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The Third Circuit Adopts the Relation-Back Doctrine to Prevent Defendants from Picking off Representative Plaintiffs of Putative Class Actions in Weiss v. Regal Collections

Dennis Lueck

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THE THIRD CIRCUIT ADOPTS THE RELATION-BACK DOCTRINE TO PREVENT DEFENDANTS FROM "PICKING OFF" REPRESENTATIVE PLAINTIFFS OF PUTATIVE CLASS ACTIONS IN WEISS v. REGAL COLLECTIONS

I. INTRODUCTION

Federal courts are grappling with the conflict between Rules 23 and 68 of the Federal Rules of Civil Procedure. Rule 23, which governs class action lawsuits, allows courts to hear and resolve similar claims of numerous plaintiffs in a single lawsuit. Rule 68 encourages the settlement of disputes and discourages frivolous or unnecessarily lengthy litigation. Standing alone, these rules are admirable and beneficial to the judicial system. Nonetheless, their simultaneous operation has created a great


2. See Fed. R. Civ. P. 23 advisory committee's notes (1937) (explaining that Rule 23 was intended to incorporate Equity Rule 38 which allowed 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").

3. See 13 James WM. Moore et al., Moore's Federal Practice § 68.02[2], at 68-7 (3d ed. 2004) (discussing fundamental reasons for adoption of Rule 68); see also Roy D. Simon, Jr., The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 1-2 (1985) (stating that Rule 68 is "the only procedural rule devoted exclusively to settlements").

4. See David Hill Koysza, Preventing Plaintiffs from Mooting Class Actions by Picking Off Named Plaintiffs, 53 DUKE L.J. 781, 782, 789 (2003) (commenting on benefits of each respective rule). Koysza notes, however, that Rule 23 class actions are certainly not without critics. See id. at 782-83 (recognizing that "pages of reputable journals and reporters are filled with descriptions of litigation-mad, bottom-feeding, money-hungry, professional plaintiffs lawyers") (internal quotations omitted). On the other hand, 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." See id. at 783 (quoting Catherine M. Sharkey, Punitive Damages as Societal Damages, 113 YALE L.J. 347, 402-03 (2003)). Koysza does not argue for or against class actions, but instead bases his argument on the fundamental assumption that "class actions are a good thing, useful enough to be worth preserving." Id. at 782. Similarly, this Casebrief will not debate the merits of class actions and will assume that class actions are worth preserving.
deal of conflict and has resulted in the “picking off” of named class representative plaintiffs by defendants.\(^5\)

The Federal Rules of Civil Procedure are designed to be interdependent, and “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”\(^6\) In the event of a conflict, however, one rule may have to take precedence over the other.\(^7\) In a growing trend, many courts have allowed defendants to short-circuit the class action process by conveying full offers of judgment under Rule 68.\(^8\) These courts held cases as moot even though the plaintiff did not accept the offer of judgment.\(^9\) Some commentators argue that this application of Rule 68 allows defendants to force dismissal of pending class actions and therefore deny qualified class plaintiffs the ability to take advantage of the Rule 23 class action device.\(^10\)

This Casebrief examines the Third Circuit’s approach to preventing defendants from picking off representative class action plaintiffs prior to plaintiffs’ filing for class certification. Part II discusses the approach taken by the United States Supreme Court and the federal district courts in determining the effect of full offers of judgment to a named plaintiff in class action lawsuits.\(^11\) Part III examines Weiss v. Regal Collections\(^12\) and the Third Circuit’s use of the “relation-back” doctrine to prevent defendants

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5. See Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (warning against potential danger of allowing defendants to pick off class action plaintiffs); Lusardi v. Xerox Corp., 975 F.2d 964, 982 (3d Cir. 1982) (establishing picking off as name for practice of mooting class action plaintiff’s claims through offers of judgment); Koysza, supra note 4, at 781 (noting that many courts, including Supreme Court, describe offering judgments to class action plaintiffs in order to render their claims moot as picking off of plaintiffs).


8. See Koysza, supra note 4, at 781-82 (lamenting that “[a]n already significant and growing number of federal district courts have held that such offers of judgment . . . require[e] . . . dismissal of the entire class action”). In this Casebrief, “full” offers of judgment refer to those offers that provide a plaintiff with the maximum amount of recovery available by statutory recovery limitations.


10. See Eugene J. Kelley, Jr., et al., Offers of Judgment in Class Actions: Do Defendants Have a Secret Weapon?, 54 CONSUMER FIN. L.Q. REP. 283, 283 (“Recent consumer finance cases suggest that when faced with the daunting task of defending a class action lawsuit, a defendant can make an offer of judgment . . . which will derail the potential class action . . . ”); Koysza, supra note 4, at 782 (arguing against allowing defendants to pick off class action plaintiffs).

11. For a discussion of the approaches employed by the Supreme Court and the federal courts when considering whether offers of judgment render a class action moot, see infra notes 16-102 and accompanying text.

12. 385 F.3d 337 (3d Cir. 2004).
from picking off a named plaintiff prior to class certification.\(^{13}\) Part IV predicts that other circuit courts will follow the Third Circuit's approach.\(^{14}\) Part V concludes that the Third Circuit has adopted the best approach for both furthering the purposes of class action lawsuits and providing remedies for harmed plaintiffs who otherwise would not receive resolution of their claim.\(^{15}\)

II. Picking Off Plaintiffs in Federal Class Action Lawsuits

Before assessing the merits of the Third Circuit's use of the relation-back doctrine to prevent defendants from picking off named plaintiffs, a closer look at the causes of the conflict between Rules 23 and 68 is in order. First, Part II.A introduces the Rule 23 class action mechanism.\(^{16}\) Second, Part II.B discusses Rule 68 offers of judgment.\(^{17}\) Third, Part II.C considers the case or controversy requirement of the Constitution.\(^{18}\) Last, Part II.D examines Supreme Court precedent and the various district court approaches to determine whether offers of judgment render cases moot and deprive courts of subject matter jurisdiction.\(^{19}\)

A. Introducing Class Action Lawsuits: Rule 23 and the Requirement of Filing for Certification

Rule 23 authorizes a discrete number of litigants to aggregate their claims and proceed as a class against a common defendant.\(^{20}\) In class action lawsuits, a named plaintiff bears the burden of pleading facts that bring the case within the parameters of Rule 23.\(^{21}\) To meet this burden, Rule 23 first requires the plaintiff to satisfy four prerequisites.\(^{22}\) Stated

13. For a discussion of the Third Circuit's adoption of the relation-back doctrine, see infra notes 103-39 and accompanying text.

14. For a discussion of why other circuits will adopt the Third Circuit's approach, see infra notes 140-61 and accompanying text.

15. For a discussion of why the Third Circuit's approach is the best approach to further the purposes of class actions and provide just results, see infra notes 162-63 and accompanying text.

16. For a discussion of class actions as defined by Rule 23, see infra notes 20-31 and accompanying text.

17. For a discussion of offers of judgment as defined by Rule 68, see infra notes 32-38 and accompanying text.

18. For a discussion of the Constitution's case or controversy requirement, see infra notes 39-47 and accompanying text.

19. For a discussion of the way in which the Supreme Court and other federal courts have dealt with mootness caused by offers of judgment made to class representatives, see infra notes 48-102 and accompanying text.


