

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

ETHEL WILLIAMS, JAN WRIGHTSELL, DONELL HALL)
and EDWARD BRANDON, on behalf of themselves and all)
others similarly situated,)

Plaintiffs,)

v.)

No. 05 C 4673

Judge Hart

ROD BLAGOJEVICH, in his official capacity as)
Governor of the State of Illinois, CAROL L. ADAMS,)
in her official capacity as Secretary of the Illinois)
Department of Human Services, LORRIE STONE,)
in her official capacity as Director of the)
Division of Mental Health of the Illinois)
Department of Human Services, ERIC E. WHITAKER,)
in his official capacity as Director of the Illinois)
Department of Public Health, and BARRY S. MARAM, in his)
official capacity as Director of the Illinois Department)
of Healthcare and Family Services,)

Defendants.)

**PLAINTIFFS' REPLY MEMORANDUM IN FURTHER SUPPORT OF
MOTION FOR CERTIFICATION OF CLASS**

Defendants' opposition to class certification not only fails to address the well-defined prerequisites of Rule 23(a),¹ it also fails to address the core issue under Rule 23(b)(2): whether Defendants' conduct (*i.e.*, segregating persons with mental illness in institutions for mental diseases ("IMD"s)) is generally applicable to the proposed class (*i.e.*, persons segregated in those IMDs). *See* Fed. R. Civ. P. 23(b)(2). Instead, Defendants attempt to shoehorn improper, merits-

¹ Plaintiffs' opening brief argued that Rule 23(a)'s express prerequisites of numerosity, commonality, typicality and adequacy have been fulfilled. (*See* Pls.' Mem. Supp. Mot. Class Certif. at 2-12). Defendants do not respond to these arguments and any challenges to those arguments are therefore waived. *See, e.g., Commodity Futures Trading Comm'n v. Collins*, 997 F.2d 1230, 1233 (7th Cir. 1993) (holding argument not mentioned in brief waived).

based arguments into the Rule 23 analysis. Specifically, Defendants engage in extensive non-expert interpretation of the named Plaintiffs' psychiatric records and putative "analysis" of whether those individuals' psychiatric treatment has been adequate. This purported analysis is not relevant to a determination of whether there are systemic barriers to providing treatment in an integrated setting, and it is inappropriate in determining class certification under Rule 23.

The gravamen of Plaintiffs' First Amended Complaint and Motion for Certification of Class is Defendants' systemic failure to offer adequate services for all class members, defined as persons who (1) have a mental illness; (2) with appropriate supports and service, could live in the community; and (3) are institutionalized in privately owned IMDs. Plaintiffs challenge Defendants' failure (i) to identify IMD residents who could live in more integrated settings; (ii) to ensure that these residents are afforded an opportunity to live in more integrated settings; (iii) to ensure that sufficient community-based services are available to enable these residents to live in more integrating settings; and (iv) to move these residents into more integrated community settings. *See* Am. Compl. ¶¶ 27, 83, 90-91, 94-96. This is a paradigmatic case for certification pursuant to Rule 23(b)(2).

ARGUMENT

I. CLASS CERTIFICATION IS APPROPRIATE BECAUSE PLAINTIFFS MEET THE REQUIREMENTS OF RULE 23(A) AND 23(B)(2)

Defendants do not contest Plaintiffs' arguments that they meet each of the requirements of Rule 23(b)(2), but instead focus exclusively on the merits of Plaintiffs' claims. Defendants expressly acknowledge that "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Defs.' Mem. Supp. Resp. at 3, citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Indeed, the Seventh Circuit continues to

adhere to *Eisen*'s guiding principle that "nothing in either the language or history of Rule 23 gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130 U.A.*, 657 F.2d 890, 895 (7th Cir. 1981) (quoting *Eisen*, 417 U.S. at 177). Defendants, however, urge the Court to disregard this long-standing principle and to focus on Defendants' lay interpretations of the individual records of the named plaintiffs. Defendants' brief contains over ninety citations to records obtained from the IMDs in which the named Plaintiffs currently reside — all purporting to challenge Plaintiffs' ability to live in the community.²

To justify this merits-based approach, Defendants rely on *General Telephone Co. of Southwest v. Falcon* for the general proposition that "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." 457 U.S. 147, 160 (1982). Defendants also cite the Seventh Circuit's decision in *Szabo* for the proposition that a court may make "whatever factual and legal inquiries are necessary" in determining whether the requirements of Rule 23 have been met. Defs.' Mem. at 3, citing *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675-76 (7th Cir. 2001). However, *Falcon* and *Szabo* do not permit the type of merits-based inquiry Defendants ask this Court to undertake here. Rather, they permit only a very limited inquiry for the purpose of determining whether the requirements of Rule 23 are met. *See, e.g., Szabo*, 249 F.3d at 677 (a court must determine class certification before reaching the merits, though Rule 23 allows the court to look "beneath the surface of a complaint to conduct

