Florida State University Law Review

Volume 1 | Issue 3 Article 2

1973

Mootness and Standing in Class Actions

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MOOTNESS AND STANDING IN CLASS ACTIONS

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I. INTRODUCTION

Almost seven years of analysis have confirmed one commentator's view that rule 23 of the Federal Rules of Civil Procedure, as amended in 1966, still "tends to ask more questions than it answers."[1] The extensive utilization of rule 23 in these years has revealed that among other things the rule raises questions of the application of traditional legal principles to the restructured class action device.[2] Among the doctrines challenged by the class action device are mootness and standing. The challenge to mootness concerns the situation where, prior to a rule 23(c)(1) determination,[3] the plaintiff-class representative's interest becomes moot while the class interests remain "live" and the defendant moves to dismiss the entire cause of action on the basis of the mootness of the representative's interest.[4] In a ruling on this motion, the issue then becomes whose interest shall be regarded as controlling —the interests of the representative or the interests of the inchoate class. Likewise, in the controversy over the application of the standing doctrine to the class action, the issue is whether the mooting of the representative's interest subsequent to filing the class suit destroys his standing to represent the class. It is the contention of this article that a class action is moot only when the interests of the entire class are moot and that the mootness of the representative's claim subsequent to filing the class suit will not deprive him of standing to represent the class if he had standing when the suit was filed.

II. THE CONSTITUTIONAL UNDERPINNINGS

The concepts of mootness and standing derive from the doctrine

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1. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

2. For example, Federal Rule of Civil Procedure 23 [hereinafter cited as rule 23] has been viewed as challenging the doctrine of aggregation in determining jurisdictional amounts for class actions brought in federal courts. *See* Snyder v. Harris, 394 U.S. 332 (1969); Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971), *aff'd*, 469 F.2d 1033 (2d Cir. 1972), *cert. granted*, 93 S. Ct. 1370 (1973); Wright, *Class Actions*, 47 F.R.D. 169, 182-83 (1969).

3. Rule 23(c)(1) provides in part:

> 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.

4. The dispute over this issue is summarized in Spriggs v. Wilson, 467 F.2d 382, 385 (D.C. Cir. 1972). The court does not, however, resolve the issue.

of justiciability that is in turn derived from article III, section 2, of the United States Constitution.[5] Article III, section 2, restricts the judicial power of the United States to actual "cases" or "controversies." "Justiciability" is a generic term that describes a cause of action as being a "case" or "controversy." The Supreme Court has, on several occasions, explicated the constitutional doctrine of justiciability. In *Aetna Life Insurance Co. v. Haworth*,[6] the Court held:

> A "controversy" in this sense must be one that is appropriate for judicial determination. . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.[7]

Similarly, in *Flast v. Cohen*,[8] Chief Justice Warren noted that "justiciability" is a term of art designed to reflect the general limitation placed upon the federal courts by the words "case" or "controversy." Referring to these words, the Chief Justice wrote:

> In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.[9]

Chief Justice Warren attempted to define the critical elements of justiciability:

> Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought

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5. Article III, § 2, states in part:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States . . . .
6. 300 U.S. 227 (1937).
7. *Id.* at 240-41.
8. 392 U.S. 83 (1968).
9. *Id.* at 95.

> to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action.[10]

As a doctrine of limitation, then, justiciability is pre-eminently concerned with ensuring that the judiciary adjudicates only disputed issues arising from definite controversies. In understanding the concepts of mootness and standing, it must be recognized that they are only two elements of justiciability and serve only as benchmarks in determining the existence of an actual controversy capable of judicial resolution. Ultimately, causes of action are not dismissed because they are moot or because the plaintiff lacks standing but rather because they are not justiciable—that is, they are not actual "cases" or "controversies."[11]

III. Mootness Generally

The doctrine of mootness is properly invoked in both class actions[12] and nonclass actions "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[13] In other words, a cause of action becomes moot when a "justiciable controversy was once present but has for one reason or another degenerated to the status of the merely theoretical with the passage of time."[14] In deciding questions of mootness, a court must ask whether there exists an actual controversy upon which effective relief may be granted. A moot case is one in which the issue in controversy no longer presents a basis for relief. Thus the absence of an actual controversy renders the subject matter academic or hypothetical. In these cases, article III, section 2, commands that the suit be regarded as nonjusticiable and beyond the scope of the federal judicial power.

This command has often been reflected in the opinions of the Supreme Court. In *Liner v. Jafco, Inc.*,[15] the Court stated that the basic jurisdictional infirmity underlying moot cases "derives from the requirement of Article III of the Constitution under which the exercise

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10. *Id.* (footnotes omitted); *accord,* Poe v. Ullman, 367 U.S. 497, 508-09 (1961).

11. This statement may appear to present a difference without a distinction. In a constitutional sense, however, there is a real difference since the concepts of mootness and standing are only rules of practice and exist only as judge-made derivatives from the constitutionally mandated doctrine of justiciability. This distinction is recognized by Justice Brandeis in his oft-quoted concurring opinion in Ashwander v. TVA, 297 U.S. 288, 345-48 (1936). *See also* Poe v. Ullman, 367 U.S. 497, 503-04 (1961).

12. The term "class actions" is used here to include those cases that both have and have not been declared class actions under rule 23(c)(1).

13. Powell v. McCormack, 395 U.S. 486, 496 (1969).

14. Note, *Mootness and Ripeness: The Postman Always Rings Twice,* 65 Colum. L. Rev. 867, 871 (1965).

15. 375 U.S. 301 (1964).

of judicial power depends upon the existence of a case or controversy."[16] The Supreme Court has viewed the moot case as nonjusticiable because there is no basis for significant relief. In *Mills v. Green*,[17] the Court stated:

> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

A short time later, the Court reiterated this doctrine, stating that the "court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate."[18]

The Supreme Court has also held that a case is not moot until all the issues in the suit are moot. In *Powell v. McCormack*,[19] a United States Congressman brought suit seeking a declaration that the defendants' acts in excluding him from his seat in the 90th Congress were unconstitutional, and requesting writs of mandamus to compel the officers of the House of Representatives to seat him and to pay his back salary. Subsequent to the granting of certiorari, however, the 90th Congress adjourned and the 91st convened. The Congressman was granted his seat in the 91st Congress. The respondents, arguing that the 91st Congress was factually and legally a distinct body from the 90th Congress, sought to have the entire suit dismissed as moot.[20] The respondents described the salary issue as incidental and based their argument for dismissal on the fact that it was "no longer possible for Mr. Powell to be seated in the House of the 90th Congress."[21] The Court rejected this argument, however, and held that the issue of back salary remained "live," thus preventing the suit from being dismissed as moot. The Court held that "the remaining live issues supply the constitu-

16. *Id.* at 306 n.3; *accord,* North Carolina v. Rice, 404 U.S. 244 (1971); Muskrat v. United States, 219 U.S. 346 (1911).

17. 159 U.S. 651, 653 (1895). *See generally* Note, *Mootness on Appeal in the Supreme Court,* 83 HARV. L. REV. 1672, 1674-77 (1970).

18. *Ex parte* Baez, 177 U.S. 378, 390 (1900); *cf.* Golden v. Zwickler, 394 U.S. 103 (1969).

19. 395 U.S. 486 (1969).

20. Respondents contended:

> Time and the evolution of the political process have made this action moot and rendered the relief sought wholly academic and unnecessary. Since certiorari was granted, the 91st Congress has been convened and organized and Mr. Powell has been seated in the House of the 91st Congress. Petitioners now concede, as they must, that "the remedial form of mandamus to the Speaker to require Petitioner's [Mr. Powell's] seating is no longer required."

Brief for Respondents at 110, Powell v. McCormack, 395 U.S. 486 (1969).

21. *Id.* at 111.

tional requirement of a case or controversy. . . . Petitioner Powell has not been paid his salary by virtue of an allegedly unconstitutional House resolution. That claim is still unresolved and hotly contested by clearly adverse parties."[22]

As *Powell* suggests, when there are multiple issues within a suit, the mootness of some of the issues will not destroy justiciability since controversies still exist upon which relief may be granted. And, when a plaintiff seeks several forms of relief, the case will not be declared moot if only some of the forms of relief are moot.[23] A suit is not moot when "[r]elief can be given in some form."[24]

In defining "live" controversies within the context of mootness, federal courts have looked beyond the existence or nonexistence of a present controversy. They have devised two tests that will, under certain circumstances, sustain the justiciability of the suit. The tests are applicable even though there is no present controversy. Only the possibility of prospective recurrence of the controversy between the parties is required.

The first test, the "mere possibility" test, relates to the character of the defendant's behavior. In *United States v. W.T. Grant Co.*,[25] the Supreme Court held that when injunctive relief was sought, the voluntary cessation of the defendant's conduct was not enough to render the case moot. Since "[t]he purpose of an injunction is to prevent future violations," "[t]he necessary determination is that there exists some cognizable danger of recurrent violation, something more than *the*

22. 395 U.S. at 497, 498.

23. *See, e.g.*, Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) (suit by Negro tenants in public housing found not to be moot even though some of the construction projects that they sought an injunction against had been completed); Cash v. Swifton Land Corp., 434 F.2d 569 (6th Cir. 1970) (class action for alleged racial discrimination in apartment renting was moot in regard to the discrimination charge because the plaintiff had accepted the landlord's offer to rent an apartment, but was not moot in regard to the damages sought by the plaintiffs).

