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

NANCY MARTIN,
et al.,

Plaintiffs,

Case No. C-89-362
Judge Edmund A. Sargus, Jr.
Magistrate Judge Norah McCann King

vs.

ROBERT TAFT,
et al.,

Defendants.

RESPONSE OF AMICUS OHIO PROVIDER RESOURCE ASSOCIATION TO JOINT MOTION FOR APPROVAL OF SETTLEMENT OF CLASS ACTION

A. Introduction

Amicus Ohio Provider Resource Association ("OPRA") anticipates filing written comments about the proposed Consent Decree in this case by August 31, 2004, in accordance with this Court's Order of July 20, 2004.[1] In the meantime, OPRA asks the Court to consider taking the following actions in connection with the fairness hearing scheduled for September 14, 2004:

1. Order Defendants Hayes and Ritchey to send Notice to each guardian of a class member for which Defendant Ritchey or Defendant Hayes has a record;

2. Extend the time for submission of objections by such guardians from August 31 to September 13; and

3. Schedule a status conference to determine if the hearing should continue beyond September 14, 2004, and to otherwise give guidance on the scope of the fairness hearing.

The remainder of this Memorandum sets forth OPRA's reasons for the above suggestions.

[1] The name of OPRA used to be Ohio Private Residential Association. OPRA has over 140 members serving approximately 16,000 developmentally disabled individuals. Approximately 57 OPRA members operate ICFMRs serving approximately 4,100 class members.

B. This Court Should Order That The Named Parties Send Notice To All Known Guardians Of Class Members, The Individuals Most Likely To Object To The Consent Decree

1. Notice of the proposed settlement should be sent to all the guardians of class members

When parties to a proposed consent decree in a class action ask for a court's approval of the consent decree, "members of plaintiff class … **must receive** the 'best notice practical under the circumstances, including **individual notice to all members who can be identified through reasonable effort.**'" Williams v. Vukovich, 720 F. 2d 909, 921 (6th Cir. 1983)(Emphasis added) In Thompson v. Midwest Foundation Independent Physicians Ass'n, 124 F.R.D. 154, 157 (S.D. Ohio, W.D. 1988), Judge Weber held that "[b]ecause the names and last known addresses of all class members were available from ChoiceCare's business records, the mailing [to those addresses] of the notice of the proposed settlement agreement and the fairness hearing scheduled for November 30, 1988 was the best notice practicable under the circumstances." See also, Brotherton v. Cleveland, M.D., 141 F.Supp.2d 894, 904 (S.D. Ohio, W.D., 2001)("Notice of the proposed settlement should be given to all those affected by it"); Reed v. Rhodes, 869 F.Supp. 1274, 1278 (N.D. Ohio, E.D., 1994)("Notice of the proposed settlement and the fairness hearing must be provided to class members"); and Bronson v. Bd. of Education of City School Dist. of City of Cincinnati, 604 F.Supp. 68, 72 (S.D. Ohio, W.D. 1984).

When the addresses are known, in other words, the named parties should send notice of the proposed consent decree to the last known addresses of the unnamed class members. See, In re Dunn & Bradstreet Credit Services Customer Litigation, 130 F.R.D. 366, 370 (S.D. Ohio, W.D., 1990)("this Court … ordered … the approved form of notice be sent by Defendants to each class member, at the class member's last known

business address appearing in Dun & Bradstreet Credit Services' computerized customer records"); White v. National Football League, 41 F.3d 402, 408 (8th Cir. 1994), *cert. denied* 515 U.S. 1137 (1995)("district court required direct mailing of notice to all class members' last known address approximately one month prior to the first settlement hearing, as well as publication of notice in a national newspaper."); and In re General Tire and Rubber Co. Securities Litigation, 726 F.2d 1075, 1079 (6th Cir. 1984), *cert. denied* 469 U.S. 858 (1984)(in considering a settlement of a shareholders' derivative action, "notice of a settlement hearing was sent to all 50,000 of General Tire's shareholders"). Although in this case the severity of the disabilities of class members who have guardians would mean that notice to the class members would be ineffective, notice to the guardians should be the necessary substitute.

