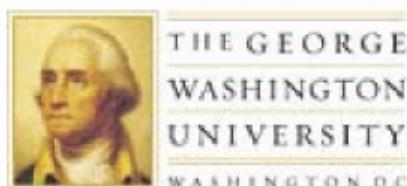


# The Burger Court Opinion Writing Database

*Deposit Guaranty National Bank v. Roper*  
445 U.S. 326 (1980)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 1, 1979

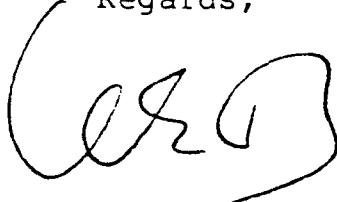
Re: 78-904 - Deposit Guaranty National Bank v.  
Roper, et al.

MEMORANDUM TO THE CONFERENCE

Enclosed is the proposed opinion in the above case. I have placed the holding on the narrow grounds of the named plaintiffs' economic interests leaving to later cases the development of just what are the "representative" obligations, if any, owed to an uncertified class when property interests are involved.

I would prefer to keep the holding narrow and await developments in the other courts. Harry's opinion in Geraghty deals with liberty interests and may be on a broader ground. If so, some accommodation may be called for. I doubt there will be any conflict.

Regards,



To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: NOV 2 1979

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, }  
v. } the United States Court  
Robert L. Roper et al. } of Appeals for the Fifth  
Circuit.

[November —, 1979]

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; seek 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, which permit banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located," § 85; and, in a case where a higher rate of interest than allowed has been "knowingly"

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 16, 1979

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

MEMORANDUM TO THE CONFERENCE:

Attached is a revised draft of the opinion with  
editorial changes throughout.

Regards,

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: Nov 16 1979  
Recirculated: Nov 16 1979

**2nd DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 78-904

Deposit Guaranty National Bank, On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, } the United States Court  
v: } of Appeals for the Fifth  
Robert L. Roper et al. } Circuit.

[November —, 1979]

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. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly"

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

November 26, 1979

PERSONAL

Re: No. 78-904, Deposit Guaranty Nat'l Bank v. Roper  
No. 78-572, United States Parole Comm'n v. Geraghty

Dear Harry:

With all the "paper chase" you may not have yet had time to note my changed language in Roper, last sentence, page 6 over to page 7 of the second draft, you will see that I have now made clear we have not held that "the individual controversy between the plaintiffs and the defendant bank was rendered moot, in the strict Art. III sense, by payment and satisfaction of a final judgment." (See your page 11, last sentence of the first draft of Geraghty.) Accordingly, the assumed premise of your sentence is not present.

I have had no negative reactions from anyone on the changes in the second draft of Roper, except one "corridor comment" that no real difference was perceived and the "join" stood.

Would it be worth considering a holding in Geraghty that the case is moot in this Court, but that the Court of Appeals was wrong in not granting Becher's motion for intervention. I think I could go with that for if that motion had been granted, the case could have been kept alive with repeated timely interventions. I'm not sure, but there may be some mileage in an exercise of our supervisory authority to remand to the Court of Appeals for that court to entertain timely motions for intervention, perhaps after granting the motions for intervention currently before this Court.

Regards,



Mr. Justice Blackmun

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: NOV 28 1979

Recirculated: \_\_\_\_\_

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, | On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, | the United States Court  
v. | of Appeals for the Fifth  
Robert L. Roper et al. | Circuit.

[November —, 1979]

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-American" 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. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly"

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

**Circulated:**

DEC 3 1979

Recirculated:

## 4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, Jackson, Mississippi, Petitioner  
v.  
Robert L. Roper et al. } On Writ of Certiorari to  
the United States Court of Appeals for the Fifth Circuit.

[November — 1979]

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.

五

Respondents, holders of credit cards issued on the "Bank-American" 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. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly"

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 15, 1980

PERSONAL

Re: 78-904 - Deposit Guaranty National Bank v. Roper, et al

Dear Harry:

If you continue to have a concern with note 5, page 6, one simple way to deal with any difficulty is to omit the first 7 1/2 lines and begin with "We note," striking "however."

I can readily do this if this meets your problem.

