

Pick Your Prejudice: The Pace Factors' Effect on a Plaintiff's Potential Claim Dismissal

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When a plaintiff seeks to voluntarily dismiss her claim against a defendant, the initial reaction by the defendant may be to simply permit such a dismissal and let the parties go their respective ways. But a recent decision in the *Depakote* class action shows that plaintiffs and defendants alike may want to give serious consideration to the timing and manner of dismissals.

In re Depakote is a class action pending in the Southern District of Illinois, wherein nearly 600 plaintiffs have alleged that use of the neurological medication Depakote caused severe birth defects. In 2010, the plaintiffs began filing their state-court claims; thereafter, the cases were removed to federal court and the class was certified. The *Depakote* court established a bellwether trial process, ordered depositions of key witnesses, and identified cases for full discovery work-up in preparation for trial. After discovery proceeded for several years, the court began slotting cases for trial on 2018 dockets. Just months before the trials were set to begin, the plaintiffs sought to dismiss without prejudice five of the trial-set cases.

Although the court had granted other plaintiffs' dismissals without prejudice, it refused to do so here, noting that with respect to these five plaintiffs, granting dismissals without prejudice would result in severe prejudice to the defendants. Mem. and Order, *In re Depakote*, No. 12-CV-52-NJR-SCW (S. Dist. Ill. Oct. 10, 2017). The court gave the plaintiffs two options: dismiss the claims with prejudice or try their cases. Otherwise, remaining class members would get full advantage of the time and costs expended by the defendants and the court in facilitating the discovery process. *Id.* at pp. 7–8.

The court used the *Pace* factors as guidance in determining if the defendants would be prejudiced by the dismissals. The *Pace* factors are: (1) the effort and expense incurred by the defendant in preparation for trial; (2) the plaintiff's delay or lack of diligence in prosecuting her claim; (3) whether there is a sufficient explanation for dismissing the claim; and (4) whether the defendant has filed summary judgment motions. *Pace v. Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969).

The court found that three *Pace* factors were present. First, discovery was "well underway in each case" by virtue of the class-action efforts, and the defendants "expended an enormous amount of time and expense" in advancing the cases towards trial—including taking depositions, motion practice, and the like. *Id.* at p. 5. This time and expense alone established a "threshold showing necessary for dismissal with prejudice." *Id.* at p. 6. Further, the court found that the plaintiffs benefited from many class-action summary judgment rulings, and that even if there were a sufficient explanation for dismissing the claims, it would be outweighed by the benefit class members received in the work done to date. *Id.* at p. 6.

But the court also found that the plaintiffs' attempt to dismiss these claims was motivated—at least in part—by a desire to control the ordering of the trials, a role that the court would not cede. *Id.* at p. 7. The court noted that class-action management is a "monumental task that the Court

undertakes in selecting even one case to proceed to trial out of the hundreds that have been filed," and that permitting the plaintiffs to control which case would be tried and when would "set a precedent that other plaintiffs could use to manipulate the integrity of the [C]ourt's . . . process." *Id.* (internal quotations omitted). Because the *defendants* would suffer undue prejudice if dismissals were granted in the plaintiffs' favor *without prejudice*, and because the plaintiffs were attempting to usurp the function of the court's trial-selection process, the requests to dismiss without prejudice were denied.

Practice Points

Because a plaintiff's dismissal with prejudice will inure to the benefit of a defendant, both parties should take note of the *Depakote* court's application of the *Pace* factors and consider the following:

1. If a plaintiff seeks to dismiss her/his claims without prejudice, s/he should be diligent in the timing and manner of the dismissal.
 - Failing to dismiss prior to significant discovery being conducted and expenses incurred may give a court grounds to find that a dismissal *with prejudice* is warranted.
 - A plaintiff should be prepared to give sufficient justification as to why dismissal without prejudice is the appropriate avenue, and explain how the dismissal will not result in prejudice to the defendant.
2. The defendant in this situation should likewise be diligent.
 - If a plaintiff is seeking a dismissal without prejudice after time and money have been expended defending against the claim, the defendant may want to oppose the dismissal, and request that the court only grant the dismissal with prejudice.

As seen in *Depakote*, an analysis of if and where prejudice will lie in the face of a potential dismissal should be undertaken by both parties, and the *Pace* factors provide pivotal guidance in furthering that determination.

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