22. See Fed. R. Civ. P. 23(a)(1)-(4). The Rule provides: One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of
generally, Rule 23 requires: (1) the existence of a numerous class; (2) the existence of a common question of fact or law in all cases; (3) that the claims or defense of the representative be typical of the class; and (4) that the representative must adequately represent the class.\textsuperscript{23} Second, Rule 23 requires that a proposed action fall into one of the following three specified categories: (1) the proposed action will create a risk of inconsistent results or determine the outcome of other proposed actions; (2) the proposed action is appropriate because the party opposing the class has acted or refused to act in the same manner toward the class; or (3) the proposed action possesses common questions of law or fact applicable to the individuals.\textsuperscript{24} These categories specify how common the question of fact or law must be in order to certify a class.\textsuperscript{25}

Third, and most importantly for the purposes of this Casebrief, an action is not deemed a class action until the court grants a motion filed by all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id.

23. See id.

24. See Fed. R. Civ. P. 23(b)(1)-(3). The Rule states:
An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

25. See id. (delineating requirements for class certification).
the named plaintiff requesting class certification.\textsuperscript{26} According to the Supreme Court, a "ruling on the certification issue is often the most significant decision rendered in . . . [a] class-action proceeding."\textsuperscript{27} As discussed below, certification of a class is important indeed as it prevents the moot- ing of the class action suit through offers of judgment.\textsuperscript{28}

Given Rule 23's specificity and the importance of class certification, it is odd that Rule 23 noticeably lacks a temporal requirement for filing the motion for certification of the class.\textsuperscript{29} Some jurisdictions, such as the United States District Court for the Eastern District of Pennsylvania, have established a time period within which motions for certification must be filed.\textsuperscript{30} On the other hand, in jurisdictions that do not provide rules for governing the timely filing of motions for class certification, the temporal requirements are vastly different.\textsuperscript{31}

\textbf{B. Rule 68 Offers of Judgment}

Rule 68 allows for offers of judgment to plaintiffs and was "adopted to promote settlements and avoid protracted litigation."\textsuperscript{32} According to the Supreme Court, "[t]he Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits."\textsuperscript{33} This Rule allows defendants to convey offers of judgment to plaintiffs, who then have a choice to either accept or

\begin{itemize}
  \item \textsuperscript{26} See Fed. R. Civ. P. 23(c)(1)(A) (requiring courts to determine whether actions are certifiable as class actions). Prior to a court's granting of class certification, the class is commonly referred to as a putative class. See Koysza, supra note 4, at 782 (referring to uncertified class as putative class).
  \item \textsuperscript{28} For a discussion of why certified class actions are not susceptible to mootness, see infra notes 51-59 and accompanying text.
  \item \textsuperscript{29} See Fed. R. Civ. P. 23(c)(1)(A) ("When 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.") (emphasis added); see also Koysza, supra note 4, at 785 ("Practice under Rule 23(c) gives the court flexibility in determining the appropriate time to consider the issue of class certification.").
  \item \textsuperscript{30} See E.D. Pa. R. Civ. P. 23.1(c) (requiring named plaintiffs to file motion for certification within ninety days of filing their complaint).
  \item \textsuperscript{31} See Conte & Newberg, supra note 21, § 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.").
  \item \textsuperscript{32} Moore, supra note 3, § 68.02[2], at 68-7 (noting primary purpose of Rule).
\end{itemize}
reject the offer within ten days. If the plaintiff accepts the offer, one of the parties files notice with the clerk and judgment is entered. If the offer is rejected, the plaintiff agrees to pay the defendant’s attorneys’ fees and costs if the amount awarded at trial is less than the offer. Rule 68, while enacted to benefit both the judicial system and the parties to a lawsuit, has also led to protracted litigation and controversy when used in the context of class action lawsuits. The controversy centers on whether Rule 68 full offers of judgment—offers for the maximum possible recovery—conveyed to a named plaintiff prior to certification of the class moot the entire class’s claim and deprive the court of subject matter jurisdiction.

C. Class Certification and Mootness: The Article III Case or Controversy Requirement

The United States Constitution requires that there be a case or controversy in order for a federal court to possess subject matter jurisdiction

34. See Fed. R. Civ. P. 68. The Rule provides:
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.

Id.

35. See id. ("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.

36. See id. ("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.

37. See, e.g., Ian H. Fisher, Federal Rule 68, A Defendant’s Subtle Weapon: Its Use and Pitfalls, 14 DEPAUL BUS. L.J. 89, 95 (2001) ("Serious questions...exist whether and when a defendant may make Rule 68 offers in the class context."). But see Kelley, supra note 10, at 284 ("Under proper circumstances, an offer of judgment or settlement can be an effective tool in destroying a class action because the defendant can moot the named plaintiff's claim, deny them a personal stake in the case, and bar them from representing the class.").

38. See Greenstein, supra note 1, at 900-01 (explaining situation in which mootness doctrine collides with potential class action). Greenstein notes that:
[T]here are three ways in which a [class action] case may become moot:
(1) the issues presented by the class representative on behalf of both himself and the class may become moot; (2) only the issues presented on behalf of the class may become moot, leaving the representative's personal claim to be adjudicated; or (3) only the issues presented on behalf of the class representative may become moot, leaving the class claims to be decided.

Id. As recognized by Greenstein, however, the difficulty arises when the representative plaintiff's claims have become moot, but the class claims are still alive. See id. (noting that courts have no difficulty applying mootness doctrine when issues presented by both class and named plaintiff may become moot, or when only class's issues may become moot).
over an action.\textsuperscript{39} Thus, when an individual ceases to have a "personal stake" in the litigation, there is no longer a case or controversy, and the court is deprived of subject matter jurisdiction.\textsuperscript{40} This is commonly referred to as a moot case.\textsuperscript{41} Whenever a case is deemed moot, the court must dismiss the action, regardless of whether the parties motion for dismissal.\textsuperscript{42}

As noted above, Rule 68 of the Federal Rules of Civil Procedure provides for offers of judgment.\textsuperscript{43} If an offer of judgment for \textit{complete} relief is made to the plaintiff, the plaintiff's claim will generally be mooted because the plaintiff no longer has a personal stake in the outcome of the case.\textsuperscript{44} Should the same result be reached when the plaintiffs are suing not only on their own behalf, but also on the behalf of "all those similarly situated"?\textsuperscript{45} The answer to this question appears to depend upon the timing of the offer of judgment and whether a motion for certification is pending or has been ruled on by the court.\textsuperscript{46} An examination of relevant Supreme Court precedent indicates an increasing tendency to allow cases to go forward, notwithstanding the mootness of a named plaintiff's claim.\textsuperscript{47}

\textsuperscript{39} See U.S. CONST. art. III, \S\ 2 ("The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution \ldots [and] to Controversies \ldots ").

\textsuperscript{40} See County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) (noting that when controversies causing case are no longer at issue case becomes moot and must be dismissed because court no longer has subject matter jurisdiction).

\textsuperscript{41} See, e.g., 1A C.J.S. \textit{Mootness Generally} \S 76 (2005) ("[A] moot case is one in which there is no real controversy or which seeks to determine an abstract question which does not rest on existing facts or rights . . . ").

\textsuperscript{42} See \textit{Fed. R. Civ. P. 12(h)(3)} (requiring dismissal of cases where court lacks subject matter jurisdiction).

\textsuperscript{43} For a discussion of the Rule 68 offer of judgment, see \textit{supra} notes 32-38 and accompanying text.

\textsuperscript{44} See Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004) (citing Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991)) ("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 \textit{Fed. R. Civ. P. 12(b)(1)}, because he has no remaining stake.").

