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Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of th Federal Rules of Civil Procedure?

NOTES

DOES MOOTING OF THE NAMED PLAINTIFF MOOT A CLASS SUIT COMMENCED PURSUANT TO RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE?

I. INTRODUCTION

No one can doubt the rapidly increasing utilization[1] of the class action.[2] Yet, the relative novelty of any significant application of this procedural weapon in federal jurisprudence has laid bare various problems which not long ago had been obscured or wholly concealed by less frequent utilization. One such problem, the subject of the present article, concerns the proper disposition of a class action whose representative plaintiff has been rendered moot.

a) The Concept of Mootness

At an early date,[3] English courts delimited the judicial process to cases presented in an adversary context and involving an actual controversy.[4] In the United States, this delimitation was not judicially but constitutionally imposed, by the adjuration of article III, section 2 restricting the federal judicial power to "cases" or "controversies."[5] In determining which suits fall within the scope of the "case" or "controversy" requirement and hence within the ambit of

1. Such utilization of class actions was deterred somewhat by the Supreme Court in *Snyder v. Harris*, 394 U.S. 332 (1969), where the Court held that class members could not aggregate their individual claims to satisfy the jurisdictional amount requirement imposed upon diversity and federal question cases in federal court. The impact of *Snyder* is lessened, however, by the fact that its application does not extend to class actions initiated in state court, or to federal class actions based upon a jurisdictional provision not requiring a claim in excess of $10,000.

2. Note, *Appealability of a Class Action Dismissal: The "Death Knell" Doctrine*, 39 U. CHI. L. REV. 403 (1972).

3. *See* Coxe v. Phillips, 95 Eng. Rep. 152 (1736), wherein the court held that an attempt to conduct a fictitious lawsuit on fabricated issues was contempt of court.

4. *See generally* Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125 (1945). [hereinafter cited as Diamond].

5. U.S. CONST. art. III, § 2 provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two

federal judicial power, the courts have established the rule that they have no power to decide "moot" cases.[6] In determining whether or not a particular case is moot, the traditional test has been whether, at all stages of the litigation, there is an "actual controversy, and adverse interests."[7] Where there is no real dispute between the plaintiff and defendant, either because the suit is seen to have been collusive from its inception,[8] or through subsequent events an originally extant controversy has been extinguished,[9] or where the questions sought to be reviewed are totally abstract,[10] or the happening of events has rendered it impossible for the court to grant any effectual relief,[11] the cause will be treated as moot.

A finding of mootness is of fundamental significance, for it connotes the absence of a "case" or "controversy"[12] without which a federal court is powerless to adjudicate.[13]

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or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

See generally Golden v. Zwickler, 394 U.S. 103 (1969); Baker v. Carr, 369 U.S. 186 (1962); Muskrat v. United States, 219 U.S. 346 (1911); R. HARRIS, THE JUDICIAL POWER OF THE UNITED STATES (1940); Borchard, *Justiciability*, 4 U. CHI. L. REV. 1 (1936); Note, *What Constitutes a Case or Controversy Within the Meaning of Article III of the Constitution?*, 41 HARV. L. REV. 232 (1927).

6. *See* North Carolina v. Rice, 404 U.S. 244, 246 (1971); Powell v. McCormick, 385 U.S. 486, 496 n.7 (1969); Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964); J. MICHAEL, THE ELEMENTS OF LEGAL CONTROVERSY 94-117 (1948).

7. Lord v. Veazie, 49 U.S. (8 How.) 251 (1850).

8. *Id. Accord*, United States v. Johnson, 319 U.S. 307 (1943). *See also* Chicago & G.T. Ry. v. Wellman, 143 U.S. 339 (1892). In *Wellman*, the Supreme Court stated:

> [I]t never was thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislature's act.

Id. at 345.

9. An actual controversy may be extinguished by subsequent events either by a change in the controlling fact situation or a change in the existing law. *See* Diamond at 132-36.

10. *E.g.*, Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928); Hayburn's Case, 2 U.S. (2 Dall.) 409 (1796).

11. *E.g.*, Mills v. Green, 159 U.S. 651 (1895).

12. *See* note 5 *supra* and accompanying text.

13. *See* Diamond at 127, where it is stated: "When a court decides that a case before it is moot, it ousts itself of jurisdiction." In *California v. San Pablo & Texas Ry.*, 149 U.S. 308 (1893), the Supreme Court observed:

> [This Court is not empowered to decide] moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

Id. at 314.

Account should be taken of the "exception" to the mootness doctrine, which was conceived in *Southern Pacific Terminal Co. v. ICC*.[14] There, plaintiffs sought judicial review of an adverse administrative order which by its terms expired after two years. Over defendant's claim of mootness, the Supreme Court held that it had jurisdiction to adjudicate the controversy despite the expiration of the specific order upon which plaintiffs had initiated suit, explaining that

> |t|he questions involved in orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated by short term orders capable of repetition, yet evading review . . . .[15]

This exception to the mootness doctrine recognizes that certain recurrent claims are so intrinsically ephemerous that their review would be effectively precluded under a strict application of the mootness doctrine. Hence, an exception to application of the doctrine was devised, to accomodate plaintiffs whose claims were "capable of repetition, yet evading review."[16]

The generally accepted reasons for the mootness doctrine are easily stated. First is the basic precept of our jurisprudence that the judicial process functions best in an adversary context, wherein all claims are likely to be presented vigorously and extensively. It is feared that if individuals without an adverse interest could litigate, the adversary system would be prone to malfunction.[17] Secondly,

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But cf. Alton & So. Ry. v. International Ass'n of Mach. & A.W., 463 F.2d 872 (D.C. Cir. 1972). In *Alton*, it was held that mootness is of two dimensions—constitutional and administrative, implying that federal courts often utilize mootness, apart from any constitutional considerations, as a tool of judicial administration, enabling a court to pick and choose the cases it desires to hear by application of the mootness doctrine.

14. 219 U.S. 498 (1911).

15. *Id.* at 515.

16. This principle has been applied in a variety of contexts. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (pregnancy); Dunn v. Blumstein, 405 U.S. 330 (1972) (durational residency requirements for voting).

