

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

NANCY MARTIN, et al.,	:	
	:	
Plaintiffs,	:	Case No. C2-89-362
	:	
vs.	:	Judge Edmund A. Sargus, Jr.
	:	
ROBERT TAFT, et al.,	:	Magistrate Judge Norah McCann King
	:	
Defendants.	:	

**REPORT AND RECOMMENDATION ON MOTIONS TO
DECERTIFY CLASS AND MOTION TO DISQUALIFY COUNSEL**

This Court filed an Order to Certify Nancy Martin, *et al.* (the "Plaintiffs") as a class on March 21, 1990. Subsequently, the Plaintiffs and Robert Taft, *et al.* (the "Defendants") proceeded with settlement negotiations. On June 29, 2004, the parties filed a Joint Motion for Approval of Settlement, with the Proposed Consent Order attached (Doc. No. 451).

Support for the Proposed Consent Order began to collapse while the Joint Motion for Approval of the Settlement was still pending. Several Plaintiff groups (the "Plaintiff-Objectors") filed objections to the Joint Motion for Approval of Settlement and the following motions (collectively, the "Motions to Decertify" and the "Motion to Remove Counsel"):

- a. Motion to Decertify Class filed by Joel Martin Objectors (Doc. No. 609);
- b. Motion to Decertify Class filed by Shawna Klein Objectors (Doc. No. 669);
- c. Motion to Decertify Class filed by Donna Amato Objectors (Doc. No. 679);
- d. Motion to Decertify Class filed by Paul Peterson Objectors (Doc. No. 680);
- e. Motion to Decertify Class filed by Thomas J. Grady, et al. (Doc. No. 681);
- f. Motion to Remove Counsel filed by Joel Martin Objectors (Doc. No. 690); and

g. Motion to Disqualify Counsel filed by Paul Peterson Objectors (Doc. No. 705).

Pursuant to the Order Appointing Special Master, the Special Master, after attempts to assist in settlement, must give the Court a Report and Recommendation on the Motions to Decertify the Class and the Motion to Remove Counsel. The Special Master recommends that this Court DENY the Motion to Decertify and DENY the Motion to Remove Counsel for the following reasons:

- I. The Elements Necessary to Certify the Class still exist, and therefore, Decertification is not Proper;
- II. The Motions to Decertify the Class are Moot Because the Plaintiff Class has Withdrawn Its Motion to Approve Settlement;
- III. Some of the Objectors Do Not have Standing to Move this Court to Decertify the Class; and
- IV. Plaintiff Class' Counsel Is able to Adequately and Fairly Represent the Plaintiff Class.

I. The Class May be Maintained Because the Class Still Fulfills the Elements of Fed. R. Civ. P. 23(b)(1)(B).

The definition of the Plaintiff Class given in the Opinion and Order of March 21, 1990 (Doc. 46, available through electronic filing at Doc. 609-2) that certified the class, (the "Order Certifying the Class") is, "all mentally retarded or developmentally disabled Ohioans who are, or will be, in need of community housing and services which are normalized, home-like and integrated, and a subclass who, in addition to being members of the class, are, or will be, Medicaid recipients."

A court may decertify a plaintiff class when and if the class no longer meets the criteria for class certification in Fed. R. Civ. P. ("Rule") 23. Rule 23(b) states in pertinent part,

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Rule 23(b)(2). The Court is not to evaluate the merits of the plaintiff's case when determining whether the Plaintiff Class may be maintained. *See McCarthy v. Kleindienst*, 741 F.2d 1406 (D.C. Cir. 1984); *Anderson v. City of Albuquerque*, 690 F.2d 796 (10th Cir. 1982). The Plaintiff Class continues to meet the criteria in Rule 23(b)(2), under which it was certified, and therefore, may be maintained.

The Plaintiff Class also continues to meet the prerequisites in Rule 23(a), and therefore may remain certified. The prerequisites listed in Rule 23(a) that a class must meet to become certified are that

1) the class is so numerous that joinder of all members is impracticable, 2) there are questions of law or fact common to the class, 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and 4) the representative parties will fairly and adequately protect the interest of the class.

Rule 23(a). Though the Plaintiff Objectors raise several issues, they only challenge the last Rule 23(a) prerequisite, namely that the representative parties, or named plaintiffs, adequately represent the Plaintiff Class.¹ The named plaintiffs still fairly and adequately represent the interests of the class, despite possible conflicts based on different remedies sought by members of the Plaintiff Class, and therefore, the Plaintiff Class still fulfills the necessary prerequisites of Rule 23(a).

