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Moot Suit Riot: An Alternative View of Plaintiff Pick-off in Class Actions

Johnathan Lott†

INTRODUCTION

Mootness has long been a hotly contested issue in consumer class actions. Article III of the United States Constitution requires that a court have a "case or controversy" before it in order to hear a case.¹ This requirement presents a unique challenge for class actions because named plaintiffs represent not just themselves, but the interests of the entire class. Questions frequently arise about what to do when the named plaintiff's personal stake in the litigation becomes moot, even though the other members of the class still retain an interest.

The Supreme Court has held that after a motion for class certification has been filed, the litigation may proceed on behalf of the class even after the named plaintiff's case becomes moot.² But the Court has never resolved the issue of what to do when the named plaintiff's case becomes moot before the motion to certify the class has been filed. Mootness with respect to the named plaintiff seems especially problematic when it arises due to a unilateral move by the defendant—often an offer of full judgment to the named plaintiff—that is commonly described as "pick off."³ A circuit split has recently emerged on the issue. A majority of appellate courts, led by the Third Circuit, holds that mootness would not halt the class action.⁴ But the Seventh Circuit recently disagreed, finding instead that a named

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† BA 2011, University of Florida; JD Candidate 2014, The University of Chicago Law School. I would like to thank Professor Tony Casey for providing valuable insights and ideas, which helped make this Comment possible.

¹ US Const Art III, § 2.
³ See, for example, Deposit Guaranty National Bank v Roper, 445 US 326, 339 (1980). See also notes 6 and 15 and accompanying text.
⁴ See, for example, Weiss v Regal Collections, 385 F3d 337, 347–48 (3d Cir 2004).
plaintiff could not maintain a class action when her interest had become moot prior to a motion for certification.\textsuperscript{5}

This issue is critical to the viability of class action suits generally and to consumer protection suits specifically. Courts, including the Supreme Court, express great concern over the ability of defendants to "buy off" named plaintiffs through settlement offers and thus dismantle potential class action suits.\textsuperscript{6} In consumer protection actions, this could indefinitely delay litigation and thwart vindication of consumer rights against corporate defendants. On the other hand, allowing moot suits to proceed raises serious constitutional concerns and undermines the policy of encouraging settlement.

Although previous commentators have considered the issue, none have directly considered the Seventh Circuit's recent approach. Nor, perhaps more significantly, have any critically considered the practical outcomes of these competing approaches. While the pick-off problem is a long-standing concern in consumer class action litigation, the issue might not be problematic in long-run equilibrium so long as the courts acknowledge and anticipate the problem. The debate over the issue has traditionally been about balancing concerns over pick off with worries about running afoul of the mootness doctrine;\textsuperscript{7} yet if pick off is not in fact a problem, constitutional concerns should dominate.

This Comment proceeds as follows. In Part I, I summarize both longstanding and recent judicial opinions on the matter, and then compare the various approaches taken by courts. I next argue, in Part II, that the minority position of the Seventh Circuit is a valid solution to the pick-off problem. I show that the seemingly hardline minority approach affords at least as much protection to class action plaintiffs as the seemingly pro-consumer majority approach. Finally, I suggest that the minority approach is the more workable approach as it provides adequate protection to consumers without raising the serious constitutional concerns of the majority approach.

\textsuperscript{5} Damasco v Clearwire Corp, 662 F3d 891, 896 (7th Cir 2011).
\textsuperscript{6} See Roper, 445 US 326 at 339.
\textsuperscript{7} Compare id at 339 (expressing deep concern over the pick-off problem), with id at 345 (Powell dissenting) (arguing that the Court's solution to the pick-off problem is unconstitutional and incompatible with the mootness doctrine).
I. CURRENT STATE OF THE LAW

Article III of the US Constitution allows only "cases" and "controversies" to come before the courts.\(^8\) As the Supreme Court has noted, "[i]t is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed."\(^9\) If a defendant offers the plaintiff all the relief she asks for prior to a court's judgment, then the case necessarily becomes moot.

The Federal Rules of Civil Procedure encourage this practice. Rule 68 allows a defendant to make an offer of judgment to a plaintiff in order to facilitate settlement.\(^10\) If this offer is for all the relief sought, then the plaintiff can seek no further relief from the courts and so the case is moot.\(^11\) If the offer is in fact for full judgment, then the claim becomes moot regardless of whether the plaintiff attempts to reject the offer, since the plaintiff would necessarily receive no additional benefit from further litigation. However, in order to moot the claim, it must actually include \textit{all} relief sought, possibly including attorney's fees.\(^12\)

This is quite sensible for individual claims, but is somewhat problematic in the context of class actions.\(^13\) A named plaintiff in a class action suit represents not only herself but also the interests of the entire class.\(^14\) A crafty defendant could thus use

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\(^8\) US Const Art III, § 2.


\(^10\) FRCP 68.

\(^11\) 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 68 ("An offer of judgment that would give the plaintiff all the relief that he is entitled to can lead to the court dismissing the case for lack of subject-matter jurisdiction under the mootness doctrine."). Note, however, that the offer need not necessarily come under Rule 68 so long as it is for all the relief requested, although Rule 68 seems to be the most common form. For an example of an offer of full judgment not made under Rule 68, see \textit{Damasco v Clearwire Corp}, 662 F3d 891, 896 (7th Cir 2011) ("Although these decisions address offers that, unlike [defendant's], were made under Rule 68, their same analysis seems to apply to any offer of complete relief."). In \textit{Damasco}, the defendant made its offer under state law provisions that were similar, but not identical, to Rule 68. Id.

\(^12\) \textit{Thorogood v Sears, Roebuck & Co}, 595 F3d 750, 753 (7th Cir 2010) ("In order to moot the case, the offer must include a reasonable attorney's fee.").


\(^14\) Charles Allan Wright and Mary Kay Kane, 20 \textit{Federal Practice and Procedure Deskbook} § 77 (Thomson Reuters 2012) ("[T]he named representatives must be such as will fairly ensure the adequate representation of [all the class members].").
Rule 68 offers to methodically moot the case of every named plaintiff that attempts to bring suit, thereby "picking off" plaintiffs and indefinitely delaying the class action litigation.\(^{15}\)

Given the significance of the issue and the potential for abuse of the class action mechanism, the Supreme Court has considered the issue several times. However, it has never specifically addressed the issue of mooting a case prior to the motion for certification, and its precedent has left substantial room for debate. A sophisticated analysis of this issue requires a detailed explication of the existing case law.\(^{16}\)

A. Supreme Court Precedent

1. *Sosna v Iowa.*

In 1975, the Supreme Court first substantively addressed the issue of a class action case becoming moot in *Sosna v Iowa.*\(^{17}\) In *Sosna,* a woman filed a class action suit alleging the unconstitutionality of an Iowa law which maintained a one-year residency requirement in order to seek a divorce in the state.\(^{18}\) After a three-judge panel convening for the Northern District of Iowa determined the rule was constitutional, the one-year time

\(^{15}\) See Joseph M. McLaughlin, *McLaughlin on Class Actions* § 4:28 (Thomson Reuters 9th ed 2012) ("The applicable principles are mindful of the potential mischief that could flow from permitting Rule 68 judgment offers of judgment to become a vehicle to 'pick off' a representative plaintiff and thereby frustrate the objective of Rule 23 to permit the assertion of small claims."); William B. Rubenstein, *Newberg on Class Actions* § 2:15 (Thomson Reuters 5th ed 2012) ("[T]he defendant may effectively prevent judicial review by 'picking off' named plaintiffs before the court can rule on, or even before plaintiffs can make, a motion for class certification.").