\textsuperscript{45} See Koysza, \textit{supra} note 4, at 787 (arguing that even if named plaintiff no longer has "personal stake" in outcome, other class members exist to provide requisite case or controversy).

\textsuperscript{46} See id. at 790 (noting that timing is critical to issues of mootness in class action context). As discussed below, the law is well-settled regarding offers of judgment made either after filing for certification or after the court has granted certification. For a discussion of how class certification, or filing for class certification, renders class actions impervious to mootness resulting from offers of judgment to named plaintiffs, see infra notes 51-88 and accompanying text. The issue for discussion in this Casebrief, however, is when an offer of judgment is conveyed prior to a named plaintiff's filing for class certification.

\textsuperscript{47} For a discussion of the Supreme Court's increasing tendency to find exceptions to the mootness doctrine and allow class actions to proceed, see infra notes 51-88 and accompanying text. See also Koysza, \textit{supra} note 4, at 789 (noting flexible approach of Supreme Court to issues of justiciability).
1. The Stance of the Supreme Court

The Supreme Court has candidly acknowledged the difficulty in reconciling the cases that have dealt with mootness in the class action context. Nonetheless, the overarching theme since the 1970s has been "increased access to the federal courts for class litigants within the framework of shaky constitutional principles." The Court has carved-out multiple exceptions to the traditional mootness doctrine in the decisions discussed below.

Today, it is settled law that a properly certified class action may continue, even if the named plaintiff's claim has been rendered moot. In Sosna v. Iowa, the Court held that even though the claim of the named plaintiff had become moot, a controversy could still exist between the named defendant and the certified class. In Sosna, a plaintiff sought certification of her suit as a class action in order to represent other Iowa residents who wished to initiate marriage dissolution proceedings, but who were barred by a state residency statute. After the district court certified the class, the plaintiff continued to reside in Iowa, thereby satisfying the Iowa statutory residency requirements. The state argued that the claim was moot and should be dismissed.

In rejecting the state's argument, the Court found that certification of the class provided the unnamed members of the class a legal status separate from the named plaintiff. The Sosna Court stated that so long as a named plaintiff with the requisite case or controversy is involved in the suit at the time of certification, the case is not deemed moot by an offer of

48. See U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 n.11 (1980) ("We concede that the prior cases may be said to be somewhat confusing, and that some, perhaps, are irreconcilable with others."); see also Greenstein, supra note 1, at 897-98 (aspiring to disentangle Court's "confusing" and "irreconcilable" opinions regarding justiciability).

49. See Greenstein, supra note 1, at 897 (discussing patchwork nature of Supreme Court cases addressing mootness in class action context).

50. For a discussion of the mootness exceptions created by the Supreme Court to deal with the unique challenges of class actions, see infra notes 51-88 and accompanying text.

51. See Sosna v. Iowa, 419 U.S. 393, 397-403 (1975) (allowing plaintiff to maintain her class action challenge although issue was deemed moot under traditional mootness principles because of plaintiff's action subsequent to class certification); Koyzsa, supra note 4, at 787 (discussing evolution of mootness doctrine when applied to class action context).

52. 419 U.S. 393 (1975).

53. See id. at 402 (providing reasons for holding that plaintiff's claim is not moot).

54. See id. at 397 (stating facts).

55. See id. (same).

56. See id. (recounting defendants' argument).

57. See id. at 397 n.8 ("The certification of a suit as a class action has important consequences for the unnamed members of the class . . . [because] it is contemplated that the decision will bind all persons who have been found at the time of certification to be members of the class.").
judgment. Although the Sosna Court did not specifically rely on the relation-back doctrine for its holding, the doctrine was nevertheless introduced in the dicta of the opinion and employed in multiple cases shortly thereafter.

Under the relation-back doctrine, the date of the certification is considered to be the same date as the filing of the original complaint. This provides an exception to the traditional mootness doctrine, thereby allowing class actions to continue. Despite being introduced in a footnote, the relation-back doctrine has reappeared as the central

58. See id. at 402 (providing reasons why Court's holding does not detract from constitutional case or controversy requirement).

59. See id. at 399-400 (stating Court's reasoning). The Sosna Court held that the case was justiciable regardless of the mootness of the plaintiff's claim because the class had been certified prior to the mooting of the plaintiff's claim. See id. (same). Further, the problem was "capable of repetition yet evading review." Id. The Court went on to state in dicta:

There may be cases in which the controversy involving the named plaintiff 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. During the same year as the Sosna decision, the Court applied the relation-back doctrine. See Gerstein v. Pugh, 420 U.S. 103, 107-10 (1975) (applying relation-back doctrine). In Gerstein, the plaintiffs challenged state pretrial detention procedures, however, the time period was so short that the plaintiffs' claims were rendered moot prior to certification. See id. at 107, 110 n.11 (stating facts). The Court held that despite the mootness of the representative's claim, the certification would relate back to a time prior to the mooting of the claim. See id. at 110 n.11 (incorporating relation-back doctrine into Court's holding). Not long after Gerstein, the Court applied the relation-back doctrine without requiring an issue that is capable of repetition yet evading review remain. See Franks v. Bowman Transp. Co., 424 U.S. 747, 754 (1976) (applying relation-back doctrine without requiring issue capable of repetition that evades review).

60. See, e.g., U.S. Parole Comm'n v. Geraghty, 445 U.S. 387, 398-99 (1980) (explaining how Court has rendered time of filing for class certification nondeterminative because, if requirements for exception under relation-back doctrine are met, filing for certification relates back to date of original claim).

61. See White v. OSI Collections Servs., Inc., No. 01-CV-1343(ARR), 2001 WL 1590518, at *2 (E.D.N.Y. Nov. 5, 2001) ("When a court relates class certification back to the original filing of the complaint, the putative class representatives retain standing to litigate the question of class certification even though their individual claims are moot."); Kocosz, supra note 4, at 804 (explaining that application of relation-back doctrine "relates back" motions for class certification to date of filing of original complaint, thereby allowing court to retain subject matter jurisdiction although plaintiff's claim is rendered moot); Don Zupanec, Law and Motion—Cases at a Glance, 19 Fed. Litig. 1, 8 (2004) ("The relation back rule recognizes that, to give effect to the purpose of F.R.C.P. 23 [class actions], it may be necessary in some circumstances to consider a named plaintiff part of an indivisible class, not simply an individual, prior to a certification ruling.").
underpinning for decisions holding that full offers of judgment to plaintiffs do not render class actions moot.62

In addition to the principle announced in Sosna, it is well-settled that a member of a putative class may appeal a denial of class certification, regardless of whether the named plaintiff’s claim is moot.63 In United States Airlines v. McDonald,64 a putative class member filed a motion to intervene after a district court’s denial of class certification.65 The motion to intervene was filed after the named plaintiff had settled with the defendant.66 Nevertheless, the McDonald Court reasoned that because the respondent was a putative member of the original class, and the motion to intervene for appeal was timely filed, no justification existed to bar the respondent from appeal.67 Once again, the Court emphasized the distinction between the interests of the named plaintiff and the interests of the putative class members.68

Then, in a pair of decisions decided on the same day,69 the Court held that named plaintiffs may appeal the denial of class certification, even if their individual claim is moot.70 In United States Parole Commission v. Geraghty,71 the named plaintiff brought a class action challenging the United States Parole Commission’s Parole Release Guidelines.72 The district court denied the class certification, and the plaintiff subsequently appealed to the Third Circuit.73 Before the appeal could take place, however, Geraghty was released from prison.74 Upon granting certiorari, the Supreme Court held the claim to be justiciable by applying the rela-

———. 62. See, e.g., County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991) (applying relation-back doctrine to “inherently transitory” claims); Geraghty, 445 U.S. at 399 (same); Weiss v. Regal Collections, 385 F.3d 337, 348 n.16 (3d Cir. 2004) (applying relation-back doctrine to claim characterized as transitory because claim was acutely susceptible to mootness).

