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PERSONAL STAKE, RULE 23, AND THE EMPLOYMENT DISCRIMINATION CLASS ACTION†

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Under Rule 23 of the Federal Rules of Civil Procedure,¹ a class action without a class representative is like one hand clapping. The concept simply is

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¹ FED. R. CIV. P. 23 [hereinafter cited as Rule 23] governs class actions in the federal courts. It provides as follows:

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

(b) **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; 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 question 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 par-

not contemplated by the Rule.² This creates a dilemma if the personal claim of the named plaintiff, the putative class representative, becomes moot during the pendency of a class action. The named plaintiff's ability to proceed with the

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

(c) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in conduct of actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise. 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.

FED. R. CIV. P. 23.

² The requirement of a class representative is inherent in the language of Rule 23. Thus, for example, a class action can be commenced when "[o]ne or more members of a class . . . sue as representative parties on behalf of all . . . Rule 23(a) (emphasis added). Rule 23, and indeed the Federal Rules in their entirety, simply do not provide for an action by a class, as such, in the absence of representative parties.

lawsuit is undermined for two reasons. First, unless an exception is made to the requirements of Rule 23, the named plaintiff is no longer a potential class representative.³ Consequently, the named plaintiff can neither proceed on his personal claim (because it is moot), nor can he proceed on his class claims (because he is not an appropriate class representative). Second, the named plaintiff may no longer have a personal stake in the outcome of the lawsuit. Thus, since personal stake is a prerequisite to any judicial action,⁴ the named plaintiff cannot continue with the suit. Nevertheless, unnamed class members may have claims against the defendant that will remain unredressed if the action cannot be prosecuted.⁵ Hence, the unnamed class members have an interest in the continuation of the lawsuit. This paradigmatic situation — the mooted class action⁶ — is the subject of this article.⁷

The developing doctrinal landscape on the personal stake issue is "one of uncertain and shifting contours";⁸ yet the Court has provided only amorphous landmarks as guides through the unfamiliar terrain. While it is clear that there are two components to the personal stake limitation on judicial power — a constitutional limitation⁹ and an additional, self-imposed restraint¹⁰ — it is unclear

³ The named plaintiff is disqualified as a class representative for two reasons: (1) he is no longer a member of the class he seeks to represent, *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); see text and notes at notes 183-84 *infra*; and (2) since he no longer has a claim against the defendant, his claims are no longer typical of the claims of the unnamed class members. See Rule 23(a)(3).

⁴ Although it is clear that there is a personal stake requirement, see *United States Parole Comm'n v. Geraghty*, 100 S. Ct. 1202, 1208 (1980); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755 (1976); *Baker v. Carr*, 369 U.S. 186, 204 (1962), the law in this area is so muddled that even the labels used to define the problem seem deficient in precision. For the purposes of this article, "personal stake" is employed as a generic term to describe both mootness and standing problems. Standing problems occur when the named plaintiff has little or no personal stake in the lawsuit at the commencement of the action. Mootness problems occur when the named plaintiff loses his personal stake in the lawsuit at some time during the pendency of the action. See also note 21 *infra*.

⁵ See, e.g., text at note 109 *infra*.

⁶ The term "mooted class action" is intended as a shorthand way to refer to class actions in which the named plaintiff's claim is lost or mooted, while unnamed class members retain arguably valid claims. The term does not refer to a class action in which the claims of all class members are moot, although, admittedly, that is the situation it seems to describe. In this latter situation, the action would be dismissed in its entirety. See *Hall v. Beals*, 396 U.S. 45 (1969).

⁷ As will be demonstrated, the mooted class action confirms the observation of one commentator that Rule 23 "tends to ask more questions than it answers." Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

⁸ *Flast v. Cohen*, 392 U.S. 83, 97 (1968), quoted in *United States Parole Comm'n v. Geraghty*, 100 S. Ct. 1202, 1211 (1980). See also text at notes 127-31 *infra*.

⁹ The constitutional limitation of the personal stake doctrine is based on the "case or controversy" language of article III. Although the precise parameters of the constitutional limitation are unclear, this limitation has traditionally required some actual or threatened injury to the plaintiff as a result of the allegedly illegal conduct of the defendant. See, e.g., *United States Parole Comm'n v. Geraghty*, 100 S. Ct. 1202, 1215-16 (Powell, J., dissenting); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). See also text and notes at notes 132-39 *infra*.

¹⁰ The self-imposed restraint of the personal stake doctrine is perhaps even more amorphous than the constitutional limitation. The self-imposed restraint is an exercise of judicial self-governance designed to avoid decision on "abstract questions of wide public significance [where] other governmental institutions may be more competent to address the questions and [where] judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422

how the components are applied even to an individual plaintiff.¹¹ When the personal stake issue arises in class actions, and compliance with Rule 23 is added as an issue, the doctrinal terrain begins to resemble Mount St. Helens.

This article will first examine the Supreme Court's failure to articulate an acceptable doctrine for effectively dealing with the personal stake and Rule 23 issues that arise in mooted class actions. The Court's attitude toward continuance of class actions following post-certification and post-denial of certification mootness¹² will be presented, with particular emphasis on two recent decisions, *Deposit Guaranty National Bank v. Roper*¹³ and *United States Parole Commission v. Geraghty*.¹⁴ Attention will then focus on the inequity existing between the

U.S. 490, 500 (1975). See also *United States Parole Comm'n v. Geraghty* 100 S. Ct. 1202, 1215 (1980) (Powell, J., dissenting); *Singleton v. Wulff*, 428 U.S. 106, 112-14 (1976) (plurality opinion).

¹¹ See, e.g., *Flast v. Cohen*, 392 U.S. 83, (1968); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953).

¹² For definitions of the terms post-certification mootness, post-denial of certification mootness, pre-suit mootness and pre-certification mootness, see text and notes at notes 18-21 *infra*.

¹³ 100 S. Ct. 1166 (1980).

¹⁴ 100 S. Ct. 1202 (1980). *Roper* and *Geraghty* were cases in which the named plaintiffs' personal claims became moot after the court had denied class certification. See text and notes at notes 58-78 *infra*. Prior to *Roper* and *Geraghty*, the courts of appeals had disagreed on an appropriate resolution of such cases. *Compare Armour v. City of Anniston*, 597 F.2d 46, 48-50 (5th Cir. 1979) (named plaintiff cannot represent a class where class certification is incorrectly denied and the named plaintiff's personal claim is subsequently dismissed) and *Winokur v. Bell Fed. Sav. & Loan Ass'n*, 560 F.2d 271, 275-77 (7th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) (named plaintiff cannot obtain appellate review of lower court's denial of class certification where, subsequent to denial, named plaintiff's personal claim becomes moot), *with Goodman v. Schlesinger*, 584 F.2d 1325, 1331-33 (4th Cir. 1978) (named plaintiffs obtain appellate review of lower court's denial of class certification even though, subsequent to denial, named plaintiffs' personal claims were properly dismissed). See also *Davis v. Roadway Express, Inc.*, 590 F.2d 140, 142-44 (5th Cir. 1979) (named plaintiff cannot obtain appellate review of class action issues where class certification is denied and the named plaintiff's personal claims are subsequently dismissed); *Roper v. Conserve, Inc.*, 578 F.2d 1106, 1110-11 (5th Cir. 1978), *aff'd sub nom. Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. 1166 (1980) (named plaintiffs can obtain appellate review of lower court's denial of class certification even though, subsequent to denial, named plaintiff's personal claims are mooted); *Satterwhite v. City of Greenville*, 578 F.2d 987, 992-98 (5th Cir. 1978), *vacated and remanded in light of Roper and Geraghty*, 100 S. Ct. 1334 (1980) (named plaintiff cannot represent a class where class certification is denied and the named plaintiff's personal claim is dismissed); *Lasky v. Quinlan*, 558 F.2d 1133, 1136 (2d Cir. 1977) (named plaintiffs cannot prosecute an action where class certification is denied and the named plaintiffs' personal claims are subsequently mooted). The courts of appeals had also been split on an appropriate resolution where the named plaintiff's claim became moot after the lawsuit had been filed, but prior to a decision on class certification. *Compare Susman v. Lincoln American Corp.*, 587 F.2d 866, 868-71 (7th Cir. 1978) (named plaintiffs can pursue class claims where their individual claims are mooted by the tender of their full monetary damages prior to consideration of the class certification issue), and *Cox v. Babcock and Wilcox Co.*, 471 F.2d 13, 15-16 (4th Cir. 1972) (class action need not be dismissed where named plaintiff's individual claim is dismissed prior to class certification), *with Shipp v. Memphis Area Office*, 581 F.2d 1167, 1172-73 (6th Cir. 1978), *cert. denied*, 99 S. Ct. 1788 (1979) (named plaintiff could not pursue class claims where his individual claim was dismissed prior to class certification), and *Bradley v. Housing Auth.*, 512 F.2d 626, 628-29 (8th Cir. 1975) (class action dismissed where named plaintiff's claim is mooted prior to class certification). See also *Vun Cannon v. Breed*, 565 F.2d 1096, 1098-1101 (9th Cir. 1977) (class action dismissed where named plaintiff's personal claim is mooted prior to class cer-

Court's handling of such situations and its treatment of cases involving pre-suit and pre-certification mootness. Next, in deference to Justice Douglas' dictum that "[g]eneralizations about [personal stake] are largely worthless as such,"¹⁵ the article will discuss the often conflicting policies presented by mooted class actions in a specific substantive area — employment discrimination.¹⁶ It will be submitted that the Supreme Court's resolution of mooted class action issues does not sufficiently consider these conflicting policies. Finally, a proposal for dealing with the mooted class action in the field of employment discrimination will be presented. It will be suggested that an analysis that includes both a more liberal interpretation of the personal stake requirement and a narrower construction of Rule 23 will result in a more acceptable resolution of mooted class action issues.

I. DOCTRINAL DEVELOPMENT IN THE SUPREME COURT

The Supreme Court has struggled with the class action mootness issue in a series of cases culminating in *Roper* and *Geraghty*. Despite the Court's protestations to the contrary,¹⁷ these cases place significance on when the loss of the named plaintiff's personal claim occurs. The loss can occur at four points in the action:¹⁸ (1) after the court has certified a class pursuant to Rule 23(c) ("post-

tification); *Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1336-38 (9th Cir. 1977) (class action dismissed where named plaintiff's personal claim is mooted prior to class certification); *Boyd v. Justices of Special Term*, 564 F.2d 526, 527 (2d Cir. 1976) (class action dismissed where named plaintiff's personal claim is mooted prior to class certification); *Napier v. Gertrude*, 542 F.2d 825, 827-28 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977) (class action dismissed where named plaintiff's personal claim is mooted prior to class certification).

¹⁵ *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151 (1970).

¹⁶ A number of federal statutes render various types of employment discrimination illegal. *See, e.g.*, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17 (1976) [hereinafter cited as Title VII] (prohibits certain employment discrimination on the basis of race, color, religion, sex, or national origin); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976) (prohibits certain discrimination in wage rates on the basis of sex); Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621-634 (1976) (prohibits certain employment discrimination on the basis of age); Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976) (prohibits certain racial discrimination); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976) (prohibits certain discrimination under color of state law); Vocational Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-774 (1976) (prohibits certain handicap discrimination.). This article will focus on Title VII for several reasons. First, Title VII is the most far-reaching and comprehensive of the federal non-discrimination obligations. C. ABERNATHY, *CIVIL RIGHTS CASES AND MATERIALS* 442 (1980). Second, in contrast with the Equal Pay Act and the Age Discrimination in Employment Act, both of which have peculiar "opt-in" class action procedures, *see Lachappelle v. Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975), Title VII class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 405 (1977). Third, focusing on Title VII will provide a concrete setting to illustrate the issues discussed without unduly confusing the discussion by reference to other anti-discrimination laws.

¹⁷ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1209 ("Although one might argue that [certain cases contain] an implication that the critical factor for Article III purposes is the timing of class certification, other cases . . . clearly demonstrate that the timing is not crucial.").

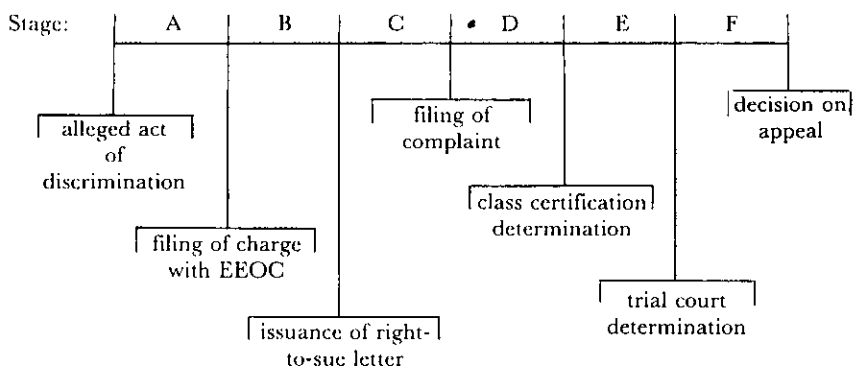
¹⁸ As an illustration, a claim of employment discrimination will be considered here. This substantive area will be explored in more depth later. *See text at notes 90-123 infra.* The time line

certification" mootness); (2) after the court has refused to certify a class ("post-denial of certification" mootness);¹⁹ (3) after the lawsuit is filed, but before the court has considered the issue of class certification ("pre-certification" mootness);²⁰ or (4) before the lawsuit is filed ("pre-suit" mootness).²¹ This section will analyze the case-by-case development of the Supreme Court's current doctrine in the area of class action mootness, and discuss its rationale and ramifications. The analysis will starkly illustrate the failure of the Court to articulate a coherent doctrine in the area and the Court's concomitant, outcome-determinative manipulation of inchoate doctrine in the area.

A. Post-Certification Mootness

The Supreme Court, in a number of cases, has considered the class action mootness issue when the named plaintiff's personal claim was lost after a class had been certified. The basic rule, although subsequently refined, was set forth in *Sosna v. Iowa*.²² In *Sosna*, the appellant's divorce petition was dismissed by an Iowa trial court for lack of jurisdiction because she failed to meet the Iowa statutory requirement that a petitioner in a divorce action be a resident of the state for one year preceding the filing of the petition.²³ Appellant then challenged the durational residency requirement in federal court on constitutional grounds.²⁴ The district court certified the class, with the appellant as the class

below highlights several significant times during the pendency of an employment discrimination claim:



¹⁹ Post-certification and post-denial of certification occur at the same time on the time line. See note 18 *supra*. The difference between the two lies in the judicial decision on the class certification issue.

