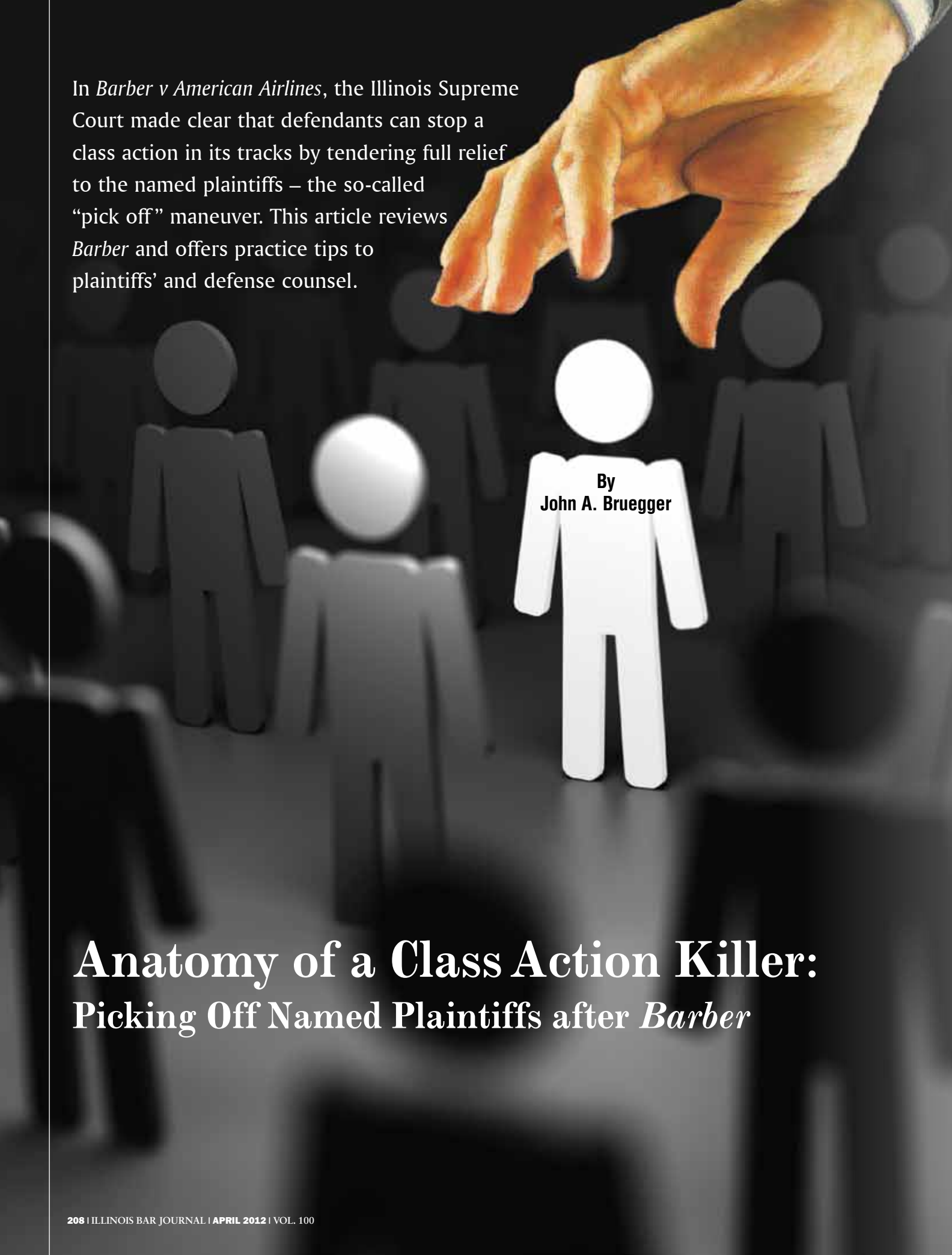

In *Barber v American Airlines*, the Illinois Supreme Court made clear that defendants can stop a class action in its tracks by tendering full relief to the named plaintiffs – the so-called "pick off" maneuver. This article reviews *Barber* and offers practice tips to plaintiffs' and defense counsel.

By
John A. Bruegger

Anatomy of a Class Action Killer:
Picking Off Named Plaintiffs after *Barber*

Thou cut'st my head off with a golden axe
And smilest upon the stroke that murders me.
William Shakespeare, *Romeo and Juliet, 3. 3*

When the battle is joined in Illinois class action practice, defense lawyers are typically seeking either to prevent class certification – and possibly have the case dismissed – while plaintiffs' lawyers are fighting to keep the class action alive so it can be certified. Class certification is often the earliest step in a class action's lifespan and certainly one of the most important.