63. See U.S. Airlines v. McDonald, 432 U.S. 385, 393-95 (1977) (refusing to bar plaintiff from opportunity to appeal class certification denial).

64. 432 U.S. 385 (1977)

65. See id. at 387 (stating facts).

66. See id. at 389 (noting that original parties agreed upon award amounts for each plaintiff and court dismissed action).

67. See id. at 393-94 (explaining reasoning for Court’s holding).

68. See id. at 394 (allowing plaintiff to appeal because “as soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests”).


70. See Roper, 445 U.S. at 389-40 (refusing to dismiss case for lack of subject matter jurisdiction); Geraghty, 445 U.S. at 404 (same).


72. See Geraghty, 445 U.S. at 390 (stating facts).

73. See id. at 393 (noting procedural posture).

74. See id. at 394 (stating facts).
tion-back doctrine. The Court also revived the "capable of repetition but evading review" doctrine by noting that some claims may require relation-back because of their "inherently transitory" nature.

The Court, however, took a slightly different approach in Deposit Guaranty National Bank v. Roper. Roper involved a class action brought by credit card holders challenging finance charges applied to their accounts. Following a denial of class certification by the district court, the defendants tendered the plaintiffs the maximum individual award. According to the Roper Court, the case was still justiciable because the named plaintiffs retained an interest in sharing the expenses of the litigation with other members of the class. Furthermore, the Court reasoned that mooting the entire case would defeat the purpose of class actions and invite waste of judicial resources.

Recently, in County of Riverside v. McLaughlin ("Riverside"), the Court expanded upon the rationales employed in Roper and Geraghty. In Riverside, the Court held that a putative class action may proceed regardless of whether the named plaintiff's claim has been mooted, provided that the named plaintiff's claim is "so inherently transitory that the trial court will

75. See id. at 404 n.11 ("We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the date of the original denial.").

76. See id. at 399 ("Some claims are 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.").

77. 445 U.S. 326 (1980). In Roper, the Court did not explicitly rely on the relation-back doctrine. See id. at 333 (holding that neither rejected offer of judgment nor forced dismissal of plaintiff's case "terminate[s] the named plaintiffs' right to take an appeal on the issue of class certification").

78. See id. at 329 (stating facts).

79. See id. at 329-30 (same). The Fifth Circuit subsequently denied the plaintiffs' motion for an interlocutory appeal to challenge the class certification denial. See id. at 329 (same). Following the denial of appeal, the bank tendered to each plaintiff an "Offer of Defendant to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability." Id. The plaintiffs rejected the offer. See id. (stating facts). Nevertheless, the court entered judgment based upon the offer and dismissed the action. See id. at 329-30 (same).

80. See id. at 340 (providing justification for exception to traditional mootness doctrine). The Geraghty Court expressed similar sentiment regarding economic justifications for allowing the case to proceed. See Geraghty, 445 U.S. at 404 (same). The Roper Court further explained that a central concept behind Rule 23 class action lawsuits is to provide claimants, especially those with small claims, a cost effective means of redress. See Roper, 445 U.S. at 338 n.9 (noting that attorney's fee would typically exceed value of individual judgment); see also Phair, supra note 20, at 837 ("By spreading the cost of litigation across a class, a greater number of litigants are able to pool their resources in an effort to vindicate their rights.").

81. See Roper, 445 U.S. at 339 (looking to purpose of Rule 23 in deciding whether claim was moot).


83. See id. at 52 (1991) (refusing to find plaintiffs claim moot under traditional mootness jurisprudence by using "inherently transitory" exception).
not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.”

The plaintiff in Riverside brought a class action requesting the district court to order the County of Riverside to alter its policies for providing hearings to in-custody arrestees who were arrested without warrants. The plaintiff filed for class certification shortly after filing the complaint. By this time, however, the plaintiff had been provided a hearing. The Supreme Court used the relation-back doctrine introduced in Sosna to find that the district court retained jurisdiction over the case.

2. The District Courts: Two Distinct Approaches

Although the above examination of Supreme Court jurisprudence indicates a flexible approach to mootness issues, the lower federal courts are divided when deciding if a court is stripped of subject matter jurisdiction when, prior to class certification, full offers of judgment to a named plaintiff are made. The first approach is exemplified by Ambalu v. Rosenblatt. Generally stated, this approach holds that if the sole named plaintiff’s claim is rendered moot, the case must be dismissed. The second approach used by the district courts is demonstrated in Liles v. American Corrective Counseling Services, Inc. Under this approach, cases are not moot if the offer of judgment is prematurely extended, or if the motion

84. Id. (quoting Geraghty, 445 U.S. at 399).

85. See id. at 48 (noting relief sought by plaintiff). Specifically, McDonald asked the court for “an order and judgment requiring that defendants and the County of Riverside provide in-custody arrestees, arrested without warrants, prompt probable cause, bail and arraignment hearings.” Id.

86. See id. at 48-50 (stating facts).

87. See id. (discussing timeline of case).

88. See id. at 52 (“[Here] the ‘relation back’ doctrine is properly invoked to preserve the merits of the case for judicial resolution.”). For a discussion of the relation-back doctrine, see supra note 60 and accompanying text.

89. See Koysza, supra note 4, at 791-92 (highlighting two distinct approaches that federal district courts use). The majority of case law cited in this Casebrief, as in Koysza’s article, is district court decisions. See id. at 791 (noting lack of circuit court guidance on issues associated with subject matter jurisdiction and giving named plaintiffs Rule 68 full offers of judgment). This is because the Third Circuit was the first court of appeals to address this issue when it decided Weiss v. Regal Collections. See Fisher, supra note 37, at 90 (remarking on anomalous fact that no federal court of appeals [prior to Weiss] has addressed whether Rule 68 offers of full judgment deprive courts of subject matter jurisdiction in class action context).


91. See, e.g., id. at 453 (“If a named representative’s claim becomes moot before class certification, the entire case is to be dismissed for lack of subject matter jurisdiction.”); see also Moore, supra note 3, § 68.03[3], at 68-17 (noting differing district court approaches).

