfied (either voluntarily or by a Rule 68 offer).[79] If, however, the claim is satisfied following a ruling on the certification issue, the entire action should not be dismissed if the named plaintiff retains a personal stake in the litigation.[80]

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76. *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004).

77. *See Potter*, 329 F.3d at 613–14; Morlan v. Universal Guar. Life Ins. Co., 298 F.3d 609, 616 (7th Cir. 2002) ("[U]ntil certification, the jurisdiction of the district court depends upon its having jurisdiction over the claim of the named plaintiffs when the suit is filed and continuously thereafter until certification . . . because until certification there is no class action but merely the prospect of one; the only action is the suit by the named plaintiffs." (citation omitted)); Brunet v. City of Columbus, 1 F.3d 390, 405 (6th Cir. 1993); Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) (holding that where a Rule 68 offer has been made and the amount fully satisfies the named plaintiff's complaint, the complaint should be dismissed unless a class has been certified); Rocky v. King, 900 F.2d 864, 869 (5th Cir. 1990); Tucker v. Phyfer, 819 F.2d 1030, 1033 (11th Cir. 1987); Ambalu v. Rosenblatt, 194 F.R.D. 451, 453 (E.D. N.Y. 2000) ("Though plaintiff's arguments may have some validity after class certification, they do not apply to the present case. No class has been certified and no motion has been made for certification." (citation omitted)).

78. *Brunet*, 1 F.3d at 400 ("[T]he holdings in these cases are limited to the question of a proposed class representative's right to appeal the denial of class certification . . . . We do not read *Roper* and *Geraghty* as doing away with the requirement that the proposed class representative have standing at the time of class certification.").

79. *See Potter*, 329 F.3d at 611 ("[A] federal court should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified a class.").

80. *See id.* ("[A] named plaintiff can appeal a denial of class certification after its individual claim has been satisfied, if the named plaintiff has a continuing personal stake in the outcome.").

*Jones v. CBE Group, Inc.*[81] is an exemplary illustration of the rule and its application. In *Jones*, the plaintiff filed a class action complaint, alleging a violation of the FDCPA. Within two days of filing an answer denying the allegations, the defendant served the plaintiff a Rule 68 offer of judgment, thereby satisfying the entirety of the named plaintiff's claim (including reasonable costs and attorney's fees).[82] After the named plaintiff rejected the Rule 68 offer, and six weeks before the plaintiff moved to certify the class, the defendant filed a motion to dismiss, contending that the offer mooted the named plaintiff's claim.[83]

The Court found that the Rule 68 offer was valid and satisfied the plaintiff's claim in its entirety, thereby rendering the plaintiff's claim moot before moving for class certification.[84] While the court did recognize that "there may be valid policy arguments for not applying Rule 68 in the class context, there is little authority for such an exception."[85] In holding that the Rule 68 offer rendered the plaintiff's claim moot before filing for certification, the court reasoned that "[n]othing in Rule 68 . . . either permits or requires an exception to the application of the rule to class action litigation"[86] and that "nothing in Rule 23 prevents the court from dismissing a putative class action as moot."[87]

### *B. No Dismissal of Class Action Complaint Where the Named Plaintiff's Claim Is Mooted After Filing for Class Certification but Before Certification Has Been Judicially Determined*

In light of the numerous policy concerns listed by the Supreme Court in *Roper*—specifically the potential harm posed by intentionally mooting a named plaintiff's claim and its bearing on the function, process, and benefits of class actions—other circuits have rejected a rigid interpretation of *Roper* and *Geraghty*, holding that these

81. 215 F.R.D. 558 (D. Minn. 2003).
82. *Id.* at 561.
83. *Id.*
84. *Id.* at 564–65 ("[P]laintiff's claim became moot, long before plaintiff had moved for class certification.").
85. *Id.* (internal quotation marks omitted) (citing WRIGHT ET AL., *infra* note 119).
86. *Id.*
87. *Id.* n.4. *See also* Ambalu v. Rosenblatt, 194 F.R.D. 451, 453 (E.D. N.Y. 2000) ("[N]othing prevents the defendant from attempting to facilitate settlement by making a pre-certification Rule 68 offer of judgment.").

cases apply outside of appealing adverse decisions on class certification.[88] Considering the broad policy concerns of picking off the named plaintiff, this sect of case law constructed an exception to mootness doctrine. Further redefinition of the temporal threshold—which divides live claims from moot claims—would regress to an earlier point in the procedural process of class actions.[89] Although courts applying this approach have generally arrived at a unified conclusion—that a diligently and timely filed motion for certification will not moot an entire class action before a hearing on the issue has occurred—these courts have justified this exception through differing judicial mechanisms.[90]

In *Lusardi v. Xerox*, for example, the Third Circuit firmly delineated *Roper* and *Geraghty* as standing for the general principal that "a named plaintiff can appeal an adverse decision on class certification if, at the time the decision was rendered, or . . . at the time the class certification motion was filed, that plaintiff had a live claim."[91] Although the court stressed that other circuits have held that resolution of the named plaintiff's claim ipso facto precludes a district court from addressing the class certification motion,[92] it determined that "allowing a district court to decide a pending class certification motion—filed when the named plaintiff had a live claim—after the

88. *See, e.g.*, Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544 (7th Cir. 2003); Lusardi v. Xerox Corp., 975 F.2d 964 (3d Cir. 1992); Reed v. Heckler, 756 F.2d 779 (10th Cir. 1985); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981); Susman v. Lincoln Am. Corp., 587 F.2d 866 (7th Cir. 1978).