Regards,

WRB

Mr. Justice Blackmun

1/29  
V come I cont - w/ or  
yr decision in G?

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 18, 1980

Re: 78-904 - Deposit Guaranty National Bank v. Roper

MEMORANDUM TO THE CONFERENCE:

Lewis has made a strong case for which there is growing support, that Rule 23 needs revision.

I tend to agree with his view that the Rule has spawned "lawyers' lawsuits" in which they will be the chief beneficiaries. But I am not prepared to rewrite Rule 23, much as I would like to do so.

Here is a revised draft, in part to meet Lewis' points.

Regards,



3-5-7-9-14

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: \_\_\_\_\_

Recirculated: FEB 21 1980

5th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, | the United States Court  
v. | of Appeals for the Fifth  
Robert L. Roper et al. | Circuit.

[March —, 1980].

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. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly"

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 25, 1980

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,

*WFB*

Mr. Justice Powell

Copies to the Conference

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

10/12

6th DRAFT

Circulated: \_\_\_\_\_  
Recirculated: MAR 12 1980

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, Jackson, Mississippi, Petitioner, v. Robert L. Roper et al. On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

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-American" 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. Section 85 permits banks within the coverage of the Act to charge interest "at the rate allowed by the laws of the State, Territory, or District where the bank is located." In a case where a higher rate of interest than allowed has been "knowingly"

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 13, 1980

Re: 78-904 - Deposit Guaranty National Bank v. Roper

MEMORANDUM TO THE CONFERENCE:

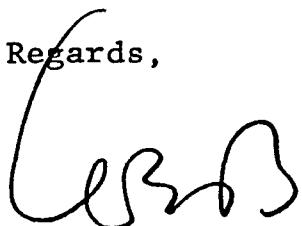
The opinion circulated March 12 is being amended as follows:

Line 4, second paragraph, page 6, by inserting after "court" "without their consent"

Line 5, second paragraph, page 6, by inserting a new sentence:

"Neither the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification."

Regards,



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

March 14, 1980

Re: 78-904 - Deposit Guaranty National Bank v. Roper

MEMORANDUM TO THE CONFERENCE:

A small change in this opinion is made to add the essence of note 6, on page 7, to a sentence on page 10, line 5, first full paragraph, following the word "question":

"in their desire to shift parts of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails."

Regards,

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

5-<sup>20</sup> P.M.

March 19, 1980

RE: Holds for No. 78-904, Deposit Guaranty Nat'l Bank v. Roper  
MEMORANDUM TO THE CONFERENCE

The following cases have been held for Roper:  
No. 79-1008, Satterwhite, et al. v. City of Greenville, Texas  
No. 79-5649, Armour v. City of Anniston, et al.  
No. 78-1169, Lincoln American Corp., et al. v. Susman  
No. 78-1286, Eberstadt et al. v. Flamm

1. Nos. 79-1008 and 79-5649 raise principally a question of federal practice under Rule 23, not of federal jurisdiction. In his memorandum circulated today, Harry recommends that the cases be granted, vacated and remanded for reconsideration in light of Roper and Geraghty. I agree that the opinions below would benefit from a sharpening of analysis, and I believe that such honing may be possible with the Art. III concerns removed from the case by Roper and Geraghty.

In these distinct cases, the named plaintiffs lost on the merits in the trial court, and had their motions for class certification denied. Appeals were taken to the Court of Appeals for the Fifth Circuit both on the question of class certification and on the merits. In each case, the Court of Appeals clearly had Art. III jurisdiction over an appeal by the named plaintiff. In both cases the District Court's rulings on the merits were affirmed. In my view, the important questions in these cases, not unambiguously answered by the opinions of the Fifth Circuit, are: (1) whether a named plaintiff who has lost a judgment on the merits of his individual claim may ever be a proper class representative; and, (2) whether, in a case where the sole ground for denying class certification is the fact of inadequate representation, federal practice should dictate that the case be remanded to the district court to hold for a reasonable time to allow intervention rather than remanded for immediate dismissal.