92. 201 F.R.D. 452 (S.D. Iowa 2001).
for certification is made within the ten-day period in which the offer remains open.\textsuperscript{93} Both approaches have significant adherents.\textsuperscript{94}

In \textit{Ambalu}, the named plaintiff brought an action under the Fair Debt Collection Practices Act (FDCPA or "Act") on behalf of himself and a class of similarly situated individuals.\textsuperscript{95} Prior to class certification, the defendant made an offer of judgment equivalent to the maximum statutory allowance under the FDCPA.\textsuperscript{96} In dismissing the claim for lack of subject matter jurisdiction, the court stated: "[h]aving offered all that Ambalu could hope to recover through this litigation, 'there is no justification for taking the time of the court and the defendant in the pursuit of [a] miniscule individual claim[ ] which [the] defendant has . . . satisfied.'"\textsuperscript{97} As evidenced by this statement, the \textit{Ambalu} court explicitly refused to recognize the legal status of the putative class.\textsuperscript{98}

In \textit{Liles}, a factually similar case that also arose under the FDCPA, the United States District Court for the Southern District of Iowa reached the

\begin{itemize}
\item \textsuperscript{93} See Moore, \textit{supra} note 3, \S 68.03[3], at 68-17 (noting differing district court approaches). Although these cases do not find the claim moot, they do not explicitly rely on the relation-back doctrine. See Weiss v. Regal Collections, 385 F.3d 337, 347 n.16 (3d Cir. 2004) ("[S]everal cases have declined to dismiss the class claims on mootness grounds even when the Rule 68 offer came before the filing of a motion for class certification, but these cases have not explicitly relied on the relation back doctrine.");
\item \textsuperscript{94} Other courts have followed \textit{Ambalu}. 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 \textit{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 \textit{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 [in \textit{Ambalu}]."); modified by 201 F.R.D. 321 (S.D.N.Y. 2001). Some courts have followed \textit{Liles}. See, e.g., Bond v. Fleet Bank (RI), N.A., No. CIV.A. 01-177L, 2002 WL 373475, at *5 (D.R.I. Feb. 21, 2002) (refusing to allow defendant to render case moot by making offer of judgment six days after filing of 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 defendant from rendering case moot by making offer of judgment day after complaint was filed); 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' claim after the class action complaint has been filed but before the class has been properly certified.'" (quoting Goetz v. Crosson, 728 F. Supp. 995, 1000 (S.D.N.Y. 1999)));
\item \textsuperscript{95} See \textit{Ambalu}, 194 F.R.D. at 452 (articulating plaintiff's cause of action).
\item \textsuperscript{96} See \textit{id.} at 452 (noting that defendant offered plaintiff \S\S 1692(k)(a)(1)-(3) statutory maximum of \$1,000 and cost of action).
\item \textsuperscript{97} \textit{Id.} at 453 (quoting Abrams v. Interco, Inc., 719 F.2d 23, 32 (2d Cir. 1983)).
\item \textsuperscript{98} See \textit{id.} at 453 (rejecting plaintiff's argument that offer of judgment fails to compensate for entire class "because no class has been certified and plaintiff has not moved for certification").
\end{itemize}
opposite result. In *Liles*, the defendant conveyed a full offer of judgment to the plaintiff for the statutory maximum. The *Liles* court held that the plaintiff's claim was not moot and expressly rejected the reasoning of *Ambalu*, stating that "[i]n essence, the *Ambalu* court permitted the defendant to pay off the named plaintiff and preemptively force an end to the putative class action." The Third Circuit, however, did not adopt the approach of either *Ambalu* or *Liles*.

III. The Third Circuit "Relates-Back" in Weiss v. Regal Collections

*Weiss*, a case of first impression, required the Third Circuit to decide whether the district court erroneously deemed a case moot when an offer of judgment for a statutory maximum was made to the individual plaintiff, but offered no relief to the putative class. The Third Circuit found that the dismissal had been erroneous and reversed the district court's ruling. The court held that, absent undue delay in filing a motion for class certification, the plaintiff's filing for class certification should relate back to the complaint's original filing date. This preserved the court's subject matter jurisdiction over the claim.


100. See id. at 454 (stating facts).

101. See id. (explaining why court found logic of *Ambalu* flawed). The *Liles* court took issue with the *Ambalu* court for citing *Board of School Commissioners v. Jacobs*, 420 U.S. 128 (1975), to support its holding that a plaintiff's claim is moot when defendant conveys a full offer of judgment prior to class certification. See id. at 454 (criticizing *Ambalu* decision). The *Liles* court was quick to distinguish *Jacobs* from both *Ambalu* and the case before them. See id. (same). The distinguishing characteristic, according to the *Liles* court, was that the claims of the plaintiffs in *Jacobs* were mooted because of the plaintiffs' graduation from high school, not because of an offer of judgment forcing mootness on them. See id. (same); see also Roper v. Consurve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978) ("The notion that a defendant may short-circuit a class action by paying off the class representatives either with the acquiescence or, as here, against their will, deserves short shrift.").

102. See Weiss v. Regal Collections, 385 F.3d 337, 358 (3d Cir. 2004) (holding that Weiss can file motion in trial court). For a further discussion of the Third Circuit's refusal to follow either the *Ambalu* or *Liles* approach, see infra notes 140-61 and accompanying text.

103. See id. at 342 ("Because defendants' Rule 68 offer included no relief for the putative class, either under the provisions of the FDCPA or through the aggregation of class claims, we address the mootness question in that context."). The Third Circuit had one opportunity to address this issue prior to *Weiss*, but the case was dismissed on an unrelated procedural issue. See Colbert v. Dymacol, Inc., 302 F.3d 155 (3d Cir. 2002) (holding that if defendant makes full offer of judgment to named plaintiff prior to certification case is moot and court loses jurisdiction), vacated by 305 F.3d 1256, 1256 (3d Cir. 2002), dismissed en banc, 344 F.3d 334, 334 (3d Cir. 2003).

104. See Weiss, 385 F.3d at 348 (stating holding).

105. See id. (same).

106. See id. (same).
In 2001, Richard Weiss filed a class action complaint against Regal Collections ("Regal") alleging unfair debt collection practices. Before Weiss's attorneys filed for class certification, Regal's defense lawyers made a Rule 68 offer of judgment to Weiss of $1,000 plus reasonable attorneys' fees—the maximum amount that an individual can recover under the FDCPA. Weiss, however, declined to accept this offer of judgment.

Despite Weiss's rejection of the offer, Regal argued that Weiss's claim was rendered moot by the offer and moved to dismiss the case. The district court agreed, granting the defendant's motion to dismiss due to lack of subject matter jurisdiction. On appeal, Weiss argued that the offer of judgment by Regal did not moot his claim because he sought recovery for a putative nationwide class.

B. The Third Circuit's Analysis and Its Use of the Relation-Back Doctrine

In a unanimous decision the Third Circuit determined, as a threshold matter, that the offer made by Regal was indeed a full offer of judgment. In doing so, the Third Circuit joined the majority of courts, which have recognized that the FDCPA does not provide for declaratory or injunctive relief. After determining Regal's offer did provide the

107. See id. at 339 (stating facts).
110. See Weiss, 385 F.3d at 340 (recounting events at district court trial).
111. See id. (discussing trial court's holding).
112. See id. at 342 (phrasing Weiss's argument on appeal).
113. See id. at 340-42 (finding that offer of $1,000 plus reasonable attorneys' fees was statutory maximum relief allowed under FDCPA). Weiss's complaint had requested declaratory and injunctive relief. See id. at 340 (discussing whether defendant's offer was in fact offer of "full" judgment). The court, however, held that no injunctive or declaratory relief was available because there was no explicit provision in the FDCPA providing for declaratory or injunctive relief, and most courts have not found such relief available. See id. at 341-42 (stating holding). Because no injunctive or declaratory relief was available, the offer conveyed to Weiss provided all the relief available to him as an individual plaintiff. See id. at 342 (same).
maximum relief available to Weiss, the court turned its attention to the mootness issue.115

1. The Supreme Court Does Not Approve of Defendants Picking Off Named Plaintiffs

In analyzing the issue, the court found that Supreme Court case law indicated disapproval of defendants who use offers of judgment to pick off class action plaintiffs.116 The Third Circuit admitted that "[t]he question of mootness in the class action context is not a simple one."117 The court then turned to the Geraghty and Roper decisions for guidance.118