²⁰ Pre-certification mootness occurs when the named plaintiff's claim becomes moot after the complaint is filed but before the class is certified. See note 18 *supra*.

²¹ For the purpose of consistency, the terms "mootness" and "named plaintiff" will be used. From a strictly technical standpoint, however, there is no "named plaintiff" prior to suit and, at that time, the mootness issue is classified more appropriately as a standing issue. See *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1208-09; Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973).

²² 419 U.S. 393 (1975).

²³ *Id.* at 395.

²⁴ *Id.* at 395-96.

representative, but by the time the case reached the Supreme Court the appellant's personal claim was mooted for two reasons: (1) she had been a resident of Iowa for more than one year, and (2) she had obtained a divorce in another state. Hence, appellant was no longer adversely affected by the durational residency requirement.²⁵

In deciding whether the plaintiff could continue as class representative after her personal claim had been mooted, the *Sosna* Court first considered the constitutional limitation of the personal stake requirement. Noting that Article III requires a live controversy at all times, the Court held that, after a class is certified, the controversy may exist "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."²⁶ The Court then turned its attention to the self-imposed, prudential limitation of the personal stake requirement. According to the *Sosna* Court, this limitation was overcome by reliance on the now familiar "capable of repetition, yet evading review" exception to the mootness doctrine.²⁷ The Court stated:

[T]he case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage of time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion.

... We believe that a cause such as this, in which ... the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiff.²⁸

Thus, the *Sosna* Court held that, despite the mootness of the named plaintiff's personal claim, the prudential limitation of the case or controversy requirement could be satisfied where the controversy was both likely to recur and likely to be short-lived when it did recur. The Court, however, was careful to limit the scope of the exception. It specifically noted that where "the alleged harm would not dissipate during the normal time required for resolution of the controversy, ... Art. III jurisdiction require[s] that the [named] plaintiff's personal stake in the litigation continue *throughout the entirety of the litigation*."²⁹

In addition to its consideration of the personal stake requirement, the *Sosna* Court also discussed whether the named plaintiff remained a proper class representative under Rule 23. The Court limited its inquiry to whether the named plaintiff could continue to fairly and adequately protect the interests of the class.³⁰ Finding no conflicts within the class and noting that the interests of

²⁵ *Id.* at 397-98.

²⁶ *Id.* at 402.

²⁷ See *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). See also 6A MOORE'S FEDERAL PRACTICE § 57.13, at 57-133-36; C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3533, at 286-89.

²⁸ 419 U.S. at 400-01.

²⁹ *Id.* at 402 (emphasis added).

³⁰ *Id.* at 403. The Court's inquiry was limited because it considered only one of the four prerequisites to maintenance of a class action, Rule 23(a)(4). See text of Rule 23 at note 1 *supra*.

the class had been competently urged at each level of the proceeding, the Court held that the requirements of Rule 23(a) had been met and, hence, that the named plaintiff could continue to represent the class.³¹ The Court did not find it significant that the named plaintiff was no longer a member of the class she sought to represent.³² Since the named plaintiff had been a class member and since every class member's tenure in the class was limited, the Court's resolution was another manifestation of the "capable of repetition, yet evading review" exception. A refusal to allow the named plaintiff to continue as the representative of the class would have required the periodic substitution of new class representatives and, consequently, would have resulted in unnecessary and repeated delays.

Therefore, *Sosna* on its face was based on, and limited by, the "capable of repetition, yet evading review" exception to the mootness doctrine. In *Franks v. Bowman Transportation Co.*,³³ however, the Supreme Court freed the doctrine announced in *Sosna* from the constraints of that exception. In *Franks*, the issue was whether a class of employees which had been subjected to discrimination was entitled to seniority relief.³⁴ The representative of the class, however, had been discharged for cause and, as a result, was not eligible for the relief sought.³⁵ Like the *Sosna* majority, the *Franks* Court held that the unnamed class members had a personal stake in the outcome sufficient to satisfy the constitutional aspect of the case or controversy requirement.³⁶ The *Franks* Court also held that the prudential limitation of the case or controversy requirement had been satisfied. Although the controversy in *Franks* was not of the evading review variety, the Court found that to require "individual class members [to] begin anew litigation on the sole issue of seniority relief would be destructive of the ends of judicial economy and would postpone indefinitely relief which under the law may already be long overdue."³⁷

This latter holding in *Franks* was inconsistent with dicta in *Sosna*. *Sosna* had indicated that after the personal claim of the named plaintiff had been lost, the prudential limitation of the case or controversy requirement could be met only if the controversy was "capable of repetition, yet evading review."³⁸ *Franks*,

³¹ 419 U.S. at 403. The rules announced by the Supreme Court in *Sosna* were reiterated in *Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978), and *Bell v. Wolfish*, 441 U.S. 520, 526 n.5 (1979).

³² 419 U.S. at 403. In a subsequent case, the Supreme Court required class membership as a prerequisite to representative status. *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977). See also *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216 (1974); 3B MOORE'S FEDERAL PRACTICE § 23.04[2]; C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1761.

³³ 424 U.S. 747 (1976).

³⁴ *Id.* at 750. The relief sought by the members of the class was the seniority status they would have enjoyed under the defendant company's seniority system but for the company's illegal discriminatory actions.

³⁵ *Id.* at 752-53.

³⁶ *Id.* at 755-56.

³⁷ *Id.* at 757 n.9.

³⁸ In *Sosna* the Court stated that if a case was not "capable of repetition, yet evading review," Article III required the named plaintiff to retain a personal stake in the outcome. In *Franks*, the Court allowed a case to continue even though the case was not "capable of repetition, yet evading review" and even though the named plaintiff had lost his personal stake.

however, held that the nature of the controversy was only one factor relevant to the personal stake determination. The Court in *Franks* relied on two other factors — judicial economy and remedial delays — to surmount the prudential limitations on the Court's jurisdiction.

Perhaps more startling than this inconsistency between *Franks* and *Sosna* was the failure of the *Franks* Court to mention Rule 23. While the *Franks* Court determined that the plaintiff met the personal stake requirement, the Court did not decide whether the class was adequately represented by the plaintiff under Rule 23. As in *Sosna*, the plaintiff plainly could not meet the requirements of the Rule.³⁹ Perhaps the *Franks* Court felt failure to satisfy Rule 23 was insignificant where the named plaintiff had originally been a class member. The Court, however, failed to make any inquiry into potential conflicts within the class, a factor which the *Sosna* Court relied on in allowing the plaintiff to continue to represent the class notwithstanding her failure to meet Rule 23 standards.⁴⁰ Moreover, the *Franks* Court could not rely on the fact that the substitution of a new class representative would result in repeated delays, as had the *Sosna* Court,⁴¹ because the claims of individual class members in *Franks* were not inherently short-lived. Thus, there is less justification in *Franks* than in *Sosna* for the Court's failure to demand adherence to the requirements of Rule 23.

In *Kremens v. Bartley*,⁴² the Supreme Court refined the inchoate, class action mootness doctrine of *Sosna* and *Franks*. In *Kremens*, five mentally ill individuals, fifteen to eighteen years of age, challenged the constitutionality of a Pennsylvania statute governing the voluntary admission and commitment of persons aged eighteen and under in state mental health facilities.⁴³ The plaintiffs sought to represent a class of persons under seventeen, who had been, or might have been, admitted or committed to such facilities.⁴⁴ After a class had been certified and the district court had held certain provisions of the Pennsylvania statute unconstitutional, a new statute was enacted which clearly mooted the claims of the named plaintiffs and the claims of a substantial portion of the unnamed class members. Some unnamed class members, however, retained their claims even under the newly enacted statute.⁴⁵

The *Kremens* Court recognized that, after *Sosna* and *Franks*, the existence of

³⁹ As a prerequisite to representation of a class, Rule 23 requires, *inter alia*, (1) a representative plaintiff to be a member of the class he seeks to represent, *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977), and (2) that the claims of the representative plaintiff be typical of the claims of the class. Rule 23(a)(3). See text and notes at notes 183-84 *infra*. The plaintiff in *Franks* could not meet either of these requirements.

⁴⁰ Such an inquiry in *Franks* might have led to the disqualification of the named plaintiff as the class representative. Because he had accumulated actual seniority with the Company, the named plaintiff had an interest in denying judicially-mandated seniority to other class members. Those class members who had applied for work with the company prior to the named plaintiff would bypass the named plaintiff if judicially-mandated seniority was awarded. If judicially-mandated seniority was denied, the other class members would remain inferior in seniority to the named plaintiff. The named plaintiff's discharge for cause does not mitigate this conflict, since the named plaintiff could reapply for employment.

⁴¹ *Sosna v. Iowa*, 419 U.S. at 403.

⁴² 431 U.S. 119 (1977).

⁴³ *Id.* at 121-22.

⁴⁴ *Id.* at 122.

⁴⁵ *Id.* at 122-27.

"live" claims between some unnamed members of the certified class and the defendant satisfied the requirements of Article III.⁴⁶ Nevertheless, the Court in *Kremens* refused to allow the case to continue, stating that "we have never adopted a flat rule that the mere fact of certification of a class by a district court was sufficient to require us to decide the merits of the claims of unnamed class members when those of the named parties had become moot."⁴⁷ In support of its position, the Court noted that neither of the "critical factors"⁴⁸ permitting review in *Sosna* and *Franks* were present in *Kremens*. First, the case did not fall within the class of cases "capable of repetition, yet evading review." Thus, the danger in *Sosna* that the controversy would never be resolved on the merits unless the mooted named plaintiff was allowed to pursue the case was not present.⁴⁹ The second "critical factor" mentioned in *Kremens* was the dubious continued validity of the certified class.⁵⁰ The *Kremens* Court found that only a properly certified class could succeed to the adversarial position of a named representative whose claim becomes moot.⁵¹ In both *Sosna* and *Franks* the certified class remained stable; the named plaintiff was simply no longer a member of the class. In *Kremens*, however, the class itself was affected; not only were the claims of the named plaintiff mooted but so were the claims of a substantial number of the unnamed class members.⁵² Hence, because neither of the "critical factors" found in *Sosna* and *Franks* were present in *Kremens*, the Court would not allow the class action to continue. Rather, the *Kremens* Court remanded the case to the district court for reconsideration of the class definition, exclusion of those whose claims were moot, and substitution of class representatives with live claims.⁵³

The "critical factor" analysis forwarded in *Kremens* inadequately distinguishes *Sosna* and *Franks*. First, the *Kremens* Court's reliance on the "evading review" factor is unconvincing because *Franks*, like *Kremens*, did not fall within the class of cases "capable of repetition, yet evading review," and yet review in *Franks* was permitted.⁵⁴ In making its decision, the Court in *Kremens* did not even consider the reasons given in *Franks* for allowing review, namely, judicial economy and prompt judicial relief.⁵⁵ Second, the "properly

⁴⁶ *Id.* at 134.

⁴⁷ *Id.* at 130.

⁴⁸ *Id.* at 133.

⁴⁹ *Id.* See also *Sosna v. Iowa*, 419 U.S. at 399-402.

⁵⁰ 431 U.S. at 133.

⁵¹ *Id.*

⁵² *Id.* at 132.

⁵³ *Id.* at 135. It is unclear from the Court's discussion whether the Court declined to review the merits in *Kremens* because of the prudential limitation of the personal stake requirement or because the case failed to maintain compliance with the requirements of Rule 23. The Court's disposition supports the conclusion that the case satisfied the Article III requirements. See 431 U.S. at 134 n.15; Champlin, *Personal Stake and Justiciability: Application to the Moot Class Action*, 27 KAN. L. REV. 85, 88 n.20 (1978) [hereinafter cited as Champlin] (If review is impossible because mootness undermines the Article III basis for a lawsuit, federal courts vacate the judgment of the lower court and remand with instructions to dismiss the case as moot.).

⁵⁴ *Franks v. Bowman Transp. Co.*, 424 U.S. at 757 n.9.

⁵⁵ Judicial economy would have been served to some extent by permitting judicial review in *Kremens*. The issues had been tried below and briefed extensively in the Supreme Court. A countervailing factor would have been the change in issues since the time of the district

certified class" factor, like the "evading review" factor, does not adequately distinguish *Sosna* and *Franks* from *Kremens*. In *Sosna* and *Franks*, as in *Kremens*, the propriety of the certified class was undermined as soon as the named plaintiff's claim became moot.⁵⁶ The *Kremens* Court gave no reasons, in law or policy, why the impropriety of the class certification in *Kremens* rendered the case unreviewable on the merits, while the impropriety of the class certification in *Sosna* and *Franks* did not.⁵⁷

Although the rationale is suspect, the "rules" of *Sosna*, *Franks*, and *Kremens* governing post-certification mootness of the named plaintiff's personal claim appear relatively clear. After a class has been certified, the controversy between unnamed class members and the defendant will satisfy the constitutional requirement of Article III. This alone, however does *not* insure the continuation of the lawsuit. In addition, certain "critical factors" must be present, such as a controversy "capable of repetition, yet evading review," or the continued existence of a "properly certified class." If such "critical factors" are present, the case will be allowed to go forward with the named plaintiff continuing his representation of the class, despite the mootness of his claim, so long as he can fairly and adequately protect the interests of the class. If the "critical factors" are not present, the case will be remanded so that the class can be redefined and a new class representative, with a live claim, can be substituted.

B. Post-Denial of Certification Mootness

While *Sosna*, *Franks*, and *Kremens* dealt with mootness of a named plaintiff's claim occurring after a court has certified the class, such mootness can also occur after a court has denied class certification. In two recent cases

court decision. The legislative change would have required the Supreme Court to consider issues that were not presented below.

⁵⁶ See text at notes 183-84 *infra*.

