In the

Supreme Court of the United States

DEPOSIT GUARANTY NATIONAL BANK,
JACKSON MISSISSIPPI,

PETITIONER

V.

ROBERT L. ROPER, ET AL.,

RESPONDENT

No. 78-904

Washington, D. C.
October 2, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

DEPOSIT GUARANTY NATIONAL BANK, JACKSON, MISSISSIPPI, Petitioner	
v.	No. 78-904
ROBERT L. ROPER, ET AL., Respondent	

Washington, D. C.
Tuesday, October 2, 1979

The above-entitled matter came on for argument at 11:27 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WILLIAM F. GOODMAN, JR., Jackson, Mississippi; on behalf of the Petitioners

CHAMP LYONS, JR., Mobile, Alabamal on behalf of Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Deposit Guaranty National Bank v. Robert L. Roper.

Mr. Goodman, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM F. GOODMAN, JR.,

ON BEHALF OF THE PETITIONERS

MR. GOODMAN: Mr. Chief Justice and may it please the Court:

Rule 23 cases somehow tend to evoke emotional and hypothetical arguments from both sides. I will try to avoid such arguments insofar as possible. I will try to deal with the realities of this case on its merits, because my hope is to persuade this Court to deal with this case in the same manner.

Very briefly, two credit card holders sued the bank in 1971. The District Court denied certification in October of 1975. Interlocutory appeal was denied by the Court of Appeals in December of 1975. Over seven months later, the bank tendered to the two plaintiffs all that they demanded and the litigation was concluded.

An appeal was then attempted on behalf of an unnamed and uncertified class. And the Court of Appeals reversed, rejecting the mootness concept and went further to order certification. Hence, this petition.

QUESTION: Meanwhile, I assume, unless the other members of the potential class read about it in the newspapers, would not have known anything about this lawsuit, its issues; is that correct?

MR. GOODMAN: We don't know the answer to that, Your Honor, but we do know this: that from 1971 to the present date, according to the record, not a single other customer of the bank had filed suit, joined this suit, sought to intervene, or made a complaint, from 1971 to 1979, not a single other customer had done any of those things. That we know from the record.

Of course, your friend might argue that they may have refrained from doing so in reliance upon what they thought was the existence of a class action, even though it was not certified.

MR. GOODMAN: Of course, my response to that, Your Honor, would be that it was not certified. It was simply filed in a Clerk's office and entitled a class action. Certification was denied. As I said, over seven months went by before the case was finally terminated. And no one made any effort to join or intervene or enter the suit in any fashion. And that leads me to say that this Court has previously dealt, in effect, with two situations: one an appeal for a certified anonymous class, despite a mooted plaintiff, and where the only identifiable person showing an evident continuing interest in the legal issue was counsel.

QUESTION: Mr. Goodman.

MR. GOODMAN: Yes, sir.

QUESTION: I don't know whether you said or not, nobody tried to intervene up until now?

MR. GOODMAN: And not now. That is exactly right, Your Honor. I meant to say that. I may not have said it. No one has attempted to intervene at any point, including up until today.

Now, you have previously considered a situation where there was an appeal on behalf of a certified class. In addition, the Court has considered a situation where there was an appeal by an intervenor after denial of certification, and after a settlement by the named plaintiffs. But today you are considering a situation where named plaintiffs with moot claims asked the appellate court to reverse the trial court's denial of class status with no intervenors.

QUESTION: Mr. Goodman, you referred to our previous cases and, certainly, in cases like Jacobs and Sosna and Franks and United Air Lines and Rodriquez we have dealt with various trees in the class action forest. Do you think all of our cases are reconcilable?

MR. GOODMAN: I think the cases are reconcilable, Your Honor. I think that sometimes when we write a particular opinion we tend to say it a little bit strong for the particular version being put forth. And I am familiar with all of those

cases and that's what I was referring to. But today you are confronted with a situation where the plaintiffs with moot claims are asking the appellate court somehow to engage in legal fiction.

And let me say this: I think this is the heart of the lawsuit. An exercise in legal fiction is unquestionably required to reverse on appeal and make the reversal, if Your Honor please, retroactive back past the mootness occurrence until the time that the appellate court says the District Court should have certified the case.

Now, that takes an exercise in legal fiction. The question before this Court is whether Article 3 permits engaging in such a legal fiction or, perhaps better put, the question before the Court is the question of whether such a legal fiction should be employed in the facts of this case.

QUESTION: Let's take it in McDonald. There a class action denied, plaintiff recovers whatever he wanted, and he is paid off. And at that moment you would think he had no more interest in the case. An intervenor comes in and he is permitted to appeal the denial of class action; right?

MR. GOODMAN: Yes, sir.

QUESTION: Now, the only difference between that case and this one is that there is no intervenor, but the named plaintiffs want to appeal it on behalf of the class; right?

MR. GOODMAN: Yes, sir.

QUESTION: And you say they shouldn't be able to do it because the named plaintiff's interest is over; it is moot?

MR. GOODMAN: Yes, sir.

QUESTION: Now, in McDonald I would think as soon as the named plaintiffs had been paid off, his case was moot in McDonald, and the case was moot and was just as dead as a door nail, at least as dead as this one, and yet the intervenor was permitted to appeal. So why shouldn't the named plaintiff be permitted to appeal here?

