Notes

PREVENTING DEFENDANTS FROM MOOTING CLASS ACTIONS BY PICKING OFF NAMED PLAINTIFFS

DAVID HILL KOYSZA

> These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.[1]

INTRODUCTION

Federal rules are adopted for specific purposes. Rule 23 of the Federal Rules of Civil Procedure, the class action rule, was adopted to enable courts to resolve the similar claims of numerous plaintiffs in a single action.[2] This Note spotlights and criticizes a threat to the function of the class action device. The threat takes the shape of a full offer of judgment, conveyed by class action defendants to named plaintiffs before class certification, intended to force mootness upon plaintiffs and prevent them from employing the class action device. The practice has been labeled by many courts, including the United States Supreme Court, as the "picking off" of named plaintiffs.[3] An already significant and growing number of federal district courts have

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1. FED. R. CIV. P. 1.

2. *See* FED. R. CIV. P. 23 advisory committee's note (1937) (explaining that Rule 23 represented an adoption of Equity Rule 38, which empowered courts to resolve claims "of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court"). References in this Note to Rule 23 reflect the recent amendments to the Rule, effective December 2003.

3. *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (lamenting the fact that named plaintiffs' claims "effectively could be 'picked off' by a defendant's tender of judgment"); Potter v. Norwest Mortgage, Inc., 329 F.3d 608, 613 (8th Cir. 2003) (bestowing the same "picking off" label upon the practice of settling with the named plaintiff to moot the class action); Lusardi v. Xerox Corp., 975 F.2d 964, 982 (3d Cir. 1992) (same); Wilson v. Sec'y of Health & Human Servs., 671 F.2d 673, 679 (1st Cir. 1982) (same); Satterwhite v. City of Greenville, 634 F.2d 231, 233 (5th Cir. 1981) (Gee, J., dissenting) (same).

held that such offers of judgment, if conveyed before the class is certified, and if consisting of the full amount of damages that each named plaintiff could possibly recover in the action, render the named plaintiffs' claims moot, requiring dismissal of the entire class action.[4] Because these decisions have not required that named plaintiffs actually *accept* the full offer of judgment—according to many courts, the mere fact that a full offer was *made available* is sufficient to moot the action—defendants are thereby granted the ability to force dismissal of the putative class action, stripping otherwise qualified plaintiffs of the ability to fully employ the class action device. This Note argues that bestowing such a "secret weapon"[5] upon defendants both thwarts the function of the class action device and vitiates the policies behind it.

This argument rests on a fundamental assumption—that class actions are a good thing, useful enough to be worth preserving. To be sure, the class action device has not gone uncriticized. Commentators and courts have bemoaned the disconnect that often arises between class action lawyers and the class members whom they purport to represent.[6] The pages of reputable journals and reporters are filled with descriptions of "litigation-mad, bottom-feeding, money-hungry, professional plaintiffs' lawyers."[7] Jurists so eminent as Henry Friendly

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4. *See infra* Part II (discussing the split that has emerged among the district courts on this issue).

5. Eugene J. Kelley, Jr. et al., *Offers of Judgment in Class Action Cases: Do Defendants Have a Secret Weapon?*, 54 CONSUMER FIN. L.Q. REP. 283, 283 (2000) (referring to the offer of judgment as a class action defendant's "secret weapon"). A somewhat less sinister label might be the "[s]ubtle [w]eapon." *See* Ian H. Fisher, *Federal Rule 68, a Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 89 (2001).

6. *See, e.g.*, Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 834 F.2d 677, 678 (7th Cir. 1987) (Posner, J.) ("Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest. This fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems . . . ."); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1346 (1995) ("[I]ndividual plaintiffs have weak to nonexistent control over their attorneys across the mass tort context for reasons that are inherent to the economics of mass tort litigation."). For a fascinating and lively discussion of the ethical implications arising from this disconnect, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994). Weinstein suggests that, on the whole, "there is reason to criticize and praise everyone involved in these cases." *Id.* at 472.

7. Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773, 1775 (1997); *see also* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 180 (2001) ("Many ordinary Americans seem to think that class actions are a new-fangled litigation device invented by greedy plaintiff attorneys.").

and Richard Posner warn that unscrupulous plaintiffs can leverage the class action device to extract "blackmail settlements" from defendants.[8] Newspapers ridicule the frivolous claims[9] and exorbitant attorneys' fees[10] so often associated with class actions.

Yet even the harshest class action critics cannot completely dismiss the social policies facilitated by the class action device.[11] By allowing numerous plaintiffs who meet Rule 23's prerequisites to pool their resources into a single litigation, thereby spreading the costs of litigation among many participants,[12] properly certified class actions "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[13] The class action device has been described as "a complex machinery capable of rectifying huge wrongs spread amongst millions of people who, standing alone, would lack both the incentive and the ability to act with such curative effect."[14] Rather than relying on the government as the sole protector of individual rights, citizens who meet the prerequisites of Rule 23 can themselves use class actions to act as "private attorneys general,"[15] preventing discrimination and

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8. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (quoting Judge Friendly, who, according to Judge Posner, "was not given to hyperbole"); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

9. *See, e.g.*, Shannon Brownlee, *Portion Distortion: You Don't Know the Half of It*, WASH. POST, Dec. 29, 2002, at B5 (describing a class action against McDonald's filed by a mother who claimed that she "always believed McDonald's food was healthy for [her] son").

10. *See, e.g.*, Roger Parloff, *Coughing It Up*, N.Y. TIMES, Sept. 24, 2000, § 7, at 17 (commenting upon the "troublesome knots in the logic behind the litigation that [tobacco class action plaintiffs' attorney Ron] Motley led, which is scheduled to earn his small firm in Charleston, S.C., more than $1 billion in fees").

11. *See* Ryan Patrick Phair, Comment, *Resolving the "Choice-of-Law Problem" in Rule 23(b)(3) Nationwide Class Actions*, 67 U. CHI. L. REV. 835, 837 (2000) (concisely setting forth the policy goals facilitated by class actions).

12. *See id.* ("By spreading the costs of litigation across a class, a greater number of litigants are able to pool their resources in an effort to vindicate their rights.").

13. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

14. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 402–03 (2003) (quoting Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 951 (E.D. Tex. 2000)); *see also* John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1419 (2003) ("The class action has many uses. The most compelling occurs when someone inflicts a small harm on each member of a large group of people.").

15. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 250 (1988) ("[A] different way to prevent law enforcement officials from committing repeated violations of constitutional rights is for a plaintiff to file a civil rights suit, seeking to establish

effecting broad social change. As a result, properly certified class actions have become a significant means by which to implement some of the nation's most important civil rights legislation.[16] Simply put by Justice William O. Douglas, the class action is "one of the few legal remedies the small claimant has against those who command the status quo."[17]

This Note does not join the debate over the merits of the class action device. Instead, it assumes that the class action device exists to be used, and that Rule 23 should be interpreted, as the federal rules prescribe, "to secure the just, speedy, and inexpensive determination of every action."[18] Part I of this Note discusses the somewhat tortured relationship between Article III of the U.S. Constitution and the class action device,[19] highlighting the Supreme Court's application of mootness principles in the class action context. Part II describes in detail the practice of picking off named plaintiffs, and surveys the treatment of the issue by lower federal courts, a significant number of which have endorsed the practice. Part III sets forth four specific reasons why defendants should be prevented from mooting class actions by picking off named plaintiffs. Part IV considers existing tactical and scholarly proposals to prevent this practice, and advances a new, better theory to ensure that the class action device remains available to plaintiffs whose claims satisfy the prerequisites of Rule 23.