⁵⁷ The Court in *Kremens* made a vague allusion to "disputes . . . so unfocused as to make informed resolution of them almost impossible." 431 U.S. at 134. Unquestionably, the regulations and statute that were enacted subsequent to initiation of the suit in *Kremens* rendered the case more complex. The statute in effect when the lawsuit was initially filed made few or no distinctions based on the age of the juvenile. *Id.* at 124-25. The subsequently enacted regulations and statutes made such distinctions. *Id.* at 125-26. In addition, the new statute repealed the challenged provisions of the original statute except insofar as they related to mentally retarded persons. *Id.* at 126. Consequently, the case was rendered more complex because the validity of the claims of unnamed class members varied depending on the individual class member's age and on whether he was committed for mental illness or mental retardation. *Id.* at 130-31. Increased complexity, however, does not equal "unfocused" disputes. Indeed, in *Kremens* the increased complexity probably created disputes that were more focused. Under the original statute, even though the statute itself made no distinctions based on age, the commitment procedures required by the Constitution may have varied depending on whether a three-year-old or an eighteen-year-old was being committed. See Champlin, *supra* note 53, at 102. Moreover, the commitment procedures required for an eighteen-year-old may have varied depending on whether the commitment was, for example, for mental retardation which was manifested continuously or for mental illness which was manifested only intermittently. Thus, the subsequently enacted regulations and statute which made distinctions based on age and the reasons for commitment may have aided the courts in focusing on factors relevant to a resolution of the dispute. Consequently, the vague allusion in *Kremens* to "disputes . . . so unfocused as to make informed resolution of them almost impossible" is not helpful in distinguishing *Kremens* from *Sosna* and *Franks*.

the Supreme Court considered the latter situation and determined that a named plaintiff could appeal the denial of class certification despite the mootness of his personal claim.

In *Deposit Guaranty National Bank v. Roper*,⁵⁸ the named plaintiffs were the holders of credit cards issued by the defendant bank.⁵⁹ The named plaintiffs alleged that the defendant had made usurious finance charges against their accounts and the accounts of a putative class of approximately 90,000 other credit card holders.⁶⁰ The district court, however, denied the named plaintiff's motion for class certification.⁶¹ The defendant then tendered to each named plaintiff the maximum amount that each could have recovered.⁶² The named plaintiffs refused the tender, but the district court entered judgment in their favor on the basis of the tender and dismissed the action.⁶³ On appeal to the Supreme Court, the defendant argued that the induced mootness precluded the named plaintiffs from obtaining review of the class certification ruling.⁶⁴ The Supreme Court disagreed. The Court noted that even after the defendant's attempt to moot the action, the named plaintiffs retained an interest in shifting part of the costs of the litigation to those who would share in its benefits if a class was certified and ultimately prevailed.⁶⁵ The Court held that this residual interest was sufficient to permit the named plaintiffs to appeal the adverse certification ruling, even though their individual claims were satisfied through the entry of the judgment over their objections.⁶⁶

In *United States Parole Commission v. Geraghty*,⁶⁷ the Court expanded its holding in *Roper* by recognizing an even more tenuous interest as sufficient to overcome alleged post-denial of certification mootness. The named plaintiff in *Geraghty*, a federal prisoner who twice had been denied parole, challenged the validity of the United States Parole Commission's Parole Release Guidelines.⁶⁸ The district court denied the named plaintiff's request for class certification and granted summary judgment for the defendants on the merits.⁶⁹ The named plaintiff was released from prison during the pendency of the appeal and, as a result, the defendants claimed the action was moot.⁷⁰ Once again, the Supreme Court disagreed. The Court refused to distinguish between cases in which the alleged mootness was caused by a judgment, as in *Roper*, and cases in which the alleged mootness was caused by the "expiration" of the named plaintiff's claim, as in *Geraghty*.⁷¹ Rather, the Supreme Court expanded the *Roper* holding

⁵⁸ 100 S. Ct. 1166 (1980).

⁵⁹ *Id.* at 1168.

⁶⁰ *Id.*

⁶¹ *Id.* at 1169.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1169-70.

⁶⁵ *Id.* at 1173-74.

⁶⁶ *Id.* at 1173-75. See also *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1210 ("[T]he Court holds [in *Roper*] that named plaintiffs whose claims are satisfied through entry of judgment over their objections may appeal the denial of a class certification ruling.").

⁶⁷ 100 S. Ct. 1202 (1980).

⁶⁸ *Id.* at 1206.

⁶⁹ *Id.* at 1206-07.

⁷⁰ *Id.* at 1207-08.

⁷¹ *Id.* at 1211.

by deciding that a named plaintiff's interest in his claim that he is entitled to represent a class is sufficient to allow him to appeal an adverse certification ruling, despite the mootness of his personal claim.⁷² The Court's holding in *Geraghty*, narrowly construed, is that when a district court erroneously denies a claim of class certification which, if correctly decided, would have prevented the action from becoming moot, the named plaintiff can appeal the denial and the corrected ruling will relate back to the date of the original denial.⁷³

Roper and *Geraghty* both recognize tenuous interests as sufficient to permit named plaintiffs to appeal adverse class certification rulings. In *Roper* the interest in shifting the costs of litigation was tenuous on the facts. Counsel in the case agreed to a contingency fee of twenty-five percent (25%).⁷⁴ As a result, the named plaintiffs' interest in shifting costs was de minimis. In *Geraghty*, the interest recognized by the Court was a mere procedural claim — the named plaintiff's interest in his claim that he was entitled to represent a class. Even the majority in *Geraghty* admitted that such an interest is rarely sufficient to satisfy the requirements of Article III.⁷⁵ The impetus for the *Roper* and *Geraghty* decisions, then, obviously was not the overwhelming strength of the residual interests of the named plaintiffs. Rather, the impetus was another decision of the Court, *Coopers & Lybrand v. Livesay*.⁷⁶ In *Coopers & Lybrand*, the Supreme Court held that an order denying class certification was not subject to interlocutory appeal as of right. As a result, in *Roper* and *Geraghty*, where class certification had been denied and the named plaintiff subsequently had lost on the merits, the Supreme Court was forced (1) to dismiss the appeal because the named plaintiff's claim was moot, thus rendering unreviewable the district court's class certification ruling; or (2) to allow the appeal by relying on a tenuous interest to avoid mootness of the named plaintiff's claim. The Court opted for the latter even though it raised the spectre of "spurious" class actions.⁷⁷

Thus, the "rule" for post-denial of certification mootness is that the

⁷² *Id.*

⁷³ *Id.* at 1212-13 n.11.

⁷⁴ *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1180 (Powell, J., dissenting).

⁷⁵ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1211.

⁷⁶ 437 U.S. 463 (1978). See generally Note, *Satterwhite v. City of Greenville and Breathing New Life into the Headless Class Action*, 32 STAN. L. REV. 743, 756-58 (1980) [hereinafter cited as *New Life*].

⁷⁷ In "spurious" class actions under the original Rule 23, some courts permitted members of the class to intervene after an adjudication on the merits favorable to their interests, even though they would not have been bound by an adverse decision. See 3B MOORE'S FEDERAL PRACTICE §§ 23.11 [3], 23.12. *Roper* and *Geraghty* may permit a similar tactic. If class certification is denied, unnamed class members would not be bound by an adverse determination on the merits. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1789. The defendant would not be in a position to seek reversal of the class certification ruling since he prevailed on that issue at the class certification stage. C. WRIGHT, A. MILLER, & E. COONER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3901 (a party may not appeal from a decision in his favor). If, however, the named plaintiff is successful on the merits, *Roper* and *Geraghty* presumably would allow the named plaintiff or an intervening, unnamed class member, see *United Airlines v. McDonald*, 431 U.S. 385 (1977), to appeal the class certification denial in an attempt to share the fruits of the favorable decision. *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1172; *id.* at 1182 (Powell, J., dissenting). *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1212.

named plaintiff's interest in shifting litigation costs or in his claim that he is entitled to represent a class is sufficient to enable him to appeal the denial of class certification, even though his personal claim has expired. If he loses that appeal, the claim on the merits must be dismissed as moot. If he wins the appeal, the class certification relates back to the date of the original denial and he stands in the same position as the named plaintiff in *Sosna*.⁷⁸

C. Pre-Certification and Pre-Suit Mootness

While the Supreme Court has allowed named plaintiffs to continue suits following post-certification or post-denial of certification mootness, it has reacted differently when pre-suit and pre-certification mootness has occurred. The Court has ruled that where the named plaintiff's claim becomes moot before a lawsuit is filed⁷⁹ or after a lawsuit is filed but before the certification issue is considered,⁸⁰ such mootness will undermine the plaintiff's ability to

⁷⁸ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1212, 1214. The continued vitality of another Supreme Court opinion, *Weinstein v. Bradford*, 423 U.S. 147 (1975), is questionable after *Geraghty*. See *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1210 n.7; *id.* at 1219-20 (Powell, J., dissenting). The facts in *Weinstein* were similar to those in *Geraghty*. In *Weinstein*, the named plaintiff claimed that the defendants, members of the North Carolina Board of Parole, had denied him certain procedural rights in considering his eligibility for parole. 423 U.S. at 147. After denying the named plaintiff's motion for class certification, the district court sustained his claim that he was constitutionally entitled to certain procedural rights. *Id.* The defendants attempted to appeal, but by the time the case reached the Supreme Court, the named plaintiff had been released from prison. *Id.* at 147-48. The Supreme Court, noting the mootness, refused to review the case. *Id.* at 149. Thus, in *Weinstein* the named plaintiff was asserting mootness to avoid review in a post-denial of certification situation, while in *Geraghty* it was the defendant who was asserting the mootness defense.

Geraghty either overrules or does not overrule *Weinstein*. If it does overrule *Weinstein*, *Weinstein* is instructive as an illustration of the responsibilities a named plaintiff may assume when he seeks to represent a class. See note 172 *infra*. Specifically, a named plaintiff in the position of the named plaintiff in *Weinstein* may be required to pursue the litigation even though his personal interest in the case is greatly diminished. If *Geraghty* does not overrule *Weinstein*, *Weinstein* stands as either an historical footnote of passing interest to litigation strategists or as a startling aspect of personal stake doctrine. If *Weinstein* was not overruled because the defendants sought to challenge the merits of the proceeding on review and not merely, as in *Geraghty*, the class certification decision, *Weinstein* is an historical footnote. It instructs litigation strategists on the proper manner in which to seek appeal in a post-denial or certification situation. If, however, *Weinstein* was not overruled because the named plaintiff, rather than the defendant as in *Geraghty*, forwarded the mootness claim, *Weinstein* is a startling aspect of personal stake doctrine. Specifically, a named plaintiff in a post-denial of certification situation has the option of either refraining or shedding his personal stake in the action and the defendant simply has no control over the exercise of that option.

Geraghty appears to favor the historical footnote option noted above. *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1210 n.7. That avoids the startling personal stake interpretation noted above and delays Supreme Court consideration of the fiduciary responsibilities of class representation.

⁷⁹ See *Duke Power Co. v. Carolina Environmental Control Group, Inc.*, 438 U.S. 59, 72 (1978); *Warth v. Seldin*, 422 U.S. 490, 499-501 (1975); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-89 (1973); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152 (1970).

⁸⁰ *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 429-30 (1976); *Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975). See generally Comment, *The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake*, 39 M.D. L. REV. 121 (1979) [hereinafter cited as *Pre-Certification Loss*].

proceed with the action. The Court recognizes only one exception to the pre-certification rule. Under this exception, if the claims of the named plaintiff are so inherently transitory that the trial court does not even have time to rule on the class certification issue before the named plaintiff's claim is rendered moot, the trial court can consider the class certification issue and its determination will relate back to the date of the filing of the complaint, thus allowing continuation of the suit.⁸¹ This exception is merely another manifestation of the "capable of repetition, yet evading review" consideration discussed earlier.⁸²

The Supreme Court's treatment of pre-suit and pre-certification mootness exposes horizontal inequities⁸³ in current Supreme Court doctrine. In post-certification and post-denial of certification situations, the Court has recognized tenuous interests of the named plaintiff and of unnamed class members as sufficient to satisfy the personal stake requirement. The Court, without explanation refuses to recognize those same interests in pre-suit and pre-certification mootness situations. In *Roper* and *Geraghty*, the Court recognized the named plaintiff's interest in allocating attorney's fees and representing a class as sufficient to satisfy the requirements of Article III. The interests recognized in *Roper* and *Geraghty*, however, are present before, as well as after, the trial court considers the class certification issue. Indeed, they may be present before the lawsuit is filed, particularly in employment discrimination lawsuits. For example, assume Applicant A files a charge of unlawful employment discrimination against the SLW Company.⁸⁴ The charge alleges that SLW discriminated against A and a class of similarly situated job applicants. Upon investigation, the EEOC finds reasonable cause to believe SLW has discriminated against A and the class. A's attorney is active during the conciliation process; nevertheless, the matter cannot be resolved. The EEOC issues a right-to-sue letter, but the day before the lawsuit is filed, SLW hires A and fully compensates him for all the losses he alleged. This is a situation of pre-suit mootness, but the interests noted in *Roper* (allocation of attorney's fees) and *Geraghty* (right to represent a class) are as sharply presented as they were in

⁸¹ For example, assume that a named plaintiff files a class action challenging the constitutional validity of his pre-trial detention. Since the length of pre-trial custody cannot be ascertained at the outset and since it can be ended at any time, it is uncertain that any individual will remain in pre-trial detention long enough for a judge to certify a class. Consequently, even if the named plaintiff is released from pre-trial custody prior to class certification, he should be able to pursue the class action despite the mootness of his personal claim. See *Gerstein v. Pugh*, 420 U.S. 103, 110-11 (1975). See also *Swisher v. Brady*, 438 U.S. 204, 213-14 n.11 (1978); *Sosna v. Iowa*, 419 U.S. at 402 n.11.

⁸² See text at notes 27-29 *supra*. It should be briefly noted that the Supreme Court has sanctioned the use of a "relation back" in two situations and that the relation back operates differently in each situation. In a post-denial of certification situation, the Court has sanctioned a relation back to the date of the original denial of certification. *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1212-13 n.11. In a pre-certification situation where the claim is capable of repetition, yet evading review, the Court has approved a relation back to the time of the filing of the complaint. *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975). See also *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975).

⁸³ "Horizontal inequities" refers to inequities that result when cases are treated differently merely because the named plaintiffs' claims moot at different times.

⁸⁴ The SLW Co. is a fictional company. Any resemblance to an actual company is purely coincidental and wholly unintentional.

the post-denial of certification circumstances presented in those cases. Thus, it could be argued that Applicant A has sufficient interest in pursuing his class claims to satisfy the requirements of Article III and he, too, should be placed in the same position as the named plaintiff in *Roper* and *Geraghty*; that is, he should be entitled to pursue his claim for class certification. If he should lose, the case would be dismissed as moot. If he should win, the focus would be "shift[ed] . . . from the elements of justiciability to the ability of the named representative to 'fairly and adequately protect the interests of the class.'"⁸⁵ Yet, despite the presence of the same interests identified in *Roper* and *Geraghty*, the Court has been unwilling to recognize the continuing personal stake of the named plaintiff in instances of pre-suit and pre-certification mootness.