17. R. BISCHOFF, SUPREME COURT AND SUPREME LAW 26-35 (E. Cahn ed. 1954); P. FRUEND, ON UNDERSTANDING THE SUPREME COURT 79-80, 84-88 (1954); Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 COLUM. L. REV. 867 (1965); Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. PA. L. REV. 772 (1955). The latter Note states, "This adversary system depends upon self interest as the motive best suited to bring all pertinent facts, policies, and legal issues before the court." *Id.* at 773.

there is the consideration of judicial economy.[18] Thus, it is believed that the function of the courts in resolving disputes is so time-consuming and important, that they should not misuse their time by passing on the merits of nondisputes. To do so, it is presumed, would make an already overburdened judicial docket more onerous.[19]

b) Mootness in a Class Action Context

The class action was an invention of equity,[20] to enable a court to proceed to a decree in suits where the number of those interested in the subject of the litigation was so great that their joinder as parties in conformity to the usual rules of procedure would have been impracticable, and where one or more members of the class sued or was sued on behalf of all.[21] The prevailing recognition in federal jurisprudence of the class action is found in Rule 23 of the Federal Rules of Civil Procedure.[22] The burgeoning occasions in which the parties involved in litigation are many, compounded with the specter of a multiplicity of suits, has generated an increasing utilization of the class action.[23] Such recent utilization has revealed

18. *See* Notes, *supra* note 17.

19. Note, *Moot Administrative Orders*, 53 HARV. L. REV. 628, 629 (1940).

20. The class suit had its origins nearly three hundred years ago in the English Court of Chancery, which developed the bill of peace to facilitate the adjudication of such disputes. *See* City of London v. Richmond, 23 Eng. Rep. 870 (1701); How v. Tenants of Bromsgrove, 23 Eng. Rep. 277 (1681); Brown v. Vermuden, 22 Eng. Rep. 797 (1676). At an early time, American federal courts authorized such suits. *See, e.g.*, West v. Randall, 29 F. Cas. 718 (No. 17,424) (C.C.D.R.I. 1820). Because of their origin in the English Chancery Court, class suits in the United States were originally of equitable cognizance only. The fusion of law and equity in the Federal Rules of Civil Procedure made class actions in federal courts under Rule 23 available in cases at law as well as in actions in equity. *See generally* Z. CHAFEE, SOME PROBLEMS OF EQUITY 220-42 (1950); Wheaton, *Representative Suits Involving Numerous Litigants*, 19 CORNELL L.Q. 339 (1934).

21. Hansberry v. Lee, 311 U.S. 32, 41 (1940).

22. FED. R. CIV. P. 23 (a). as amended in 1966, provides:

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

23. Pomerantz, *New Developments in Class Actions—Has Their Death Knell Been Sounded?*, 25 BUS. LAW. 1259 (1970).

The class action is mushrooming throughout the courts of our land. It has become one of the most socially useful remedies in history. Millions of victims of securities frauds, anti-trust violations and an endless variety of consumer wrongs are, thanks

several hitherto latent problems. One such problem, the topic of this note, concerns the question of whether a class action must be adjudged moot when the named plaintiff is so adjudged. Several, though discordant, cases have considered this issue. It is to a survey of these cases that the ensuing two sections are devoted.

II. Cases Holding that the Mooting of the Named Plaintiff Does Not Moot the Class Action

A great majority of pertinent cases have concluded that the mooting of the named plaintiff does not render a class action moot. Such a conclusion has typically been reached via application of one of a variety of policies and fictions, which have been judicially fashioned to circumvent the mootness doctrine. The devices most commonly employed are amenable to the categorization of the following subsections. Their propriety will be considered in section V.

a) Mootness Is Determined at the Inception of the Class Action

An undisguised fiction which various courts have seized upon to avoid pronouncing a class action moot when the named plaintiff is so adjudged, is to simply hold that if the named plaintiff is a competent litigant at the commencement of the class suit, he remains so throughout, to the extent that his subsequent mootness will be of no effect either upon himself or upon the class action.

Illustrative of this sophistry is the recent case of *Moss v. Lane Co., Inc.*[24] Therein, a suit for class and individual relief was filed under Title VII of the 1964 Civil Rights Act.[25] Subsequent to the filing of the suit, but before a final determination, the named plaintiff's individual claim was dismissed on the ground that there was no showing that he had been personally discriminated against. The trial court accordingly dismissed the entire case, under the assumption that the dismissal of the individual claim took with it the class action.[26] On appeal, the Fourth Circuit Court of Appeals reversed,

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to the class action device, now able to gain access to our courts.

Id. at 1259.

24. 471 F.2d 853 (4th Cir. 1973).

25. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000(e), prohibits employers in any industry affecting commerce and employing twenty-five or more employees from discriminating in employment practices on the basis of race, color, religion, sex or national origin.

26. 471 F.2d at 855.

exhorting that if the plaintiff were a member of the class at the commencement of the action and his competency as a representative then determined or assumed, the subsequent dismissal or mooting of his individual claim should not operate to render moot the action of the class.[27]

Moss is not without precedential underpinnings. In *Gaddis v. Wyman*,[28] plaintiff Gaddis filed a class action in federal district court, assailing section 139(a) of the New York Social Services Law as violative of the equal protection clause. This statute required social service officials to deny public assistance to any person who applied for such assistance within one year of his or her arrival in the state. After filing the suit, plaintiff's attorney was informed that despite section 139(a), plaintiff would thereafter receive assistance. As a result of this change in circumstances, defendant moved to dismiss the class action on the ground that the entire case was mooted by the mooting of the sole named plaintiff. The district court rejected defendant's theory, holding that the mooting of plaintiff Gaddis did not render the class action moot, since "when the action was commenced . . . Gaddis *was* properly a representative of the purported class."[29]

To the same effect is *Gatling v. Butler*.[30] Gatling had been declared a "delinquent" by a Connecticut juvenile court. She sought review of this pronouncement in a Connecticut superior court, but was prevented from doing so by her inability to comply with a state statute requiring the payment of a fee as a prerequisite to the docketing of an appeal. Gatling initiated a class action in the Connecticut District Court, alleging that this statute constituted an abridgment of her fourteenth amendment rights. While the federal action was pending, Gatling was informed by state officials that she had been granted leave to file her appeal in the superior court without payment of the fee. Defendant thereupon moved for dismissal of the class action on the ground that the waiving of the fee requirement as to Gatling effectively mooted both her and the class which she alone represented. The district court, in denying defendant's motion, reasoned that Gatling must be deemed to have been a pro-

27. *Id.*
28. 304 F. Supp. 713 (S.D.N.Y. 1969).
29. *Id.* at 715.
30. 52 F.R.D. 389 (D. Conn. 1971).

per representative of the class from the time the suit was initiated.[31] As such, the court implied, any subsequent mooting of Gatling's individual interest would not affect her competency to represent the class, and hence, could have no effect upon the class action itself.[32]

In *Thomas v. Clarke*,[33] plaintiff had filed a class action challenging the constitutionality of a Minnesota statute providing that any person who had instituted an action to replevy personalty could obtain immediate possession of such property at any time prior to defendant's answer. Settlement of the state court replevin action in which plaintiff had been involved, defendant argued, mooted plaintiff's claim and thereby rendered the class action moot. The Minnesota District Court, citing *Gatling*[34] and *Gaddis*,[35] held that where the named plaintiff is a member of the class which he purports to represent at the commencement of that suit, he is a proper representative and remains so throughout the litigation.