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that equitable relief is needed to prevent future violations, even if the risk of harm to the individual plaintiff is minute.").

16. *See* John W. Welch, Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 DUKE L.J. 573, 573 n.2 (observing that the class action device has been vital to enforcing the Civil Rights Act of 1964).

17. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting in part).

18. FED. R. CIV. P. 1.

19. As one commentator has observed, "[a]pplication of the mootness doctrine to class actions has confounded the Justices of the United States Supreme Court." Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 897 (1983).

I. ARTICLE III AND THE CLASS ACTION DEVICE

A. The Anatomy of a Class Action

In the class action context, named plaintiffs have the burden of pleading facts that bring the action within the rubric of Rule 23.[20] Every proposed class action must satisfy the four, well-known prerequisites set forth in Rule 23(a): numerosity,[21] commonality,[22] typicality,[23] and adequacy of representation.[24] Additionally, named plaintiffs must demonstrate that their claims fall within one of the three categories of Rule 23(b).[25] The true transformation of a class action begins with the class certification motion, at which point the court determines whether the named plaintiffs have met all the requirements to maintain a class action. Rule 23(c)(1)(A) provides that "[w]hen a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action."[26] Any party to the litigation, as well as the court acting *sua sponte*, may initiate the certification process.[27] If the court finds that the requirements of Rule 23 are met, it may grant the motion for class certification.[28]

Practice under Rule 23(c) gives the court flexibility in determining the appropriate time to consider the issue of class certification. As Professors Conte and Newberg observe, "there are no formal procedures or timetables leading to an initial class determination."[29] The rule merely requires that "at an early

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20. *See* 3 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 7:16, at 64 (4th ed. 2002). For a concise summary of class action requirements, see Sharkey, *supra* note 14, at 403 n.201.

21. FED. R. CIV. P. 23(a)(1).

22. FED. R. CIV. P. 23(a)(2).

23. FED. R. CIV. P. 23(a)(3).

24. FED. R. CIV. P. 23(a)(4).

25. FED. R. CIV. P. 23(b)(1)–(3).

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

27. 3 CONTE & NEWBERG, *supra* note 20, § 7:6, at 17–18.

28. *See* 5 MOORE'S FEDERAL PRACTICE § 23.04, at 23-28 to -29 (3d ed. 2003) ("The Fourth Circuit has held that a district court's broad discretion is not limited to making mere factual determinations as to whether the four Rule 23(a) criteria are met. If these criteria are met, an action 'may,' not 'must,' be maintained as a class action. If other factors militate against trying the case as a class action, it is appropriate for a district court to refuse to certify, or to decertify, the class.") (footnotes omitted) (citing Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 758 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999)).

29. 3 CONTE & NEWBERG, *supra* note 20, § 7:5, at 17.

practicable time" the court shall consider the issue.[30] Some courts have promulgated local rules that establish a specific time period within which a named plaintiff must file a class certification motion. In the Eastern District of Pennsylvania, for example, plaintiffs must file certification motions within ninety days of filing the complaint.[31] In the Southern District of New York, the deadline is sixty days after filing the complaint.[32] In jurisdictions that do not have local rules governing the timing of certification motions, the timing of such motions varies greatly with each case.[33] As a result, certification rulings "have been made as early as a few months following the filing of the complaint and as late as several years thereafter."[34]

B. Article III in the Class Action Context

Article III of the U.S. Constitution limits the subject matter jurisdiction of federal courts to actual "cases" or "controversies" between parties.[35] When an individual plaintiff loses her so-called "personal stake" in the litigation, the requisite case or controversy no longer exists, and the court is deprived of subject matter jurisdiction over the claim.[36] One way in which the plaintiff can lose her personal stake in the litigation is for the defendant to surrender all that the plaintiff is seeking in the action.[37] If the defendant conveys a full offer of judgment to the plaintiff, the plaintiff no longer has anything to gain in the litigation, and the case must be dismissed as moot.[38] As

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

31. E.D. PA. R. 27, *cited in* 3 CONTE & NEWBERG, *supra* note 20, § 7:6, at 21.

32. S.D.N.Y. CIV. R. 11A(c), *cited in* 3 CONTE & NEWBERG, *supra* note 20, § 7:6, at 21.

33. *See* 3 CONTE & NEWBERG, *supra* note 20, § 7:14, at 47 ("When the cases are examined, one finds that each suit has its own case history and surrounding circumstances that affect the practicabilities of reaching an initial class determination.").

34. *Id*.

35. U.S. CONST. art. III, § 2.

36. Baker v. Carr, 369 U.S. 186, 204 (1962).

37. *See, e.g.*, Greisz v. Household Bank (Illinois), N.A., 176 F.3d 1012, 1015 (7th Cir. 1999) ("Such an offer, by giving the plaintiff the equivalent of a default judgment . . . , eliminates a legal dispute upon which federal jurisdiction can be based."); Holstein v. City of Chicago, 29 F.3d 1145, 1147 (7th Cir. 1994) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake." (quoting Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991)) (citations omitted)); *cf.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) ("Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable.").

38. *See* cases cited *supra* note 37.

tersely distilled by Judge Posner, "[y]ou cannot persist in suing after you've won."[39]

But what if the plaintiff is suing not only on behalf of herself, but also on behalf of "all those similarly situated," as is the case with class actions?[40] In such cases, even if the named plaintiff loses her personal stake in the litigation, there remains a recognizable group of persons—the putative class members—on the opposite side of the "v" from the defendants, sufficient to provide the requisite case or controversy under Article III.

Or does there? The U.S. Supreme Court has grappled with the question of at what point in the life of a class action the separate and distinct interests of putative class members alone are sufficient to maintain a class action, even if the claims of the named plaintiffs have become moot. In a line of decisions that are, by the Court's own admission, "somewhat confusing"[41] and at times "irreconcilable,"[42] the Court has carved out several class action exceptions to the traditional doctrines of standing and mootness.[43] Although these decisions do not deal directly with the practice of picking off named plaintiffs, they provide important foundation for understanding the implications of Article III for this practice.

First, in *Sosna v. Iowa*,[44] the Court held that a class action, *once properly certified*, may proceed even after a named plaintiff's claim is rendered moot.[45] This is justified, according to the Court, because a properly certified class "acquire[s] a legal status separate from the

39. *Greisz*, 176 F.3d at 1015.

40. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 121 (1973) (noting that one set of plaintiffs sued "on behalf of themselves and all couples similarly situated").

41. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 404 n.11 (1980).

42. *Id*.

