

UNPUBLISHED

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

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

Dawn C. Stewart, 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.

This opinion more fully explicates the reasons why I have allowed the plaintiffs to withdraw their class action allegations without my first determining class certification under Federal Rule of Civil Procedure 23.

In this diversity action, the plaintiffs claim that they have been injured as consumers by the prescription pain medication known as OxyContin. The defendants are various pharmaceutical companies who manufacture and sell OxyContin. The suit was originally filed in state court, and removed to this court. Before any proceedings

under Rule 23 for class certification were held, the plaintiffs moved for leave to amend the complaint to delete any class allegations. A hearing was held on this request on February 13, 2002, and by order entered February 14, 2002, I allowed the amendment, conditioned upon certain limited notice of the contemplated deletion of the class claims.

As I have earlier noted in this case, *see McCaulley v. Purdue Pharma, L.P.*, No. 2:01CV00080, 2002 WL 142326, at *1 (W.D. Va. Jan. 30, 2002), the dismissal of class claims, even prior to class certification under Rule 23, may be problematic if there has been reliance by putative class members on the pendency of the suit. The danger is that “[c]lass members with individually recoverable claims may have relied upon informal publicity about the existence of the class suit and abstained from filing individual or class claims, and class attorneys may have refrained from initiating additional class actions on behalf of small claimants.” *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1540 (1976).

The plaintiffs represent that they wish to dismiss their class claims since they have now decided that they do not wish to be class representatives. There is no question but that it is likely that final determination of the claims of the named plaintiffs will move more expeditiously without the added complexities of class representation. The parties do not at this point contemplate settlement of the individual claims, and thus

there is no issue that abandonment of the class is merely a tactic to enhance the plaintiffs' settlement advantage to the prejudice of the putative class members.

The defendants object to any dismissal without a prior determination by the court that class certification is unwarranted. Relying on *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1316 (4th Cir. 1978), the defendants contend that the widespread publicity surrounding this case has produced a reliance interest by putative class members that cannot be rectified except by a determination under Rule 23 that no class ought to be certified.

It is correct that the suit has attracted media attention, particularly in this region, but also nationally. It has been part of the broad public attention to the national problem of prescription drug abuse. The plaintiffs are agreeable to giving limited notice of the voluntary dismissal of the class allegations, which notice would consist of press releases, letters to persons who have directly contacted plaintiffs' counsel about the case, and a paid advertisement in a state-wide lawyers' newspaper. The defendants insist that such notice is insufficient, but more importantly for their purposes, argue that under *Shelton* once there is a showing of a reliance interest, the only alternative is for the court to determine whether class certification is proper, and if it is, order notice consistent with Rule 23. There are other cases in other courts making similar claims against the defendants, and the defendants agree that a

determination that class certification is unwarranted in this case would not be binding on the other litigants in different cases. Thus, a determination against class certification would give the defendants no advantage other than whatever precedential value such a decision might have.

I find that a determination under Rule 23 of class certification is unnecessary. Since all of the parties in the case now desire that no class be certified, I could not be assured that the normal adversary system would correctly inform the court of the factors to be considered under Rule 23. Additional proceedings under Rule 23, even if truncated by the lack of effective opposition, would waste judicial resources over an issue that has no practical significance.

Moreover, even accepting that *Shelton* requires a Rule 23 determination under certain circumstances before dismissal of any class claims, that opinion points out that reliance interest is often speculative. *See id.* at 1315. In spite of the wide publicity here, there has been no direct showing of any reliance by putative class members. Given the nature of the subject matter of the case—persons who have become addicted to pain pills—it is unlikely that there is a relevant audience of those ““who are sophisticated enough in the ways of the law to understand the significance of the class action allegation.”” *Id.* (quoting Malcolm Wheeler, *Predismissal Notice and Statutes*

of Limitations in Federal Class Actions After American Pipe and Construction Co. v. Utah, 48 S. Cal. L. Rev., 771, 804-05 (1975)).

Accordingly, I find that the limited notification proposed by the plaintiffs will be sufficient to remove any likelihood of reliance interest by putative class members, in spite of the publicity that this case has received. Since there is no evidence that the voluntary dismissal of the class claims is collusive, or otherwise prejudices any possible class members, I do not find it necessary to determine class certification under Rule 23.

DATED: March 14, 2002

United States District Judge