In *Barber v American Airlines, Inc.*,[1] the Illinois Supreme Court removed a shield used by plaintiffs' counsel against the defense counsel's powerful "golden axe" – the decapitating "pick off" of the named plaintiff as discussed in *Wheatley v Board of Education*.[2] *Barber* has important implications for the early battles that rage in Illinois class action practice.

This article will discuss the background of the "pick off" maneuver in Illinois class action jurisprudence, the "pick off exception" that developed after *Wheatley*, and how *Barber* removed the exception – and what that means for both plaintiffs' and defense class action practice.

Wheatly: Picking off named plaintiffs as a way to kill a new class action

The named plaintiffs in any class action play an important role in determining whether the trial court will ultimately certify the class and allow the case to proceed as a class action. The Illinois class action statute requires that the court find questions of fact or law common to the class if the class action is to survive. The court must further find that these common questions predominate over any that affect only individual members, and that the representative parties will adequately protect the interest of the class.[3]

As in any case, plaintiffs in a class action seek relief, either monetary or injunctive. In *Wheatley*, the court held that a class action could be dismissed as moot if the named class representatives received the relief they sought before the class certification, assuming there was no motion to substitute a non-settling for a settling plaintiff.[4]

The court considered a proposed class action by tenured teachers who were terminated at the end of a school year.[5] Prior to the plaintiffs' counsel filing a motion for class certification, the named plaintiffs were all given their jobs back.

The defendant then filed a motion to dismiss, claiming the class action was moot because the named plaintiffs received the relief they sought. The plaintiffs maintained that the case was not moot because there was a substantial public interest in whether the defendant can simply fire teachers at the end of a school year and rehire them at the beginning of the next year.[6]

The court held that the case was moot and upheld its dismissal. "Because the claims of the named representatives here have been resolved, they are not proper parties who would fairly and adequately protect the interest of the class they purport to represent."[7] Furthermore, "[o]nce a representative plaintiff is granted the desired relief, he is no longer a member of the class because his interests are not consistent with the interests of the other class members."[8]

The *Barber* holding clearly favors the fast-acting defendant who tenders full relief right after a case is filed.

The court also found it relevant that no other

1. *Barber v American Airlines, Inc.*, 241 Ill 2d 450, 948 NE2d 1042 (2011).
2. *Wheatley v Board of Education of Township High School District 205*, 99 Ill 2d 481, 459 NE2d 1364 (1984).
3. 735 ILCS § 5/2-801, which reads in total:
§ 2-801. Prerequisites for the maintenance of a class action. An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
(1) The class is so numerous that joinder of all members is impracticable.
(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
(3) The representative parties will fairly and adequately protect the interest of the class.
(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.
4. *Wheatley* at 486-487, 459 NE2d at 1367 – 1368.
5. Id at 483-484, 459 NE2d at 1366.
6. Id at 485, 459 NE2d at 1367.
7. Id at 486, 459 NE2d at 1367.
8. Id at 486-487, 459 NE2d at 1367.

John A. Bruegger <jbruegger@hptylaw.com> is in the St. Louis office of Hawkins, Parnell, Thackston & Young, LLP, where he is in the business, environmental, toxic tort, and products liability litigation practice groups. He holds a J.D. from Saint Louis University and an LL.M. in Taxation from Washington University.

member of the class attempted to substitute himself as a named representative in place of the settling plaintiffs. Thus, this became a class action with no adequate representative, and therefore the court held there can be no class action.

By keeping a stock of ready but unnamed class representatives, the plaintiff can endure a pick off without losing the entire case.

Arriola and the pick-off exception to save class actions

Wheatley illustrates an easy way for fast-acting defendants to win the advantage in the early stages of a class action, when the plaintiffs' counsel may not be ready (or have sufficient information) to file a motion for class certification. Often when the damages per class member are small (such as the $40 at issue in *Barber*) or the desired relief is easy to give, the defendant can cut the head off the class action by "picking off" the named plaintiffs by early settlement.

Illinois courts soon created an exception to the pick-off mechanism, starting with the appellate court's decision in *Arriola v Time Insurance Company*.[9] In that case, the plaintiff sought to bring a class action against his medical insurance company, alleging that it had improperly asserted a subrogation lien over his personal injury recovery without an express contractual provision giving it that right.[10]

The insurer discovered that only 46 other insureds were part of the class. It successfully settled with and obtained releases from 44 of those insureds.[11] After a review of Illinois jurisprudence on class actions and mootness, including the *Wheatley* case, the court held that the plaintiffs' case is moot because they did not file for class certification before the motion to dismiss was filed or in the six months it took the court to rule that motion.[12]

Interestingly, after finding for the defendants, the *Arriola* court in dicta discussed the hypothetical situation of what would happen if the defendant had tendered the relief to the named plaintiffs early in the litigation.[13] The court reviewed three federal decisions – *Hillenbrand*, *Susman* and *Roper*, all discussed below – and created the rule that filing a motion for class certification can prevent the pick off. In these cases, the court allowed a case to continue despite the tender of complete relief by the defendant.