43. For a concise summary of the class action exceptions to the mootness doctrine, see the Rosetta Stone of all things jurisdictional, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.5.5 (4th ed. 2003). In addition to the class action exceptions, brief attention is warranted here to the "capable of repetition yet evading review" exception, which may appear to dispose of the issue in this Note. That exception allows litigation of a moot issue if the issue is (1) "of a type likely to happen to the plaintiff again," and (2) "of inherently limited duration so that it is likely to always become moot before federal court litigation is completed." *Id*. § 2.5.3, at 132. Although named plaintiffs' claims are rendered "of inherently limited duration" by a defendant's willingness to settle with the plaintiffs seriatim, *see infra* Part IV.C, this exception is inapplicable because the defendant's settlement offer makes it impossible for the same claims to arise again with respect to the same named plaintiffs, *see id.* ("[T]here must be a reasonable chance that it will happen again to the plaintiff.").

44. 419 U.S. 393 (1975).

45. *Id.* at 401.

interest asserted by [the named plaintiff]."[46] Second, in *United Airlines v. McDonald*,[47] the Court held that a member of the putative class may intervene to appeal the *denial* of class certification, even if the named plaintiff's claim has become moot.[48] In so holding, the Court again recognized that the interests of putative class members are distinct from those of named plaintiffs.[49] Third, in *Deposit Guaranty National Bank v. Roper*[50] and *United States Parole Commission v. Geraghty*[51]—both decided on the same day—the Court held that a named plaintiff in a putative class action may herself appeal the denial of class certification, even if her substantive claim has become moot.[52] This exception is justified, according to the Court, by the named plaintiff's continuing interest in sharing the costs of litigation with members of the putative class.[53] These decisions make clear that *after* the trial court has entertained the class certification motion, a class action can proceed even if the named plaintiff's claim is rendered moot.[54] Finally, in *County of Riverside v. McLaughlin*,[55] the Court held that putative class actions—that is, actions in which the class has not yet been certified by the court—may continue after the named plaintiff's claim is rendered moot, if the nature of the named plaintiff's claim is "so *inherently transitory* that the trial court

46. *Id.* at 399.

47. 432 U.S. 385 (1977).

48. *Id.* at 393–95.

49. *Id.* at 393–94.

50. 445 U.S. 326 (1980).

51. 445 U.S. 388 (1980).

52. *Roper*, 445 U.S. at 340; *Geraghty*, 445 U.S. at 404.

53. *Roper*, 445 U.S. at 336; *Geraghty*, 445 U.S. at 402–03. The Court in *Roper* also sought to prevent defendants from being able to "buy off" named plaintiffs before their appeals are fully resolved. 445 U.S. at 339.

54. As this paragraph indicates, the Court's decisions in this area appear to take a somewhat flexible approach in applying the mootness doctrine to class action litigation. *See* CHEMERINSKY, *supra* note 43, § 2.5.5. This approach is not without tension with regard to several decisions by the Court that appear to require a rigid application of the mootness doctrine in other contexts. *See, e.g.*, Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430–31 (1976) (stating that, but for the intervention of the United States, the case would have been moot because all plaintiffs had graduated from the school system and the case had not been certified as a class action); Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (holding a former prisoner's non-class action claim against the Parole Commission to be moot because there was no "reasonable expectation" that the plaintiff would again be subject to the Commission's jurisdiction); Bd. of Sch. Comm'rs v. Jacobs, 420 U.S. 128, 129 (1975) (declaring students' claim against the Board of School Commissioners to be moot because the students had already graduated from high school and because the case had not been properly certified by the district court as a class action).

55. 500 U.S. 44 (1991).

will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."[56]

In light of the flexibility with which the Court has applied the mootness doctrine in the class action context, it would seem plausible that federal courts would take an equally expansive approach when addressing cases involving efforts by defendants to pick off named plaintiffs at the outset of class actions. As the next Part illustrates, however, this has not been the case.

II. PICKING OFF NAMED PLAINTIFFS

Rule 68 of the Federal Rules of Civil Procedure provides a mechanism by which defendants can convey offers of judgment to plaintiffs, giving plaintiffs the choice between accepting the offer within ten days of its conveyance, or rejecting the offer and agreeing to pay the defendant's attorneys' fees and costs should the amount obtained at trial be less than the amount set forth in the offer.[57] The primary purposes of Rule 68 are to encourage settlement and discourage frivolous or protracted litigation.[58] However, class action defendants have embraced the Rule 68 mechanism for a different purpose: thwarting class action litigation. In a growing trend already endorsed by a significant number of federal courts, defendants are conveying Rule 68 offers of judgment for the full amount claimed by named plaintiffs, and then filing motions to dismiss on the ground that, in light of the full offer, the plaintiffs no longer have a personal stake in the litigation.[59]

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56. *Id.* at 52 (quoting *Geraghty*, 445 U.S. at 399) (emphasis added).

57. Rule 68 of the Federal Rules of Civil Procedure provides, in relevant part:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

58. *See* Thomas D. Rowe, Jr., *Offer of Judgment*, *in* 13 MOORE'S FEDERAL PRACTICE § 68.02[2], at 68-7 (3d ed. 2003) ("The primary purpose of Rule 68 is to promote settlements and avoid protracted litigation.").

59. *See* FED. R. CIV. P. 12(b)(1) (allowing motions to dismiss for "lack of jurisdiction over the subject matter").

The practice of picking off named plaintiffs in this manner requires precise timing. Because of the Supreme Court's willingness to allow *properly certified* class actions to continue even after the named plaintiff's claim is rendered moot,[60] the full offer of judgment must certainly be conveyed before the class is certified by the trial court. Several courts of appeals, however, have moved the mark to an earlier point in the action, holding that the separate and distinct interests of the putative class are implicated not only upon proper certification of the class, but also upon *filing* of a class certification motion with the court.[61] Thus, under the decisions of the Supreme Court and the courts of appeals, in order to have any effect upon the justiciability of the class action as a whole, offers of judgment must be conveyed before the named plaintiff files the class certification motion.

Only one court of appeals has weighed in on the effect of full offers of judgment conveyed before the class certification motion is *filed*. In *Colbert v. Dymacol, Inc.*,[62] a Third Circuit panel issued a temporarily crushing blow to the class action plaintiffs' bar. Rejecting the argument that "because [the] litigation was filed as a class action, typical mootness rules [did] not apply," the panel held that when a defendant makes a full offer of judgment to a named plaintiff before a motion for class certification is *filed*, the litigation becomes moot and a court no longer has jurisdiction over the matter.[63] Plaintiffs' attorneys breathed a sigh of relief, however, when the Third Circuit,

60. *See* Sosna v. Iowa, 419 U.S. 393, 397–403 (1975) (permitting the plaintiff to maintain her class action challenge of Iowa's residency requirement for divorce even though she had satisfied the residency requirement since filing the claim).

