December 1979

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Recommended Citation
Yuri B. Zelinsky, Adverting Defendant-Induced Pre-Certification Mootness of Class Actions, 55 Chi.-Kent L. Rev. 793 (1979). Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol55/iss3/9

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AVERTING DEFENDANT-INDUCED PRE-CERTIFICATION MOOTNESS OF CLASS ACTIONS

Susman v. Lincoln American Corp.

587 F.2d 866 (7th Cir. 1978)

Class actions are a judicially and economically efficient means of aggregating and adjudicating substantially similar claims. The procedural prerequisites for class actions brought in federal courts are embodied in rule 23 of the Federal Rules of Civil Procedure. Class actions brought pursuant to that rule are necessarily subject to the justiciability requirement imposed by article III of the United States Constitution, which restricts the adjudicative power of the federal courts to cases involving "questions presented in an adversary context"—in essence, "real and substantial controversies." If at any time during the course of a lawsuit the controversy between the litigants is abated, the federal court has no recourse but to declare the action moot and dismiss it.

Application of this "mootness doctrine" to class actions frequently results in inequitable outcomes which run counter to the policy underpinnings of the class action procedural device. Typically, the problem

1. For an extensive discussion of the theories and functions of class actions, see generally Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318 (1976) [hereinafter cited as Developments].

2. Fed. R. Civ. P. 23(a) states:
One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Additionally, class actions must come under one of the three subsections of rule 23(b).

3. U.S. Const., art. III, § 2 provides, in pertinent part:
The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party.


7. See, e.g., Hall v. Beals, 396 U.S. 45 (1969) (per curiam) (class action by voters who had not fulfilled Colorado's six-month residency requirement was mooted when Colorado reduced the residency requirement to two months and named plaintiffs were denied certification of a class of voters who did not fulfill the amended residency requirement). For a discussion of mootness principles as applied to class actions, see H. Newberg, Newberg on Class Actions §§ 1085-92 (1977); Note, Mootness On Appeal In The Supreme Court, 83 Harv. L. Rev. 1672 (1970); Note, A
arises when the controversy between the named plaintiff and the defendant is extinguished, leaving only the unnamed class members in an adverse posture with the defendant. Under these circumstances, the question becomes whether the dispute between the unnamed class claimants and the defendant is sufficient to maintain the requisite spark of controversy within the given case. As recently as 1973, the United States Supreme Court appeared ready to answer this question in the negative. However, some lower courts continued to carve out exceptions and develop rationales for allowing class actions to survive the mooting of the named plaintiff's claim. As a result, no uniform rules were available to guide the federal judiciary in evaluating the status of class actions after the extinction of the named representative's claim.

In 1975, the Supreme Court handed down its decision in *Sosna v. Iowa*, which instructed the federal courts on how to resolve tensions between the mootness doctrine and the representative action device. The United States Court of Appeals for the Seventh Circuit recently responded to this mandate in *Susman v. Lincoln American Corp.* by changing the existing circuit rule regarding class actions in which the named plaintiff's cause of action is mooted by defendants' initiative before the district court has had a reasonable opportunity to rule on the motion for class certification. In so doing, the Seventh Circuit aligned itself with the Second and Fifth Circuits, which also allow class actions to survive pre-certification mooting of the named representative's complaint. *Susman* also places the Seventh Circuit into conflict with the Eighth Circuit, which has held that mooting of the named plaintiff's cause of action, before class certification, mandates dismissal of the entire suit.

This comment will establish that the Seventh Circuit's modifica-

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11. See text accompanying notes 103-07 infra.
12. 587 F.2d 866 (7th Cir. 1978), petitions for cert. filed, 47 U.S.L.W. 3520 (U.S. Jan. 6, 1979) (No. 78-1169, *Susman*) and 47 U.S.L.W. 3658 (U.S. Feb. 17, 1979) (No. 78-1286, *Eberstadt*). *Susman* and its companion case, *Flamm v. Eberstadt*, were consolidated on appeal to the Seventh Circuit. However, petitions for certiorari were filed separately in the United States Supreme Court.
tion, in *Susman*, of its earlier rule in *Winokur v. Bell Federal Savings & Loan Association* was a correct response to the policy considerations and the equitable principles involved in the process of reconciling the class action device with the demands of the mootness doctrine. This comment will further establish that although the court of appeals enunciated a correct rule on the narrow facts of *Susman*, the court was excessively circumspect in refusing to adopt a broader rule similar to that endorsed by the United States Court of Appeals for the Fifth Circuit.

**The State of the Law Prior to *Susman***

**Supreme Court Cases**

Prior to 1975 and the United States Supreme Court’s holding in *Sosna v. Iowa*, the federal judiciary had no coherent standards for analyzing and deciding the problems caused by so-called “headless” class actions, i.e., actions in which the named plaintiff’s claim had been satisfied or otherwise mooted. Some courts tried to develop rationales for allowing such actions to continue, while others, including the Seventh Circuit, reasoned that the extinction of the named plaintiff’s claim marked the end of all justiciable controversy within a class action.

United States Supreme Court decisions during the pre-*Sosna* period were of minimal value in unraveling the conflicting analyses. In three opinions handed down in successive years preceding *Sosna*, the Supreme Court indicated a preference for the “no survival” tack taken by the Seventh Circuit and other courts. In *Laird v. Tatum*, the Court focused on the issue of standing to raise a claim and held that

16. See text accompanying notes 154-70 infra.
17. 419 U.S. 393 (1975).
23. In each case, the Supreme Court refused to look beyond the named plaintiffs’ claims to those of the class members to find the requisite controversy. The Court, however, did not expressly foreclose the possibility that the unnamed class plaintiffs’ claims could be used to fulfill the article III requirement. See also *A Search for Principles*, supra note 7, at 1320, 1323-24, for a discussion of *Laird*, *Burney*, and *O’Shea*.
where the named plaintiff fails to allege a sufficient injury at the start of
the litigation, both the individual claim and the class action must be
dismissed for failure to meet the case or controversy requirement.25 \textit{Indiana Employment Security Division v. Burney}26 afforded the Court an
opportunity to examine this rule with regard to the issue of mootness
since the named representative in that case was given full satisfaction
of his claim shortly after the filing of the suit.27 Nonetheless, the
Supreme Court chose not to address the issue of whether the class' claims could supply the requisite element of controversy.28 Instead, the
Court simply remanded the case for a ruling on whether the named plaintiff continued to have a viable claim.29 In \textit{O'Shea v. Littleton},30 the case decided after \textit{Burney}, the Court restated the \textit{Laird} rule. As a
result of these three cases, the question of whether a class action could
survive the mooting of the named plaintiff's initially justiciable claim
was left unanswered. However, these decisions did evince reluctance
on the part of the Court to search for a case or controversy in the un-
named class members' claims.