The preceding four decisions represent one of many prevailing schools of juridical thought concerning the proper disposition of a class suit whose representative plaintiff has been mooted. Under this view, the competency of the representative in a class suit is determined at the commencement of such a suit, with the consequence that subsequent mooting of the representative is of no effect either upon him or upon the class which he represents.[36]

b) Class Suits in Which the Controversy Is "Capable of Repetition, Yet Evading Review"

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31. *Id.* at 395.

32. *Id.*

33. 54 F.R.D. 245 (D. Minn. 1971).

34. *See* note 30 *supra* and accompanying text.

35. *See* note 28 *supra* and accompanying text.

36. *Contra*, Carroll v. Associated Musicians, 316 F.2d 574 (2d Cir. 1963). In *Carroll*, plaintiff orchestra leaders brought a class action to enjoin defendant union from collecting surcharges, taxes and welfare payments. After the class action had been instituted, the representative plaintiffs were expelled from the union. As such, they were no longer required to make the challenged payments. The Second Circuit Court of Appeals found that as a result no real controversy existed as between the named plaintiffs and the defendant union. It accordingly dismissed the entire suit. *See also* Sawyers v. Grand Lodge, I.A.M., 279 F. Supp. 747 (E.D. Mo. 1967). There, a local union officer filed a class suit alleging that his dues and those of the class which he purported to represent had been increased illegally. The named plaintiff was a competent representative at the commencement of the class action, though he was subsequently expelled from the union. Relying on *Carroll*, the district court concluded that where a representative plaintiff is mooted after the institution of the class suit, he is not competent to represent the class.

The established exception to the mootness doctrine, which permits courts to adjudicate seemingly moot controversies which are "capable of repetition, yet evading review,"[37] has been applied in the class action context to sustain the competency of a seemingly moot representative plaintiff, and thereby the class he purports to represent. Illustrative of this utilization of the mootness exception is the recent United States Supreme Court decision of *Roe v. Wade*.[38] Roe, a pregnant woman, had initiated a class suit in a specially convened three-judge federal district court challenging the constitutionality of the Texas abortion laws. She appealed an order of the three-judge court that had granted declarative but denied injunctive relief directly to the Supreme Court. During the pendency of this appeal, Roe's pregnancy was naturally terminated. Appellee thereupon urged that since the representative plaintiff's claim had become moot, the entire class suit should be dismissed as moot. The Supreme Court, disagreeing with appellee, concluded that the termination of Roe's pregnancy did not moot her individual claim, and consequently, neither was the class action mooted. It observed,

> If . . . the termination of pregnancy makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. . . . Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review."[39]

A similar result was reached in *Torres v. New York State Department of Labor*.[40] Plaintiff had individually brought an action in federal court challenging as violative of due process various sections of the New York Labor Law[41] which authorized the termination of unemployment compensation benefits without a prior hearing. While the suit was pending, defendant granted plaintiff a hearing, at which the termination of plaintiff's welfare payments was upheld. Following the determination of this hearing, plaintiff moved in the district court for an order declaring that his action could

37. *See* note 15 *supra* and accompanying text.
38. 410 U.S. 113 (1973).
39. *Id.* at 125.
40. 318 F. Supp. 1313 (S.D.N.Y. 1970).
41. N.Y. LABOR LAW §§ 597, 598, 620 (McKinney 1965).

proceed as a class action. Defendant opposed this request on the ground that plaintiff was no longer competent to represent a class of persons challenging pre-hearing termination of benefits, because he himself had received a full-fledged hearing, and that as a result, the entire matter was moot. The district court held that the action could proceed as a class action and that plaintiff was a proper representative of the class. It seemed impressed with the fact that in several other cases the defendant satisfied the named plaintiff's individual grievance and then urged that the case was moot, or not appropriate as a class action for lack of a representative plaintiff.[42] Seemingly impelled by such evidence, the court continued:

> In cases such as this there is a conceivable danger that the defendants could always grant the named plaintiff a hearing and then claim that the matter is moot . . . in an effort to evade a judicial determination.[43]

Such cases evidence a second means by which courts have breathed vitality into what appears, under traditional concepts, to be a moot case. Thus the competency of a representative plaintiff will be sustained, and thereby the class which he represents, where the conduct or conditions which seemingly moot his individual claim are "capable of repetition, yet evading review."[44]

c) A Judicial Gallimaufry

The remaining cases reaching a result analogous to that of the above subsections represent a mélange of circumstances and ratiocinations, incapable of categorization.

Some courts, if they perceive a willful effort by the defendant

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42. 318 F. Supp. at 1317.

43. *Id.* at 1318.

