2000 WL 33982023 (C.A.11) (Appellate Brief)
United States Court of Appeals,
Eleventh Circuit.

John/Jane DOES 1-13, Plaintiffs/Appellees,
v.
Jeb BUSH, et al., Defendants/Appellants.

No. 00-12097-DD.
June 2, 2000.

From the U.S. District Court for the Southern District of Florida Case no. 92-589-Civ-Ferguson

Appellants' Initial Brief

Robert A. Butterworth, Attorney General

By and Through

Thomas E. Warner, Solicitor General, Florida Bar no. 176725

Jason Vail, Assistant Attorney General, Florida Bar no. 298824, Office of the Attorney General, Suite PL-01, The Capitol, Tallahassee, FL 32399, (850) 414-3300

Counsel for Defendants/Petitioners

***iv** TABLE OF CONTENTS

***vi** TABLE OF AUTHORITIES

Cases

Other Authorities

*1 STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. s. 1331. The claims arose under 42 U.S.C. s. 1396a.

The district court rendered the order under review, an order granting class certification, on Feb. 11, 2000. R-604. The defendants petitioned this court for permission to appeal, pursuant to Fed. R.Civ. P. 23 (f) on Feb. 24, 2000. See Eleventh Circuit docket number 00-90005-D.

This court granted permission to appeal on April 27, 2000. Eleventh Circuit docket number 00-90005-D.

The defendants filed their notice of appeal on May 5, 2000. R-607.

This court has jurisdiction under Fed. R.Civ. P. 23(f) and 42 U.S.C. s. 1292.

STATEMENT OF THE ISSUES

1. Did the district court lack jurisdiction to enter a class certification order four years after entry of the final judgment?

2. Does Fed. R.Civ. P. 23(c) by its plain language prohibit class certification after final judgment on the merits?

3. Were the named plaintiffs unfit class representatives when their claims had been rendered moot because they had received all the relief they sought in the complaint?

***2** 4. Did the district court lack jurisdiction to certify a class when the claims of the named plaintiffs had been rendered moot either because they were receiving the relief they sought or they had abandoned the quest for relief.

5. Did the district court abuse its discretion in certifying a class four years after final judgment based on a four-year-old report and recommendation without conducting a new inquiry into the named plaintiffs' continued fitness to be class representatives?

6. Did the district court abuse its discretion in certifying a class four years after final judgment without giving the defendants notice of its intention to take up the four-year-old report and recommendation recommending certification and giving the defendants an opportunity to object under 28 U.S.C. s. 636?

STATEMENT OF THE CASE AND FACTS

This is an appeal of a class certification order rendered nearly *four years* after entry of final judgment on the merits and denial of the original motion to certify the class and two years after this court's affirmance of the final judgment. In addition, the entry of the class certification order occurred four months after entry of a contempt order currently on appeal before this court in case number 99-14590-DD. That appeal challenges the ***3** contempt order in part on the ground that no class had ever been certified in the case.

The 13 named plaintiffs in the action are individuals with developmental disabilities who claimed that they had not been provided services in intermediate care facilities for the developmentally disabled (ICF/DDs) with "reasonable promptness." R-1.[1] ICF/DDs are institutions that provide round-the-clock residential care and services to severely disabled individuals with developmental disabilities. 42 U.S.C. s. 1396a(a) (10) (A) (ii) (VI); s. 59G-4.170(2) (d), Fla. Admin. Code. ICF/DDs are reimbursed for care provided to residents through the joint state-federal Medicaid program. Sec. 59G-4.170(5) (a), Fla. Admin. Code.

In July 1992, four months after the filing of the initial complaint, the plaintiffs moved for class certification. R-57, 58. The defendants vigorously opposed class certification. R-84, 85, 86, 139, 278, 281, 282, 321, 322, 330, 331, 351, 390, 394, 401, 403, 579. (The record is available to the court in case number 99-14590-DD.)