\textbf{The \textit{Sosna} Decision}

\textit{Sosna v. Iowa},31 a class action challenging Iowa's requirement that
divorce petitioners reside within the state one year before seeking disso-
lution of their marriages, presented the Court with another opportunity
to examine the circumstances under which a class action may survive
the mooting of the named representative's claim. Sosna moved to Iowa
from New York and shortly after her arrival filed a divorce petition in
an Iowa court. Her petition was dismissed because she failed to meet
the one year residency prerequisite.32 She then filed suit in the federal
district court and succeeded in obtaining certification of a class of "similarly situated" individuals.33 Following an adverse ruling by a three-
judge panel in the district court,34 Sosna appealed to the United States

25. In \textit{Laird}, a class action involving military surveillance of civilian activists, the plaintiffs failed to allege actual harm sustained as a result of the Army's conduct. The Court did not address the issue of whether other class members could allege the requisite injury. 408 U.S. at 3, 13-
14.


27. \textit{Id.} at 541.

28. \textit{Id.} at 541-42.

29. \textit{Id.} at 542.


32. \textit{Id.} at 395.

33. \textit{Id.} at 397.

34. Sosna v. Iowa, 360 F. Supp. 1182 (N.D. Iowa 1973). Although the three-judge panel in
During the pendency of the appeal, Sosna fulfilled the required year of in-state residency and succeeded in procuring a divorce in New York. The threshold question on certiorari thus became whether the entire action was moot in light of the satisfaction of the named plaintiff’s cause of action.

Writing for the majority, Justice Rehnquist indicated that had Sosna sued only on her own behalf, the case would have been moot and dismissal would have become the Court’s only option. However, the successful and proper certification of the class of unnamed plaintiffs was found to confer “a legal status separate from the interest asserted by the appellant” upon the anonymous claimants.

Having found that the case involved interests other than those of the named party, the Court still had to ascertain whether the case continued as a live controversy or, if all controversy had ceased, whether there was some basis for averting an article III dismissal. For this purpose, the Court relied on an application of the mootness doctrine which it first had articulated sixty-four years earlier and which it had revitalized in 1972, in Dunn v. Blumstein.

Dunn involved a Tennessee law which established residency requirements for voting eligibility. A class action was filed challenging the prerequisites, but by the time the district court issued its opinion, the passage of time had mooted the named plaintiff’s claim. Nonetheless, a three-judge district court panel declined to dismiss the action, holding that the problems which gave rise to the named plaintiff’s action were “capable of repetition” with regard to the members of the certified class, but were “evading appellate review” because of the in-

the district court certified Sosna as class representative, it held that the challenged durational residency requirement was constitutional.

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36. Id. at 398.
37. Id. at 398 n.7.
38. Id. at 398-99.
39. Id. at 399.
40. Id.
41. Id. at 399-401.
42. See Southern Pac. Terminal Co. v. Interstate Commerce Comm’n, 219 U.S. 498 (1911). In that case, the Court held that the expiration of an improper ICC injunction against a shipper did not moot the controversy because similar injunctions could be issued in the future and the question of their propriety could continue to escape review because of their limited duration. Id. at 515-16.
43. 405 U.S. 330 (1972).
44. Id. at 334.
45. Id. at 333 n.2. The election for which the named plaintiffs sought to register had taken place, and the residency period would be satisfied by the named plaintiffs before the next regularly scheduled election.
ability of any one plaintiff to maintain a controversy for the entire duration of the litigation. The Supreme Court approved this application of the mootness doctrine.

In Sosna, the Court found the mootness doctrine as applied in Dunn to be controlling. In so finding, the Court reiterated the importance of protecting the interests of the unnamed class members under the general principles of article III.

Sosna involved a situation where the named plaintiff's claim was extinguished after class certification had been granted by the district court. However, the Court recognized, in dictum, that potential complications could arise if the named representative's cause of action was somehow mooted before the district court had a reasonable opportunity to rule on the motion for class certification. The Court indicated that in such a case a legal fiction might be used whereby the district court would allow the certification to "relate back to the filing of the complaint." The propriety of invoking this fiction was to be determined on the facts of each individual case, with particular attention being given to the aspects of each controversy which were "capable of repetition, yet evading review."

The Gerstein Opinion

Gerstein v. Pugh, decided shortly after Sosna, provided the setting for the elevation of the "relation back" concept from dictum to doctrinal status. The plaintiffs in Gerstein raised a constitutional challenge to Florida's pre-trial detention practices, but trial and conviction mooted their claim before it could be considered by the district court. Although the record of the case did not reveal whether the mootness had occurred prior to, or after, the district court's granting of class certification, the Supreme Court justified its review of the case by applying the "relation" back doctrine, having first determined that the case involved a controversy of the "capable of repetition, yet evading review" variety.

47. 405 U.S. 330, 333 n.2 (1972).
49. 419 U.S. 393, 402-03 (1975).
50. Id. at 399.
51. Id. at 402 n.11.
52. Id.
53. Id.
55. Id. at 110 n.11. The fact that the mooting of the named claimants' actions in Gerstein
Thus, after *Sosna* and *Gerstein* it is clear that a properly certified\(^6\) class action is not automatically mooted by the resolution or satisfaction of the named representative's claim. If the mooting of the named plaintiff's cause of action occurs before the district court has had a reasonable opportunity to consider and rule on the class certification motion, the following questions must be answered in the affirmative before the relation back doctrine may be applied:

1. Was there a live controversy between the named plaintiff and the defendant at the time the class action was brought in the district court?\(^5\)

2. Did the named plaintiff, prior to the mootling of his claim, file a proper motion for class certification?\(^6\)

3. Was the named representative's cause of action mooted before the district court could reasonably have been expected to consider and decide the certification motion?\(^9\)

4. Was the gravamen of the named plaintiff's complaint in-

occurred through the passage of time and in the ordinary course of events has led some courts to limit application of the relation back doctrine to cases where the time element causing mootness is inherent in the nature of the controversy. See, e.g., *Banks v. Multi-Family Management, Inc.*, 554 F.2d 127 (4th Cir. 1977) (the time element was held not inherent in the plaintiffs' claim where defendant-landlord consented to a permanent injunction barring plaintiffs' eviction); *Inmates of San Diego County Jail v. Duffy*, 528 F.2d 954 (9th Cir. 1975) (the time element was held inherent in plaintiffs' cause of action where first amendment claims of pre-trial detainees were mooted by trial or release); *Robinson v. Leahy*, 73 F.R.D. 109 (N.D. Ill. 1977) (state prisoner's class suit alleging a right to individualized treatment from a state social services agency was held mooted by termination of plaintiff's incarceration because there was no evidence that other prisoners' terms would bar them from bringing essentially the same action).

\(^{56}\) FED. R. CIV. P. 23(b) states the prerequisites to certification. Rule 23(b) provides:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

1. the prosecution of separate actions by or against individual members of the class would create a risk of
   
   (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
   
   (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the party opposing the class or

2. the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

3. the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.