In *Hillenbrand v Meyer Medical Group, S.C.*,[14] the plaintiffs purported to represent a class of HMO beneficiaries who received medical treatment and benefits from their HMO after injuries inflicted by a third party, against whom plaintiffs have a claim.[15] The plaintiffs alleged that the physician groups providing the medical benefits did not have a right to a physician lien for the full amount of the services provided. The plaintiffs' lawyer asserted a claim on behalf of all lawyers who represented members of the class because the physician groups were not paying their proportional share of the attorney fees in the case.[16]

Eventually, as the case was pending, all issues were resolved except attorney fees.[17] After the plaintiffs filed their motion for class certification, the defendants tendered the full amount of attorney fees plus interest to the plaintiffs, and the tender was never rejected or accepted.[18] Instead, the defendants filed a motion for summary judgment, which the trial court ruled on before considering the motion for class certification.

The appellate court reversed, holding that "as a general rule, a proper tender to the named plaintiffs prior to class certification mandates dismissal of the action. [Citation omitted.] Such is not the case, however, when a motion for class certification is pending at the time the tender is made."[19]

Adopting the seventh circuit's reasoning in *Susman v Lincoln American Corporation*,[20] the court stated, "To hold otherwise would allow a party to avoid ever defending a class action suit by simply tendering payment to the named plaintiffs, in each class action filed against it, prior to the trial court's ruling on their motion for class certification."[21] In *Susman*, the seventh circuit held that "when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages."[22]

Illinois courts have also turned to the United States Supreme Court holding in *Deposit Guaranty National Bank v Roper*[23] in support of this rule. The *Roper* court considered a similar fact pattern, where the defendant credit-card issuer attempted to pick off the named class members by tendering the maximum amount each individual would have recovered.[24]

The Supreme Court wrote, "A district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration."[25] Ultimately, the Court held that the pick off maneuver would frustrate the purposes of the class action procedure.[26]

Thus, in the wake of the *Wheatley* case, Illinois courts looked to the federal courts to justify continuing to hear class action cases in the face of a tender designed to moot them. The "pick off" rule in Illinois would allow a trial court to properly dismiss a class action as moot if full relief had been tendered to the named plaintiffs before the plaintiffs filed a motion for class certification.

However, under the exceptions allowed in *Hillebrand* and *Arriola*, the court could deny a motion to dismiss if a motion for class certification is pending when the tender was made. It was in this context that *Barber* came before the Illinois high court.

---

9. *Arriola v Time Insurance Company*, 323 Ill App 3d 138, 751 NE2d 221 (1st D 2001).
10. 323 Ill App 3d at 142, 751 NE2d at 224.
11. Id.
12. Id at 151, 751 N2d at 231.
13. Id at 152, 751 NE2d at 231 – 232.
14. *Hillenbrand v Meyer Medical Group, S.C.*, 308 Ill App 3d 381, 720 NE2d 287 (1st D 1999).
15. Id at 383, 720 NE2d at 289.
16. Id at 383 – 384, 720 NE2d at 290.
17. Id at 389,720 NE2d at 294.
18. Id at 389 – 390, 720 NE2d at 294.
19. Id at 391 – 392, 720 NE2d at 296.
20. 587 F2d 866, 870 (7th Circuit 1978).
21. *Hillenbrand* at 392, 720 NE2d at 296.
22. 587 F2d 866 at 870.
23. 445 US 326, 100 S Ct 1166 (1980)
24. Id at 330 – 331.
25. Id at 339.
26. Id at 340.

Barber: Implications for plaintiffs and defendants

In *Barber*, the plaintiffs represented a purported class of airline passengers who had been charged a $40 nonrefundable baggage fee by American Airlines.[27] Two weeks after being served with the class action complaint, American Airlines offered to refund the $40 plus court costs, but the plaintiff declined, so the airline refunded the $40 to her credit card over her objection.[28]

The plaintiff scrambled, sending the defendant an interrogatory seeking to discover the names of other class members.[29] The defendant objected and filed a motion to dismiss on the grounds of mootness, arguing that *Wheatley* mandated dismissal.[30] The plaintiff argued that she pursued class certification with reasonable diligence, even though she had not yet filed her motion for class certification, and therefore the "pick off" exception applied.[31]