MR. GOODMAN: That's the reason I tried to say with deference that what we are talking about is an exercise in legal fiction. And, if I can say so, that's what the Court did in McDonald. But the Court did it because it had a party before the Court who possessed a live controversy in the person of an intervenor.

QUESTION: You are just saying a live controversy because the named plaintiff was out of the case even; his case was moot.

MR. GOODMAN: Yes, sir.

QUESTION: And there had never been a certified class.

QUESTION: And the intervenor, in effect, didn't have to bring a class action. The intervenor could have brought a simple action on her own behalf. It seems to me that

McDonald must mean that not only is the controversy revolving around an amount of money due iustitiable but that there is an additional element, the right to bring a class action, which is also a iustitiable question.

MR. GOODMAN: Well, McDonald, of course, troubles me, and I wouldn't be candid if I didn't say that it did. There is one sentence in McDonald that, of course, my friend seized upon, and I wish it wasn't there. But that sentence was not necessary for the decision. That sentence was not essential for the decision, as I read the decision, United conceded that particular--

QUESTION: But the dissent said the majority was quite wrong in saying that, but the majority stuck right to it.

MR. GOODMAN: Yes, sir, but as I recall the dissent, they were also dealing in other factors. My point is this: What the Court has done, right or wrong, so far the Court has said, we can permit an appeal by a certified class because it acquires a separate and distinct legal status. And we have not only said that, we have said that sifnificantly. And so we can permit a certified class to appeal. And then we come along in McDonald and we can take this a step further, and we can permit an intervenor to appeal where we do not have a certified class.

Now, if we are now going to say that anytime a lawyer files a suit and entitles it a class action, does not

parsuade the Court that the case should be certified, the case becomes moot, that counsel, at his own instance, and on his own behalf, can continue to pursue the litigation as long as he chooses.

QUESTION: What about Judge Thornbury's concurrence in the Fifth Circuit saying that if the named plaintiffs had accepted the tender, that's all the Court had to -- the Court didn't have to decide what the question would be then. These named plaintiffs have refused a tender.

MR. GOODMAN: He was simply saying, as I recall, Your Honor, that Judge Rubin went further than he had to go.

QUESTION: Yes.

MR. GOODMAN: But I see no distinction.

In October, 1975, this case was stripped of its class action characteristics. It had none. Now, the bank--

QUESTION: Because there was no certification?

MR. GOODMAN: No certification.

QUESTION: Well, doesn't the plaintiff ever have a right to appeal from a denial for class certification; and, if so, when?

MR. GOODMAN: Excuse me, Your Honor.

QUESTION: Doesn't he ever have such a right?

MR. GOODMAN: Certainly, unless in the interim his claim becomes moot.

QUESTION: What?

MR. GOODMAN: Unless in the interim his claim becomes moot.

QUESTION: Supposing his request is denied, then what is he motivated to do? Should he try and win his individual claim? I assume he should, and if he wins on his individual claim, does he lose the right to appeal the denial of class certification?

MR. GOODMAN: In our judgment, he does.

QUESTION: What is his motivation at that point, if he has lost on the class certification? I guess it's in his interest then to try not to win his lawsuit?

MR. GOODMAN: Well, we have to assume that the motivation of a named plaintiff is to recover his--

QUESTION: Individual claim.

MR. GOODMAN: Yes.

QUESTION: But you also then have to assume he has no separate legal interest in representing a class.

MR. GOODMAN: Well, you have said that he does as long as he himself possesses a live claim, but not in immortality.

QUESTION: I don't get it. He didn't accept this. He didn't agree to this, did he?

MR. GOODMAN: Well, Your Honor--

QUESTION: The way I read it in the opinion, the opinion in this case said they didn't.

MR. GOODMAN: Well, let's talk about that for a minute because that's one of the key things here.

QUESTION: Well, the whole point is if that was all of their claim, if you take the class action out and the only thing they are entitled to is 800 to 400, then they have grave trouble with the excess of 10,000; don't they?

But the other point is they didn't agree that's what the facts were. Now, what's behind that? The statement is made in the opinion that the plaintiffs do not agree to this, the appellants do not agree with it.

MR. GOODMAN: Well, there is also talk of settlement in the opinion, and that is incorrect. Here is what happened, and the record shows it: Seven months after the denial of class certification, the bank said to the two plaintiffs, "What are you claiming?"

They responded, "The bank tender to them every dollar they were claiming."

Now, it's inferred in the Court of Appeals that there is something wrong about that. What did the bank do?

QUESTION: Mr. Goodman, that isn't really correct. That's what they were claiming. Weren't they from the beginning of the lawsuit making two separate claims: one that they are entitled to $12.00 apiece, or whatever it was, I forget the dollars; and, secondly, that they were entitled to represent a large group of persons who had similar claims.

Didn't they make both claims? They did, and they got half of it when you tendered them the money, but they have never gotten the first thing they asked; namely, the right to represent everybody.

And when did they lose that right? When did they lose the right to assert that they had a right to represent everybody?

MR. GOODMAN: Well, to get right down to the lawsuit, Judge, there is no way that Rule 23, a Rule of Procedure, can somehow create appellate jurisdiction or power to decide a moot question.