As stated in the Order Certifying the Class, "Rule 23(a)(4) requires that the Court determine

¹ See Motion to Decertify Class by Joel Martin Objectors, p. 15-16; Motion to Decertify Class by Shawna Klein Objectors, p. Motion to Decertify Class by Thomas J. Grady Objectors, p. 5-6; Motion to Decertify the Class by Paul Patterson Objectors, p. 3; and Motion to Decertify Class by Donna Amato Objectors, p. 1.

Part of the requirement that class representatives adequately represent the class is that representative's counsel be qualified to adequately represent the class. Because the Joel Martin Objectors also filed a Motion to Remove Counsel, this Recommendation will address the adequacy of representative's counsel in the section addressing that motion.

that ...the interest of the representative class are not antagonistic to those of the class." p. 5, citing *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), and *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333 (D.C. Ohio 1976). The Plaintiff Objectors point to the Proposed Consent Agreement as proof that the interests of the class representatives are antagonistic to those of the class. Specifically, the Plaintiff Objectors claim that because members of the Plaintiff Class desire various remedies, a conflict exists between the interests of the representative class and other members of the Plaintiff Class. See Motion to Decertify the Class filed by Joel Martin Objectors, p. 14-15, Motion to Decertify the Class filed Thomas Grady Objectors, p. 5-6, and Motion to Decertify the Class filed by Shawna Klein Objectors, p.10-12.

Many courts have held, though, that, "potential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy." *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 431, n.7 (4th Cir. 2003), citing *Hanrahan v. Britt*, 174 F.R.D. 356, 364 (E.D. Pa. 1997); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977), *questioned on other grounds* (finding that representation was adequate even though current gas station lessees and former lessees would ultimately seek different remedies); and 1 Newberg on Class Actions, § 3:25, at 422-23 & fn. 4.

In *Gunnells*, the employers that purchased a failed health plan for employees, and the employees covered by the failed health plan, brought an action against the administrators and successor in interest of the failed health plan, and the insurance agents that sold the health plan. The court affirmed the class certification for the claims against the former administrators and successor in interest of the failed health plan, but reversed the class certification for the claims against the insurance agents that sold the health plan because proof of reliance is individual to the plaintiff. The

administrators and successor in interest claimed that class certification should fail due to conflicts of interest in remedies among class members. The Fourth Circuit held that,

For a conflict of interest to prevent plaintiffs from meeting the requirement of Rule 23(a), that conflict 'must be fundamental. It must go to the heart of the litigation.' Here, the employers and employees share common objectives and the same factual and legal positions. They have the same interest in establishing the liability of TPCM. Thus, any potential conflict does not go to the heart of their roles as class representatives.

Gunnells, 348 F.3d at 430-431, citing 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 18:14 (4th ed. 2002); and *Uniondale Beer Co. v. Anheuser-Busch, Inc.*, 117 F.R.D. 340, 343 (E.D.N.Y. 1987) (finding that economic conflict between competitor class members in antitrust action did not render representatives inadequate because all class members sought to prove that defendants conspired to fix prices).

The Joel Martin Objectors cite to *Martin v. American Medical Systems, Inc.*, 1995 WL 680630 (S.D. Ind. 1995) for the proposition that a class should not be certified if the named plaintiffs are pursuing relief that directly conflicts with the interests of a portion of the proposed class. In *AMS*, the class included all purchasers of a product. A portion of the class was concerned that an award of money damages would dissuade the manufacturer from continuing to provide the product, as a portion of the class was satisfied with the product. However, the class here is limited to those who are not satisfied with current services. Every class member in this case, as the class is defined, seeks to prove the Defendants liable for violation of the Rehabilitation Act, the Developmental Disabilities Act, and the Civil Rights Act. The Defendants' actions allegedly adversely affected the rights of all class members under the United States Constitution, whether by not providing enough of existing services or not providing enough options for services. The interests of the representative

class are not antagonistic to those of the Plaintiff Class and therefore, the Plaintiff Class should not be decertified.

II. The Motions to Decertify the Class are Moot Because the Plaintiff Class has Withdrawn Its Motion to Approve the Settlement.

The Motions to Decertify the Class were written after the Plaintiff Class filed its Motion to Approve Settlement. The major theme throughout the Motions to Decertify the Class is that a conflict exists in the Plaintiff class between the class representatives and the remainder of the class because the Proposed Consent Agreement only addresses the interests of the class representatives, and not those of the Plaintiff Class as a whole. The Plaintiff's withdrew their Motion to Approve the Settlement, and consequently the Proposed Settlement Agreement on June 29, 2004.