\(^{58}\) *Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

\(^{59}\) *Id* at 402 n.11 (1975).
herently of such short duration that the normal pace of judicial function did not allow the district court a reason-
ably opportunity to review the certification motion? 60
5. Has the district court subsequently certified the class and
approved the named plaintiff's continued participation as
class representative? 61
6. Was the problem which gave rise to the action capable of
being repeated vis-à-vis the named plaintiff, the putative
class plaintiffs or potential future plaintiffs, and, if so, was
it likely to continue to evade adjudication? 62
Pre-certification mootness cases which could not be aligned within
these parameters typically have been dismissed under the provisions of
article III. 63

The Seventh Circuit Approach

In Winokur v. Bell Federal Savings & Loan Association, 64 the
United States Court of Appeals for the Seventh Circuit addressed, al-
beit inadvertently, the pre-certification mootness issue after the United
States Supreme Court's treatment of this issue in Sosna and Gerstein.
In Winokur, the named plaintiffs alleged that the defendant banking
institutions had engaged in deceptive and misleading advertising with
regard to the interest that would be paid to depositors. 65 A motion was
filed seeking certification of a class comprised of depositors who had
relied to their detriment on the defendants' advertisements. 66 The dis-
trict court denied certification, indicating that "the questions of fact va-
ried almost on an individual basis, with material variations . . . in the

60. Id. Accord, Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Morales v. Minter, 393 F.
61. Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975). See Board of School Comm'rs of Indianap-
olis v. Jacobs, 420 U.S. 128 (1975) (per curiam), where the district court's failure to comply in full
with the requirements of rule 23(b) was held to be the functional equivalent of a denial of certifi-
cation.
63. See, e.g., Inmates v. Owens, 561 F.2d 560 (4th Cir. 1977) (where county prisoners alleg-
ing substandard jail conditions were released before motion for class certification was filed);
Winokur v. Bell Fed. Sav. & Loan Ass'n, 560 F.2d 271 (7th Cir. 1977), cert. denied, 435 U.S. 932
(1978) (where named plaintiffs' claims were settled after the district court denied class certifica-
tion); Lasky v. Quinlan, 558 F.2d 1133 (2d Cir. 1977) (where county prisoners asserting depriva-
tions of constitutional rights were released from jail following district court's refusal to certify a
class); Napier v. Gertrude, 542 F.2d 825 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977) (where
named plaintiff, a minor challenging a state juvenile detention statute, was released from state
custody and supervision following the district court's refusal to consider the certification motion).
64. 560 F.2d 271 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978).
65. Id. at 272-73.
66. Id. at 273.
kinds or degrees of reliance by the depositors.\textsuperscript{67} After the denial of certification, the defendants tendered claimed damages and costs to the named plaintiffs.\textsuperscript{68} The defendants also altered the interest-crediting practices that gave rise to the suit.\textsuperscript{69} The case was appealed to the United States Court of Appeals for the Seventh Circuit where the denial of certification was affirmed.\textsuperscript{70}

In affirming the denial of class certification, the Seventh Circuit relied on \textit{Sosna} and subsequent Supreme Court holdings in cases involving the extinction of the putative class representative's individual claim.\textsuperscript{71} In doing so, the \textit{Winokur} court formulated a number of generalizations ostensibly derived from these holdings.\textsuperscript{72} The second of these generalizations stated that where there has been no determination of an action's suitability for maintenance as a class action, and the controversy between the named plaintiff and the defendant is extinguished, the case must be dismissed for want of a justiciable controversy.\textsuperscript{73} This was the state of the law at the time the United States Court of Appeals for the Seventh Circuit decided \textit{Susman v. Lincoln American Corp.}

**\textbf{Susman v. Lincoln American Corp.}**

The \textit{Susman} decision\textsuperscript{74} involves the companion cases \textit{Flamm v. Eberstadt} and \textit{Susman v. Lincoln American Corp.} These two cases were

\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} Id. at 274.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 277.
\item \textsuperscript{72} The generalizations are:
\begin{enumerate}
\item When, after an action is ordered maintained as a class action, the controversy between the named party in his own interest and his opponent dies, court adjudication of the merits remains appropriate because the interests of the class members are sufficiently represented by the named party so that controversy between the class members and the opponent is still alive and being litigated in the action.
\item When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.
\item When the right to maintain a class action is denied and the trial court decides the claim on its merits, the named party who is still interested in a live controversy, and who sought to represent the class, is deemed to have standing to seek review of the denial.
\item In situation 3 a member of the proposed class may promptly intervene and have standing to seek review of the denial even if the named party elects not to seek review.
\end{enumerate}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} 587 F.2d 866 (7th Cir. 1978).
\end{itemize}
consolidated on appeal from the United States District Court for the 
Northern District of Illinois.75

Facts

In Flamm v. Eberstadt, plaintiffs Ann and Arnold Flamm, mother and son, had purchased and sold stock in Microdot, Inc. In a complaint originally filed in 1976 in the federal district court, plaintiffs alleged that the defendant corporation and its agent, Eberstadt, made false and material misstatements and omissions with regard to the sale of the Microdot stock.76 Plaintiffs moved to have the court certify a class consisting of “[a]ll sellers of the common stock of Microdot, Inc. during the period beginning on December 5, 1975 and ending at the close of business on January 23, 1976, excluding the defendants and those in concert with them.”77

Defendants Eberstadt and Microdot challenged the certification motion, questioning the plaintiffs’ fitness to fairly and adequately protect the interests of the class.78 Defendants argued that the relationship between the plaintiffs and plaintiffs’ counsel, when considered along with the fact that potential attorney’s fees in the case could well exceed the probable individual recoveries, raised a strong possibility that the plaintiffs’ role as class representatives would come into conflict with their personal interests as individual claimants.79 The district judge agreed80 and, pointing to the potential for a conflict of interest as well as to possible ethical issues, denied certification of the class.81

In Susman v. Lincoln American Corp., plaintiff Susman brought a stockholder’s derivative action, alleging that the defendants acted deceptively and misstated and omitted material facts regarding the purchase and sale of securities and the solicitation of proxies.82 Susman sought certification of a class comprised of common share stockholders in the Consumers National Corporation, a company Lincoln American had acquired in a statutory merger.83 Defendants opposed the motion for class certification on virtually the same legal and factual

75. Id.
76. Id.
77. 561 F.2d 86, 88 (7th Cir. 1977).
78. Id.
79. Id.
80. Id.
81. Id.
82. 587 F.2d at 866.
83. 561 F.2d 86, 89.
basis as in Flamm.⁸⁴ Relying on his earlier decision in Flamm, the district judge declined to certify the class.⁸⁵

