

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

<b>A.F. McCAULLEY, ET AL.,</b>	)	
	)	
Plaintiffs,	)	Case No. 2:01CV00080
	)	
v.	)	<b>OPINION AND ORDER</b>
	)	
<b>PURDUE PHARMA, L.P., ET AL.,</b>	)	By: James P. Jones
	)	United States District Judge
Defendants.	)	

*Neil L. Henrichsen, Henrichsen Siegel, P.L.L.C., Washington, D.C., Emmitt F. Yeary, Yeary & Associates, P.C., Abingdon, Virginia, Stephen D. Annand, Cohen Millstein Hausfeld & Toll, P.L.L.C., Washington, D.C., for Plaintiffs; Wm. W. Eskridge and Wade W. Massie, Penn, Stuart & Eskridge, Abingdon, Virginia, for Defendants Purdue Pharma L.P., Purdue Pharma, Inc., and The Purdue Frederick Company; Steven R. Minor, Elliott Lawson & Pomrenke, Bristol, Virginia, for Defendants Abbott Laboratories and Abbott Laboratories, Inc.*

In this diversity action involving the manufacture and sale of the pain medication known as OxyContin, the plaintiffs have moved for leave to amend the complaint in order to delete any class action allegations. The defendants object to the voluntary dismissal of the class actions claims without prejudice.

The amendment of a complaint is governed by Federal Rule of Civil Procedure 15(a). However, where the proposed amendment involves the dismissal of claims, the court should also consider the standards evolved from Rule 41(a)(2), relating to

voluntary dismissal. *See Skinner v. First Am. Bank of Va.*, No. 93-2493, 1995 WL 507264, at \*2 (4th Cir. Aug. 28, 1995) (unpublished). “The purpose of Rule 41(a)(2) is freely to allow voluntary dismissals unless the parties will be unfairly prejudiced.” *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987).

The defendants claim that they will be prejudiced by the voluntary dismissal of the class allegations in this case. However, the case is at an early stage, no discovery has occurred, and no proceedings for class certification have taken place. The defendants have not identified any basis for legal prejudice to them from a voluntary dismissal of the class action claim. *See id.* at 1274-75 (holding that the possibility that a plaintiff will gain a tactical advantage over a defendant in future litigation is insufficient ground to deny Rule 41(a)(2) dismissal).

There is a more serious issue, not raised by the parties. The court must not dismiss class claims, even prior to class certification under Rule 23, without assuring itself that no putative class member will be prejudiced by the dismissal, or taking steps to minimize any such prejudice. *See Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1314-16 (4th Cir. 1978). If allowed, the voluntary dismissal here would not bar any future claims against the defendants by putative class members, so that is not a concern. However, the court must consider whether the putative class members here have a “reliance interest” in the present action that must be protected. *See id.* at 1314-15. The

dismissal of class allegations may cause the statute of limitations to resume as to putative class members. *See Culver v. City of Milwaukee*, No. 01-1555, 2002 WL 47201, at \*5 (7th Cir. Jan. 15, 2002). Unless they are notified that the class action is dismissed, they may fail to file their own suits to their prejudice. *See id.*

This “reliance interest” may be insubstantial in a particular case. *See McCoy v. Erie Ins. Co.*, 204 F.R.D. 80, 84 (S.D.W. Va. 2001) (“[I]t is likely few if any of the putative class members were made aware of this case.”); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 690 (N.D. Ga. 1997) (“Since there is no evidence that any unnamed class members have learned of this case, the court finds no danger of unnamed class members foregoing litigation opportunities if they do not receive notice of this dismissal.”). Here, however, there has been local and national publicity as to the filing of the class action. *See, e.g., Josh White, Va. Class-Action Suit Filed Against OxyContin Firm*, Wash. Post, Jun. 19, 2001, at A6. Under the circumstances, it is appropriate to hold a hearing to explore further the question of possible prejudice to putative class members.

Accordingly, it is **ORDERED** that the clerk is directed to schedule a prompt hearing on the plaintiffs’ motion for leave to file an amended complaint. At the same hearing, the court will consider entry of a scheduling order in the case.

ENTER: January 30, 2002

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United States District Judge