UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

- x

NANCY MARTIN, et al.,

Plaintiffs,

- against -

ROBERT TAFT, et al.,

Defendants.

- x

Case No. C 2-89-362

Judge SARGUS
Magistrate Judge KING

MOTION TO DECERTIFY CLASS
(Shawna Klein objectors)

Oral argument is requested.

Pursuant to FRCP 23(c)(1)(C), the 27 Klein Objectors[1] move this Court to decertify the class herein, and support the separate decertification motion of the Joel Martin Objectors, filed 7 September 2004. We ask that this motion be treated in the normal 21-day responding course, pursuant to Rule 7.2(a)(2) of this Court. A supporting affidavit and memorandum of law are attached.

Dated: New York, New York
October 22, 2004

Respectfully submitted,

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[1] This motion is also supported by amici curiae Ohio League for the Mentally Retarded ("OLMR"), and The Voice of the Retarded ("VOR").

KLEIN OBJECTORS' MEMORANDUM OF LAW
IN SUPPORT OF DECERTIFICATION OF CLASS.

On 7 September 2004, the Joel Martin objectors moved to decertify plaintiff class, upon due process grounds and conflicts among class members. Complying with this Court's order of 10 September 2004, all major objectors then made a good faith, concerted effort to respond to the pending proposed consent order, as "clarified" by the proposing parties that day. On 24 September 2004, those objectors submitted a single, unitary counter-proposed consent order, reflecting the work product of eight separate groups of objectors.

On 8 October 2004, the proposing parties replied:

> "The parties were unable to adopt any of the proposals made by the objectors." (Parties' Second Submission, p. 1; emphasis added.)

In the face of this response, the Shawna Klein objectors now join in the Joel Martin objectors' motion to decertify; adopt the arguments of the Joel Martin objectors as their own, and offer additional considerations in support of the motion. As amici curiae, OLMR and VOR support the position of both sets of objectors.[2]

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[2] In a prior filing, trial counsel to plaintiffs and plaintiff class correctly described OLMR as "the largest organized group of parent-guardians who oppose facility/DC closure". (Memo dated 9 August 2004, p. 6.) VOR is a national advocacy organization incorporated in Illinois, dedicated to insuring that individuals with mental retardation receive the care and support they require in a setting appropriate to each individual's needs. Both OLMR and VOR submit that, depending on the unique

We offer three further considerations in this memorandum. Procedurally: (a) this Court has the power to decertify the class at this time (Point I[A], below); (b) subclass treatment under FRCP 23(c)(4)(B) is no longer available because of the conflict of interest of plaintiff class counsel (Point I[B], below). Substantively, the facts surrounding the breakaway of OLMR from ARC Ohio illustrate some of the irreconcilable divisions within the class (Point II, below).

Pursuant to S.D. Ohio Civ. R. 7.1(b)(2), we represent that oral argument should be granted in view of the statewide healthcare issues raised in this action.

I. THIS COURT MAY AND SHOULD DECERTIFY THE CLASS, BUT IT MAY NOT NOW CREATE SUBCLASSES.

A. This Court May Decertify The Class At Any Time Prior To Final Judgment.

(n. 2, cont'd.)
condition of each person, that appropriate setting could be community placement, or it could be institutional treatment. A spectrum of choices must be available. Olmstead v. L.C., 527 US 581 (1999).

In a filing dated 1 October 2004, counsel to plaintiffs, and to plaintiff class, concede that there is no conflict of interest between the Klein Objectors, as parties, and VOR and OLMR, as amici curiae, (Memorandum dated 1 October 2004, in opposition to the separate motion of the Joel Martin objectors to decertify the class ["Pl. Oct. Memo"], p. 19, n. 13.)

Just as a federal court is under a continuing duty to ascertain its subject matter jurisdiction (see FRCP 12[h][3]), so must it continuously determine the propriety of a class action. Under FRCP 23(c)(1)(A), it must initially determine certification "at an early practicable time".[3] However, FRCP 23(c)(1)(C) also expressly provides:

> "An order under FRCP 23(c)(1) may be altered or amended before final judgment."

The Federal Rules Advisory Committee notes for the 2003 amendments to FRCP 23(c)(1) read, in pertinent part:

> "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met.
>
> * * *
>
> In this setting, the 'final judgment' concept is pragmatic."

In Coopers & Lybrand v. Livesay, 437 US 463 (1978), a unanimous Supreme Court (per Stevens, J.) described a District Court's decertification powers. It concluded:

> "[S]uch an order is subject to revisions in the District Court. [FRCP] 23(c)(1).[11]" (437 US at 469.)

[3] Amendment effective 1 December 2003.