Similar horizontal inequities are apparent in the Supreme Court's treatment of the interests of unnamed class members in the continuance of a mooted class action. In cases of post-certification mootness, the Court has found the interest of unnamed class members sufficient to satisfy Article III requirements.⁸⁶ Yet the Supreme Court has been unwilling to consider the interests of unnamed class members in pre-suit and pre-certification mootness cases. As the hypothetical above illustrates, however, unnamed class members have the same interest in the named plaintiff's — Applicant A's — suit prior to the filing of the complaint as they would have at the post-certification stage.⁸⁷

These horizontal inequities in the treatment of named plaintiffs and unnamed class members expose the Court's case-by-case manipulation of personal stake doctrine. In these cases, the Supreme Court is not examining the interests of the named plaintiff and unnamed class members to determine whether they measure up to the personal stake standards. Rather, the Court is utilizing Article III rhetoric to make hidden policy choices, such as permitting judicial review of class certification determinations in *Roper* and *Geraghty*⁸⁸ and enhancing judicial economy and ensuring prompt judicial relief in *Sosna* and *Franks*.⁸⁹ The practical application of the Court's decisions, and the practical effect of the horizontal inequities created thereby, is best illustrated by reference to class actions in a specific, substantive area.

II. COMPETING INTERESTS IN EMPLOYMENT DISCRIMINATION CLASS ACTIONS

This section will focus on class actions within the field of employment discrimination. After a consideration of the importance of class actions in the employment discrimination area, the interests of the various parties in these class actions will be discussed. Based upon this discussion, it will be proposed that the Court's resolution of mooted class action issues does not sufficiently satisfy these interests.

At the outset, it should be noted that the class action is a particularly

⁸⁵ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1214 (quoting *Sosna v. Iowa*, 419 U.S. at 403).

⁸⁶ See *Sosna v. Iowa*, 419 U.S. at 402; *Franks v. Bowman Transp. Co.*, 424 U.S. at 755-56.

⁸⁷ See text at notes 106-11 *infra*.

⁸⁸ See text at notes 76-77 *supra*.

⁸⁹ See text at note 37 *supra*.

useful and valuable tool for combatting illegal employment discrimination. The class action in employment discrimination lawsuits, as in other types of actions, provides a convenient and economical means for disposing of similar lawsuits and facilitates the spreading of litigation costs among numerous litigants with similar claims.⁹⁰ In addition, since "suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs,"⁹¹ the class action enables victims of discrimination to attack those classwide wrongs and seek classwide remedies.⁹² In employment discrimination litigation, the class action has particular value, since it may ease the evidentiary showing necessary to establish a *substantive* claim of employment discrimination.⁹³ Moreover, it makes possible the revival of claims that would be time barred but for the class action mechanism.⁹⁴ Thus, limits on the ability of a named plaintiff with a mooted personal claim to continue litigation on behalf of a class hamper to some extent enforcement of the federal non-discrimination obligation. Conversely, an interpretation of Rule 23 and the

⁹⁰ United States Parole Comm'n v. Geraghty, 100 S. Ct. at 1211.

⁹¹ East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 405 (1977).

⁹² Classwide remedies are essential to combat systemic or wide-ranging employment discrimination:

Suppose that some group has been identified as suffering from a denial of equal opportunities. How is the situation to be corrected? Imagine a race where some racers have been assigned a heavy weight to carry because they belong to a particular group. Because of this handicap the average runner with weights will lag behind the average runner without weights, but some runners with weights will come out ahead of some runners without weight. Now suppose someone waves a magic wand and the weights are lifted from the backs of all runners. If the two groups of runners are equal in ability the mean difference between the weighted and unweighted groups ceases to expand but those who suffered from the earliest discrimination will never catch up. If this is a race where parents who are ahead are able to hand the baton to their children, there is no equalization of the race even across generations. The race can be made fair only if everyone is forced to stop and begin again at the same starting line, if those without weights are forced to carry weights until the differences in average group-performances disappear, or if those who have been handicapped in the past are given special privileges until they catch up.

Thorow, *A Theory of Groups and Economic Redistribution*, 9 PHILOSOPHY & PUBLIC AFFAIRS 25, 35 (1979).

⁹³ To establish a *prima facie* case of disparate treatment in a private non-class discrimination suit the individual plaintiff must meet the five-part test set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). One element of the five-part test is a demonstration by the plaintiff that he is qualified for the position being sought. *Id.* In a class action, the plaintiff class can establish a *prima facie* case of disparate treatment by creating an inference of employment discrimination through the use of statistical proof. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). Once a *prima facie* case has been established, the individual class member need only show that he unsuccessfully applied for a job to become eligible for individual relief. 431 U.S. at 362. The individual class member need not show that he is qualified for the job being sought. *Id.* at 362. Thus, availability of the class action device may ease the showing necessary to establish a substantive claim of employment discrimination. See *Davis v. Califano*, 613 F.2d 957, 969-72 (D.C. Cir. 1980) (MacKinnon, J., dissenting); *Sledge v. J.P. Stevens and Co.*, 585 F.2d 625, 636-38 (4th Cir. 1978).

⁹⁴ See text and notes at notes 108-09 *infra*.

personal stake requirement that permits such lawsuits to continue aids the enforcement effort.

The value of the class action mechanism to employment discrimination litigation, however, can best be demonstrated through an examination of the interests of the various parties to an employment discrimination class action. Consideration of a prototypical employment discrimination case will facilitate such an examination. Assume that Employee A, an employee of the SLW Co., thinks she has been denied a promotion because of her sex. She retains an attorney and promptly files a charge of discrimination against the SLW Co. with the EEOC. Employee A claims not only that SLW has discriminated against her, but also that SLW has discriminated against a class composed of all females who have been denied promotions by SLW. The EEOC investigates Employee A's charge and finds reasonable cause to believe that SLW has discriminated against both Employee A and the class. After completing an unsuccessful conciliation process, the EEOC issues a right-to-sue letter to Employee A. Employee A files a class action in federal district court. On a motion for summary judgment filed by SLW, the court finds that Employee A has no personal claim against SLW because she was unable to demonstrate that she was qualified for the job she sought. At this point, the court is faced with the class action mootness issues. Should the lawsuit be allowed to continue? If so, should Employee A be allowed to represent the putative class?

Resolution of the class action mootness issues will depend on the manner in which the competing interests of four entities are accommodated. First, the interests of Employee A, the named plaintiff, must be considered. By definition in mooted class actions, Employee A's personal claim has been mooted. Nevertheless, although undercut to some extent, Employee A's interests remain significant. If Employee A retains interests sufficient to meet the requirements of Article III and Rule 23 despite the loss of her personal claim, the suit may continue without an inquiry into the interests of unnamed class members. Second, as adumbrated above, the interests of unnamed class members merit examination. Even if Employee A no longer has a sufficient interest to justify continuation of the lawsuit, perhaps the interests of unnamed class members in the expeditious prosecution of their claims should be recognized. Third, the SLW Co. has an obvious interest in avoiding both the employment discrimination litigation itself and the concomitant potential liability. Finally, the broader interests of the public are significant. The public has an interest in a just enforcement of the non-discrimination obligation, as well as an interest in the broader public policies allegedly furthered by the personal stake requirement and by Rule 23. The following paragraphs will explicate further the interests of these four entities.

As noted above,⁹⁵ the Supreme Court in *Roper* and *Geraghty* liberally construed Employee A's residual interests. Allowing mooted class actions to continue, the Court recognized the named plaintiff's interest in (1) shifting "to successful class litigants a portion of those fees and expenses that have been incurred in [the] litigation and for which they assert a continuing obligation"⁹⁶

⁹⁵ See text at notes 58-78 *supra*.

⁹⁶ *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1171 n.6.

and (2) obtaining class certification.⁹⁷ Both of these interests take on an added significance in employment discrimination class actions.

The interest of the named plaintiff in shifting attorneys' fees will in most cases be greater in employment discrimination class actions than it was in *Roper*. In *Roper*, the interest was minimal because the plaintiffs had entered into a contingent fee agreement whereby they and other class members would pay 25% of their recovery to counsel. Consequently, the named plaintiff's only continuing interest was in shifting other, albeit unspecified, costs and expenses.⁹⁸ In employment discrimination cases, however, a named plaintiff who is able to prevail on his class allegations despite the loss of his personal claim, may be able to shift at least some portion of his costs and expenses, including attorneys' fees, to the defendant.⁹⁹ Thus, Employee A has an interest in pursuing class allegations despite the loss of her personal claim because success on the class allegations may allow her to shift some portion of her attorneys' fees to the defendant.

Similarly, in some circumstances the interest of the named plaintiff in obtaining class certification may be greater in employment discrimination lawsuits than it was in *Geraghty*. In the hypothetical, for example, Employee A's personal claim failed because she was unable to demonstrate that she was qualified for the job she sought. If Employee A is allowed to pursue her class claims and can create an inference of discrimination against the class, she no longer needs to demonstrate that she was qualified for the job to prevail. That burden is shifted to the SLW Co.¹⁰⁰ As a result, because of the differences in the evidentiary proof required for individual and class claims,¹⁰¹ Employee A's interest in obtaining class certification is substantial.¹⁰²

⁹⁷ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1211.

⁹⁸ 100 S. Ct. at 1180 (Powell, J., dissenting).

⁹⁹ Title VII provides for an award of reasonable attorney's fees. Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (1976). *See also* 42 U.S.C. § 1988 (1976) (provides for awards of attorney's fees for suits brought to enforce rights under the 19th-century civil rights laws). The courts differ as to what are reasonable attorney's fees for plaintiffs who only partially prevail. Some courts limit fees to the extent of the victory, *see Walker v. Robbins Hose Co.*, No. 1, 23 EPD ¶ 30,965, at 15,981 (3d Cir. 1980); *Ridgewater v. United Hosp.-Miller Div.*, 563 F.2d 923, 928 (8th Cir. 1977); *Crocker v. Boeing Co.*, 444 F. Supp. 890, 895 (E.D. Pa. 1977); *Boyd v. Ozark Airlines, Inc.*, 419 F. Supp. 1061, 1065 (E.D. Mo. 1976); *Ruckel v. Essex Int'l, Inc.*, 14 FEP Cas. 403, 413 (N.D. Ind. 1976), while others do not penalize the plaintiff for unsuccessful time spent, *see Bolton v. Murray Envelope Corp.*, 553 F.2d 881, 884 (5th Cir. 1977); *Saracini v. Missouri Pacific R.R.*, 431 F. Supp. 389, 398 (E.D. Ark. 1977). Nevertheless, even in jurisdictions where the courts limit fees to the extent of the victory, the named plaintiff may be able to shift a portion of his costs and expenses if the unsuccessful individual claims and the successful class claims depended on a common nucleus of operative facts and the time spent by the plaintiff's attorney on the successful claims cannot be reasonably segregated. *Cooper v. Curtis*, 16 EPD ¶ 8099, at 4512 (D.D.C. 1978).

¹⁰⁰ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977). *See note* 93 *supra*.

¹⁰¹ *See note* 93 *supra*.

¹⁰² The class of cases in which Employee A's interest in obtaining class certification is greater than the named plaintiff's in *Geraghty* is admittedly quite small. It encompasses only those cases in which the named plaintiff's personal employment discrimination claim fails because of an inability to demonstrate qualifications for the job sought and in which the defendant employer is subsequently unable to demonstrate lack of qualification for the job sought. Presumably, in the

Employee A also has other residual interests in continuing the lawsuit. As an employee of SLW, she has an interest in the "important benefits"¹⁰³ flowing from a sexually — or racially — balanced workforce.¹⁰⁴ Moreover, to the extent employment discrimination laws foresee a more generalized, societal benefit from the upgrading of the relative economic positions of protected groups,¹⁰⁵ Employee A has a minimal residual interest, as a member of the society benefited, in the continuation of her lawsuit.

The interests of the unnamed class members in Employee A's suit against SLW are perhaps more substantial than Employee A's residual interests. Title VII has two prerequisites to the filing of a federal court action: (1) the timely filing of a charge of discrimination with the EEOC, and (2) the timely filing of a court action after receiving a "right-to-sue" letter from the EEOC.¹⁰⁶ Failure to fulfill the procedural prerequisites within the statutory time limits, however, does not preclude unnamed class members from recovery. A named plaintiff, such as Employee A, who has fulfilled the procedural prerequisites can obtain relief on behalf of class members who have not.¹⁰⁷ Thus, unnamed class members who have not fulfilled the procedural prerequisites to suit in a timely fashion retain a substantial interest in the continuation of the class action even after Employee A's personal claim expires. If the alleged discrimination is continuing in nature — and thus the bringing of an action by a class member would not be time barred under Title VII — the unnamed class members still retain an interest in the continuation of the class action. Their interest in such a situation is to extend the period of potential backpay as far into the past as possible.¹⁰⁸ If the alleged discrimination is a completed act — and class

majority of employment discrimination class actions, the interest of the named plaintiff in obtaining class certification is the same as the interest of the named plaintiff in *Geraghty*.

¹⁰³ Cf. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209-10 (1972) (existing tenants found to have standing to challenge allegedly illegal exclusion of minorities from housing complex based on allegation of injury from loss of "important benefits" of interracial associations).

¹⁰⁴ *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976). See also *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 277 (10th Cir. 1977).

¹⁰⁵ Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-40, 244-49 (1971).

¹⁰⁶ Title VII, 42 U.S.C. § 2000e-5 (1976). See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

¹⁰⁷ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975).

