Memos on Report

6. Remand to balance 2d, before certifying class

5. C J's opinion relies heavily on 713 in re lawyers fees.

Redact note 2 & consider

2. Cf. Alter's no. avoids:

Although § 5 is

properly

stated

in 14:

division of Art III as a

remedial

remedy for cases (see ter 41

by finding a personal stake in

procedural issue of class

certification - pp 6, 7

"Art was limited to 'injunction' issue - p 7 - check § 4 in Art X

The personal stake of Alter described

as "related right to justice" procedure

remedy under 23 - 5

In a

"procedural" right (distinct from

a right of merits) - 6

Art

Art III - 7

3. Cooper + hydra = etc.

4. Cite in reper back to Gersten

our class/mootness case - not

mentioned by WEB.

5. DC found possible "destruction

of trust" - Cfr in Part III

as am equitable as well in practical consideration
Dr. Morgan

Interest in Alpert, free—move into text?

Count seems to find follows case on "altet's fee" & assume "procedural vcnr" of case certification—p. 5, 6. If a right descends from all fees—6.

But in p. 6, C J seems to say procedural right in "suitability" to merits & falls with instead of merits if they are settled—6.

The foregoing seems contradictory. Apparently C J gets around this by fact that case was paid "settled" as Morgan did not argue.

And by saying appeal here in "rule of practice"—7.
TO: Mr. Justice Powell
FROM: Ellen
RE: No. 78-904, Roper

1. Page 2, second full sentence. I have changed this to accord better with the Court's definition of the issue quoted on page 4. See what you think.

2. Page 2, first line of first full paragraph. I do not think there are any differences between the cases "material" to the question presented here. But the analysis differs slightly because of potential economic interests in Roper. I suggest we say only that there are "some differences."

3. Page 4, last sentence of Part I. It seemed odd to me to refer to a "client-less" class action. It is not the action but the lawyer that has no "client." Would "headless" do? I stole that phrase from an earlier dissenting opinion from the CA5.

4. Page 5, third sentence of first full paragraph. I phrased the "critical distinction" this way because it is much closer to the language actually used by the Court (slip op. p. 9) than what I had said in Geraghty, which was: "between mootness deriving from a judgment and mootness resulting from events extrinsic to the litigation." I still think that the language on
page 5 is more accurate. It also serves us better here by setting up the issue of "appealability" to which the Court (and the dissent) then turn. If you still prefer the other phraseology, we can simply lift it from *Geraghty*.

5. Page FN1, notes 2 & 3. The respondents asked the DC to order an award of attorney's fees comprising 25% of the "funds and judgment to be paid Plaintiff and other persons similarly situated." Note 2 is intended to show only that the attorney's fees were not *in addition to* the damage recovery. Note 3 then goes on to attempt some reconstruction of what the actual fee arrangement is and whether the respondents would benefit by paying a smaller proportion of their judgment in fees if the class recovers. Although the arrangement is not entirely clear, it appears to be a straight 25% contingent fee of whatever is recovered by plaintiffs or the class. I do not believe they are inconsistent, and have reworded note 2 to try to remove the ambiguity.

6. Page FN9, note 19. I have changed this around somewhat, mainly in the interest of brevity. But I have one substantive concern. I'm not sure that the DC can exercise equitable discretion for the petitioner in the class certification ruling. If it is assumed that the bank has violated the law and the requirements of Rule 23 otherwise are met, I am not sure that a DC should refuse to certify simply because the liability is too large or because class members have taken no individual action.
while the class action was pending. At least, it seems that there is more room for equitable discretion on the question of tolling of the statute of limitations, which would arise if the DC were to conclude that these respondents could not represent the class. The footnote as written now is somewhat open-ended, but refers specifically only to the tolling issue. If you want to refer specifically to the certification issue, we might omit reference to tolling altogether and put back in, at the beginning of the last sentence, “When acting on today’s mandate to reconsider class certification, . . . .”

7. I have inserted A and B headings in Part II, and also the headings you had placed in Part III. But that makes a lot of sections. Since Part III is only 4 1/2 pages long, do you think we could do without the subparts there? Or, alternatively, what about just part A (comprising present parts A and B) and B (now C)?
TO: Mr. Justice Powell
FROM: Ellen
RE: No. 78-904 Roper

David's review of the Chambers Draft in this case provided some stylistic improvements, which I have marked on pages 2, 4, 7, and 8 of the draft, and correction of one minor inaccuracy on page 2. There is also a typo on page 6. All of these could be corrected on a second draft after circulation. But David had two somewhat more substantive concerns which I felt were well-taken.

First, on pages 10-11, he was confused by the sudden jump from the discussion of Electrical Fittings and Altvater as cases in which there was no personal stake to the conclusion referring back to the part of Electrical Fittings in which there was such a stake. I have added a sentence that we both feel solves this problem.