24. Shannon v. HUD, 436 F.2d 809, 822 (3d Cir. 1970). It appears, however, that a court will moot the entire case if the remaining relief sought is insubstantial. In Kerrigan v. Boucher, 450 F.2d 487 (2d Cir. 1971), the plaintiff sought to have declared unconstitutional a Connecticut statute giving boarding or lodging housekeepers a lien on the personal property of the lodgers. After the commencement of the suit, however, the landlord returned all of the renter's possessions. The lower court relied on *Powell* to support a finding that the landlord's action did not dispose of the damage question. The Second Circuit affirmed the lower court, but distinguished *Powell:*

> In this case there is no basis for granting any prospective relief either in the form of injunction or declaration since there is no existing relationship between the parties . . . . Powell's claim for back salary was not insubstantial and was hotly contested. There is no contest at all here. The personal effects have been returned and the plaintiff's claim for damages was conceded to be "nominal."

Id. at 489. *But see* Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970).

25. 345 U.S. 629 (1953).

mere possibility which serves to keep the case alive."[26] In these situations, the absence of a present controversy between the parties is not enough to render the suit nonjusticiable on the grounds of mootness, or as one commentator has stated: "When the immediate dispute ends because the challenged activity or inactivity terminates, thus arresting present effect on the challenging party, the *possibility* of mootness arises."[27] In making a mootness determination, the court must ask whether there exists a possibility that the challenged activity will recur; if the possibility exists, the suit will not be declared moot.

The "mere possibility" test is properly invoked when the defendant's cessation of the challenged conduct stems from his ostensible bad faith. The Court in *W.T. Grant* noted that even though the defendant voluntarily ceases the challenged conduct, he "is free to return to his old ways."[28] In such a case, the suit will be declared moot only when the defendant voluntarily ceases the challenged conduct and demonstrates that "there is no reasonable expectation that the wrong will be repeated."[29]

The second test, the "capable of repetition, yet evading review" test, is used to sustain the justiciability of cases which, due to the nature of the suits, may not be susceptible of adjudication before they become moot. The test, based upon the holding of *Southern Pacific Terminal Co. v. ICC*,[30] states that although the present dispute has been mooted,

26. *Id.* at 633 (emphasis added); *accord,* Swift & Co. v. United States, 276 U.S. 311, 326 (1928) ("suit for an injunction deals primarily, not with past violations, but with threatened future ones"); Solien v. Teamsters Local 610, 440 F.2d 124, 127 (8th Cir. 1971) ("case is [not] moot because the probability of repetition of unlawful secondary boycott activity by the Union in the instant case is sufficient to satisfy the 'mere possibility' test"); Guelich v. Mounds View Independent Pub. School Dist. No. 621, 334 F. Supp. 1276, 1278 (D. Minn. 1972) ("case may become moot if the cause ceases to exist or if the defendant can demonstrate that there would be no reasonable expectation that the wrong will be repeated").

27. Note, *Mootness on Appeal in the Supreme Court,* 83 HARV. L. REV. 1672, 1682 (1970) (emphasis added).

28. 345 U.S. at 632. It should be emphasized that the "mere possibility" test outlined in *W.T. Grant* requires that the possibility exist as between the same plaintiff and defendant.

29. United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d Cir. 1945); *cf.* Morris v. Williams, 149 F.2d 703, 709 (8th Cir. 1945). In Gautreaux v. Romney, 448 F.2d 731, 735 (7th Cir. 1971), the court rejected as a basis for dismissing the suit as moot the defendant's voluntary promise to cease discriminatory practices. The court stated: "We have no doubt that such assertions are offered in good faith, but we do not think that they are sufficient for us to hold this appeal moot." The court suggests that something more than a mere promise by the defendant is required to demonstrate that the wrong will not be repeated. Since the defendant's promise is insufficient, the defendant must show that the circumstances have changed such that it is impossible for the challenged activity to recur. As the *W.T. Grant* Court states, "[t]he burden is a heavy one." 345 U.S. at 633.

30. 219 U.S. 498 (1911).

if it is capable of repetition and is of such a nature that any future judicial resolution of the dispute will be prevented by the repeated mooting of the suit, the courts have jurisdiction to resolve the dispute. In *Southern Pacific* the plaintiff sought to enjoin a short-term cease and desist order of the Interstate Commerce Commission. Prior to adjudication the order expired and the defendant sought to dismiss the suit as moot. The court denied the defendant's motion, stating that "[t]he questions involved in the orders of the Interstate Commerce Commission are usually continuing and their consideration ought not to be, as they might be, defeated, by the short-term orders, capable of repetition, yet evading review."[31]

The "mere possibility" test and the "capable of repetition, yet evading review" test suggest that courts should not dismiss a suit as moot when any prospective elements of justiciability exist. In framing these tests, courts have defined the terms "case" and "controversy" broadly and have stated that, in making mootness determinations, a court must look beyond the apparent mootness of the particular claim before it and assess the possibility of recurrence. When some likelihood of prospective recurrence of the challenged activity exists, a "case" or "controversy" remains. In such a situation, "the adverseness and personal stake thought essential to full litigation remains intact despite intervening events."[32]

IV. Mootness and Class Actions

Broadly speaking, there are two types of class actions that have been dismissed as moot. First, there are those in which intervening events have rendered the controversies of the entire class nonjusticiable. Second, there are those in which intervening events have mooted only the named plaintiff's cause of action, but which have not affected the justiciability of the unnamed plaintiffs' controversies.

In the first type there can be no disagreement with court decisions dismissing those actions since, under article III, section 2, the complete absence of a "live" controversy among the entire class renders the suit nonjusticiable. In *Hall v. Beals*,[33] petitioners brought a class action to challenge the constitutionality of Colorado's six-month residency requirement for voting. Under this requirement the petitioners had been denied the right to register for the 1968 presidential election since they had not resided in the state for the requisite period of time. They sought mandamus and injunctive relief to compel the state election

31. *Id.* at 515; *accord,* Moore v. Ogilvie, 394 U.S. 814, 816 (1969).
32. Note, *supra* note 27, at 1687.
33. 396 U.S. 45 (1969).

officials to register them and all those similarly situated for the 1968 election. Subsequent to the filing of the suit but prior to adjudication, the national election was held. In addition, the Colorado Legislature amended the statute during this period to require only two months residency for voting purposes. Petitioners then challenged the new requirement, arguing: "The fact that the 1968 election is over and that there is no relief that can be presented to the appellants does not make this matter moot. The problems in this case will continue to govern future elections unless they are squarely faced and resolved by the Court here."[34] The petitioners further argued that the two-month requirement should be declared unreasonable even though it did not adversely affect them at the time. The Supreme Court rejected the petitioners' argument and dismissed the suit as moot. Its per curiam opinion was based upon three grounds. First, the Court reasoned that the relief sought vis-a-vis the 1968 election was impossible to grant; so one issue was moot. Second, the six-month requirement that was the original subject matter of the controversy no longer existed; thus the amendatory action of the Colorado Legislature had operated to render this issue moot. Third, the Court denied the petitioners' challenge to the two-month statute since they had never been, nor probably ever would be, adversely affected by the statute.[35]

The first two grounds represent traditional applications of the mootness doctrine. Certainly the passage of time had rendered the mandamus and injunctive relief vis-a-vis the 1968 election moot as to the entire class. The amendatory action of the Colorado Legislature eliminated any possible recurrence of enforcement of the six-month requirement against the class, thus rendering the prospective controversy moot as to the class.[36] Both these events represent the type of intervening events that appropriately render class actions moot; they are events that affect the entire class. The third ground for decision in this case does not present a mootness issue because the two-month statute had never adversely affected the class and, therefore, could not have been an issue once justiciable but now theoretical. This ground essentially raises questions of class standing, an issue that will be discussed later.[37]

In the second type of class action, dismissal of the suit is predicated on the mootness of the controversy as it affects the class representative

34. Brief for Petitioner at 60, Hall v. Beals, 396 U.S. 45 (1969).

35. 396 U.S. at 48. *See also* Brockington v. Rhodes, 396 U.S. 41 (1969); Committee To Set Free the Fort Dix 38 v. Collins, 429 F.2d 807 (3d Cir. 1970); Lopez v. White Plains Housing Authority, 355 F. Supp. 1016 (S.D.N.Y. 1972).

36. Similarly, in Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972), the Supreme Court held that the action of the Florida Legislature in amending a challenged statute prior to review on appeal destroyed the justiciability of the suit.

37. *See* pp. 454-62 *infra*.

rather than as it affects the entire class. Typically the representative files a class suit seeking equitable or declaratory relief.[38] Prior to a rule 23(c)(1) determination, an intervening event occurs that destroys the basis for the representative's cause of action, whereupon the defendant moves to dismiss the suit on the basis of the alleged mootness of the representative's cause of action. The prototypic case in this category is *Watkins v. Chicago Housing Authority*.[39] There, twenty-three named plaintiffs sued in a representative capacity on behalf of a class of approximately 140,000 tenants of the Chicago Housing Authority to challenge the constitutionality of certain clauses in the defendant's standard lease. The lease gave the Authority power to evict tenants at any time merely by giving fifteen days notice. All twenty-three named plaintiffs had been served with eviction notices at the time the suit was commenced. In the complaint, however, the plaintiffs described the class as consisting of "all other tenants with similar actions pending against them, and . . . all tenants of the Chicago Housing Authority."[40] The class was framed broadly because, ostensibly, all tenants of the Authority were susceptible to these summary eviction notices and had an interest in the adjudication. The plaintiffs sought both injunctive and declaratory relief. Subsequent to the filing of the suit and prior to a rule 23(c)(1) determination, the defendants abandoned their eviction proceedings against the named plaintiffs, reinstated them as tenants and moved to dismiss the complaint as moot. The trial court granted the defendant's motion.

