IADC COMMITTEE NEWSLETTER

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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In This Issue

Bob Redmond, Chair of the IADC's Toxic and Hazardous Substances Litigation Committee, explains how proposed revisions to FRCP 26(b)(1) support the use of Lone Pine Orders in complex tort cases pending in federal court.

Lone Pine Orders and Proposed Revisions to Rule 26(b)(1)

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Member participation is the focus and objective of the Toxic and Hazardous Substances Litigation Committee, whether through a monthly newsletter, committee Web page, e-mail inquiries and contacts regarding tactics, experts and the business of the committee, semi-annual committee meetings to discuss issues and business, Journal articles and other scholarship, our outreach program to welcome new members and members waiting to get involved, or networking and CLE presentations significant to the experienced trial lawyer defending toxic tort and related cases. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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The Judicial Conference of the United States has recently approved revisions to Rule 26. The most significant revision is to Rule 26(b)(1). The proposed revision advances the concept of proportionality in discovery by restating and reinvigorating previous language that had been buried in Rule 26(b)(2)(C)(iii). This paper examines whether the proposed revision to Rule 26(b)(1) engrafts a Lone Pine Order onto complex tort cases pending in federal court.

Given the historical purpose of Lone Pine Orders and the objectives of revised Rule 26(b)(1), defense counsel can make a good argument that complex tort cases in federal court should include the general provisions of a Lone Pine Order.

Background on Lone Pine Orders

Lone Pine orders are based on a 1986 opinion, *Lore v. Lone Pine Corporation*, 1986 WL 637507, 1986 Super. LEXIS 1626 (Law Div. Nov. 18, 1986). *Lone Pine* was an environmental exposure case arising from the Lone Pine Landfill in New Jersey. Dozens of plaintiffs brought suit against 464 defendants. The plaintiffs alleged personal injury and property damage claims. The New Jersey trial judge, Judge Wichmann, was concerned that the plaintiffs' claims were too vague and would unnecessarily subject the defendants to burdensome and costly discovery unless the claims were whittled down before discovery commenced.

Judge Wichmann crafted a case management order that required each plaintiff to provide certain basic information before discovery commenced. Judge Wichmann required the plaintiffs to produce:

- A description of each individual plaintiff's exposure to each toxic substance;
- Medical reports substantiating causation for these injuries;
- A description of each plaintiff's diminution of property value claim;
- The addresses for each parcel of affected property;
- Reports from real estate experts supporting the diminution of valued claims.

Judge Wichmann believed that the plaintiffs' counsel should have obtained this information before filing suit. He gave the plaintiffs' counsel four months to provide the required information. He extended the deadline for another two months.

At the end of the deadline, the plaintiffs' counsel were unable to provide a single medical report from any plaintiff's treating doctor. Judge Wichmann wrote:

> Plaintiffs' attorneys stated that the doctors and treating physicians contacted by him were unwilling to commit to a causal connection. If they are unwilling who, then, can provide the information.

The plaintiffs' counsel were also unable to provide any addresses for allegedly contaminated real property. The plaintiffs' counsel could only provide a 2½ page report

from a single real estate expert to support the diminution in value claims. The "report" was not even from a real estate expert but rather a broker.

Judge Wichmann dismissed the plaintiffs' claims; providing the following rationale:

> A trial judge assigned to handle a matter dealing with over 400 defendants and 120 attorneys should direct that at least a modicum of information dealing with damages and causal relationship should be established at the outset of the suit. In this court's opinion, it is time that prior to institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate to a reasonable degree the allegations of personal injury, property damage and proximate cause.

Judge Wichmann's ruling became known as the Lone Pine Order. It has become a shorthand description of a pre-trial order requiring plaintiffs to provide basic factual information that supports claims of injury and causation before allowing plaintiffs to conduct discovery. The rationale behind the Lone Pine Order has been accepted and adopted by the Fifth Circuit in *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2008):

> Lone Pine Orders are designed to handle the complex issues and potential burdens on defendants in the court in mass tort litigation.

The Ninth Circuit adopted the rationale of the Lone Pine Order in *Avila v. Willits Environmental Remediation Trust,* 633 F.3d 828 (9th Circuit 2011):

> We agree with *Acuna's* explanation that district judges have broad discretion to manage discovery and to control the course of litigation under Federal Rule of Civil Procedures 16.

The D.C. Circuit affirmed the trial judge's dismissal of the plaintiff's claims after adopting a Lone Pine Order:

> Such an Order is sometimes called a "Lone Pine Order" in reference to Lore v. Lone Pine. It generally requires plaintiffs in a toxic tort case to produce affidavits setting forth some basic information regarding their alleged exposure and injury.

Arias v. DynCorp., 752 F.3d . 1011, 1014 (D. C. Cir. 2014).

Lone Pine Orders have been frequently applied in asbestos and other toxic tort litigation in the Third Circuit. *See In re: Asbestos Products Liability Litigation (VI)*, 718 F.3d 236, n.2. (3d Cir. 2013); *McMunn v. Babcock & Wilcox Power Generation Group*, Inc., 896 F.Supp.2d 347 (W.D. Pa. 2012)(dismissing claims in counts based on plaintiff's failure to comply with "Lone Pine" Order).

Other circuits have been hostile to Lone Pine Orders – viewing them as an unfair restriction on a plaintiff's ability to pursue a case. *See Hagy v. Equitable Products Company* 2012 U.S. Dist. LEXIS 28439, 10

(S.D.W.VA 2012), and *In re: Digitek,* 264 F.R.D. 249, 259 (S.D.W.VA 2010). There are many other courts that have adopted or rejected the Lone Pine Order concept. As a general proposition, courts are familiar with Lone Pine Orders and accept or reject those orders based on the trial judges' predilection.