\(^{16}\) After this paper was submitted for final publication, the Supreme Court revisited the issue of plaintiff pick-off in *Genesis Healthcare Corp v Symczyk,* 133 S Ct 1523 (2013). However, *Genesis* should not have much bearing on the issues and theories discussed in the paper both because the case was narrowly tailored to its facts, see *Genesis,* 133 S Ct at 1533 (Kagan dissenting) ("The situation *[Genesis] addresses should never again arise."), and because it is distinguishable from the line of circuit cases at issue in this paper, see *Chen v Allstate Insurance Co,* 2013 WL 2558012 (ND Cal) ("[Genesis], which was an FLSA collective action, is easily distinguishable from *Pitts.*"). The Court also specifically chose not to address the broader pick-off issue. See *Genesis,* 133 S Ct at 1528–29 ("While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, we do not reach this question."). However, subsequent literature might attempt to provide a more in-depth analysis of the *Genesis* decision with respect to pick-off in class action suits.

\(^{17}\) 419 US 393 (1975).

\(^{18}\) Id at 395–96.
period lapsed, effectively mooting the named plaintiff's interest in the case.\textsuperscript{19}

The United States Supreme Court, however, held that this did not deprive the court of subject matter jurisdiction to hear the class action.\textsuperscript{20} There was a critical distinction, it held, between bringing the action as an individual (which would have been moot) and bringing the action on behalf of a class.\textsuperscript{21} The Court made clear that once the class became certified, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant."\textsuperscript{22}

The Court seemed to present this rationale as a sort of analogue to the common exception to the mootness doctrine in which a case is "capable of repetition, yet evading review."\textsuperscript{23} While this case did not fit precisely into that category,\textsuperscript{24} it was a situation in which "the issue sought to be litigated escapes full appellate review at the behest of any single challenger," and so, the Court held, the issue "does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs."\textsuperscript{25} However, the Court limited its new rule to cases in which individual cases would normally dissipate prior to the full resolution of litigation,\textsuperscript{26} and sought not to disturb any previous Article III jurisprudence.\textsuperscript{27}

\begin{footnotesize}
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\begin{enumerate}
\item Id at 398–99.
\item Id at 399–402.
\item \textit{Sosna}, 419 US at 399.
\item Id. The Court implied that a court would have more discretion over mootness once the class became certified, noting that "[o]nce the suit is certified as a class action, it may not be settled or dismissed without the approval of the court." Id at 399 n 8.
\item Id at 399–401. Where a claim is likely to occur frequently but can never be litigated because each individual occurrence becomes moot so quickly that no court can rule on the matter, the case is often determined to be "capable of repetition, yet evading review." In such cases, the timeframe of mootness for the purposes of class certification relates back to the time of filing, so that the case can be litigated and the defendant punished even though the named plaintiff's claim is moot by the time of decision. Id at 402 n 11. See also Charles Alan Wright, et al, 13C \textit{Federal Practice and Procedure Jurisprudence and Related Matters} § 3533.8 (Thomson Reuters 3d ed 2013) ("Courts... frequently deny mootness on the ground that the acts are 'capable of repetition, yet evading review.'")
\item \textit{Sosna}, 419 US at 400.
\item Id at 401.
\item Id at 402.
\item Id. As the Court noted, "[A]n Article III controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." Id.
\end{enumerate}
\end{footnotesize}
Justice White, however, dissented. In his view, the Article III standing requirements must apply uniformly to individual suits and class actions. As he noted, this case had become one-sided and had lost the adversarial quality necessary to satisfy the constitutional "case or controversy" requirement. The issue to him seemed to be one of adequate representation, and he noted that "[n]one of the anonymous members of the class is present to direct counsel and ensure that class interests are being properly served." He argued that the precedent that the majority used in order to derive the logic of its position did not lend itself to this situation and that it undermined established Article III standing requirements.

2. **Gerstein v Pugh.**

A month after it handed down its opinion in *Sosna*, the Court expanded its holding. In *Gerstein v Pugh*, prisoners brought a class action lawsuit against the state of Florida; the class was certified, but they were released from prison before the suit was fully litigated. The Court dealt with the mootness issue in one footnote. Although *Sosna* was limited to cases in which the litigation would not normally end before the controversies mooted, the Court believed that this case was an exception because the length of prison terms are not finite and the timeframe is not ascertainable when viewed from the outset. The Court also noted the importance of potential recurrence, which was very likely in the case at hand. There would certainly, at any given point, be other plaintiffs with a live interest in the case.

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28 *Sosna*, 419 US at 410 (White dissenting).
29 Id at 410–11.
30 Id at 412.
31 Id.
32 *Sosna*, 419 US at 415 (White dissenting).
33 420 US 103 (1975).
34 Id at 106–10.
35 Id at 110 n 11.
36 Id.
37 *Gerstein*, 420 US at 110 n 11.
38 Id.

The Court revisited the issue of mootness in class action suits in 1980, when it decided Deposit Guaranty National Bank v Roper and United States Parole Commission v Geraghty. Roper and its sister case, Geraghty, were different from Sosna and Gerstein in that the former became moot during appeal of a denied motion for certification, while the latter had already been certified before the claims became moot.

In Roper, credit card holders brought a class action suit against a bank alleging violation of state usury laws. After the district court denied the class certification, the defendant made a settlement offer in the maximum amount to each named plaintiff. Although the plaintiffs declined the offer, the district court nonetheless entered judgment in plaintiffs' favor, thus mooting the action. No other plaintiffs sought to intervene, and the statute of limitations expired for them to do so. However, on appeal, the Fifth Circuit determined that the class action was not moot and ordered that the class be certified.

The Supreme Court affirmed, holding that a named plaintiff could maintain an appeal for class certification even after her individual interest had been mooted. The Court reasoned that there were more interests at stake than simply the interests of the named plaintiffs—there was also the responsibility of the named plaintiff to represent the class, the interests of the unnamed class members, and the responsibility of the district court to protect the unnamed interests and the judicial process. The Court accordingly distinguished between the right to appeal the individual claims and the right to appeal the class action. While the individual claim was moot, “it does not follow that this circumstance would terminate the named plaintiffs’ right to take
an appeal on the issue of class certification."\textsuperscript{48} The named party retains a stake in the class action, even if not its own claim, which satisfies Article III requirements.\textsuperscript{49} This is because the ruling on a class action motion is collateral to the merits of the litigation.\textsuperscript{50} Such a determination might raise collateral estoppel or stare decisis issues in future litigation, so the named plaintiffs retain a personal stake,\textsuperscript{51} allowing the named plaintiffs to proceed with the appeal.\textsuperscript{52} The Court was particularly concerned over the alternative outcome in which the plaintiff might attempt to "buy off" or "pick off" named plaintiffs, thus delaying litigation and wasting judicial resources.\textsuperscript{53}

The decision, however, was not unanimous. Justice Rehnquist concurred (and distinguished this case from \textit{Geraghty})\textsuperscript{54} by noting that the plaintiff in \textit{Roper} retained an interest in this case because they had not ever accepted the settlement offer, and that this case fit within the "evading review" category.\textsuperscript{55}

Justice Powell, joined by Justice Stewart, dissented because he believed that allowing continued litigation could not pass Article III muster.\textsuperscript{56} He rejected the majority's argument that the named plaintiffs could still maintain a stake in the litigation, noting that the plaintiffs could obtain no relief from the defendants.\textsuperscript{57} Instead, he argued that it was primarily the lawyers who would retain an interest.\textsuperscript{58} He also raised concerns about the adequacy of representation, both practically and in the context of Rule 23.\textsuperscript{59} Justice Powell acknowledged the majority's concern about picking off plaintiffs and wasting judicial resources, but instead suggested that the legislature, rather than the judiciary, should address the problem.\textsuperscript{60}

\textsuperscript{48} Id at 333.
\textsuperscript{49} \textit{Roper}, 445 US at 334.
\textsuperscript{50} Id at 336.
\textsuperscript{51} Id.
\textsuperscript{52} Id at 340.
\textsuperscript{53} \textit{Roper}, 445 US at 339.
\textsuperscript{54} See Part I.A.4.
\textsuperscript{55} \textit{Roper}, 445 US at 340–41 (Rehnquist concurring). See also note 23.
\textsuperscript{56} Id at 345 (Powell dissenting).
\textsuperscript{57} Id at 346 (Powell dissenting).
\textsuperscript{58} Id at 347 (Powell dissenting).
\textsuperscript{59} \textit{Roper}, 445 US at 357 (Powell dissenting).
\textsuperscript{60} Id at 354–55 (Powell dissenting).