¹⁰⁸ Assume, for example, a situation in which the SLW Co., maintains a policy of refusing to promote women into a job classification. On January 1, 1980, Employee A filed her charge with the EEOC alleging discrimination against herself and a class of similarly situated women. Employees B, C, and D rely on A's charge and do not file charges themselves. Employee A receives a "right-to-sue" letter on December 1, 1980 and promptly files a suit in federal court. On January 1, 1981, the court finds that Employee A was not qualified for the promotion and dismisses Employee A's individual claim. Since the discriminatory policy is still in effect, Employees B, C, and D can file a new charge with the EEOC on January 1, 1981. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 972 (1975). But if they do so and the company is later found to have violated Title VII, the company's backpay liability will accrue from January 1, 1979 — a date two years prior to the filing of the charge with the EEOC. Section 706(g) of Title VII, as codified in 42 U.S.C. § 2000d-5(g). On the other hand, if B, C, and D can continue A's suit, despite the loss of her personal claim, and the company is

members are time barred from bringing an action under Title VII — the unnamed class members' interest is in maintaining an otherwise time barred action.¹⁰⁹

In addition to the two interests noted above, some unnamed class members may have other reasons for favoring continuation of Employee A's lawsuit. For example, they may want to insure their anonymity in an action against defendants with whom they have continuing necessary relationships.¹¹⁰ Moreover, the continuation of Employee A's lawsuit may allow unnamed class members to get two bites at the proverbial apple. On the one hand, if Employee A wins the class suit, the unnamed class members can come forward to claim their share of the relief awarded. On the other hand, if Employee A loses the class suit, the unnamed class members can argue that Employee A's suit should have only a limited, adverse *res judicata* effect and that, hence, they should not be barred from pursuing anew their claims.¹¹¹

The SLW Co., however, has interests which counterpoise the interests of unnamed class members. As previously noted, allowing Employee A's suit to continue may have the effect of allowing an otherwise time barred suit to continue or of extending the period of backpay liability. The defendant has a legitimate interest in an interpretation of the time limit provisions of Title VII

later found to be liable, the company's backpay liability will accrue from January 1, 1978 — a date two years prior to the filing of A's charge with the EEOC. *Id.* See *New Life*, *supra* note 76, at 754-56.

¹⁰⁹ Assume the same circumstances as in note 108, but assume in addition that the SLW Company revised the discriminatory policy on December 1, 1979, and commencing on that date promoted women into the job classification on a non-discriminatory basis. In this situation, when Employee A's individual claim is dismissed, Employee B, C, and D would be time barred from filing a new charge with the EEOC because Title VII requires that a charge be filed within 180 days of the discriminatory act. Section 706(e) of Title VII, as codified in 42 U.S.C. § 2000e-5(e) (assuming the discrimination occurred in a state without a fair employment practices agency with authority to grant or seek relief). The general rule that the statute of limitations on the individual causes of action of unnamed class members is tolled from the date of filing of the class action complaint, *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 552-56 (1974), provides little comfort to B, C, and D. Because of the shortness of the time limits under Title VII, and because Title VII, to further its conciliation goals, requires a significant time delay between the time a charge is filed and the time a complaint can be filed in court by a private party, sections 706(b), (c), and (f)(1) of Title VII, as codified in 42 U.S.C. § 2000e-5(b), (c), (f)(1), the individual claims of unnamed class members are generally time barred before the class action complaint is filed. Thus, unless B, C, and D can continue Employee A's lawsuit despite the expiration of Employee A's individual cause of action, they will be unable to pursue the alleged discrimination. See *New Life*, *supra* note 76, at 754-56.

¹¹⁰ See *Satterwhite v. City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978), *vacated*, 100 S. Ct. 1334 (1980); *Ste. Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 449 (S.D.N.Y. 1976).

¹¹¹ The *res judicata* argument of the unnamed class members can take several forms. First, they can claim that, because of Employee A's obvious lack of class membership and typicality, they received inadequate representation in Employee A's class action and should not be bound by it. Second, they can claim a judgment on classwide Title VII claims should have no *res judicata* effect on their individual claims. Third, they can claim the adverse judgment in Employee A's class action should bar only injunctive, but not monetary relief. See Note, *Due Process Rights of Absentees in Title VII Class Actions — The Myth of Homogeneity of Interest*, 59 B.U. L. REV. 661, 685-86 (1979). See also Note, *Class Actions: Certification and Notice Requirements*, 68 GEO. L. J. 1009, 1027-35 (1980).

that limits, to the greatest extent possible, the retroactive reach of the Act. In another context, the Supreme Court has recognized this interest:

A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. . . . [I]t is merely an unfortunate event in history which has no present legal consequences.¹¹²

Thus, the SLW Co. has an interest, noted approvingly by the Supreme Court, in avoiding liability for allegedly discriminatory acts that were not promptly prosecuted by the alleged discrimination victims. In addition, the defendant has an interest in limiting the number of persons who can bring and/or continue employment discrimination lawsuits. To the extent Article III and Rule 23 requirements are eased, defendants are exposed to a greater risk of litigation because the class of potential plaintiffs increases.¹¹³ Defendants have an interest in avoiding such litigation, whether or not it eventually results in liability.¹¹⁴ Moreover, since the representative status of Employee A is questionable at best,¹¹⁵ the SLW Co. has an interest in concluding the suit because even if SLW wins the suit, it may not preclude subsequent suits by unnamed class members.¹¹⁶

Finally, after focusing on the interests of the named plaintiff, the unnamed class members, and the defendant, the broader interests of the public in Employee A's suit must be considered. The public has a special interest in employment discrimination lawsuits. The elimination of employment discrimination is a societal goal that has been expressed in myriad state and federal laws. Consequently, the public has an interest in a resolution of the class action mootness issue which furthers this goal. Since a resolution terminating the lawsuit could hinder or block the ability of unnamed class members to litigate the employment discrimination issue,¹¹⁷ this public interest weighs in favor of allowing Employee A's suit to continue.¹¹⁸ Nevertheless,

¹¹² *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

¹¹³ Although the actual increase in the risk of litigation will be dependent on a number of factors, including the number of potential plaintiffs, an increase in potential plaintiffs does increase to some extent the company's potential exposure to litigation.

¹¹⁴ Even if the litigation does not result in a finding of liability, the defendant will undergo considerable expense and his chances for recovering such expense are not good. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (defendants cannot recover attorney's fees unless action was unreasonable, frivolous, meritless, or vexatious).

¹¹⁵ See text at notes 183-84 *infra*.

¹¹⁶ See note 111 *supra*. Of course, if subsequent judicial decisions increase the certainty of the *res judicata* effect of the judgment in Employee A's class suit, the SLW Co. may prefer the continuation of Employee A's suit, particularly if the Company feels that it is likely to prevail and/or that unnamed class members are quite likely to pursue their claims.

¹¹⁷ See notes 108-09 *supra*.

¹¹⁸ The class representative in employment discrimination lawsuits is seeking to vindicate the public interest as a "private attorney general." The phrase "private attorney general" was first coined in a case which did not involve employment discrimination. *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943), *vacated and remanded*, 320 U.S. 707 (1943). The phrase, however, does describe accurately plaintiffs in employment discrimination lawsuits and, consequently, has been used in countless Title VII cases. See, e.g., *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978); *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968).

countervailing public interests can be found in Title VII's conciliation procedures and time limitations. Title VII has a clearly stated conciliation policy intended to minimize the disruptive effect and expense of employment discrimination disputes.¹¹⁹ If Employee A is allowed to continue the suit, the employment discrimination issue will have reached court without any conciliation between the SLW Co. and the allegedly adversely affected parties, that is, the unnamed class members.¹²⁰ Thus, while the public interest in eliminating employment discrimination supports a continuation of the suit by Employee A, the public interest in conciliation weighs in favor of dismissing Employee A's suit and requiring unnamed class members to conciliate their claims before being allowed to litigate them in the federal courts.

Along with its interest in eliminating employment discrimination and in promoting conciliation between the employer and his employees, the public also has interests in Employee A's suit which are not limited to employment discrimination lawsuits. The personal stake requirement is said to enhance the public interest in the separation of powers,¹²¹ integrity of the decision-making process¹²² and economy of judicial resources.¹²³ These public interests weigh in favor of limiting Employee A's ability to continue her lawsuit after her personal claim becomes moot.

In summary, the four sets of interests discussed above — those of the named plaintiff, the unnamed class members, the defendant, and the public — interact and sometimes collide when an employment discrimination class action is "mooted." The current Supreme Court resolution of the mooted class action issues, however, does not adequately accommodate these interests. Rather, the Supreme Court overemphasizes the interests of the named plaintiff by clinging to the vestiges of an outdated notion of personal stake, while undermining Rule 23 requirements that are intended to protect unnamed class members, defendants and the public. The following section will, through an

¹¹⁹ See § 706 of Title VII, as codified in 42 U.S.C. § 2000e-5 (1976).

¹²⁰ If Employee A's class claims were fully considered during the conciliation process between Employee A and the SLW Co., allowing Employee A to continue her suit will have only a minimal adverse effect on the conciliation process. See note 209 *infra*.

¹²¹ The separation of powers interest surfaces when constitutional adjudication may lead to a conflict between coordinate branches of the government. For example, in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974), certain citizens challenged the Reserve membership of members of Congress under the incompatibility clause of the Constitution, which provides in part that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." U.S. CONST. art. 1, § 6, cl. 2. The case involved constitutional adjudication which could have resulted in a confrontation between the judicial and legislative branches of government. In the absence of a concrete injury to the citizen-plaintiff, the Court denied standing. 418 U.S. at 216-27. See also *Ashwander v. TVA*, 297 U.S. 288, 324-26 (1936); *Muskraat v. United States*, 219 U.S. 346, 357-58 (1911).

¹²² The personal stake requirement is thought to "assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962). See also *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152 (1970); *Barlow v. Collins*, 397 U.S. 159, 164, 172-73. But see K. DAVIS, *ADMINISTRATIVE LAW* § 22.04 (3d ed. 1972) [hereinafter cited as DAVIS].

¹²³ Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645, 670-83 (1973); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1675 (1970). But see Champlin, *supra* note 53, at 95.

analysis of the interests in mooted employment discrimination class actions, propose a more appropriate resolution of the mooted class action issues.

III. DOCTRINE IN SEARCH OF A RATIONALE

The current Supreme Court approach to the class action mootness issues is the result of a series of case-by-case determinations that lack the unifying force of a consistent and well-advised rationale. It is clear, however, that the mooted class action presents two basic issues: (1) whether the case, despite the mootness of the named plaintiff's personal claim, continues to satisfy the personal stake requirement, and (2) whether the case continues to meet the requirements of Rule 23. This section will propose, in the context of mooted employment discrimination class actions,¹²⁴ that the personal stake requirement be eased so that most, if not all, mooted class actions will continue to satisfy that requirement.¹²⁵ The section will also propose that the named plaintiff's continued compliance with the requirements of Rule 23 be reviewed when he loses his personal claim. If, as is probably the case, he can no longer satisfy the Rule's requirements, the court should hold the case on its docket until a class member comes forward who can meet the requirements. If no class member has come forward after a reasonable period of time, the case should be dismissed. Such an analysis would result in a consistent and predictable mooted class action doctrine; it would permit such actions to continue where the interests of the named plaintiff, class members, defendant, and public are served, while maintaining the integrity of the Rule 23 requirements.

A. Personal Stake in the Mooted Action

Personal stake is surely one of the most maligned judicial doctrines of our time. The "gossamer distinctions"¹²⁶ required by the "labyrinth of analytically questionable decisions"¹²⁷ in the area have prompted more than one commentator to suggest that "like an old soldier, . . . the doctrine [should] fade away."¹²⁸ Indeed, the Supreme Court has recognized that the doctrine is

¹²⁴ It should be noted that, although this article utilizes the employment discrimination class action as a paradigm for discussion, the conclusions reached should in most instances be directly applicable, or at least closely analogous, to class actions in other substantive areas.

¹²⁵ See text at notes 119-75 *infra*. See also Tushnet, *The "Case or Controversy" Controversy*, 93 HARV. L. REV. 1698, 1706-07 (1980) [hereinafter cited as Tushnet Controversy].

¹²⁶ *Florida v. Weinberger*, 492 F.2d 488, 495 (5th Cir. 1974).

¹²⁷ Bernstine, *A "Standing" Amendment to the Federal Rules of Civil Procedure*, 1979 WASH. U.L.Q. 501, 503.

¹²⁸ Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 700 (1977) [hereinafter cited as Tushnet Standing]. See also Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343 (1974); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 806 (1969) [hereinafter cited as Berger]; Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968); Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229 (1969); Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 COLUM. L. REV. 867 (1965). Cf. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390 (1980) [hereinafter cited as

"riddled with exceptions"¹²⁹ and that jurisprudence in the area "can be characterized, aptly [and quite generously], as 'flexible.'" ¹³⁰

As noted above,¹³¹ the personal stake requirement has two aspects in the ordinary case: (1) a constitutional limitation on the power of the federal courts that derives from the "case or controversy" language of Article III, and (2) an additional, self-imposed, "prudential" restraint on the exercise of judicial power.¹³² In employment discrimination cases, however, Congress defined standing as broadly as is permitted by the Constitution.¹³³ Consequently, the personal stake requirement imposes only a constitutional limitation in such lawsuits.¹³⁴ Traditionally, this constitutional personal stake requirement has required "some actual or threatened injury as a result of the putatively illegal conduct of the defendant."¹³⁵ Resolution of the personal stake issue, then, would turn on the plaintiff's ability to allege a "continuing or threatened injury at the hands of the adversary."¹³⁶ This articulation of the personal stake requirement was thought to enhance the public interest in the separation of powers, integrity of the decision-making process and economy of judicial

Roberts] (the Supreme Court's "manipulation of pleading principles has diverted the Court from formulating a comprehensive and workable approach to standing").

¹²⁹ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. 1202, 1213 n.11 (1980).

¹³⁰ *Id.* That which is "flexible" to the Supreme Court is "lawlessly discretionary" to critical commentators. See *Tushnet Standing*, *supra* note 128, at 697.

¹³¹ See text at note 10 *supra*.

¹³² *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1215 (Powell, J., dissenting).

¹³³ "The use in 42 U.S.C. § 2000e-5 of the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Hackett v. McGuire Brothers, Inc.*, 445 F.2d 442, 446 (3d Cir. 1977). See also *Gray v. Greyhound Lines*, 545 F.2d 169, 176 (D.C. Cir. 1976); *Waters v. Heublein*, 547 F.2d 466, 469-70 (9th Cir. 1976); *Senter v. General Motors Corp.*, 532 F.2d 511, 517 (6th Cir. 1976).

¹³⁴ See note 133 *supra*. The Supreme Court has held that the prudential restraint on judicial power can be bypassed when a claim is brought pursuant to a statute which expressly or impliedly extends standing to the limits permitted by Article III. See, e.g., *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *United States v. SCRAP*, 412 U.S. 669, 702 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972). See generally *Cascone*, 57 U. DET. J. URB. L. 671, 676 (1980).

It should be noted, however, that although the personal stake requirement has been cloaked by the courts in constitutional outer garments, the concept has been largely a creation of twentieth century judicial decisions. There is nothing in history requiring a rigid standing rule as implicit in the Article III language. *Berger*, *supra* note 128, at 840. See C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3531, at 176, 180.