The United States Court of Appeals for the Seventh Circuit affirmed the lower court denials of class status in both the Flamm and Susman cases, noting that the plaintiffs were not barred from retaining substitute counsel and refiling their actions either as individual plaintiffs or as putative class representatives.⁸⁶ The plaintiffs in both cases chose to pursue the latter course and, after obtaining different counsel, reinstated both suits as class actions, filing motions for class certification along with their complaints in the district court.⁸⁷

After the plaintiffs had refiled their renewed actions and certification motions, but before the court had an opportunity to consider and rule on the motions, the defendants in both cases tendered full monetary damages including the amounts plaintiffs claimed as losses as well as properly chargeable costs.⁸⁸ Relying on the earlier Seventh Circuit holding in Winokur v. Bell Federal Savings & Loan Association,⁸⁹ the district court ruled that the tender mooted the plaintiffs’ claims and that article III mandated dismissal of the cases.⁹⁰ In dismissing the action in Flamm, the district court stated that the second generalization of the Winokur court is the “rule of law applicable to the case at bar.”⁹¹ The district court dismissals in Flamm and Susman were appealed to the United States Court of Appeals for the Seventh Circuit where the cases again were consolidated for review.⁹²

**The Seventh Circuit’s Reasoning**

In reviewing the district court decisions, the court of appeals recognized that the inexactitude of its language in Winokur had resulted in an inequitable outcome contrary to the policies underlying the representative action device. Accordingly, the Susman court limited the language of the second Winokur generalization so as to exclude cases where the motion for class certification was pending before the district

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⁸⁴. *Id.*
⁸⁵. *Id.*
⁸⁶. *Id.* at 96.
⁸⁷. 587 F.2d at 868.
⁸⁸. *Id.* at 868-69.
⁸⁹. 560 F.2d 271 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). See text accompanying notes 64-73 supra and 113-23 infra.
⁹². 587 F.2d at 868. The consolidated case in the Seventh Circuit will hereinafter be referred to as *Susman.*
court and where mootness of the named plaintiff's complaint was "artificially created" at the defendant's behest.\textsuperscript{93}

The Susman case, as the court of appeals pointed out, was not one for treatment under the relation back doctrine.\textsuperscript{94} The fact that the named plaintiffs' claims had not been inherently of short duration and had been mooted by the defendants' intentional conduct rather than by "the mere passage of time," made Susman an inappropriate context for invoking the relation back fiction.\textsuperscript{95} Cognizant of the potent equitable and policy considerations\textsuperscript{96} which militated against dismissal in Susman, the Seventh Circuit turned to Sosna and Gerstein in search of a solution.

The court of appeals interpreted Sosna as standing for the proposition that although article III requirements must be met in all federal court litigation, they should not be interpreted and applied dogmatically, especially if such procedural pedantry "would prevent some otherwise justiciable claims from ever being subject to judicial review."\textsuperscript{97} According to the court of appeals, the mandate of Sosna and Gerstein is, broadly speaking, that under certain circumstances, in the context of class actions, courts may use their discretion in determining whether the constitutional requirements of justiciability are fulfilled in a given action.\textsuperscript{98} Where necessity dictates, this discretion may extend to include the formulation of legal fictions and constructs, such as the relation back doctrine.\textsuperscript{99}

The court of appeals then held that the filing and pursuit "with reasonable diligence" of a motion for class certification by the named plaintiffs acts provisionally to bring the interests of the putative class members before the court and into conflict with the interests of the defendant.\textsuperscript{100} This, the court indicated, is sufficient to fulfill the constitutional requisite of functional adversity should the defendant act to moot the named representative's claim during the pendency of the cer-

\textsuperscript{93} Id. at 869. See note 72 and text accompanying note 73 supra for a description of the second Winokur generalization.

\textsuperscript{94} Id. at 870

\textsuperscript{95} Id. See also text accompanying note 60 supra.

\textsuperscript{96} Foremost among these considerations is prevention of abuse of the class action device. It not only would be inequitable to allow defendants to buy out of class-wide liability, it would also subvert the objectives of judicial efficiency and increased access to the courts which underlie the rule 23 action.

\textsuperscript{97} 587 F.2d at 870.

\textsuperscript{98} Id.

\textsuperscript{99} Id. See also Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975).

\textsuperscript{100} 587 F.2d at 870.
tification motion. The Seventh Circuit then remanded the cases to the district court for determinations on the class certification motions which were pending at the time of dismissal.

ANALYSIS

The Sosna Directive

The Seventh Circuit’s development of a rule sharply reducing the potential for pre-certification mooting induced by defendants’ tender of monetary damages to named plaintiffs is responsive to what may be termed the mandate of Sosna v. Iowa. In resolving the tension between the mootness doctrine and the class action device, the Sosna Court did not lose sight of the primary function of the class action or the compelling policy considerations underlying its creation: the protection and determination of legitimate claims and interests of similarly situated litigants with claims too small to warrant individual case litigation. In addition, utilization of the representative action device promotes judicial efficiency and economy.

In Sosna, the United States Supreme Court evinced a willingness to “shift the focus of examination from the elements of justiciability to the ability of the class representative to ‘fairly and adequately protect the interests of the class.’” This, the Court indicated, is appropriate in cases where the interplay between the “practical demands of time” in the functioning of the courts and the article III “cases and controversies” provision “would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation.”

Although the Sosna majority admonished that the holding “in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only to ‘cases and controversies’ specified in that Article,” their words were belied by the creation of one fiction and the suggestion of another. The Sosna holding that class

101. Id. at 869.
102. Id. at 873.
104. Id. at 401 n.9 (1975). The Court acknowledged that a “blanket” application of the mootness doctrine to class actions “would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation.” Id.
105. See Developments, supra note 1, at 1322.
106. 419 U.S. at 403.
107. See note 104 supra.
108. 419 U.S. at 402.
certification brings the interests of the unnamed class plaintiffs into controversy with those of the defendant is itself a fiction. The relation back device suggested in a footnote[109] of *Sosna* is clearly a fiction as well. Justice White, in his dissent to *Sosna*, asserted that the majority's formulation "dilutes the jurisdictional command of Art. III to a mere prudential guideline."[110] The subsequent ratification, in *Gerstein v. Pugh*,[111] of the relation back fiction as a means of "fulfilling" the demands of article III served to further underscore the perception that the Supreme Court no longer interprets the constitutional provision as a demand for the existence of a live controversy throughout the course of class action litigation. Indeed, the Court's creation of the relation back construct indicates a readiness to stretch traditional concepts of justiciability when necessary to fit meritorious class actions within the liberalized confines of *Sosna*.[112] The lesson of *Sosna* and *Gerstein* is that where the strict application of the cases and controversies requirement works to defeat the principal function of the class action device, the federal courts may resort to fictions, constructs and other formulas to find satisfaction of the article III provision. It is with this mandate that the United States Court of Appeals for the Seventh Circuit set out to refine and expand, albeit narrowly, the law of the circuit.