² Defendants did not attach exhibits to their brief, thereby making it difficult to accurately identify the records Defendants attempt to analyze. Plaintiffs note that Defendants' brief apparently cites records that post-date the filing of the First Amended Complaint. Such records are inapposite to the allegations raised in the First Amended Complaint and should be disregarded by the Court. Plaintiffs have also discovered that several of the citations and most of the purported analyses are inaccurate.

the inquiries identified in” Rule 23); *Chapman v. Worldwide Asset Mgmt. L.L.C.*, No. 04 C 7625, 2005 WL 2171168, at *1 (Hart, J.) (N.D. Ill. Aug. 30, 2005) (“in determining whether to grant certification, whether a claim will ultimately be successful is not a consideration”).

Indeed, *Szabo* is consistent with *Eisen*’s guiding principle that Rule 23 does not authorize courts to conduct a preliminary assessment of the merits of Plaintiffs’ individual claims:

We do not believe that *Szabo* directs district courts to decide class certification questions based on a preliminary assessment of the ultimate merits of the plaintiffs’ claims: to base class certification on a prediction of who will win the case would be at odds with *Eisen*. In our view, the “preliminary inquiry into the merits” discussed in *Szabo* is a more limited one, that has at its focus not the substantive strength or weakness of the plaintiffs’ claims but rather the merits of those allegations that bear on the suitability of a case for class treatment under Rule 23(a) and (b). It is in this limited sense that the Court assesses the “merits” of plaintiffs’ allegations in considering the class certification motion.

Rahim v. Sheahan, No. 99 C 0395, 2001 WL 1263493, at *10 (N.D. Ill. Oct. 19, 2001); *see also* *Yon v. Positive Connections, Inc.*, No. 04 C 2680, 2005 WL 628016, at *1 (N.D. Ill. Feb. 2, 2005) (“*Szabo* does not permit a court to reach the merits of a matter in deciding class certification but, rather, only make the factual and legal inquiries necessary to determine whether a class should be certified”); *Belbis v. County of Cook*, No. 01 C 6119, 2002 WL 31600048, at *6 (N.D. Ill. Nov. 18, 2002) (“[C]ontrary to Defendant’s overly broad reading of *Szabo*, the court does not undertake a review of the merits as if it were determining a motion for summary judgment Accordingly, the Court does not determine the substantive strength or weakness of the allegations in the complaint but rather the merits of the allegations only as they bear on the suitability of a class action under Rule 23(a) and (b).”); *Hamilton v. O’Connor Chevrolet, Inc.*, No. 02 C 1897, 2006 WL 1697171, at *3 (N.D. Ill. June 12, 2006) (“A district court does not probe behind a plaintiff’s allegations or factual assertions to attempt to determine whether the

plaintiff or defendant ultimately will win on the merits Instead, a district court often probes behind a plaintiff's allegations or assertions because it is necessary to determine whether, if the class were certified, the issues presented could fairly and confidently be resolved with respect to all the absent class members based on the proof offered on behalf of the named plaintiff(s).” It is without question that the issues presented could be fairly and confidently resolved with respect to all class members in the present case since it is Defendants’ actions/inaction toward the entire class which gives rise to this action.

It also bears mention that *Szabo* was not decided in the context of Rule 23(b)(2), the class provision at issue in the instant case. Rather, the *Szabo* plaintiffs sought class certification under Rule 23(b)(3), wherein the court was required to find “that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Id.* at 676. The *Szabo* Court found that this requirement was not met because the class — a nationwide class asserting claims for breach of warranty, fraud and negligent misrepresentation — was “beset” by “[n]agging issues of choice of law, commonality, and manageability.” *Id.* at 677. Individual damages, in particular, had to be addressed in *Szabo*. By contrast, Plaintiffs bringing an action under Rule 23(b)(2) need not show that common questions of law or fact predominate, but merely that defendants acted on grounds generally applicable to the class. Additionally, the proposed class here is only requesting injunctive and declaratory relief.³ Choice of law and manageability are simply not concerns in

³ Thus, “unlike the concerns present in class action personal injury suits, the [class] here will not degenerate into individualized damage determinations.” *Elliott v. Chicago Hous. Auth.*, No. 98 C 6307, 2000 WL 263730, at *5 (N.D. Ill. Feb. 28, 2000); *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (“[B]ecause they do not ... involve an individualized inquiry for the determination of damage awards, injunctive actions ‘by their very nature often
(Continued...)”