89. *See supra* text accompanying note 88.

90. Several of these circuits, including the Third and Seventh, have seemingly inconsistent approaches to the same question and greatly struggle in reconciling their application. Although these courts purport to adhere to precedent on the issue, their distinctions are unclear, unsatisfactory, and have the substantive effect of eradicating a previous approach. This ambiguity has left the district courts in utter confusion about the issue. *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004); Brown v. Phila. Hous. Auth., 350 F.3d 338 (3d Cir. 2003); *Lusardi*, 975 F.2d 964.

91. 975 F.2d at 981 (internal citations omitted). In *Lusardi*, the named plaintiffs, after two orders decertifying the class, "agreed to a full and unconditional General release" of their individual claims, and those claims were dismissed. *Id.* at 968. Nevertheless, those same named plaintiffs subsequently filed a motion for class certification, and the lower court dismissed the class claims as moot. The Third Circuit, in affirming the dismissal, noted that once the named plaintiffs' claims had been voluntarily settled, those plaintiffs no longer had justiciable claims upon which they could seek class certification. The court determined that the accepted offer did not involve an offer of judgment made in response to the filing of the complaint. Rather, because the settlement in *Lusardi* was reached after lengthy settlement negotiations and two orders decertifying the class, the tactical "picking off" concerns identified in *Roper* were not implicated. *Id.* at 982–84.

92. *Id.* at 977 n.19.

named plaintiff's individual claims have been resolved is consistent with the Supreme Court's holding in *Geraghty*."[93] Applying the relation-back principal to reconcile the differing procedural stages of class action litigation, the court averred that, "[j]ust as appellate review may relate back to an adverse class certification decision made when plaintiffs had a live claim . . ., review of a pending certification motion relates back to its filing, if plaintiff had a live claim at the time."[94]

Furthermore, the court echoed the concerns enumerated in *Roper*—fear of a class action defendant effectively preventing resolution of a class certification issue—finding these threats equally applicable when a claim was live at the time of certification, and a trial court lacked a reasonable opportunity to rule on the merits of the certification issue.[95] Contrasting the potential "picking off" strategy that occurred in *Roper* with the case sub judice, the *Lusardi* court concluded that it need not decide whether there had been a sufficient showing of intent to "pick off" the plaintiff because the claim had already been settled after certification had been denied twice and the offer had been voluntarily accepted.[96]

The Seventh Circuit has also adopted this approach to mootness in the class action context, consistently upholding the principal that an entire class action suit should not be dismissed if a motion for certification has been timely filed.[97] In *Primax Recoveries, Inc. v. Sevilla*, Judge Posner outlined the specific standard and rationale for the rule:

> [T]he mooting of the named plaintiff's claim in a class action by the defendant's satisfying the claim does not moot the action so long as the case has been certified as a class action, or, as in this case, so long as a motion for class certification has been made and not ruled on, unless . . . the movant has been dilatory . . . . Otherwise the defendant could delay the

93. *Id.* at 982 n.32 (citing Wilkerson v. Bowen, 828 F.2d 117, 121 (3d Cir. 1987)).

94. *Id.* at 982.

95. *See id.* at 982–83 (citing Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981)).

96. *Id.* at 982 n.31.

97. *See, e.g.*, Primax Recoveries, Inc. v. Sevilla, 324 F.3d 544 (7th Cir. 2003); Parks v. Pavkovic, 753 F.2d 1397, 1403 (7th Cir. 1985) ("[T]his circuit holds that if the defendant 'buys off' the named plaintiff while a motion for class certification is pending, the case may not be moot."); Susman v. Lincoln Am. Corp., 587 F.2d 866, 866 (7th Cir. 1978).

> action indefinitely by paying off each class representative in succession.[98]

In addition to the Third and Seventh Circuits, the Fifth, Tenth, and Eleventh Circuits have strongly advocated a similar mode of analysis.[99]

### *C. The* Weiss *Approach: No Dismissal of Class Action Complaint Where the Named Plaintiff's Claim Is Mooted Before Filing for Class Certification if No Undue Delay on Part of Named Plaintiff and There Is Evidence of "Picking Off" the Named Plaintiff*

A recent trend within the framework of Article III mootness analysis of class action litigation, advocated and developed by the Third Circuit,[100] has also garnered support among multiple district courts.[101] This third approach is the most expansive and flexible method of analysis and holds that if a named plaintiff's claim is involuntarily mooted by a defendant's offer or actions before filing a motion for class certification, absent undue delay, "the appropriate course is to relate the certification motion back to the filing of the class complaint."[102] Although the relation-back principal has typically been applied to claims inherently transitory due to their time sensitivity, courts advocating the third approach find a further exception to mootness where a named plaintiff's claim is of a nature that is "acutely susceptible to mootness" by a defendant's ability to "pick off" the named plaintiff.[103] In such cases, the third approach takes another temporal leap back to the filing of the initial complaint. If there was a live claim at the time of filing, a subsequent motion for certification by a named plaintiff whose claim had been rendered moot before the motion was made would not be dismissed but would, instead, relate back to the complaint.[104]

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98. 324 F.3d at 546–47 (citations omitted).

99. *See id.*; Lusardi v. Xerox Corp., 975 F.2d 964 (3d Cir. 1992); Reed v. Heckler, 756 F.2d 779 (10th Cir. 1985); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030 (5th Cir. 1981); *Susman*, 587 F.2d 866.