61. *See, e.g.*, Phillips v. Allegheny County, 869 F.2d 234, 237 (3d Cir. 1989) ("[A]n action filed as a class action should be treated as if certification has been granted for the purposes of settlement until certification is denied."); Susman v. Lincoln Am. Corp., 587 F.2d 866, 869 (7th Cir. 1978) ("We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court [to] avoid a mootness artificially created by the defendant . . . ."), *cert. denied*, 445 U.S. 942 (1980); Roper v. Consurve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978) ("By the very act of filing a class action, the class representatives assume responsibilities to members of the class."), *aff'd sub nom.* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980). *But see* Hechenberger v. W. Elec. Co., 742 F.2d 453, 455 (8th Cir. 1984) (holding that where there is no evidence that the claims would otherwise evade review, dismissal is required when the plaintiff's claim is mooted before class certification), *cert. denied*, 469 U.S. 1212 (1985).

62. No. 01-4397, 2002 WL 1974538 (3d Cir. Aug. 28, 2002).

63. *Colbert*, 2002 WL 1974538, at *2.

sitting *en banc*, vacated[64] and ultimately dismissed on an unrelated procedural issue[65] the *Colbert* decision.

Lacking further guidance from the Supreme Court or the courts of appeals, the federal district courts are sharply divided over the effect of full offers conveyed before the named plaintiff files the certification motion. Two expressly contradictory approaches have emerged, each with its staunch adherents. Characteristic of the first approach is *Ambalu v. Rosenblatt*.[66] In *Ambalu*, a district court in the Eastern District of New York addressed a situation in which the defendant, a debt collection agency, attempted to short-circuit a class action brought under the Fair Debt Collection Practices Act (FDCPA)[67] by serving on the named plaintiff an offer of judgment pursuant to Rule 68. The offer consisted of the maximum damages that the named plaintiff could recover under the Act ($1,000), and it was conveyed before the named plaintiff filed a motion for class certification.[68] Acknowledging that the defendant had "offered all that Ambalu could hope to recover through this litigation," the court dismissed the action for lack of subject matter jurisdiction.[69] Numerous other district courts have since followed this reasoning.[70]

The opposite approach is well represented by *Liles v. American Corrective Counseling Services, Inc.*[71] In *Liles*, the district court for the Southern District of Iowa faced precisely the same fact pattern as that faced by the court in *Ambalu*. The defendant, another debt collection agency, served a Rule 68 offer upon the named plaintiff in a class action brought under the FDCPA and its state law counterpart.[72] The offer consisted of full statutory damages in the amount of $1,000 for each claim, and it was conveyed before the named plaintiff filed a

64. 305 F.3d 1256, 1256 (3d Cir. 2002).

65. 344 F.3d 334, 334 (3d Cir. 2003).

66. 194 F.R.D. 451 (E.D.N.Y. 2000).

67. 15 U.S.C. § 1692 (2000).

68. *Ambalu*, 194 F.R.D. at 452.

69. *Id.* at 453.

70. *See, e.g.*, Edge v. C. Tech Collections, Inc., 203 F.R.D. 85, 88 (E.D.N.Y. 2001) ("This Court joins Judges McMahon and Glasser in wholeheartedly agreeing with the sound reasoning of Judge Nickerson in *Ambalu*."); Tratt v. Retrieval Masters Creditors Bureau, Inc., No. 00-CV-4560(ILG), 2001 WL 667602, at *2 (E.D.N.Y. May 23, 2001) ("I simply adopt Judge Nickerson's opinion [in *Ambalu*] as being entirely dispositive here . . . ."); Wilner v. OSI Collection Servs., Inc., 198 F.R.D. 393, 395 (S.D.N.Y. 2001) ("I agree wholeheartedly with Judge Nickerson's reasoning."), *modified*, 201 F.R.D. 321 (S.D.N.Y. 2001).

71. 201 F.R.D. 452 (S.D. Iowa 2001).

72. *Id.* at 453–54.

class certification motion.[73] After first acknowledging the *Ambalu* decision,[74] the court expressly rejected that decision's reasoning and denied the defendant's motion to dismiss.[75] The court explained very directly its basis for rejecting the reasoning in *Ambalu*:

> [The named plaintiff] filed this action as a class action. As such, she has assumed a responsibility to members of the putative class and this Court has a special responsibility to protect their interests, regardless of whether a motion for class certification has been filed. Hinging the outcome of this motion on whether or not class certification has been filed is not well-supported in the law nor sound judicial practice; it would encourage a "race to pay off" named plaintiffs very early in litigation, before they file motions for class certification.[76]

Numerous other district courts have reached the same conclusion as that reached in *Liles*, precluding defendants from short-circuiting class actions by picking off named plaintiffs at the outset.[77]

III. WHY DEFENDANTS SHOULD BE PREVENTED FROM PICKING OFF NAMED PLAINTIFFS

This Note began with an assumption—that class actions exist to be used, and that practices which would thwart class actions should be prevented.[78] Courts and commentators alike have recognized the destructive effect on the class action device of the practice of picking

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73. The offer also included compensation for reasonable costs and attorneys' fees. *Id.* at 454.

74. *Id*.

75. *Id.* at 455.

76. *Id*.

77. *See, e.g.*, Nasca v. GC Servs. Ltd. P'ship, No. 01CIV10127(DLC), 2002 WL 31040647, at *3 (S.D.N.Y. Sept. 12, 2002) (refusing to dismiss the case as moot but finding for the defendant on the merits); Bond v. Fleet Bank (RI), N.A., No. CIV.A. 01-177L, 2002 WL 373475, at *5 (D.R.I. Feb. 21, 2002) (precluding the defendant from rendering the case moot by making an offer of judgment six days after the filing of the complaint); White v. OSI Collection Servs., Inc., No. 01-CV-1343(ARR), 2001 WL 1590518, at *4 (E.D.N.Y. Nov. 5, 2001) (precluding the defendant from picking off the plaintiff by serving an offer of judgment the day after the plaintiff filed her complaint); Crisci v. Shalala, 169 F.R.D. 563, 568 (S.D.N.Y. 1996) ("[T]his Court must consider the potential ability of defendants to purposefully moot the named plaintiffs' claims after the class action complaint has been filed but before the class has been properly certified." (internal quotation marks omitted)); Goetz v. Crosson, 728 F. Supp. 995, 999–1001 (S.D.N.Y. 1990) (concluding that the defendant could not "purposefully moot the named plaintiffs' claims" before certification of the class), *summary judgment granted on merits*, 769 F. Supp. 132 (S.D.N.Y. 1991), *remanded*, 967 F.2d 29 (2d Cir. 1992).

78. *See supra* notes 5–6 and accompanying text.

off named plaintiffs. For example, Chief Justice Burger, certainly not known for liberally construing Article III limitations,[79] nevertheless remarked in dicta that the practice of picking off named plaintiffs "obviously would frustrate the objectives of class actions."[80] Another federal judge recently declared that the practice of picking off named plaintiffs "would render the class action mechanisms a nullity."[81] Apart from these general admonitions, this Part considers four specific reasons why defendants should be prevented from picking off named plaintiffs.