THEREFORE, I SHALL VOTE TO GVR.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

November 6, 1979

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

Dear Chief:

I agree.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

November 6, 1979

Re: 78-904 - Deposit Guaranty Nat. Bank v. Roper

Dear Chief:

Although I agree with your opinion as presently written, I shall withhold my vote until Harry's opinion in the Geraghty case is circulated. The two cases are, as Harry says, necessarily related, and very probably accommodations will have to be made in both opinions.

Sincerely yours,

23.

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

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,

P.S.  
P.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

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,

C. S.  
1/

The Chief Justice

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 10, 1980

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

Dear Lewis,

Your revised dissenting opinion seems fine to me, and I am glad to continue to add my name to it.

Sincerely yours,

PS

Mr. Justice Powell

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 9, 1979

Re: 78-904 - Deposit Guaranty National  
Bank v. Roper, et al.

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice  
Copies to the Conference  
cmc

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

November 8, 1979

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

Dear Chief:

I shall withhold my vote until Harry's  
proposed opinion in Geraghty is circulated.

Sincerely,

T.M.  
T.M.

The Chief Justice  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 14, 1980

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

---

Dear Chief:

Please join me.

Sincerely,

*T.M.*

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 6, 1979

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

Dear Chief:

I shall withhold my vote in this case until I am able to circulate a proposed opinion in No. 78-572, United States Parole Commission v. Geraghty. I think it desirable that these cases be considered together. This, of course, merely repeats what I stated in my note of October 9 to you.

Sincerely,

*HAB.*

The Chief Justice  
cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20530

CHAMBERS OF  
JUSTICE MARY A. BLACKMUN

November 29, 1979

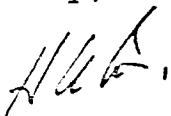
Dear Chief:

Re: No. 78-204 - Deposit Guaranty National Bank v. Roper  
No. 78-572 - United States Parole Comm'n v. Geoghegan

Changes made in the last two drafts of your opinion in Roper require some minor changes in my proposed opinion in Geoghegan. This is primarily because I quoted Roper and made repeated citations to it. I think you will find those minor changes acceptable.

There is, in my view, one point of tension that remains between the two opinions. In my footnote 10, I state flatly that we intimate no view as to whether a named plaintiff, who settles his individual claim after denial of class certification, may appeal from that denial. I much prefer to retain that "no view" posture. In footnote 5 of your November 28 recirculation of Roper, however, the Court decides this issue. The basic authority for this is Lewis' dissent in United Airlines which you and Bryon joined. In that dissent he states flatly that "this question has not been decided by this Court," although he further states that "the answer on principle is clear." 432 U.S., at 400. As I indicated in my letter of November 17, I am not convinced that "the settlement situation is all that easy and clear." I, for one, would not resolve the question by dictum, and I would prefer that it be left open until it is specifically presented to us. I therefore could not join footnote 5 of Roper and would concur only in your result in that case if that footnote remains.

Sincerely,



The Chief Justice

cc: The Conference

February 19, 198

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

Dear Chief:

This is in response to your note of February 15. I, of course, continue to have problems with your footnote 5 on page 6 of your fourth draft circulation of December 3, and for the reasons stated in my circulated note of November 29.

Your proposed deletion of the first 7 1/2 lines of your footnote 5 obviously will meet many of my concerns, and I welcome that deletion.

Whether I shall be able to join Roper depends largely on your posture with respect to Geraghty. If you go with the dissent in Geraghty, then I shall have to recast my opinion there, particularly with some of its cross references to Roper. You and I now are the only ones "out" on these two cases. I hope that we can resolve such differences as we have and get these rather stale cases down.

Sincerely,

HAB

The Chief Justice

MR. JUSTICE BLACKMUN  
MR. JUSTICE BREWSTER  
MR. JUSTICE CAMPBELL  
MR. JUSTICE MARSHALL

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 78-904

Argued March 13, 1980

Deposit Guaranty National Bank, *v.* On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, the United States Court  
Robert L. Roper et al. of Appeals for the Fifth  
Circuit.