100. *See generally* Weiss v. Regal Collections, 385 F.3d 337 (3d. Cir. 2004).

101. *See, e.g.*, Geismann v. Allscripts Healthcare Solutions, Inc., 764 F. Supp. 2d 957, 964 (N.D. Ill. 2011); Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc., 754 F. Supp. 2d 1009 (W.D. Wis. 2010); Clausen Law Firm, PLLC v. Nat'l Acad. of Continuing Legal Educ., No. 10-cv-01023-JPD, 2010 WL 4396433 (W.D. Wash. Nov. 2, 2010).

102. *Weiss*, 385 F.3d at 348.

103. *See id.* at 347.

104. *Id.* at 348.

The Third Circuit first proposed and applied this standard in *Weiss v. Regal Collections*,[105] and its rationale has been crucial to the adoption of the standard by the district courts. In *Weiss*, the plaintiff filed a class action complaint alleging unfair debt collection practices in violation of the FDCPA and sought both statutory damages and declaratory relief.[106] Before filing an answer, and prior to the plaintiff moving for class certification, the defendants offered the named plaintiff the maximum recovery permitted under the FDCPA.[107] Following the plaintiff's rejection of the offer, the defendants filed a motion to dismiss for lack of subject matter jurisdiction based on the argument that the plaintiff's claim had become moot when the defendants made a settlement offer for the maximum allowable recovery under the statute.[108]

Although prior holdings in the Third Circuit would seemingly require dismissal of the complaint as the claim was moot prior to filing a motion for certification,[109] the *Weiss* court nevertheless reversed the district court's dismissal of the named plaintiff's complaint.[110] In allowing the named plaintiff to file his motion for class certification, the court recognized that the purpose of class action suits is to reduce litigation costs, especially in cases where the monetary damages are relatively small.[111] By allocating the costs of litigation among an entire class of plaintiffs, the Third Circuit noted that a class action suit provides litigants with a vehicle for small claims that would be financially impractical if pursued individually.[112] The

105. 385 F.3d 337 (3d Cir. 2004).

106. *Id.* at 339.

107. *Id.* FDCPA sets the maximum recovery for an individual plaintiff at $1000. *See* 15 U.S.C. § 1692k(a)(2)(A) (2006).

108. *Weiss*, 385 F.3d at 340.

109. *See* Brown v. Phila. Hous. Auth., 350 F.3d 338, 343 (3d Cir. 2003) ("[W]hen claims of the named plaintiffs become moot before class certification, dismissal of the action is required." (quoting Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992))); *Lusardi*, F.2d at 981. The *Weiss* court noted that tension was created by its new approach, and tenuously distinguished the cases based upon voluntary settlements and a clear lack of defendant's intentional "picking off." *Weiss*, 385 F.3d at 348–49. This is clearly adverse to the bright-line holding in *Lusardi* that the relation-back doctrine is only applicable after a motion for certification must be filed. *Lusardi*, 975 F.2d at 983 (noting that to hold otherwise would render the constitutional doctrine of mootness hollow). To the extent that *Weiss* extends the bright-line rule to pre-certification with no filing of a motion, it has functionally seceded from the rule and reasoning in *Lusardi*.

110. *Weiss*, 385 F.3d at 348.

111. *Id.* at 345.

112. *Id.*

court also noted that "[a]llowing defendants to pick off putative lead plaintiffs contravenes one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action"[113] and that such a tactic would "waste judicial resources by 'stimulating successive suits brought by others claiming aggrievement'" without ever reaching a meaningful resolution.[114]

Based upon these conclusions—and drawing from the enumerated concerns of picking off the named plaintiff in *Roper*—the *Weiss* court ultimately applied the relation-back doctrine and reversed the district court's ruling on the motion to dismiss.[115] Under the traditional application of the relation-back doctrine in the class action context, courts have applied the relation-back doctrine in two specific procedural scenarios: (1) during an appeal of the denial of class action litigation—subsequent to the named plaintiff's claim becoming moot—which was deemed to relate back to the date of the denial where the named plaintiff retained a personal stake in appealing the denial,[116] and (2) in cases where the named plaintiff filed the motion for class certification, but the claim was "so inherently transitory that the trial court [would] not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."[117]

While the plaintiff in *Weiss* never filed a motion for class certification, and his claims were not "inherently transitory" in the sense that they were not time-sensitive, the Court found that the plaintiff's claims were acutely susceptible to mootness due to the defendants' tactic of "picking off" named plaintiffs to avoid certification.[118]

## IV. ANALYSIS

Courts have been faced with the daunting task of reconciling the separate sources of law (Rule 23, Rule 68, and Article III) into a unified legal doctrine, faithfully adherent to the prescriptions and underlying purposes of each authority. These legal authorities, however, consist of several doctrinally inconsistent principles, and, there-

113. *Id.*
114. *Id.* (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).
115. *See id.* at 343–48.
116. *See id.* at 342–43.
117. *Id.* at 346 (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980)).
118. *Id.* at 347 nn.15–16.

fore, have resulted in a scattered assortment of differing approaches to the question of mootness. While total reconciliation of the letter and policies of these laws is procedurally and substantively futile—absent congressional intervention—the Third Circuit's approach in *Weiss* offers the most practicable method of incorporating the varying legal concepts into the class action sphere of jurisprudence.