Litigation proceeded without a ruling on the motion, and on July 22, 1996, still without a ruling on class certification, the district court granted the plaintiffs' motion for summary ***4** judgment. R-439. At that time, however, the district court did not grant *final* judgment. The July 1996 summary judgment order disposed only of the question of liability. It did not impose a remedy.

A month after entry of summary judgment, on Aug. 26, 1996, a magistrate judge recommended certifying a class. The

magistrate judge *did not specifically articulate a class definition*. Apparently, the magistrate judge intended to recommend the one offered by the plaintiffs: "all developmentally disabled individuals in the State of Florida who are entitled to Intermediate Care Facilities for the Mentally Retarded ("ICF/MR") placement but have not received a placement with reasonable promptness." R-446 p. 2 (quoting plaintiffs' proposed definition).

On August 28, 1996, two days after publication of the report and recommendation (R&R) and before the defendants knew about the R&R and had an opportunity to respond, the district court held a hearing in the case. The court indicated that it was aware of the R&R on class certification because it referred to it at the hearing:

> The court: First, let me state what is not for discussion this morning. That is the issue of mootness. I have now a report and recommendation from the Magistrate/Judge, who ***5** finds that certification is necessary to insure the requested relief …

R-458 pp. 4-5. Later in the hearing the court again mentioned the R&R:
Mr. Weinger [the plaintiffs' lawyer]: The motion for class certification was filed four years ago and is still pending before the magistrate.

The court: I have the Magistrate's recommendation now. I received it. I guess you received it too.

Mr. Weinger: I have not.

The court: He does recommend that it be certified as a class.

Id. p. 23-24.

Immediately after the hearing, the court issued its final judgment on the merits, dismissing "all pending motions" as moot. R-449 p. 1. It retained jurisdiction *only* to enforce the judgment. *Id.* Thus, the court did not certify a class:

> ORDERED AND ADJUDGED that defendants shall, within 60 days of the date of this Order, establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed ninety days, for individuals who are eligible for placement in ICF/DD institutional care facilities. Jurisdiction is retained to enforce this Order. Any pending motions are dismissed as moot.

R-449 p. 1.

***6** The defendants appealed the final judgment and this court affirmed in *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998). There was no cross-appeal of the denial of all pending motions or of the failure to certify a class. The defendants raised the question of lack of class certification (see the briefs in that case), but the court never addressed the issue.

In October 1999, more than a year after this court affirmed the judgment on the merits, the district court held the defendants in contempt for an alleged failure to implement sweeping institutional changes to the delivery of services for individuals with developmental disabilities. R-587. These changes went far beyond the limited relief imposed in the final judgment, a requirement to amend the Medicaid state plan to provide for an ICF/DD waiting period of not more than 90 days. The district court clearly intends to remake the entire service delivery system, relief unnecessary to provide a remedy to the 13 named

plaintiffs. R-587. The defendants have appealed that contempt order, and it is now before this court in case no. 99-14590-DD.

In the appeal in case no. 99-14590-DD, the defendants challenged the contempt order as outside the court's jurisdiction because of the lack of class certification. Indeed, in the contempt order, the district court admitted that no class had ever been certified in the case. R-587 p. 6 n. 2.

***7** On Feb. 11, 2000, nearly four years after entry of the final judgment, the district court sua sponte rendered an order on class certification. The court acted without notice to the parties and gave the defendants no opportunity to respond to the R&R as permitted under 28 U.S.C. s. 636. To certify the class, the district court resurrected the magistrate judge's outdated R&R and the dismissed motion for class certification. "Having duly considered the motion, the report and recommendation, and pertinent portions of the record," the court defined the class as:

> Medicaid eligible individuals with developmental disabilities who have formally requested placement in an Intermediate Care Facility ("ICF/DD") and for whom the placement would be medically and otherwise appropriate but who have not received a placement with reasonable promptness. Specifically included in this case are the approximate 600 individuals-the State of Florida has identified as eligible for ICF/DD placement who have been awaiting placement for more than 90 days.