Second, on pages 14-15, he felt the paragraph dealing with the problems created by the Court's result was jumpy and unclear. On reflection, I agree, and have drafted a revised and I believe clarified version of that paragraph. (Rider A).

David also suggests that we strike the second paragraph of Note 19, because the mere introduction of legislation is a slim reed on which to rely. In this instance, the bill we describe would commit substantial resources of the Justice Department to
oversight of the new actions, a move that may not be popular in Congress these days. The bill may also have due process problems in eliminating pre-judgment notice in some of these actions, but providing that class members will be bound by the judgment. I tend to agree with David on this too.

I would recommend that we have the draft reprinted to adopt the changes, together with any others you may wish to make, and circulate on Tuesday.
February 6, 1980

No. 78-904  Deposit Guaranty National Bank v. Roper

Dear Bill:

I now have my dissent in this case ready for circulation.

In view, however, of the tension that may exist between your "join" in this case and your being good enough to join my Geraghty opinion, I am delivering two copies to you before circulating it to other Chambers. Although I doubt that I could make major changes, if you have suggestions as to language I certainly will consider them sympathetically.

In your join note to me you stated that there is some authority supporting Harry's position in Geraghty. I think one can say that Geraghty merely continued the process in class actions of eroding Article III that commenced in Sosna and Bowman. One also must say, I think, that Geraghty accelerates and significantly extends that process - perhaps to the point of making Article III meaningless in class actions.

I do agree that dicta in McDonald and Coopers & Lybrand support the result in Geraghty. Again, however, as stated in my note 10 in Roper - the dicta hardly can be viewed as reflecting any considered judgment by the Court.

But back to the problem at hand, if you have thoughts about changes in Roper do let me know. In view of Harry's understandable discomfort, I would like to circulate my dissent in Roper fairly promptly.

Sincerely,

Mr. Justice Rehnquist

LFP/lab
February 8, 1980

Re: No. 78-904, Deposit Guaranty Nat. Bank v. Roper

Dear Chief,

Lewis Powell's dissenting opinion has persuaded me that the issue in this case is analytically almost identical to that presented in the Geraghty case. Accordingly, I have decided to join his dissenting opinion.

My regret for this shift from my previously expressed tentative view is mitigated by the fact that it will in no way change the result.

Sincerely yours,

The Chief Justice

Copies to the Conference
February 8, 1980

Re: No. 78-904, Deposit Guaranty Nat. Bank v. Roper

Dear Lewis,

Please add my name to your dissenting opinion.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference
MR. JUSTICE STEVENS, concurring.

In his dissenting opinion MR. JUSTICE POWELL states that, because the District Court erroneously refused to certify the class and because no member of the class attempted to intervene, the respondents "are the only plaintiffs arguably present in court." Post, at 2. I respectfully disagree. In my opinion, when a proper class action complaint is filed, the absent members of the class automatically become parties to the case or controversy for purposes of the court's Article III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of the case or controversy, as those words are used in Article III, does not depend on the district judge's initial answer to the certification question; rather, it depends on the plaintiffs' right to have a class certified.1/

1/ The adoption of MR. JUSTICE POWELL's position would make an erroneous failure to certify a class unreviewable even in a case in which the named plaintiff prevailed on the merits of

This takes an entirely different position from that of the majority. As I said in my dissent, a district court's failure to certify a class is an error that is not subject to review in a plenary appeal, even if the class members prevail on the merits of the action.
Accordingly, even if the named plaintiff's personal stake in the lawsuit is effectively eliminated, no question of mootness arises simply because the remaining adversary parties are unnamed. Rather, the issue which arises is whether the named plaintiff continues to be a proper class representative for the purpose of appealing the adverse class determination. See United States Parole Comm'n v. Geraghty, ___ U.S. ___, ___ (slip op., at 16). In my judgment, in this case, as in Geraghty, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose.

I therefore join the opinion of the Court.

1/ (continued)

his claim. Post, at 11. Nothing in either Article III or Rule 23 of the Federal Rules of Civil Procedure requires the Court to reach such a counterproductive result. Rule 23 simply establishes procedures for managing class actions; it does not purport to determine whether the erroneous denial of class certification may destroy the interests of absent class members for purposes of Article III jurisdiction. And I fail to see how the constraints imposed by Article III would be offended by an appellate court's adjudication of a live controversy over the right of absent class members to share in the judgment won by the class representative.