This Part will first analyze and compare the underlying purposes, policies, and requirements of Rules 23 and 68 of the Federal Rules of Civil Procedure and the Case or Controversy Clause of Article III. Once identified, these considerations will then be imputed to the three approaches, as defined in Part III, effectively illustrating that the *Weiss* approach is the dominant method for evaluating and remedying purposefully manufactured mootness in class actions. Finally, it will be argued that the *Weiss* approach is judicially administrable despite criticism that (1) it lacks a proper test for determining whether a claim is acutely susceptible to mootness[119] due to a defendant's ability to pick off the named plaintiff, and (2) that it fails to identify a reasonable opportunity to seek certification. To the extent that these specific issues may be underdeveloped by the *Weiss* approach, this Part will suggest several elements that courts applying the *Weiss* approach should evaluate when determining whether the proposed class action is moot due to defendant's "picking off" the named plaintiff prior to certification.

### *A. Reconciliation of Rule 23 and Rule 68 Through the* Weiss *Approach*

Policy arguments aside, nothing in the language of Rules 23 and 68 restricts the application of Rule 68 offers to class action complaints.[120] Assuming Congress will not amend the rules, the flexibility of the *Weiss* approach poses the best solution to reconciliation of the two Rules when a named plaintiff's claim has been moot and no class has been affirmatively certified.

The complexity that courts face when attempting to reconcile Rules 23 and 68 in the class action framework derives from the inherently divisive functionality of their interplay. Rule 68 is constructed to functionally shield defendants—who are willing to con-

119. *Id*. at 347 (quoting Comer v. Cisneros, 37 F.3d 775, 797 (2d Cir. 1994)).

120. 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3001.1 (2d ed. 1997).

sent to judgment—from costs of further litigation, thus allowing them to provide plaintiffs with full satisfaction of their claims.[121] This policy functions to promote settlements while avoiding unnecessary litigation.[122] While Rule 68 promotes settlement, Rule 23 promotes widespread litigation.[123] In *Roper*, the Court defined the primary purposes of Rule 23 as the following: (1) reduction of litigation costs through disbursement of fees throughout a class, (2) aggregation of small claims that might otherwise never reach a court, therefore allowing individual claimants the ability to recover for such an injury, and (3) conservation of judicial resources by consolidating multiple claims into one action.[124] In light of these observations, the court recognized that "buying off" or "picking off" a named plaintiff clearly frustrates these purposes.[125]

The *Weiss* approach to analyzing the mootness of a named plaintiff's claim offers the best solution to preserving the primary purposes of Rule 23 while not categorically disposing of the defendant's ability to make a Rule 68 offer to an individual plaintiff. First, because a Rule 68 offer could be made before a motion for certification has been filed (evidencing a clear intent to pick off a named plaintiff), drawing the cut-off point for a Rule 68 offer at the filing of the motion for certification would do little to thwart defendants from intentionally mooting a claim.[126] Defendants with this intention would simply propose the offer earlier in the procedural process. Thus, the frustration of Rule 23 would still occur, just at an earlier point in the litigation. By allowing a district court to consider a claim's susceptibility to mootness, the timing of the proposed Rule 68 offer, the nature of the offer, and the named plaintiff's acceptance or denial of the offer, a court can prevent the frustration of Rule 23's purposes throughout the entire process. The strict approach to mootness ignores these concerns altogether, allowing "picking off" to occur at any time before certification has been decided. And while

121. *Id.*
122. MOORE ET AL., *supra* note 26.
123. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338–40 (1980).
124. *Id.* at 339–40.
125. *Id.* at 339.
126. *But see* Lusardi v. Xerox Corp., 975 F.2d 964, 983 (3d Cir. 1992) (expressing concern that by allowing a named plaintiff with a moot claim to file a motion to certify a class, courts would essentially eviscerate Article III's Case or Controversy requirement).

this strict approach serves the function of Rule 68, it does nothing to balance the frustration that this tactic places upon Rule 23.[127]

Second, although a defendant's ability to "pick off" a named plaintiff is restricted in cases where a plaintiff's claim is acutely susceptible to mootness[128] through buying off the named plaintiff, the *Weiss* approach offers a flexible mode of analysis that allows defendants to make individual offers in certain circumstances. In cases where there has been an undue delay in filing a motion for certification, and a defendant makes a Rule 68 offer during the procedural interim, a claim is moot for the purposes of filing a class action certification motion under *Weiss*.[129] Moreover, the restriction on Rule 68 offers applies only to those cases where the defendant intentionally manufactures the mootness of a named plaintiff's claim for purposes of avoiding class action litigation.[130] If the Rule 68 offer was made at any time before a motion for certification was filed or before a decision on certification had been procured, and the named plaintiff accepted the offer, then the Rule 68 offer would moot the entire proposed class action complaint.[131] By accepting such an offer, it cannot be argued that a named plaintiff has been involuntarily picked off because the motion for certification could have been filed but for the acceptance of the offer. The exception is only concerned with proposed class actions that would never reach a judicial determination due to a defendant's ability to involuntarily moot individual claims, thereby applying the relation-back doctrine to the proposed class action complaint.[132] If a plaintiff can accept or decline the offer, then it is not solely the defendant's action that would prevent adjudication of the class issue, and the relation-back doctrine is unnecessary.