A. Depriving Plaintiffs of the Motivation and Ability to Employ the Class Action Device

Allowing defendants to moot class actions at their outset deprives many plaintiffs of both the motivation and the practical ability to bring their claims. As discussed at the outset of this Note, class actions have evolved into something more significant than merely a procedural device.[82] By allowing numerous plaintiffs to pool their resources and collaborate in a single litigation, class actions provide a vehicle with which to effect broad social change.[83] The prospect of a full-scale movement against a defendant may motivate the filing of some lawsuits by plaintiffs who otherwise would have thought their individual claims too petty to pursue.[84] Moreover, even absent the motivation of social change, class actions alleviate costs that might otherwise prohibit individual plaintiffs from seeking relief. The U.S. Supreme Court has recognized that plaintiffs have a genuine interest, distinct from the interest in resolving their substantive claims, in ultimately "shift[ing] part of the costs of litigation to those

79. *See, e.g.*, United States v. Richardson, 418 U.S. 166, 170 (1974) (Burger, C.J.) (dismissing for lack of standing a taxpayer's suit challenging the constitutionality of keeping secret the spending records of the Central Intelligence Agency); Laird v. Tatum, 408 U.S. 1, 3, 15 (1972) (Burger, C.J.) (dismissing as nonjusticiable a class action alleging that plaintiffs' First Amendment rights were being chilled by the mere "existence and operation of the intelligence gathering and distributing system, which [was] confined to the Army and related civilian investigative agencies").

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

81. *Bond*, 2002 WL 373475, at *6.

82. *See supra* notes 11–17 and accompanying text.

83. As noted in the Introduction, class actions have been a significant vehicle for implementing the Civil Rights Act of 1964. *See* Welch, *supra* note 16, at 573 n.2.

84. *Roper*, 445 U.S. at 338 (observing that class actions have played a great role "in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost").

who will share in its benefits if the class is certified and ultimately prevails."[85] Without the ability to share costs with other class members that the class action device provides, smaller claims might be swallowed up by the costs of litigation. Yet by conveying full offers of judgment upon individual named plaintiffs before the certification motion is filed, defendants attempt to deprive the court of subject matter jurisdiction before the issue of certification can even be entertained. This practice is capable of dissuading would-be plaintiffs from even attempting to file a claim.

B. Creating an Unnecessary Multiplicity of Suits

As one commentator observes, "Rule 68 permits a defendant who may be liable to thousands of potential class members for nominal claims to 'pick-off' every would-be class representative, forever delaying adjudication of the class claims."[86] Allowing defendants to pick off named plaintiffs seriatim contravenes the very purpose for which class actions were created—to provide a mechanism to resolve the claims of numerous plaintiffs in a *single* action.[87] Such practice also contravenes one of the central purposes for the adoption of Rule 68—to avoid unnecessary and protracted litigation.[88] Rather than resolving claims in a single action, defendants who pick off named plaintiffs show their willingness to litigate identical claims in separate actions *ad infinitum*. "This would contravene the basic policy of class action practice which is to avoid a multiplicity of suits."[89] Moreover, as Chief Justice Burger remarked in *Deposit Guaranty National Bank v. Roper*,[90] allowing defendants to moot class actions strategically "would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."[91] The more efficient practice—and indeed the practice envisioned by the drafters of Rule 23[92]—is to prevent defendants from

85. *Id.* at 336. This interest became the basis of the Court's decision in finding that the named plaintiffs retained a personal stake in the litigation and thus could appeal the trial court's denial of class certification even after the defendant had conveyed upon them full offers of judgment. *Id.* at 340.

86. Fisher, *supra* note 5, at 115.

87. *See supra* note 2 and accompanying text.

88. *See supra* note 58 and accompanying text.

89. Welch, *supra* note 16, at 580 n.29.

90. 445 U.S. 326 (1980).

91. *Id.* at 339.

92. *See supra* note 2 and accompanying text.

thwarting class actions that otherwise meet the prerequisites set forth in Rule 23.

C. Creating an Unnecessary Race to the Courthouse

If the survival of the class action hinges on whether the defendant's offer is conveyed before or after the certification motion is filed,[93] both defendants and plaintiffs have great motivation to file Rule 68 offers or class certification motions as quickly as possible. On its face, this might seem like a benefit, in that it would result in the expeditious resolution of certification issues. But hinging the court's jurisdiction on who can get to the courthouse first does nothing but create a race between the parties to file documents with the court. Taking this to its logical (and foreseeable) extreme, named plaintiffs would be required to file class certification motions concurrently with the complaint in order to prevent a Rule 68 offer from reaching them first.[94]

Such concurrent filing would be contrary to sound judicial administration. First, the federal rules do not contemplate the immediate filing of the certification motion, requiring instead that the court consider the issue merely "at an early practicable time."[95] Though some courts have set definite time periods within which the certification motion must be filed, none of these deadlines includes "immediately."[96] Second, discovery may be necessary to define properly the class.[97] Though class certification motions are often decided based upon the pleadings,[98] the certification decision should generally be made with more information than what is alleged in the pleadings.[99] Courts may, in their discretion, grant permission for limited "class discovery" on the issues necessary to decide certification.[100] Allowing named plaintiffs time to prepare the

93. *See supra* notes 60–77 and accompanying text.

94. *See* Asch v. Teller, Levit & Silvertrust, P.C., 200 F.R.D. 399, 400 (N.D. Ill. 2000) (warning that such a rule "would force plaintiffs to file class certification motions with the complaint").

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

96. *See supra* notes 31–32 and accompanying text.

97. Mary Kay Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFF. L. REV. 83, 104 (1976).

98. 3 CONTE & NEWBERG, *supra* note 20, § 7:2, at 7–9.

99. 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1785, at 107 (2d ed. 1986).

100. *See* Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972); 3B JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE ¶ 23.85, at

certification motion and to conduct discovery would help to ensure accurate, well-drafted motions and to prevent certification of ill-defined classes.[101]

D. Hinging the Availability of the Class Action Device on Arbitrary Timing

The nature of the alleged harm to the named plaintiffs and members of the putative class is presumably no different before or after the point at which the class certification motion is filed. As the court recognized in *Liles*, allowing defendants to pick off plaintiffs before certification, but not after, would nevertheless hinge the availability of the class action device on this arbitrary point in time.[102] To be sure, rules that attach legal significance to arbitrary points in time are not foreign to the American judicial system. The law routinely assigns, for example, statutes of limitations to various types of claims. At these arbitrary points in time, would-be plaintiffs who have failed to assert their claims against defendants lose the right to assert those claims. Of course, to the extent that would-be plaintiffs have suffered harm, their injuries neither change nor disappear merely because the statute of limitations runs. But for policy reasons—namely, to mark for defendants a point in time at which they can be certain that their past actions will not result in legal ramifications—plaintiffs are stripped of their ability to sue.