2/ I agree with the Court's determination in this case and in Geraghty that the respective named plaintiffs continue to have a sufficient personal stake in the outcome to satisfy Article III requirements. See ante, at 12; Geraghty, ___ U.S., at ___ (slip op., at 15).
In his dissenting opinion MR. JUSTICE POWELL states that, because the District Court erroneously refused to certify the class and because no member of the class attempted to intervene, the respondents "are the only plaintiffs arguably present in court." Post, at 2. I respectfully disagree. In my opinion, when a proper class action complaint is filed, the absent members of the class automatically become parties to the case or controversy for purposes of the court's Article III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of the case or controversy, as those words are used in Article III, does not depend on the district judge's initial answer to the certification question; rather, it depends on the plaintiffs' right to have a class certified.1/

1/ The adoption of MR. JUSTICE POWELL's position would make an erroneous failure to certify a class unreviewable even in a case in which the named plaintiff prevailed on the merits of
Accordingly, even if the named plaintiff's personal stake in the lawsuit is effectively eliminated, no question of mootness arises simply because the remaining adversary parties are unnamed. Rather, the issue which arises is whether the named plaintiff continues to be a proper class representative for the purpose of appealing the adverse class determination. See United States Parole Comm'n v. Geraghty, ___ U.S. ___ (slip. op., at 16). In my judgment, in this case, as in Geraghty, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose.

I therefore join the opinion of the Court.

1/ (continued)
his claim. Post, at 11. Nothing in either Article III or Rule 23 of the Federal Rules of Civil Procedure requires the Court to reach such a counterproductive result. Rule 23 simply establishes procedures for managing class actions; it does not purport to determine whether the erroneous denial of class certification may destroy the interests of absent class members for purposes of Article III jurisdiction. And I fail to see how the constraints imposed by Article III would be offended by an appellate court's adjudication of a live controversy over the right of absent class members to share in the judgment won by the class representative.

2/ I agree with the Court's determination in this case and in Geraghty that the respective named plaintiffs continue to have a sufficient personal stake in the outcome to satisfy Article III requirements. See ante, at 12; Geraghty, ___ U.S., at ___ (slip op., at 15).
In his dissenting opinion MR. JUSTICE POWELL states that, because the District Court erroneously refused to certify the class and because no member of the class attempted to intervene, the respondents "are the only plaintiffs arguably present in court." Post, at 2. This position is apparently based on the notion that, unless class members are present for all purposes (and thus may be liable for costs, bound by the judgment, etc.), they cannot be considered "present" for any purpose. I respectfully disagree. In my opinion, when a proper class action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Article III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of

Nothing here touches our footnote. Mr. JUSTICE STEVENS simply "disagrees" with Jacoby, and doesn't appear to care that the onerous burden he would impose on class representatives may deter people from filing suit. In FN1, he strongly implies that a court of appeals can, at least for purposes of Art. III, certify the class on appeal—a question reserved in East Texas Motor
the case or controversy, as those words are used in Art. III, does not depend on the district judge's initial answer to the certification question; rather, it depends on the plaintiffs' right to have a class certified.1/

1/ There is general agreement that, if a class has been properly certified, a case does not become moot simply because the class representative's individual interest in the merits of the litigation has expired. In such a case the absent class members' continued stake in the controversy is sufficient to maintain its viability under Art. III. In a case in which certification has been denied by the district court, however, a court of appeals cannot determine whether the members of the class continue to have a stake in the outcome until it has determined whether the action can properly be maintained as a class action. If it is not a proper class action, then the entire case is moot. If, on the other hand, the district court's refusal to certify the class was erroneous, I believe there remains a live controversy which the courts have jurisdiction to resolve under Art. III.

I recognize that there is tension between the approach I have suggested and the Court's sua sponte decision in Indianapolis School Comm'r's v. Jacobs, 420 U.S. 128. See also Pasadena City Bd of Education v. Spangler, 427 U.S. 424, 430. As MR. JUSTICE BLACKMUN points out in United States Parole Comm'n v. Geraghty, U.S. , n. 7 (slip op. at 12, n. 7), that case is distinguishable from this case because it involved an attempt to litigate the merits of an appeal on behalf of an improperly certified class. I agree that the Court did not have jurisdiction to consider the merits until the threshold question of whether a class should have been certified was resolved. However, I disagree with the Court's conclusion that the entire action had to be dismissed as moot. In my view, the absent class members remained sufficiently present so that a remand on the class issue would have been a more appropriate resolution.

Just as absent class members whose status has not been fully adjudicated are not "present" for purposes of litigating the merits of the case, I would not find them present for purposes of sharing costs or suffering an adverse judgment. If a class were ultimately certified, the class members would, of course, retain the right to opt out.
Accordingly, even if the named plaintiff's personal stake in the lawsuit is effectively eliminated, no question of mootness arises simply because the remaining adversary parties are unnamed. Rather, the issue which arises is whether the named plaintiff continues to be a proper class representative for the purpose of appealing the adverse class determination. Cf. United States Parole Comm'n v. Geraghty, ___ U.S. ___, ___ (slip op., at 16). In my judgment, in this case, as in Geraghty, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose.