Finally, commentators have expressed concern that the *Weiss* approach would prevent the "sincerely apologetic" defendant—who has concluded that his actions toward the named plaintiff did inflict

127. *But see* Koysza, *supra* note 31, at 789–95 (discussing how permitting defendants to pick off named plaintiffs may, in fact, contravene one of the purposes of Rule 68—to avoid unnecessary and protracted litigation). Koysza argues that a "more efficient practice . . . is to prevent defendants from thwarting class actions that otherwise meet the prerequisites set forth in Rule 23." *Id.* at 794–95.

128. Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004) (quoting Comer v. Cisneros, 37 F.3d 775, 797 (2d Cir. 1994)).

129. *Id.* at 348.

130. *See id.*

131. *Id.* at 349.

132. *See id.*

a legal injury upon the individual—from resolving the individual claim without class litigation.[133] Although it is conceded that the *Weiss* approach may partially limit a defendant's ability to settle some individual claims with the named plaintiff of a proposed class action, it does not go so far as to entirely restrict the defendant's ability to make an individual an offer.[134] First, the exception is only applied to cases that are acutely susceptible to mootness due to a defendant's ability to moot the named plaintiff's claim, such as claims where the remedies are fixed by a statute that provides low maximum recovery value ($100.00 for example).[135] This flexibility allows courts to investigate circumstances probative of intentional mooting while evaluating precisely what these commentators fear—claims that are not susceptible to mootness. Second, a defendant may offer the settlement before the named plaintiff files a motion for certification, and the named plaintiff is free to accept the offer, thereby mooting the class action complaint.[136] The *Weiss* exception would only impact those offers that are denied by the named plaintiff but have the effect of involuntarily mooting the claim.

Third, if the offer is declined, and the defendant has not inflicted the same widespread injury to an entire class but believes that "its conduct toward potential class members cannot be addressed in the aggregate due to a predominance of individual issues,"[137] then it is unlikely that the case will ever pass the certification stage[138] or be designated as a claim that is acutely susceptible to mootness due to the defendant's ability to pick off the named plaintiff.[139] Moreover, if a claim in a proposed class action suit was so individualized, then a court applying the *Weiss* approach would not designate the claim as

133. *Cf.* Zariski et al., *supra* note 11, at 111 ("*Weiss* appeared to assume, without any detailed factual record, that the defendants settled the plaintiff's claim for a nefarious reason.").

134. Defendants are free to make an offer to the named plaintiff, but if the named plaintiff rejects, defendants cannot turn around and file a motion to dismiss. *Weiss*, 358 F.3d at 349.

135. *Id.*

136. *Id.*

137. Zariski et al., *supra* note 11, at 111.

138. *See* FED. R. CIV. P. 23(a)(3) ("[T]he claims or defenses of the representative parties are typical of the claims or defenses of the class."); *see also* FED. R. CIV. P. 23(a)(2) (requiring "questions of law or fact common to the class").

139. *Cf. Weiss*, 385 F.3d at 348. The *Weiss* exception is not concerned with picking off individual claims because the purpose of Rule 68 is to allow defendants to enter an offer of judgment. *Id.* at 345. Therefore, if the class is so individualized, the *Weiss* court would not find this type of distinct and individualized claim troublesome, because it would likely fail the predominance requirement at certification.

acutely susceptible to mootness because defendants could not continuously "pick off" named plaintiffs to avoid certification of an unnamed class.[140] There is no continuous evasion of adjudication of an aggregated issue because the predominance of individual issues among the class would not be represented by the named plaintiff's individual claim that became moot.[141] The defendant could therefore oppose class certification on the predominance issue or satisfy the named plaintiff's claim without fear of a court finding that there was an intention to avoid class action litigation through successive "picking off" tactics.

### *B. Application of the Relation-Back Doctrine to the Filing of the Complaint Is Consistent with the Court's Flexible Interpretation of Article III*

The Court has yet to consider whether the relation-back doctrine should be applied prior to filing a motion for certification,[142] but considering the Court's flexible approach to mootness and its concern of "a defendant's tender of judgment before an affirmative ruling on class certification could be obtained,"[143] the *Weiss* exception to mootness best captures these ideals. Although it has been argued that the *Weiss* approach would eviscerate the constitutional doctrine of mootness,[144] the Court has recognized that Article III "is not a legal concept with a fixed content or susceptible of scientific verification"[145] but "one of uncertain and shifting contours."[146] Moreover, the Court has noted that "the strict, formalistic view of Art. III jurisprudence, while perhaps the starting point of all inquiry, is riddled with exceptions . . . . [I]n creating each exception, the Court has looked to practicalities and prudential considerations."[147] The *Weiss* approach cannot eviscerate such a malleable doctrine, and therefore,

140. If the named plaintiff's claim was so individualized, there would be no additional named plaintiffs to pick off. Thus, this type of claim is not of the same genus with which the *Weiss* court is concerned.

141. *See supra* note 127 and accompanying text.

142. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 n.12 (1980) ("Difficult questions arise as to what . . . are the named plaintiffs' responsibilities to the putative class *prior* to certification; this case does not require us to reach those questions.").

143. *Id.* at 339.

144. Zariski et al., *supra* note 11, at 108.

145. Poe v. Ullman, 367 U.S. 497, 508 (1961).

146. Flast v. Cohen, 392 U.S. 83, 97 (1968).

147. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 406 n.11 (1980).

it is consistent with the evolving approach of the Article III Case or Controversy requirement.