In affirming the lower court's decision, the Seventh Circuit set the pattern for the dismissal of putative class suits on the mooting of the representative claims. Since there had been no 23(c)(1) determination that a class existed, the court disregarded the definition of the purported class in the complaint and constructed its own definition of a proper class. The court reasoned that "an actual controversy . . . [with] the plaintiffs, both named and unnamed, could be engendered only when the Authority took some positive eviction action."[41] The court then reviewed the facts and concluded that no class existed since "there is no claim that any of the unnamed plaintiffs had been sued . . . by

38. Most typically these suits are maintained under rule 23(b)(2), which provides:

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

. . . .

(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 . . . .

39. 406 F.2d 1234 (7th Cir. 1969).

40. *Id.* at 1235.

41. *Id.* at 1237.

the Authority."[42] This rationale enabled the court to eliminate from the controversy the interests of the purported class and to moot the case on the basis of the nonjusticiability of the named plaintiffs' cause of action. The court impliedly reasoned that without a present class there can be no controversy between the class and the defendant.

Similar dismissals were granted in *Callier v. Hill*[43] and *Craddock v. Hill*.[44] In these putative class suits, brought before the same judge in the same federal district court, the plaintiffs challenged the Missouri Division of Welfare for failing to notify the plaintiffs promptly of their eligibility for welfare payments. Equitable and declaratory relief was sought. Subsequent to the filing of each of these suits, the defendant provided the representatives with the desired eligibility determination and then moved to dismiss the suit on the basis of the mootness of the representatives' cause of action. In these cases, the court, unlike the *Watkins* court, did not rely upon a factual determination that no class existed, but rather relied upon the absence of a 23(c)(1) imprimatur to preclude effectively consideration of the justiciability of the unnamed plaintiffs' cause of action.

In *Callier,* the court supplemented its reliance upon the absence of a 23(c)(1) determination by finding a lack of standing as well. The court stated:

> Plaintiff, however, contends that she can maintain the class action even though any individual claim she has might have been mooted by the voluntary grant of relief by defendant. Again, the principal problem involved in this contention is that the Court has never entered an order in this case declaring that this is a class action. It has not been determined whether the prerequisites of a class action exist and, in fact, . . . the grant of relief to plaintiff has rendered her no longer similarly situated with any other members of the proposed class.[45]

Thus, rather than make the 23(c)(1) determination itself, the court summarily foreclosed the interests of the alleged class by dismissing the suit on the basis of the mootness of the controversy as to the named plaintiff.

Likewise, the *Craddock* court, basing its argument upon both *Callier* and *Watkins,* concluded that the absence of a 23(c)(1) determination permitted aborting the class action.[46] The court also de-

42. *Id.*
43. 326 F. Supp. 669 (W.D. Mo. 1970).
44. 324 F. Supp. 183 (W.D. Mo. 1970).
45. 326 F. Supp. at 673.
46. The court stated:
Further, this case has not yet been determined to be a class action and therefore

clined to make the 23(c)(1) determination and was thus able to dismiss the putative class action on the basis of the mootness of the representative's claim.

In dismissing these suits as moot, the *Watkins, Callier* and *Craddock* courts manifested a profound misunderstanding of the mootness doctrine and its relation to the class action device. The *Watkins* court erred by failing to consider the possible recurrence of the controversy between the representatives and the defendant. It regarded the defendant's action in reinstating the named plaintiffs as conclusively ending the justiciability of the suit by ending the present controversy. The court stated:

> Assuming that there was such a controversy between the twenty-three named plaintiffs and the Authority at the time the suit was filed, it was based on the premise that there was pending in the State court suits brought by the Authority for possession of the premises which plaintiffs occupied. When these suits were settled and all plaintiffs were restored to their original status, we think any controversy between the parties was extinguished.[47]

The court did not consider that the voluntary cessation of conduct by the defendant at least raised the "mere possibility" of recurrence which, under the *W.T. Grant* test, is sufficient to keep a controversy "live."[48] Certainly the reinstatement of the class representatives as tenants did not guarantee that the defendant would not use the challenged eviction proceedings against the representatives in the future. The controversy arguably remained "live" despite the actions of the defendant.

This failure to consider the "mere possibility" of recurrence is especially grievous when the plaintiffs seek to enjoin a defendant's conduct toward a class of people.[49] Since injunctive relief is prospective, it focuses on the prospective continuance or recurrence of the conduct. When injunctive relief is sought, it is imperative that the court assess the possibility of recurrence of the conduct in considering motions for dismissal on the grounds of mootness, since the possibility of recurrence

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plaintiffs cannot contend that they should be permitted to continue to prosecute this action as representatives of the class. See Callier v. Hill (W.D.Mo.) 326 F. Supp. 669. See also Watkins v. Chicago Housing Authority (C.A. 7) 406 F.2d 1234, holding that when the class representatives have received the relief which they have requested and the case is moot with respect to them, no case or controversy exists with respect to the possible class action.

324 F. Supp. at 188.

47. 406 F.2d at 1235. *See also* Spriggs v. Wilson, 467 F.2d 382, 384-85 (D.C. Cir. 1972).

48. 345 U.S. at 633.

49. Such an action is characteristically a 23(b)(2) action. *See* note 38 *supra*.

may make injunctive relief appropriate.[50] This assessment is especially crucial in the class action since the defendant may view it expedient to cease illegal conduct temporarily in order to avoid a possible adverse judgment of a class magnitude. In *Torres v. New York State Department of Labor*,[51] a case analytically similar to *Watkins*, the "mere possibility" test was cited to emphasize the continued justiciability of the class suit despite the defendant's grant of termination hearings to the class representative. The court held defendant's acts to be insufficient to moot the representative's suit and insufficient to moot the class suit:

> [D]efendants deny that such terminations are a "wrong" and presumably, believing in the correctness of their position, will continue the practice unless ordered otherwise. Under these circumstances, injunctive relief could be appropriate, for there certainly "exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive."[52]

In discussing the class aspect of the suit, the *Watkins* court adopted a narrow view of the controversy involved in that case. It held that the only justiciable class controversy that could exist in the situation was a contest between tenants who had already been served with eviction notices and the defendant. The court reasoned:

> As already shown, there is no claim that any of the unnamed plaintiffs had been sued for possession by the Authority. To hold that they had an actual controversy . . . would border on the absurd. . . . No actual controversy could exist between such tenants and the Authority prior to the time the Authority took some action to cancel a lease.[53]

The effect of such a redefinition was to eliminate from class membership those tenants threatened with summary eviction in the future and to narrow the focus of the mootness determination.[54] Even assuming that the court was procedurally correct in redefining the class,[55] such a narrow view of the term "controversy" within a class action context is

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50. This assessment does not involve any review of the merits of the case; rather, it is merely an important jurisdictional inquiry. The inquiry is not determinative of whether final injunctive relief will issue.

51. 318 F. Supp. 1313 (S.D.N.Y. 1970).

52. *Id.* at 1316, *quoting from* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953).

53. 406 F.2d at 1237.

54. *See* Yaffe v. Powers, 454 F.2d 1362, 1365 (1st Cir. 1972) (similar redefinition held to be erroneous and appealable as a denial of broad injunctive relief).

55. *See* Thomas v. Clarke, 54 F.R.D. 245, 249 (D. Minn. 1971).

not supported by rule 23 nor by the general principles of the mootness doctrine.

Rule 23(b)(2) permits class membership based upon the threat of future experience with the challenged conduct.[56] The 23(b)(2) action was devised to provide a vehicle for achieving group injunctive or declaratory relief against future conduct directed toward individuals possessing the group characteristic. For example, rule 23(b)(2) was designed to facilitate the use of the class action device in civil rights litigation,[57] although its use was not limited to these cases.[58] The chief characteristic of the challenged conduct in civil rights cases is that it is directed against a group and against individuals only as they possess the group characteristics.[59] Thus as a device concerned with providing injunctive relief from group wrongs, a 23(b)(2) action must necessarily include those persons who possess the group characteristic and who may, prospectively, be affected by the challenged conduct.[60]

Likewise, under traditional mootness doctrine neither the named plaintiffs nor the unnamed plaintiffs need be affected by the defendant's conduct at the time the suit is filed. The justiciability of such a case is preserved by the possible recurrence of the challenged conduct. In a suit in which the plaintiffs seek injunctive relief, the past manifestations of the defendant's conduct and the possible recurrence of that conduct are sufficient to support the injunction. The "controversy" remains if the conduct is likely to recur. The aggrieved party is allowed to maintain his suit on the basis of the threat of future injury.