the present case. When such “nagging issues” are absent, *Szabo*’s rationale for inquiring into the merits to determine class certification is not implicated. *See, e.g., Parker v. Risk Mgmt. Alternatives, Inc.*, 206 F.R.D. 211, 213 (N.D. Ill. 2002) (defendants’ reliance on *Szabo* to challenge plaintiffs’ allegations in the complaint was “misplaced” because “the court’s decision not to grant class certification in *Szabo* was based on choice of law and manageability issues, not lack of evidence in the original motion for class certification”). Thus, courts in the Northern District of Illinois have adopted a much more limited view of the types of “preliminary inquiry” a court may make in certifications involving Rule 23(b)(2). *See, e.g., Owner-Operator Indep. Drivers Assoc. v. Allied Van Lines, Inc.*, 231 F.R.D. 280, 286 (N.D. Ill. 2005) (finding that merits-based arguments had to be deferred until after certification was granted).

Here, the proposed class fits squarely within the ambit of subdivision (b)(2), which includes “actions in the civil rights field where a party is charged with discriminating unlawfully against a class.” Advisory Committee Notes, *Report of the Judicial Conference on the Proposed Rules of Civil Procedure for the United States District Courts*, 39 F.R.D. 98, 102 (1966). It is the defendants’ conduct that is at issue in Rule 23(b)(2) class certification, rather than minor differences in the Plaintiffs’ individual circumstances. *See, e.g., Allen v. Isaac*, 99 F.R.D. 45, 56 (N.D. Ill. 1983) (Hart, J.) (“Indeed, Rule 23(b)(2) was intended precisely to reach such cases, where application of a clearly defined policy is appropriate to final injunctive or declaratory relief, settling the legality of the behavior with respect to the entire class.”). As recently articulated, “[w]here a defendant’s standardized conduct is at issue, this court does not require that the putative class members all suffer the same injury, but rather the uniformity of the

present common questions satisfying Rule 23(a)(2).”) (quoting 7A Charles A. Wright et al., *Federal Practice and Procedure* § 1763, at 201 (1986)).

defendant's conduct toward the potential members and the plaintiffs' legal theory." *See Ligas v. Maram*, No. 05 C 4331, 2006 WL 644474, at *3 (N.D. Ill. Mar. 7, 2006), citing *Rosario v. Livaditas*, 963 F.2d 1013, 1018 (7th Cir. 1992). Plaintiffs have alleged a pattern or practice generally applicable to the class as a whole: Defendants' practices and policies effectively deny the Plaintiffs and class members the opportunity to move from IMDs to more integrated settings in the community. Pl. Mem. at 13. Notably, Defendants nowhere deny that their conduct, in respect to IMD residents, is generally applicable to the class as a whole. Class certification is thus appropriate under Rule 23(b)(2).

II. DEFENDANTS' MISCHARACTERIZATION OF PLAINTIFFS' MEDICAL RECORDS DEMONSTRATES THE INAPPROPRIATENESS OF DEFENDANTS' MERIT-BASED ARGUMENTS AT THE CLASS CERTIFICATION STAGE

Plaintiffs believe a merits-based discussion is inappropriate to class certification in the instant case, but feel compelled to address some of the more misleading and erroneous statements made by Defendants with respect to Plaintiffs' IMD records. This discussion aptly illustrates why the Court should not be reviewing such records at the class certification stage. Defendants, for instance, are conspicuously selective in the records they choose to putatively "analyze." These records are removed from their proper context, thereby distorting the meaning of the documents in regard to the Plaintiffs' ongoing psychiatric treatment and their "fit" for community-based integrated housing. Most importantly, Defendants rely primarily on pre-printed, formulaic assessment forms that do not address the question that Defendants purport to answer: whether Plaintiffs are being served in the most integrated setting appropriate to their needs. In fact, the records clearly support the Plaintiffs' claim that no system of evaluation of

community alternatives exists nor are choices given to Plaintiffs in their form and place of treatment.⁴

Defendants, for instance, incorrectly argue that Plaintiffs cannot live in the community based primarily on the fact that, for each named Plaintiff, the IMD physician signed a pre-printed form that states as follows:

I certify that I have reviewed & approved the care plan & level of care for this patient & he/she continues to need () Skilled () Respite () ICF/MR () Intermediate care in this facility.