[March —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment because, under *United States Parole Comm'n v. Geraghty, post*, p. —, respondents' appeal of the order denying class certification is not moot. I agree with the Court that the ruling on a class certification motion stands as a litigated issue which does not become moot just because the named plaintiff's suit on the merits is mooted. I would not limit appealability of this procedural motion, however, to situations where there is a possibility that the named plaintiff will be able to recover attorney's fees from either the defendant or the fund awarded to the class.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 6, 1979

78-904 Deposit Guaranty v. Roper

Dear Chief:

In accord with my vote at the Conference, I will circulate a dissent in due time.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

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

2-5-80

3,15

1st DRAFT

SUPREME COURT OF THE UNITED STATES

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

No. 78-904

From: Mr. Justice Powell  
FEB 7 1980

Deposit Guaranty National Bank, On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, v. the United States  
Robert L. Roper et al. Circulated: \_\_\_\_\_  
of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE POWELL, dissenting.

Respondents are two credit-card holders who claim that petitioner charged them usurious interest in violation of the National Bank Act and Mississippi law.<sup>1</sup> They filed this action late in 1971 to recover those charges plus a penalty equal to the same amount, for individual totals of \$683.30 and \$322.70. App. 59. Respondents also sought relief on behalf of a class alleged to include 90,000 persons with claims aggregating \$12 million. After four years of litigation, the District Court denied respondents' motion for class certification. Seven months later, petitioner tendered to respondents the full amount of their individual claims plus legal interest and court costs. Over respondents' objection, the District Court entered final judgment in their favor. Petitioner then deposited the full amount due with the clerk of the court.

No one disputes that the petitioner has tendered everything that respondents could have recovered from it in this action. Nevertheless, the Court of Appeals for the Fifth Circuit rejected petitioner's suggestion of mootness and reversed the denial of class certification. This Court affirms the judgment of the Court of Appeals without identifying the case or controversy that remains to be litigated between the parties. The Court decides that the central issue is not mootness but

<sup>1</sup> Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and 28 U. S. C. § 1335.

PP. 1, 16-17

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

2-13-80

Circulated: \_\_\_\_\_

2nd DRAFT

Recirculated: FEB 13 1980

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, | On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, | the United States Court  
v. | of Appeals for the Fifth  
Robert L. Roper et al. | Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART |  
joins, dissenting.

Respondents are two credit-card holders who claim that petitioner charged them usurious interest in violation of the National Bank Act and Mississippi law.<sup>1</sup> They filed this action late in 1971 to recover those charges plus a penalty equal to the same amount, for individual totals of \$683.30 and \$322.70. App. 59. Respondents also sought relief on behalf of a class alleged to include 90,000 persons with claims aggregating \$12 million. After four years of litigation, the District Court denied respondents' motion for class certification. Seven months later, petitioner tendered to respondents the full amount of their individual claims plus legal interest and court costs. Over respondents' objection, the District Court entered final judgment in their favor. Petitioner then deposited the full amount due with the clerk of the court.

No one disputes that the petitioner has tendered everything that respondents could have recovered from it in this action. Nevertheless, the Court of Appeals for the Fifth Circuit rejected petitioner's suggestion of mootness and reversed the denial of class certification. This Court affirms the judgment of the Court of Appeals without identifying the case or controversy that remains to be litigated between the parties.

<sup>1</sup> Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and 28 U. S. C. § 1335.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

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

lfp/ss

cc: The Conference

March 10, 1980

78-904 Deposit Guaranty v. Roper

Dear Potter:

Here is the proposed revision of my dissent in this case.

Although the rationale has not been changed, I have made substantial revisions to meet the Chief's even more substantial changes in his opinion for the Court. In his present draft, the Chief - unlike Harry's opinion in Geraghty - recognizes what I have thought were settled Article III principles. He then misapplies them, as I view it, by finding the continuing "personal stake" in the sharing of fees and expenses. But the fee arrangement was a 25% contingency, and no present expenses are identified for which petitioner has any responsibility.

I send this to you before circulating as you are my only constituent. If you find it to be satisfactory, I will recirculate promptly and possibly these cases can be brought down next week.

I hope you had a good trip to San Francisco.