QUESTION: Well, when did that question become moot, the question of whether or not they could represent a class, when did that become moot?

MR. GOODMAN: It became moot when there was nobody left in a lawsuit contending that the question still existed but counsel. There was nobody before the Court.

QUESTION: The plaintiffs continued because they rejected your tender. They said, "We don't want your money. We still want to try and represent the class as we have from the beginning of this lawsuit."

The only thing that has happened is that insofar as we claim wrongdoing in money, they have acknowledged that we were right. So why should that cause them to forfeit their right to litigate the other half of their case?

MR. GOODMAN: Because the controversy is moot.

QUESTION: The individual controversy, but not the controversy their claim to right to represent this class. When did that become moot?

MR. GOODMAN: It became moot, Your Honor, as I said, the minute their personal claims--

QUESTION: You could have sent them the money before even the class certification issue arose.

MR. GOODMAN: We could have.

QUESTION: Would it have become moot then?

MR. GOODMAN: Not as I read the decisions of the Court. As I read the decisions of the Court, you have got to give the trial court a fair chance, and a fair opportunity to rule on the certification question. You can't just run in and moot the case immediately.

QUESTION: Why not give the appellate court the same right then?

QUESTION: Mr. Goodman, don't you really have to get down a little deeper than perhaps Court has in some of its class action cases here and recognize that at least many courts have read into Rule 23 that it's basically a case managed, not by clients, but by lawyers; and that clients themselves couldn't care less about getting $12.00 apiece from the bank, and that somehow or other, as Justice Stevens says, the other half of the issue, or at least another part of the issue,

one is whether each client will recover a particular sum of money and the other of which is whether a rather large class which will furnish a rather large attorney's fee to attorneys will be certified or will not be certified?

MR. GOODMAN: That's a candid look at it, Your Honor. I think that, and I realize that I am not satisfying your inquiries over here, and the reason is that I think you are assuming with those questions that when you file a lawsuit that somehow the Rule, when it permits you to request class action status, permits you to litigate that question all the way up.

Here's the problem: The Court of Appeals said -- I don't think it should ever have gotten to the question, but it did, and it said the District judge was wrong when he denied certification. Now, what the District judge did was not void. It was simply wrong, according to the Court of Appeals.

Now, the Court of Appeals could not enter a nunc pro tunc type ruling and have that jump back in time to the time when the District judge entered his ruling.

I think the problem is that if you are conscientious appellate judge and you have something before you and you think it was decided wrong below, you know, you feel like you need to decide it and correct it, but there are many instances--

QUESTION: Mr. Goodman, if you're talking in terms of power, I don't understand why a tender before the issue of

certification is even presented to the trial judge wouldn't equally moot the case.

MR. GOODMAN: Well, I think I couldmake a strong argument that it would.

QUESTION: Sure, I think you have made the argument that it would. I think that's exactly the argument you're making, that whenever the tender is made to the individual claimant,if there has been no certification, there is nothing more to litigate.

MR. GOODMAN: As I understand the rulings, you have made an important distinction between the time of certification.

QUESTION: Logically, that distinction is the same, regardless of whether it is before a presentation to certification or an erroneous denial of certification. Logically, you have the same mootness problem, it seems to me.

If we accept your argument and carry it to the logical conclusion, I think we should equally have to hold -- and maybe we should -- that a defendant can run in before -- as soon as a complaint is filed and pay off the plaintiff.

MR. GOODMAN: I don't know.

QUESTION: I don't know why not. You'd defeat a lot of class actions that way and people would get their money. The same thing you're doing here.

MR. GOODMAN: The personal stake here, Your Honor, is money.

QUESTION: The same in my hypothetical.

MR. GOODMAN: Is money, and if these named plaintiffs recover their money, they have recovered their entire stake.

Now, what has happened in the Fifth Circuit, and perhaps in other places around the country, this is exactly what's happened. First, they came along with Title VII cases, let's say, and the named plaintiff's controversy would become moot, but the Court would say because it's this type of case, and because Congress has entrusted the Federal courts with the particular responsibility in this kind of case, sort of a private attorney general concept, that the nexus is there, and we will continue with the lawsuit, with legal fiction, perhaps justified, perhaps not.

They do that in half a dozen cases, Your Honor, and then all of a sudden they get to a pure, commercial, money lawsuit, and they do the same thing, and cite as authority these earlier Title VII decisions which were bottomed on an entirely different premise.

QUESTION: You are referring to the realism of this whole pattern of conduct earlier. What you're saying -- well, put it this way: Isn't what you're saying about what shouldn't be done, if these class action people, or if the lawyers sponsoring the litigation want to have, want to continue it, they should go out and drum up another plaintiff?

Isn't that what you're saying?

MR. GOODMAN: I would hate to say it exactly that way. That is one way for them to continue it, unfortunately.

QUESTION: Isn't that the realistic aspect of a great many class actions, not necessarily this one, or any category, but a great many class actions don't talk to the benefit of the named plaintiff who may get, as in one famous case, $8.63, but for the benefit of the lawyers? Isn't that the realism?

MR. GOODMAN: The realism, and I wish I knew how to say this correctly, the realism is that the case should not be here, and shouldn't be litigated when there is no controversy. There is not a single dissatisfied customer out of 90,000 Deposit Guaranty National Bank other than two who claimed money and it has been tendered to them. Not a single dissatisfied customer.