44. *See* note 15 *supra* and accompanying text. *Accord*, Moore v. Ogilvie, 394 U.S. 814 (1968); Hall v. Beals, 396 U.S. 45 (1969) (Brennan, J., dissenting); *cf.* Vaughan v. Bower, 313 F. Supp. 37 (E.D. La. 1970), *aff'd mem.*, 400 U.S. 884 (1970). In *Vaughan*, defendant moved to dismiss plaintiff's class action, in which plaintiff represented mentally incompetent inmates of the Arizona State Hospital who were not residents of Arizona and who were returned to their native states pursuant to a state law authorizing such transfer, on the ground that it had been rendered moot by the absence of any persons in the class which plaintiff purported to represent. The court denied defendant's motion. Observing that each year thirty to thirty-five patients were returned to their respective states under the statute, it concluded that it was the very administrative action challenged which produced the short life of the class plaintiff wished to represent, and that hence, "what is involved . . . is a problem capable of repetition, yet evading review." 313 F. Supp. at 40.

to render a class action moot by granting the named plaintiff the relief he individually seeks, fall back upon the pronouncement of the Supreme Court in *United States v. W.T. Grant, Co.*:[45]

> Voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot.[46]

This pronouncement was applied in *Davis v. Caldwell*,[47] a case involving a class suit challenging the Georgia workmen's compensation law.[48] The defendant in *Davis* had granted to the representative plaintiff the relief she individually sought, thereafter moving to dismiss the entire action as moot for want of a competent representative. The specially convened three-judge district court, wanting no part of this machination, declared that the defendants could not be allowed to moot this case by the use of a "resist and withdraw" technique. Were this not so, a defendant's economic power would enable him "to avoid decisions such as the one sought here, by settling individual claims."[49]

The *Grant* ruling has been applied by several courts in cases involving class actions challenging racial discrimination. This occurred in *Smith v. YMCA of Montgomery*.[50] Plaintiffs, who had been denied admission to a YMCA day camp allegedly on account of race, brought a class suit in federal court, seeking an injunction prohibiting the YMCA from operating any of its programs in a racially discriminatory way. Shortly after the suit was filed, defendant notified plaintiffs that they had been accepted as members in the day camp program. Defendant then moved to dismiss the action as moot. The Fifth Circuit Court of Appeals held that mootness was not so easily established, reasoning that subsequent remedial actions taken allegedly to avoid a cause of action strongly mitigate against a finding of mootness, particularly where the plaintiffs present a prima facie showing of racial discrimination.[51]

To the same effect is *Cypress v. Newport News General and*

45. 345 U.S. 629 (1952).
46. *Id.* at 632.
47. 53 F.R.D. 373 (N.D. Ga. 1971).
48. GA. CODE ANN. §§ 114-703, 114-709 (1973).
49. 53 F.R.D. at 376.
50. 462 F.2d 634 (5th Cir. 1972).
51. *Id.* at 645.

Nonsectarian Hospital Association.[52] Cypress, a black doctor, brought a class action challenging the racially discriminatory policies of the defendant hospital, claiming that it denied black doctors staff privileges. During an appeal from a district court ruling adverse to plaintiff, defendant granted Cypress active staff privileges, later citing this development in support for a motion to dismiss the appeal as moot. The Fourth Circuit Court of Appeals decided against defendant on the mootness question, finding as "suspect, to say the least" the fact that defendant, a few weeks before the case was heard on appeal, voluntarily reversed a whole history of racial discrimination in granting Cypress staff privileges.[53]

Perhaps the principal case dealing with the proper disposition of a class suit challenging alleged racial discrimination, and whose representative plaintiff has been rendered moot, is *Jenkins v. United Gas Corp.*[54] Jenkins, after having been denied a promotion by defendant, instituted a class action in district court, alleging systematic racial discrimination by defendant in his hiring and promotion practices, in violation of Title VII of the 1964 Civil Rights Act.[55] Within a few weeks after the institution of the suit, defendant offered Jenkins a promotion, which was accepted. Defendant then moved to dismiss the entire cause as moot. Jenkins appealed from the district court order granting defendant's motion.[56] The Fifth Circuit Court of Appeals reversed. It cited *Grant*,[57] indicating that voluntary remedial action by defendant, in satisfying the representative plaintiff's individual claim, should not render the entire action moot. The court, unwilling to bottom its decision on this precedent, proceeded to an analysis of Title VII. It concluded that because the actual enforcement of this provision was left largely up to the individual plaintiff who was discriminated against, he in effect became "a private attorney general" through whom congressional policies could be effectuated.[58] It noted further that:

> [This] suit is therefore more than a private claim by the

52. 375 F.2d 648 (4th Cir. 1967).

53. *Id.* at 658.

54. 400 F.2d 28 (5th Cir. 1968). *Jenkins* is perhaps the principal case in the sense that it is the most commonly cited.

55. *See* note 25 *supra* and accompanying text.

56. 261 F. Supp. 762 (E.D. Tex. 1966).

57. *See* note 45 *supra* and accompanying text.

58. 400 F.2d at 33.

> employee seeking the particular job which is at the bottom of the charge of unlawful discrimination . . . . [That] individual, often obscure, takes on the mantel of the sovereign.[59]

Invested with such judicially endowed power, Jenkins was deemed a capable representative of the class, notwithstanding his recent promotion. Such cases as *Smith*,[60] *Cypress*,[61] and particularly *Jenkins*,[62] indicate a judicial proclivity towards nonmootness where questions of racial discrimination are involved.[63]

The "importance" of the issues has been deemed sufficient justification by a few courts to reach a nonmootness conclsion as to the representative plaintiff, and thereby to the class action itself. This view is exemplified well by *Kelly v. Wyman*.[64] Several welfare recipients, having had their assistance terminated without a pretermination hearing, initiated a class suit attacking the state laws which sanctioned such procedure. During the pendency of the litigation, the representative plaintiffs began receiving public assistance on an emergency basis, which prompted defendant's motion to dismiss the entire action as moot. The court, declining defendant's motion, held that judicial determination of questions of such importance could not thus be evaded.[65]

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59. *Id.* at 32.

60. *See* note 50 *supra* and accompanying text.

61. *See* note 52 *supra* and accompanying text.

62. *See* note 54 *supra* and accompanying text.

63. *Accord*, Rackley v. Board of Trustees, 238 F. Supp. 512 (E.D.S.C. 1965); McSwain v. Board of Educ., 138 F. Supp. 570 (E.D. Tenn. 1956). *Contra*, Heard v. Mueller Co., 464 F.2d 190 (6th Cir. 1972).

If the results in *Jenkins* and *Cypress* were due primarily to the presence in those cases of racial discrimination, as is here suggested, then certain subsequent cases which anchored themselves to those decisions may have been improvidently decided. Thus, *Vaughan v. Bowers*, 313 F. Supp. 37 (E.D. La. 1970), *aff'd mem.*, 400 U.S. 884 (1970), involved a class action challenging the constitutionality of a state law permitting non-residential inmates of state hospitals to be sent back to their native states, yet, the court based its ruling on *Jenkins*. Similarly, in *Rivera v. Freeman*, 469 F.2d 1159 (9th Cir. 1972), the court based its conclusion of nonmootness on *Jenkins* and *Cypress*, though the case before it involved the constitutionality of a state juvenile detention statute, not racial discrimination. And, in *Thomas v. Clarke*, 54 F.R.D. 245 (D. Minn. 1971), the court rested a conclusion of nonmootness as to the representative plaintiff on the *Jenkins* and *Cypress* precedents, though the case before it dealt with the constitutionality of a state replevin statute.