Sincerely,

Mr. Justice Stewart

lfp/ss

1-15

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

3-5-80

From: Mr. Justice Powell

3rd DRAFT

Circulated: \_\_\_\_\_

Received by \_\_\_\_\_: MAR 10 1980

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, Jackson, Mississippi, Petitioner, *v.* Robert L. Roper et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Respondents are two credit-card holders who claim that petitioner charged them usurious interest in violation of the National Bank Act and Mississippi law.<sup>1</sup> They filed this action late in 1971 to recover those charges plus a penalty equal to the same amount, for individual totals of \$683.30 and \$322.70. App. 59. Respondents also sought relief on behalf of a class alleged to include 90,000 persons with claims aggregating \$12 million. After four years of litigation, the District Court denied respondents' motion for class certification. Seven months later, petitioner tendered to respondents the full amount of their individual claims plus legal interest and court costs. Over respondents' objection, the District Court entered final judgment in their favor. Petitioner then deposited the full amount due with the clerk of the court.

No one disputes that the petitioner has tendered everything that respondents could have recovered from it in this action. Nevertheless, the Court of Appeals for the Fifth Circuit rejected petitioner's suggestion of mootness and reversed the denial of class certification. This Court affirms the judgment of the Court of Appeals, after finding that respondents retain a personal stake in sharing the expense of litigation

<sup>1</sup> Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and 28 U. S. C. § 1335.

14-15

3-12-80

4th DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-904

To: The Chief Justice  
 Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
 Mr. Justice Marshall  
 Mr. Justice Blackmun  
 Mr. Justice Rehnquist  
 Mr. Justice Stevens

From: Mr. Justice Powell

Deposit Guaranty National Bank, Jackson, Mississippi, Petitioner, v. Robert L. Roper et al. On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Circulated: \_\_\_\_\_ Recirculated: MAR 13 1980

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

Respondents are two credit-card holders who claim that petitioner charged them usurious interest in violation of the National Bank Act and Mississippi law.<sup>1</sup> They filed this action late in 1971 to recover those charges plus a penalty equal to the same amount, for individual totals of \$683.30 and \$322.70. App. 59. Respondents also sought relief on behalf of a class alleged to include 90,000 persons with claims aggregating \$12 million. After four years of litigation, the District Court denied respondents' motion for class certification. Seven months later, petitioner tendered to respondents the full amount of their individual claims plus legal interest and court costs. Over respondents' objection, the District Court entered final judgment in their favor. Petitioner then deposited the full amount due with the clerk of the court.

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<sup>1</sup> Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and 28 U. S. C. § 1335.

March 14, 1980

No. 78-904 Deposit Guaranty v. Roper

Dear John:

I did not see your new footnote 3 until after we adjourned today. Perhaps my use of the term "fiction" did not convey my thought.

You have now added citations to cases that require some response, and I also take this opportunity to clarify the use of the term "fiction". I have tried to make clear that it seems to me you would create a legal fiction for the purpose of achieving review of denial of certification. This might be one way to achieve this purpose, although I would prefer that it be worked out more carefully in a much needed revision of Rule 23.

I suggest that you and I agree on our "battle of footnotes" before we recirculate. And, if you would prefer that I omit the word "fiction", I will be most happy to do so.

Sincerely,

Mr. Justice Stevens

LFP/lab

14-15

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Black  
Mr. Justice Black  
~~Mr. Justice Black~~  
Mr. Justice Black  
Mr. Justice Black  
Mr. Justice Black  
Mr. Justice Stevens

From: Mr. Justice Powell

3-15-80

Circulated:

5th DRAFT

Re-circulated: MAR 14 1980

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, | On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, | the United States Court  
v. | of Appeals for the Fifth  
Robert L. Roper et al. | Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

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<sup>1</sup> Jurisdiction was premised on the National Bank Act, 12 U. S. C. §§ 85, 86, which adopts the interest limits set by state law, and 28 U. S. C. § 1335.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 6, 1979

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

Dear Chief:

Please join me in your present draft. I think that I disagreed more than some of the Conference with the treatment of Geraghty by the Court of Appeals for the Third Circuit and I don't think Harry's earlier forecast that the two opinions may not dovetail is totally unfounded. I say this because I doubt that I could join an opinion affirming Geraghty for the reasons that the Court of Appeals did. So I deliberately use the words "this draft" of your opinion. If it were to be revised to indicate approval of CA 3's treatment of Geraghty, I reserve the right to "jump ship" on you!