So, I submit that the realism of the matter is that because counsel wishes to pursue the litigation, it can be pursued so long as counsel deems appropriate.

May I reserve the balance of my time?

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Lyons.

ORAL ARGUMENT OF CHAMP LYONS, JR.

ON BEHALF OF RESPONDENT

MR. LYONS: Mr. Chief Justice and may it please the Court:

There have been charges made during the briefing and, to some extent, during argument, that this is an action maintained for the benefit of the attorneys. I don't mean to take undue omberage, but I do detect some suggestionof lack of professional conduct. There has been no evidence whatsoever. I'm confident that if there had been any evidence of it, the defendant would have been able to produce it. That, we submit, is a smokescreen.

This is not purely a commercial damage action. We must not lose sight of the fact that this is a charge of usury by a National bank, an instrumentality of the United States in direct violation of a Federal statute.

Usury has been universally condemned by about every culture that our civilization has produced. This is not a technical usurly claim of one-half a point or so forth, this is a charge of 10 percent over the legal rate of interest. It involves claims that will range from $100.00 on up. That may be a small sum of money to the bank, but it aggregates to the extraction of $12 million in illegal interest from a class composed of upwards of 90,000 people in the State of Mississippi.

In that posture, the public interest is involved and this is an action charging a violation of a Federal statute.

QUESTION: Well, Mr. Lyons, isn't that exactly why we have to explore here just the recovery of individual plaintiffs but whether, in adopting Rule 23, it was intended to confer not only the right to litigate about individual claims, but about the right to litigate whether or not a class should be certified as a class action?

MR. LYONS: Yes, sir, that is essential to my theory of the harmonizing of all of these cases which Your Honor referred to as many trees in the class action forest. In all of the cases in which we find language that a properly-certified class avoid mootness, in none of those cases was the right to proceed as a class action a litigated issue in a case, as it is here.

In only one case, this Court granted certiorari and vacated the proceedings as moot where the class action was a litigated issue in the case. And that is Ihrke v. Northern States Power. But in that case the Court of Appeals had said no, the District Court was right, it shouldn't be a class, different from the case here.

QUESTION: What were your options when the Court denied class action certification?

MR. LYONS: In fact, what happened, when the Court denied class action certification, an interlocutory appeal was

sought to the Fifth Circuit. And the defendant successfully opposed it. And the seven-month hiatus period that has been talked about was consumed during that proceeding. Then the plaintiffs came back and moved for summary judgment on the individual claim and at that time the tender was made. It was filed with the Court in the form of Confession of Judgment. WE served a counter offer judgment, which would have expressly made the defendants agree that the class issue is available for review. They wouldn't have anything of it.

The District Court entered a judgment over our objection and the money remains in the court as of this date.

Now, the thing we can't lose sight of is the Fifth Circuit held this was a classic case for class action treatment, and there had been, indeed, an abuse of discretion.

QUESTION: That question, as I understand,in view of our limited grant is not before us here, whether the Court of Appeals was right or wrong on the merits of the class action.

MR. LYONS: That's correct.

QUESTION: Is that correct?

MR. LYONS: That's correct. And the intent of the named plaintiffs here was nothing more than a deliberate act to destroy jurisdiction. It was a calculated gimmick. And they refer in their briefs of being weary of the litigation, I think electrified of the possibility of having

to pay back the illegal interest is what motivated their entire conduct. The case of controversy rule, the basis for it in a tripartite government, it makes sense that the judicial power not be exercised except in real cases and not in imaginary cases.

It is also a device for ensuring the quality of an adversary proceeding in the form that we have historically become accustomed to resolution of judicial controversy. I submit that we have that here.

There are cases where both parties say, "Please rule; we have got to have an answer to this", and this Court has said, "Oh, no, just because both parties want the answer that doesn't mean that this Court is going to have a case of controversy jurisdiction."

Those cases aren't in point here. We have got one party that doesn't want any ruling. We have got one that says this is a live and active controversy, and that's the plaintiff.

Now, mootness is a time dimension of standing. There is no question at the time of commencement of this action the named plaintiffs had standing, and they possessed all of the prerequisites of Rule 23.

QUESTION: Mr. Lyons, let me get at this another way. I am confused. Look, you write the bank and you say, "Look, if you don't pay me my money now you owe me, I'm going to sue

you." And the bank says, "Okay, I'll pay." You don't have any suit though.

MR. LYONS: That's right.

QUESTION: You file the lawsuit and the day after you filed it, the bank comes in and says, "We'll pay you." You are still going for your class action. You have a right for your class action.

MR. LYONS: Yes, sir.

QUESTION: I have trouble with that.

MR. LYONS: Yes, sir, and I think there is no basis for trouble because of the sauce in the line of cases, which recognizes this Court has already embraced a notion that standing can exist at the commencement of an action. Events can occur prior to certification which would moot the individual claim but nonetheless the case of controversy jurisdiction is ongoing.

QUESTION: That's capable of repetition, but evading a review type of situation where you are not seeking a money judgment; you're seeking relief which the particular named plaintiffs may not ever be able to obtain because of the durational residency requirement. I have trouble with transferring that over into a simple money judgment question.