On the same day that the Court handed down Roper, it announced its decision in Geraghty. In a case procedurally similar to Roper, a prisoner sued the state on behalf of a class; his motion for certification was denied, and his case became moot on appeal. But whereas the claim in Roper was mooted due to the defendant's settlement offer, the Geraghty case became moot because the plaintiff was released from prison for reasons unrelated to the litigation.

A five-justice majority, speaking through Justice Blackmun, held that the appeal could likewise continue even though the named plaintiff's claim was moot. The Court noted the "inherently transitory" nature of the claim as some justification, but was even more emphatic in its articulation of the "flexible character of the Art. III mootness doctrine." The Court declined to distinguish between a case becoming moot due to natural expiration and one becoming moot due to the defendant's actions. The plaintiff, the Court reasoned, still held a "personal stake" and could continue to "vigorously" advocate for the class. The Court noted that in a case like this, an individual acting as a private attorney general meets the requirements of Rule 23.

Justice Powell again dissented—this time joined by three other justices. He questioned the majority's characterization of mootness as "flexible" as well as its use of the private attorney general concept to expand appealability. Powell took a hardline approach, arguing that "the practical importance of review

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61 Geraghty, 445 US at 394.
62 Id at 404.
63 Id at 399.
64 Id at 400.
65 Geraghty, 445 US at 402.
66 Id at 403–04.
67 Id at 403.
68 Id at 409 (Powell dissenting). Rehnquist and Burger sided with the majority in Roper, but they switched sides and joined the Geraghty dissent along with Powell and Stewart, who also dissented in Roper. The majority opinion in Geraghty, allowing appeal even in the more traditional case of mootness through natural expiration of the claim, seems broader than the Roper opinion. See also Part I.A.3 (discussing Rehnquist's concurrence in Roper).
69 Geraghty, 445 US at 409 (Powell dissenting).
cannot control," nor could the "public interest," when the necessary constitutional requirements were not satisfied.  

5. **County of Riverside v McLaughlin.**

The last relevant Supreme Court case is *County of Riverside v McLaughlin.* In *McLaughlin,* an arrestee brought a class action suit against the police alleging that the police took so much time in making a probable cause determination about him that they violated his constitutional rights. However, the defendants argued that since the named plaintiff had already received the sought-after procedure, he lacked standing and his claim was moot. The district court rejected this argument, and the Ninth Circuit affirmed.

The Supreme Court agreed. Quoting heavily from the *Sosna* line of cases, the Court reemphasized that even though the named plaintiff’s claim was indeed moot, "by obtaining class certification, plaintiffs preserved the merits of the controversy for our review." The majority decided it did not matter that the class was not certified until after the named plaintiffs’ claims had already become moot, as the claim was "inherently transitory." The Court found that in such inherently transitory cases, jurisdiction over the case relates back to the status of the plaintiffs at the time of initial filing, so the case may be litigated and decided even though the named plaintiff’s claim was moot by the time of judgment.

6. **Brief summary of the Supreme Court jurisprudence.**

Thus the current rule is that courts should not dismiss a class action suit when a named plaintiff’s case becomes moot.

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70 Id at 411–12 (Powell dissenting).
71 500 US 44 (1991). Note that while all five of circuits to address the mootness-prior-to-certification matter cited *Sosna, Gerstein, Roper,* and *Geraghty,* only two of them—*Pitts* and *Weiss*—cited *McLaughlin.* See Part I.B.1 & n 156.
72 *McLaughlin,* 500 US at 48.
73 Id at 50.
74 Id at 49–50.
75 Id at 51.
76 *McLaughlin,* 500 US at 51.
77 Id.
78 Id. The same logic applies when a case is found to be "capable of repetition, yet evading review." See note 23 and accompanying text.
after filing the motion for certification. The Supreme Court has specifically applied this rule to situations where (as in Sosna and Gerstein) the case becomes moot during appeal after a court has certified a class,\textsuperscript{79} and where (as in Geraghty and Roper) the case becomes moot during appeal of a denial of the certification.\textsuperscript{80} Note that the Supreme Court has not formally drawn a bright-line rule for mootness at the point of the motion for certification, but lower courts appear to interpret the Court's rule to extend at least to this point.\textsuperscript{81}

B. Lower Court Rulings and Summary of the Circuit Split

Though the Supreme Court has addressed mootness in class action suits after the motion for certification has been filed, it has not addressed the scenario of a case becoming moot prior to the motion for certification. Several circuits have addressed the matter directly, resulting in a split in authority. A majority of circuits, led by the Third Circuit, allows the action to continue despite mootness. A minority—the Seventh Circuit—does not.

1. The majority approach of the Third, Fifth, Ninth, and Tenth Circuits.

The Third Circuit was the first appeals court to consider the mootness-prior-to-certification issue directly in Weiss v Regal Collections.\textsuperscript{82} Three other circuits—chronologically, the Fifth, Tenth, and Ninth Circuits—have since followed Weiss and adopted substantially similar holdings.

In Weiss, the plaintiff filed a class action suit against a debt collection company, but prior to class certification, the company made a formal offer under Rule 68 that effectively mooted the named plaintiff's case.\textsuperscript{83} The Third Circuit reasoned, though, that while the offer mooted the individual's case by providing the maximum relief, it did not provide full relief to the class.\textsuperscript{84} The court looked to Supreme Court precedent, especially Geraghty and Roper, for guidance. It found that the policy

\textsuperscript{79} See Parts I.A.1 & I.A.2.
\textsuperscript{80} See Parts I.A.3 & I.A.4.
\textsuperscript{81} See note 161 and accompanying text.
\textsuperscript{82} 385 F3d 337 (3d Cir 2004).
\textsuperscript{83} Id at 339-40.
\textsuperscript{84} Id at 341-42.
purposes underlying these cases, including the primary concern about “picking off” plaintiffs, dictated that the court should allow the case to proceed as not moot. It recognized that other cases on the issue had all dealt with situations in which the motion for certification had already been made, but thought that “reference to the bright line event of the filing of the class certification motion may not always be well-founded.” The court believed that the filing of the petition for certification should “relate back” to the date the case was filed, so long as there was no undue delay, so it remanded to give the plaintiff a chance to do so.

The Fifth Circuit considered a similar—though not identical—issue in Sandoz v Cingular Wireless LLC. The Sandoz plaintiff brought a putative collective action under the Fair Labor Standards Act (FLSA) against her employer, Cingular, which mooted the case through a Rule 68 offer for full judgment. While acknowledging the distinctions between the FLSA action and Rule 23 actions, the court still recognized the concerns about “picking off” plaintiffs from Geraghty and Roper. The court relied on the relation-back doctrine as well as the reasoning in Weiss and found that a plaintiff should be able to file the petition for certification (or, in the case, the FLSA equivalent), even after the individual case has become moot through an offer of judgment. The court reemphasized that only when there is no “undue delay” could the plaintiff retain this option and use the relation-back doctrine.