64. 294 F. Supp. 887 (S.D.N.Y. 1968), *aff'd sub nom.*, Goldberg v. Kelly, 397 U.S. 254 (1970).

65. 294 F. Supp. at 890. *Accord*, Torres v. New York State Dep't of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970).

The various devices elucidated in this and the preceding two subsections all avoided a holding of mootness as to the class action by perpetuating the representative plaintiff's competency, despite his apparent mootness under traditional concepts. Such devices were doubtless a product of a fear that a conclusion of mootness as to the representative plaintiff would necessitate the same conclusion as to the class suit itself. That such a fear was not unwarranted is indicated by the ensuing section.

III. Cases Holding that the Mooting of the Named Plaintiff Moots the Class Action

A few courts have refused to utilize fictions in order to animate their predilictions concerning the proper treatment of a class action whose representative plaintiff has become moot. Rather than perpetuate the competency of a moot plaintiff by employment of a fiction, they find the representative plaintiff moot and conclude that this renders the entire class action moot.

The two leading cases propounding this view are *Hall v. Beals*[66] and *Watkins v. Chicago Housing Authority*.[67] In *Hall*, plaintiffs had moved to Colorado five months prior to the 1968 presidential election and were refused permission to vote in that election because of a Colorado statute[68] making a six month residence in the state a prerequisite to voting in a national election. Plaintiffs commenced a class action assailing the constitutionality of this statute. A trial court upheld the law's validity and, as a result, plaintiffs did not vote in the 1968 election. During plaintiffs' appeal to the Supreme Court, the Colorado legislature reduced the residency requirement from six to two months. In a per curiam decision, expressing the view of six Justices, the Court found the representative plaintiffs to have been mooted by the change in state law, since under the new provision the plaintiffs could have voted in the 1968 election. The Court concluded that the entire case had therefore lost its character as a present, live controversy,[69] and accordingly dismissed the action as moot.[70]

66. 396 U.S. 45 (1969).
67. 406 F.2d 1234 (7th Cir. 1969).
68. Colo. Rev. Stat. Ann. § 49-24-1 (1963).
69. 396 U.S. at 48.
70. *Id.* at 59.

The preceding section demonstrates that the Supreme Court's ruling in *Hall* has not been followed. A majority of courts clearly will not allow the mootness doctrine to frustrate their inclinations concerning the proper disposition of a class action whose representative plaintiff has, under traditional standards, been rendered moot. Courts imbued with such conviction find distinguishing *Hall* no uneasy task.[71]

In *Watkins*, several plaintiffs initiated a class suit in federal court, challenging the constitutionality of clauses in the Chicago Housing Authority's standard lease which gave the Authority the power to evict public housing tenants at any time, with or without cause, by giving five days notice. At the commencement of the suit, all of the representative plaintiffs had been sued by the Authority in state courts for failure to comply with eviction notices. The Authority, after initiation of the class suit, abandoned its litigation against the named plaintiffs and reinstated them as tenants. It then moved to dismiss the entire action as moot. The district court granted the Authority's motion, and the Seventh Circuit Court of Appeals affirmed. Judge Major, speaking for the court of appeals, reasoned that where the representatives have received the relief which they have individually requested and the case is therefore moot with respect to them, no case or controversy exists with respect to the class action either, which must likewise be dismissed as moot.[73]

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71. *See generally* Note, *Developments in the Law of Federal Class Action Litigation—Catch 22 in Rule 23*, 10 HOUS. L. REV. 337 (1973).

72. *See* note 67 *supra* and accompanying text.

73. *Accord*, Perkins v. Iowa Through Its Dep't of Social Servs., 465 F.2d 724 (8th Cir. 1972); Heard v. Mueller, 464 F.2d 190 (6th Cir. 1972); Heumann v. Board of Educ., 320 F. Supp. 623 (S.D.N.Y. 1970).

Judge Major's reasoning is extremely tenuous, particularly in respect to its indebtedness to *Gray v. Board of Trustees*, 342 U.S. 517 (1952). *Gray* involved a class action commenced by a number of blacks seeking to enjoin Tennessee school authorities from denying them admission to the University of Tennessee. During the litigation, the named plaintiffs were admitted to the school. Being thus informed, the Supreme Court dismissed the class action as moot, on the ground that the representative plaintiffs had received the relief they had requested—namely, admission to the University of Tennessee. Further, the Court in *Gray* seemed to have made its conclusion dependent on the absence of any suggestion that other blacks would not be afforded similar treatment. 342 U.S. at 518. In *Watkins*, neither factor existed. The representative plaintiffs had not received the relief they requested, which was an injunction against the Authority's standard lease and a declaration as to its unconstitutionality. Nor was there an absence of any suggestion that other persons would not be accorded similar treatment, for the standard lease remained in full force.

The conclusions reached in *Watkins* and *Hall* evidence a deep concern for adherence to traditional notions of mootness, doubtless induced by an appreciation of the fundamental significance of the mootness doctrine in our constitutional system.[74] For such courts, the primacy of the mootness doctrine is not to be eroded by judicially created fictions fashioned solely to avoid a conclusion of mootness as to an otherwise moot representative plaintiff.