This approach has been used in the class action context to support

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56. Under rule 23, a 23(b)(2) action is maintainable if the complaint simply alleges that the "party opposing the class has acted or refused to act." There is no requirement that the class consist of those to whom the conduct was directed in the past. In Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972), the court held that "the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists." Thus although a 23(b)(2) action is premised upon the alleged unlawful conduct of the defendant toward a group, the class may consist of those persons who are threatened by such conduct.

57. Note, *Proposed Rule 23: Class Actions Reclassified,* 51 VA. L. REV. 629, 647 (1965).

58. Advisory Comm. on Rules, *Committee Note of 1966 to Rule 23 as Revised in 1966,* in 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01 (2d ed. 1969).

59. This characteristic is recognized by one commentator who states: "segregation is a group phenomenon. Although the effects of discrimination are felt by each member of the group, any discriminatory practice is directed against the group as a unit and against individuals only as their connection with the group invokes the antigroup sanction." Comment, *The Class Action Device in Antisegregation Cases,* 20 U. CHI. L. REV. 577 (1953).

60. This conclusion is supported by the Advisory Committee Note, which states that the "[a]ction or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class." 3B J. MOORE, FEDERAL PRACTICE ¶ 23.01[10.-2], at 23-28 (2d ed. 1969).

class membership on the basis of future injury. In *Vaughan v. Bower*,[61] the class representative challenged the constitutionality of a state statute that permitted hospital superintendents to return nonresident inmates of state hospitals to the state of their residence for treatment. He sought injunctive and declaratory relief. Subsequent to the commencement of the suit, the state discharged the plaintiff from the hospital. Thereafter the defendant sought to dismiss the class suit as moot since, at the time of the oral argument, neither the class champion nor any other nonresident was threatened with transferral. The court did not, however, view the absence of present class members as fatal to the justiciability of the action. Instead, the past occurrence of such conduct and the defendant's ardent advocacy of the challenged statute led the court to conclude that the conduct fell within the "capable of repetition, yet evading review" test.[62] The court, in effect, concluded that the action could be brought on behalf of a class that consisted entirely of persons who were subject only to the threat of future injury. It is apparent that the *Watkins* court was mistaken in regarding the absence of present class members as justifying the dismissal of the class action on the basis of the alleged mootness of the representatives' claim.

In *Callier* and *Craddock*, the court erred in a different manner. It recognized the concept of prospective justiciability in the mootness context but applied it only to the representatives' causes of action. In both cases the district judge concluded that there was no present controversy between the defendants and the class representatives and that there was no possibility of recurrence of the controversies between these parties. The court stated in *Callier* that the "plaintiff's right to an administrative determination of her eligibility to welfare benefits is alleged to be a current issue with no likelihood of a necessity of a future

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61. 313 F. Supp. 37 (D. Ariz.), *aff'd*, 400 U.S. 884 (1970).

62. The court reasoned:

> The fact that at the time of oral argument there was no one in the class Mrs. Vaughan purports to represent should have no bearing on the mootness question. The record indicates that in recent years thirty to thirty-five patients are returned to their respective states of origin pursuant to A.R.S. § 36-522. At least two patients were so returned subsequent to the filing of this action. It is this very administrative action challenged herein which produces the short life of the class plaintiff wishes to represent. What is involved here is a problem "capable of repetition, yet evading review."

313 F. Supp. at 40. *See also* Hall v. Beals, 396 U.S. 45, 50 (1969) (Brennan, J., dissenting):

> [T]he constitutional challenge of the amended Colorado statute is peculiarly evasive of review. This is because ordinarily a person's standing to make that challenge would not mature unless he had become a Colorado resident within two months prior to a presidential election. Barring resort to extraordinary expedients, that interval is obviously too short for the exhaustion of state administrative remedies and the completion of a lawsuit . . . .

redetermination."[63] Similarly, in *Craddock* the court concluded that "defendants in this cause will not likely again delay past the statutory time in making the notifications which are pleaded in the complaint herein."[64] Since the mooting event had occurred prior to a 23(c)(1) determination, the court, in both cases, failed to consider the mootness question with respect to the class of unnamed plaintiffs.

In dismissing these class suits, the *Watkins, Callier* and *Craddock* courts espoused two general principles concerning the application of the mootness doctrine at the pre-23(c)(1) stage of litigation. First, these cases held that prior to the 23(c)(1) ruling, the mootness of the representative's action is sufficient to support the dismissal of the entire class suit. Second, these cases suggest that the inchoate class interests merit no consideration or protection at this state of litigation. Both of these propositions must be rejected in order to prevent the subversion of the class action device.

The first principle must be rejected on the express ground of its subversive effect. Endorsement of this view by the courts would allow defendants to avoid the potentially adverse consequences of litigation by causing the representative's claim to become moot and thereafter moving to dismiss the entire suit as moot. Such a proposition expressly contradicts the policy underlying the holding in *W.T. Grant,* which states that the defendant's voluntary cessation of the challenged conduct will not operate to deprive the court of jurisdiction over the case.[65] Although *W.T. Grant* was not a class action case, the strong policy against allowing a defendant to undermine litigation should be extended to class actions since the benefits to be gained by such conduct may often be greater in a class suit than in a nonclass suit. The defendant may even encourage the class representative to accept the defendant's proffered settlement by granting more than the representative sought. The class representative thus stands in a particularly vulnerable position.

In *Jenkins v. United Gas Corp.,*[66] the court, recognizing that in a class suit there is strong incentive to undermine litigation, held that a class suit is not rendered moot by the mootness of the representative's claim. The court stated:

> With so much riding on the claim of the private suitor, the possibility that in this David-Goliath confrontation economic pressures will be at work toward acceptance of [proferred] post-suit jobs and

63. 326 F. Supp. at 672.
64. 324 F. Supp. at 188-89.
65. 345 U.S. at 632.
66. 400 F.2d 28 (5th Cir. 1968).

> the equal possibility that an employer would devise such a resist-and-withdraw tactic as a means of continuing its former ways calls for the trial court to keep consciously aware of time-tested principles particularly in the area of public law. Such actions in the face of litigation are equivocal in purpose, motive and permanence.[67]

And in *Heumann v. Board of Education*,[68] the court clarified the scope of this protective policy by linking it to the bad faith of the defendant:

> Those cases do not hold that an action can never be mooted by the actions of a party taken after its commencement; they are directed at the danger that a defendant may deliberately obstruct the efforts of plaintiffs to secure relief for a large and genuine class by the technical expedient of voluntarily granting the requested relief piecemeal to one named plaintiff after another.[69]

The policy is further supported by the fact that a contrary rule provides no assurance that the defendant would permanently cease the challenged conduct after he had undermined the litigation. To allow the dismissal of a class suit on the basis of the mootness of the representative's action would enable the defendant to evade possible legal sanction while continuing the challenged conduct. Such a rule would encourage defendants to frustrate litigation and to return to their old ways.[70]

The second major ground for rejecting any dismissal of a class suit on the basis of the mootness of the named plaintiff's cause of action rests on the fundamental notion that where there are multiple claims, the mootness of some will not destroy the justiciability of all.[71] In a class suit, the mootness of the representative's claim does not render the entire suit moot since, by definition, a class suit embodies multiple,

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67. *Id.* at 33 (footnote omitted); *accord,* Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967); Thomas v. Clark, 54 F.R.D. 245 (D. Minn. 1971); Gatling v. Butler, 52 F.R.D. 389 (D. Conn. 1971); Vaughan v. Bower, 313 F. Supp. 37 (D. Ariz.), *aff'd,* 400 U.S. 884 (1970).

68. 320 F. Supp. 623 (S.D.N.Y. 1970).

69. *Id.* at 624, *referring to* Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970); Kelly v. Wyman, 294 F. Supp. 887 (S.D.N.Y. 1968), *aff'd sub nom.* Goldberg v. Kelly, 397 U.S. 254 (1970). In Smith v. YMCA, 316 F. Supp. 899, 903 (M.D. Ala. 1970), the court affirmed this rule against dismissing class suits on the basis of the mootness of the representative's claim. The court held: "Even if the individual plaintiffs were no longer entitled to personal relief, the other members of the class would still have standing to maintain this action. The rights of the class cannot be subverted by the granting of such belated and equivocal relief . . . ." *Cf.* Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

70. *See* Gray v. Sanders, 372 U.S. 368, 376 (1963).

71. *See* notes 19-24 and accompanying text *supra.*

separate and distinct claims.[72] The mootness of the representative's claim does not affect the justiciability of the suit since the claims of the unnamed plaintiffs remain "live" and afford a basis for the granting of relief.

The application of this fundamental notion to class suits is necessary in order to apply the mootness doctrine consistently to both class and nonclass suits. Consistency would seem to be mandated by rule 82 of the Federal Rules of Civil Procedure, which provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[73] If under a restrictive interpretation of rule 23 the mootness of the representative's claim were held necessarily to moot the remaining claims in the class suit, the result would be to limit the jurisdiction of the federal district courts by regarding as nonjusticiable in class actions what is justiciable in nonclass actions.