I therefore join the opinion of the Court.

---

2/ I agree with the Court's determination in this case and in Geraghty that the respective named plaintiffs continue to have a sufficient personal stake in the outcome to satisfy Article III requirements. See ante at 12; Geraghty, ___ U.S., at ___ (slip op., at 15).

3/ My view of the jurisdictional issue would not necessarily enlarge the fiduciary responsibilities of the class representative as MR. JUSTICE POWELL suggests, see post, at 16 n. 2. In any event, I do not share his concern about the personal liability of a class representative for costs and attorneys' fees if the case is ultimately lost. Anyone who voluntarily engages in combat—whether in the courtroom or elsewhere—must recognize that some of his own blood may also be spilled.
February 14, 1980

Re: No. 78-904 - Deposit Guaranty National Bank v. Roper

Dear Chief:

Please join me.

Sincerely,

[Signature]

T.M.

The Chief Justice

cc: The Conference
Deposit Guaranty National Bank, On Writ of Certiorari to
Jackson, Mississippi, Petitioner, v.
Robert L. Roper et al.

Robert L. Roper et al.

Supreme Court of the United States

No. 78-904

Deposit Guaranty National Bank, On Writ of Certiorari to
Jackson, Mississippi, Petitioner, v.
Robert L. Roper et al.

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to decide whether a tender to named
plaintiffs in a class action of the amounts claimed in their
individual capacities, followed by the entry of judgment in
their favor on the basis of that tender, over their objection,
moots the case and terminates their right to appeal the denial
of class certification.

I

Respondents, holders of credit cards issued on the “Bank-
Americard” plan by petitioner Deposit Guaranty National
Bank, sued the bank in the United States District
Court for the Southern District of Mississippi, seeking to represent both
their own interests and those of a class of similarly aggrieved
customers. The complaint alleged that usurious finance
charges had been made against the accounts of respondents
and a putative class of some 90,000 other Mississippi credit
card holders.

Respondents’ cause of action was based on sections 85 and
86 of the National Bank Act, 12 U. S. C. §§ 85 and 86. Sec-
tion 85 permits banks within the coverage of the Act to charge
interest “at the rate allowed by the laws of the State, Territo-
ry, or District where the bank is located.” In a case where
a higher rate of interest than allowed has been “knowingly”

1. A
"procedural
ruling" not
"appealable" - but only
Not
continuous
State
9
2. Benefi-
t; sharing
lawyers
June 9
P11
3. "Shared
mut.
administrative
in 
"relevan-
- p13
10. Relie generally
"policy consideration" - 13
11. Relies on "individual interests" w/ or w/o identifying them - 13
charged § 86 allows a person who has paid the unlawful interest to recover twice the total interest paid. 

The modern phenomenon of credit card systems is largely dependent on computers, which perform the myriad accounting functions required to charge each transaction to the customer's account. In this case, the bank's computer was programmed so that, on the billing date, it added charges, subtracted credits, added any finance charges due under the BankAmericard plan, and prepared the customers' statements. During the period in question, the bank made a monthly service charge of 1 1/2% on the unpaid balance of each account. However, customers were allowed 30 days within which to pay accounts without any service charge. If payment was not received within that time, the computer added to the customer's next bill 1 1/2% of the unpaid portion of the prior bill, which was shown as the new balance. The actual finance charges paid by each customer varied depending on the stream of transactions and the repayment plan selected. In addition, the effective annual interest rate paid by a customer would vary because the same 1 1/2% service charge was assessed against the unpaid balance no matter when the charged transactions occurred within the 30-60-day period prior to the billing date. This 1 1/2% monthly service charge is asserted to have been usurious because under certain circumstances the resulting effective annual interest rate allegedly exceeded the maximum interest rate permitted under Mississippi law.

The District Court denied respondents' motion to certify the class, ruling that the circumstances did not meet all the requirements of Fed. Rule Civ. Proc. 23 (b) (3). The District Court found that the requirements of Rule 23 (b) (3) were not met because the putative class representatives had failed to establish the predominance of questions of law and fact common to class...
The District Court certified the order denying class certification for discretionary interlocutory appeal, pursuant to 28 U. S. C. § 1292 (b); the proceedings were stayed for 30 days pending possible appellate review of the denial of class certification.

The United States Court of Appeals for the Fifth Circuit denied respondents' motion for interlocutory appeal. The bank then tendered to each named plaintiff, in the form of an "Offer of Defendants to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability," the maximum amount that each could have recovered. The amounts tendered to respondents Roper and Hudgins were $889.42 and $423.54, respectively, including legal interest and court costs. Respondents declined to accept the tender and made a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse class certification ruling. This counteroffer was declined by the bank.