R-604 p. 1. Obviously, the court did not adopt the plaintiffs' proposed class definition, which the magistrate judge evidently approved. It appears the district court was influenced by this court's opinion in *Brown v. Bush*, case no. 99-11544 p. 6 (11th Cir. Feb. 3, 2000), involving the same district judge, in which the court invalidated a class certification order for overbreadth and told the district court how to define the class.

***8** The order appears to be a reaction to the defendants' argument in the pending appeal of the contempt order, case no. 99-14590-DD. The order also appears to be an effort to affect this court's decision on the defendants' appeal of the contempt order:

> In a pending appeal the defendants have challenged the breadth of an order on the grounds that it compels relief for a class of individuals beyond the named plaintiffs. This Order on class certification is germane to that issue and should be added to the record on appeal as a supplement.

R-604 p. 1 n. 1.

While the district court said it considered "pertinent portions of the record," it did not specify which portions. It is uncertain, for instance, whether the district court considered the current situations of the named plaintiffs, which have changed significantly since the filing of the complaint and from the date of the magistrate judge's recommendation on class certification. The district court did not conduct a new inquiry into the named plaintiffs' current fitness to be class representatives.

The most recent evidence in the record is that they either are receiving appropriate ICF/DD services or have refused them. R-585. Three have died. *Id.*:

***9** *Plaintiff Christina Carroll* had been residing in an ICF/DD since Sept. 4, 1992. R-585 p. 2.[2]

Plaintiff Brian Dwyer was admitted to an ICF/DD in December 1992, but his mother removed him in early 1994. His current

recommended setting is at home, and he is receiving services under the Medicaid Home and Community-based Waiver (the waiver)[3]. His mother no longer desires an ICF/DD placement for him. R-585 p. 2.

Plaintiff Phillip Dwyer lives at home with his mother and brother, Brian. He wants to stay there, and his mother no longer wants an ICF/DD placement for him. R-585 p. 3.

Doe 3 died in December 1993. R-585 p. 3.

Plaintiff David Bissonette twice was offered ICF/DD placements, but it turned out the targeted ICF/DD lacked the trained staff to deal with his acute medical problems. Instead of ICF/DD care, the family was offered in-home services. In late 1998, Mr. Bissonette, who lives in South Florida, was offered an ICF/DD placement in Pensacola, which his family refused. The ***10** family has decided to care for Mr. Bissonette at home using waiver services. R-585 pp. 4-5.

Plaintiff Mary Williams is living in a Miami ICF/DD. R-585 p. 7.

Plaintiff Evelyn Church was admitted to the Sunrise Main Facility, an ICF/DD, on May 25, 1999. Ms. Church had previously been offered placements at two other ICF/DDs, but her mother said that she would wait until a vacancy opened at the Sunrise facility. R-585 pp. 7-8. Also, the plaintiffs refused to allow Officials of the Department of Children and Families to meet Ms. Church to determine whether she actually needed ICF/DD placement. R-585 p. 8.

Plaintiff Howard Schutzer lives with his father. The father does not want ICF/DD services for his son. R-585 p. 9.

Doe 8 died in a nursing home in December 1995. R-585 p. 9.

Plaintiff Glenn Bell lives in an ICF/DD. R-585 p. 9.

Plaintiff Christopher Cramer lives in an adult foster home. He receives waiver services. His family no longer seeks an ICF/DD placement for him. R-585 p. 9.

Plaintiff Shawn Faris lives in an ICF/DD. He has been in an ICF/DD since September 1993. R-585 p. 9.

Plaintiff Andrew Roth lives in a group home. His parents said they are pleased with the placement and they no longer want an ICF/DD placement for Mr. Roth. R-585 p. 10.

***11** *Doe 13* died in November 1998. R-585 p. 10.

THE STANDARD OF REVIEW

The court reviews orders granting class certification for abuse of discretion. *Kendrick v. Jefferson County Board of Education*, 932 F.2d 910, 914 (11th Cir. 1991).