The Third Circuit noted that the Roper opinion expressed concern about a class action defendant’s ability to pick off plaintiffs.119 The Third Circuit was quick to note, however, that the issue addressed in Roper was not identical to the one at hand because a motion for class certification had been made and denied in Roper.120 The Weiss court also noted that the holding in Roper was a limited one.121 Nonetheless, the Third Circuit concluded that the central concerns about defendants picking off plaintiffs in Roper were at play in Weiss and similar cases under the FDCPA.122

115. See Weiss, 385 F.3d at 342 (beginning court’s analysis).
116. See id. at 342-44 (reciting Supreme Court case law); Sara Hoffman Jurand, Offer of judgment Does Not Derail Class Action, Third Circuit Holds, 40 TRAL 61 (2004) (discussing Weiss court’s analysis of relevant Supreme Court jurisprudence).
117. Weiss, 385 F.3d at 342 (citing Lusardi v. Xerox Corp., 975 F.2d 964, 974 (3d Cir. 1992)).
118. See id. at 342-44 (conducting case law analysis).
119. See id. at 343 (“Of special significance to this appeal, in Roper, the Supreme Court expressed concern at a defendant’s ability to ‘pick off’ named plaintiffs by mooting their private individual claims.”); see also Koysza, supra note 4, at 792-95 (“Courts and commentators alike have recognized the destructive effect on the class action device of the practice of picking off named plaintiffs.”).
120. See Weiss, 385 F.3d at 343 (“We recognize Roper addressed a different issue.”). In Roper, a motion for certification had been made and denied prior to the offer of judgment by the defendants. See Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 332 (1980) (discussing procedural posture of case). In Weiss, the offer of judgment was conveyed prior to a motion for class certification. See Weiss, 385 F.3d at 339 (discussing timeline of action).
121. See Weiss, 385 F.3d at 344 n.10 (“We also acknowledge Roper specifically limited its holding, stating: ‘Difficult questions arise as to what, if any, are the named plaintiffs’ responsibilities to the putative class prior to certification; this case does not require us to reach these questions.’” (quoting Roper, 445 U.S. at 340 n.12)).
122. See id. at 344 n.11 (“The rationale animating the Court’s determination [in Roper] ... speaks directly to the concerns present here.” (quoting White v. OSI Collection Servs., Inc., No. 01-CV-1343(ARR), 2001 WL 1590518 (E.D.N.Y. Nov. 5, 2001))).
2. Offers of Judgment Are Suspect in Class Actions

The application of Rule 68 is strained in the class action context. According to the Weiss court, offers of judgment to a named plaintiff threaten to "undercut close court supervision of class action settlements, create conflicts of interests for named plaintiffs, and encourage premature class certification motions." The court then compared the Weiss situation to that in Roper, and reasoned that if defendants are allowed to pick off plaintiffs through the use of Rule 68 offers of judgment less than two months after the filing of the original complaint, the viability of the class action procedure may be substantially undercut.

3. Offers of Judgment That Moot Putative Class Claims Contravene the Purpose of Rules 23 and 68, and Defeat the Intent of Congress

Allowing defendants to moot the claim of putative class members is contrary to the purposes of Rule 23. In Weiss, the Third Circuit quoted Roper while noting that one of the primary purposes of class action lawsuits

123. See id. at 344 ("As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class representative."). Most courts that have examined the application of Rule 68 offers employed in class actions have found Rule 68 applicable. See, e.g., Gordon v. Gouline, 81 F.3d 235, 239 (D.C. Cir. 1996) (allowing case to settle through Rule 68 offer); White v. Alabama, 74 F.3d 1058, 1062-63 (11th Cir. 1996) (same); Blair v. Shanahan, 38 F.3d 1514, 1517-18 (9th Cir. 1994) (same); Garrity v. Sununu, 752 F.2d 727, 730-33 (1st Cir. 1984) (same); Cotton v. Hinton, 559 F.2d 1326, 1329 (5th Cir. 1977) (same). Although the majority of courts find no problem with allowing Rule 68 offers in the class action context, at least two district courts have expressly prohibited such use of Rule 68 offers. See Schaake v. Risk Mgmt. Alternatives, Inc., 203 F.R.D. 108, 111 (S.D.N.Y. 2001) ("[I]t has long been recognized that Rule 68 Offers of Judgment have no applicability to matters legitimately brought as class actions pursuant to Rule 23."); Martin v. Mabus, 734 F. Supp. 1216, 1222 (S.D. Miss. 1990) (holding that Rule 68 is inapplicable to class actions because court approval is required before settlement).

124. Weiss, 385 F.3d at 344 n.12 (citing cases that have taken note of questionable application of Rule 68 to class action lawsuits); see also 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001.1, at 76 (2d ed. 1997) ("There is much force to the contention that, as a matter of policy [Rule 68] should not be employed in class actions."); MOORE, supra note 3, § 68.03[3], at 68-15 ("[P]olicy and practicality considerations make application of the offer of judgment rule to class and derivative actions questionable."); CONTE & NEWBERG, supra note 21, § 15.36, at 115 ("[B]y denying the mandatory imposition of Rule 68 in class actions, class representative will not be forced to abandon their litigation posture each time they are threatened with the possibility of incurring substantial cost for the sake of absent class members.")

125. See Weiss, 385 F.3d at 344 (highlighting tension between Rules 23 and 68).

126. See id. at 345 ("Allowing defendants to 'pick off' putative-lead plaintiffs contravenes one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action."); see also Zupanec, supra note 61 (discussing reasoning of Weiss court). For a detailed discussion of how Rule 68 offers of judgment defeat the purpose of class actions, see Greenstein, supra note 1, at 897-926 (summarizing Supreme Court's past treatment of class action mootness problem and exploring possible solutions).
is to allow plaintiffs to allocate their costs among the members of the class.\textsuperscript{127} The Weiss court also noted that the Supreme Court has recognized, "[c]lass actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."\textsuperscript{128} The Third Circuit held the above-mentioned purposes to be irreconcilable with Rule 68 offers of judgment.\textsuperscript{129}

Furthermore, the Third Circuit found that allowing plaintiffs to be picked off could lead to the wasting of judicial resources.\textsuperscript{130} This would be contrary to the purposes of Rule 68, which was enacted to promote settlements and avoid litigation.\textsuperscript{131} "Allowing plaintiffs to be 'picked off' at an early stage in a putative class action may waste judicial resources by 'stimulating successive suits brought by others claiming aggrievement,'" thereby failing to promote settlements or avoid litigation.\textsuperscript{132}

The Third Circuit also emphasized that allowing defendants to moot the claim of putative class members defeats the congressional intent behind the enactment of statutes such as the FDCPA.\textsuperscript{133} The Weiss court recognized that Congress specifically provided for class damages under the FDCPA, and that the Act was to be self-enforcing by private attorney generals.\textsuperscript{134} The court found that defendants served with a class action complaint could simply tender the maximum settlement amount, derailing the putative class and thereby frustrating the goal and enforcement mechanism of the FDCPA.\textsuperscript{135}

\textsuperscript{127} See Weiss, 385 F.3d at 344-45 ("A significant benefit to claimants who choose to litigate their individual claims in a class action context is the prospect of reducing their costs . . . ." (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 n.9 (1980))).