"Objections raised by members of the plaintiff class should be carefully considered." Vukovich, 720 F.2d at 923. However, here the named plaintiffs and defendants asked that notice be sent **not to the class members or to the family members who are guardians of class members**, but to: (1) superintendents of all developmental centers; (2) administrators of all ICFMR's; (3) administrators of all nursing facilities; and (4) one guardianship agency, Advocacy and Protective Services, Inc. The Joint Motion also contemplated that "Ohio Legal Rights Service shall insure that the notice will be made available to any person who may be a class member or the member's guardian **requesting the notice**." (Emphasis added). This is a tautology, however -- the guardians cannot request the Notice if they in fact do not have notice. Vukovich is a nullity unless all the guardians receive notice.

2. Guardians of class members who are relatives of the class members are those persons most likely to object to the proposed settlement

The Notice of the Consent Decree provided so far in this case, moreover, has not notified, nor has it been calculated to notify, those class members most likely to object. The class members most likely to object to the Consent Decree are those class members who have guardians who are relatives of the class members. This is an additional reason why OPRA suggests that the Court order additional notice -- notice directed to the guardians of such class members.[2]

Notice to the guardians of the class members is essential, since a court "should insure that the interests of counsel and the named plaintiffs are not unjustifiably advanced at the expense of unnamed class members." Vukovich, 720 F.2d at 923. See also, Bailey v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990); and Levell v. Monsanto Research Corp., 191 F.R.D. 543, 550 (S.D.Ohio, W.D., 2000).[3] In this case, OPRA believes that counsel for the named plaintiffs does not adequately represent the class members whose guardians are family members and who believe that the proposed Consent Decree, if approved and implemented, will harm the health and safety of those class members. The way to determine this is to notify and hear from the guardians.

One of the issues at a fairness hearing is whether the counsel for the named plaintiffs and the named plaintiffs have been an adequate representative of the class in negotiating the proposed Consent Decree. See, King v. South Cent. Bell Tel. and Tel. Co., 790 F.2d 524, 530 (6th Cir. 1986)("adequacy of representation is a factual finding for the court before whom the class action is pending") In Molski v. Gleich, 318 F.3d 937, 956

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[2] OPRA recognizes that it has notice of the proposed Consent Decree, and that as an amicus, its rights in this litigation are different than named parties and class members. In re Telectronics Pacing Systems, Inc., 137 F.Supp.2d 985, 1022 (S.D.Ohio, W.D. 2001); and Tennessee Association of Health Maintenance Organizations, Inc. v. Grier, 262 F.3d 559, 566 (6th Cir. 2001). However, OPRA believes as an amicus it is appropriate to notify the Court of this notice issue.

[3] OPRA does not believe and is not suggesting that counsel for the named parties have any improper financial interest in the outcome of this case.

(9th Cir. 2003), the Ninth Circuit rejected a consent decree, concluding that the "terms of the consent decree were unfair, inadequate, and unreasonable for the absent class members and consequently demonstrate that the named plaintiff and class counsel failed to prosecute the action with due diligence and reasonable prudence as required under Rule 23(a)(4). The Ninth Circuit explained that "[a]dequate representation 'depends on …. **an absence of antagonism, a sharing of interests between representatives and absentees**, and the unlikelihood that the suit is collusive.'"[4] In Levell, 191 F.R.D. at 558, the District Court rejected a proposed consent decree, in part because it concluded that the "Agreement favors current Mound employees over former employees and retirees." Here, unless the Court directs that the named parties send notice to the family members who are guardians of the class members, many guardians will not have an opportunity to consider the Consent Decree, object to the Consent Decree and appear at the fairness hearing.

OPRA is in the process of notifying guardians of residents of the over 50 ICFMR's that are operated by entities who are members of OPRA, but there are large numbers of other facilities whose residents are class members but whose operators are not members of OPRA. These facilities include, but are not limited to, state developmental centers and nursing facilities, in which thousands of class members reside.