Sincerely,



The Chief Justice

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist  
8 FEB 1980

1st DRAFT

Circulated:

**SUPREME COURT OF THE UNITED STATES**

No. 78-904

Deposit Guaranty National Bank, Petitioner, On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, v. the United States Court  
Robert L. Roper et al. of Appeals for the Fifth  
Circuit.

[February —, 1980]

MR. JUSTICE REHNQUIST, concurring.

I write briefly to state what seems to me to be sufficient differences between *Roper* and *Geraghty* to allow the appeal of the denial of class certification in *Roper*, and to dismiss the attempted appeal of the same question in *Geraghty* as moot. If I were writing on a clean slate, I might well resolve both these cases against the respondents. But the Court today has not cleaned the slate or been successful in formulating any sound principles to replace what seem to me to be the muddled and inconsistent ones of the past. Compare *Sosna v. Iowa*, 419 U. S. 393 (1975) with *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976); *United Airlines, Inc. v. McDonald*, 432 U. S. 385, 393 (1977) with *Pasadena City Board of Education v. Spangler*, 427 U. S. 424, 430 (1976); *Coopers & Lybrand v. Livesay*, 437 U. S. 463, 469, 470, n. 15 (1978) with *Indianapolis School Comm'r's v. Jacobs*, 420 U. S. 128 (1975); and now *Deposit Guaranty National Bank v. Roper*, — U. S. — (1980) with *United States Parole Comm'n v. Geraghty*, — U. S. — (1980).

Article III, and this Court's precedents in *Jacobs, supra*, and *Pasadena, supra*, require dismissal of the action in *Geraghty* because there is simply no individual interest remaining, no certified class or intervenors to supply that interest, and the action is not within that "narrow class of cases" that are "distinctly 'capable of repetition, yet evading review.'" *Gerstein v. Pugh*, 420 U. S. 103, 110, n. 11 (1975).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 5, 1979

Re: 78-904 - Deposit Guaranty National Bank  
v. Roper

Dear Chief:

Please join me.

Respectfully,



The Chief Justice  
Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Black  
Mr. Justice Blackmun  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist

78-904 - Deposit Guaranty National Bank v. Roper

From: Mr. Justice Stevens

Circulated: FEB 11 '80

R. Stevens

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.<sup>1/</sup>

---

<sup>1/</sup> 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

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

*Printed*  
From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

1st DRAFT Recirculated: Feb 12 '80

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, | On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, | the United States Court  
v. | of Appeals for the Fifth  
Robert L. Roper et al. | Circuit.

[February —, 1980]

MR. JUSTICE STEVENS, concurring.

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<sup>1</sup> 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 his claim. *Post*, at 11. Nothing in either Art. 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 Art. III jurisdiction. And I fail to see how the constraints imposed by Art.

*Changes, pg. 1-3.*

Second Draft

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

78-904 - Deposit Guaranty National Bank v. Roper

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

Recirculated: FEB 14 1979

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 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

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

7.2

From: Mr. Justice Stevens

Circulated: \_\_\_\_\_

3rd DRAFT

Recirculated: FEB 21 '80

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, } the United States Court  
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[February —, 1980]

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<sup>1</sup> 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

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

P.3.

From: Mr. Justice Stevens

Circulated:

Recirculated:

MAR 13 '80

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, Jackson, Mississippi, Petitioner,  
v.  
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[February —, 1980]

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Mr. Justice Brennan  
 Mr. Justice Stewart  
 Mr. Justice White  
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 Mr. Justice Blackmun  
 Mr. Justice Powell  
 Mr. Justice Rehnquist

7.2



4th DRAFT

From: Mr. Justice Stevens

Circulated:

Recirculated: MAR 1 4 '80

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, | On Writ of Certiorari to  
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[February —, 1980]

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Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist

From: Mr. Justice Stevens

*5th*  
Circulated \_\_\_\_\_

Recirculated: MAR 14 '80

~~5th~~ DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 78-904

Deposit Guaranty National Bank, | On Writ of Certiorari to  
Jackson, Mississippi, Petitioner, | the United States Court  
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