Courts applying the narrow approach to Article III mootness in class actions—strictly limiting the applicability of the exception to the conclusion of the certification issue—fail to capture the Court's conception of Article III jurisprudence.[148] By constructing an impenetrable barrier to an entire class action complaint due to the involuntary mootness of the named plaintiff's claim (prior to a determination on certification), this approach ignores the "shifting contours" of Article III.[149] Courts should not ignore "practicalities and prudential considerations . . . . [E]ach case must be decided on its own facts."[150] Under *Geraghty*, a court's mootness determination should be flexible and should not be locked into a specific procedural stage of the certification process.[151]

While this narrow approach of line drawing does create a bright-line rule, therefore simplifying its administrability for the purposes of class actions, it fails to account for the burdens that such a rule would place on judicial resources and the possibility of defendants forcing settlements upon the named plaintiff to avoid adjudication of the issue.[152] The Court did not intend to make a static and bright-line rule for evaluating mootness in class actions; it intended to create a mere starting point prior to analysis of its special rules and exceptions.[153]

Although Courts applying the second approach—where a named plaintiff must possess a live claim at the time a motion for certification was filed—do recognize the ramifications of allowing defendants to pick off named plaintiffs, their consideration is conditioned upon a filing for certification.[154] If the doctrine of mootness is flexible and adaptable to the specific concerns of "picking off" discussed in

148. *See supra* text accompanying notes 84–87.

149. *See Geraghty*, 445 U.S. at 401, 406 n.11.

150. *Id.* at 406 n.11.

151. *Cf.* WRIGHT ET AL., *supra* note 3 ("There is plainly room in [*Geraghty*] either for the wholesale disregard of mootness of a representative's individual claim, or for ad hoc dismissals whether mootness occurs before certification is decided, after certification is granted, or after certification is denied.").

152. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339–40 (1980).

153. *See Geraghty*, 445 U.S. at 406 n.11 (noting that once exceptions are made, bright-line rules become more difficult to draw, but finding that Article III was intended to be flexible and capable of formalistic adherence).

154. *See* discussion *supra* Part III, Section B.

*Roper*, and there has been a past exception for inherently transitory claims before a motion for certification of a class,[155] then why would these courts not allow for consideration of picking off before the motion is filed? Under the second approach, a defendant could repeatedly make an offer for complete judgment at any point before a motion for certification was filed while clearly intending to evade litigation over the certification issue. Courts applying this standard would grant a motion to dismiss the proposed class action complaint, regardless of any indicia of "picking off" through involuntary acceptances of the offer.[156] But if an offer is made a day after a motion for certification has been filed, and the court has yet to consider the issue, the proposed class action complaint may not be dismissed. The implementation of this artificial deadline results in an absurd temporal fiction that contravenes previous notions of flexibility, defies the underlying rationale and policy of Rules 23 and 68, and unnecessarily limits access to legal recourse for ongoing and continuous civil harms.

This result is puzzling because, regardless of whether a named plaintiff's claim becomes involuntarily moot prior to a motion for certification (but after the proposed complaint has been filed) or directly after the filing of the motion, no class has been certified or no judicial inquiry on the certification issue would have occurred. So if the overarching concern leading courts to apply the relation-back doctrine to the named plaintiff's mooted claim is a defendant's ability to "pick off" the named plaintiff, and there has been no undue delay in filing the motion for class certification, then it is unclear as to why the line must be drawn at the actual filing of the motion. Proponents of this view will argue that once a motion for certification has been filed, an offer of full judgment that satisfies the named plaintiff's claim does not resolve the dispute between the defendant and the unnamed class members, and although the class does not

155. *See* Koysza, *supra* note 31, at 804–05 (comparing similarities and concerns of inherently transitory claims with "picking off" tactics).

156. Courts applying this second approach have recognized that defendants, prior to a motion for class certification, can pick off a named plaintiff. *See, e.g.*, Ptasinska v. U.S. Dep't of State, No. 07 C 3795, 2008 WL 294907, at *3 (N.D. Ill. Jan. 31, 2008) (finding that Rule 23 permits defendants to pick off plaintiffs one by one if offers are made to named plaintiffs before filing a class certification motion); White v. Humana Health Plan, Inc., No. 06 C 5546, 2007 WL 1297130, at *7 (N.D. Ill. May 2, 2007) ("The rule, as it stands presently, does permit a defendant to 'pick off' plaintiffs one by one, if offers are made before motions for class certification are filed.").

exist because the court has not had a chance to review the certification issue before the named plaintiff was "picked off" by defendant, review of the pending certification issue will relate back to the filing of the motion for certification. [157]

The same pattern of reasoning, however, can be imputed to claims that have been intentionally mooted by defendants' offer of full judgment to the named plaintiff prior to filing a motion for certification. In both cases, there is no certified class, so the interest possessed by the proposed class is an equivalent fiction until certified. As Justice Stevens explicitly argued in his concurrence in *Roper*, "[I]n my opinion, when a proper class-action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purposes of the court's Article III jurisdiction."[158] Thus, a defendant's tactic of picking off the named plaintiff "may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion."[159] Therefore, the certification motion should relate back to the filing of the initial complaint, or if no motion has been filed, the named plaintiff should be allowed to file the appropriate motion without dismissal of the entire proposed class action complaint. This is contingent on the fact that plaintiff possessed a live claim at the time of filing for certification and that the claim was involuntarily mooted by the offer.