More recently, the Tenth and Ninth Circuits reached similar conclusions. In March of 2011, the Tenth Circuit handed down its opinion in Lucero v Bureau of Collection Recovery, Inc.
A plaintiff filed a class action against a debt collector that promptly responded with a full offer under Rule 68. Although the class action litigation proceeded for several months and a certification motion was later filed, the district court dismissed for lack of subject matter jurisdiction based on the date of the Rule 68 offer. On appeal, the Tenth Circuit reversed, adopting the Third and Fifth Circuits’ position that an unaccepted settlement offer will not moot a case where the plaintiff should have time to file a motion for certification that relates back to the date of original filing. The court went through an extended discussion and analysis of the Supreme Court and circuit precedent to conclude that a named plaintiff retains sufficient interest to justify Article III standing to bring a class action even after the defendant has made a full offer of judgment. The court relied heavily on Geraghty’s holding that “the personal stake of the class inheres prior to certification” and concerns about picking off plaintiffs and waste of judicial resources.

In August 2011, the Ninth Circuit also aligned itself with the majority position in Pitts v Terrible Herbst, Inc. In Pitts, an employee filed FLSA and Rule 23 actions against his employer, who subsequently made a full offer under Rule 68. After an extended discussion of the Supreme Court precedent, the court held that the plaintiff’s class action must not be considered moot. The court reasoned that the relation-back doctrine must apply since the plaintiff’s claim was transitory, albeit not inherently transitory.

95 Id at 1241.
96 Id.
97 Id at 1250.
98 Lucero, 639 F3d at 1245–49.
99 Id at 1249, citing Geraghty, 445 US at 406 n 11.
100 Lucero, 639 F3d at 1250.
101 653 F3d 1081 (9th Cir 2011). The court explicitly recognized that it was aligning itself with the Weiss, Sandoz, and Lucero courts. Id at 1092 n 3.
102 Id at 1085.
103 Id at 1090–91.
104 Id at 1091.
2. The minority approach of the Seventh Circuit.

The Seventh Circuit, however, in *Damasco v Clearwire Corp.*,\(^{105}\) rejected the approach adopted by the four other circuits. In a familiar fact pattern, a plaintiff filed a class action lawsuit against a defendant, and the defendant offered full relief prior to the motion for class certification.\(^{106}\) The plaintiff did not accept the offer, but the district court nonetheless dismissed the complaint as moot.\(^{107}\)

The Seventh Circuit affirmed the district court's dismissal.\(^{108}\) The court specifically rejected the approach of *Weiss* and its progeny, criticizing the exception to the mootness doctrine as unnecessary.\(^{109}\) Instead, it relied heavily on its 1994 opinion *Holstein v City of Chicago*,\(^{110}\) which it declined to reconsider or overrule.\(^{111}\) In *Holstein*—well before the influence of *Weiss* and its progeny—the Seventh Circuit held that a class action plaintiff who had received a full offer of settlement could not proceed with the action since the claim had become moot.\(^{112}\) The *Holstein* court reasoned that the case did not fit within the *Geraghty* exception, since there had not yet been a motion for certification, and did not attempt to extend *Geraghty*'s holding.\(^{113}\) The court likewise determined the claim was not inherently transitory and therefore did not fall within the capable-of-repetition-yet-evading-review exception.\(^{114}\)

Rather than rejecting or restricting *Holstein* in light of the subsequent jurisprudence, as the plaintiff requested, the *Damasco* court approved of *Holstein* and instead criticized the

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\(^{105}\) 662 F3d 891 (7th Cir 2011).

\(^{106}\) Id at 893. There were some distinctions in this fact pattern and the other cases. Most notably, in this case, the settlement offer did not come formally under Rule 68, but under a somewhat similar rule while the case was still in state court. The court made little of this distinction, noting that "although [precedential decisions] address offers that, unlike Clearwire's, were made under Rule 68, their same analysis seems to apply to any offer of complete relief." Id at 896.

\(^{107}\) Id at 893.

\(^{108}\) Id at 897.

\(^{109}\) *Damasco*, 662 F3d at 896.

\(^{110}\) 29 F3d 1145 (7th Cir 1994).

\(^{111}\) *Damasco*, 662 F3d at 895.

\(^{112}\) *Holstein*, 29 F3d at 1147.

\(^{113}\) Id.

\(^{114}\) Id at 1148.
Weiss line of cases. The Seventh Circuit rejected a flexible approach to mootness and instead took a hardline stance on Article III, explaining that “[t]o allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.” The court’s reasoning indeed seemed reminiscent of Justice Powell’s dissent in Roper, which had criticized a flexible approach to mootness.

The court also acknowledged the buy-off problem which had troubled so many other courts, but suggested instead that plaintiffs seeking to avoid this problem should simply move for certification at the same time that they file the suit. The court lastly determined that this case was not inherently transitory and therefore did not fall into an exception.

The Seventh Circuit’s approach is not entirely novel, as some district courts (which it did not reference) had previously adopted this approach. Further, other courts have given clues to how they might resolve this situation; the Sixth Circuit, for instance, noted that “where ... the named plaintiff’s claim becomes moot before certification, dismissal of the action is required.”

C. Summary of Commentary on the Matter

Although no academic article has cited Damasco as of this writing, there has been some commentary on the question of

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115 Damasco, 662 F3d at 896.
116 Id.
117 See note 69 and accompanying text.
118 See Damasco, 662 F3d at 896. The court rejected the argument that this would lead to premature motions, as extensions and delayed rulings should mitigate this problem. Id.
119 Id at 897. The court referred to the “established exception for inherently transitory claims,” in which claims are able to proceed even though the named plaintiff’s case is moot. See id. See also note 78 and accompanying text. The Damasco court, however, did not reference the Ninth Circuit’s suggestion in Pitts that claims need not be inherently transitory so long as they are transitory. See Part I.B.1.
120 See, for example, Ambalu v Rosenblatt, 194 FRD 451, 453 (EDNY 2000).
121 Brunet v City of Columbus, 1 F3d 390, 399 (6th Cir 1993). But in Brunet, unlike the other cases discussed, the defendant actually accepted the offer of settlement. Id at 400.
whether a defendant can unilaterally moot a named plaintiff's case prior to the motion for certification.\textsuperscript{122}

David Koysza, for instance, criticizes the problematic nature of the pick-off problem even before the Weiss court adopted its solution.\textsuperscript{123} He identifies several perverse policy outcomes from allowing defendants to pick off plaintiffs, including overdetering class action plaintiffs, creating multiple suits, creating a race to the courthouse, and creating arbitrary timing requirements for class action suits.\textsuperscript{124}

Andrew Campanelli, similarly, makes an argument that picked off claims should not be rendered moot.\textsuperscript{125} He identifies three approaches to the solution, including a narrow approach (very similar to Damasco, though not citing Damasco) and a broad approach (citing Weiss).\textsuperscript{126} He then advocates for more expansive adoption of the Weiss approach.\textsuperscript{127}

Daniel Zariski, et al, by contrast, characterize four approaches to the solution, including the narrow and broad approaches.\textsuperscript{128} The authors, however, are much more critical of the Weiss approach, especially from a constitutional perspective.\textsuperscript{129} They propose a novel "test" that they believe would be a better resolution to the issue: Rule 68 offers must extend to the whole class, rather than just to the named plaintiff in order to be valid.\textsuperscript{130}

\textsuperscript{122} Note that no relevant law review articles, at the time of this writing, have engaged in any meaningful discussion of Sandoz, Lucero, Pitts, or Damasco.


\textsuperscript{124} Id at 793–96.

\textsuperscript{125} M. Andrew Campanelli, Note, You Can Pick Your Friends, but You Cannot Pick Off the Named Plaintiff of A Class Action: Mootness and Offers of Judgment Before Class Certification, 4 Drexel L Rev 523, 523 (2012).

\textsuperscript{126} Id at 534–35.

\textsuperscript{127} Id at 542.

\textsuperscript{128} Daniel A. Zariski, et al, Mootness in the Class Action Context: Court-Created Exceptions to the "Case or Controversy" Requirement of Article III, 26 Rev Litig 77, 85 (2007).