The court reviews the district court's findings of fact using the clearly erroneous standard. *Brooks v. Miller*, 158 F.3d 1230, 1236 (11th Cir. 1998).

The court reviews questions of Article III jurisdiction de novo. *Florida Association of Medical Equipment Dealers v. Apfel*, 194 F.3d 1227, 1229 (11th Cir. 1999).

SUMMARY OF ARGUMENT

I.

The district court lacked jurisdiction to enter the order. In granting final judgment, the district court only retained jurisdiction to enforce the judgment. Further, the district court lacked jurisdiction to enter or amend an interlocutory order such as a class certification order after final judgment. Also, the district court lacked jurisdiction to certify a class because the question of class certification is a subject of an appeal pending in this court.

***12 II.**

The court lacked jurisdiction to certify a class four years after judgment because by that time all the named plaintiffs' claims had been rendered moot. Three have died, and the remainder either are receiving ICF/DD services or no longer want them. The court cannot certify a class when the claims of the named plaintiffs are moot on the date of class certification.

III.

The plain text of Rule 23(c) and the principle that Rule 23 must be strictly complied with prohibit the post-judgment entry of a class certification order. Because the district court failed to certify the class before entry of the final judgment, it cannot do so now.

The rule's plain text requires class certification before entry of judgment on the merits. The Supreme Court requires strict compliance with Rule 23's provisions.

According to the Advisory Committee Notes, the rule's rationale is to provide clear definition to the case. That is, certification before judgment defines the class and delineates who is entitled to relief and who is bound by the judgment.

In addition, the rule is imbued with Article III concerns, because certification gives the court jurisdiction over absent class members.

***13** Because of these concerns, many courts flatly refuse to permit post-judgment class certification.

However, some courts have been willing to imply the existence of a class when the defendants acquiesced or stipulated to the existence of a class and the parties and the court then treated the matter as a class action. The underlying legal premise for these cases is that the court does not have to strictly adhere to Rule 23's requirements.

But such a legal premise is at odds with the Supreme Court's admonition to strictly comply with Rule 23. It permits cases with undefined or ill-defined classes to go forward, violating dual rule requirements for a specific class definition in the judgment and for specificity of injunctions. Moreover, without formal class certification, the court lacks jurisdiction of absent class members.

IV.

If the district court had jurisdiction, it abused its discretion by failing to conduct a new inquiry into the named plaintiffs' fitness to be class representatives. The R&R is almost four years old, and its findings about commonality and typicality of the named plaintiffs are outdated. The defendants filed evidence in the record showing that the named plaintiffs had all received services or had refused them, raising the possibility of mootness.

***14 V.**

If the district court had jurisdiction, it abused its discretion by taking up and approving the R&R without notice to the defendants and without giving them an opportunity to object to the R&R, as they have a right to do under 28 U.S.C. s. 636. The court granted final judgment two days after publication of the R&R, simultaneously dismissing the class certification motion as moot along with all other pending motions. Thus, the defendants never responded to the R&R because they had no reason to.

***15 ARGUMENT**

I. THE COURT LACKED JURISDICTION TO ENTER THE CLASS CERTIFICATION ORDER.

A. The order was entered four years after final judgment.

The court had no jurisdiction to certify a class four years after the final judgment and two years after this court decided an appeal on the merits. The district court plainly meant the final judgment to end the litigation. See, e.g., *Caitlin v. U.S.*, 324 U.S. 229, 65 S.Ct. 631, 633 (1945), and *Pitney Bowes Inc. v. Mestre*, 701 F.2d 1365, 1368 (11th Cir. 1983). The court expressly retained jurisdiction for *only* one purpose: to enforce the judgment. Exhibit 5 p. 1. That narrow, express intention relinquished jurisdiction to do anything else. Having relinquished jurisdiction to do anything but to enforce the judgment, the district court lacked the power, fours years after the fact, belatedly to certify a class.