IV. A Practical Guide for Attorneys

The cases elucidated in section II illustrate four means by which courts have avoided a mootness conclusion as to a representative plaintiff and thereby the class which he represents. Under the first approach, the competency of the representative plaintiff is determined at the commencement of the suit, with the consequence that his subsequent mooting is of no effect upon either him or the class he purports to represent. A second approach seized upon by some courts to reach the same result, is to simply apply the established exception to the mootness doctrine of cases "capable of repetition, yet evading review."[75] Thus the competency of the representative plaintiff will be sustained, and thereby the class he represents, where the circumstances which seemingly moot his individual claim are "capable of repetition, yet evading review."[76] Thirdly, some courts rely upon old dicta to the effect that voluntary cessation of allegedly illegal conduct does not render an action moot.[77] Lastly, a few courts have deemed that the mere importance of proffered issues is sufficient justification for a conclusion of non-

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Nevertheless, *Watkins* has been expressly followed by a few courts. *See* Jacobs v. Board of School Comm'rs, 349 F. Supp. 605 (S.D. Ind. 1972); Callier v. Hill, 326 F. Supp. 669 (W.D. Mo. 1970); Craddock v. Hill, 324 F. Supp. 183 (W.D. Mo. 1970). In *Craddock*, representative plaintiffs in a class suit attacking excessive delay before determination of welfare eligibility, were rendered moot by a final determination of eligibility which included the granting of benefits lost due to the delay. The District Court for the Western District of Missouri held, citing *Watkins*, that the class action was thereby rendered moot. *But cf.* Burg v. Feichter, Civil No. 72 F 65 (N.D. Ind., filed Nov. 20, 1972) (Swygert, C.J., dissenting).

74. *See* note 13 *supra* and accompanying text. Of course, it is conceivable that such a view may also be attributable to a Benthamesque disdain for legal fiction. *See, e.g.*, 6 J. Bentham, Works 582 (1843):

> Not a fiction but is capable of being translated, and occasionally is translated, into the language of truth. Burn the original, . . . and employ the translation in its stead. Fiction is no more necessary to justice, than poison is to sustenance.

75. *See* section II, subsection b, *supra*.

76. *Id.*

77. *See* note 45 *supra* and accompanying text.

mootness as to an otherwise moot representative plaintiff.[78]

Such are four currently recognized means by which courts have permitted a seemingly moot representative plaintiff to retain his competency, thereby avoiding dismissal of the class suit for want of competent representation. A closer scrutiny of the cases brings certain appurtenant considerations within perception. For instance, an examination of the cases canvassed in section II indicates that the early utilization of each of the devices employed by courts desiring to circumvent a mootness conclusion occurred in cases involving a constitutionally "suspect" classification.[79] It is further apparent that early utilization of such devices exclusively in suits involving "suspect" classifications ultimately led to their applicability regardless of the presence of such classifications.[80] The trend by such courts as recognize the various devices circumventive of mootness seems clearly to be in the direction of applying these devices to class suits whether involving suspect classifications or not.[81]

Nevertheless, there persists a small number of decisions which have applied traditional mootness principles and accordingly held moot a representative plaintiff who has in fact become so.[82] Such cases are not distinguishable from those which comprise the conflicting view on the problem of the proper disposition of a class action whose representative plaintiff has been rendered moot. Rather, they constitute an entirely different approach to the problem, based upon the precept that mootness is a doctrine of

78. *See* note 64 *supra* and accompanying text.

79. "Suspect" classifiction is terminology borrowed from the equal protection vernacular. Such classifications have been held to include race, *e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964); alienage, *e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); and wealth, *e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). As to wealth as a "suspect" classification, *see also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 122 (1973) (Marshall, J., dissenting). *But cf.* the majority opinion of Mr. Justice Powell in *Rodriguez*, 411 U.S. at 20.

The earliest case cited under subsection a involved a classification affecting wealth. *See* Gaddis v. Wyman, 304 F. Supp. 713 (S.D.N.Y. 1969). The earliest case cited under subsection b similarly involved a classification touching upon wealth. *See* Torres v. New York State Dep't of Labor, 318 F. Supp. 1313 (S.D.N.Y. 1970). Finally, the earliest case cited in subsection c involved a classification affecting race. *See* Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648 (4th Cir. 1967).

80. *See* Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971), and Davis v. Caldwell, 53 F.R.D. 373 (N.D. Ga. 1971).

81. *See* note 80 *supra* and accompanying text.

82. *See* section III *supra*.

fundamental significance in our constitutional system, and should not be eroded by judicially sanctioned devices. This particular approach to the problem, though definitely a minority position,[83] nonetheless warrants some consideration because of its continued employment. It remains a possible basis of decision in all but a few federal courts.[84]

V. A PROPOSAL

The cases enunciated in section II and III, though of unconsonant result, are alike in their recognition of the applicability of mootness to a class suit whose representative plaintiff has been rendered moot. This recognition, while salient in the *Hall* and *Watkins* approach, is only implied by the contrary view through its employment of various schemes ostensibly to circumvent a conclusion of mootness as to the entire class action. Logically, however, if such adherence to the mootness doctrine is not dictated by its underlying purposes, then neither of the approaches to the present problem is appropriate.[85]

As indicated earlier,[86] mootness is a function of the "case" or "controversy" requirement of article III, section 2 of the Constitution. It is a justiciability concept invoked in order to prevent the adjudication of suits devoid of a "real controversy, and adverse interests."[87] The mootness doctrine is grounded in a conviction that the dialectical process of justice is dependent upon an adverseness between litigants, which alone can insure a thorough presentation of views.[88] The second commonly acknowledged purpose for the doctrine, perhaps more of a practical consequence of the first, is

83. *See* Starrs, *Continuing Complexities in the Consumer Class Action*, 49 J. URB. L. 349, 360 (1972).

84. It appears that a few courts may have repudiated this view. Thus, the Fourth Circuit Court of Appeals decided both the *Moss* and *Cypress* cases and has not rendered a decision following the *Hall-Watkins* approach. The Fifth Circuit Court of Appeals decided the *Jenkins* and *Smith* cases, while no cases following the *Hall-Watkins* approach can be found among its recent decisions. The District Court for the Southern District of New York authored the *Gaddis, Torres* and *Kelly* decisions, though also deciding *Heumann*.

85. If the theory behind mootness does not dictate its application in the present context, then the decisions in *Hall* and *Watkins* and their progeny are clearly unwarranted, and the contrary view's invention of schemes to circumvent application of the doctrine would be both inappropriate and unnecessary. *See* notes 93 and 94 *infra* and accompanying text.

86. *See* note 6 *supra* and accompanying text.

87. *See* note 7 *supra* and accompanying text.