The second principle espoused by the *Watkins, Callier* and *Craddock* courts—that inchoate class interests merit no consideration or protection prior to the 23(c)(1) ruling—conflicts with the rule of presumptive validity. The rule of presumptive validity states that for the purposes of dismissal, the interests of the unnamed plaintiffs are presumptively valid and maintainable as a class action until a negative 23(c)(1) determination is made. This rule was first recognized in *Philadelphia Electric Co. v. Anaconda American Brass Co.*[74] There the court held that rule 23(e)[75] required a presumption of class validity in situations of contemplated dismissal in which there had been no 23(c)(1) determination. The court stated:

> [W]hatever uncertainties exist as to the precise status of an action brought as a class action, during the interim between filing and the 23(c)(1) determination by the court, it must be assumed to be a class

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72. The "multiple claim" nature of the class action device is expressly recognized in Snyder v. Harris, 394 U.S. 332 (1969). In that case Justice Black began the Court's opinion by stating the issue and by describing the nature of a class suit. "The issue presented . . . is whether *separate and distinct claims* presented by and for various claimants in a class action may be added together to provide the $10,000 jurisdictional amount in controversy." 394 U.S. at 333 (emphasis added); *cf.* Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971), *aff'd,* 469 F.2d 1033 (2d Cir. 1972), *cert. granted,* 93 S. Ct. 1370 (1973).

73. *Cf.* Snyder v. Harris, 394 U.S. 332, 337 (1969). *See also* Reconstruction Fin. Corp. v. Duke, 14 F.R.D. 265, 273 (D. Md. 1953), *aff'd,* 209 F.2d 204 (4th Cir. 1954); Koster v. Turchi, 79 F. Supp. 268 (E.D. Pa. 1948), *aff'd,* 173 F.2d 605 (3rd Cir. 1949).

74. 42 F.R.D. 324 (E.D. Pa. 1967).

75. Rule 23(e) states: "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."

> action for purposes of dismissal or compromise under 23(e) unless and until a contrary determination is made under 23(c)(1).[76]

The rule of presumptive validity simply reflects the fundamental class action tenet that the plaintiff as representative in a class action asserts far more than his individual rights; he asserts the rights of a large absent class as well. Thus, prior to the 23(c)(1) ruling, the interests of both the named and the unnamed plaintiffs are before the court.

This rule was extended in *Gaddis v. Wyman*,[77] a class action almost identical to *Watkins, Callier* and *Craddock*. In *Gaddis*, the defendant argued that the class suit should be declared moot on the basis of the mootness of the representative's claim since the court had never made the 23(c)(1) determination. The court rejected the argument, quoting the above-stated passage from *Philadelphia Electric Co.*, and concluded that "an action commenced as a class action retains that character until a court finds otherwise."[78] The *Gaddis* court supported this proposition by citing to the Advisory Committee's note on the 1966 amendments to rule 23. The Committee said in reference to 23(c)(1) determinations:

> An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through the intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. *A negative determination means that the action should be stripped of its character as a class action.*[79]

This statement strongly suggests that a presumption of validity exists prior to a 23(c)(1) determination since a negative 23(c)(1) ruling does not say that the action *never* existed as a class action but rather that the action may *no longer* be styled as a class action. Professor Moore con-

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76. 42 F.R.D. at 326; *accord*, City of Inglewood v. City of Los Angeles, 451 F.2d 948, 951 (9th Cir. 1971). *See generally* Haudek, *The Settlement and Dismissal of Stockholders' Actions—Part I*, 22 Sw. L.J. 767, 772 (1968).

77. 304 F. Supp. 713 (S.D.N.Y. 1969).

78. *Id.* at 715; *accord*, Kahan v. Rosenstiel, 424 F.2d 161 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970). In *Kahan* the court concurred with the *Gaddis* decision, holding "that a suit brought as a class action should be treated as such for purposes of dismissal or compromise, until there is a full determination that the class action is not proper." 424 F.2d at 169; *see* Weight Watchers v. Weight Watchers Int'l, 53 F.R.D. 647, 651 (E.D.N.Y. 1971); Yaffe v. Detroit Steel Corp., 50 F.R.D. 481, 483 (N.D. Ill. 1970); Torres v. New York State Dep't of Labor, 318 F. Supp. 1313, 1317 (S.D.N.Y. 1970).

79. *Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 73, 104 (1966) (emphasis added).

curs in this position. He states that "[i]n the interim between the commencement of the suit as a class action and the court's determination as to whether it may be so maintained it should be treated as a class suit."[80] Moore does not even attempt to limit the rule to circumstances involving dismissal and compromise. As these authorities indicate, the rule of presumptive validity recognizes that the interests of the absent class members exist prior to the 23(c)(1) determination. The 23(c)(1) ruling constitutes either an affirmation or rejection of a prior status.

The primary purpose of the rule of presumptive validity is to prevent what occurred in *Watkins, Callier* and *Craddock*—the summary dismissal of class interests. Rule 23(e), the statutory basis for presumptive validity, requires court approval and notice prior to the dismissal or settlement of actions brought as class suits. This rule suggests that a class suit may not be compromised or dismissed if the compromise or dismissal adversely affects the interests of the class members. Rule 23(e) also implies that, once filed, the class suit is beyond the discretion of the representative—he has assumed fiduciary duties requiring that class interests weigh heavily in the contemplation of dismissal or compromise.[81] This intent to protect absentee class interests is especially evident in the notice requirement of rule 23(e). The Supreme Court, in *Mullane v. Central Hanover Bank & Trust Co.*,[82] stated that notice requirements are generally reflective of a concern for due process and the protection of personal and property interests:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[83]

Rule 23(e) protects class interests equally before and after the 23(c)(1) determination. Protection is extended to the pre-23(c)(1) stage because the interests are presumptively existent and valid then. If rule 23(e) were not extended to this stage, the rule of presumptive validity

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80. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.50, at 23-1103 (2d ed. 1969) (footnote omitted).

81. This position was taken by the court in Sheffield v. Itawamba County Bd. of Supervisors, 439 F.2d 35, 36 (5th Cir. 1971), in which the court held that the class representatives "having instituted a public lawsuit to secure rectification for a constitutional wrong of wide dimension, they cannot privately determine its destiny." *See generally* Haudek, *supra* note 76.

82. 339 U.S. 306 (1950).

83. *Id.* at 314. *But see* Maraist & Sharp, *Federal Procedure's Troubled Marriage: Due Process and the Class Action*, 49 TEXAS L. REV. 1 (1970), in which the authors regard *Mullane* as not being persuasive authority for the limits of due process in representative actions.

would be rendered meaningless since the inchoate class interests could be compromised or dismissed with impunity. This extension was recognized in *Gaddis,* which held that rule 23(e) prohibits the "dismissal or compromise of a class action if the result would be to injure the other members of a purported class."[84]

The rule of presumptive validity and the extension of rule 23(e) to the pre-23(c)(1) stage show that inchoate class interests merit protection at the pre-23(c)(1) stage of litigation and that the summary dismissal of these interests by the *Watkins, Callier* and *Craddock* courts violates the policy of rule 23. The general thrust of the arguments rejecting the underlying propositions of the *Watkins, Callier* and *Craddock* cases has been that these cases represent unsound and inconsistent utilization of the mootness doctrine in class actions and disregard the vital interests of the unnamed plaintiffs. Any rejection of the policy of these cases, however, cannot be totally convincing unless viewed in the light of a more rational and consistent counterpolicy. The fundamental premise of such a counterpolicy is that courts should consider the mootness of all the claims—both the claims of the representative and the claims of the class—in making a mootness determination in class actions. In order to consider whether the claims of the class are moot, a 23(c)(1) determination must first be made to determine whether a class exists. The purpose of such a requirement is to stipulate at the earliest practicable moment what interests are in controversy. Such a stipulation would serve to protect the interests of absentee class members and would also serve to facilitate the mootness determination by outlining the proper scope of such an inquiry.

The advocacy of a mandatory 23(c)(1) determination in all actions brought as class actions is nothing new. In fact, rule 23(c)(1) requires that "*[a]s 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."[85] Professor Moore concurs in this interpretation by stating that rule 23(c)(1) provides that "in every case brought as a class action, . . . the court shall determine by order whether it is to be so maintained. The language is mandatory."[86]

This construction of rule 23(c)(1) has been supported by case law. *Gatling v. Butler*[87] involved a situation analytically similar to that in *Watkins, Callier* and *Craddock.* Plaintiff Gatling was denied review of an adjudication made by a Connecticut juvenile court because of her

84. 304 F. Supp. at 715.

85. Rule 23(c)(1) (emphasis added).

86. 3B J. MOORE, FEDERAL PRACTICE ¶ 23.50, at 23-1101 (2d ed. 1969); *see* Dorfmann v. Boozer, 414 F.2d 1168 (D.C. Cir. 1969).

87. 52 F.R.D. 389 (D. Conn. 1971).

inability to pay the statutory filing fee for docketing appeals. The plaintiff thereafter brought a class action challenging the constitutionality of the statute, seeking a declaratory judgment and an injunction. Subsequent to the commencement of the suit, the appellate court granted Gatling leave to file her appeal without payment of the fee. The defendant moved to dismiss the case as moot. Prior to discussing the question of mootness, the court stated:

> Whether plaintiff's claim meets the requirements of a class action is relevant to later consideration of mootness. . . . Rule 23(c)(1) Fed. R. Civ. P. mandates that the court shall determine by order whether an action brought as a class action may be so maintained "as soon as practicable after the commencement of [the] action . . . ." No such order having yet issued in this case, the court turns first to that question.[88]

Thus the *Gatling* court, confronted with a motion for dismissal, viewed the 23(c)(1) determination as a mandatory precondition to disposition of the mootness issue because mootness cannot be properly resolved without some determination as to what claims are actually before the court. If the action is determined to be a class action, then the mootness inquiry must extend to the claims of the class as well. The *Gatling* court further suggested that this determination was essential because the justiciability of the class interests alone would be sufficient to prevent the dismissal of the action on the grounds of mootness.[89]

In *Quevedo v. Collins*,[90] the court made a strong though cryptic statement requiring the determination of class status prior to ruling on the mootness issue. The court vacated the lower court's judgment that the case was moot on the basis of the representative's interest and remanded the suit for 23(c)(1) determination, stating:

> [W]e are not in a position to determine whether this suit was appropriately brought as a class action under Rule 23 . . . . Such a determination is crucial because the action of the plaintiff Quevedo in moving would not necessarily moot the class action portion of the suit.[91]

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88. *Id.* at 392. *See also* Caldwell v. Craighead, 432 F.2d 213 (6th Cir. 1970).