The Illinois Supreme Court reviewed the holding in *Wheatley* and stated that the bright-line rule was that a motion for class certification must be on file at the time the tender is made to sufficiently bring the interests of the class members before the court.[32] Because there was no class certification motion on file, the court ruled that the case was properly dismissed as moot, and then it proceeded to address the plaintiff's request that the court expand the "pick off" exception to this case.[33]

The court traced the pick-off exception to the *Arriola* case dicta. The *Barber* court held that "the exception to *Wheatley* developed through this line of cases has no basis in the law."[34] The court narrowly construed the *Susman* holding and corrected what it saw as a misconstrual of *Susman* by *Arriola*.[35]

In response to the plaintiff's public policy arguments, the court held that requiring class action plaintiffs to be diligent about pursuing certification and have a motion for class certification on file at the time of tender is consistent with the public policy of class action procedures.[36] The court noted that unnamed class members are still free to pursue claims for individual damages or bring a class action in their own names. "Indeed," the court wrote, "this class action could have survived if one of the remaining class members had substituted himself as the named representative."[37]

The *Barber* court then wrote that "the 'pick off' exception by the appellate court below directly contradicts *Wheatley*, which upheld a dismissal for mootness where the named plaintiffs were granted the relief requested but never moved for class certification. We hereby reject this 'pick off' exception."[38] In other words, *Barber* reaffirms the dominance of *Wheatley*, which requires a class representative to have a motion for class certification on file when the tender is made. Failure to do this will result in a dismissal for mootness.

Practical implications for plaintiffs and defendants

What implications do these cases have for Illinois attorneys practicing in class action cases? Clearly, as stated in *Wheatley* and reaffirmed in *Barber*, the named class representatives must have a motion for class certification on file when a tender is made by the defendant. Illinois courts will not allow a plaintiff to reject a tender of full relief so he or she can bring a class action case. If the tender is made, the court seems to presume that the plaintiff is thereby made whole. If there is no motion for class certification on file, the court will allow a dismissal on the grounds of mootness.

For their part, plaintiffs' counsel must be hyper-vigilant about the defendant tendering relief to the named class representative. The *Barber* holding clearly favors the fast-acting defendant who tenders full relief right after a case is filed. Even before filing, the plaintiffs' counsel should thoroughly investigate the class and locate several class members who can serve as class representatives.

By keeping a stock of ready but unnamed class representatives, the plaintiff can endure a pick off without losing the entire case. Thus, once a named representative is picked off, plaintiff should have another representative waiting in the wings to quickly step into the case. This, of course, will not prevent the defendant from picking off subsequent class representatives, but it does allow the plaintiff more time to put together a motion for class certification.

It does mean that plaintiffs' counsel must know their class. They can no longer expect ample time to conduct class discovery and file a class certification motion. They should have a "pick off" plan to quickly get a class certification motion on file, which will require laying out a strategy and knowing as much about the class as possible before filing.

For defense counsel, the supreme court's mandate is clear – to avoid a class action in Illinois, quickly tender full relief to the named plaintiff. Early in a case, the plaintiff may not know the extent of the purported class and may be in an especially vulnerable position without being able to file a class certification motion.

Defense counsel can tender individual relief, often at a low cost in consumer class actions, and move for dismissal whether the plaintiff accepts the tender or not. Thus, in the 30 days a defendant has to file a responsive pleading in Illinois, focus on identifying the individual relief sought (which may include court costs or attorneys' fees), making a full tender, and preparing a motion to dismiss based on mootness.

Conclusion – the lay of the land after *Barber*

No longer in Illinois courts can a plaintiff file a class action suit, wait for defendants to answer, conduct a leisurely class discovery, and eventually file a motion for class certification. The rule of *Barber*, stated succinctly, is that a motion for class certification must be on file at the time a tender is made. If not, the court can dismiss the case for mootness because the interests of the unnamed class members are not properly before the court. Plaintiffs' counsel must be vigilant about the pick-off maneuver, into which the *Barber* court has breathed new life and with which ambitious defense counsel can effectively kill a burgeoning class action by cutting off its head – the named representative.

Attorneys for plaintiffs are advised to "know thy class" before filing in Illinois and create a "pick off" plan to counter such a move. Defense attorneys, for their part, are advised to pick up the golden axe of *Wheatley*, newly sharpened by *Barber*, and move quickly to tender full relief to the class representatives. ■

---

27. *Barber* at 452 – 453, 948 NE2d at 1043.
28. Id.
29. Id at 453, 948 NE2d at 1044.
30. Id at 453-454, 948 NE2d at 1044.
31. Id at 454 – 455, 948 NE2d at 1044.
32. Id at 456 – 457, 948 NE2d at 1045.
33. Id at 457, 948 NE2d at 1046.
34. Id at 458, 948 NE2d at 1046.
35. Id at 459, 948 NE2d at 1047.
36. Id.
37. Id.
38. Id.