No such policy considerations justify hinging the availability of the class action device on whether a full offer was conveyed before or after class certification. Allowing defendants to moot class actions before certification does the direct opposite of granting certainty about future legal ramifications. Rather than resolving the dispute with *all* potential class members in a single action, the defendant, by mooting a class action early in the process, leaves open the possibility

23-500.1 (2d ed. Supp. 1996–97); *see also* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350 (1978) (holding that the federal rules governing class actions authorize discovery on issues relevant to certification); Asch v. Teller, Levit & Silvertrust, P.C., 200 F.R.D. 399, 400 (N.D. Ill. 2000) (noting that defense tactics that force a plaintiff to file a motion of class certification with the complaint also force the court to rule on the motion prior to any discovery).

101. *See* 3 CONTE & NEWBERG, *supra* note 20, § 7:2, at 6–7 ("The plaintiff should be diligent in assuring that any class certification order issued by the trial court clearly sets forth and describes the scope of the class with particularity. Such diligence assures that a proper litigation framework will be set . . . .").

102. Liles v. Am. Corrective Counseling Servs., Inc., 201 F.R.D. 452, 455 (S.D. Iowa 2001).

that other plaintiffs will file similar suits down the line.[103] The defendant thus accomplishes nothing more than to guarantee the uncertainty of future litigation.

It is true that the Supreme Court's decisions have at times hinged the independent legal status of a class on whether or not the court has properly certified the class. In *Sosna v. Iowa*, for example, the Court reasoned that it is the trial court's answer to the question of whether the putative class meets the requirements of Rule 23 that determines whether or not the class can proceed notwithstanding the named plaintiff's mooted claim.[104] If the answer is yes, the action can proceed; if no, the action is moot.[105] But allowing defendants deliberately to moot class actions before certification would deny the district court the very ability to reach the certification question—to make the crucial determination on which the *Sosna* dichotomy hinges.[106] If the class is worthy of certification, and thus worthy of status distinct from that of the named plaintiff, the trial court should at least be given the chance to say so.[107]

In the end, the reason why defendants should be prevented from mooting class actions by picking off named plaintiffs can be distilled quite readily. Rule 23 makes available a mechanism that can be employed once certain prerequisites are met. The practice of picking off named plaintiffs nullifies that mechanism. To ensure that class

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103. *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (positing that the practice of picking off named plainiffs would "invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement").

104. Sosna v. Iowa, 419 U.S. 393, 399 (1975).

105. *See id.* at 401 ("[A] case such as this, in which . . . the issue sought to be litigated escapes full appellate review at the behest of any single challenger, does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs.").

106. Consider this language from the Court's opinion in *Sosna*:

> There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them *before the district court can reasonably be expected to rule on a certification motion*. In such instances, whether the certification can be said to "relate back" to the filing of the complaint may depend upon the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review.

Id. at 402 n.11 (emphasis added).

107. Some commentators have argued for a rule of "presumptive validity" to be applied to class actions; that is, "an action commenced as a class action retains that character until a court finds otherwise." James A. Bledsoe, Jr., *Mootness and Standing in Class Actions*, 1 FLA. ST. U. L. REV. 430, 447 (1973) (quoting Gaddis v. Wyman, 304 F. Supp. 713, 715 (S.D.N.Y. 1969)); *see also* 3B MOORE, *supra* note 100, ¶ 23.50, at 23-396 to -397 (2d ed. Supp. 1996–97) ("In 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.").

actions, and all of the policy goals that they facilitate, remain available for plaintiffs with qualifying claims, defendants must be prevented from picking off named plaintiffs at the outset of class actions.

IV. HOW DEFENDANTS CAN BE PREVENTED FROM PICKING OFF NAMED PLAINTIFFS

The goal of preventing defendants from picking off named plaintiffs at the outset of class actions can be effectuated in a number of ways, ranging from tactical decisions about how to run the litigation, to more theoretical revisions of Article III principles as they apply in the class action context. This Part first discusses the tactical approaches, concluding that while such approaches may be successful on a case-by-case basis, they represent nothing more than quick fixes—mere Band-Aids on the deeper wounds inflicted by the practice of picking off named plaintiffs. Second, this Part briefly surveys other, more theoretical approaches advanced by scholars attempting to solve the problems associated with picking off named plaintiffs. Unsatisfied that these scholars' approaches represent the best solution to the problem, this Part concludes by advancing a new theory. This theory calls for application of the "inherently transitory" principle from the Supreme Court's decision in *County of Riverside v. McLaughlin*[108] to cases in which defendants attempt to forestall class action litigation by picking off named plaintiffs.

A. Tactical Approaches

1. *Substituting Another Named Plaintiff.* As Part I.B discussed, Article III of the U.S. Constitution requires that a plaintiff with a personal stake in the dispute be present at all times in the litigation.[109] Absent a plaintiff with a personal stake, the litigation ceases to be adversarial and must be dismissed as moot.[110] If the named plaintiff in a putative class action receives a full offer of judgment from the defendant, and thereby loses her personal stake in the litigation, it might seem like a logical solution simply to find another named

108. 500 U.S. 44 (1991).

109. *See supra* notes 35–39 and accompanying text.

110. Baker v. Carr, 369 U.S. 186, 204 (1962).

plaintiff to substitute.[111] Yet while substituting a new plaintiff seems to be a quick and easy fix, some courts have made class certification a *prerequisite* to substitution of a new named plaintiff in place of one whose claim has been rendered moot.[112] Thus, if the named plaintiff is picked off before the class is certified, substitution of a new named plaintiff would not be permitted and the action would be dismissed.[113] The attorneys for the class would then be forced to find another named plaintiff and to file the action anew.[114] Cases might arise, also, where it is difficult and time-consuming to find another named plaintiff, resulting in delay and expense, and contravening the class action device's goal of efficiency. Further, filing individual actions seriatim completely belies the central, efficient purpose behind class actions—that of resolving the similar claims of numerous plaintiffs in a *single* action.

2. *Filing the Class Certification Motion Concurrently with the Complaint.* Another quick fix is to file the class certification motion concurrently with the complaint. As most courts are unwilling, after the certification motion has been filed, to dismiss an entire class action solely by virtue of the fact that the named plaintiff's claim has become moot,[115] plaintiffs can prevent defendants from thwarting class action litigation by filing the certification motion when they initiate the action.[116] Such a tactic, however, as Part II.C discussed,[117] would be contrary to sound judicial administration. Immediate filing of class certification motions is not contemplated by either Rule 23 or related local rules.[118] Filing the complaint and class certification motion concurrently would restrict the information available to

111. *See* Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 56 (2d Cir. 2000) (reviewing the district court's decision ordering, *inter alia*, that another plaintiff be substituted in lieu of a plaintiff whose claim had been rendered moot).

112. *See, e.g.*, Walters v. Edgar, 163 F.3d 430, 432 (7th Cir. 1998) (Posner, C.J.) (setting forth two conditions for the substitution of a new named plaintiff: (1) "that the suit had been certified as a class action," and (2) "that at least one of these unnamed class members had standing").

113. *See id.* (implying that failure to meet either of the two listed conditions would necessitate dismissing the action as moot).

114. *See* Fisher, *supra* note 5, at 116.

115. *See supra* note 61 and accompanying text.