¹³⁵ *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). See also *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977); *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

¹³⁶ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1216 (Powell, J., dissenting). The emphasis on injury in fact gives one an impression of simple, almost mechanical, application to most cases. That is not the case:

Injury in fact would seem to be a simple test for standing, but several Supreme Court opinions have introduced considerable complexity by radically restricting the range and types of qualifying "injuries." A purely abstract injury will not suffice; it must be a "concrete," "particularized" injury not shared by the public generally.

Roberts, *supra* note 128, at 394.

resources.¹³⁷ More specifically, the personal stake requirement was intended to ensure a "concrete and adversarial presentation."¹³⁸ Thus, the traditional personal stake requirement — an injury to the plaintiff — was artificial to the extent it sought to further certain public policies, not by a direct consideration of the policies, but by reliance on an extraneous factor, actual or threatened harm.¹³⁹

This traditional interpretation of the personal stake requirement poses problems for the mooted class action plaintiff. Assume, for example, that in the hypothetical posed in Section II,¹⁴⁰ Employee A's personal claim was mooted after the district court had denied Employee A's motion for class certification. Employee A can no longer point to an "actual or threatened injury" as a result of illegal conduct by the SLW Co. Employee A was not qualified for the job, so SLW's refusal to hire her was not illegal conduct. Thus, under traditional personal stake analysis which focuses on Employee A's interest in pursuing her substantive claim, Employee A would not be allowed to continue the class action.¹⁴¹

Geraghty, however, presages a weakening of traditional personal stake notions. In *Geraghty*, the Supreme Court allowed a plaintiff in Employee A's position to continue a lawsuit. The Court noted that the named plaintiff's residual interest in obtaining class certification was tenuous,¹⁴² but nevertheless held that the personal stake requirement could be met if the purpose of the requirement was satisfied:

[T]he purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. . . . We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired. . . . [V]igorous advocacy can be assured through means other than the traditional requirement of a "personal stake in the outcome."¹⁴³

Thus, the Supreme Court drifted away from the traditional, but artificial, personal stake requirement which assumed that lack of actual or threatened harm to the named plaintiff would undermine a concrete and adversarial presenta-

¹³⁷ See notes 121-23 *supra*.

¹³⁸ Tushnet Controversy, *supra* note 125, at 1706 n.35. See also *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1208, 1212.

¹³⁹ This "traditional personal stake inquiry" is the culmination of considerable judicial writhing on the issue. See generally C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3531.

¹⁴⁰ See text at note 84 *supra*.

¹⁴¹ The Supreme Court has refused to recognize the interests of unnamed class members in the absence of class certification. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976); *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976); *Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (per curiam); *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128, 130 (1975). But see *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1175-76 (1980) (Stevens, J., concurring).

¹⁴² 100 S. Ct. at 1211-12.

¹⁴³ *Id.* at 1212.

tion of the case.¹⁴⁴ Rather, the *Geraghty* Court expanded its inquiry beyond a narrow examination of Employee A's "actual or threatened injury" and directly and practically determined whether the dispute satisfied the policies underlying the personal stake requirement.

In *Geraghty*, then, the outlines of a new and pragmatic approach to personal stake can be discerned. This pragmatic approach recognizes, as does *Geraghty*, that the personal stake requirement can be met even if the traditional "actual or threatened injury" with respect to the named plaintiff's substantive claim is absent.¹⁴⁵ Article III merely requires "vigorous advocacy"¹⁴⁶ and that requirement can be satisfied even after the loss of the named plaintiff's substantive claim. Under the pragmatic approach, the search for the required "vigorous advocacy" would extend beyond the named plaintiff's interest in his substantive claim to his residual interests¹⁴⁷ and to the interests of unnamed class members.¹⁴⁸ If these latter interests provided the incentive for the necessary "vigorous advocacy,"¹⁴⁹ a denial of review would be justified only if such a denial would further an articulated policy.¹⁵⁰ For example, a denial of

¹⁴⁴ See notes 138-39 *supra*.

¹⁴⁵ This does not mean that the existence or non-existence of actual or threatened injury is rendered irrelevant. Rather, the existence of the traditional injury in fact is the starting point of the analysis. A plaintiff who is injured in fact is entitled to judicial review. Elementary justice dictates that one who is injured by allegedly illegal action should have a remedy. DAVIS, *supra* note 122, at § 22.02 (1970).

¹⁴⁶ In *Geraghty*, the Supreme Court held that the personal stake requirement could be met, even though the named plaintiff's personal claim had expired, if the purpose of the requirement was satisfied. 100 S. Ct. at 1212. "Vigorous advocacy" was the shorthand the Court utilized in *Geraghty* to identify that purpose. *Id.* Although the Court's finding of "vigorous advocacy" in *Geraghty* was conclusory, vigorous advocacy appears to include both "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." *Id.* Vigorous advocacy also appears to be the crux of Professor Tushnet's proposed "barebones approach" to Article III. Tushnet Controversy, *supra* note 125, at 1706.

¹⁴⁷ See text at notes 58-78 *supra*.

¹⁴⁸ Although the Supreme Court noted the interests of unnamed class members, the Court's dispositions in *Roper* and *Geraghty* did not require it to consider those interests. See *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1170, 1174 & n. 12. Justice Stevens in his concurrence, however, stated that the interests of unnamed class members should be recognized as sufficient to satisfy the personal stake requirement. 100 S. Ct. at 1175-76. *But see* 100 S. Ct. at 1184 n.21 (Powell, J., dissenting). See also text at notes 168-73 *infra*.

¹⁴⁹ *Roper* and *Geraghty* hold that these interests do supply the required vigorous advocacy. It should be noted that the pragmatic approach is not precluded by the constitutional basis of the personal stake requirement. Article III does not explicitly impose an "actual or threatened injury" requirement; rather, the Article III language is general and, hence, subject to varying interpretations. The proposed pragmatic approach would merely expand the scope of the search for the vigorous advocacy required by Article III.

¹⁵⁰ The pragmatic approach to personal stake modifies the traditional approach by utilizing a familiar legal technique — a shifting of the burden of proceeding. In the absence of an injury in fact under the traditional approach, review is denied unless the plaintiff comes forward with a policy, such as "capable of repetition, yet evading review," which overcomes the otherwise automatic denial of review. Compare *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 429-30 (1976), and *Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975) (review denied), with *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978), and *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975) (review permitted). This approach occasionally results in standing decisions which lack an articulated policy basis. See, e.g., *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953). The proposed pragmatic approach places the burden of proceeding on the

review would be justified if the absence of the traditionally required injury in fact resulted in unavoidable separation-of-powers concerns¹⁵¹ or if a "better" plaintiff were available.¹⁵²

This pragmatic approach to the personal stake issue is an encouraging improvement over the artificial traditional approach. The traditional approach, as noted above,¹⁵³ focuses on the interests of Employee A in her substantive claim. It fails to consider adequately the residual interest of Employee A and the interests of unnamed class members.¹⁵⁴ In addition, the determinative factor under the traditional approach is the existence or nonexistence of actual or threatened harm to the named plaintiff. That factor, however, does not ensure furtherance of the policies underlying the personal stake requirement.¹⁵⁵ In *Geraghty*, for example, the named plaintiff could not satisfy the traditional "actual or threatened harm" factor,¹⁵⁶ but the Court found that the policy underlying the personal stake requirement — the assurance of a concrete dispute capable of judicial resolution¹⁵⁷ — was satisfied. If the *Geraghty* Court had adhered to the traditional approach, review would have been denied on personal stake grounds even though the policy underlying the personal stake requirement was satisfied. Finally, the traditional approach is easily manipulated.¹⁵⁸ As a result, the courts may "hide [their] real concerns about separa-

defendant. Once the expanded search of the pragmatic approach locates an interest assuring vigorous advocacy, the defendant must come forward with a rational policy basis to obtain an order denying review. Consequently, by permitting review unless a policy is articulated which militates against a consideration of the merits, the pragmatic approach ensures that an artificial and purposeless barrier will not deny parties an opportunity to be heard.

¹⁵¹ See note 121 *supra*. See also Tushnet Standing, *supra* note 128, at 700.

¹⁵² This "best plaintiff" notion may be the key to a more enlightened personal stake doctrine. Although a plethora of policies have been utilized to support the traditional personal stake doctrine, see notes 121-23 *supra*, the overriding policy consideration is, and should be, whether the plaintiff is a proper party to adjudicate the issues raised. See *United States v. Richardson*, 418 U.S. 166, 174 (1974) (standing "focuses primarily on the party seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated . . .'"); *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968) ("[w]hen standing is placed in issue . . . the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . ."). See also DAVIS, *supra* note 122, at § 22.04. The pragmatic approach to personal stake would face this issue, not by looking to an artificial indicator like injury in fact, but by a direct evaluation of the challenged plaintiff and possible alternative plaintiffs. This "best plaintiff" concept has been utilized by the Supreme Court in *jus tertii* cases. See *Singleton v. Wulff*, 428 U.S. 106, 115-16 (1976) (plurality opinion); C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3531, at 211-12. A broader use of the concept has been advocated by a distinguished commentator. Tushnet Standing, *supra* note 129, at 700. A full explication of the factors impacting on the "best plaintiff" issue is beyond the scope of this article. See text at notes 174-75 *infra*.

¹⁵³ See text at note 139 *supra*.

¹⁵⁴ See text at notes 147-48 *supra*.

¹⁵⁵ DAVIS, *supra* note 122, at § 22.04.

¹⁵⁶ 100 S. Ct. at 1211.

¹⁵⁷ *Id.* at 1212. It is interesting to note that the Court in *Geraghty* considered only one of the underlying policies of the personal stake requirement.

¹⁵⁸ See, e.g., Tushnet Controversy, *supra* note 125, at 1705; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-21, at 93 (1978); Tushnet Standing, *supra* note 128, at 663-64, 699; Wolff, *Standing to Sue: Capricious Applications of Direct Injury Standard*, 20 ST. LOUIS U.L.J. 663, 674-75 (1976).

tion of powers, federalism, public law litigation, or whatever behind the cloak of [personal stake],"¹⁵⁹ and thus obscure the real issues.

The pragmatic approach meets these shortcomings. It embraces a consideration of interests in addition to those of Employee A in her substantive claim. It furthers the policies underlying the personal stake requirement by directly considering those policies rather than relying on an extraneous and artificial factor. Finally, by requiring this direct consideration of policies, the pragmatic approach limits the ability of courts to obscure or avoid the real reasons underlying a decision to short-circuit a suit.

Unfortunately, the *Geraghty* Court carefully limited its holding to a post-denial of certification situation.¹⁶⁰ Presumably, then, the named plaintiffs in pre-certification and pre-suit mootness situations¹⁶¹ still must meet the traditional requirements of personal stake.¹⁶² Thus, the horizontal inequities inherent in the Supreme Court's current approach to the mooted class action continue. An expansion of the applicability of the pragmatic approach to the pre-certification and pre-suit mootness situations would be preferable.

The application of this pragmatic approach to personal stake can be illustrated by reference to the employment discrimination hypothetical of Sec-

¹⁵⁹ Tushnet Controversy, *supra* note 125, at 1726.

¹⁶⁰ 100 S. Ct. at 1212. Indeed, the Court so vigorously limited its holding that it may not even apply to all post-denial of certification situations. In *Geraghty*, the named plaintiff was challenging parole guidelines. *Id.* at 1206. He remained a prisoner until after class certification was denied, but was released prior to the decision on appeal. *Id.* at 1207. When the class certification ruling was reversed on appeal, the reversal related back to the date of the original denial — a time at which the named plaintiff was suffering "actual or threatened harm." *Id.* The Court notes, however, that "[i]f the named plaintiff [had] no personal stake in the outcome at the time class certification [was] denied, relation back of appellate reversal of that denial still would not prevent mootness of the action." 100 S. Ct. at 1214 n.11. The ramifications of this statement can be illustrated by reference to the Employee A hypothetical. Assume that class certification is denied and then the court determines Employee A was not qualified for the job she sought. If the class certification denial is reversed on appeal, will the relation back doctrine of *Geraghty* save the case from mootness? Arguably, the answer is no because Employee A, unlike the named plaintiff in *Geraghty* who was still a prisoner when class certification was denied, had no personal stake in the outcome at the time class certification was denied, or indeed at any time. Nevertheless, the court may hold that Employee A did have a personal stake in the outcome at the time class certification was denied because, at that stage of the litigation, mere allegations suffice to establish Employee A's personal stake. If that is the result, however, the determination depends wholly on the timing of the original class certification denial. If the lower court says "Employee A is not qualified and, by the way, the class is denied," the case will be forever moot. If the court instead says "the class is denied and, moreover, Employee A is not qualified," the class claims can later be revived. Such a distinction would aggravate the horizontal inequities noted above. See text at notes 83-88 *supra*.

¹⁶¹ In post-certification mootness situations, the Supreme Court has sanctioned an approach somewhere in between the traditional and pragmatic approaches described above. On the one hand, the approach to post-certification mootness goes beyond the traditional approach by looking beyond the interest of the named plaintiff to the interests of unnamed class members to find the required personal stake. On the other hand, the approach continues to require the traditional "actual or threatened injury."

¹⁶² As noted before, see text at notes 81-82 *supra*, in a pre-certification mootness situation, an exception is made to the traditional requirements if the claim of the named plaintiff is so inherently transitory that the trial court does not even have time to rule on class certification before the claim is mooted.

tion II.¹⁶³ Assume that Employee A's substantive claim was mooted after a right-to-sue letter had been issued, but before the complaint was filed.¹⁶⁴ Employee A nevertheless filed a complaint against the SLW Co. seeking (1) to obtain an injunction against certain allegedly illegal employment practices, and (2) to represent a class of employees against whom the SLW Co. had allegedly discriminated. Here it appears that Employee A has not suffered an injury sufficient to meet the traditional personal stake requirement, because her interest in her substantive claim has dissipated.¹⁶⁵ Consequently, under the traditional approach, Employee A's suit would be dismissed. The pragmatic approach, however, sanctions an expanded search for the vigorous advocacy required by Article III. This expanded search involves a consideration of both the residual interests of Employee A and the interests of unnamed class members. *Roper* and *Geraghty* hold that in post-denial of certification situations, the mooted named plaintiff's residual interests in allocating litigation expenses and in pursuing class claims are sufficient to overcome the personal stake limitation.¹⁶⁶ Employee A can forward these same residual interests to satisfy the personal stake requirements in the pre-suit mootness situation postulated.¹⁶⁷

In addition to Employee A's residual interests, Employee A could forward the interests of unnamed class members to meet the Article III requirements. The Supreme Court has indicated that after certification of the class, the personal stake requirement can be satisfied by the existence of a controversy between the named defendant and unnamed class members.¹⁶⁸ Justice Stevens has argued that the interests of the unnamed class members could fulfill the personal stake requirement even before the class has been certified.¹⁶⁹ Justice Stevens thus raises the issue of the point at which the class *qua* class is entitled to judicial recognition.¹⁷⁰ His resolution of that issue — that is, that even before class certification the class is entitled to a limited judicial recognition — finds support in normal pleading rules. Generally, a party need not prove allegations

¹⁶³ See text at note 84 *supra*.