MR. LYONS: Both capable of repetition but yet evading review standards in the mootness field in the concept of voluntary cessation of illegal conduct as not being a

basis for mootness arose historically in the injunctive context. This is an action for money damages, but I submit that both doctrines have a field of operation here. The voluntary cessation of illegal conduct is a ready analogue to paying two out of 90,000 claims; therefore, that act ought not be viewed as it existed for purposes of mootness.

They have argued in their brief that it is not what is the cause of mootness, but the fact that very rule, the voluntary cessation of illegal conduct flies in the face of that.

Secondly, capable of repetition, yet evading review. We all recall the ICC where there was a rate order that was going to expire and it did expire, and they said no capable of repetition evading review go forward. The ready analogue to that in the money judgment case is in this case there will be an evasion of review. Because the case is moot, the bar of the statute of limitations comes crashing down.

QUESTION: But it won't be moot as to people who have not filed unless there has been an intervening event, the statute of limitations, and then it's not a question of mootness. It's a question of the bank having an affirmative substantive defense.

MR. LYONS: Well, Your Honor, this Court has recognized in United Airlines v. McDonald that

the named plaintiff can appeal.

QUESTION: Upon timely intervention.

MR. LYONS: Within 30 days after the entry of final judgment, the intervenor can appeal. But the named plaintiff could have appealed. One of the bases for Coopers & Lybrand where the right of interlocutory review was withheld had to do with the fact the collateral order doctrine didn't apply because of effective review available at the time of judgment at the behest of the named plaintiff. In a nine to nothing opinion, this Court cited United Airlines v. McDonald. So the statute of limitations has got to be told during the pendency of all possible process to exhaust a challenge to the ruling in the District Court.

The finding of a District judge on certification must be deemed infallable if the defendants have their way in clearly erroneous refusal to certify has the effect of destroying the case.

In this case the defendants--

QUESTION: Couldn't a member of the class have intervened?

MR. LYONS: Pardon?

QUESTION: Couldn't a member of the class have intervened?

MR. LYONS: Could have intervened.

QUESTION: Yes.

MR. LYONS: Could have intervened for himself or another. The teaching of United I would assume he could intervene for class certification. This appeal was noted before United was written, where the right of the intervenor to come in and prosecute the appeal was not as clearly established.

QUESTION: They couldn't have appealed the class certification issue until the case was over.

MR. LYONS: That's right.

QUESTION: The only thing he could have done to intervene during the trial was to try his own case like the named plaintiff was trying.

MR. LYONS: Of course, in United there was condemnation of setting up the multiplicity of actions whereby the named -- the non-member class--

QUESTION: There was judgment entered there, so the intervention didn't occur until after judgment.

MR. LYONS: In United, that's correct. But the statute of limitations arguments were unavailable, unavailable in a context where the named plaintiff himself could--

QUESTION: As a matter of fact, here when somebody intervened they would pay him off.

MR. LYONS: That's the point, because they had rejected the counter offer judgment and itwould have just been a pick off system one . I think there is a strong argument they were estopped at the moment -- the

clear implication of it is if we had only had an intervenor we would have had a right controversy to refuse class wide issue when in truth and in fact they would have paid them off one at a time and I further submit that if too many of them had showed up they would have turned me over to the Grievance Committee.

QUESTION: When you talk about a pick-off system, couldn't you equally well refer to it as the system of a defendant settling with the plaintiffs who present claims? I mean it all depends on how you couch the language I think.

MR. LYONS: It's a pick-off any way you slice it, whether it occurred before certification or after and it is a calculated gimmick to avoid Rule 23 treatment.

If it was so easy, so lawyers, you know, a big case, that went through this Court on big occasions missed the boat because they could have tendered $1.10 and got rid of a whole case, if this was only valid.

QUESTION: Suppose you go to the bank and you say, "You have been violating the usury laws, why don't you pay us all off?" And the bank says, "We'll think about it." And you say, "Well, you had better, because I'm going to sue you."

So they call you up and say, "Well, we're going to pay you. We'll pay you. You've got two clients; we'll pay both your clients." And you say, "I'm awfully happy about

that; please pay us and I am going to file suit on behalf of the clients"? I don't suppose you could do that.

MR. LYONS: No, sir.

QUESTION: Why not?

MR. LYONS: Because you have standing at the commencement of the action.

QUESTION: You have to have your own interest?

MR. LYONS: Yes, sir.

QUESTION: But the day after, as soon as you file, the day you file you are no longer subject to being picked off?

MR. LYONS: Not the class claim.

QUESTION: That's what I mean.

MR. LYONS: Because the class claim is a properly certifiable class claim. That is the distinction.

QUESTION: You say you have the right to have that issue finally decided on appeal, whether you are picked off or not?

MR. [illegible]: Yes, sir, once you have had standing going in.

QUESTION: Once the case starts, the case can't possibly be mooted by being paid off or your recovering judgment.

MR. LYONS: Even the Seventh Circuit has ruled that the pre-certification payoff won't cut it. That's Susmann v. Lincoln American.

QUESTION: Even if the case might otherwise be called moot, it just isn't moot on the class action?

MR. LYONS: If it's a properly certifiable class, that's correct. And that harmonizes with Sosna in that line of cases.