The Court's note 11 reads:

> "The Rule provides that an order involving class status may be 'altered or amended before the decision on the merits'. Thus, a district court's order denying or granting class status is inherently tentative." (437 US 463, at 469, n. 11; emphasis added.)

This view was reiterated in General Telephone Co. v. Falcon, 457 US 147 (1982). Speaking for a court unanimous on this point, and citing Coopers & Lybrand, supra, Justice Stevens concluded:

> "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent events in the litigation." (457 US at 160; emphasis added; footnote omitted.)

The Court of Appeals for the Sixth Circuit put it well in Barney v. Holzer Clinics, Ltd., 110 F. 3d 1207 (6 Cir. 1997):

> "The district court's duty to assay whether the named plaintiffs are adequately representing the broader class does not end with the initial certification; as long as the court retains jurisdiction over the case, it must continue carefully to scrutinize the adequacy of representation, and withdraw certification if such representation is not furnished." (110 F. 3d at 1214; emphasis added; internal quotation omitted.)

See, also, Eisen v. Carlisle & Jacquelin, 417 US 156, at 177-8 (1974; determine propriety of class action before reaching merits), and East Texas Motor Freight System v. Rodriguez, 431 US 395, at 406 n. 12 (1977; same). Both opposing parties so concede. (Pl.

Oct. Memo, p. 15; Defendants' Memorandum dated 28 September 2004 in opposition to Joel Martin motion to decertify, p. 1.)[4]

The remedy for an improperly certified class is a vacatur of certification. Amchem Products, Inc. v. Windsor, 521 US 591, at 611-2(1997); Coleman v. General Motors Acceptance Corporation, 296 F. 3d 443 (6 Cir. 2002); Reeb v. Ohio Department of Rehabilitation and Corrections, 221 FRD 464 (SD Ohio 2004); Owner-Operator Independent Drivers Association v. Arctic Express, Inc., 288 F. Supp. 2d 895 (SD Ohio 2003).

This action is now ineligible for class action treatment. FRCP 23(c)(1)(C), as recently amended, mandates decertification at this time.

B. Subclasses Are No Longer A Viable Alternative.

FRCP 23(c)(4)(B) provides, in pertinent part:

> "When appropriate...a class may be divided into subclasses, and each subclass treated as a class...".

[4] Given this perspective, it would be a waste of judicial resources to press on to a fairness hearing without first deciding the motions to decertify. The parties appear to agree. (Parties' Second Submission, p. 2.)

As noted in the Recitals clause of objectors' proposed consent order, submitted 24 September 2004, there are at least five distinctive subgroups in this litigation. All are "mentally retarded and developmentally disabled individuals in Ohio". They differ by residence and placement desire, as follows:

	Subgroup	Residence	Placement Desire
a)	Satisfied I	ICF/MR	Stay where they are, with continued funding.[5]
(b)	Satisfied II	Community	Stay where they are.
(c)	Dissatisfied I	ICF/MR	Community[6]
(d)	Dissatisfied II	Community	ICF/MR[7]
(e)	Waiting list	Home	ICF/MR or community

As pointed out so forcefully in the submission of the Joel Martin objectors in their separate motion to decertify the class, plaintiff class counsel has an insoluble conflict of interest in purporting to represent these five conflicting groups. One consequence of this conflict, which has played out over more than a decade, is that subclass treatment is no longer possible. Directly on point is Ortiz v. Fibreboard Corporation, 527 US 815 (1999; "Ortiz" hereafter).

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[5] This subgroup opposes elimination of ICF/MR funding.

[6] This subgroup favors elimination of ICF/MR funding.

[7] This subgroup also opposes elimination of ICF/MR funding.

Ortiz involved claims of certain individuals injured by asbestos. Many of the actions were globally settled by the creation of a common fund and the commencement of a class action against the fund. The total of the claims far exceeded the amount of the fund. No subclasses were created. (527 US at 821-832.)

A large number of individuals within the class refused to settle, and were thereby excluded from the common fund. No reserve for unsettled claims was made. (527 US at 854-5.) The Court pointedly noted:

> "[T]here can be no question that such a mandatory settlement class will not qualify when, in the very negotiations aimed at a class settlement, class counsel agreed to exclude what could turn out to be as much as a third of the claimants..., a substantial number of whom class counsel represent." (527 US at 854; emphasis added.)

In addition to the conflict created by exclusion from the class, the Court also noted conflicts within the class between those presently injured and those with claims of future, potential injury. The Court stated that "it is obvious" that the class:

> "requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel." (527 US at 856; emphasis added.)

Without such a division, held the Court, the threshold requirement of FRCP 23(a)(4)--adequacy of representation--could not be met. (527 US at 856-7 and n. 31.)