\textsuperscript{128} Id. at 345 (quoting Phillips Petroleum v. Shutts, 472 U.S. 797, 809 (1985)). The Weiss court also stated that "[t]his 'cost-spreading can also enhance the means for private attorney general enforcement and the resulting deterrence of wrongdoing.'" Id. at 345 (quoting In re Gen. Motors Corp., Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995)).

\textsuperscript{129} See id. at 344-45 (explaining that allowing defendants to derail class actions through offers of judgment negates benefits of class action device).

\textsuperscript{130} See id. at 345 (noting that Rule 68 serves to preserve judicial resources through promoting settlements).

\textsuperscript{131} See id. (providing reasons for holding that tension between Rules 23 and 68 should be resolved in favor of Rule 23).

\textsuperscript{132} Id. (quoting Roper, 445 U.S. at 339).

\textsuperscript{133} See id. (rejecting defendant's argument that offer of judgment rendered case moot partly because it would "frustrate Congress's explicit directive").

\textsuperscript{134} See id. (noting that statutes such as FDCPA are enacted by Congress with class actions envisioned as means of resolving disputes).

\textsuperscript{135} See id. (discussing reasons why allowing defendants to pick off plaintiffs in class action frustrates congressional intent).
4. Relation-Back Is the Proper Way to Resolve the Tension Between Rules 23 and 68

The Weiss court ultimately held that, in situations where there is no undue delay in filing for certification by the plaintiff, the relation-back doctrine should apply. In analyzing the relation-back doctrine, the court noted that in FDCPA cases offers of judgment are often made prior to a court's consideration of class certification. The Weiss court then turned to existing precedent, noting that the Supreme Court has used the relation-back doctrine in the class action context, but under different circumstances. Although the court noted that Weiss's claims were not "inherently transitory," as were the claims in Riverside, the Weiss court nonetheless applied the relation-back doctrine because the claim was "acutely susceptible to mootness," rendering the claim transitory.

IV. The Approach of the Third Circuit Is Likely to Be Adopted in Other Circuits

Although no other circuit court has addressed the precise issue presented in Weiss, case law indicates that the relation-back doctrine is likely to be adopted in other circuits and employed where offers of judg-

136. See id. at 348 (stating holding). Although the Weiss court did not define "undue delay," it did not find six weeks to be an undue delay. See id. at 348 n.18 (noting that defendants made offer of judgment six weeks after amended complaint was filed). For further discussion of the rules governing the timely filing of motions for certification, see supra notes 29-31 and accompanying text.

137. See Weiss, 385 F.3d at 346 (recognizing that FDCPA plaintiffs are especially susceptible to being picked off); see also Koysza, supra note 4, at 790 (emphasizing importance of "precise timing" as it relates to employing Rule 68 in successful litigation strategy).

138. See id. at 346-47 (summarizing history of relation-back doctrine in Supreme Court jurisprudence). The Supreme Court has repeatedly expanded upon the relation-back doctrine since its introduction. See Sosna v. Iowa, 419 U.S. 393, 399 (1975) (introducing relation-back doctrine as means to avoid mootness of cases); U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980) (applying relation-back doctrine to claims that are "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"); County of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991) (applying "inherently transitory" exception to claims). For a further discussion of these cases, see supra notes 51-88 and accompanying text.

139. See Weiss, 385 F.3d at 347 (quoting Comer v. Cisneros, 37 F.3d 775, 797 (2d Cir. 1994)) (justifying application of relation-back doctrine). Claims under the FDCPA and similar statutes are deemed acutely susceptible to mootness because such statutes set the maximum recovery for individuals at relatively low amounts. See Comer, 37 F.3d at 797 (explaining reasons for recognition of claims as acutely susceptible to mootness). Comer involved a series of racial discrimination suits against a local administrator of public housing. See id. at 780 (describing facts). Because of population fluidity in the housing market, the court reasoned that the amount of harm caused to plaintiffs remained constant, albeit at a relatively low amount. See id. at 797 (emphasizing reason for disagreement with lower court).
ment are made prior to class certification.\textsuperscript{140} Moreover, legal scholars have recognized that the approach taken by the Third Circuit is the logical extension of previous Supreme Court cases.\textsuperscript{141} These scholars also advocate that the Third Circuit’s relation-back approach is the most appropriate way to resolve the tension between Rules 23 and 68.\textsuperscript{142}

A. Adoption of the Weiss Approach by Other Circuits

As noted earlier, following the Sosna case, it became well established that once the court has certified the class, the mooting of the named plaintiff’s claim does not deprive the court of subject matter jurisdiction.\textsuperscript{143} Several courts of appeals have expanded this holding by recognizing that a class obtains a separate status not only once certification has been granted, but also once a party has filed for class certification.\textsuperscript{144} The Fifth Circuit is particularly likely to follow the Weiss approach because of its concern with defendants deliberately picking off plaintiffs.\textsuperscript{145}

\textsuperscript{140} For a discussion of why case law indicates that other circuits will adopt the approach of the Third Circuit, see infra notes 141-52 and accompanying text.

\textsuperscript{141} See Kysza, supra note 4, at 802-05 (advocating extension of Riverside’s “inherently transitory” mootness exception to prevent mootness prior to plaintiff’s filing for class certification); Moore, supra note 3, § 68.03[3] at 68-19 (recognizing that Weiss approach is preferable because Supreme Court has approved use of relation-back doctrine under distinguishable yet similar circumstances).

\textsuperscript{142} See, e.g., Kysza, supra note 4, at 802-05 (predicting use of Riverside analysis); Moore, supra note 3, § 68.03[3], at 68-19 (commending Weiss court analysis). But see Greenstein, supra note 1, at 905-25 (arguing that relation-back doctrine is not best way to resolve mootness issue in class action context). Greenstein states: “If a case or controversy is needed for a federal court constitutionally to exercise jurisdiction, and if class certification is necessary to raise the class claim to case-or-controversy status, then it follows that the mooting of the class representative’s claims prior to certification ends the court’s [A]rticle III jurisdiction.” Id. at 905-06. He doubts that the relation-back “fiction” resolves this dilemma and instead argues that the case or controversy requirements are satisfied when the injured parties plead for redress from the court. See id. at 926 (stating conclusion).

\textsuperscript{143} For a discussion of the Supreme Court’s determination that class certification prevents the entire action from being deemed moot when the named plaintiff’s individual claim is rendered moot, see supra note 51 and accompanying text. For a detailed listing of cases allowing actions to proceed once certification has been granted, regardless of whether the named plaintiff has a “stake” in the issue, see Romualdo P. Eclavea, Mootness of Class Representative’s Claim Pending Litigation as Precluding Maintenance of Class Action Under Rule 23 of Federal Rules of Civil Procedure, as Amended in 1966, 33 A.L.R. Fed. 484, 510-15 (2004).

\textsuperscript{144} See, e.g., 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 interest of class members before the court [to] . . . avoid a mootness artificially created by the defendant . . . .”); Roper v. Consecure, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978) (noting that upon filing of class action complaint, plaintiffs assume responsibility for unidentified members of class), aff’d sub nom. Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326 (1980).