*The Winokur Correction*

In dismissing the claims of the Susmans and the Flamms, the United States District Court for the Northern District of Illinois considered itself bound by the 1977 Seventh Circuit holding in *Winokur v. Bell Federal Savings & Loan Association*.[113] The *Winokur* court had sought to clarify and distill the reasoning utilized by the Supreme Court in *Sosna* and subsequent cases dealing with the problem that mooting of the named representative's cause poses for class actions. Toward this end, the court of appeals formulated four generalizations which purported to summarize the state of the law.[114] An inherent weakness of generalizations, however, is that they often cut a broader swath than is either necessary or appropriate. That proved to be the shortcoming of the second *Winokur* generalization,[115] largely because

109. *Id.* at 402 n.11.
110. *Id.* at 412 (White, J., dissenting).
111. 420 U.S. 103, 110 n.11 (1975). *See* text accompanying notes 54-55 *supra*.
112. *See* 420 U.S. at 110 n.11.
114. *Id.* at 277. *See* note 72 *supra*.
115. *Id.*
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of the Seventh Circuit’s reliance on the Supreme Court’s decision in Board of School Commissioners of Indianapolis v. Jacobs.\(^{116}\)

The Jacobs Court, in a per curiam opinion, had held that the district court’s failure to observe rule 23 provisions for “proper” certification\(^ {117}\) amounted to a denial of the motion for class certification.\(^ {118}\) The named plaintiffs’ complaints having been mooted by the passage of time, the Court accordingly remanded the case for dismissal under the basic Sosna rule.\(^ {119}\) The Jacobs case, because of its unique and somewhat confused factual underpinning,\(^ {120}\) is best viewed as an aberration among post-Sosna Supreme Court decisions. At least one circuit has indicated that Jacobs ought to be looked upon as being limited to its facts.\(^ {121}\) The Seventh Circuit’s reliance on Jacobs is all the more curious in light of the court of appeals’ failure, in Winokur, to even mention the Gerstein holding.\(^ {122}\)

The Winokur court compounded the confusion by an inept wording of the generalization which it derived from Jacobs. In Winokur, the court of appeals phrased its second generalization to state:

> When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between the parties who are present or represented before the court in the action.\(^ {123}\)

What the court failed to perceive was that two distinct sets of circumstances could be encompassed by such phraseology. On the one hand, there is “no determination that an action be maintained as a class action” when there has been a consideration and subsequent denial of a certification motion by the district court. On the other hand, if a dis-


\(^ {117}\) Id. at 130.

\(^ {118}\) Id. at 129-30.

\(^ {119}\) Id. at 130.

\(^ {120}\) In Jacobs, the record did not reveal whether the named plaintiff high school students had filed their motion for class certification before graduation mooted their claims. Further, the district court’s non-compliance with certification procedure was held against the plaintiffs by the Court, which remanded for dismissal.

\(^ {121}\) See Geraghty v. United States Parole Comm’n, 579 F.2d 238 (3d Cir.), petition for cert. filed, 47 U.S.L.W. 3351 (U.S. Oct. 5, 1978), where the court of appeals held that:

> In light of Gerstein, handed down on the same day as Jacobs, and of Baxter and McDon-ald, both decided after Jacobs, the Jacobs case should not be viewed as standing for the proposition that the federal courts are constitutionally barred from continuing to adjudicate disputes when the named plaintiff no longer retains his claim . . . . Consequently, the holding of Jacobs is perhaps best understood as a specific instance. . . .

\(^ {122}\) 579 F.2d at 250. Both Baxter v. Palmigiano, 425 U.S. 308 (1976), and United Airlines v. McDon-
ald, 432 U.S. 385 (1977), dealt with the issue of whether putative class members ought to be permitted to intervene for purposes of appeal after the mooting of the named plaintiff’s claim.

\(^ {123}\) Id. at 277 (emphasis added).
The district court is not allowed a reasonable amount of time to consider a certification motion and can make no ruling at all, then too "no determination" of suitability for class action maintenance is made. The critical distinction, of course, is that in the first instance some determination has been made. The district court has had an opportunity to review the interests of all putative parties to the action, both named and unnamed, and the protections of rule 23(c) have been accorded if and where appropriate. In the second situation, exemplified by the facts of Susman, the district court is not given a reasonable opportunity to consider and rule on the motion for certification. Quite literally, there is "no determination," pro or con, whether a class of unnamed plaintiffs exists or whether the named plaintiff is a suitable class representative.

The lower court's dismissals in Susman demonstrated to the Seventh Circuit the devastating use to which such an overbroad rule could be put by ingenious defendants confronted with potential class action liability. Where the named plaintiff's individual claim is for a relatively small sum of money or for some conduct easily provided on an individual basis, a defendant upon notice of the filing of a class action, could tender full damages (or perform or refrain from performing the claimed conduct) and moot the named plaintiff's cause of action. The possibility of such misuse was apparent to Judge Swygert, who dissented from the Seventh Circuit's denial of a rehearing in Winokur. In his dissent, Judge Swygert stated:

The unfortunate consequences of the rule formulated in this decision on future consumer class actions are plain: defendants in such actions are now given the arbitrary power to bar appellate review by simply tendering the damages claimed by the putative class representative. Rather than go to trial and face the potential payment of damages which might be assessed in a class suit, defendants will pay off the named plaintiff or plaintiffs thereby mooting the entire case. I think justice dictates that the right to judicial review should not be denied under the circumstances.

The Susman dismissals convinced the court of appeals that the danger foreseen by Judge Swygert was very real and, unless remedied, could pose a threat to the survival of the plaintiff class action in the

124. Denial of certification coupled with subsequent mooting of the named plaintiff's claim would, absent timely intervention, result in a standard article III dismissal.

125. FED. R. Civ. P. 23(c)(2) demands the "best notice practicable under the circumstances" to all identifiable class members. The rule also provides for exclusion from the class at members' request and for entry of appearance through counsel. Id.

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Seventh Circuit. Accordingly, the court of appeals limited the language of its second Winokur generalization to exclude those cases where a motion for class certification, which has been pursued with reasonable diligence and is pending before the district court, is not reviewed because the named plaintiff's complaint is mooted by defendant's tender of full money damages.

Toward a Substantive Rule

In Susman, the Court of Appeals for the Seventh Circuit was confronted with the problem of devising a plausible basis for finding on the facts that there was a live controversy in the case. Absent such a determination, Sosna's requirement that a live controversy exist at the time of class certification would bar the court of appeals from remanding the cases to the district court for a ruling on class suit maintainability.

The policy considerations involved are of substantial magnitude. The utility of the class action device as a means of protecting and promoting the interests of similarly situated small claimants while fostering economy of adjudication within the courts, is jeopardized if the action is dismissed. The equities in the case also militate for a rule which would at least allow the district court to consider the certification motion and decide whether a legitimate class of nameless claimants exists. As the Seventh Circuit noted, a rule which enables putative class action defendants to "buy out" from class-wide liability by paying off only the named plaintiffs "could prevent the courts from ever reaching the class issues . . . even in cases where a class action would be most clearly appropriate."