QUESTION: Now, suppose you are paid off, you file a suit, class action denied, and then you're paid off, and then you go out and you file a separate suit on behalf of the class; you'll be thrown out, I guess?

MR. LYONS: You wouldn't have the standing to bring a new action.

QUESTION: But you have standing to maintain the old one.

MR. LYONS: You can prosecute the ongoing proceeding, yes, Your Honor.

In this case the rules of mootness have been there must have been mootness on all claims. That's Powell v. McCormack. Part of the claim remains unsatisfied. Two out of 90,000 are the only claims that have been satisfied.

The mootness rules of this Cout have said there must be complete eradification of the effect of illegal conduct. There has been no such complete eradification.

QUESTION: Is your position consistent with Jacobs v. The Indianapolis School Board, do you think?

MR. LYONS: Yes, sir. Jacobs, the question of

certification was not before the Court in this proceeding. The litigation of whether or not there should have been a certification never came up.

The Sosna Case is in harmony with this. But the Sosna Case said that the fact of a certified class may be a sufficient basis to avoid a finding of mootness.

I respectfully submit that the certifiability of the class is also a basis for the avoidance of mootness in that the Sosna Case isn't inconsistent with that because nobody litigated in SOSNA.

QUESTION: But you have to pray for certification in your complaint in order to harmonize it with Jacobs.

MR. LYONS: Yes, sir, you have to ask for certification, and you have to have it refused and you have to keep litigating it, which we did.

QUESTION: What you're saying, on the practical side of it, these problems would be solved if there was a requirement that class action -- denial of certification be appealed within 30 days and resolved right at the threshold?

MR. LYONS: That would be a solution to the problem and would avoid the dilemma that no review of certification creates, but if there can be no immediate review of certification, as we understand the law to be today, then unless there is review after judgment, then you're down the deadend street of no review and you have to indulge in the presumption

that the District Court's discretion on the denial of class action is infallable. And I frankly find that abhorrant to the system of justice I have come to expect, with the right to review of final judgment of a District Court of the United States on all your claims.

QUESTION: That presupposes that it is a valid case or controversy type of Article 3 claim to say that you want to represent a class of people whom you don't know probably, very often you wouldn't know them. Has the Court ever really decided yet clearly that that is a case that can right itself clearly?

MR. LYONS: Well, the Court has said this, that there is no absence of case of controversy when a named plaintiff's claim becomes moot before certification can take place; and that the doctrine of relation back where the issue will otherwise evade review is available. Now, they say there is a fiction involved here. I say that if there be a fiction, the greater fiction is to say that the case of controversy is gone and there is no mootness because two out of 90,000 claims have been satisfied.

QUESTION: When you refer to the doctrine of relation back, are you referring to Sosna?

MR. LYONS: Footnote 11 in Sosna.

QUESTION: That simply left the questionopen, didn't it?

MR. LYONS: Your Honor, it does speak in the context of a transitory, temporal type claim. We respectively submit the doctrine is equally applicable here where the transitory appeal time has got to run before you can get up and then get your review and then it ought to relate back to the date you were in District Court asking for certification. The defendants never challenged the standing at that time.

QUESTION: But those are the kinds of open questions we have got to decide or put to one side in this case.

MR. LYONS: Yes, Your Honor. I don't think it requires an expansion of any existing precedent. I think it is just a situation of new wine in old bottles. It's just that these are new facts which have never clearly been opened. And I submit that it's just an essential ingredient of the method by which we administer justice if the relation back principle applies. Because there is no way to go toappeal and go to the Fifth Circuit and get it reversed just like that. And even if Mr.Chief Justice's suggestion of opening it up for 30 days to take your appeal, you are going to consume many months probably before you could get a ruling if it were reviewable at that time.

QUESTION: Apart from cases involving short time when the doctrine of evading review -- I forget the exact language -- apart from those cases, has the Court ever squarely held that the tender in advance of an attempt to certify will

not moot a case, a class action?

MR. LYONS: This Court has not. The Seventh Circuit has.

QUESTION: But, logically, it seems to me, that's sort of the bedrock of the whole argument is whether a tender even then might moot it. Because I think their argument about apply in advance of certification as well as after, and he doesn't want to press that. Of course, I know it is an extreme position, but don't you have to start from the proposition that there is a case or controversy prior to certification even though the named plaintiff has been tendered all he has asked and, therefore, is no longer a good class representative would be the argument.

MR. LYONS: Yes, that's correct because of the existence of a properly certifiable class.

QUESTION: It is certifiable, but 10 days after the lawsuit starts, the named plaintiff is tendered his $300.00, or whatever it is. Now, he's happy. If he refuses that tender how is he going to be a good class representative anymore?

MR. LYONS: If he refuses the tender?

QUESTION: Yes, because he has shown he is not really interested in his own claim anymore.

MR. LYONS: He's interested in his own claim to the extent that he doesn't want to do anything to jeopardize the

other prong of his being there, and that's the fiduciary duty to the class.

QUESTION: I must confess I'm a little troubled by Mr. Justice White's example. In terms of Article 3, why is there such a difference between going in to the bank informally and say, "Pay us off now and we won't sue you." Then there is no lawsuit. They, obviously, can't come in the next day and represent the class. And paying him off three days after the lawsuit is filed, why wouldn't that moot the case?