89. The court stated:

> In any event, the court need not decide at this point whether the named plaintiff's case is moot on the ground that she has no personal stake in the recurrence of the challenged conduct. The class action aspect of her suit obviates the necessity of deciding that question.

52 F.R.D. at 395 n.8.

90. 414 F.2d 796 (5th Cir. 1969).

91. *Id.* at 797.

The court recognized, as indicated by the language quoted, that "live" class interests may sustain the justiciability of the suit notwithstanding the mootness of the representative's claim.

In *Caldwell v. Craighead*,[92] the failure to make a 23(c)(1) determination prior to consideration of the mootness issue was held to be error. The court also suggested that the necessity of making this determination may rest upon due process grounds as well as upon the policy of rule 23. The court stated:

> The District Court did not determine whether the action should have been maintained as a class action and enter the order required by 23(c) of the Federal Rules of Civil Procedure. Therefore, for the purposes of jurisdiction, procedural and substantive due process and to determine the binding effect of any judgment in this matter, it must be decided if this is a proper class action.[93]

The court failed to discuss the rationale for such a possible due process mandate, but the requirement surely stems from the need to protect potentially valid class interests against summary dismissal.

Although the proposed counterpolicy presents a strong case for the mandatory 23(c)(1) determination, it raises further questions when the determination is affirmative and only the representative's claim is moot. In this situation, the existence of "live" class interests may be irrelevant if the class has no representative to prosecute its claims. It is at this point in the analysis that the question of standing becomes determinative.

V. STANDING GENERALLY

Standing has been viewed traditionally as an element of justiciability.[94] In *Flast v. Cohen*,[95] for example, Chief Justice Warren stated that "[s]tanding is an aspect of justiciability."[96] Likewise, in *Association of Data Processing Service Organizations Inc. v. Camp*,[97] Justice Douglas stated that "the question of standing . . . is to be considered in the framework of Article III which restricts judicial power to 'cases' and 'controversies.'"[98] The role of standing has been generally perceived as

92. 432 F.2d 213 (6th Cir. 1970).

93. *Id.* at 216. It should be noted that in *Quevedo* the court of appeals refrained from making the 23(c)(1) ruling and remanded the case for the determination. In *Caldwell*, on the other hand, the court of appeals made the determination.

94. For a general discussion of justiciability, see pp. 430-32 *supra*.

95. 392 U.S. 83 (1968).

96. *Id.* at 98.

97. 397 U.S. 150 (1970).

98. *Id.* at 151.

assuring adverseness in a "case" or "controversy." In *Flast,* Chief Justice Warren wrote:

> [I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.[99]

Adverseness is regarded as a precondition to asserting the merits of a case. Without it a plaintiff has no standing and may not assert otherwise justiciable issues.[100]

The genuine controversies over standing have not concerned the role of standing itself but rather have concerned the minimal characteristics necessary to ensure adverseness[101]—the rules of standing.

In *Baker v. Carr,*[102] the Supreme Court stated the most basic rule of standing. The Court held that a party must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."[103] The implicit assumption underlying this rule is that a party will pursue the litigation with fervor if he has a personal stake or benefit to be gained by the outcome of the dispute. Recent decisions have clarified this rule by providing that the personal stake or interest need not be economic in nature.[104]

In *Flast v. Cohen,* the Court analyzed the relationship that must exist between the plaintiff's personal stake and his claim in order for the plaintiff to have standing. The Court held that standing requires a logical nexus between the status of the litigant and the claim sought to be adjudicated.[105] This nexus is viewed as essential to assure that the litigant is a "proper and appropriate party to invoke federal judicial power"[106] or, in other words, to assure that the party is adverse.

The "nexus" test was affirmed in principle by the Supreme Court in *Data Processing.* In restating the test, the Court held that article III requires that a litigant satisfy two conditions in order to have standing.

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99. 392 U.S. at 101.

100. *See id.* at 99.

101. *Id.* at 101-02.

102. 369 U.S. 186 (1962).

103. *Id.* at 204.

104. In *Data Processing* the Supreme Court recognized that injury to "aesthetic" or "conservational" interests may be remedied as well as injury to economic interests. 397 U.S. at 154.

105. 392 U.S. at 102.

106. *Id.*

The litigant must allege first that "the challenged action has caused him injury in fact, economic or otherwise,"[107] and, second, that the injury was to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[108] The "injury-in-fact" requirement assures that the nexus between the litigant and his claim is direct.

Finally, in *Sierra Club v. Morton*,[109] the Supreme Court explicated the "injury-in-fact" test by holding that standing "requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."[110] In reaching this conclusion the Court returned to the basic analytical starting point for standing—the requirement of "personal stake" to ensure adverseness.[111]

Within recent years various commentators have adopted "heretical" positions toward standing by challenging the heretofore unquestioned purpose and necessity of the traditional standing doctrine.[112] Almost uniformly these writers ask whether standing is a constitutional requirement or simply a "rule of self-restraint."[113] They argue that "personal stake" is not a necessary prerequisite to the constitutional requirement of "case" or "controversy" since adverseness may exist when the plaintiff has no personal stake.[114] The traditional justification for the "personal stake" requirement has been undercut by one analysis

107. 397 U.S. at 152.

108. *Id.* at 153.

109. 405 U.S. 727 (1972).

110. *Id.* at 734-35; *accord,* United States v. SCRAP, 93 S. Ct. 2405 (1973).

111. *Id.* at 732, 738; *see* S. v. D., 93 S. Ct. 1146 (1973).

112. The term "traditional" is used here to describe those Supreme Court decisions in which "personal stake" is the *sine qua non* of standing.

113. *E.g.,* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?,* 78 YALE L.J. 816 (1969). Courts have also raised this question. In Flast v. Cohen, Chief Justice Warren viewed the confusion over standing as having stemmed from commentators' attempts to determine whether the rule of standing pronounced in Frothingham v. Mellon established "a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self-restraint which was not constitutionally compelled." 392 U.S. at 92. Warren observed in a footnote that "[t]he prevailing view of the commentators is that *Frothingham* announced only a nonconstitutional rule of self-restraint." *Id.* at 92 n.6.

114. Professor Jaffe has made the clearest exposition of this argument by asking "whether it is a necessary element of a case that there be a plaintiff who proffers for judicial determination a question concerning his own legal status." Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033 (1968). *See also* Scott, *Standing in the Supreme Court—A Functional Analysis,* 86 HARV. L. REV. 645 (1973); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis,* 25 VAND. L. REV. 479 (1972). Professors Jaffe and Scott both argue that the costs of litigation serve to ensure that plaintiffs will pursue litigation with the proper zeal. Scott concludes that "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." Scott, *supra,* at 674.

which shows that prior to 1787 the English courts recognized cases brought by plaintiffs without "personal stakes."[115] One commentator has concluded that the doctrine of standing should be abolished.[116] Another asserts that the traditional rationale for standing—the need for adverseness—is no longer valid and that the doctrine should be recognized for what it is: a rule of judicial restraint that operates to ensure judicial economy.[117] While it does not appear that the federal judiciary will heed these arguments and discard the notion of standing, the citadel is under attack.

VI. Standing and Class Actions

In general two sets of rules of standing affect class action litigation. The first consists of the general rules of standing derived from article III, section 2, of the Constitution, while the second consists of the procedural rules of standing embodied in rule 23.

The general rules of standing are traditionally linked to the justiciability requirements of article III, section 2. As they apply to class actions these rules affect the standing of the class as well as the standing of the representative. But only rarely will a class suit fail for lack of class standing in the constitutional sense.[118]

The standing rules embodied in rule 23 are found in subsections 23(a)(3) and 23(a)(4). They apply only to the class representatives. Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class . . . ." Rule 23(a)(4) requires that the "representative parties . . . fairly and adequately protect the interests of the class."

The question presented here concerns the application of these standing rules to the situation in which an affirmative 23(c)(1) determination has been made but where the class representative's cause of action is technically moot. The party opposing the class may argue either that the representative's standing is constitutionally deficient since there is no longer a personal stake in the outcome of the controversy or that the representative has no procedural standing under rule 23. Surprisingly, the constitutional challenge has been infrequently

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115. Berger, *supra* note 113, at 827. Berger further asserts that standing is a "judicial construct pure and simple." *Id.* at 818.