In the Motion to Decertify the Class filed by Joel Martin Objectors, the Joel Martin Objectors detail several conflicts within the class, all based on the Proposed Consent Order. The Joel Martin Objectors state that it is a violation of Due Process to allow a class to be certified if some of its, " 'members have opposing interest or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class.'" Motion to Decertify Class filed by Joel Martin Objectors, p.4, citing *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000). But, the Joel Martin Objectors fail to realize that the members of the Plaintiff Class in the case do not have opposing interests or consist of members that benefit from the same acts alleged to be harmful to other members of the class. The named plaintiffs, and the members of the Plaintiff Class, all allege that the Defendants have violated Rehabilitation Act, the Developmental Disabilities Act, and the Civil Rights Act, which adversely affected the rights of all class members under the United States Constitution, whether by not providing enough of existing services or not providing enough options

for services.

The Joel Martin Objectors believe that the conflict between the class representatives and the Plaintiff Class violates due process because, "[t]housands of class members object to the relief sought by the class representatives. [Therefore], the class previously certified in this case is not valid." Motion to Decertify filed by the Joel Martin Objectors, p.6. As stated above, the Proposed Consent Order has been withdrawn. Therefore, it no longer stands as the relief sought. The class representatives are free to seek other relief that may more closely coincide with the interests of those objectors who are in the class.

In the Motion to Decertify filed by Shawna Klein Objectors, the Shawna Klein Objectors state that they are satisfied with their current ICF/MR placements and desire ICF/MR funding to continue. p. 10. Additionally, the Shawna Klein Objectors state that community placement is also appropriate when desired by the consumer's family and when medically appropriate, as contemplated by *Olmstead*. They believe that these are complementary positions that, "morph into opposing positions only when the elimination of either the ICF/MR option or the community placement option is proposed [as in the Proposed Consent Order]." Motion to Decertify filed by the Shawna Klein Objectors, p.11. As stated above, the Proposed Consent Order has been withdrawn, and therefore, the position of the class representatives is no longer antagonistic to the position of the Shawna Klein Objectors.

It is obvious that any conflict between members of the Plaintiff Class have stemmed from the Proposed Consent Order. Plaintiffs' counsel has withdrawn the Motion to Approve the Settlement, and consequently, the Proposed Consent Agreement. The primary cause of conflict between the class representatives and the Plaintiff Class longer exists, and therefore, the Plaintiff

Class should remain certified.²

III. Some of the Objectors Do Not have Standing to Move this Court to Decertify the Class.

If the objectors are not part of the class, he or she does not have standing to Move to Decertify the Class. The definition of the Plaintiff Class given in the Order Certifying the Class is, "all mentally retarded or developmentally disabled Ohioans who are, or will be, in need of community housing and services which are normalized, home-like and integrated, and a subclass who, in addition to being members of the class, are, or will be, Medicaid recipients." (Emphasis added). If the individual is not, or will not be, in need of community housing and services as described above, then they are not class members. It follows that those individuals that are not class members may not move this Court to Decertify the Class.

This is the Court's first occasion to apply the above definition of the class. This Court, in an opinion dated September 19, 2002 (reported at 222 F. Supp.2d 940 (S.D. Ohio 2002) cites *L.C. v. Olmstead*, 527 U.S. 581, 602 (1999) in its decision denying the Defendants' Motion to dismiss as the standard under which the Plaintiffs must prevail for an Americans with Disabilities Act claim. The Court in *Olmstead* held that an individual may allege discrimination for being refused community housing if he or she is able to prove, among other elements, that he or she 1) is qualified for community housing, and 2) has not refused the community housing. If the individual is not qualified for community housing, he or she cannot be in need of it, but rather is in need of institutionalization. If the individual has declined community housing, he or she is does not, by self-admission, need community housing. In this similar action, for an individual with mental

² Any dissatisfaction with a future Proposed Consent Order may be addressed at the fairness hearing.

retardation to be "in need of" community housing, he or she must 1) be qualified to receive community housing, and 2) not have refused community housing.

To determine whether an individual is qualified, the court in *Olmstead* held that a state, "generally may rely on the reasonable assessments of its own professionals in determining whether an individual meets the 'essential eligibility requirements' for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting." *Olmstead*, 527 U.S. at 602. In the case *sub judice*, members of the Plaintiff Class must be qualified to be "in need of" community housing. An individual is qualified for community housing only if a professional has assessed this individual and approved community housing as a viable option for this individual. Therefore, only those individuals for whom community housing has been approved as a viable option are "in need of" this service.

Moreover, the court in *Olmstead* had held that disabled individuals have the right to decline community-based treatment. *Id.* at 602. If an individual with mental retardation has declined the service, he or she, by admission, does not need the service. Therefore, in the case *sub judice*, if an individual with mental retardation does not wish to participate in community housing, then he or she is not "in need of" this service. Under *Olmstead*, read in accordance with the Order Confirming Certification, individuals with mental retardation that have either 1) been assessed as unqualified by a professional to participate in community housing, or 2) declined community housing, are not "in need of" community housing and are therefore not part of the Plaintiff Class.