See, e.g., MP 3909.⁵ Defendants' reliance on these forms is misplaced. Defendants claim these forms prove that Plaintiffs have been "evaluated for their readiness for community placement." Defs.' Mem. Supp. Resp. at 4. They are wrong. In fact, a finding that a facility resident requires the level of care that the facility provides is regularly used and typically required for any person served under Defendants' long-term care system, including people living in institutions and the community. It is not, and never has been, a determination that Plaintiffs or anyone else are inappropriate for the community. And it is not a determination that the facility is the only setting, or the most integrated setting, in which that level of care can be provided.

Indeed, the standard for the level of care provided by an IMD is a relatively low standard that would be met by many individuals living in community mental health programs. The individual must require: (a) professional observation for medication monitoring, adjustment or

⁴ For example, the records of Plaintiff A show that, despite a goal for Plaintiff A of "immediate discharge" to a less structured setting in less than 90 days, MP 4036, Plaintiff A has not been offered any opportunity to move to a less structured setting.

⁵ Indeed, most of these forms do not even contain check marks indicating which level of care the individual needs; the forms merely contain a signature below the set of unchecked boxes setting forth various levels of care.

stabilization and (b) daily supervision and assistance in at least two of the following areas: self-maintenance, social functioning, community living activities, and work-related skills.⁶ These services are routinely provided to individuals in integrated community programs in Illinois.⁷

The stock certifications upon which Defendants rely are in fact adapted from various state and federal mandates concerning utilization of institutional care. *See Wisconsin Dep't of Health & Soc. Servs. v. Bowen*, 797 F.2d 391 (7th Cir. 1985). They are likely contained in the records of every person in Illinois who is institutionalized. By analogy, Medicaid regulations require that a physician certify that each resident of an institution for people with developmental disabilities (an "intermediate care facility"), or a hospital for people with mental illnesses, needs the services provided in the institution. 42 C.F.R. §§ 456.360, 456.160.

However, just because someone is certified to "need" services that are provided in institutions does not mean the person cannot also safely and adequately receive those services in the community. Indeed, eligibility for many Medicaid-funded community services depends upon a finding that an individual "needs" an institutional level of care. Under Medicaid, states may provide certain "home or community-based services" only

to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a hospital or a nursing facility or intermediate care facility....

⁶ Illinois Dep't of Human Services, Mental Health Program Book, PAS/MH, available at http://www.state.il.us/omh/document/progbook/210_60.htm.

⁷ *See, e.g.*, www.thresholds.org/residential.asp (the integrated community program provides services such as medication monitoring, psychosocial rehabilitation, skill enhancing activities, crisis intervention, and individual and group counseling to people with mental illnesses in supervised apartment and other settings).

42 U.S.C. § 1396n(c)(1).⁸ Thus, the finding that a person “needs” an institutional level of care does not negate the appropriateness of community services; to the contrary, federal law *assumes* that many persons who need institutional care could also be served in the community.⁹

Other than the “level of need” determination that Defendants misinterpret, Defendants point to nothing else in the named Plaintiffs’ records that states they cannot, from a medical or rehabilitative perspective, be provided with mental health services in the community. Indeed, the named Plaintiffs’ records show that they are appropriate for and want community services, but have not been provided with them. For example, even though Plaintiff A’s records contain “level of need” certifications cited by Defendants to suggest that she cannot live in the community, Plaintiff A’s IMD records also indicate that discharge to a less structured setting is an “immediate goal.” MP 4036. While Plaintiff C was certified as requiring an intermediate level of care, Plaintiff C’s IMD records also indicate that his day program provider was contacted “to inquire about [Plaintiff C]’s chances to be assessed for a group home.” WC 244-45. Clearly, even the IMDs do not regard the “certification of need” as a professional determination on whether the named Plaintiff could live in the community. Simply put, Defendants’ inaccurate construction of Plaintiffs’ medical records further illustrates why a merits-based analysis of Plaintiffs’ claims is inappropriate at the class certification stage.

⁸ Plaintiffs do not allege that IMDs, which are barred from receiving federal Medicaid funds for persons aged 22-64, operate under these requirements. Plaintiffs raise these provisions simply to show that, both as a matter of law and as a matter of Defendants’ actual operation of long-term care services, the “level of need” determination does not address whether the setting in which individuals are being served is the most integrated setting appropriate to their needs.

⁹ Indeed, under Medicaid, States must provide anyone “determined to be likely to require the level of care provided in [an institution]” the “choice” of “feasible alternatives” available in the community under Medicaid. *Id.* § 1396n(c)(2)(C). If being “determined to be likely to require” an institutional level of care meant that a person could not safely and adequately be served in the community, Congress’s requirement that States provided such persons with the “choice” of community care would be at best superfluous and at worst irresponsible.