\textsuperscript{145} See Roper, 445 U.S. at 339 (lamenting improperity of allowing defendants to pick off named plaintiffs).
The Fifth Circuit has stated: "[t]he notion that a defendant may short circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift."\(^{146}\) The Fifth Circuit has continued to express this concern in later cases.\(^{147}\) Furthermore, the Fifth Circuit is likely to adopt the approach of the Third Circuit because the Fifth Circuit has applied the relation-back doctrine, albeit to factually different situations.\(^{148}\)

At least one district court, deciding a case factually similar to \textit{Weiss}, has explicitly relied upon the relation-back doctrine to retain subject matter jurisdiction prior to a motion for class certification.\(^{149}\) Of particular concern to that court was the intentional nature of the defendant's action in rendering the class representative's claim moot.\(^{150}\) The court stated that allowing defendant's to pick off a named plaintiff essentially renders the plaintiff's claim "so transitory that the court realistically could not address the class certification issue, or, more precisely, the plaintiff realistically could not even bring the motion."\(^{151}\) Although the court was specific

\(^{146}\) Roper v. Consunve, Inc., 578 F.2d 1106, 1110 (5th Cir. 1978).

\(^{147}\) See, e.g., Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1049 (5th Cir. 1981) (asserting reasons why defendants should not be permitted to pick off named plaintiff through offer of judgment).

\(^{148}\) See \textit{id.} at 1048-49 (applying relation-back doctrine to prevent mootness where motion for certification was denied). In \textit{Zeidman}, the court denied the plaintiff's motion to certify the class. See \textit{id.} at 1032 (stating facts). An offer of judgment was then made to the plaintiff, rendering their claim moot. See \textit{id.} (same). The \textit{Zeidman} court noted that a defendant could simply tender a plaintiff the full amount of their personal claim and derail a putative class action. See \textit{id.} at 1049-50 (providing reasons for application of relation-back doctrine).

\(^{149}\) See White v. OSI Collection Servs., Inc., No. 01-CV-1343(ARR), 2001 WL 1590518, at *5-6 (E.D.N.Y Nov. 5, 2001) (applying relation-back doctrine to prevent mootness of class action). In \textit{White}, the defendant made an offer of judgment just one day after filing an answer and only eleven days after the plaintiff filed a complaint under the FDCPA. See \textit{id.} at *1 (stating facts). The plaintiff never filed a motion for certification but, nonetheless, requested a promotion conference where she expressed an intent to seek certification of the class. See \textit{id.} (same).

\(^{150}\) See \textit{id.} at *4-5 (examining cases where courts have noted importance of defendant's intent to pick off plaintiffs when deciding whether to hold claim as moot). The \textit{White} court noted that many of the cases holding defendant's intent as relevant did not involve application of the relation-back doctrine \textit{prior} to certification. See \textit{id.} (distinguishing current case from other Second Circuit cases). Nonetheless, the \textit{White} court held, "[b]ecause the considerations animating the courts' deliberations in these [other] cases, however, are identical to the concerns present in this case, it is appropriate to apply the relation back doctrine to the specific facts and circumstances of this case . . . ."). \textit{Id.}

\(^{151}\) Id. at *4. The \textit{White} court admitted that the plaintiff's claim was not inherently transitory. See \textit{id.} at *4 n.7 (explaining reasons for applying relation-back doctrine). The court took the same approach later used by the Third Circuit, however, noting that the claims were "acutely susceptible to mootness" and, therefore, should be treated as inherently transitory. See \textit{id.} (citing Comer v. Cisneros, 37 F.3d 775, 797 (2d Cir. 1994)) (noting that although "the nature of the plaintiff's claim is not inherently transitory" FDCPA provides maximum award of $1,000, "[i]t is financially feasible for the defendant to buy off successive plaintiffs in the hopes of preventing class certification").
in limiting its holding to the facts at hand—essentially applying relation-back where there is no undue delay by the plaintiff—it nonetheless indicates that other courts are amenable to the approach taken by the Third Circuit in Weiss.\textsuperscript{152}

\section*{B. Discussion in the Legal Community Indicates That the Approach of the Weiss Court Will Be Adopted in Other Circuits}

Prior to the Weiss decision, one commentator advocated applying the Riverside “inherently transitory” exception to cases in which defendants pick off plaintiffs.\textsuperscript{153} The author argued that, although many class action complaints are not “inherently transitory,” these complaints should nonetheless be treated as such.\textsuperscript{154} According to the author, the Riverside holding was essentially premised upon the Court’s refusal “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.”\textsuperscript{155} That author concluded that a named plaintiff’s class certification motion should relate back to the date of the filing of the original complaint because, when defendants pick off plaintiffs, their claims are rendered transitory through no fault of their own.\textsuperscript{156}

Similarly, other legal scholars argue that the Weiss decision was correct.\textsuperscript{157} Moore’s Federal Practice examined the approach taken by the Third

\begin{quotation}
\textsuperscript{152} See id. at *6 (“At least in the limited circumstances presented by the instant case, therefore,—when defendant’s offer of judgment comes very early in the litigation and before a plaintiff . . . can reasonably bring a motion to certify—it is proper to apply the relation back exception even though no motion for class certification has yet been filed.”).

\textsuperscript{153} See Koyzsa, supra note 4, at 804 (advocating application of relation-back doctrine to cases involving offers of judgment prior to class certification). Prior to advocating use of the relation-back doctrine, Koyzsa enumerates four specific reasons why defendants should not be allowed to pick off plaintiffs. See id. at 793-98 (explaining why courts should adopt approaches to provide protection from mootness until class certification decision is rendered). According to Koyzsa, the picking off of plaintiffs should not be permitted because: (1) it deprives plaintiffs of the motivation and ability to bring their claims; (2) it creates a multiplicity of suits; (3) it creates a “race” to the courthouse; and (4) it hinges the survival of the class action on the timing of the motion for certification. See id. (same). Relation-back avoids all of these difficulties. See id. (same).

\textsuperscript{154} See id. at 804 (“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.”).

\textsuperscript{155} Id.

\textsuperscript{156} See id. at 804-05 (endorsing judicial use of relation-back doctrine in situations factually similar to Riverside).

\textsuperscript{157} See Moore, supra note 3, § 68.03[3], at 68-19 (commending Weiss court); William W. Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial Ch. 10 ¶ 10:352 [15.7(c)] (2004) (concluding that reasoning of Weiss court seems correct); Paul Mollica, More Daily Developments in EEO Law (Sept. 30, 2004), at http://www.mmbmlaw.com/CM/DailyDevelopments/September2004.asp (“The court did not foreclose entirely the use of Rule 68, such as where plaintiff unreasonably delays moving for class certification. But in the
Circuit in Weiss and deemed it to be the most suitable for resolving the tension between Rules 23 and 68. In Moore’s Federal Practice, the author argues that the relation-back analysis employed by the Supreme Court in Riverside, and adopted by the Third Circuit in Weiss, should be used in all class action cases where the filing of the class certification was not unduly delayed. Therefore, “if a Rule 68 offer that would moot the named plaintiff’s claim is made before the district court has had a reasonable opportunity to rule on class certification, the court should be able to retain jurisdiction until it has a chance to decide whether to certify the class.” This, of course, is the approach adopted in Weiss.

V. Conclusion

The conflict between Rules 23 and 68 should be resolved in favor of Rule 23 through the application of the relation-back doctrine. The Third Circuit approach is the best suited to ensure that Rule 23 is “construed and administered to secure the just, speedy, and inexpensive determination of every action.” Were it not for the class action device, aggrieved persons with claims that are not economically feasible to pursue in the traditional lawsuit format would be without legal redress. The relation-back doctrine should be adopted and employed by the courts to ensure that the class action device remains a viable means of legal redress for those who were intended to benefit from its use.

Dennis Lueck