\textsuperscript{129} Id at 108.

\textsuperscript{130} Id at 113.
II. THE IRRELEVANCE OF THE PICK-OFF "PROBLEM" AND THE BENEFITS OF THE DAMASCO APPROACH

As discussed above, courts are split on their treatment of the situation when a defendant moots a class action by extending an offer of judgment to a named plaintiff before the plaintiff has moved for certification. A majority of circuits, led by the Third Circuit in Weiss, would allow the class action to continue, while the Seventh Circuit would dismiss that claim as moot.

This Comment, however, makes the novel argument that the actual outcomes under either rule will be nearly identical, such that the Seventh Circuit's approach will not actually result in pick-offs. Due to the constitutional and practical concerns with the Third Circuit's approach, this Comment then argues that the Seventh Circuit's approach is the best solution to the pick-off problem.

A. Assessing Outcomes under Each Rule

The problem that arises when a defendant moots a named plaintiffs' case prior to certification is one that cuts to the very core of the class action lawsuit. The different rules—broadly described as the Weiss approach and the Damasco approach—could have vastly different implications on the incentives to bring and litigate a class action suit, particularly in the field of consumer protection where named plaintiffs often have very small individual interests. To fully understand these implications, it is important to consider the plight of a litigant under each outcome and what result might be expected in each.

1. The fixed outcome under the Weiss rule.

Consider first the case of a hypothetical plaintiff's attorney in the Third Circuit, which has adopted the Weiss approach,

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131 To reiterate, the "Weiss approach" is the rule, first set forth by the Third Circuit in Weiss and since adopted by three other circuits, that states that class actions may proceed to certification even if the defendant attempts to moot the named plaintiff's case through a full offer of settlement. See Part II.B.1. The "Damasco approach" is the alternative rule, adopted by the Seventh Circuit in Damasco, that such an offer completely moots the named plaintiff's interest in the case and the suit must therefore be dismissed for lack of subject matter jurisdiction. See Part II.B.2.
where a case may continue even after a named plaintiff's case becomes moot due to a defendant's offer of judgment.

Suppose a consumer ("Consumer"), who was outraged after purchasing her children large amounts of a product that marketed itself as having "health benefits," comes to the lawyer for advice. The damages of the class members are small and somewhat speculative, so a class action would be the best way to handle the litigation. The lawyer files suit against the manufacturer ("Manufacturer"), with Consumer as the named plaintiff. The lawyer agrees to take the suit on a contingency fee basis, only receiving payment if she prevails against, or settles with, the manufacturer.

Manufacturer, given the Weiss rule, would not be able to stop the case by making a full offer of relief to Consumer; it would not be able to simply pick her off and wait for another named plaintiff to surface. The plaintiff, by law, retains a stake in the litigation until such time as a timely motion for certification has been denied and appeals have been exhausted.

This would mean that if Manufacturer wanted to pick off the suit, it would have to offer full judgment to the entire class. This would be significantly more expensive than offering full judgment to the named plaintiff alone. In fact, it would be prohibitively expensive. Class actions frequently settle at a price that is only a fraction of the total amount that could be claimed; some have gone so far as to argue that they "always settle." If this is the case, then Manufacturer will have no incentive to offer a full judgment to the class, but will instead wait until it is better able to weigh the costs and benefits of a more limited, negotiated settlement. Negotiating a settlement with

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132 This hypothetical is loosely based off Williams v Gerber Products Co, 552 F3d 934 (9th Cir 2008).

133 Second Amended Complaint, Williams v Gerber Products Co, Civil Action No '05 CV 1278 JM (JFS), ¶ 3 (SD Cal filed Jan 9, 2006) (available on Westlaw at 2006 WL 528322).

134 Pitts, 653 F3d at 1092.

135 For a description of such an argument, see Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 NYU L Rev 1357, 1363–65 (2003). The (heavily debated) concern is that class actions, after a certain point, will settle regardless of their merits in order to avoid exorbitant legal fees, and this settlement will typically be very favorable to the plaintiffs' attorneys. See Milton Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Annual Antitrust Review, 71 Colum L Rev 1, 9–10 (1971).
Consumer's attorneys is Manufacturer's best option in this case.\textsuperscript{136}

Consumer, for her part, probably does not have much to do with any of this, as individual litigants, even named plaintiffs, tend to have very low individual stakes and interest in large class action cases.\textsuperscript{137}

2. The \textit{Damasco} option.

Now consider a hypothetical plaintiffs' attorney in the Seventh Circuit, which has adopted the \textit{Damasco} rule that full judgment to the named plaintiff prior to certification will end the case. In the same fact pattern as above, the lawyer must first decide whether to file a motion for certification concurrently with the suit.

If the lawyer does file the motion concurrently, the outcome will be \textit{exactly the same} as in the Third Circuit—the class action suit could not be derailed by a settlement offer to the named plaintiff, and the named plaintiff would retain an interest until the motion was decided and appeals exhausted.\textsuperscript{138} There is some debate over whether an early filing of this motion might result in a hastened and lower-quality motion for certification. Although if courts are indeed fair about extensions and allowing time for discovery, as the Seventh Circuit suggested they would be, this should not make any difference.\textsuperscript{139}

\textsuperscript{136} This limited settlement contrasts with an offer of full judgment to the class since full judgment to the plaintiff (pick off) would not end the suit. Litigation to the point of judicial resolution, of course, is a possible alternative. But again this seems rare in non-frivolous class action suits. See note 135 and accompanying text.

\textsuperscript{137} See Nantiya Ruan, \textit{Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions}, 10 Empl Rts & Empl Pol J 395, 411 (2006) ("In many consumer or securities class actions, the classes are so large that there are low individual stakes, which result in limited interest by the named plaintiffs."). See also Jonathan R. Macey and Geoffrey P. Miller, \textit{The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform}, 58 U Chi L Rev 1, 41 (1991).

\textsuperscript{138} See note 134 and accompanying text. See also Damasco, 662 F3d at 896 ("The pendency of that motion protects a putative class from attempts to buy off the named plaintiffs.")

\textsuperscript{139} Damasco, 662 F3d at 896. The Seventh Circuit suggested that there would be no problem with "ask[ing] the district court to delay its ruling to provide time for additional discovery or investigation." Id. It went so far as to admonish district courts that they must allow time for appropriate discovery, lest they abuse their discretion. Id at 897. Such forceful support for this option suggests that plaintiffs who file concurrently in this jurisdiction would not suffer any prejudice or disadvantage relative to waiting longer to file. For a more skeptical view, see Koysza, Note, 53 Duke L J at 799–800 (cited in note
Whether to file concurrently, shutting down the possibility of pickoffs, or file later, thus preserving the option of being bought off, becomes a tactical decision that the plaintiffs' lawyer must make. The Damasco rule thus creates an option for the plaintiff.

In which situations, though, might a plaintiffs' lawyer want to preserve the option of the named plaintiff being bought off? Remember that the plaintiff and her attorney always have the option of accepting a full offer of judgment should the defendant choose to make one. The Damasco rule would just allow the distinct (and perhaps unusual) situation whereby a plaintiff and her counsel can, by choosing not to file for certification concurrently, willingly put herself into a position in which she is legally able to be picked off by a defendant. This position would not be possible under a Weiss regime.