88. *See* note 17 *supra* and accompanying text.

the desire to prevent the strains on an already overburdened docket which the adjudication of moot cases would entail.[89]

It is manifest that where the representative plaintiff, but not the class, has been mooted, neither the very prerequisite for application of the mootness doctrine[90] nor the purposes for the doctrine dictate a conclusion of mootness as to the class. For, as between the class and defendant, a "real controversy" persists, notwithstanding the change in the representative plaintiff's competency. Further, a conclusion of mootness would be inconsistent with the purposes underlying the doctrine, since it would necessitate the dismissal of a bona fide dispute, and would result in a greater strain upon an already overburdened judicial system.[91]

Under such an analysis, it is evident that both of the general approaches[92] to the problem of the proper disposition of a class action whose representative plaintiff has been mooted, are inappropriate. The *Hall* and *Watkins* approach, which expressly recognizes the applicability of mootness to a class whose representative plaintiff has been mooted, would be clearly aberrant.[93] And, the contrary

89. *See* note 19 *supra* and accompanying text. It should be noted that some have advocated the complete abolition of the mootness concept. *See, e.g.*, Singer, *Justiciability and Recent Supreme Court Cases*, 21 ALA. L. REV. 229 (1968); Note, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 COLUM. L. REV. 867 (1965). The former article apparently bases this conclusion upon a fear that unless mootness and other justiciability concepts are abolished or considerably eroded, the streets will perhaps be the only path for making oneself heard. 21 ALA. L. REV. at 286. The latter Note reasoned that abolition of mootness would be beneficial to the development of constitutional jurisprudence, since the creation of ad hoc exceptions to the doctrine would no longer tax judicial ingenuity. 65 COLUM. L. REV. at 875. Neither article evidenced any great concern for the propriety of such a conclusion vis-à-vis the "case" or "controversy" requirement of article III, section 2 of the Constitution.

It is submitted that the mootness doctrine has been and is an integral means of defining the "case" or "controversy" requirement of article III, section 2. Its abolition would be contrary to the ostensible intent of the framers of the Constitution that the federal judicial power not be invoked for the adjudication of nondisputes.

90. The essential prerequisite for the application of the mootness doctrine is the absence of a real controversy between adverse interests. *See* note 7 *supra* and accompanying text.

91. The greater strain upon the judicial system would result from the probable reinstitution of the class suit by another plaintiff, thereby necessitating two conjurings of the adjudicative process instead of the one which would be required if a court determined that the class was not rendered moot.

92. *See* sections II and III *supra*.

93. In *Hall*, the Supreme Court dismissed a class action as moot where the representative plaintiffs but not the class had been so rendered by state legislative action. The Supreme Court concluded that since the representative plaintiffs were mooted by the legislature's action, the entire suit had thereby lost its character as a live controversy between adverse

approach's invention of fictions to perpetuate the representative plaintiff's competency in order to circumvent a conclusion of mootness as to the class, would be both inappropriate and unnecessary.[94]

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litigants, and accordingly dismissed. Hence, a class suit was scuttled for want of a competent representative notwithstanding the fact that a real controversy as between the class and the defendant persisted. Such a resolution is irreconcilable with the very purposes of the doctrine by which this result was purportedly compelled, and overlooks the absence of even the factual prerequisite to application of the mootness doctrine. The cardinal prerequisite for application of the doctrine—the absence of a real controversy between adverse interests—was lacking as between the class and the defendant in *Hall*, despite the change of the representative plaintiffs' competency.

Further, the generally accorded purposes for the mootness doctrine did not dictate the result in *Hall*. There existed between the class and defendant that adverseness which it is the primary purpose of the mootness doctrine to insure. And, dismissal of the entire suit doubtless undermined the second, more incidental, purpose of the doctrine—judicial economy; this because of the greater pressure upon the judicial system resulting from the probable re-institution of the same class suit against defendant, represented by another plaintiff, and necessitating two invocations of the adjudicative process instead of the one which would have been required if the Court had determined that the class had not been rendered moot by the mooting of its representatives. This analysis is equally applicable to *Watkins*.

94. Clearly the devices elucidated in section II, utilized to perpetuate a representative plaintiff's competency and thereby that of the class he represents, are not rendered imperative by the doctrine whose circumvention was the reason for their creation. Where the representative plaintiff alone has been rendered moot, there continues as between the class and defendant a real controversy, making a mootness conclusion as to the class completely unwarranted. Yet, it is a fear of this very result which has been the stimulus behind the creation of the various fictions discussed in section II. If the impropriety of a mootness conclusion as to the class in such a case be recognized, then such fictions must be viewed as unnecessary.

Thus, one fiction utilized by courts seeking to perpetuate a representative plaintiff's competency and thereby to avoid a conclusion of mootness as to the class, is that of determining a representative plaintiff's competency at the commencement of the litigation. *See* Moss v. Lane, Inc., 471 F.2d 853 (4th Cir. 1973). In *Moss*, the Fourth Circuit Court of Appeals reversed a trial court ruling which had dismissed an entire class action after the representative plaintiff had been rendered moot. The court held that if the representative plaintiff were a member of the class at the commencement of the action, and was then a competent litigant, his subsequent mootness should not operate to render moot the action of the class. Such a fiction was doubtless employed to avoid the trial court's assumption that the mooting of the representative plaintiff moots the class. Yet, such strategy overlooks the fact that not even the very purposes underlying the concept of mootness require that a class whose representative has been mooted itself be adjudged moot. For, as between the class and defendant a real controversy persists, insuring a thorough presentation of views. And, the burden on the judicial process would probably be less if a court refrains from dismissing an entire class action as moot—since a dismissal of such an action will often lead to an immediate re-institution of the same suit, represented by a new plaintiff, necessitating two invocations of the judicial system. As a result, such a fiction is simply not necessary. There is no need for a device circumventive of an inapposite doctrine.

The same analysis is equally applicable to each of the various other devices courts have seized upon to avoid a mootness conclusion as to a class whose representative plaintiff has become moot. *See* subsections b and c of section II, *supra*. In each case, the court was applying a device with which it sought to avoid the employment of what must be considered an inapplicable doctrine.

What is needed, then, is a recognition on the part of the courts of the inappropriateness of a mootness conclusion as to a class whose representative has been mooted, but which itself harbors interests adverse to those of the defendant.