Based on the bank’s offer, the District Court entered judgment in respondents' favor, over their objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court, where it remains. At no time has any putative class member sought to intervene either to litigate the merits or to appeal the certification ruling. It appears that by the time the District Court entered judgment and dismissed the case, the statute of limitations had run on the individual claims of the unnamed class members.

members, and because a class action was not shown to be a superior method of adjudication due to (1) the availability of traditional procedures for prosecuting individual claims in Mississippi courts; (2) the "horrendous penalty," which could result in "destruction of the bank" if claims were successfully aggregated; (3) the substantive law of Mississippi which views the aggregation of usury claims as undesirable; and (4) the tremendous burden of handling 90,000 claims, particularly if counterclaims were filed.

Reversal of the District Court's denial of certification by the Court of Appeals may relate back to the time of the original motion for certification for the purposes of tolling the statute of limitations on the
When respondents sought review of the class certification ruling in the Court of Appeals, the bank argued that the case had been mooted by the entry of judgment in respondents' favor. In rejecting the bank's contention, the court relied in part on United Airlines, Inc. v. McDonald, 432 U. S. 385 (1977), in which we held that a member of the putative class could appeal the denial of class certification by intervention, after entry of judgment in favor of the named plaintiff, but before the statutory time for appeal had run. Two members of the panel read Rule 23 as providing for a fiduciary-type obligation of the named plaintiffs to act in a representative capacity on behalf of the putative class by seeking certification at the outset of the litigation and by appealing an adverse certification ruling. In that view, the District Court also had a responsibility to ensure that any dismissal of the suit of the named plaintiffs did not prejudice putative class members. One member of the panel, concurring specially, limited the ruling on mootness to the circumstances of the case, i. e., that, after filing of a class action, the mere tender of an offer of settlement to the named plaintiffs, without acceptance, does not moot the controversy so as to prevent the named plaintiffs from appealing an adverse certification ruling.

Having rejected the bank's mootness argument, the Court of Appeals reviewed the District Court's ruling on the class certification question. It concluded that all the requisites of Rule 23 had been satisfied and accordingly reversed the adverse certification ruling; it remanded with directions to certify the class and for further proceedings.

Certiorari was sought to review the holdings of the Court of Appeals on both mootness and class certification. We granted the writ limited to the question of mootness, to resolve conflicting holdings in the courts of appeals.4 440 U. S. 945.

claims of the class members. See United Airlines, Inc. v. McDonald, 432 U. S. 385 (1977).

II

We begin by identifying the interests to be considered when questions touching on justiciability are presented in the class action context. First is the interest of the named plaintiffs: their personal stake in the substantive controversy and their related right as litigants in a federal court to employ in appropriate circumstances the procedural device of a Rule 23 class action to pursue their individual claims. A separate consideration, distinct from their private interests, is the responsibility of named plaintiffs to represent the collective interests of the putative class. Two other interests are implicated: the rights of putative class members as potential intervenors, and the responsibilities of a district court to protect both the absent class and the integrity of the judicial process by monitoring the actions of the parties before it.

The Court of Appeals did not distinguish among these distinct interests. It reviewed all possible interests that in its view had a bearing on whether an appeal of the denial of certification should be allowed. These diverse interests are interrelated, but we distinguish among them for purposes of analysis, and conclude that resolution of the narrow question presented requires consideration only of the private interest of the named plaintiffs.

A

The critical inquiry, to which we now turn, is whether respondents' individual and private case or controversy became moot by reason of petitioner's tender or the entry of judgment in respondents' favor. Respondents, as holders of credit cards issued by the bank, claimed damages in their private capacities for alleged usurious interest charges levied in violation of federal law. Their complaint asserted that they had suffered actual damage as a result of illegal acts of the bank. The complaint satisfied the case or controversy requirement of Art. III of the Constitution.
As parties in a federal civil action, respondents exercised their option as putative members of a similarly situated cardholder class to assert their claims under Rule 23. Their right to assert their own claims in the framework of a class action is clear. However, the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims. Should these substantive claims become moot in the Art. III sense, by settlement of all personal claims for example, the court retains no jurisdiction over the controversy of the individual plaintiffs.

The factual context in which this question arises is important. At no time did the named plaintiffs accept the tender in settlement of the case; instead, judgment was entered in their favor by the court and the case was dismissed over their continued objections. Although a case or controversy is mooted in the Art. III sense upon payment and satisfaction of a final, unappealable judgment, a decision that is "final" for purposes of appeal does not absolutely resolve a case or controversy until the time for appeal has run. Nor does a confession of judgment by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgment fully satisfying named plaintiffs' private substantive claims would preclude their appeal on that aspect of the final judgment; however, it does not follow that this circum-

8 We note that Rule 23 (e) prescribes certain responsibilities of a district court in a case brought as a class action: once a class is certified, a class action may not be "dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Conceivably, there also may be circumstances, which need not be defined here, where the district court has a responsibility, prior to approval of a settlement and its dismissal of the class action, to provide an opportunity for intervention by a member of the putative class for the purpose of appealing the denial of class certification. Such intervention occurred in United Airlines, Inc. v. McDonald, 432 U. S. 385 (1977).
stance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.