The best practical notice would include Defendant Hayes and Defendant Ritchey sending Notices to the legal guardians of each class member for which they have record. Defendant Ritchey should know the names and addresses of the legal guardians

[4] (Emphasis added), quoting Crawford v. Honig, 37 F.3d 485, 487 (9th Cir. 1995)(amended opinion), in turn quoting Brown v. Ticor Title Ins. Co., 982 F.2d 386, 390 (9th Cir. 1992), cert. dismissed as improvidently granted, 511 U.S. 117 (1994). The Court in Molski also said that adequate representation also depended on the qualifications of counsel for the named parties. OPRA is not questioning the qualifications of counsel for the named parties.

of each resident of a state developmental center. Defendant Hayes should know the name and address of each guardians of each class member who is receiving Medicaid benefits. It is only by sending such notice to these guardians of class members that the parties will comply with the requirement of the best practical notice.

C. Extending The Time for Submission Of Objections

The current deadline for filing Objections is August 31, approximately a month in the future. This Court earlier recognized that there were over 10,000 class members. See Martin v. Taft, 222 F.Supp. 2d 940, 947 (S.D. Ohio, E.D. 2002). As the Sixth Circuit said in Vukovich, "acquiescence in the decree must be voluntary and knowing" and "all parties should also be afforded a full and fair opportunity to consider the proposed decree and develop a response." The over 10,000 unnamed class members are parties, or have the same rights as parties, and their guardians are their spokespersons.[5] OPRA suggests that since notice has not yet been sent to these guardians, August 31 is not sufficient time for the guardians to consider their position on the Consent Decree.

Although extending the time to file objections until September 13 would not provide much additional time, if Notice is now sent promptly to the guardians, the guardians would have a month and a half to consider the Consent Decree. Moreover, extending the period of time for guardians to file objections to the proposed Consent Decree from August 31 to September 13 would not delay the fairness hearing and could only help class members, through their guardians, to consider the Consent Decree, their positions with respect to the Consent Decree, and, if they desire, to notify the Court of

[5] In Devlin v. Scardelletti, 536 U.S. 1 (2002), the Supreme Court held that unnamed class members who objected in a timely manner to the approval of a class action settlement at a fairness hearing had standing to appeal the approval without first intervening.

objections. There could be no harm to extending the time period for filling Objections, only benefit.[6]

D. Providing Guidance On The Scope Of The Fairness Hearing

The "reasonableness hearing is a forum for all interested parties to comment on the proposed decree." Vukovich, 720 F.2d at 921. There are several factors for a court to consider in deciding whether to approve a proposed consent decree:

> "(1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement;
> (2) the complexity, expense, and likely duration of the litigation;
> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the judgment of experienced trial counsel;
> (5) the nature of the negotiations;
> (6) the objections raised by the class members; and
> (7) the public interest."

See In re Southern Ohio Correctional Facility, 173 F.R.D. 205, 212 (S.D. Ohio, W.D. 1997), citing In re Dun, 130 F.R.D. at 371, in turn citing Vukovich, 720 F.2d at 922; Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 245 (S.D.Ohio, E.D. 1991); and Midwest Foundation Independent Physicians Association, 124 F.R.D. at 157. At a fairness hearing, a District Court in effect acts as a "as a guardian of the rights of absent class members."[7]

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[6] The Ohio Legal Rights Service and Defendants may argue that they would then not have time to prepare for testimony in response to any objections submitted on September 13. First, there is no reason to assume that all objections would be filed on September 13. Second, those parties have been litigating and negotiating this case for years and must know why they think the Consent Decree is a fair and reasonable settlement, regardless of any objections that may be filed. Third, this Court could always allow those named parties to file responses after the September 14 fairness hearing.

[7] In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Lit., 55 F.3d 768, 785 (3rd Cir. 1995), *cert. denied* 516 U.S. 824 (1995), quoting Grunin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975) *cert. denied* 423 U.S. 864 (1975). *See also*, Reynolds v. Beneficial Nat. Bank, 288 F.3d 277, 279-280 (7th Cir. 2002) referring to the judge in reviewing a settlement in a class action as a "fiduciary of the class."