Other conflicts within the class were also identified. (527 US at 857.) The Court concluded that the conflicts should have been addressed before the class was certified. (527 US at 888.) Allowing the case to proceed to a proposed settlement by class counsel without resolution or separate representation of the conflicting interests:

> "tainted the negotiation of the global settlement, and...at this point cannot be undone." (527 US at 859, n. 33.)

Reversing the Court of Appeals' approval of the settlement, the Court concluded, in pertinent part:

> "[I]t would be essential that...intraclass conflicts [be] addressed by recognizing independently represented subclasses. In this case,...[the] error [was] magnified by the representation of class members by counsel also representing excluded plaintiffs.... [S]eparate settlements, together with other exclusions from the claimant class, precluded adequate structural protection by subclass treatment, which was not even afforded to the conflicting elements within the class as certified." (527 US at 864-865; emphasis added.)

Amchem's holding may be restated in terms of the subgroups identified at p. 7, supra: because the negotiation of the proposed settlement ignored the interests of three subgroups (Satisfied I; Dissatisfied II, and the Waiting List), it is "tainted" and "cannot be undone" by belated subclass treatment.

C. Summary

Pursuant to Amchem, supra, the only remedy for conflicted representation is decertification of this non-homogeneous class. (A, above.) At this late stage of the litigation, subclass treatment is unavailable and foreclosed by Ortiz, supra. (B, above.)

II. THE KLEIN OBJECTORS HAVE INTERESTS SEPARATE AND DISTINCT FROM OTHER MEMBERS OF THE CLASS.

A. Two different groups

All members of the Klein Objectors fit within subgroup (a) in Point I(B), above: they are in state ICF/MR placements; are satisfied where they are, and desire ICF/MR funding to continue. They are also all members of OLMR, which unambiguously favors ICF/MR placement when desired by the consumer's family, and when medically appropriate.[8]

The Klein Objectors have no difficulty with the converse position: community placement is also appropriate when desired by the consumer's family, and when medically appropriate. Each position implements the holding of Olmstead v. L.C., 527 US 581 (1999).[9]

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[8] Amicus curiae VOR also supports that position.

[9] In their opposition to the decertification motion of the Joel Martin objectors, counsel to plaintiff and plaintiff class incompletely state the holding of Olmstead v. L.C., supra. (Pl. Oct. Memo, p. 3.) Olmstead supports choice: choice of community or institutional placement, depending on (a) guardian's choice, and (b) medical appropriateness. 527 US at 604-5, 607. Counsel cites only one of the choices available under Olmstead.

These complementary positions morph into opposing positions only when the elimination of either the ICF/MR option or the community placement option is proposed.[10] The founding of OLMR, as a breakaway from ARC of Ohio, is a historic illustration of that difference.

As set forth more fully in the accompanying affidavit of Alfred Leist, sworn to 21 October 2004, the options of community placement and institutional placement have had separate advocates in Ohio. The original advocates of community placement here, usually publicly funded, began to seek that goal to the exclusion of the institutional placement option.[11] Disagreeing with that focus, Mr. Leist and others founded the privately-funded predecessor of amicus curiae OLMR. He has consistently advocated, and lobbied for, the preservation of a funded institutional placement option in Ohio, for the protection of profoundly retarded individuals like his son, Mark.

This difference of position--between ARC and People First, on the one hand, and OLMR and its predecessor on the other--has gone on for over two decades. The historic

[10] The consent order proposed by counsel to the plaintiff class and counsel to defendants effectively threatens elimination of the ICF/MR option.

[11] For a current example, see, e.g., Ex. D to the decertification memorandum of the Joel Martin objectors. (ARC statement.)

Olmstead v. L.C. decision, rendered five years ago, satisfies both interests if public funding of both options continues. Conflict between those interests is certain, however, when elimination of one option (or of the public funding of that option) is proposed.

B. Procedural Consequences

A fatal conflict of interest appears, at least for purposes of adequate representation under FRCP 23(a)(4), when the proponent of elimination of one choice is a publicly-funded advocacy agency (OLRS), acting in concert with two other state agencies. Who represented the profoundly disabled in the "negotiations" leading to the proposed consent order? How could OLRS negotiate away the right to publicly funded ICF/MR placements enjoyed by a significant portion of the class?

It is undisputed that this class was certified under FRCP 23(b)(2). Because no opt-out is permitted from such a class, it is properly certified as such only when:

> "the party opposing the class has acted, or refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive relief...with respect to the class as a whole." (FRCP 23[b][2].)

As the Sixth Circuit put it in Coleman v. General Motors Acceptance Corporation, supra:

> "These procedural protections [opt-out; individual notice] are considered unnecessary for a Rule 23(b)(2) class, because its requirements are designed to permit only classes with homogeneous interests." (296 F. 3d at--; slip op., p. 7; emphasis added.)