If the purpose of the relation-back doctrine is to counter the defendant's ability to successively "pick off" named plaintiffs to avoid certification proceedings, then the reasoning for the exception is undermined when courts bury their heads in the sand, refusing to surface until a motion has been filed. Defendants will simply make their offers more quickly in jurisdictions adopting this approach, leaving the courts facing the same concerns of wasted judicial resources, evasion of class litigation, and perpetuation of an alleged ongoing wrong without possibility of class-wide relief. This will only transport these concerns to an earlier stage in the proposed class

157. *See, e.g.*, Greisz v. Household Bank, 176 F.3d 1012, 1015 (7th Cir. 1999) ("[A]n offer to one is not an offer of the entire relief sought by the suit.") (citing Alpern v. Utilicorp United, Inc., 84 F.3d 1525, 1539 (8th Cir. 1996); *Roper*, 445 U.S. at 341 (1980))).

158. *Roper*, 445 U.S. at 342 (Stevens, J., concurring).

159. Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004).

action proceedings.[160] Contrary to suggestions from courts adopting the second approach, placing the burden on the named plaintiff to file a motion for class certification in correlation with or immediately after filing a proposed class action complaint is not an efficient solution to the "picking off" concerns of *Roper*.[161]

First, this "remedy" would force plaintiffs to quickly file a class certification motion before the development of the record is complete.[162] While motions for certification are sometimes filed congruently with proposed class action complaints, "the need for preliminary discovery may make it impossible in many cases to file a motion for class certification along with the complaint."[163] Second, because the Court has found that "[a] district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings,"[164] plaintiff's counsel should have sufficient time to conduct preliminary discovery to ensure that the motion is sufficiently pled. A rush to the courthouse to file the motion could result in the denial of certification and waste substantial judicial resources—which otherwise could have been saved had proper discovery occurred. Since certification is so important, it should not be prematurely filed. Finally, plaintiffs have a positive right not to file their motions in correspondence with their proposed class action complaint. Rule 23(c)(1)(A) does not require immediate filing of a motion for certification but only calls for a decision "[a]t an early practicable time after a person sues . . . as a class representative."[165] If the act of "picking off" coerces named plaintiffs to file immediately, they would lose this statutory right, and the language would be rendered meaningless.

Proponents of an alternative approach to *Weiss* have suggested reconciling Rules 23 and 68 under Article III.[166] It would require that

160. *See* Koysza, *supra* note 31, at 795–98.

161. *See* Martin v. PPP, Inc., 719 F. Supp. 2d 967, 973 (N.D. Ill. 2010) (quoting *White*, 2007 WL 1297130, at *7) ("This could cause some waste of judicial resources if the same class action suit was brought repeatedly . . . only to be mooted time and time again. This can be avoided . . . by filing a motion for class certification immediately.").

162. *See* Krueger & Applegate, *supra* note 8.

163. Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc., 754 F. Supp. 2d 1009, 1015 (W.D. Ill. 2010) (citing Szabo v. Bridgeport Machs., Inc., 249 F.3d 672, 676 (7th Cir. 2001)); *see also* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166 (3d Cir. 2001).

164. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

165. FED. R. CIV. P. 23(c)(1)(A).

166. Essentially, this approach would dismiss the entire proposed class action as moot if, prior to a ruling on the certification issue, an offer had been voluntarily accepted by the

"a defendant's offer of judgment must extend to the asserted claims of all potential class members."[167] If the offer was accepted, the court would determine whether it was a reasonable settlement under Rule 23(e). If the offer was declined, the normal cost shifting would burden the named plaintiff if certification were denied or if the plaintiff failed to obtain a better result.[168] This suggested approach, while intriguing, fails to recognize that the language of Rule 23(e) constrains a court's ability to evaluate settlements of an uncertified class: "[T]he claims, issues, or defenses of a *certified class* may be settled, voluntarily dismissed, or compromised only with the court's approval."[169]

A court has no jurisdiction over a class that has yet to be certified, and a named plaintiff could not accept an offer for an uncertified class because he only possesses an individual claim at the time the Rule 68 offer was made.[170] So unless the proponents of this approach are willing to concede that the unnamed class has some interest before certification and are parties to the proposed complaint, then an offer of full judgment would still moot the named plaintiff's individual claim, and the action would be dismissed.[171] But if it is conceded that the unnamed/uncertified class members are considered parties for Article III purposes in the proposed action prior to certification, then there would be no issue of "picking off" because as long as a member of the unnamed class possessed a live claim, an action could be maintained under Article III and would not be dismissed.[172]

named plaintiff or "by actions taken in the ordinary course of a defendant's operations," as judged from an objective standpoint, unless a traditional exception to the mootness doctrine applies. It would also require that the Rule 68 offer be made to the class at large. It is unclear how objectively judging "the ordinary course of defendant's actions" would be any more clear than judging a claim "acutely susceptible to mootness" by defendants' ability to "pick off" the named plaintiff. *See* Zariski et al., *supra* note 11, at 113–16.

167. *Id.* at 113.

168. *Id.*

169. FED. R. CIV. P. 23(e) (emphasis added).

170. *See* Greisz v. Household Bank, 176 F.3d 1012, 1015 (7th Cir. 1999).

171. This is because there is no class, only the individual plaintiff, and therefore, if defendant made an offer for full judgment of his individual demand, it would moot the claim. A defendant cannot make an offer to an entity that does not legally exist.

172. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 342 (1980) (Stevens, J., concurring).