116. *See, e.g.*, Asch v. Teller, Levit & Silvertrust, P.C., 200 F.R.D. 399, 401 (N.D. Ill. 2000) ("One thing is certain: if defendant is successful in its use of Rule 68 in this case, few class action complaints will be filed in this district in the future without accompanying class certification motions.").

117. *See supra* notes 93–101 and accompanying text.

118. *See supra* notes 95–96 and accompanying text.

plaintiffs to that which is available at the time of filing, potentially limiting a plaintiff's ability to define the nature and boundaries of the putative class with precision.[119] Moreover, as a federal judge recently observed, such preemptive certification motions "would force defendants to brief the motion and the court to rule on it prior to any discovery and prior to any opportunity on the part of the parties to address settlement in a meaningful way."[120] To be sure, in some cases the plaintiff would have no trouble drafting a precise class certification motion to be filed when the action is initiated. But in other cases, where additional information obtained through discovery would facilitate the more precise crafting of class certification motions, the goals of efficiency inherent in class actions call for a better solution than this quick fix.

B. Approaches Advanced by Commentators

Several commentators have eschewed the quick fixes discussed in Section IV.A, advocating instead for "a serious redefinition of the justiciability of class actions."[121] For example, one commentator suggests that the status of the named plaintiff should be completely ignored during the standing-mootness inquiry.[122] Instead, the court should concern itself only with whether the members of the putative class—if they were actually present in court—would have standing to sue the defendant.[123] This theory is bold and drastic. Although it would certainly quell the problems arising from the practice of picking off named plaintiffs, it would also require the wholesale disposal of basic class action principles—most prominently, the principle that "the representative parties will fairly and adequately protect the interests of the class."[124]

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119. *See* 3 CONTE & NEWBERG, *supra* note 20, § 7:2, at 6–7.

120. *Asch*, 200 F.R.D. at 400–01 (citing "pressure from the Civil Justice Reform Act to rule on motions in no more than six months from filing" as generally prohibitive of class discovery under such circumstances).

121. Greenstein, *supra* note 19, at 926; *see infra* notes 122–123, 125–127, and accompanying text.

122. Note, *Class Standing and the Class Representative*, 94 HARV. L. REV. 1637, 1659 (1981). A similar argument for completely removing the class representative from the equation was advanced in Greenstein, *supra* note 19, at 898 ("[T]he claims of a class present an article III controversy, independent of the individual claims of the class representative, from the moment the complaint is filed as a class action.").

123. *Class Standing and the Class Representative*, *supra* note 122, at 1649–50.

124. FED. R. CIV. P. 23(a)(4).

Another commentator suggests a novel, more flexible, and certainly progressive approach to the mootness inquiry, arguing that courts should examine, on a case-by-case basis, the claims of plaintiffs that have become moot, to determine if the policies behind the mootness doctrine—preserving separation of powers, concrete adversity between plaintiff and defendant, and vigorous advocacy by each party—would be advanced by dismissing the entire action.[125] While, again, such a theory would prevent defendants from thwarting most legitimate class actions, the case-by-case inquiry advocated by the commentator would do little to provide certainty to plaintiffs and defendants as to which types of class actions would survive a full offer of judgment, and which would not. There is the potential, also, that the courts would be overburdened in conducting such a nuanced analysis in each case.

Still another commentator advocates a decidedly more measured approach. Under this approach, if the named plaintiff files a class certification motion at any time within the ten-day pendency of the Rule 68 offer,[126] the court should entertain the motion regardless of whether the offer technically moots the individual claim of the named plaintiff.[127] This approach requires far less of a departure from traditional class action principles than do the previous two examples. It does not completely ignore the status of the named plaintiff; instead, it hinges the availability of the class action device on the actions of the named plaintiff, in accordance with the representational nature of the class action device.[128] To be sure, this approach attempts to strike a reasonable compromise between traditional Article III principles and the pragmatism necessary to prevent defendants from nullifying the class action device.[129] However, from a practical

125. Kenneth H. Leggett, Note, *Article III Justiciability and Class Actions: Standing and Mootness*, 59 TEX. L. REV. 297, 322 (1981).

126. *See* FED. R. CIV. P. 68 ("If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment.").

127. Fisher, *supra* note 5, at 115–16.

128. *See* FED. R. CIV. P. 23(a)(4).

129. Indeed, several courts have embraced and applied this theory. *See, e.g.*, Kremnitzer v. Cabrera & Rephen, P.C., 202 F.R.D. 239, 243 (N.D. Ill. 2001) (holding that a plaintiff need only seek, not receive, class certification during the ten-day period in order to suspend a Rule 68 offer, because class certification, if granted, would materially change the litigation so as to extinguish the offer); Gibson v. Aman Collection Serv., Inc., No. 00-1798-CT/G, 2001 WL 849525, at *2 (S.D. Ind. May 23, 2001) (agreeing that allowing motions for class certification during the pendency of a Rule 68 offer restores Rule 68 to the role of facilitating and

standpoint, this approach only buys named plaintiffs ten extra days in which hurriedly to draft a class certification motion so as to survive a defendant's attempt to moot the entire class action. Although giving named plaintiffs ten days is certainly better than requiring them to file the certification motion concurrently with the complaint, this approach does little to rectify the problems associated with hurriedly drafted, "preemptive" (or, under this approach, "defensive") class certification motions.[130] Moreover, from a constitutional standpoint, there would still exist a short period during which the federal court would technically lack subject matter jurisdiction over the case—the period between the filing of the defendant's Rule 68 offer, which presumably moots the named plaintiff's claim, and the filing of the plaintiff's certification motion. This approach fails to articulate a theory under which the court could maintain jurisdiction throughout the dispute without violating fundamental Article III principles. In an attempt to fill this gap, the next Section advances just such a theory.

C. Advancing a New Theory: Application of the Supreme Court's Decision in Riverside

Recall from Part I.B[131] the Supreme Court's decision in *County of Riverside v. McLaughlin*.[132] In *Riverside*, the Court held that putative class actions may continue after the named plaintiff's claim becomes moot if the named plaintiff's claim is "so *inherently transitory* that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."[133] To highlight the applicability—or, potentially, the inapplicability—of *Riverside* to the practice of picking off named plaintiffs, a close examination of its facts is necessary. In *Riverside*, the Court addressed Fourth Amendment challenges to the manner in which Riverside County, California, provided probable cause determinations to citizens who were arrested and temporarily held in custody without a warrant.[134] The named plaintiff, Donald Lee

encouraging settlements); Asch v. Teller, Levit & Silvertrust, 200 F.R.D. 399, 400–01 (N.D. Ill. 2000) (declaring that a motion for class certification made during the pendency of a Rule 68 offer precludes a plaintiff from accepting an individual settlement).

130. *See supra* notes 115–120 and accompanying text.

131. *See supra* notes 55–56 and accompanying text.

132. 500 U.S. 44 (1991).

133. *Id.* at 52 (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980)) (emphasis added).

134. *Id.* at 47.