Congress has vested appellate jurisdiction in the courts of appeals for review of final decisions of the district courts. 28 U. S. C. § 1291. Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. Public Service Comm'n v. Brashear Freight Lines Inc., 306 U. S. 204 (1939); New York Telephone Co. v. Maltbie, 291 U. S. 645 (1934); Corning v. Troy Iron & Nail Factory, 15 How. 451 (1853); J. W. Moore, Federal Practice para. 203.06. The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III. In an appropriate case appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III. An illustration of this principle in practice is Electrical Fittings Corp. v. Thomas & Betts Co., 307 U. S. 241 (1939). In that case, respondents sued petitioners for infringement of a patent. In such a suit, the defense may prevail either by successfully attacking the validity of the patent or by successfully defending the charge of infringement. In Electrical

8 The dissent construes the Notice of Appeal as a complete abandonment by respondents of their Art. III personal stake in the appeal. Post, at 3. Such is not the case. Indeed, the appeal was taken by the named plaintiffs, although its only purpose was to secure class certification. Throughout this litigation, respondents have asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in that litigation and for which they assert a continuing obligation. See Plaintiffs-Appellants' Brief in Opposition to Motion to Dismiss Appeal and Reply Brief in No. 76-3600, filed in the Court of Appeals for the Fifth Circuit 4, 12, 16, 17.
Fittings the decree of the District Court adjudged the patent valid but dismissed the complaint for failure to prove infringement. The respondents did not appeal, but petitioners sought review in the Court of Appeals of so much of the decree as adjudicated the patent valid. Respondents filed a motion to dismiss the appeal "based on the ground that the appeal can raise no questions not already moot because of the fact that the [petitioners] have already been granted in the dismissal of the bill all the relief to which they are entitled." 100 F. 2d, at 404. The Court of Appeals dismissed the appeal on this ground after ruling that the decree of the District Court would not in subsequent suits, as a matter of collateral estoppel or otherwise, influence litigation on the issue of the patent's validity. On review here, this Court did not question the view that the ruling on patent validity would have no effect on subsequent litigation. Nevertheless, a unanimous Court allowed the appeal to reform the decree:

"A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree. But here the decree itself purports to adjudge the validity of [the patent], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this Court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." 307 U. S., at 242 (footnotes omitted).

Although the Court limited the appellate function to reformation of the decree, the holding relevant to the instant case was that the federal courts retained jurisdiction over the
controversy notwithstanding the District Court's entry of judgment in favor of petitioners. This Court had the question of mootness before it, yet because policy considerations permitted an appeal from the District Court's final judgment and because petitioners alleged a stake in the outcome, the case was still live and dismissal was not required by Art. III. The Court perceived the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal.

B

We view the denial of class certification as an example of a procedural ruling collateral to the merits of a litigation, that is appealable after the entry of final judgment. The denial of class certification stands as an adjudication of one of the

In a sense, the petitioner in Electrical Fittings sought review of the District Court's procedural error. The District Court was correct in inquiring fully into the validity of the patent, Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945), but was incorrect to adjudge the patent valid after ruling that there had been no infringement. By doing so the District Court had decided a hypothetical controversy, Altwater v. Freeman, 319 U.S. 356, 363 (1941); yet petitioners could take the appeal to correct this error because there had been an adverse decision on a litigated issue, they continued to assert an interest in the outcome of that issue, and for policy reasons this Court considered the procedural question of sufficient importance to allow an appeal. In Copper v. Liebrand, 437 U.S. 455 (1978), we held that the class certification ruling did not fall within that narrow category of circumstances where appeal was allowed prior to final judgment as a matter of right under 28 U.S.C. § 1291. However, our ruling in Liebrand was not intended to preclude motus under 28 U.S.C. § 1292 (b) seeking discretionary interlocutory appeal for review of the certification ruling. See 437 U.S., at 474-475. In some cases such an appeal would promise substantial savings of time and resources or for other reasons should be viewed hospitably.
issues litigated. As in Electrical Fittings, the respondents here, who assert a continuing stake in the outcome of the appeal, were entitled to have this portion of the District Court's judgment reviewed. We hold that the Court of Appeals had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy.