### *C. The* Weiss *Approach: A Judicially Administrable Methodology*

The *Weiss* approach has been attacked for its lack of a bright-line rule and underdevelopment of enumerated guidelines in determining when the exception should be applied. The *Weiss* case did not define rigid elements for determining an "undue delay in filing a motion for certification" or a clear definition of claims that are "acutely susceptible to mootness in light of defendants' tactic of 'picking off' lead plaintiffs with a Rule 68 offer to avoid a class action."[173] Although it is likely that the *Weiss* approach was intentionally formulated to be adaptable due to the Supreme Court's recognition of "the flexible character of the Art. III mootness doctrine . . . [that] 'is one of uncertain and shifting contours,'"[174] this Section will provide a formulaic outline and list several elements courts should consider when applying the *Weiss* approach.

Courts must analyze the procedural posture of the proposed class action complaint. This involves a preliminary inquiry into whether the named plaintiff of the proposed class action had standing at the time the complaint was filed and possessed a live claim throughout the litigation process until it was rendered moot by the defendant's Rule 68 offer. Assuming the named plaintiff had standing at the time of the complaint, the exact stage in the procedural process where the offer was made must be determined. If the offer was made once a class has been certified or while awaiting a decision on the certification issue, and the claim has been made moot by defendant's offer of judgment, the complaint should not be dismissed since the determination of a live claim relates back to the filing of the motion for certification. If the offer was voluntarily accepted at any time before certification, the proposed class action should be dismissed as moot ipso facto.

If the offer was made before the named plaintiff could file for class certification, and there was no undue delay in the filing of the motion, determination of certification should relate back to the filing of the proposed complaint. The undue delay determination will undoubtedly be locally driven, depending on each district's rules on filing for certification. District courts can establish tentative schedules and use these schedules as a default. Obviously, some cases are

173. Weiss v. Regal Collections, 385 F.3d 337, 347–48 (3d Cir. 2004).

174. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400-01 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)).

more complex than others, but due to the flexibility of this doctrine, courts can take into consideration complexities of the proposed complaint. For example, investigations into damages for fixed statutory injuries in personal injury cases will likely be less complex than securities fraud litigation. Courts can apply their experience with different types of litigation, in conjunction with their devised litigation schedule, to determine whether there has been an unreasonable delay in the filing of the motion.

In analyzing whether a claim is of the type that is acutely susceptible to mootness—due to a defendant's ability to pick off the named plaintiff and evade litigation of the issue—a district court should objectively consider whether such a tactic is financially feasible. This analysis will involve an objective investigation into the nature of the claim, the amount of the Rule 68 offer, and the timing of the offer. First, if the claim is for a relatively small, statutorily fixed amount, this should create a presumption of susceptibility to "picking off." Because a statute defines the claim, the defendant is aware of what an offer for full judgment will consist of. If the alleged injuries and damages suffered are not as defined, it will be less likely that the claim is susceptible to mootness, as it will not be clear whether the offer satisfies the entire claim.

Moreover, smaller amounts are more likely to be picked off than larger amounts because defendants can only pick off a named plaintiff for so long until picking off becomes financially impractical. Therefore, inquiry into the amount of the alleged damage and the defendant's ability to fund systematic "picking off" shall guide courts' inquiries. For example, if each named plaintiff was alleging $5,000,000 worth of damage (assuming damages were clearly defined, and an offer of judgment would effectively render the claim moot), and a company would only be able to pay off ten out of potentially one hundred unnamed class members, the concerns of methodical evasion of litigation are not as severe. Because, eventually, a defendant could not afford to moot every claim, the case would eventually reach trial. This example is admittedly simple, and uncertainty exists as to what is financially feasible at the intermediate levels. This is precisely why courts should apply a flexible, ad hoc analysis. If the named plaintiff can demonstrate that a defendant is financially capable of economically sustaining large amounts of Rule

68 offers to evade adjudication,[175] that the amounts of tenders are relatively small and clearly defined, that the defendant made the offer unreasonably early following the proposed complaint and quickly moved to dismiss the claim, and that the plaintiff absolutely rejected the offer, then this offer could be said to raise a presumption of "picking off."

## CONCLUSION

The Third Circuit's approach in *Weiss* offers the most practicable method of incorporating the varying legal requirements and policies of Rules 23 and 68 into the class action sphere of jurisprudence. While its application has yet to be sanctioned by the Supreme Court, its genesis derives from the flexible approach the Court has applied to the doctrine of mootness. Because of the primary purposes of Rule 23—(1) reduction of litigation costs though disbursement of fees throughout a class, (2) aggregation of small claims that might otherwise never reach a court, therefore allowing individual claimants the ability to recover for such an injury, and (3) conservation of judicial resources by consolidating multiple claims into one action[176]—the Court should recognize that "buying off" or "picking off" a named plaintiff, even before a motion for certification has been granted, clearly frustrates these purposes.[177] District courts should be afforded the ability to monitor this practice if the claim is susceptible to being "picked off," the named plaintiff has not unreasonably delay filing a motion for class certification, and the named plaintiff denies the Rule 68 offer. If all of these conditions are satisfied, the motion for certification should relate back to the initial filing of the proposed class action complaint.

175. This could involve preliminary discovery into the defendant's economic history, the nature of the defendant's business or wealth, and estimates of sustainability by measuring assets to the proposed transactional costs of successively tendering named plaintiffs.

176. *Roper*, 445 U.S. at 339–40.

177. *Id.* at 339.