116. Sedler, *supra* note 114, at 512.

117. Scott, *supra* note 114, at 670.

118. *See, e.g.*, Hall v. Beals, 396 U.S. 45 (1969). In this case, since the alleged harm had never adversely affected any member of the class, the entire class lacked standing. *Cf.* Lopez v. White Plains Housing Authority, 355 F. Supp. 1016 (S.D.N.Y. 1972). *See also* Kelberine v. Societe Internationale, Etc., 363 F.2d 989 (D.C. Cir. 1966).

invoked. This may be due in part to the fact that rule 23 offers a more explicit ground for dismissal.

Distinction must be made between the two types of mootness that may be involved in constitutional challenges. The first type involves the representative who lacks standing because he has never suffered any injury from the alleged wrongful conduct. This is not a true mootness situation since the representative's claim does not involve issues once justiciable but now theoretical.[119] His claim poses an abstract or hypothetical question because he has not suffered the necessary injury that enables him to challenge the conduct. The problem is one of standing only, not mootness. The second type deals with the class representative who has suffered the necessary injury but has had his basis for relief nullified since the filing of the action. This situation involves questions of both mootness and standing.

An example of the first type is found in *Palmer v. Thompson.*[120] There twelve Negro citizens of Jackson, Mississippi, filed an action on their behalf and on behalf of their fellow Negro citizens and residents "who are similarly situated because of race and color."[121] These representatives sought, *inter alia,* to enjoin the alleged discriminatory conduct of the local government in maintaining segregated jails. The court held that the class representatives lacked standing to challenge the segregated operation of the jail since the "[a]ppellants [had] not shown that they [were] within a class whose right to a nonsegregated jail [had] been denied or [would] be denied."[122] Furthermore, the court concluded that the named plaintiffs could not represent a class of whom they were not a part.[123] Although these conclusions suggest that the

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119. For a general discussion of mootness, see pp. 432-36 *supra.*

120. 391 F.2d 324 (5th Cir. 1967), *aff'd on other grounds,* 403 U.S. 217 (1971).

121. *Id.* at 325.

122. *Id.* at 329. As this quote indicates, present injury is not required in order to have constitutional standing. The court expressly recognized that where injunctive relief is sought pursuant to rule 23(b)(2), a person threatened by injury at some time in the future may have standing to represent the class:

> It seems, therefore, that only the person who presently is incarcerated or is threatened by government officials with incarceration is a person (1) who has been aggrieved and (2) who is a person or a member of a class that may be aggrieved in the future by the operation of segregated jails.

Id. at 328. The court supported this position by citing Singleton v. Board of Comm'rs, 356 F.2d 771 (5th Cir. 1966), which held that "[t]he general standing requirement in cases involving governmental segregation is that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." 356 F.2d at 773 (footnote omitted). *See also* Anderson v. City of Albany, 321 F.2d 649 (5th Cir. 1963); Lake v. Lee, 329 F. Supp. 196 (S.D. Ala. 1971).

123. 391 F.2d at 328, *citing* Bailey v. Patterson, 369 U.S. 31, 32-33 (1962). *See also* Hall v. Beals, 396 U.S. 45, 49 (1969); Long v. District of Columbia, 469 F.2d 927, 930 (D.C. Cir. 1972).

court was speaking to the representative character of the proponents' case, that is, rule 23 standing, the fundamental legal basis for these conclusions was the traditional standing notion that "[n]ormally a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation."[124] In other words, without the requisite injury in fact, a person cannot represent himself nor a class of others.[125] Therefore, in this first type of mootness, the traditional standing doctrine applies without modification.[126]

In the second situation, where the representative has suffered injury but where his basis for relief has subsequently been nullified, it is also arguable that the representative has lost his personal stake and thereby is no longer qualified to represent himself or the class. This traditional standing argument was used in *Watkins*[127] to deny standing to the named plaintiffs. The *Watkins* court stated: "It must be a novel theory, at least one to which we do not subscribe, that named plaintiffs without the right to further represent themselves can continue to represent unnamed parties allegedly in a similar situation."[128] This argument was also used in *Cash v. Swifton Land Corp.*,[129] another housing

124. 391 F.2d at 327.

125. *See* Mintz v. Mather Fund, Inc., 463 F.2d 495, 499 (7th Cir. 1972).

126. This conclusion of course assumes that the concept of the ideological plaintiff is not tenable, as recent case law suggests. *See* Sierra Club v. Morton, 405 U.S. 727 (1972). The question arises whether the exception to the traditional standing doctrine, as stated in Barrows v. Jackson, 346 U.S. 249 (1953), applies in the class action context. This exception provides that in "unique circumstances" a person whose constitutional rights have not been violated may enforce the rights of others. *Id.* at 257. In recognizing this exception the *Barrows* Court held that the general rule barring such assertions was simply a rule of practice. *Id. See generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599 (1962). The "unique circumstances" in the *Barrows* decision are: (1) when the action of a state court "might result in a denial of constitutional rights," and (2) when it "would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." 346 U.S. at 257. These are given broad scope in one writer's "factor test": "(1) the interest of the assailant, (2) the nature of the right asserted, (3) the relationship between the assailant and third parties, and (4) the practicability of assertion of such rights by third parties in an independent action . . . ." Sedler, *supra,* at 627. Accordingly the question within the class action context is whether an uninjured party under these circumstances could assert the rights of an injured class. Third-party vindication of rights would not be possible in this context since rule 23(a)(3) requires that the class representative have claims typical of those of the class. An uninjured party would not meet this requirement. However, in Smith v. Board of Educ., 365 F.2d 770 (8th Cir. 1966), the court held that these circumstances may allow courts to view standing requirements without "blind adherence to technical rules of representation." *Id.* at 776. The court in *Smith* allowed an organization to represent individuals. *Cf.* National Welfare Rights Organization v. Wyman, 304 F. Supp. 1346 (E.D.N.Y. 1969); Wisconsin State Employees Ass'n v. Wisconsin Natural Resources Bd., 298 F. Supp. 339, 344 (W.D. Wis. 1969).

127. Watkins v. Chicago Housing Authority, 406 F.2d 1234 (7th Cir. 1969).

128. *Id.* at 1236.

129. 434 F.2d 569 (6th Cir. 1970).

discrimination case. In *Cash* the named plaintiffs had filed a class suit alleging discrimination by the defendant in the rental of apartment units. Subsequent to filing of the suit the defendant rented an apartment to the plaintiffs. The court stated that even if the class were valid, "the claims of the named plaintiffs, the Cashes, for injunctive relief having been satisfied, '[t]hey cannot represent a class of whom they are not a part.'"[130] Thus the court stated that even though the Cashes had been allegedly injured by the defendant's acts and had been members of the class when the suit was filed, the change in their position negated their standing to challenge those acts on behalf of the class.

As can be seen, the relationship between mootness and standing in this second situation is particularly close and complex since at the initiation of the suit the class representative was a true member of the class and thus had standing to represent the class. The issue in this situation is one of determining whether subsequent mooting of the representative's claim impairs his standing to prosecute the class claims. It is submitted that in this second situation the traditional standing argument must be modified to render the standing doctrine consistent with the mootness doctrine and to prevent manifest injustice.

A class representative should not be hastily dismissed for lack of standing in those cases in which judicially developed rules would otherwise defeat dismissal on the grounds of mootness. Accordingly, in cases otherwise justiciable, the court should continue to recognize a representative's standing although his claim has apparently been rendered moot by the defendant's voluntary cessation of illegal conduct. Voluntary cessation, under the rule of *United States v. W.T. Grant Co.*,[131] does not render the case genuinely moot. This principle was followed in *Jenkins v. United Gas Corp.*,[132] where the court allowed a class representative to maintain the class suit notwithstanding the technical mootness of his claim because the defendant had voluntarily mooted the representative's claim. Similarly, in *Gatling v. Butler*,[133] the court noted that "[i]t is well settled that a defendant cannot by voluntary cessation of a constitutionally challenged practice moot the challenge to that practice or deprive the court of jurisdiction." The court then concluded that "[t]he mooting out of the representative of

130. *Id.* at 571; *cf.* Callier v. Hill, 326 F. Supp. 669, 673 (W.D. Mo. 1970).

131. 345 U.S. 629 (1953); *see* discussion at pp. 434-35 *supra.*

132. 400 F.2d 28, 33 (5th Cir. 1968) (plaintiff suing on behalf of all Negro employees to bar discrimination in promotions permitted to continue the action even though he had been granted a promotion after the commencement of the suit); *see* Rivera v. Freeman, 469 F.2d 1159, 1163 (9th Cir. 1972).

133. 52 F.R.D. 389, 394 (D. Conn. 1971).

a class in a class action does not bar his litigating the issues, despite his lack of remaining personal stake."[134] To uphold challenges to standing in such situations would provide bad faith defendants with an easy tactic and strong incentive to moot the claims of representatives and thereby undermine litigation. Such an approach would also render meaningless the rule of *W.T. Grant,* by providing for its easy circumvention. At a minimum the voluntary cessation of unlawful conduct by a defendant against a class representative should be regarded as presumptively subversive in motive unless the voluntary cessation extends to the entire class of allegedly injured persons and there exists no cognizable danger of recurrent violations.[135]

When the representative's standing is destroyed because factors have rendered the controversy "capable of repetition, yet evading review,"[136] the court should preserve the standing of the representative for so long as he adequately protects the class interests. Such a preservation of standing is based on the rule of *Southern Pacific Terminal Co. v. ICC,*[137] which states that such situations are not truly moot. This approach has been expressly adopted by the United States Supreme Court in the recent case *Roe v. Wade.*[138] In that case the class representative was an expectant mother who sought to challenge certain abortion laws. Although the plaintiff was pregnant at the initiation of the suit, she gave birth during the pendency of the proceedings, thus technically depriving her of a basis for relief. The defendant argued that the representative's case was moot and that she had no standing to represent herself or her class. The Supreme Court rejected this argument, using a three-pronged approach. First, the Court held that, as of the time of filing, the suit presented a case or controversy;[139] second, that pregnancy was a "significant fact in the litigation"; third, that the fact of pregnancy was a phenomenon "capable of repetition, yet evading review."[140] In sum, the Court concluded:

> But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation

134. *Id.* at 395; *accord,* Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973); Rivera v. Freeman, 469 F.2d 1159, 1163 (9th Cir. 1972).