¹⁶⁴ See note 18 *supra*.

¹⁶⁵ See text at note 141 *supra*. This article has noted various interests Employee A has in the continuation of her suit: her interest as a citizen in the elimination of illegal employment discrimination, her interest as an employee in a discrimination-free work environment, and her interest in pursuing class claims. These interests have not been construed as sufficient to meet the traditional personal stake requirement in a pre-suit mootness situation. See cases cited in note 79 *supra*.

¹⁶⁶ *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1173-75; *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1211.

¹⁶⁷ See text at notes 83-89 *supra*.

¹⁶⁸ *Sosna v. Iowa*, 419 U.S. at 402.

¹⁶⁹ *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1175-76 (Stevens, J., concurring).

¹⁷⁰ Several federal courts have held that a valid class should be presumed to exist between the time a class action is filed and the trial court's decision on certification. See, e.g., *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 177 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (2d Cir.), *cert. denied*, 398 U.S. 950 (1970); *Ross v. Warner*, 80 F.R.D. 88, 90 n.1 (S.D.N.Y. 1978). See also Kane, *Standing, Mootness, and Federal Rule 23 — Balancing Perspectives*, 26 BUFFALO L. REV. 83, 97-98 (1976-77) [hereinafter cited as Kane]; Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430, 446-51 (1973) [hereinafter cited as Bledsoe].

in a complaint to withstand a motion to dismiss. It is sufficient that the allegations themselves make out a cause of action. For example, if a plaintiff alleges in a complaint that he has been discharged from his employment, he should be able to withstand a motion to dismiss and present evidence on whether or not he was actually discharged. The allegations themselves are sufficient to fulfill the personal stake requirement at least until countervailing evidence is presented. Similarly, allegations in the complaint that a class has been injured could be construed as sufficient to fulfill the personal stake requirement, thus allowing the named plaintiff to present evidence on whether there actually is a viable class, whether it has been injured, and whether the named plaintiff is a proper class representative.¹⁷¹ Based on the interests of unnamed class members,¹⁷² then, Employee A may have standing to pursue her claim that she is entitled to represent a class.¹⁷³

A finding of "vigorous advocacy" based on Employee A's residual interests or the interests of unnamed class members, however, does not end the personal stake inquiry. The SLW Co. may still argue that there is a policy-based justification for a denial of review. For example, the SLW Co. may contend that Employee A is not the "best plaintiff" to pursue the lawsuit. Accord-

¹⁷¹ See, e.g., *Washington v. Wyman*, 56 F.R.D. 266, 271 (S.D.N.Y. 1971), and cases cited in note 170 *supra*. See also Summers, *A Search for Principles of Mootness in the Federal Courts: Part Two — Class Actions*, 54 TEX. L. REV. 1320, 1328 n.63 (1976); Bledsoe, *supra* note 170, at 445-51; 3B MOORE'S FEDERAL PRACTICE ¶ 23.50, at 23-423-25; Kane, *supra* note 170, at 104.

¹⁷² According to Employee A standing on the basis of the interests of unnamed class members is not without significant problems. First, it arguably opens the door to "public interest" litigation. If class allegations themselves create a class interest capable of satisfying the personal stake requirements, anyone could file a complaint with class allegations and meet the personal stake requirement by relying on the interests of unnamed class members. This concern is minimal, however, because the horrors of public interest litigation are largely imagined, see *Tushnet Controversy*, *supra* note 125, at 1708-21, and because the door opened by this analysis should be at least partially closed by a sensitive enforcement of Rule 23. See note 173 *infra*. The second problem with basing Employee A's standing on the interests of unnamed class members, as noted by Justice Powell, *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1184 n.21 (1980) (Powell, J., dissenting), is that it may have ramifications that extend beyond Article III. If the class is entitled to judicial recognition at the pleading stage, does Employee A assume fiduciary responsibilities to the class at that time? If so, do those fiduciary responsibilities extend to an obligation to continue litigation, and to absorb the attendant expenses, even though Employee A's personal claim is meritless? See note 78 *supra*. Will this adversely affect Employee A's willingness to pursue class claims? Once again, however, a sensitive application of the Rule 23 requirements should alleviate the problem. If, as is probably the case, Employee A cannot satisfy the Rule 23 requirements, her fiduciary responsibilities should be *de minimis* and the practical effect of the personal stake holding will be to allow the case to remain on the docket until a representative surfaces who can assume such responsibilities. See note 173 *infra*. Moreover, the benefits to Employee A of recognizing such class interests, such as the increased probability that Employee A will be able to allocate litigation expenses to the entire class, may outweigh the alleged burden of undefined fiduciary responsibilities. See *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1174 n.12. Finally, as Justice Stevens notes, the possibility that fiduciary responsibilities may be imposed is but one of many risks that Employee A must weigh when she decides to pursue the litigation. *Id.* at 1176-77 n.4.

¹⁷³ As noted below, see text at notes 183-84 *infra*, it is unlikely that Employee A would be able to represent the class. She is not a member of the class and her claims are not typical of the claims of the class. Thus, the practical result of this recognition of the interests of the unnamed class members is that the court can retain the case on its docket until an appropriate class representative surfaces.

ing to SLW Co., employees B, C, and D who have actually been subjected to the alleged discrimination would have more immediate access to and knowledge of the relevant evidence. Employee A could counter by arguing that Employees B, C, and D are not likely to assert their rights because of threatened retaliation by the SLW Co. and, hence, that Employee A is the "best available proponent" of the asserted rights.¹⁷⁴ Employee A could also assert that Employees B, C, and D are not "better" plaintiffs because the case will depend on statistical evidence of discrimination and, thus, Employees B, C, and D have no greater access to or knowledge of the relevant evidence than Employee A. Although resolution of this issue and similar issues,¹⁷⁵ will define the ultimate scope of the personal stake limitation, resolution of such issues is beyond the scope of this article. The pertinent point is that the analytical framework provided by the pragmatic approach to personal stake forces the courts to consider such policy issues directly. The courts cannot, as they could under the traditional approach, avoid the policy issues by relying on the artificial factor of actual or threatened harm.

In summary, the pragmatic approach to personal stake would require nothing more startling than an expanded search for the vigorous advocacy required by Article III and a policy-based justification when review is denied. The goals of the pragmatic approach are to force a retreat from the artificiality of the traditional approach and to bring the personal stake limitation back in touch with its policy underpinnings. Satisfaction of the personal stake limitation, however, is not determinative of whether the employment discrimination class action should be allowed to continue after mootness of the named plaintiff's personal cause of action. The named plaintiff must also overcome the Rule 23 limitation.

B. Rule 23 in the Mooted Class Action

At English common law, litigation was perceived as a two-party affair — one plaintiff against one defendant. Only in rare instances did the English common law courts deviate from this principle.¹⁷⁶ Eventually the class action emerged as a procedural device to protect the defendant from inconsistent obligations, to guard the interests of absentees, to provide a convenient and economical method of disposing of similar lawsuits, and to facilitate the spreading of litigation costs among numerous litigants with similar claims.¹⁷⁷ Rule 23 subsequently was developed to encourage use of the device and to regulate potential abuses.¹⁷⁸ Under Rule 23, class actions can be maintained only if certain requirements are met.¹⁷⁹ In class actions where the named plain-

¹⁷⁴ See *Singleton v. Wulff*, 428 U.S. 106, 116 (1976) (plurality opinion); *Tushnet Standing*, *supra* note 128, at 700. See also note 152 *supra*.

¹⁷⁵ The SLW Co. could forward other policy-based justifications for denying review. For example, it could argue that review will result in a violation of separation of powers principles, see note 121 *supra*, or in an overburdening of the courts, see note 123 *supra*.

¹⁷⁶ C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1751.

¹⁷⁷ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1211.

¹⁷⁸ C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1752-1753.

¹⁷⁹ See Rule 23(a)-(b). These requirements include numerosity, Rule 23(a)(1); com-

tiff's personal claim has been lost, however, the Supreme Court has failed to require adherence to all of the requirements of Rule 23. As a result, the Court has created problems that could easily have been avoided if Rule 23 had been followed.

The Supreme Court has eased the Rule 23 requirements in at least three circumstances. First, in post-certification mootness cases like *Sosna* and *Franks*, the Supreme Court has allowed the named plaintiff to continue representing the class.¹⁸⁰ Second, in post-denial of certification cases like *Roper* and *Geraghty*, the Court has allowed the named plaintiff to represent the class for the purpose of appealing the denial of class certification.¹⁸¹ Finally, in pre-certification mootness cases, the Supreme Court has allowed the named plaintiff to represent the class if the claims asserted are inherently transitory.¹⁸² The named plaintiffs could not meet the Rule 23 requirement that the representative party be a member of the class which he seeks to represent in any of the situations above.¹⁸³ In addition, none of the named plaintiffs above could satisfy the Rule 23 dictate that the claims or defenses of the representative party be typical of the claims or defenses of the class.¹⁸⁴ Since the named plaintiff's claim is moot in each of the above situations, his claim is not merely atypical, it is nonexistent.

Many problems are created by this easing of the Rule 23 requirements. For instance, a class representative with a mooted personal claim creates settlement problems and possible conflicts between the named plaintiff and un-

monality, Rule 23(a)(2); typicality, Rule 23(a)(3); and adequate representation, Rule 23(a)(4). In addition, Rule 23 requires that the putative class action fall into one of the three Rule 23(b) categories. See note 1 *supra*. Rule 23 does not ease its requirements if the named plaintiff's personal claim expires during the pendency of the lawsuit. Rather, Rule 23's requirements must be met if the action is to be "maintained." Thus, it has been suggested that the courts should at any relevant time, reevaluate the named plaintiff's representative status in light of events which occur during the pendency of the action. See Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 602 n.122; Belcher v. Bassett Furniture Indus., Inc., 588 F.2d 904, 906 (4th Cir. 1978). But see *Sosna v. Iowa*, 419 U.S. at 403.

¹⁸⁰ See *Zablocki v. Redhail*, 434 U.S. 374, 382 n.9 (1978); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975). In *Sosna*, the Court required only that the named plaintiff fairly and adequately protect the interests of the class. 419 U.S. at 403. The Court did not require compliance with the other Rule 23 requirements noted above. See note 179 *supra*.

¹⁸¹ See *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. 1166 (1980); *United States Parole Comm'n v. Geraghty*, 100 S. Ct. 1202 (1980). These cases indicate that the Court's easing of Rule 23 may have far-reaching implications. Presumably, if the named plaintiffs in *Roper* and *Geraghty* are successful in overturning the denials of class certification, they will be in the same position as the named plaintiffs in *Sosna* and *Franks*. *United States Parole Comm'n v. Geraghty*, 100 S. Ct. 1212, 1214. That is, they may be able to continue representation of the class. Moreover, to the extent that the rationale of *Roper* and *Geraghty* can be extended to pre-certification and pre-suit mootness, see text at notes 77-89 *supra*, they may have an even greater bootstrapping effect.

¹⁸² *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11. See also *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975).

¹⁸³ See *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216 (1974); 6A MOORE'S FEDERAL PRACTICE § 23.04[2]; C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1761.

¹⁸⁴ FED. R. CIV. P. 23(a)(3).

named class members.¹⁸⁵ Another problem is that the defendant's discovery efforts may be hampered.¹⁸⁶ Furthermore, the unnamed class members may not receive representation sufficient to satisfy due process and may not be bound by an adverse judgment.¹⁸⁷ More significantly, however, the easing leads to conceptual difficulties with the class action device. Assume, for example, a post-denial of certification situation. In *Geraghty*, the Supreme Court holds that the named plaintiff retains a sufficient interest in the suit to appeal the denial of class certification.¹⁸⁸ But what is the court of appeals to do on appeal? Presumably, the court of appeals is to determine whether the district court *should have* certified a class with the named plaintiff as its representative *at the time it denied class certification*,¹⁸⁹ even though it is clear that the named plaintiff cannot now meet the requirements of Rule 23.¹⁹⁰ The court of appeals can determine either that the district court was correct in denying class certification or that it erred in doing so. If the court of appeals determines that the district court was correct, the case can be dismissed as moot.¹⁹¹ If the court of appeals determines that the district court's class certification decision was erroneous, it must remand to the district court.¹⁹² The district court, however, is not required to certify a class. Rather, it must determine whether the named plaintiff is still a proper class representative.¹⁹³ If the named plaintiff remains an ade-

¹⁸⁵ Settlement is complicated because the class representative has no personal interest in a settlement offer. The class representative's opinion on the adequacy of a settlement offer is about as valuable — or worthless — as that of any "reasonable person" off the street. Moreover, to the extent the class representative's residual interest in the suit is in allocating litigation expenses to the class, see *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. 1166 (1980), settlement offers may expose conflicts between the class representative and unnamed class members. For example, assume that the defendant in an employment discrimination suit agreed as part of a settlement offer to pay all of the plaintiff's reasonable litigation costs (including those attributable solely to pursuit of the class representative's doomed personal claim, see note 99 *supra*), but only agreed to assume a portion of the claimed liability to the class. Obviously, the class representative has an interest in accepting the settlement which may not be shared by the unnamed class members.

¹⁸⁶ Under the Federal Rules of Civil Procedure, greater discovery flexibility is available against parties as opposed to non-parties. For example, interrogatories can be addressed only to parties to the litigation, FED. R. CIV. P. 33(a); requests for the production of documents and for entry upon land under Rule 34 may be enforced only against parties, FED. R. CIV. P. 34(a); examination of the physical or mental condition of a person under Rule 35 is available only with respect to parties and persons in the custody or under legal control of a party, FED. R. CIV. P. 35(a); and requests for admission under Rule 36 can be made only against parties, FED. R. CIV. P. 36(a). See also Rule 37(d); C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 2171, 2208, 2233, 2291.

¹⁸⁷ See note 111 *supra*.