Those individuals not part of the Plaintiff Class lack standing to move that this Court decertify the Plaintiff Class. A party must have a sufficient stake in the outcome of an action to have standing to receive judicial resolution of a conflict. *Sierra Club v. Morton*, 405 U.S. 727, 731-732,

92 S. Ct. 1361 (1972), *superceded on other grounds by* 5 U.S.C. §§701-06. *See also* *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S. Ct. 1055 (1997). Those individuals that are not part of the Plaintiff Class have stake in the outcome of this action as they are not eligible to receive the community housing, either through denial of qualification by a professional or through declining the service. Further, individuals that are not part of the Plaintiff Class are not bound by any decision in this case. Therefore, those individuals that are not a party to this action lack standing to move this Court to decertify the class.

IV. Class Counsel Should Not Be Removed Because Counsel Is Able to Adequately and Fairly Represent the Plaintiff Class.

The Joel Martin Objectors also filed the Motion to Remove Counsel. The Joel Martin Objectors allege, *inter alia*, that counsel failed to communicate adequately with the class in negotiating the Proposed Consent Agreement. This same counsel has now withdrawn the Proposed Consent Agreement.

A prerequisite of class certification under Rule 23(a) is that, "(4) representative parties will fairly and adequately protect the interest of the class." The elements of fair and adequate representation are: 1) that the representative party's attorney is qualified, experienced, and generally able to conduct the litigation, and 2) that the class representative's interests not be antagonistic to the interests of unnamed plaintiffs in the class.³ *Harriss v. Pan American World Airways, Inc.*, 74 F.R.D. 24, 42 (N.D. Calif. 1977). Here, counsel is qualified, experienced and able to conduct the litigation.

³ This Recommendation addresses the interests of the named plaintiffs in Section I.

There is no question that counsel for the class representatives, the Ohio Legal Rights Service ("OLRS") fulfills the above requirements to be able to act as representative counsel. In fact, the Joel Martin Objectors state in their conclusion to their Motion to Decertify Class, "[o]ver the last 15 years, the amount and diversity of services for mentally retarded individuals in the community has expanded significantly, no doubt in some definite but unquantifiable amount due to the impetus and work of OLRS and the decisions of this Court in this Case." p.16. Even the Joel Martin Objectors, who filed this Motion to Remove Counsel, admit that counsel had played a role in improving the circumstances that are the subject of this action.

The Joel Martin Objectors base their Motion to Remove Counsel on allegations that counsel did not adequately communicate with the Plaintiff Class in negotiating the Proposed Consent Agreement. The Joel Martin Objectors cite to *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) and *Wyatt v. Horsley*, 793 F.Supp. 1053, 1055-1056 (M.D. Ala. 1991) for the proposition that class counsel, if it cannot receive input from the members of the class, must seek that input from secondary sources such public interest groups and must not allow settlement decisions to be determined exclusively by the named plaintiffs.⁴ Both the court in *Wyatt* and the

⁴ Additionally, the Joel Martin Objectors cite to *Miller v. United States*, 1980 WL 18579 (D.D.C. 1980), for the proposition that in a case in which a class member may not opt out, counsel's protection of the rights of absent plaintiffs is of particular concern. In *Miller*, the Court denied class certification because it believed that the class lacked adequate representation in its counsel. The counsel in *Miller*, though, engaged in outrageous behavior: 1) he did not contact all of the plaintiffs named in the complaint; 2) he did not receive consent from all of the plaintiffs named in the complaint to become parties to the action; 3) he made it apparent in an application for a temporary restraining order that his preparation of documentation was, "slipshod at best;" 4) he ignored a local rule of the Court; and 5) he framed an overly broad class. In the case sub judice, class counsel did not engage in any of the sort of conduct discussed in *Miller*.

court in *Pettway*,⁵ though, were determining whether to approve settlements, not whether counsel could adequately represent each class.

If this Court was deciding the Motion to Approve Settlement, these cases would be appropriate to cite in an objection to the Proposed Consent Agreement. However, that Motion is no longer before the Court.

Counsel may adequately represent the Plaintiff Class, and we expect will communicate with the class interests. Therefore, OLRS should not be removed as class counsel.

CONCLUSION

For the reasons stated above, the Special Master hereby recommends that this Court **DENY** the Motion to Decertify and **DENY** the Motion to Remove Counsel.

Dated: September 13, 2005

/s/ Mark Landes
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Special Master

⁵ In *Pettway*, seventy percent (70%) of the plaintiff class objected to the settlement.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing REPORT AND RECOMMENDATION ON MOTIONS TO DECERTIFY CLASS AND MOTION TO DISQUALIFY COUNSEL was filed electronically on this 13th day of September, 2005, and served upon all parties through the Court's CM/ECF filing system.

/s/ Mark Landes

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