135. *See* pp. 434-35 *supra.* This approach was implicitly followed in Lopez v. White Plains Housing Authority, 355 F. Supp. 1016 (S.D.N.Y. 1972).

136. *See* pp. 435-36 *supra.*

137. 219 U.S. 498 (1911).

138. 410 U.S. 113 (1973).

139. *Id.* at 124.

140. *Id.* at 125.

> seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. . . . Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."
>
> We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.[141]

The Supreme Court's flexible approach to standing in *Roe v. Wade* has significance for all cases in which a class representative's standing may be constitutionally attacked. By declaring that the mootness doctrine is not that rigid, the Court has opened the door for a case-by-case approach to mootness and standing questions in class actions. The Court has also suggested that standing may be primarily a rule of self-restraint insofar as the standing of class representatives is concerned. In this respect *Roe v. Wade* holds that, under the three conditions listed in that case, a class representative may have constitutional standing to represent a class to which he no longer belongs. This approach, though, remains subject to challenge under the procedural rules of standing of rule 23.

Standing under rule 23 requires both "typicality" and "adequacy." The typicality requirement is expressed in rule 23(a)(3), which requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class . . . ." The adequacy requirement is expressed in rule 23(a)(4), which requires that "the representative parties will fairly and adequately protect the interests of the class."

Although these requirements are stated separately, they should be viewed as interrelated and complementary.[142] The interrelationship stems from common purpose. The typicality and adequacy requirements were both developed to protect the rights of absentee class members. Both are rooted in the concept of due process. In *Hansberry v.*

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141. *Id.* (citations omitted). *See also* Lopez v. White Plains Housing Authority, 355 F. Supp. 1016, 1021 (S.D.N.Y. 1972).

142. *See* 3B J. MOORE, FEDERAL PRACTICE ¶ 23.06-2 (2d ed. 1969). *But see* White v. Gates Rubber Co., 15 FED. RULES SERV. 2d 1070, 1073 (D. Colo. 1971), in which the court rejected the notion that the typicality requirement is redundant. The court stated:

> It should be apparent that treating the requirement as identical to those of common question or adequate representation renders the requirement meaningless. . . .
>
> Since the typicality requirement must be given an independent meaning, we are of the opinion that it requires the plaintiff to demonstrate that other members of the class he purports to represent have suffered the same grievances of which he complains.

Lee,[143] the Supreme Court suggested that due process demands typicality:

> [A] selection of representatives for purposes of litigation whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.[144]

Typicality thus ensures adequate representation since, presumably, a litigant will not act in a manner detrimental to class interests when his interests are at stake as well. Similarly, due process also requires adequacy of representation. This view is reflected in the *Restatement of Judgments*:

> Due process of law means only that the interests of a person should be adequately represented; where it is not reasonably possible that he should be heard in person or by one selected by him or acting on his sole account, the requirement of reasonableness, which is at the basis of the rule of due process of law, is satisfied if his interests are in fact adequately represented.[145]

Within the factual model posed in this section—an affirmative 23(c)(1) determination but a moot cause of action for the class representative—the relevant procedural standing rule is the 23(a)(3) typicality rule. Arguably, when a class representative has not suffered an injury from the challenged conduct or has suffered an injury but has been assuaged since the filing of the action, the representative's claim is not typical.

When the named plaintiff has never suffered an injury, he would be unable to pass rule 23 muster. An affirmative 23(c)(1) determination can only be had when all the requirements of rule 23(a) have been met. The uninjured named plaintiff would fail the 23(a)(3) and 23(a)(4) requirements of typicality and adequacy, respectively.[146] He would

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143. 311 U.S. 32 (1940).

144. *Id.* at 45.

145. RESTATEMENT OF JUDGMENTS § 86, comment *b* (1942); *cf.* Carroll v. American Fed'n of Musicians, 372 F.2d 155, 162 (2d Cir. 1967); Dolgow v. Anderson, 43 F.R.D. 472, 493 (E.D.N.Y. 1968).

146. Some commentators have argued that plaintiffs should be granted standing on the basis of their zeal or access to resources. These are the ideological plaintiffs advocated by Professor Jaffe. Jaffe, *supra* note 114. Another writer has argued that the class attorney is the "real representative" while the named plaintiff is viewed as a "nominal plaintiff, who is no more than a vehicle through whom the attorney is able to perform his role . . . ." Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889, 903 (1968).

thus incur a negative 23(c)(1) determination and would have no standing under rule 23.

Although the uninjured representative may have no standing, an outright dismissal of the entire class action or a negative ruling on a 23(c)(1) determination because of the representative's lack of standing is not justifiable when the class has constitutional standing with respect to the challenged conduct.[147]

The summary dismissal of class actions "for lack of adequate representation" is not an efficient use of judicial resources nor is it an equitable practice so far as the class is concerned. It is often likely that another class member will step forth to carry the class mantle, in which event a dismissal would be inefficient because it would necessitate the refiling of the action by the new representative. Furthermore, dismissal may be highly prejudicial to the class and inequitable if the statute of limitations has run during the pendency of the action filed by the uninjured representative.

The better course of action would be to keep the class action open for a reasonable period of time until a proper representative comes forth. This procedure has been followed in at least two cases. In *Taylor v. Springmeier Shipping Co.*,[148] the court kept the case open for six months, while in *Cox v. Babcock & Wilcox Co.*,[149] the court kept the case open for a "reasonable time." This approach assures that absent class interests are protected against premature dismissal. Because this procedure simply suspends the litigation for a reasonable period or until a new representative comes forth, and does not allow the class action to be maintained, it does not violate rule 23(a)(4), which requires that the representative "fairly and adequately protect the interests of the class." If no representative appears, the class action may be properly dismissed.

When the representative's claim has been mooted subsequent to filing the action or subsequent to a positive 23(c)(1) determination, the representative's standing should not be denied for lack of typicality when the mootness of the claim is not regarded as legally sufficient to render the claim nonjusticiable. This view was adopted recently by the court in *Moss v. Lane Co.*:[150]

> If the plaintiff were a member of the class at the commencement of the action and his competency as a representative of the class then

147. Such a dismissal occurred in Newman v. Avco Corp., 313 F. Supp. 1069 (M.D. Tenn. 1970), *rev'd on other grounds*, 451 F.2d 743 (6th Cir. 1971) (action by discharged employee against both his employer and his union alleging racial discrimination).

148. 15 FED. RULES SERV. 2d 1233 (W.D. Tenn. 1971).

149. 471 F.2d 13 (4th Cir. 1972).

150. 471 F.2d 853 (4th Cir. 1973).

> determined or assumed, the subsequent dismissal or mootness of his individual claim, particularly in a discrimination case, will not operate as a dismissal or render moot the action of the class, or destroy the plaintiff's right to litigate the issues on behalf of the class.[151]

The dispositive fact in such cases must be that the representative was a proper representative when the action was commenced.[152]

The reasons for this policy are identical to those stated in the analogous constitutional standing situation. When the representative's claim has been mooted by the defendant's voluntary acts affecting the representative alone, or has been mooted by the claim but is "capable of repetition, yet evading review," his claim should not be regarded as atypical so long as his interests do not conflict with the interests of the class.[153] In this situation the justification for the ruling requiring typicality, *i.e.*, the protection of absent class members, is satisfied when the named plaintiff desires to continue in his representative capacity and does not have interests adverse to those of his class. Presumably, if the representative's ardor on behalf of the class were deemed sufficient by the earlier 23(c)(1) determination, then the mooting of his claim should not lessen that ardor if he retains the desire to continue the prosecution of the class interests. If the representative wishes to opt out at this stage or if his interests have become adverse, then the court should hold the case open for a reasonable period to allow intervention by other members of the class.

VII. Conclusion

Although the restructured class action device has raised questions concerning the application of the doctrines of mootness and standing, the answers are obtained by applying these doctrines consistently in both class and nonclass actions. The application requires that courts recognize that the justiciability of a class suit is not determined solely by the justiciability of the representative's claim but by the justiciability of all the claims.

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151. *Id.* at 855.

152. *See* Thomas v. Clarke, 54 F.R.D. 245, 252 (D. Minn. 1971).

153. The condition that his interest not conflict with those of his class has been stated as the measure of typicality anyway. Guarantee Ins. Agency v. Mid-Continental Realty Corp., 57 F.R.D. 555, 565 (N.D. Ill. 1972); Thomas v. Clarke, 54 F.R.D. 245, 251 (D. Minn. 1971).