We agree with the dissent, post, at 9, that federal appellate jurisdiction is limited by the appellant's personal stake in the appeal. Respondents have maintained throughout this appellate litigation that they retain a continuing individual interest in the resolution of the class certification question. See n. 6, supra. This individual interest may be satisfied fully once effect is given to the decision of the Court of Appeals setting aside what it held to be an erroneous District Court ruling on class certification. In Electrical Fittings, supra, the petitioners asserted a concern that their success in some unspecified future litigation would be impaired by stare decisis or collateral estoppel application of the District Court's ruling on patent validity. This concern supplied the personal stake in the appeal required by Art. III. It was satisfied fully when the petitioners secured an appellate decision eliminating the erroneous ruling from the decree. After the decree in Electrical Fittings was reformed, the then unreviewable judgment put an end to the litigation, mooted all substantive claims. Here the proceedings after remand may follow a different pattern, but they are governed by the same principles.

We cannot say definitively what will become of respondents' continuing personal interest in their own substantive controversy with the petitioner when this case returns to the District Court. Petitioner has denied liability to the respondents, but tendered what they appear to regard as a "nuisance settlement." Respondents have never accepted the tender or judgment as satisfaction of their substantive claims. Cf. Cover v. Schwartz, 132 F. 2d 541 (CA2 1942), cited by the
dissent, post, at 10, and n. 12. The judgment of the District Court accepting petitioner's tender has now been set aside by the Court of Appeals. We need not speculate on the correctness of the action of the District Court in accepting the tender in the first instance, or on whether petitioner may now withdraw its tender.

Perhaps because the question was not thought to be open to doubt we have stated in the past, without extended discussion, that "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff. . . ." Coopers & Lybrand v. Livesey, 437 U. S. 463, 469 (1978). In Livesey, we unanimously rejected the argument, advanced in favor of affording prejudgment appeal as a matter of right, that an adverse class certification ruling came within the "collateral order" exception to the final-judgment rule. The appealability of the class certification question after final judgment on the merits was an important ingredient of our ruling in Livesey. For that proposition, the Court cited United Airlines, Inc. v. McDonald, 432 U. S. 385 (1977). That case involved, as does this, a judgment entered on the merits in favor of the named plaintiff. The McDonald Court assumed that the named plaintiff would have been entitled to appeal a denial of class certification.

The use of the class action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise. A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorneys' fees, by allocating such costs among all members of the class who benefit from any recovery. Typically, the attorneys' fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress at an
there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost. The prospect of such fee arrangements offers advantages for litigation by named plaintiffs in class actions as well as for their attorneys. For better or worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the “private attorney general” for the vindication of legal rights; obviously this development has been facilitated by Rule 23.

The aggregation of individual claims in the context of a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences.

The district court’s ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingency-fee basis. This, of course, is a central concept of Rule 23.

This case does not raise any question as to the propriety of contingent-fee agreements.

the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement. It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs. Permitting appeal of the district court's certification ruling—either at once by interlocutory appeal, or after entry of judgment on the merits—also minimizes problems raised by "forum shopping" by putative class representatives attempting to locate a judge perceived as sympathetic to class actions.

That small individual claims otherwise might be limited to local and state courts rather than a federal forum does not justify ignoring the overall problem of wise use of judicial resources. Such policy considerations are not irrelevant to the determination whether an adverse procedural ruling on certification should be subject to appeal at the behest of named plaintiffs. Courts have a certain latitude in formulating the standards that govern the appealability of procedural rulings even though, as in this case, the holding may determine the absolute finality of a judgment, and thus, indirectly, determine whether the controversy has become moot.

We conclude that on this record the District Court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy, and that respondents' individual interest in the litigation—as distinguished from whatever may be their representative responsi-
Depository Guaranty Nat. Bank v. Roper

Bilities to the putative class—Is sufficient to permit their appeal of the adverse certification ruling. 

Affirmed.

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.
Mr. JUSTICE STEVENS, concurring.

In his dissenting opinion Mr. Justice Powell states that, because the District Court erroneously refused to certify the class and because no member of the class attempted to intervene, the respondents "are the only plaintiffs arguably present in court." Post, at 2. This position is apparently based on the notion that, unless class members are present for all purposes (and thus may be liable for costs, bound by the judgment, etc.), they cannot be considered "present" for any purpose. I respectfully disagree. In my opinion, when a proper class-action complaint is filed, the absent members of the class should be considered parties to the case or controversy at least for the limited purpose of the court's Art. III jurisdiction. If the district judge fails to certify the class, I believe they remain parties until a final determination has been made that the action may not be maintained as a class action. Thus, the continued viability of the case or controversy, as those words are used in Art. III, does not depend on the district judge's initial answer to the certification question; rather, it depends on the plaintiffs' right to have a class certified.¹

¹ There is general agreement that, if a class has been properly certified, the case does not become moot simply because the class representative's individual interest in the merits of the litigation has expired. In such a case the absent class members' continued stake in the controversy is sufficient to maintain its viability under Art. III. In a case in which
Accordingly, even if the named plaintiff's personal stake in the lawsuit is effectively eliminated, no question of mootness arises simply because the remaining adversary parties are unnamed. Rather, the issue which arises is whether the named plaintiff continues to be a proper class representative for the purpose of appealing the adverse class determination. Cf. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U. S. 395, 403-406; United States Parole Comm'n v. Geraghty, --- U. S. ---, --- (slip op., at 16). In my judgment, in this certification has been denied by the District Court, however, a court of appeals cannot determine whether the members of the class continue to have a stake in the outcome until it has determined whether the action can properly be maintained as a class action. If it is not a proper class action, then the entire case is moot. If, on the other hand, the District Court's refusal to certify the class was erroneous, I believe there remains a live controversy which the court have jurisdiction to resolve under Art. III.