The trial court also lacked jurisdiction because class certification is an interlocutory matter and interlocutory matters are merged and extinguished by the final judgment. *Cypress Barn Inc. v. Western Electric Co. Inc.*, 812 F.2d 1363, 1364 (11th Cir. 1987) ("Since a preliminary injunction is interlocutory in nature, it cannot survive a final order of dismissal."); *Poliquin v. Garden Way Inc.*, 989 F.2d 527, 536 (1st Cir. 1993) (interlocutory protective order only survived final ***16** judgment because of its incorporation into a settlement agreement); *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1378 n. 1 (11th Cir. 1998) (order denying class certification was an interlocutory order); *Millar v. Houghton*, 115 F.3d 348, 350 (5th Cir. 1997) (a court lacks jurisdiction to revisit and reverse itself on an interlocutory order after entry of the final judgment).

B. Entry of the belated order interferes with the court of appeals' ability to render a decision on a pending appeal.

A central issue in the pending appeal, case no. 99-14590-DD, is the district court's authority to enforce relief beyond that necessary to remedy harm to the individual plaintiffs because of the absence of class certification. The district court's belated certification of a class - with full knowledge this was a matter on appeal - is an unwarranted attempt to influence the determination of that appeal. Consequently, the district court lacked jurisdiction to certify a class.

It is a well-settled principle that the filing of a notice of appeal divests the district court of jurisdiction. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 1331 (1985); *Weaver v. Florida Power & Light Co.*, 172 F.3d 771, 773 (11th Cir. 1999). The district court only retains jurisdiction over matters not involved in the appeal, such as ***17** collateral matters, *Marrese* and *Weaver*, and to preserve the status quo. *S.E.C. v. American Capital Investments Inc.*, 98 F.3d 1133, 1146 (9th Cir. 1996); see also *Rutherford v. Harris County Texas*, 197 F.3d 173, 192 (5th Cir. 1999) ("Once the notice of appeal was filed, the district court lost jurisdiction with respect to any matters involved in the appeal."). The district court may not, for instance, grant a Rule 60(b) motion to alter the judgment, for that would interfere

with the appeal of the judgment. *Travelers Ins. Co. v. Liljeberg Enterprises*, 38 F.3d 1404, 1407 n. 3 (5th Cir. 1994); *Winchester v. U.S. Attorney for the Southern District of Texas*, 68 F.3d 947, 949 (5th Cir. 1995).

Here, because the matter on appeal on case no. 99-14590-DD involves the absence of Class certification, the district court lacked jurisdiction to enter a class certification order. That the district court entered the order with the intention to affect the appeal is clear from the order itself:

> In a pending appeal the defendants have challenged the breadth of an order on the grounds that it compels relief for a class of individuals beyond the named plaintiffs. This Order on class certification is germane to that issue and should be added to the record on appeal as a supplement.

R-604 p. 1 n. 1.

***18 C. The claims of the named plaintiffs had become moot before entry of the class certification order.**

By the time the court certified a class, all the named plaintiffs either had received the ICF/DD services they sought or they had abandoned their demand for them. R-585, second updated declaration of Teresa McGarrity. With their claims now moot, the trial court lacked jurisdiction to certify a class.

The trial court cannot certify a class when the claims of the named plaintiffs are mooted before entry of the order. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed. 599 (1976); *Tucker v. Phyfer*, 819 F.2d 1030, 1035 (11th Cir 1987); *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3rd Cir. 1992).

II. RULE 23(C) REQUIRES CLASS CERTIFICATION BEFORE A RULING ON THE MERITS.

The plain language of Rule 23(c (1) and the principle that strict compliance with the rule is necessary require class certification before a ruling on the merits. Because the district court failed to certify the class before entry of the final judgment, it cannot do so now.

***19** Rule 23(c) (1) states:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

The last sentence of this rule is an express command to the district court to certify the class before a decision on the merits.

The reason for this requirement is "to give clear definition to the action." Rule 23 Advisory Committee Notes to the 1966 amendments to paragraph (c) (1).