The Seventh Circuit indicated that the relation back doctrine was inapposite on the Susman facts because the named plaintiffs' claims were mooted by intentional conduct of one of the parties, and not by a durational element inherent in the cause of action. Language in Gerstein describing the mooted claim as "by nature temporary" sup-

127. See 587 F.2d at 870.
128. Although the Susman court limited its holding to those situations where the defendants tender monetary damages claimed by the named plaintiffs, the Seventh Circuit subsequently held, in DeBrown v. Trainor, No. 76-1628 (7th Cir. Apr. 3, 1979), that Susman encompasses "remedial actions taken by the defendants while a motion for class certification is pending. . . ." Id., slip op. at 5 (emphasis added). Since, in DeBrown, the remedial action taken was the granting of retroactive food stamp benefits, it is apparent that Susman may now be read as including conduct other than the tender of monetary damages.
129. Id.
130. Id.
ports an interpretation that the relation back doctrine was not available in Susman, and, in fact, that is the way the relation back doctrine has been applied by the majority of the federal courts.\textsuperscript{131}

Unable to utilize any of the then-existing class action mootness exceptions, the Court of Appeals for the Seventh Circuit devised one of its own. The court reasoned that if rights or interests accrue to the putative class members by virtue of the named plaintiff's filing of a motion for class certification, then moot ing of the named plaintiff's cause of action, during the pendency of the motion, would not extinguish all controversy in the case because the putative class members' claims would still be viable.

The court of appeals recited three interests of potential class members which exist even prior to a decision on certification. The first of these is the right to support or challenge the certification of the class or to assail the named plaintiff's suitability to serve as class representative.\textsuperscript{132} Another pre-certification interest enumerated by the court was the tolling of the statute of limitations on all individual causes of action, by virtue of the filing of a class action complaint.\textsuperscript{133} Finally, the court of appeals cited the putative class plaintiffs' right to be informed of, and possibly included in, settlements occurring before class certification.\textsuperscript{134} According to the court of appeals, these interests "sufficiently, though provisionally, [brought] the interests of class members before the court so that the apparent conflict between their interests and those of the defendant" would preserve the requisite controversy before the court.\textsuperscript{135}

There are a number of weaknesses in the court's reasoning. The United States Supreme Court has held that, at minimum, article III requires one litigant on each side of the controversy to have "a personal stake in the outcome of the controversy as to assure . . . concrete adverseness."\textsuperscript{136} After Sosna, a class action need not remain in this posture for the entire duration of the litigation, but the article III controversy requirement must be met at the time the action is instituted and at the time the class is certified. While all of the interests recounted

\textsuperscript{131} See note 60 supra and accompanying text.


\textsuperscript{133} 587 F.2d at 870. In so concluding, the court cited American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974).


\textsuperscript{135} 587 F.2d at 869 (emphasis added).

\textsuperscript{136} Baker v. Carr, 369 U.S. 186, 204 (1962); see notes 3-6 supra and accompanying text.
by the Susman court appear to give putative class plaintiffs an interest, if not a personal stake, in the pre-certification phase of a class suit, only the right to be included in a settlement places the potential class plaintiffs in an adversary position vis-à-vis the defendants.

The ability to endorse or oppose class certification or to question the suitability of the putative class representative is a right that potential class members have with regard to the party seeking to prosecute the class suit. The right to withdraw oneself from inclusion in a class action is specified in rule 23(c)(2)(A) of the Federal Rules of Civil Procedure\(^1\) and generally is used to remove a party from a real or potential controversy. Although a putative unnamed class member may oppose the certification of the class, such opposition generally is brought to the court's attention in the hearing on the motion for class certification. Prior to that time, the potential class member is essentially a spectator to the proceedings. A challenge to the adequacy of the named plaintiff's efforts on behalf of the class is basically a squabble among plaintiffs, and while it may affect the identity of the defendant's opponent, it does not place the unnamed potential plaintiffs in a posture adversary to that of the defendant.

Similar criticisms may be leveled at the remaining interests relied on by the Seventh Circuit. The tolling of the statute of limitations affects the potential class plaintiff's right to litigate a legitimate claim. The tolling also affects the defendant because it extends the period during which he is vulnerable to a judgment. However, these interests are not placed in an adverse position unless the putative unnamed class plaintiff either is included in a certified class or brings suit on his own behalf.

The court of appeals' reasoning in support of the final interest is tenuous as well. The court relied on Kahan v. Rosensteil\(^2\) for the proposition that potential class members, even before certification, have a right to be notified of, and possibly included in, a settlement. Yet there is no discussion in the Kahan holding of the issue of notice of or inclusion in settlements, as a matter of right. In Kahan, the defendant had intentionally and willingly made settlement offers to the potential class members, and the issue on appeal was whether the named plaintiff would recover attorney's fees from the defendant. The Kahan

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137. FED. R. CIV. P. 23(c)(2)(A) states, in pertinent part:

The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date.

court did state, however, that a suit brought as a class action should be treated as such for the purposes of dismissal or compromise.

Rule 23(e) of the Federal Rules of Civil Procedure\textsuperscript{139} governs dismissal or compromise of class actions. The rule requires notice to "all members of the class"\textsuperscript{140} of an impending settlement or compromise. This poses a problem because the existence of a class as well as the identity of its members is not formally established until the class is certified.\textsuperscript{141} Prior to that time, there is only the named plaintiff's assertion that a class of litigants exists. As for the possibility of inclusion in a compromise or settlement, the short answer is that a defendant may indeed offer to settle the claims of the uncertified class plaintiffs, depending, probably, on his assessment of the potential for even greater liability after full litigation. The settlement or compromise, with regard to the uncertified class, is a voluntary act of a defendant based on a calculation of what might occur should his interests ever be placed into an adversary posture vis-à-vis the class plaintiffs.

Finally, there is no indication that the interests discussed above are brought before the court exclusively by the motion for class certification. Indeed, all of these interests may accrue to the putative class members by virtue of the filing of the class suit alone. Thus, the Seventh Circuit's assertion that the filing and pursuit with reasonable diligence of a class certification motion brings the interests of the unnamed class members into conflict with those of the defendant is of doubtful merit.

However, an argument for finding a live controversy on the Susman facts—a reverse fiction of sorts—may be drawn from the reasoning employed by the Seventh Circuit. Although the interests described by the court of appeals in support of its "conflicting interests" formulation do not necessarily place the unnamed class plaintiff in an adverse position with regard to the defendant, they do place substantial responsibility on the named plaintiff, even before the class is certified.