¹⁸⁸ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1212, 1214.

¹⁸⁹ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1214. See also *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1174-75.

¹⁹⁰ At the time of appeal, the named plaintiff's personal claim has expired. Thus, he is not a member of the class he seeks to represent nor are his claims or defenses typical of those of the class. See notes 183-84 *supra*.

¹⁹¹ *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1212 ("If, on appeal [of the class certification ruling], it is determined that class certification properly was denied, the claim on the merits must be dismissed as moot.").

¹⁹² *Id.* at 1214.

¹⁹³ *Id.* ("[U]pon remand, the District Court can determine whether [the named plain-

adequate class representative, a class can be certified and the court can proceed to a consideration of the merits.¹⁹⁴ If the named plaintiff is no longer an adequate class representative, class certification must be denied¹⁹⁵ and the case must be dismissed¹⁹⁶ or held on the docket until a proper class representative comes forward.¹⁹⁷

The Supreme Court's approach has the "class action" cart ahead of the "class representative" horse. A class action can only be certified and maintained under Rule 23 if there is a proper class representative.¹⁹⁸ The Court requires the court of appeals to go through the rather mystical charade of determining what the lower court should have determined previously, while ignoring the fact that the named plaintiff is not now a proper class representative. The Supreme Court's approach, therefore, sanctions an appellate determination of whether the class is in some sense "proper"¹⁹⁹ before a determination is made as to whether the class representative is adequate. The approach results in a bifurcation of the issues which is inefficient for the courts and which will create undue delay for class action litigants.

In light of these problems, why has the Supreme Court sanctioned an easing of the Rule 23 requirements in post-certification and post-denial of certification cases? One reason forwarded is expediency; if the named plaintiff is allowed to remain as the class representative, the case can continue expeditiously and, arguably, judicial economy will be enhanced.²⁰⁰ A second reason is that in the class of cases in which claims are inherently transitory, the easing may be necessary to ensure that the issues can be judicially reviewed.²⁰¹

tiff] may continue to press the class claims or whether another representative would be appropriate.")

¹⁹⁴ *Id.* at 1212 ("If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim then may be adjudicated pursuant to the holding in *Sosna*.").

¹⁹⁵ *Id.* at 1214 (On remand, the district court can deny class certification if the named plaintiff is no longer an adequate class representative.). This denial of class certification can then be appealed to the court of appeals. *Id.*

¹⁹⁶ *Id.* (The controversy on the merits will be moot if the district court, on remand, denies class certification and that decision is affirmed on appeal.).

¹⁹⁷ See *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1171 n.5; *Kremens v. Bartley*, 431 U.S. 119, 135 (1977).

¹⁹⁸ See notes 2 & 179 *supra*. See also *New Life*, *supra* note 76, at 746.

¹⁹⁹ This determination is mystical, too. Rule 23 contemplates a class being certified only if there is a proper class representative. The Supreme Court, however, envisions some type of appellate determination on the maintainability of the class while reserving the issue of who is to represent the class. *United States Parole Comm'n v. Geraghty*, 100 S. Ct. at 1212, 1214. Nevertheless, a more limited preliminary determination on the viability of the class by the district court is appropriate. When the named plaintiff loses his personal claim, the district court should examine the proposed class to determine whether it could be certified if a proper representative arose. For example, the court should determine, in a cursory fashion, whether the numerosity and commonality requirements of Rule 23(a)(1) and (2) can be met. If these requirements cannot be met, the case should be dismissed. Little is served by holding a mooted class action on the docket if no named plaintiff could maintain the action.

²⁰⁰ *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 757 n.9 (1976).

²⁰¹ See *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975).

Unfortunately, the former of these reasons is not sufficient to outweigh the disadvantages engendered by the easing of Rule 23.²⁰²

A more appropriate response to the class action mootness problem would be to require a class representative with a live claim to be present at all times, that is, to require an adherence to the requirements of Rule 23.²⁰³ If the named plaintiff's claim expires, the class action cannot be maintained because Rule 23 cannot be met. Nevertheless, the district court can order the case to remain on its docket²⁰⁴ so that a new representative plaintiff who can meet the requirements of Rule 23 can surface.²⁰⁵ To avoid solicitation problems, the court

²⁰² Expediency does not justify an easing of Rule 23 for two reasons. First, in many cases the easing of Rule 23 will hinder rather than further, judicial economy. Assume that a mooted named plaintiff is allowed to continue a class suit and that he eventually loses. At that point, unnamed class members are either going to be allowed to pursue anew their claims or they are going to be barred from doing so. If they are allowed to pursue their claims because the mooted named plaintiff was an inadequate class representative, the judicial economy reason for allowing the named plaintiff's class suit to continue is undercut. If unnamed class members are barred from pursuing their claims, they have been denied the type of representation that Rule 23, and possibly due process, requires. Second, expediency does not justify an easing of Rule 23 because it provides no guidance as to which class suits should be allowed to continue with mooted named plaintiffs and which should not. As the hypothetical above illustrates, whether the continuance of a class suit will further judicial economy or not may depend on whether the named plaintiff prevails on his class allegations. That is not a determination the courts are capable of making at the time the named plaintiff's personal claim is mooted.

The second reason forwarded by the Court to justify an easing of Rule 23 is both necessary and narrowly applicable. It is necessary to ensure the availability of judicial review. It is applicable only to a relatively narrow class of cases that can be readily identified.

²⁰³ It could be argued that, as with personal stake, there should be a pragmatic approach to class representation. Under this approach, the courts would recognize that the named plaintiff has little to do with adequate representation, and that the attorney for the class ensures or undermines adequate representation. Hence, according to this approach, it is the attorney, and not the named plaintiff, who should be scrutinized to ensure adequate representation. See Kane, *supra* note 170, at 113-14; Degnan, *Foreword: Adequacy of Representation in Class Actions*, 60 CAL. L. REV. 705, 715-16 (1972). The argument certainly has some force, but not under Rule 23. Rule 23 requires that the named plaintiff be a member of the class he seeks to represent, see, e.g., *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 216 (1974), that the claims or defenses of the named plaintiff be typical of those of the class, *FED. R. CIV. P. 23(a)(3)*, and that the "representative parties" fairly and adequately protect the interests of the class. *FED. R. CIV. P. 23(a)(4)*. The advocates of a pragmatic approach to class representation must, as a first step, revise the requirements of Rule 23. Moreover, even if Rule 23 did not preclude such an approach, its advocates have not explained how to overcome the judicial reluctance to rule on the sensitive question of the ability of a member of the bar. See Comment, *The Class Representative: The Problem of the Absent Plaintiffs*, 68 NW. U.L. REV. 1133, 1136-37 (1974).

²⁰⁴ See note 199 *supra*.

²⁰⁵ See *Goodman v. Schlesinger*, 584 F.2d 1325, 1332-33 (4th Cir. 1978); *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13, 15-16 (4th Cir. 1972); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 676-77 (D. Md. 1979); *Proffitt v. Consolidation Coal Co.*, 21 FEP Cas. 382, 385 (S.D. W. Va. 1979); *Taylor v. Springmeier Shipping Co.*, 15 Fed. Rules Serv. 2d 1233, 1234 (W.D. Tenn. 1971); Bledsoe, *supra* note 170, at 461. These cases do not, however, provide guidance as to the length of time the court should retain the case on its docket. As noted by one commentator, "[a]ny time [limitation] may appear arbitrary if a new plaintiff comes forward after it has expired." *New Life*, *supra* note 76, at 761 (emphasis in original). It is probably impossible to fix any single time limitation as appropriate for all class actions, or even for employment discrimination class actions. But see *New Life*, *supra* note 76, at 762 (suggests a 180-day guideline for employment discrimination class actions). Rather, the time limitation will depend

can also order or permit notice to putative class members to inform them of the pendency of the action.²⁰⁶ If an adequate representative plaintiff does not come forward, the case can be dismissed.²⁰⁷ This procedure avoids a mystical inquiry by the court of appeals into whether a class could be maintained if there was a proper class representative. The procedure proposed here also ensures both that unnamed class members will not be unduly prejudiced by a dismissal without a prior opportunity to intervene and that only lawsuits which meet the prudent requirements of Rule 23²⁰⁸ can be maintained.²⁰⁹

The suggested procedure is generally intended for post-certification, as well as pre-certification, mootness. It does not, however, require strict compliance with Rule 23 in every mootness situation. Limited, policy-based exceptions to the requirements of Rule 23 are both permissible and desirable. For example, assume that the named plaintiff's personal claim has become moot and that the nature of the claims made on behalf of the class are such that the personal claim of each class member is short-lived.²¹⁰ If the district court required

on a number of factors, such as the size of the putative class, the type of notice to the class, the nature of the alleged discrimination, and the age of the discrimination claims.

²⁰⁶ See FED. R. CIV. P. 23(d); *Pre-Certification Loss*, *supra* note 80, at 170-72. See also *Booth v. Prince George's County*, 66 F.R.D. 466, 475-76 (D. Md. 1975); *Rothman v. Gould*, 52 F.R.D. 494, 495-96 (S.D.N.Y. 1971). In regulating such communications, the courts must be alert to potential abuse of the class action process, see Note, *Goodman v. Schlesinger and the Headless Class Action*, 60 B.U. L. REV. 348, 360-61 (1980); Federal Judicial Center, *Manual for Complex Litigation*, pt. I, § 1.14, at 46 (1978), while taking care to avoid infringement of the named plaintiff's rights of communication with the putative class under Rule 23 and the first amendment. See *Bernard v. Gulf Oil Co.*, 23 EPD ¶ 31,029, at 16,325-30 (5th Cir. 1980); *Zarate v. A. Norton Younglove*, 23 EPD ¶ 30,958 at 15,935-37 (C.D. Cal. 1980). See generally Comment, *Restrictions on Communication by Class Action Parties and Attorneys*, 1980 DUKE L.J. 360 (1980).

²⁰⁷ This procedure avoids injustice to unnamed class members. While dismissal may prejudice the interests of unnamed class members, see notes 108-11 *supra*, a dismissal after notice and an opportunity to intervene is not as objectionable as automatic dismissal upon mootness of the named plaintiff's claim. If the unnamed class members perceive their interests as too insignificant to justify intervention to save the lawsuit from dismissal, there is no injustice in allowing the lawsuit to die.

²⁰⁸ See *New Life*, *supra* note 76, at 761; Note, *Class Actions: Certification and Notice Requirements*, 68 GEO. L.J. 1009, 1025 (1980).

²⁰⁹ An additional issue is interjected in employment discrimination lawsuits. There are procedural prerequisites to the filing of an employment discrimination lawsuit. See note 106 *supra*. Nevertheless, a named plaintiff who has fulfilled the procedural prerequisites can obtain relief for unnamed class members who have not. See note 107 *supra*. If, however, the named plaintiff's personal claim becomes moot prior to the culmination of the lawsuit, should a new representative plaintiff be allowed to continue the lawsuit even though he has not satisfied Title VII's procedural prerequisites? An examination of the purposes of the procedural prerequisites leads to the conclusion that the lawsuits, in most instances, should be allowed to continue. The purposes of the procedural prerequisites are (1) to provide notice to the charged party; (2) to bring to bear the voluntary compliance and conciliation procedures of the EEOC; (3) to permit the EEOC to examine the adequacy of the charge; and (4) to determine the scope of the alleged violation, and, hence, to narrow the issues for adjudication. See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). Assuming a charge which makes appropriate class allegations, these purposes are fulfilled whether the lawsuit is pursued by the person who filed the charge or by an unnamed class member.

²¹⁰ In *Gerstein v. Pugh*, 420 U.S. 103 (1975), for example, the named plaintiffs challenged the legality of their pretrial detention. *Id.* at 106-07. Thus, the personal claim of each class member, including the named plaintiffs, was inherently short-lived. *Id.* at 110-11 n.11.

strict compliance with Rule 23 and followed the suggested procedure, the named plaintiff could not represent the class²¹¹ and the court would hold the case on its docket until a new representative came forward. The new representative's personal claim, however, would also be short-lived. Consequently, the case would be delayed repeatedly while new class representatives were certified. In this situation, a limited, policy-based exception to the Rule 23 requirements should be made.²¹² Even though the original named plaintiff can no longer meet the requirements of Rule 23, an exception is justified by interests in judicial economy that are both readily identifiable and applicable to only a narrow class of cases.²¹³

In summary, the Supreme Court has sanctioned an easing of Rule 23's requirements in a number of circumstances. This creates many problems, including an increased risk that unnamed class members will be inadequately represented. In most cases, district courts should hold class actions on their dockets when the personal claim of a named plaintiff becomes moot. This will permit the intervention of parties who can meet the requirements of Rule 23. Nevertheless, limited policy-based exceptions to strict compliance with Rule 23 are appropriate.

CONCLUSION

Although counseling a shift in focus, this article does not require a wholesale revision of Supreme Court doctrine. Rather, the cases decided by the Supreme Court contain the seeds of the approach presented in this article. This article identifies a drift away from the traditional personal stake analysis and towards a more pragmatic approach. The article urges a hastening of that drift. The article then recommends that mooted class actions be held on the docket to permit class representatives who can meet the requirements of Rule 23 to intervene. This procedure has been utilized by the Supreme Court.²¹⁴

The mooted class action is governed by a doctrinal landscape that was described early in this article as analogous to the landscape of Mount St. Helens. As with the mountain, the doctrinal rumblings will probably continue, with occasional explosions, for a quarter of a century or more before the landscape is stabilized. The proposals in this article are modestly forwarded in the hope that the rumblings, and concomitant damage and uncertainty, can be minimized.

²¹¹ See text and notes at notes 183-84 *supra*.

²¹² The proposed Rule 23 analysis is analogous to the "capable of repetition, yet evading review" exception to the standing-mootness doctrine. See *Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978); *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975). See also *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1175 (Rehnquist, J., concurring).

²¹³ Recognition of such exceptions means that some classes will be represented by persons who cannot meet the requirements of Rule 23. In applying such exceptions, then, courts should closely scrutinize the ability of putative class representatives to fairly and adequately protect the interests of the class, FED. R. CIV. P. 23(a)(4), even if the other requirements of Rule 23 cannot be met. Moreover, the exceptions themselves should, in deference to Rule 23, be limited to relatively narrow classes of cases in which the interests protected by the exception are readily identifiable.

²¹⁴ See *Kremens v. Bartley*, 431 U.S. at 135; *Deposit Guar. Nat'l Bank v. Roper*, 100 S. Ct. at 1171 n.5.

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