MR. LYONS: Because one distinction is when they pay off after the lawsuit is filed, that is a voluntary cessation of illegal conduct which is calculated to evicerate Rule 23, which this Court ought not tolerate.

QUESTION: No, it's not because it's voluntarily ceasing illegal conduct. They say,"We think we've done everything lawful all along, but we want to get you out of our hair, so we'll just pay you off and you can't sue us". Now how do we have a live case or controversy that even be certified?

MR. LYONS: Because they did it because they wanted to avoid the fact there's a good class action here. That's what they did it for.

QUESTION: But that stands W. T. Grant on its head to say that paying a money judgment is a voluntary

cessation of illegal conduct. That's always been in the injunctive context before.

MR. LYONS: Not when it's a partial payment. It's not a complete eradication of the effects of illegal conduct, which is also an essential ingredient of mootness, that the illegal conduct be completely covered up and everything be taken care of and resolved and made whole.

They say they were just buying their peace. They tendered a crumb, not even half a loaf.

QUESTION: Mr. Lyons, the fiduciary duty of the named plaintiff to the putative class, from whence did that fiduciary relationship arise? How does one individual or two give birth to a fiduciary relationship to 90,000 people they never saw and don't know?

MR. LYONS: By permitting his name to be used in the U. S. District Courthouse on a complaint with a claim asking for class action treatment. That's a commitment to that class.

QUESTION: That was the theory of the Court of Appeals in the opinion written by Judge Reubin. It wasn't necessarily the theory of Judge Thornbury and it's not one that you have to adopt.

MR. LYONS: That is very correct. We are here, whether we answered the call of duty, or whether we--

QUESTION: Or voluntary action--

MR. LYONS: And I have some views on that in the abstract if the Court is interested, but, for purposes of resolving this case, that question is not one to affect the results.

QUESTION: There is nothing -- or I will put the question to you: What is there in the class action rule that would suggest this fiduciary concept that Judge Rubin--

MR. LYONS: I don't think that the class action rule could procedurally -- a rule of procedure could dictate what is and what isn't fiduciary duty, but I think that once you cast yourself in that role that just under the general rule if it applies to fiduciaries, you've got certain responsibilities.

QUESTION: In other words, you don't need to contend that you had a duty to appeal?

MR. LYONS: Absolutely not. As a matter of fact--

QUESTION: The Court of Appeals held that you did.

MR. LYONS: In the Fifth Circuit I contended there was a right but not a duty.

QUESTION: A privilege, an action, not a right.

QUESTION: The class action was just a procedure. It has no jurisdictional value at all, does it?

MR. LYONS: That's correct.

QUESTION: That's what I'm wondering, where the fiduciary thing gets in there.

MR. LYONS: Well, if I come forward and I say I want

to represent myself and everybody else, and I avail myself of a Federal procedural rule, I'm not sure--

QUESTION: My point is, is that before or after the class is certified? That's my point, that the fiduciary point comes in. Is it there before it is certified?

MR. LYONS: Well, if he takes a payoff before certification, he's liable to get into a pack of trouble.

QUESTION: If there is a fiduciary duty, it's got to be a two-way street. If that's the concept, then it may have been and it might be that making a settlement that conceivably would moot the action would be a violation of that fiduciary duty. And when these people accepted the money--

MR. LYONS: They didn't accept money, Your Honor. The money is still under deposit.

QUESTION: I'm not speaking of your case. I'm speaking in the abstract of class actions, if settlement is made and people, 300 or 200 or whatever, on the fiduciary theory they might be violating their fiduciary duty.

MR. LYONS: Is this after certification has been refused?

QUESTION: Before or after.

MR. LYONS: Well, before, I think it's a real problem, because you could extract a greater claim in your own individual behalf than it's really worth in order to avoid the threat to defendant of class recovery; and you are making a

personal gain by reason of somebody else's being involved.

After certification, it would be my view that the duty ought to be on the member of the class to ascertain the intention of the plaintiff as to whether he was going to appeal. That clearly recognizes that he's got the right to appeal in Coopers & Lybrand and United Airlines. And if the named plaintiff decides he is not going to appeal,then you could have the intervention.

Our notice of appeal was filed on the 25th day.

We have never had an evidentiary hearing on what the 90,000 people are thinking or did think. We'd be interested to know how many of them opt out if we get back and go to a judgment. But the fact of it is, there was a five-day period after we filed our notice of appeal when the intervenor sat back and said, "Our rights are being protected. The case is going to forward. We're going to have Judge Nixon's erroneous order reviewed by the Fifth Circuit, and we feel confident it will be overturned, particularly in view of the fact there had already been the same type of case go all the way through the Alabama Federal Court system, through certification and then settlement."

QUESTION: All of this is hypothetical. Would you care to venture a guess as to how many of the 90,000 people know anything about this in the absence of a certification and notices?

MR. LYONS: I have no way of knowing what communications the bank has made available to them over the years if they had inquired of the bank as to what is going on in this lawsuit.

In summary, the defendant has a huge windfall. The ratification of this theory of mootness will allow them to keep their windfall after paying only two out of 90,000 claims. This would evicerate Rule 23. It would violate the Rule 1 mandate for the just determination of every action. It elevates the District Court's ruling on certification to a level of infallability, which destroys rights.