Clear definition is necessary so that the court and the parties will know who, as a class member, is entitled to relief and who is bound by the judgment. *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982) (res judicata effect of class action on class member); *Durre v. Dempsey*, 869 F.2d 543, 544 (10th Cir. 1989) (class member is a party in the class action); *Baldridge v. Clinton*, 139 F.R.D. 119, 126 (E.D. Ark. 1991) *citing*, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982) ("Without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate."); *Zapata v. IBP Inc.*, 167 F.R.D. 147, 156 (D. Kan. 1996) (a clear class definition ***20** delineates who is entitled to relief and who is bound by the judgment).

Because class certification gives the court jurisdiction over class members and makes class judgments binding on the class, the process is imbued with Article III concerns. See, e.g., *Sannon v. U.S.*, 631 F.2d 1247, 1252 (5th Cir. 1980) (because plaintiffs never moved for class certification and the court consequently never formally certified a class, the plaintiffs "never solidified the requisite Article III adverseness between members of the would be class" and the defendant).

Because of Rule 23's Article III implications, the Supreme Court does not sanction haphazard and partial compliance with the rule's requirements. "[A]ctual, not presumed conformance" with Rule 23's requirements "remains, however, indispensable." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 102 S.Ct. 2364, 2372 (1982). Thus, in situations where named plaintiffs' individual claims have been rendered moot, the court has refused to imply class action status even though the courts below have been willing to do so. See *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976); *Board of Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975); and *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed. 599 (1976).

***21** To do otherwise, mocks the express requirements of Rule 23(c) (1) and the Supreme Court's demand for strict compliance with the rule.

But to allow post-judgment class certification - in this case *four years* after judgment - permits imposition of class relief without a clearly defined class at the time of rendition of judgment, a judgment dangerously indefinite because there is no certainty who is bound by it. Specificity in an injunction, of course, is required by Fed. R.Civ. P. 65 (d), both as to what conduct is regulated or required and the parties affected.[4] See e.g., *American Red Cross v. Palm Beach Blood Bank Inc.*, 143 F.3d 1407, 1413 (11th Cir. 1998). This demand for specificity applies to the class definition, which also must be explicitly defined in the judgment. Rule 23(c) (3). Thus, the failure to certify the class before judgment - and to define the class in the judgment - violates both Rule 23(c) (3) and Rule 65(d)'s specificity requirement.

Because of such concerns, many courts have refused to permit class certification after a determination on the merits. See ***22** *Eisen v. Carlisle and Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 2152-2153 (1974) (preliminary findings as to the merits of class claims are barred before certification of the class); *Horn v. Associated Wholesale Grocers Inc.*, 555 F.2d 270, 274 (10th Cir. 1977); *Premier Electric Construction Co. v. National Electric Contractors Association Inc.*, 814 F.2d 358, 363 (7th Cir. 1987) ("Rules 23(c) (1) and (2) together force class members to choose the binding effect of the judgment in advance of decision on the merits."); *Watkins v. BlinzinGer*, 789 F.2d 474, 475 n. 3 (7th Cir. 1986) (deferring ruling on class certification until after merits resolution disapproved); *Rodriguez v. Banco Central*, 790 F.2d 172, 174-175 (1st Cir. 1986) (disapproving post-merits class certification); *Fair Housing for Children Coalition v. Pornchai International*, 890 F.2d 420 (9th Cir. 1989) (unpublished opinion: "Rule 23(c) invests broad authority in the district court to alter and amend orders until entry of final judgment."); *Nance v. Union Carbide Corp.*, 540 F.2d 718, 723 n. 9 (4th Cir. 1976) ("The language Of Rule 23(c) makes it quite clear that the determination of class status is to be made 'before the decision on the

merits."').