In a concurrence to \textit{Gardner v. Westinghouse Broadcasting Co.},\textsuperscript{142} Chief Judge Seitz of the United States Court of Appeals for the Third Circuit states:

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

\textit{Id.}

FED. R. CIV. P. 23(b) enumerates the criteria for identifying a certifiable class. See note 56 supra.

\textsuperscript{139} FED. R. CIV. P. 23(e) states:

\textit{Id.}

\textsuperscript{140} FED. R. CIV. P. 23(b) enumerates the criteria for identifying a certifiable class. See note 56 supra.

\textsuperscript{141} FED. R. CIV. P. 23(b) enumerates the criteria for identifying a certifiable class. See note 56 supra.

\textsuperscript{142} 559 F.2d 209 (3d Cir. 1977) (Seitz, C.J., concurring), \textit{aff'd}, 437 U.S. 478 (1978). In \textit{Gardner}, the plaintiff alleged sex discrimination in the defendant's employment practices. The plaintiff moved for certification of a class. The district court denied certification and the plaintiff immedi-
Circuit proposed that the requisite controversy could be found by reasoning that the named plaintiff, by filing a class suit, not only asserts his individual interests, but also claims to be a fiduciary on behalf of the putative class.\textsuperscript{143} The defendant, by denying class liability, implicitly challenges the existence of a class of litigants and the named plaintiff’s assumption of fiduciary responsibility for the class. That challenge provides the requisite spark of controversy, even if the named plaintiff loses his individual cause of action. Since the existence of a proper class and the named plaintiff’s fitness to represent it are not decided until the district court’s ruling on class certification, the controversy between the named plaintiff and the defendant on the issue of fiduciary status will not wane until that time. This would fulfill the \textit{Sosna} requirement of a live controversy at the time the class is certified.

Such an approach concededly is as much a legal fiction as are the relation back or \textit{Susman} approaches to the article III requirement. However, it may be less assailable, on the same facts, than the \textit{Susman} fiction. The named plaintiff does assume a fiduciary responsibility when a class suit is filed. Even before certification, the named plaintiff must seek court approval for a settlement or dismissal of the action.\textsuperscript{144} The court may order the named plaintiff to give notice to all members regarding any element in the conduct of the action.\textsuperscript{145} In order to secure certification as class representative, the named plaintiff must show that he will fairly and adequately protect the interests of the class.\textsuperscript{146} That a named plaintiff may bring a motion for certification of the class, most of the members of which are complete strangers in whose personal welfare the named plaintiff has no particular interest, is indicative of some type of fiduciary relationship arising out of the filing of the class suit. Because the fiduciary issue, as formulated, is raised by the filing of a class suit and survives at least until there is a ruling on the certification motion, this is a particularly useful fiction for avoiding pre-certification mootness.

In spite of its shortcomings, \textit{Susman} is properly decided. The notion that potential class defendants may evade justice by tendering trivial damage settlements to the named plaintiffs clearly is offensive. Such abuse of the class action not only forecloses the adjudication of legiti-

\textsuperscript{143} Id. at 219.
\textsuperscript{144} \textit{FED. R. CIV. P.} 23(e). \textit{See note} 139 \textit{supra.}
\textsuperscript{145} Id.
\textsuperscript{146} \textit{See FED. R. CIV. P.} 23(a)(4).
mate claims but also forces potential class litigants to seek relief on an individual basis, thereby adding to the congestion in the federal courts. This defeats the basic function of the representative class action. *Susman* is a first, albeit tentative, step towards curtailing this problem.

**Analyses Applied in Other Circuits**

By deciding *Susman* as it did, the Seventh Circuit aligned itself with the United States Courts of Appeals for the Second and Fifth Circuits. In *White v. Mathews*, the named plaintiff challenged delays associated with administrative hearings that are required under the Social Security Act to determine eligibility for disability insurance benefits. During the pendency of the motion for class certification, the named claimant received the desired hearing before an administrative law judge. Nevertheless, the district court proceeded to certify the class and rendered a judgment on the merits for the plaintiffs. The defendants appealed, asserting that satisfaction of the named plaintiff's claim mooted the controversy and that, as a result, the district court lacked subject matter jurisdiction to decide the case.

The United States Court of Appeals for the Second Circuit affirmed the lower court's ruling in *White*, relying exclusively on *Sosna*. The court of appeals applied a "capable of repetition, yet evading review" analysis, noting that delayed administrative hearings would continue to be a reality for members of the class and that the Social Security Administration could avoid adjudication of the issue by providing hearings to those plaintiffs who request, but have not yet secured, certification of a class. Moreover, the court found that in light of the totality of the circumstances, the case was not moot. The Second Circuit focused on the district court's consideration of the class certification motion as a critical stage in the process of ascertaining and protecting the interests of the putative class. The court of appeals

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147. More realistically, many litigants simply abandon any efforts at securing the relief to which they are entitled.
149. *Id.* at 854.
150. *Id.* at 855.
151. *Id.*
152. *Id.* at 856.
153. *Id.* at 857. Although several issues were presented on appeal, the court found *Sosna* to be dispositive with regard to the mootness issue.
154. *Id.*
155. *Id.*
156. *Id.*
stated: "a district court should have enough time to consider these important issues of class status carefully. . . . The main reason for requiring that the named plaintiff have a 'live' controversy is to assure adequate representation of the interests of the class."157

In *Roper v. Consurve, Inc.*,158 the United States Court of Appeals for the Fifth Circuit also focused on the procedural safeguards accorded the interests of the unnamed members of the proposed class. In *Roper*, two holders of BankAmericard credit cards sued on behalf of themselves and all other Mississippi cardholders, alleging that the credit plan's monthly service charge was usurious.159 Upon review of the certification motion, the district court found that although a class of litigants existed, the named plaintiffs were inadequate class representatives.160 Shortly after the denial of certification, the defendants tendered to the named plaintiffs the maximum amount that each could have recovered.161 Over plaintiffs' objection, the district court entered judgment for the plaintiffs. Although the Fifth Circuit reversed the denial of certification and remanded the case for further proceedings as a class action, the court of appeals implicitly recognized that the district court's consideration and ruling on the certification motion provided an adequate determination of the interests of potential class members.162 However, the Fifth Circuit specifically acknowledged the risks for putative class plaintiffs which are posed by pre-certification dismissals or settlements.163 Citing its earlier holding in *Pearson v. Ecological Science Corp.*,164 the court of appeals underscored the importance of assuring that the safeguards of rule 23(e)165 be observed in the context of pre-certification dismissals as well.166 Notice of a dismissal or compromise, as well as the right to challenge such a disposition, must be afforded any individual whose rights may be affected by that

157. *Id.*
158. 578 F.2d 1106 (5th Cir.), *petition for cert. filed*, 47 U.S.L.W. 3422 (U.S. Nov. 29, 1978).
159. *Id.* at 1109.
160. *Id.* at 1111.
161. *Id.* at 1109. The plaintiffs never accepted the offered settlement, but the district court entered judgment based on the offer.
162. *Id.* at 1110. The court indicated that where a determination has been made under rule 23(c)(1) of the Federal Rules of Civil Procedure that class action status is not appropriate, and where settlement or dismissal will not adversely affect the interests of individuals not before the court, the notice provision of rule 23(e) is not applicable. *See* note 139 *supra*.
163. *Id.* at 1110. The court held that "[p]rior to certification a class action cannot be dismissed merely because the representatives are satisfied, unless there is notice to the putative class of the proposed dismissal and a determination by the court that the dismissal is proper, as required by rule 23(e). . . ." *Id.*
165. *See* note 139 *supra*.
166. 578 F.2d at 1110.
disposition. The Roper court stated:

The notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive . . . . By the very act of filing a class action, the class representatives assume responsibilities to the members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims.