As a matter of law, two of the competing interests present here--ICF/MR placement and community placement--cannot be enfolded within a single class.

It has long been the law that antagonistic interests prevent class treatment. In Hansberry v. Lee, 311 US 32 (1940), the Supreme Court was faced with a restrictive covenant:

> "It is plain that...all those alleged to be bound by the agreement would not constitute a single class in any litigation brought to enforce it. Those who sought to secure its benefits by enforcing it could not be said to be in the same class with, or represent, those whose interest was in resisting performance...". (311 US at 44.)

The Court reasoned:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common right or to challenge an asserted obligation." [Citations omitted.]
>
> It is quite another to hold that all those who are free, alternatively, either to assert rights or to challenge them, are of a single class so that any group, merely because it is of the class

> so constituted, may be deemed adequately to represent any others of the class in litigating their interests, in either alternative." (311 US at 44-45; paragraphing and punctuation added.)

The flaw, held the Court, was of constitutional dimensions:

> "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily, or even probably, the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." (311 US at 45; punctuation and emphasis added.)

The Court reached the same conclusion in East Texas Motor Freight System, Inc. v. Rodriguez, supra. In ordering dismissal of a class action complaint, the Court held, in pertinent part:

> "Another factor, apparent on the record, suggesting that the named plaintiffs were not appropriate class representatives was the conflict between the vote by members of the class rejecting a merger of the city-[driver] and line-driver collective bargaining units, and the demand in the plaintiffs' complaint for just such a merger." (431 US at 405.)

A good illustration, on facts similar to ours, is found in Blum v. Yaretsky, 457 US 991 (1982). While it is primarily a decision defining "state action" (457 US at 1002-1012), the pertinent part of Blum lies in the identity of the class therein:

> "[A] class of Medicaid patients challenging decisions, by the nursing homes in which they reside, to discharge or transfer patients without notice or an opportunity for a hearing." (457 US at 993.)

In each case, the proposed transfer was from a facility providing "skilled nursing facilities" to "less extensive, and generally less expensive, medical care than the former". (457 US at 994-5, and 997, n. 9.) As the litigation developed, a "new claim" emerged: that the same procedural safeguards should apply to a proposed transfer "to a higher, i.e., more intensive, level of medical care". (457 US at 997; emphasis in original.)

The issue for decision was whether the current class representatives, opposing transfer to a lower level of care, were proper class representatives for those opposing transfer to a higher level of care. No person opposing transfer to a higher level of care was a class member, or had moved to intervene. (457 US at 1001 and n. 13.)

The Supreme Court held that the class representative lacked standing to assert a claim based on a proposed transfer to a higher level of care. The Court reasoned:

> "Transfers to higher levels of care are recommended when the patient's medical needs cannot be satisfied by the facility in which he or she currently resides. Although respondents contend that all transfers threaten elderly patients with physical or psychological trauma, one may infer that refusal to accept a transfer to a higher level of care could itself be a decision with potentially traumatic consequences. The same cannot be said of discharges or transfers to less intensive care." (457 US at 1001-2; emphasis in original.)

Accordingly, the Court concluded, the proof of the conflicting position of two groups --transfers to less intensive care, and transfers to more--precluded considering them as one in the absence of a party seeking more intensive care. (Ibid.)

While Blum is not directly on point, because the Klein Objectors are parties to this action[12], it is instructive. In the context of class actions, parties seeking different levels of care cannot be part of an undivided class, and the class representative may not be allowed to speak for two masters. The experience of OLMR's separation from ARC of Ohio is one of many factual illustrations of these point now before this Court.[13]

[12] As are others, such as the Joel Martin objectors.

[13] Another would be the experience of those so long on the waiting list, whose interests seem to be disregarded in the proposed consent order.

CONCLUSION

We respectfully submit that decertification is not the death knell for plaintiffs' efforts. Far from it. Significant and permanent changes for the better have occurred in Ohio health care as a result of this litigation. With good will from the state defendants, Olmstead-appropriate placements may be secured for the plaintiffs on an individual basis.[14]

However, there is no class, and no class representative, which properly seeks "a radical change in the structure and control of [Ohio's] Medicaid program". (Pl. Oct. Memo, p. 1.)

For the reasons given above, which build on those offered by the Joel Martin Objectors, the Klein Objectors respectfully submit that the class should be decertified.

Dated: New York, New York
October 22, 2004

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[14] We are not sure how many remain in placements unsatisfactory to them. Of the five original plaintiffs, no current mention is made of Brenna S.; two are now in "waiver settings" (Claude Martin; Warren B.); Kathy R. is in an ICF/MR, and Nancy Martin is in a NF. (Pl. Oct. Memo, p. 11, n. 9.)