When courts have considered the effect of Rule 23(c)'s plain language, they have been unable to escape the conclusion that class certification orders *must* issue before a determination on the merits. For instance, in ***23** *Peritz v. Liberty Loan Corp.*, 523 F.2d 349 (7th Cir. 1975), the trial court certified a class about six weeks after the entry of judgment. *Id.* at 351. The court of appeals vacated the class certification order as untimely in light of the *Eisen* decision from the U.S. Supreme Court and Rule 23(c)'s text: "Section 23(c) (1) makes it plain in the second sentence thereof that the order determining class status is to be made and finalized 'before the decision on the merits.'" *Id.* at 354.

However, some courts have been willing to imply the existence of a class after judgment, despite the lack of class certification. In *Bing v. Roadway Express Inc.*, 485 F.2d 441 (5th Cir. 1973), the plaintiff never moved for class certification and court never certified a class before judgment. *Id.* at 446. However, the circuit court said the case was an implied class action because:
1. The plaintiff filed the action seeking class relief.

2. The defendants did not oppose class action status.

3. Both the parties and the court believed the case to be a class action.

4. The court imposed class-wide relief.

In *Bolton v. Murray Envelope Corp.*, 553 F.2d 881 (5th Cir. 1977), the issue was whether the trial court on remand properly refused to treat the case as a class action after a prior appeal resulted in a reversal of class claims. The trial court had not ***24** formally certified a class in the case. The appellate court said that the case was a class action because:
1. In its initial opinion, trial court specifically held that a class had been properly established.

2. In the prior appeal, the appellate court specifically defined the class and discussed the class throughout its opinion.

3. The defendants never questioned the propriety of the class either in the trial court or on the first appeal. *Id.* at 883.

In *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1991), the First Circuit, with some misgivings, concluded that a case never certified as a class action was, in fact, a class action. The court was willing to imply class certification despite the lack of a formal certification order primarily because the defendants had stipulated to the existence of the class, providing a clear class definition, and the trial court entered judgment pursuant to the stipulation. *Id.* at 1335. In addition, the court, the parties and a master subsequently treated the case as a class action. *Id*. at 1336.

In *Marshall v. Kirkland*, 602 F.2d 1282 (8th Cir. 1979), the appellate court reversed dismissal of class and individual claims of alleged unconstitutional sex discrimination and remanded for determination of whether the named plaintiffs were appropriate ***25** representatives of class of female teachers. The court recognized that post-judgment class determination was unusual, citing *Eisen*, but it said that in the peculiar circumstances of this case, post-judgment certification would be permissible. The peculiar circumstances the court cited were:
1. The plaintiffs tried the case as a class action.

2. The trial court stated in its memorandum opinion that it had determined the case to be a class action, although no formal class certification order was in the record.

In *Graves v. Walton County Board of Education*, 686 F.2d 1135, 1140 (5th Cir. 1982), the court concluded that a school

desegregation case never formally certified as a class action was nevertheless a class action because it "was specifically described and treated as such by the parties and by the trial court."

The most significant common factor in these cases is the defense's acquiescence in the class nature of the action. The defendants either stipulated to the existence of a class or never resisted class certification - accepting the case as a class action. Based on the lack of resistence from the defendants, the trial court treated the case as a class action.

The underlying legal premise in these cases is articulated in *Bing*. In *Bing*, the court rejected strict compliance with the ***26** letter of Rule 23: "To say that this is not a class action would be to ignore the substance of the proceedings below in favor of an excessively formalistic adherence to the Federal Rules of Civil Procedure." *Bing*, 485 F.2d at 447. See also *Graves*, 686 F.2d at 1140; *Sannon v. U.S.*, 631 F.2d 1247, 1262 (5th Cir. 1980).

But this legal premise poses significant problems. It is at odds with the Supreme Court's directive to strictly comply with Rule 23's provisions. Rejecting strict adherence to Rule 23(c)'s requirement of pre-judgment certification also invites vagueness of judgments, particularly injunctions in violation of Rule 65(d), because the class may never be properly defined and the defendants' obligations may not be readily determinable. And it raises Article III jurisdictional concerns because the lack of formal class certification deprives the court of jurisdiction over absent class members and their claims and calls into question the res judicata effect of the judgment.