Admitting of such a conclusion, there remains the problem of the proper disposition of the class action, for though the class is not moot, it is incapable of suing without a representative.[95] Two expedients appear feasible. First, having adopted the above reasoning as to the nonmootness of the class, a court could permit a competent member of the class to intervene in the role left vacant by the mooting of the original named plaintiff. Intervention, a comparatively recent innovation in Anglo-American legal procedure,[96] has been codified into federal jurisprudence by Rule 24 of the Federal Rules of Civil Procedure.[97] It has been employed by at least two courts in the manner here suggested. In *Washington v. Wyman*,[98] the representative plaintiff's interest in a class suit attacking a New York social services law had been mooted by defendant's having voluntarily granted plaintiff the relief he individually sought. Defendant thereafter claimed that the class action had become moot and was incapable of supporting additional plaintiffs by intervention. The District Court for the Southern District of New York rejected defendant's argument and granted to two applicants the right to intervene pursuant to Rule 24.[99]

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

96. 7A WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE 464 (1972).

97. FED. R. CIV. P. 24(a) and (b) provide:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

98. 54 F.R.D. 266 (S.D.N.Y. 1971).

99. *Id.* at 270.

The Second Circuit Court of Appeals recognized this same utilization of intervention in *Norman v. Connecticut State Board of Parole*.[100] Plaintiff Norman had filed a class action to enjoin the state parole board from conducting revocation hearings without affording prospective parolees the right to counsel. During an appeal from a district court order, outstanding criminal charges against Norman were dropped, with the result that he no longer was representative of the class of prospective parolees which he purported to represent. The court of appeals, refusing to summarily declare the class action moot for want of a competent representative, remanded the case with directions to dismiss only in the event that no class member intervened within thirty days.

Courts accepting the suggestion that a conclusion of mootness as to a class is inappropriate where the representative plaintiff, but not the class, is mooted, will find Rule 24 a potent device for sustaining the viability of class actions whose representatives have been rendered moot. This is particularly true when consideration is given to the imperative of Rule 1 that the Federal Rules "be construed to secure the just, speedy, and inexpensive determination of every action."[101]

A second method of dealing with an unmooted class whose representative has been rendered moot, would be to recognize the "dual capacity" of the representative plaintiff in a class action. Such a plaintiff is representative not only of the interests of the class, but also of his personal interest in the litigation. Under such analysis, a conclusion of mootness as to the representative plaintiff's individual interest would not necessitate his demise as representative of the class. This latter, coexistent representative capacity

100. 458 F.2d 497 (2d Cir. 1972).

101. FED. R. CIV. P. 1 provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

In *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966), Mr. Justice Black observed:

> The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. . . . If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

383 U.S. at 373.

would persist, unaffected by the mooting of the plaintiff's personal interests. And, adopting the current trend toward relaxing the requirements of Rule 23(a)[102] of the Federal Rules that the representative plaintiff be a class member[103] whose claim is typical of that of the class,[104] seemingly nothing would bar the representative plaintiff whose personal interests have been mooted from representing the class.

The requirement of Rule 23(a)(4) that the representative be one who will adequately protect the interests of the class[105] is similarly satisfied, given the interpretation of that provision by recent cases.[106] The emerging standard of "adequacy" of representation clearly seems to embrace two characteristics: competency of the representative's legal counsel[107] and a representative who will vigorously prosecute the action.[108] Whether a representative plaintiff

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102. *See* note 22 *supra*.

103. FED. R. CIV. P. 23(a), in providing that "one or more members of a class may sue or be sued as representative parties," lays down the requirement that a representative plaintiff be a member of the class he purports to represent. The trend seems to be one of liberalization of this requirement. *See, e.g.*, Wymelenberg v. Syman, 54 F.R.D. 198 (E.D. Wis. 1972) (as long as representative plaintiff's interests not antagonistic to those of the class, and where the representative's counsel competently pursued the interests of the class, the representative plaintiff is a competent representative); Thomas v. Clarke, 54 F.R.D. 245 (D. Minn. 1971) (court refused to hold that where a representative plaintiff had been rendered moot, he should be precluded from litigating for want of class membership); Arkansas Educ. Ass'n v. Board of Educ., 446 F.2d 763 (8th Cir. 1971).

104. The requirement of Rule 23(a)(3) that the claims of the representative plaintiff be typical of the claims of the class, has also been given an increasingly liberal interpretation, many courts concluding that a mere lack of adverseness between the representative and the class members is demonstrative of typicality of claims. *See, e.g.*, Katz v. Carte Blanche Corp., 52 F.R.D. 510 (W.D. Pa. 1971); Vernon J. Rockler & Co. v. Graphic Enterprises, Inc., 52 F.R.D. 335 (D. Minn. 1971); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970); Weiss v. Tenney Corp., 47 F.R.D. 283 (S.D.N.Y. 1969).

105. *See* note 22 *supra*.

106. *See* notes 107 and 108 *infra* and accompanying text.

107. *See* Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (5th Cir. 1969); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Nolop v. Volpe, 333 F. Supp. 1364 (D.C.S.D. 1971); Page v. Curtiss-Wright Corp., 332 F. Supp. 1060 (D.C.N.J. 1971); Mack v. General Elec. Co., 329 F. Supp. 72 (E.D. Pa. 1971); Rank v. Krug, 90 F. Supp. 773 (S.D. Cal. 1950). "It cannot be said that counsel the plaintiffs have chosen is lacking in character, assiduity, energy or ability." 90 F. Supp. at 805.

108. *See* Hohmann v. Packard Instrument Co., 399 F.2d 711 (7th Cir. 1968); Rodriguez v. Swank, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd mem.*, 403 U.S. 901 (1971); Epstein v. Weiss, 50 F.R.D. 387 (E.D. La. 1970). "The court must be assured that the representatives will vigorously prosecute the rights of the class through qualified counsel." *Id.* at 392. Mersay v. First Republic Corp., 43 F.R.D. 465 (S.D.N.Y. 1968). "The primary criterion is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class . . . ." *Id.* at 470.

whose personal interest has been mooted satisfies the former element of "adequacy" depends upon the capabilities of his attorney. It is unequivocal, however, that the plaintiff whose personal interests have been mooted, and who nevertheless desires to continue on as representative of the class, satisfies the latter element.[109]

109. Such a plaintiff's motivation for continuing on as representative of the class, may be based either upon his own appraisal as to the probability that he will be affected by future adverse effects, or upon an ideological interest. If plaintiff's motive is based upon the latter, he displays the exceptional interest of pursuing litigation without prospect of personal gain. This interest has been recognized by Professor Jaffe in his argument that "ideological" plaintiffs who challenge governmental action merely as concerned citizens, should be accorded standing. *See* Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).