It destroys the fairly created right to review and have procedural ruling, and it allows the adverse procedural ruling to control this Court's subject matter jurisdiction.

QUESTION: Are you suggesting -- you say they didn't pay off everybody -- but are you suggesting they admitted liability?

MR. LYONS: Without prejudice.

QUESTION: Well, that's what I thought. You know a lot of people pay plaintiffs off just to get rid of a lawsuit. There's nothing wrong with that. That is, they would rather pay than litigate.

MR. LYONS: Which they paid here to get away from class action.

QUESTION: Well, I know, but they didn't admit

liability.

MR. LYONS: They did not admit liability.

QUESTION: And in the long run you may lose your case.

MR. LYONS: Absolutely. We don't have the merits here.

QUESTION: Exactly. So you may not have been entitled to your payment.

MR. LYONS: But we have not had a trial on the merits.

In summary, there is a logical nexus between the named plaintiffs and the class. This Court has the requisite concreteness and adversity sufficient to recognize case of controversy jurisdiction. They had standing going in. This Court has already embraced in Sosna the notion that something might happen to that standing as it stood on the day the plaintiff walked into the courthouse and then certification occurs subsequently without destruction of case of controversy jurisdiction.

That rule needs to be logically applied in this case so as to recognize the right of a named plaintiff who has been the victim of an erroneous moving on the right to certify the class, to have it reviewed. The proper test should be as to whether a case of controversy and jurisdiction exists; does the named plaintiff represent a properly

certifiable class? And that properly certifiable class he is entitled to have an answer in the Federal judicial system and it ought not stop at the District Court level.

We respectfully submit that the judgment of the United States Court of Appeals for the Fifth Circuit is due to be affirmed.

QUESTION: Could I ask you one thing?

Could the defendant have insisted on having the case dismissed where he tenders a settlement and you refuse it?

MR. LYONS: We have contended all along, Your Honor, that the dismissal of the case after we had claimed class action treatment ought not to have taken place. But, since the District Court had ruled against us on our right to class action, then I would suppose the District Court would have the right to say case dismissed, for whatever reason, no more claim is live so far as I'm concerned. But then we took--

QUESTION: What is the status of the named plaintiff's case now in this case?

MR. LYONS: The named plaintiff's claim was paid into the Registry of the District Court.

QUESTION: And what happened to the case?

MR. LYONS: The case was dismissed by the District Judge.

QUESTION: Why?

MR. LYONS: Because certification had been refused

and the money was paid into the Court and, based upon the tender, judgment was entered dismissing the remaining portion of the case.

QUESTION: And what if you tried to appeal?

MR. LYONS: We appealed the right to proceed on behalf of the class.

QUESTION: Why didn't you appeal the dismissal?

MR. LYONS: Yes, we filed a notice of appeal of the entire action. We took it to the Fifth Circuit.

QUESTION: Um-hum.

MR. LYONS: I'm not sure where that leaves me, but that's what happened. All along we have sought to review the right to proceed on the part of the class, and we consider that proper before the Court.

Thank you.

QUESTION: Mr. Goodman, you have about eight minutes left. You have three of them before we rise.

MR. GOODMAN: All right, sir.

REBUTTAL ARGUMENT BY WILLIAM F. GOODMAN

On BEHALF OF THE PLAINTIFFS

MR. GOODMAN: The notice of appeal is a strange thing in this case. The appeal was not filed for the named plaintiff, but was filed solely on behalf of anonymous, unnamed, uncertified class.

Reference has been made to illegal conduct on the

part of the bank. Now, the record before you shows that the Legislature of the State of Mississippi has not only specifically outlined the charges that can be made for credit card arrangements, such as this, but has made that retroactive. So you could say to me, "What are you concerned about?" Not the merits of the case, if the Court please, but concern about, with no champion, and we say no jurisdiction, concerned about notices about a dispute that started in 1971 being sent by a court to 90,000 customers, disturbing our normal, good, respectful business relationship with those customers. That's what the bank is concerned about.

And we submit that in a case of no jurisdiction that shouldn't take place. When here comes a notice from a court which, of course, a great many of them would not understand, suggesting that they opt in or opt out, as the case may be, of litigation of this type.

Now, counsel says that if certification is significant that this puts the trial judge in a position of power that perhaps he shouldn't assume. I submit that certification does require integrity at the trial level, the question of certification. And I submit that so does the entire judicial process require integrity at the trial level.

How many cases reach this elevated status?

Our system begins upon integrity at the trial level. And, whether we sometimes like it or not in the abstract,

Article 3 dictates that the trial judge many times rules upon questions that are never reached on appeal.

MR. CHIEF JUSTICE BURGER: We will resume at 1:00 o'clock.

(Whereupon, at 11:58 o'clock a.m. the Court recessed to reconvene at 1:00 o'clock p.m.)

AFTERNOON SESSION 1:00 p.m.

MR. GOODMAN: Mr. Chief Justice, after deliberation over lunch, we believe that we have concluded our argument unless the Court has further questions.

MR. CHIEF JUSTICE BURGER: I hear none.

Thank you, gentlemen, the case is submitted.

(Whereupon, at 1:02 the case was submitted.)