McLaughlin, filed a class action complaint on behalf of himself and all others similarly situated, arguing that the County deprived him and others of Fourth Amendment rights by holding them in custody without promptly granting probable cause determinations.[135] McLaughlin alleged that the County's practices resulted in delays of up to ten days before probable cause was determined, during which time citizens were held in custody without a warrant.[136] This practice, argued McLaughlin, violated certain Fourth Amendment rights that had been articulated by the Court in *Gerstein v. Pugh*[137]—rights that guaranteed "prompt" determinations of probable cause as a prerequisite to holding citizens in custody without a warrant.[138]

Before attacking McLaughlin's claim on the merits, the County argued as a threshold issue that the district court lacked subject matter jurisdiction when it entertained and granted McLaughlin's motion for class certification, because the passage of time had rendered McLaughlin's claim moot.[139] Although McLaughlin had filed the class action complaint while he was being held in custody without a warrant,[140] the County argued that McLaughlin was no longer being held in custody and that any constitutional violation under *Gerstein* had ended.[141] Further, the County argued that because McLaughlin could not prove that he was likely to be subjected to the allegedly unconstitutional conduct again, his claim was not one capable of repetition yet evading review.[142]

The Court rejected the County's arguments. Conceding that the passage of time had rendered McLaughlin's claim moot, the Court nonetheless held that the district court had properly entertained and granted the motion for class certification.[143] First, the Court recognized that McLaughlin had filed his complaint while he was being subjected to the allegedly unconstitutional conduct.[144] Then, the

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135. *Id.* at 48. Three additional named plaintiffs with identical claims were added later in the litigation. *Id.* at 49. For simplicity, only McLaughlin's claim is discussed here.

136. *Id.* at 47–48.

137. 420 U.S. 103 (1975).

138. *Riverside*, 500 U.S. at 47. Such determinations have become known as "*Gerstein* hearings." *See, e.g.*, Luck v. Rovenstine, 168 F.3d 323, 324 (7th Cir. 1999) (employing this terminology).

139. *Riverside*, 500 U.S. at 50–51.

140. *Id.* at 48.

141. *Id.* at 50.

142. *Id.* at 48.

143. *Id.* at 52.

144. *Id.* at 51.

Court observed that McLaughlin's claim was "so inherently transitory that the trial court [would] not have [had] even enough time to rule on a motion for class certification before the proposed representative's individual interest expire[d]."[145] The Court concluded that motions for class certification in cases involving such "inherently transitory" claims could, for jurisdictional purposes, relate back to the time of filing the complaint, so as to allow the district court to entertain the class certification motion notwithstanding the named plaintiff's expired claim.[146]

Although the *Riverside* decision establishes that, under some circumstances, the trial court may entertain class certification motions even if the named plaintiff's claim has become moot, *Riverside* is distinguishable from cases in which defendants affirmatively pick off named plaintiffs. In *Riverside*, the named plaintiffs' claims were "inherently transitory"—that is, transitory *by their very nature*. Donald Lee McLaughlin would have been released from pretrial confinement within a short period of time, thereby rendering his claim moot, regardless of what the defendant chose to do. In contrast, cases in which named plaintiffs are picked off by defendants' offers of judgment do not necessarily involve claims that are "*inherently* transitory." Instead, most claims brought by these plaintiffs are transitory only by virtue of the calculated actions of the defendants. Absent the full offers of judgment from the defendants, the named plaintiffs' claims would not typically expire so quickly "that the trial court will not have even enough time to rule on a motion for class certification."[147] Thus, the facts of *Riverside* are technically distinguishable from cases in which the plaintiffs' claims are rendered "transitory" only by the defendants' willingness to pick them off.

The central theory advanced by this Note is that the factual distinctions between *Riverside* and those cases in which defendants attempt to pick off named plaintiffs should not be dispositive. In *Riverside*, the Court refused to deprive plaintiffs of the ability to employ the class action device solely because the plaintiffs' claims, by no fault of the plaintiffs, were inherently transitory. Similarly, when defendants evince their willingness to thwart the class action device by conveying full offers of judgment at the outset of class actions, the named plaintiffs' claims are rendered transitory by no fault of the

145. *Id.* at 52 (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980)).

146. *Id*.

147. *Id.* at 52 (quoting *Geraghty*, 445 U.S. at 399) (emphasis added).

plaintiffs, such that "the trial court [lacks] even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."[148] Thus, in keeping with the Court's decision in *Riverside*, the named plaintiff's class certification motion should be permitted, for jurisdictional purposes, to relate back to the time at which the complaint was filed.[149]

This theory would prevent defendants from thwarting class action litigation by settling with individual plaintiffs *ad infinitum*, and it would resolve the concerns associated with previous theories advanced by commentators.[150] By grounding itself in the reasoning of the *Riverside* decision, this theory does not run afoul of traditional Article III principles. Further, this theory would not force named plaintiffs hurriedly to draft a class certification motion within the ten-day pendency of a Rule 68 offer, nor, worse, would it force them to file the certification motion concurrently with the complaint. Rather, it would enable willing named plaintiffs to employ the class action device as it was intended to be employed—to resolve the similar claims of numerous plaintiffs in a single action.

The only remaining concern associated with the instant theory is that named plaintiffs, having received full compensation from the defendant, will lack motivation to represent the class vigorously during the remainder of the litigation. One of the purposes behind Article III's case or controversy requirement is to ensure vigorous advocacy by both parties, on the assumption that vigorous advocacy leads to clearer distillations of the truth.[151] In the context of the theory here advanced, however, this concern lacks traction. Unmotivated named plaintiffs—those who simply leverage the class action device for better posture in settling their individual claims and are ambivalent about pursuing claims on behalf of putative class members—would have no reason to continue pursuing class certification once their individual claims have been settled; the case, thereafter, would be dropped. Only named plaintiffs with more sincere motivations—motivations that are broader than merely

148. *Id*.

149. *Id.* ("In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution.").

150. *See supra* Part IV.B.

151. *See Geraghty*, 445 U.S. at 403 ("[T]he purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions.").

resolving their individual claims[152]—would continue to pursue class certification after receiving a settlement offer from the defendant. Prosecution of the putative class members' claims, then, would remain in the hands of named plaintiffs who would vigorously represent the class.

CONCLUSION

The practice of successively picking off named plaintiffs at the outset of class actions is more than just a tactic employed by cunning defendants to thwart class action litigation. It represents a threat to the ability of some persons to gain access to the judicial system, and denies others the ability to collaborate toward the goal of effecting broad social change. This Note has set forth a new theory under which federal courts can prevent defendants from picking off named plaintiffs, thereby ensuring that the class action device remains available to those plaintiffs whose claims meet the prerequisites of Rule 23. By applying the principles of the Supreme Court's *Riverside* decision to cases in which defendants' strategic conduct serves to render named plaintiffs' claims "transitory," courts can effectuate the purpose and policies of the class action device, and ensure that Rule 23 is "construed and administered to secure the just, speedy, and inexpensive determination of every action."[153]

152. *See supra* notes 14–17 and accompanying text.

153. FED. R. CIV. P. 1.