This language was quoted by the Seventh Circuit as being "consistent" with its reasoning in Susman. However, the Susman court expressly limited its holding to "the fairly narrow situation where a motion for certification has been pursued with reasonable diligence and is pending when a tender is made." This limitation is appropriate to the extent that it may act as a test of the named plaintiff's good faith in filing a class suit.

The Roper court also addressed the potential misuse of class actions by plaintiffs who seek to collect "quick, undeserved damages" in so-called "strike suits." Accordingly, the Fifth Circuit held that satisfaction of representatives' claims prior to a determination on the certification motion will not result in dismissal of a class action unless the district court determines that dismissal is proper. The court held that this is applicable whether the settlement is forced upon, or solicited by, the named plaintiffs. The Fifth Circuit indicated that "[t]he court itself has special responsibilities to ensure that the dismissal does not prejudice putative members." However, the court of appeals did not specify whether the decision as to the propriety of the dismissal was to be made at an expedited hearing on the certification motion or whether the district court, upon learning of a proposed settlement, was to initiate its own fact-finding proceeding.

The holdings in White, Roper, and Susman are all in diametric contradiction to the Eighth Circuit's holding in Bradley v. Housing Authority of Kansas City. In Bradley, four applicants for public hous-

167. In Pearson, the Fifth Circuit noted that some courts, in an effort to protect the interests of the unnamed class members during the period between the filing of the suit and the certification determination, have presumed that class action status is proper for the purposes of the rule 23(e) notice requirements. See text accompanying notes 138-41 supra.

168. 578 F.2d at 1110.
169. 587 F.2d at 870-71.
170. Id. at 871.
171. 578 F.2d at 1110.
172. Id.
173. Id.
174. Id.
175. 512 F.2d 626 (8th Cir. 1975).
ing brought a class action alleging that the defendant housing authority's tenant admission policies favored higher income applicants. The defendant gave apartments to the named plaintiffs before the district court could rule on the class certification motion. The district court did not consider the motion for certification which was pending at the time of the offer and dismissed the action as moot. In affirming the dismissal, the United States Court of Appeals for the Eighth Circuit relied on the Supreme Court's holding in *Board of School Commissioners of Indianapolis v. Jacobs*. The Eighth Circuit held that "dismissal is required by the case or controversy provisions of Article III when the claims of all the named plaintiffs become moot before certification of the class under Fed. R. Civ. P. 23(c)(1)." The court of appeals acknowledged that *Sosna* did allow for the possibility that the named plaintiffs' complaint may, in some circumstances, become moot before the district court has a reasonable opportunity to rule on the motion for class certification. The *Bradley* court also noted that the defendants had acted deliberately to moot the issue as to the named plaintiffs. Nevertheless, the court of appeals indicated that real and potential complications on remand militated for dismissal of the action. In so doing, the court of appeals assumed that there would be willing plaintiffs waiting to reinstitute and prosecute the action on behalf of whatever class may still exist. Thus, although a new suit would have the appropriate motion for certification and possibly a ruling would be made on that motion, the possibility existed that no new suit would be brought for lack of a class member with sufficient resources to represent the class. This, in turn, could mean that putative members of the *Bradley* class, who had legitimate complaints against the housing authority but lacked sufficient individual resources to commence litigation on their own behalf, would be left without redress for their grievances.

176. *Id.* at 627.
177. *Id.*
178. *Id.* at 628. *See* notes 115-21 *supra* and accompanying text.
179. 512 F.2d at 628. The court here misread the *Jacobs* holding, as did the Seventh Circuit in *Winokur*. *See* text accompanying notes 114-25 *supra*.
180. 512 F.2d at 628.
181. *Id.* at 627, 629.
182. *Id.* at 629. The plaintiffs conceded that substantial amendments to the complaint would have to be made on remand. The court decided that the problems posed by the need for class redefinition outweighed the risks which dismissal posed for unnamed class plaintiffs in *Bradley*. *Id.*
183. *Id.* The court stated: "Theoretically, new parties would intervene [to prosecute the action on behalf of the class]." However, the court did not indicate whether there was any basis for presuming that the "theory" would be put into practice after dismissal. *Id.*
In spite of its ambiguity, Roper presents the better rule. By allowing some sort of evaluation, whether on the certification motion or on another basis, the Fifth Circuit moved to avoid the harshness of the Bradley rule—the needless dismissal and subsequent reinstatement on an individual basis of legitimate class claims. By ensuring that some attempt will be made at reviewing, prior to dismissal, all the interests at stake in a proposed class action, the Roper holding reduced the potential for abuse of the class action by plaintiffs and defendants alike. The Fifth Circuit better assessed and responded to the same policy considerations and equitable principles that the Seventh Circuit accommodated with reticence and circumspection in Susman.

CONCLUSION

In Susman v. Lincoln American Corp., the United States Court of Appeals for the Seventh Circuit addressed the equitable and policy dilemmas posed by defendant-induced mooting of the named plaintiff's claims during the pre-certification stage of class actions. The Seventh Circuit properly interpreted the United States Supreme Court's willingness to avoid dogmatism in devising ways for finding satisfaction of the article III provision, especially when there are compelling policy incentives. However, the Seventh Circuit's formula for finding the requisite adversity in Susman fell short of meeting even the minimal case and controversy requirements. An alternate fiction, relying on the fiduciary responsibilities of the named plaintiff to the putative class members, was suggested as a better means to the same end, that is, finding the spark of controversy alive in a case at the time that the district court certifies the class.

While the Susman holding was a positive but cautious step toward preventing abuse of the representative action device, a more vigorous approach has been suggested by the Fifth Circuit. That court ruled that no pre-certification dismissal should be permitted, whether at defendant's or plaintiff's behest, until the district court is satisfied that such dismissal is proper. Taken in combination with the "fiduciary fiction" for satisfaction of the article III requirement, the Roper rule of the Fifth Circuit affords better protection against misuse of the class action and subversion of its intended functions. The Seventh Circuit should consider adopting such a rule.

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