Consider first from the plaintiff's attorneys' perspective the nature of an offer of full judgment to the plaintiff. While it would result in fewer total fees for the lawyer than the expected value of pressing forward with the case, it would compensate the lawyer at the same rate for her time up to that point. This would in turn free up the lawyer to pursue other projects, so the lawyer should be indifferent between the options, assuming a steady flow of business and equal hourly income as between the two situations.\textsuperscript{140}

But there is also a downside to allowing pick off. Willingly preserving the pick-off option might signal to the defendant either a lack of confidence in the long-term viability of the case or a degree of the frivolity in the case, implying that the case is simply an attempt to extract quick cash from the defendant. The defendant presumably would not want to pick off such a non-viable or frivolous case, as doing so would create a moral hazard—the defendant would open itself to many similar frivolous suits and the cost of settling all of them would exceed the cost of litigation of a single case.\textsuperscript{141}

\textsuperscript{123). However, the literature suggests some common calculations of fees, including calculations supported by many courts, may undercompensate plaintiffs' attorneys because they are less likely include "multipliers" that reflect the level of risk assumed by an attorney working for a contingency fee. See, for example, Peter H. Huang, A New Options Theory for Risk Multipliers of Attorney's Fees in Federal Civil Rights Litigation, 73 NYU L Rev 1943, 1949 (1998).

\textsuperscript{141 In other words, if the defendant picked off a suit that seemed frivolous because it...
Thus in most conceivable cases, the option created by the Damasco rule does not matter. A confident plaintiffs’ lawyer would want to prevent the possibility of pick off by filing concurrently,\textsuperscript{142} while the decision not to file concurrently should not affect the outcome in a weaker case.\textsuperscript{143}

Consider also the issue from the perspective of the plaintiff, Consumer. Named plaintiffs, unlike the attorneys that represent them, have fairly low stakes in the outcomes of a large class action suit.\textsuperscript{144} A named plaintiff might prefer a personal full settlement offer, in which she would receive more compensation, though this might come at the expense of the rest of the potential class.\textsuperscript{145} Not all named plaintiffs would prefer this option, and plenty of named plaintiffs turn down the offer for full settlement.\textsuperscript{146} But this Damasco “option” creates an additional benefit for named plaintiffs that might prefer personal settlement, giving them an additional way of profiting off the case and thus additional incentive to bring their concern

\textsuperscript{142} Even the Weiss court predicted this outcome. See Weiss, 385 F3d at 348 n 19 (“To hold otherwise would predictably result in a plaintiff who seeks class relief in a consumer representative action filing a motion for class certification at the time of filing the class complaint.”). The court did not approve of this result, but its concerns seem mitigated in a jurisdiction where the rule is set and courts are prepared to deal with expected concurrent filings. See note 139 and accompanying text.

\textsuperscript{143} If there was asymmetric information between the plaintiff and defendant—for example, the plaintiff knows she has a weak case, while the defendant believes that the case is strong—then the outcome may be pick off. However, if the defendant understands this strategy, then the plaintiff’s choosing not to file concurrently may be a signaling mechanism, signaling that the case is not meritorious. The signal itself prevents pick off, and the rule again does not matter as pick off will not occur in either outcome. Further, even if pick off does happen, it would not offend our notions of justice; this is more of a nuisance to the defendant than an affront to the purposes of class action litigation, since the lawsuit was not meritorious and would later be thrown out of court.

\textsuperscript{144} See note 137.

\textsuperscript{145} Pick-off attempts are often made for amounts higher than actual damages a named plaintiff would stand to receive in a class action. See, for example, Pitts, 653 F3d at 1085. In Pitts, plaintiff received a “pick off” offer of $900 even though he only sought $88 personally in the class action suit. Id. Perhaps this is to compensate the named plaintiff, who often receives some sort of additional benefit compared to normal class members as compensation for their time, or perhaps it is just a relatively low-cost attempt to induce the plaintiff into accepting the pick off and thus delaying the litigation.

\textsuperscript{146} See, for example, Pitts, 653 F3d at 1085 (noting the plaintiff refused full offer of judgment).
to a lawyer in the first place or perhaps to cooperate with the lawyer throughout the process in the early stages. If the costs to the success of the class as a whole outweigh these benefits, the lawyer can mitigate these costs ex ante by filing concurrently and thus ensuring the same outcome as in a Weiss jurisdiction. The lawyer, after all, has a duty to protect the interests of unnamed potential class members.  

3. Takeaway: the outcomes are substantially the same.

Thus it appears that, as between the seemingly very different rules of Damasco and Weiss, at best, the Damasco rule provides additional options to a named plaintiff in pursuing her case. At worst, the choice of rule does not matter. The Damasco rule gives the plaintiff the choice of opting into a Weiss-like regime by filing the motion for class certification concurrently or of opting out by delaying filing of the motion for certification. The result probably will not make much difference, but the plaintiff is made better off simply by retaining the option.

Note that this conclusion does rest on two critical assumptions. First, filing the motion for class certification concurrently with the complaint must not add any additional costs or harm the plaintiff's ability to eventually present a well-drafted motion for certification. If it would, then a Damasco rule, by forcing the plaintiff to file concurrently, would undermine the ability of the plaintiff to fully present her case from the outset. However, if courts adopting this rule are accommodating and provide sufficient time for discovery and amendment, it seems that the outcome should be identical to the Weiss regime in which a plaintiff files suit without the possibility of pick off and then files a motion for certification as soon as it is ready. Even

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147 See Joseph M. McLaughlin, McLaughlin on Class Actions § 4:27 (Thomson Reuters 9th ed 2012) ("[P]re-certification class counsel owe a fiduciary duty not to prejudice the interests that putative class members have in their class action litigation."). This might create some tension between the duties the lawyer owes to her client, the named plaintiff (who may only want to settle for quick cash), and the duties owed to the rest of the class. This might also create later tensions with FRCP 23(a)(4) (requiring adequacy of representation for the class). While this Comment does not fully address this ethical dilemma, this situation should not actually arise frequently because the defendant will most likely never offer full settlement to a named plaintiff under a pre-announced Damasco rule, even when the plaintiff puts herself in a position to receive such an offer by not filing concurrently. See notes 142–143 and accompanying text.

148 See note 139 and accompanying text. By adopting the Damasco rule, courts lend support to the practice of filing a rough, underdeveloped motion for certification
courts adopting the Weiss rule require that the motion for certification be timely filed in order to avoid pick off.\footnote{See, for example, Sandoz, 553 F3d at 921 ("On remand, the district court must determine ... whether Sandoz timely sought certification of her collective action.")}

Second, the courts must announce the rule in order to actually avoid a pick-off problem in a Damasco regime. Otherwise, the plaintiff will not know to file concurrently and may leave herself open to being picked off, as was the case under the facts of Damasco.\footnote{See Damasco, 662 F3d at 894.} Filing concurrently as a default position in a jurisdiction that has not established the rule, however, would only be wise if courts were willing to accommodate early filing of the motion for certification.\footnote{This seems to be the case in the Seventh Circuit, given the appellate court's adoption of the Damasco rule and its support for concurrent filing. See notes 139, 148.}

B. The Weiss Rule and Constitutional Concerns

Though the practical outcomes are substantially similar under both approaches, concerns about the constitutionality of each rule are paramount in any discussion of mootness. Article III limits the subject matter of jurisdiction of federal courts to actual "cases" and "controversies."\footnote{US Const Art III, § 2.} The Supreme Court has noted that "[t]his case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit."\footnote{Lewis v Continental Bank Corp, 494 US 472, 477 (1990) (citations and quotations omitted).} In other words, if at any point during the litigation one of the two parties loses its interest in the case—"interest" being "an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision"—the case must be dismissed.

The plain language of the mootness doctrine favors the Damasco approach over the Weiss approach. The named plaintiff seems to lose her stake in the matter after her personal case becomes moot, and it is well established that a full offer of concurrently with the case filing. They should necessarily allow generous room for amendment as new information arises and the plaintiff's attorney gains more time to perfect the motion.