I recognize that there is tension between the approach I have suggested and the Court's sua sponte decision in Indianapolis School Comm'rs v. Jacobs, 420 U. S. 128. See also Pasadena City Bd. of Education v. Spangler, 427 U. S. 424, 430. As Mr. Justice BLACKMUN points out in United States Parole Comm'n v. Geraghty, --- U. S. ---, --- (slip op., at 12. n. 7), that case is distinguishable from this case because it involved an attempt to litigate the merits of an appeal on behalf of an improperly certified class. I agree that the Court could not properly consider the merits until the threshold question of whether a class should have been certified was resolved. However, I disagree with the Court's conclusion that the entire action had to be dismissed as moot. In my view, the absent class members remained sufficiently present so that a remand on the class issue would have been a more appropriate resolution. Just as absent class members whose status has not been fully adjudicated are not "present" for purposes of litigating the merits of the case, I would not find them present for purposes of sharing costs or suffering an adverse judgment. If a class were ultimately certified, the class members would, of course, retain the right to opt out.

I agree with the Court's determination in this case and in Geraghty that the respective named plaintiffs continue to have a sufficient personal stake in the outcome to satisfy Art. III requirements. See ante, at 12; Geraghty, --- U. S. at --- (slip op., at 15).
case, as in Geraghty, the named plaintiffs clearly remained appropriate representatives of the class at least for that limited purpose.\(^8\)

I therefore join the opinion of the Court.

\(^8\) My view of the jurisdictional issue would not necessarily enlarge the fiduciary responsibilities of the class representative as Mr. Justice Powell suggests, see post, at 16, n. 2. In any event, I do not share his concern about the personal liability of a class representative for costs and attorneys' fees if the case is ultimately lost. Anyone who voluntarily engages in combat—whether in the courtroom or elsewhere—must recognize that some of his own blood may be spilled.
TO: Mr. Justice Powell
FROM: Ellen
RE: Nos. 78-572 and 78-904 Roper and Geraghty

The Chief's revision of the Roper opinion substantially changes his analysis. In his new page of text, in the new FN 6, and in a number of new qualifying phrases throughout the opinion, the Chief now rests squarely on the respondents' alleged interest in sharing costs with a prevailing class. Much of the rest of the opinion, including the entire discussion of the Electrical Fittings case is, I believe, now entirely surplusage. In fact he now says that "[w]e agree with the dissent, post, at 9, that federal appellate jurisdiction is limited by the appellant's personal stake in the appeal." P. 10.

In light of these changes, I think that our discussion of the Court's unprecedented elimination of Art. III requirements from the realm of appellate jurisdiction, and our explanation of Electrical Fittings, are now unnecessary. We will also have to redo our summary of the Court's analysis, and I believe that we should now put our refutation of the "cost-spreading interest" analysis in text. Finally, we will need to change our discussion of Roper in Geraghty, since the Court no longer appears to rest on the "critical distinction" we

Ellen - let's try to recirculate both at same time.
identified there. The Court does not use the language "critical distinction" any more. See p. 9. More significantly, its present reliance on an asserted personal stake in the outcome makes it unclear that there is any distinction at all.

In short, I believe that substantial adjustments are necessary because the Chief has accepted one of our major points. There need be no substantive changes, however, and the adjustments will be largely deletions. I am proceeding on this, subject to your approval, but we certainly will not be ready to bring it down on Monday.
Re: 78-904 - Deposit Guaranty National Bank v. Roper

Dear Lewis:

Re your February 25 memo, I agree my February 21 draft has more than the form and stylistic changes of all the preceding drafts, but it hardly rises to the levels of a "new analysis." I concluded that I should try to meet your strong February 13 dissent.

Regards,

Mr. Justice Powell

Copies to the Conference
February 25, 1979

78-904 Deposit Guaranty v. Roper

Dear Chief:

The fifth draft of your opinion, recirculated on Thursday, substantially rewrites its analysis.

This will require equally substantial rewriting of my dissent. As we are in the middle of our February argument sessions, I may not be able to recirculate until the end of this week.

Sincerely,

The Chief Justice

1fp/ss

cc: The Conference