At a fairness hearing, class members have a right, through their counsel, to present evidence and cross-examine witnesses. In Cohen v. Young, 127 F2d 721, 724 (6th Cir. 1942), involving approval of a settlement of a shareholders' derivative suit, the Sixth Circuit said, "[s]ince appellant is a party by virtue of the order to show cause, it follows that he had a right to be heard not only in argument, but in the presentation of evidence." The District Court in In re Warfarin Sodium Antitrust Litigation, 212 F.R.D. 231, 263-264 (D.Del. 2002) said "an objector … is entitled to an opportunity to develop a record in support of his contentions by means of cross-examination and argument to the court."[8] . Section 21.634 of the Manual for Complex Litigation (Fourth Ed. 2004) says that at a fairness hearing, the "parties may present witnesses, experts, and affidavits or declarations. Objectors and class members may also appear and testify. Time limits on the arguments of objectors are appropriate, as is refusal to hear the same objections more than once. An extended hearing may be necessary."[9]

In United States v. Tennessee, the parties presented the District Court with a proposed consent decree calling for the closure of an ICFMR.[10] In rejecting the consent decree, the District Court described the testimony it had considered at the fairness hearing. Among other things, the District Court said that the "guardians and family members of the class and an expert testified in opposition to the Court's approval of the proposed M.S.A. § because they asserted that the community cannot serve all class members upon the closure of ADC." Rejecting the Consent Decree, the District Court said it was "not satisfied that the State has demonstrated the ability to provide the

[8] Quoting Greenfield v. Villager Industries, Inc., 483 F.2d 824, 833 (3rd Cir. 1973).
[9] Citing In re Silicone Gel Breast Implant Prods. Liab. Litig., 1994 WL 578353 (N.D.Ala. 1994) and In re "Agent Orange" Prod. Liab. Lit., 597 F.Sup. 740, 746-747 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 226 (2ndCir. 1987).
[10] 256 F.Supp.2d 768, 773 (W.D. Tenn. 2003).

constitutionally mandated reasonable care and safety in the community to those class members that are the most medically and behaviorally fragile." Id. at 784.[11]

It would be helpful if this Court indicated the scope of testimony it contemplated at the fairness hearing, and the order in which the Court expects witnesses to appear.[12] Some guardians of class members who have been notified of the Consent Decree and who are or soon will be represented by counsel want to testify, and some want to call experts to testify about the harm implementation of the Consent Decree could have on their children who are class members. Some guardians may only want to attend the hearing if they will be allowed to testify.

OPRA anticipates filing its comments on the Consent Decree by August 31, and presumably guardians who in the near future will have retained counsel would be in a position to submit objections by August 31. If the Court scheduled a status conference after August 31 in which (1) counsel for the named parties and (2) counsel for various guardians and interested individuals and groups who have submitted objections or comments can attend and explain to the Court the testimony they would like to provide at the fairness hearing, such a conference may be of assistance to all persons in planning for the hearing and to the Court in determining the length of the hearing.[13]

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[11] Of course, that rejection did not mean there had to be a trial in Tennessee. In the last sentence of the opinion, the District Court said, the "parties are encouraged to develop and present a comprehensive and varied plan that adequately provides for the care and treatment of the medically and behaviorally fragile class." Id. at 785.

[12] Paragraph 13 of the Notice provides in part: "A hearing will be held on September 14, 2004, at 10:00 o'clock a.m. before the Honorable Judge Edmund J. Sargus, Jr. of the U.S. District Court of the Southern District of Ohio in Columbus, Ohio. The judge may ask that some people who wrote to him attend the hearing." OPRA recognizes that the named parties drafted the Notice and that the Court could not have been more specific at that time it issued the Notice.

[13] In tentatively approving a class action settlement in the In re "Product Orange" Liability Litigation, 597 F. Supp. at 746, the District Court noted that "[e]leven days of nationwide hearings were conducted to give the class members themselves an opportunity to be heard on the merits of the settlement." Id. at 746.

CONCLUSION

OPRA recognizes that the Court understands the importance of this litigation to class members and appreciates the Court's consideration of this Memorandum.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 29, 2004, I served this document electronically on the following counsel:

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