\footnote{United States v Juvenile Male, 131 S Ct 2860, 2864 (2011).}
judgment renders a plaintiff's claim moot. But the issue is not that simple. Weiss and its progeny relied heavily on the Supreme Court decisions in Sosna, Gerstein, Roper, Geraghty, and McLaughlin for constitutional justification. These cases collectively held that class action suits could proceed even if the named plaintiff's stake became moot during the litigation or appeals process. However, these cases did not address the situation when a plaintiff's claim becomes moot before the motion for class certification is filed (or, for that matter, ruled on by at least the district court).

Extending these cases to plaintiffs who did not file for certification before mootness would present serious constitutional issues. A class of unnamed plaintiffs only acquires legal status after certification. Allowing named plaintiffs to continue litigation when their case is moot, when they have not solidified any extra-personal stake by filing the motion for certification, represents a significant departure from our traditional understanding of mootness. Given that Weiss and Damasco both provide identical practical outcomes and workable solutions to the pick-off problem, there appears to be little reason to wade into uncertain constitutional waters in order to justify a Weiss regime.

Roper and Geraghty imply that it is the moment of filing the motion for certification that consummates the legal existence of

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155 See note 11 and accompanying text.
156 See, for example, Weiss, 385 F3d at 344 ("[T]he matters addressed in Roper . . . have direct application to the issue presented by this appeal.").
157 For an extended discussion of these cases, see Part I.A.
158 See Weiss, 385 F3d at 343 ("We recognize Roper addressed a different issue."). The Seventh Circuit has held that a pending, undecided motion for classification is sufficient to prevent a plaintiff's case from being picked off. See Damasco, 662 F3d at 896 ("The pendency of [the certification] motion protects a putative class from attempts to buy off the named plaintiffs."), citing Primax Recoveries, Inc v Sevilla, 324 F3d 544, 546-47 (7th Cir 2003).
159 See Sosna, 419 US at 399 (noting that after certification, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant").
160 See, for example, Damasco, 662 F3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."); Geraghty, 445 US at 412 (Powell dissenting) ("Indeed, the rule barring litigation by those who have no interest of their own at stake is applied so rigorously that it has been termed the 'one major proposition' in the law of standing to which 'the federal courts have consistently adhered . . . without exception.'") (citations omitted).
the unnamed class. The Court’s explicit limitation on the extent of its holding in those cases indicates that, prior to the motion, a named plaintiff is proceeding only as an ordinary litigant whose claim can mooted by a full offer of judgment. But Weiss and its progeny take the line drawn by the Supreme Court and essentially extend it all the way to point of the filing of any suit that purports to be a class action. Under this rule, a named plaintiff’s class action suit cannot be mooted by a full offer of judgment, even though such an offer would moot the case under any other circumstance. Further, other forms of mootness (aside from an offer of judgment) would probably still render a case moot.

To address the situations where such mootness would be problematic to the purposes of class actions, the Supreme Court carved out a long-standing exception for inherently transitory cases, cases in which an otherwise meritorious suit cannot be brought solely because the action necessarily becomes moot before it can be properly litigated. In such cases, and only in such cases, the filing of the motion for certification would relate back to the date of filing the case. But an offer of judgment does not seem to necessarily push a case into this narrow category. Even in situations in which a named plaintiff is

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161 While this rule is not explicitly articulated, in both these cases, the courts allowed litigation to proceed when the case became moot after a motion for certification had been filed but before the motion had been approved. See Part I.A.3. See also note 159. The Seventh Circuit has more clearly stated this notion. See Damasco, 662 F3d at 895 (“[W]e have long held that a defendant cannot moot a case by making an offer after a plaintiff moves to certify a class.”) Even the Weiss court acknowledged this position (before expanding it). See Weiss, 385 F3d at 347 (“Nonetheless, reference to the bright line event of the filing of the class certification motion may not always be well-founded.”).

162 See Geraghty, 445 US at 404 (“Our holding is limited to the appeal of the denial of the class certification motion.”).

163 See Weiss, 385 F3d at 348 (“Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of moot all class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing.”).

164 The holding of Weiss is so narrow, see note 163, that if the claim became moot for any reason other than an offer of full judgment—for instance, the claim was resolved in the natural course of business outside of litigation—that Weiss could not be cited to argue that case should proceed as not moot.


166 See, for example, Roper, 445 US at 340–41 (Rehnquist concurring) (distinguishing between those inherently transitory cases in which the exception applies and other cases in which the exception does not).

167 See Murphy v Hunt, 455 US 478, 482 (1982) (“The Court has never held that a
open to being picked off, the class action does not evade review entirely. There are (or at least should be) other named plaintiffs out there; indeed, it is usually the lawyer who picks the plaintiff rather than the plaintiff who picks the lawyer.\textsuperscript{168} If a client is “picked off,” the lawyer should simply seek out another member of the class to serve as named plaintiff; unless the statute of limitations expires, the inability of a lawyer to find any other class member implies that the case was frivolous.

The relation-back doctrine is not one to be taken lightly; it is an exception to the strict constitutional mandate that there be an active controversy between two parties in order for a case to be heard.\textsuperscript{169} The \textit{Weiss} rule expands the doctrine to its breaking point. It seems incredibly troubling that these courts make light of the “inherently” part of the “inherently transitory” rule.\textsuperscript{170} Further, courts make this distinction solely for the purpose of addressing the pick-off problem. The \textit{Weiss} rule does not, by its language, extend further than mootness that arises from a full offer of judgment.\textsuperscript{171} Cases in which mootness comes about in

\textsuperscript{168} See John C. Coffee Jr, \textit{Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions}, 86 Colum L Rev 669, 681 (1986) (“In some areas of contemporary litigation, the pattern is typically one of the lawyer finding the client, rather than vice versa.”); Charles Alan Wright, et al, \textit{13C Federal Practice and Procedure Jurisprudence and Related Matters} § 3533.9.1 (Thomson Reuters 3d ed 2013) (“The Court is apparently reluctant to recognize openly that named representatives frequently are no more than token clients for lawyers who in fact provide the motivation and representation that animate a class action.”).

\textsuperscript{169} For example, Justice Powell noted that “[t]he essential and irreducible constitutional requirement is . . . continuing or threatened injury.” See \textit{Geraghty}, 445 US at 412 (Powell dissenting). He noted further that “the practical importance of review cannot control. . . . [n]or can public interest in the resolution of an issue replace the necessary individual interest in the outcome.” Id at 411–12.

\textsuperscript{170} See, for example, \textit{Pitts}, 563 F3d at 1091 (“[W]e see no reason to restrict application of the relation-back doctrine only to cases involving \textit{inherently} transitory claims.”); \textit{Weiss}, 385 F3d at 347 (“Although Weiss’s claims here are not ‘inherently transitory’ as a result of being time sensitive, they are acutely susceptible to mootness.”) (citations and quotations omitted).

\textsuperscript{171} See \textit{Weiss}, 385 F3d at 348 (“[T]herefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the
other ways would still presumably be dismissed under the Weiss rule unless they fall under the narrow exception. So the rule amounts to an ad-hoc workaround of a strict constitutional prohibition designed solely to deal with a problem—the pick-off problem. Indeed, this problem is quite offensive to our notions of justice, but such a constitutionally questionable approach is an improper way to address it.

C. Damasco as a Solution to the Problem

In Part II.A, I showed that as between a jurisdiction that implements a Weiss rule and one that implements a Damasco rule, when addressing the problem of forced settlement prior to the motion for certification, the outcome should not be very different. In, Part II.B, however, I raised serious concerns with the constitutionality of the Weiss rule. I now argue that the Damasco rule is a viable solution to the pick-off problem; the rule will provide adequate protection for class action suits, particularly in the realm of consumer protection.