Implying certification post-judgment in this case also is inappropriate because the defendants have consistently opposed certification.[5]

In sum, Rule 23(c)'s requirements are real, not imaginary. They cannot be bent, twisted or swept aside because of mistake, ***27** oversight or inconvenience. Formal adherence to the rule is required. "[A]ctual, not presumed conformance" with Rule 23's requirements "remains, however, indispensable." *General Telephone Co. of Southwest v. Falcon*, 102 S.Ct. at 2372. Certification of a class four years after final judgment and two years after affirmance on appeal is not actual compliance with Rule 23(c). By disregarding the plain language of Rule 23(c), the district court abused its discretion.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY CERTIFYING A CLASS AFTER FINAL JUDGMENT.

A. The court should have conducted a renewed inquiry into the fitness of the named plaintiffs to be adequate class representatives.

If the court has the authority to certify a class four years after final judgment, the district court abused its discretion by relying on the factual findings in the R&R. Because the passage of time so changed the situations of the named plaintiffs, the court should have conducted a new inquiry into their fitness to represent the class. The district court should not have virtually rubber-stamped the four-year-old R&R.

Whether a plaintiff has the requisite commonality and typicality of claims to be a class representative is a question of fact. See e.g., ***28** *In re American Medical Systems Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996) (sometimes the court needs to probe behind the pleadings to determine commonality and typicality). The passage of time can affect an individual's standing under Article III of the Constitution and his/her fitness to be a class representative. See e.g. *Board of Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975) (students' class claims mooted by their graduation). Four years is a long time and lives do not stand still. Situations change. The defendants put the court on notice that the named plaintiffs' situations had changed and that they either had been provided ICF/DD services or had refused them. R-585.

Given the passage of time and the defendants' filing, the court abused its discretion by adopting the R&R without inquiring into the named plaintiffs' *current* fitness to be class representatives.

***29 B. The district court abused its discretion by failing to give the defendants a chance to object to the magistrate judge's report and recommendation.**

In the final judgment, the district court dismissed the plaintiffs' motion for class certification - a pending motion - when it dismissed all pending motions as moot. Exhibit 5 p. 1. By implication, the court denied the two-day-old R&R to grant the motion. If resurrecting this motion and R&R from the dead is permissible, the district court denied the defendants their right under 28 U.S.C. s. 636 to object to it.

28 U.S.C. s. 636(b) gives a party 10 days to object to an R&R. *Braxton v. Estelle*, 641 F.2d 392, 297 (5th Cir. 1981). The district court never allowed the defendants their 10 days to object. By dismissing all pending motions, the court never put the defendants on notice of the need to object. Approving the R&R under these circumstances was an abuse of discretion. *Treanor v. MCI Telecommunications Corp.*, 150 E.3d 916, 919 (8th Cir. 1998) I (fax service of R&R did not eliminate permitted three days for mail service to response time because fax service not provided for by local rule; thus, party had no reason to exclude additional time for mail service).

CONCLUSION

For these reasons, the court should vacate the order and remand with instructions to dismiss the case with prejudice.

Footnotes

1 42 U.S.C. s. 1396a(a) (8) contains the "reasonable promptness" requirement.

2 R-585 consists of two declarations by Teresa McGarrity, an official of the Department and Children and Families, with supporting documents. All page references here are to Ms. McGarrity's "Second Updated Declaration."

3 The waiver is a program for reimbursement for services to individuals with developmental disabilities living in home-like and community settings. 42 U.S.C. 1396n(c); s. 59G-8.200, Fla. Admin. Codes. 59G-8.200, Fla. Admin. Code. It is an alternative to institutionalization. *Id.*

4 Rule 65(d): "Every order granting an injunction and every restraining order shall set forth the reason for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

5 The defendants in this case repeatedly and vigorously opposed class certification. R-84, 85, 86, 139, 278, 281, 282, 321, 322, 330, 331, 351, 390, 394, 401, 403, 579.