Although Damasco itself has not been seriously addressed by the literature, some commentators have argued against substantially similar approaches to the pick-off problem. Their concerns are valid to the extent that a pick-off problem

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172 Consider the argument of the Weiss court:

Although Weiss's claims here are not "inherently transitory" as a result of being time sensitive, they are "acutely susceptible to mootness," in light of defendants' tactic of "picking off" lead plaintiffs with a Rule 68 offer to avoid a class action. As noted, this tactic may deprive a representative plaintiff the opportunity to timely bring a class certification motion, and also may deny the court a reasonable opportunity to rule on the motion.

Weiss, 385 F3d at 347 (citations omitted). The court seems to be acknowledging that the problem of pick off prior to certification does not fall into any traditionally recognized exception to the mootness doctrine, but chooses to allow an exception anyway in order to prevent an unpalatable policy outcome.

173 For additional support, see Damasco, 662 F3d at 896 ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III."); Zariski, et al, 26 Rev Litig at 108 (cited in note 128) ("[T]he Weiss decision is fundamentally inconsistent with the balance struck by the Supreme Court in Sosna, Geraghty, and Roper.").

174 See, for example, Campanelli, Note, 4 Drexel L Rev at 535, 554 (cited in note 125).

175 For an example of the concerns about the pick-off problem under the strict approach, see Koytsza, Note, 53 Duke L J at 794–98 (cited in note 123).
does exist; such a problem would thwart the very purpose of class action litigation by allowing a defendant to delay litigation at little cost until the plaintiff class either becomes discouraged or the statute of limitations expires. Yet under the Damasco rule, the defendant cannot use forced settlement to pick off the plaintiff.\textsuperscript{176} The result is basically a bright-line rule under which most plaintiffs will file the case and the motion for certification concurrently and thus prevent pick off entirely.\textsuperscript{177} If plaintiffs choose not to do this, and leave themselves open to pick off, then it is at least an option in their favor.

Damasco, thus taken as a bright-line rule, will avoid the problems inherent in the flexibility of the Weiss approach. The Weiss court rested its decision on the important caveat that continuation of the class action is only possible when there is no “undue delay” in filing the certification.\textsuperscript{178} This is not a defined term, and as such will give districts court flexibility in determining what constitutes undue delay. Unless courts establish standards for “undue delay,” the lack of definition could create uncertainty for both plaintiffs and defendants and may produce perverse incentives for forum shopping whereby plaintiffs file in “friendly” courts.\textsuperscript{179} Under Damasco, plaintiffs would file concurrently and so avoid the possibility of a court finding that their case became moot because they were too late in filing their motion. In this way, the Damasco rule should lead to fewer instances of actual pick off than the Weiss rule.

Damasco therefore is the preferable approach to dealing with the pick-off problem and advancing the abilities of plaintiffs, particularly consumer-plaintiffs, to bring meritorious class action law suits. It provides protection against pick off for plaintiffs that is equal to or greater than the protection provided by Weiss,\textsuperscript{180} as plaintiffs who file concurrently can never expose

\textsuperscript{176} See Part II.A.3.

\textsuperscript{177} Note that if this is the case, and all or substantially all plaintiffs in a Damasco jurisdiction file concurrently, then concurrent filing may become less a strategic option and more of a conferment of standing to unnamed plaintiffs in a class from the moment of filing. But this may be a desirable result. See Part II.D.

\textsuperscript{178} Weiss, 385 F3d at 348. See also Sandoz, 553 F3d at 921.

\textsuperscript{179} Alternatively, defendants might strategically try to remove a suit or change the venue.

\textsuperscript{180} Note again that this assertion rests on the critical assumption that there will be no additional cost to the plaintiff’s suit associated with concurrent filing. See Part II.A.3.
themselves to pick off.\textsuperscript{181} It also avoids the serious constitutional concerns raised by the Weiss approach. If any court ever found Weiss to be unconstitutional, plaintiffs in the current pipeline would be exposed to pick off and would need to hastily file a motion for certification in order to avoid it.

D. Additional Considerations

Note the formality inherent in this Comment's position. The goal of both the Damasco and Weiss rules is to prevent pick off, and both do so effectively. Yet the primary difference between the two views is the degree to which the Article III standing requirements rests on the mere timing of a motion for certification. This difference is certainly subtle, and one might argue that it is a formalism that should not be determinative of standing for a class action suit. But the existing body of jurisprudence on mootness nonetheless requires it. Unless and until the law confers immediate standing to unnamed class members upon the filing of a class action lawsuit, that standing cannot arise until a certain formal point in our process, and Supreme Court precedent seems to say that the point is the motion for certification. The practice endorsed by Damasco—filing the motion for certification concurrently with the suit—is indeed formalist. Consider that if all class action plaintiffs filed concurrently at certification, it would be, for all intents and purposes, identical to conferring Article III standing to unnamed class members at the moment a suit is filed. But the Damasco rule is nonetheless a viable solution to the undesirable pick-off problem that complies with existing law and jurisprudence on standing in class action suits. The alternative Weiss approach seems to utilize this same idea—the rule essentially grants immediate standing to unnamed plaintiffs in cases in which the pick-off problem might arise.\textsuperscript{182} The key difference is that Damasco solves the problem in a manner that comports with the large and traditional body of Article III jurisprudence.

\textsuperscript{181} Under Geraghty, the determination of mootness is made at the time of filing the motion for class certification. Geraghty, 445 US at 398 ("[M]ootness still can be avoided through certification of a class prior to expiration of the named plaintiff's personal claim."). It follows that if a plaintiff files concurrently, there is never any period in which the expiration of the named plaintiff's personal claim can be brought about by a forced offer of settlement.

\textsuperscript{182} See Lucero, 639 F3d at 1249 ("[W]e conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint.").
The novel approach of Zariski, et al, could potentially work as a more direct solution to the pick-off problem, but it encounters serious issues in implementation. Zariski, et al, suggest that, rather than force concurrent filing, courts should require that a full offer of judgment in a class action suit satisfy the entire class rather than just the named plaintiff in order to moot a case.\textsuperscript{183} This approach would have the practical effect of preventing pick offs,\textsuperscript{184} and would also avoid any problems created by concurrent filing that might be present in a Damasco regime.\textsuperscript{185} However, it seems unlikely that the courts would actually adopt this approach. Rule 68 allows a party to make an offer of judgment to an "opposing party."\textsuperscript{186} Until the motion for certification is filed, the "opposing party" is the named plaintiff as an individual, not the class.\textsuperscript{187} Courts could not redefine "opposing party" to include the class without running into the exact same constitutional issues present in Weiss—perhaps even more overt ones. It would be difficult to implement this approach without amending the Federal Rules of Civil Procedure to explicitly account for it.

III. CONCLUSION

The federal courts of appeals have developed two competing solutions as to the problem of what happens when a defendant makes an offer of judgment to a named plaintiff in a class action suit, but the plaintiff has not yet moved for certification. A majority of circuits hold that the class action may continue; the Seventh Circuit holds that it must be dismissed as moot. After analysis of existing jurisprudence related to the matter, including Supreme Court precedent on related issues and the appellate court decisions on the matter at hand, this Comment argued that the minority approach recently advocated by the Seventh Circuit is the superior approach. After critical analysis

\textsuperscript{183} Zariski, et al, 26 Rev Litig at 113 (cited in note 128).
\textsuperscript{184} See Part II.A.1. The very concept of picking off a plaintiff would impossible if the defendant must offer relief to the entire class in order to force mootness.
\textsuperscript{185} This idea is perhaps a more direct approach than either Weiss or Damasco because it is an overt attempt to derail the very source of the pick-off problem. It would have the same practical effects as the two judicial rules in that all three would effectively stop picking off, but it addresses the problem directly rather than indirectly through interpretation of the standing doctrine.
\textsuperscript{186} FRCP 68(a).
\textsuperscript{187} Geraghty seems to support this contention. See note 181.
of the two approaches, it showed that the Damasco rule will result in equal or better protection against pick offs by defendants while avoiding the serious constitutional concerns raised by other rules.