With the adoption of new Federal Rule of Civil Procedure 26(b)(1), however, defendants have new arguments favoring the adoption of a Lone Pine Order.

The New Arguments Favoring Lone Pine Orders Are Based On The Revision To Federal Rule Of Civil Procedure 26(b)(1)

The current rule states as follows:

> *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter**. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. **All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).** (Emphasis added.)

The limitations on discovery contained in Rule 26(b)(2)(C) are as follows:

> *When Required.* On motion **or on its own**, the court **must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:**
>
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) **the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.** (Emphasis added.)

Proposed Rule 26(b)(1) incorporates the language from 26(b)(2)(c) directly into the scope of discovery rule:

> *Scope in General*. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant

to any party's claim or defense **and proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.** Information within this scope of discovery need not be admissible in evidence to be discoverable.

Thus, as the rule itself shows, the concept of proportionality is interwoven into the very heart of discovery.

Additionally, the new Rule requires that the court consider the balancing factors previously listed in Rule 26(b)(2)(c) at the outset of the case. These balancing factors include:

- The needs of the case;
- The amount in the controversy;
- The importance of the proposed discovery to the issues at stake in the action;
- The importance of the discovery in resolving the issues;
- Whether the burden and expense of the proposed discovery outweighs its likely benefit.

How Does Proposed Rule 26(b)(1) Require a Lone Pine Order?

As the discussion of *Lore v. Lone Pine,* above, shows, Lone Pine Orders were intended to allow Courts to weed out weak and factually unsupported cases before defendants were forced to undergo the burdens of discovery. The decision to adopt a Lone Pine Order or not adopt a Lone Pine Order often depended on the circumstances of the individual case. One New York Court described the analysis as follows:

> In evaluating requests for Lone Pine or modified case management orders, courts have found that a number of factors may be relevant, including (1) **the posture of the litigation**, (2) **the case management needs presented**, (3) external agency decisions that may bear on the case, (4) **the availability of other procedures that have been specifically provided for by rule or statute,** and (5) **the type of injury alleged and its cause**.

In re Fosamax Prods. Liab. Litig., 2012 U.S. Dist. LEXIS 166734, 5-6 (S.D.N.Y. Nov. 20, 2012), citing *Digitek,* 264 F.R.D. at 256 (S.D. W.Va. 2010)(emphasis added).

The factors that support a Lone Pine Order should, necessarily, apply when a court undertakes the mandatory "consideration" of discovery issues required by new Rule 26(b)(1). These include:

- Identifying " importance of issues at stake in the action";
- Identifying "the importance of categories of discovery to resolving the issues";

- Identifying "the parties' resources"; and
- Determining "whether the burdens or expense of the proposed discovery outweighs its likely benefit."

A Lone Pine Order would meet all of these factors because it would require a *prima facie* showing from plaintiffs, at the outset of discovery, thereby insuring that a defendant is not burdened by weak or implausible claims. Additionally, a Lone Pine Order allows the Court to determine, early on, the important issues in resolving the case and the parties' resources. Finally, a Lone Pine Order allows a Court to meet its mandatory obligation to insure that discovery is proportional to the needs of the case.

Many Courts have identified the benefits of Lone Pine Orders in language that tends to mirror the new language in Rule 26(b)(1):

> Typically, Lone Pine orders require plaintiffs to provide an affidavit by a specific date that states the following: 1) the identity and amount of each chemical to which the plaintiff was exposed; 2) the precise disease or illness from which the plaintiff suffers; and 3) the evidence supporting the theory that exposure to the defendant's chemicals caused the injury in question.
>
> … A Court ordering this sort of information to be produced early in the discovery process provides a tremendous advantage to defendants wishing to dispose frivolous claims quickly.

McManaway v. KBR, Inc., 265 F.R.D. 384, 385 (S.D. Ind. 2009).

In making the case for a Lone Pine Order, it would be useful to show the court that the Lone Pine Order satisfies the court's new mandatory factors under Rule 26(b)(1). These factors are cited in *Fosamax* above. Additionally, it would be helpful to cite the court to other courts that have adopted Lone Pine Orders. There are tremendous numbers of such cases. See In re Avandia Mktg., Sales Practices and Prods. Liab. Litig., MDL No. 1871, 2010 U.S. Dist. LEXIS 126450 (E.D. Pa. Nov. 15, 2010); In re Zyprexa Prods. Liab. Litig., MDL No. 1596 (E.D.N.Y. June 2, 2010); In re Bextra and Celebrex Mktg. Sales Practices and Prod. Liab. Litig., MDL No. 1699 (N.D. Cal. Aug. 1, 2008); In re Vioxx Prods. Liab. Litig., MDL No. 1657 (E.D. La. Nov. 9, 2007, July 6, 2009); In re Rezulin Prods. Liab. Litig., MDL No. 1348, 2005 U.S. Dist. LEXIS 46919 (S.D.N.Y. May 9, 2005); In re Baycol Prods. Liab. Litig., MDL No. 1431 (D. Minn. Mar. 18, 2004).

Conclusion

The proposed Rule 26(b)(1) requires courts to apply factors that were formerly buried in Rule 26(b)(2)(c). More importantly, the new Rule requires courts to insure that discovery is proportional to the needs of the case. These principles were applied by a New Jersey trial judge, Judge Wichmann, almost thirty years ago in *Lore v. Lone Pine*. There is a body of law that discusses the benefits of

Lone Pine Orders, particularly in toxic tort/mass tort cases.

Defense counsel can use the revisions to Rule 26(b)(1) and the years of judicial experience with Lone Pine Orders to urge reluctant courts to adopt a case management order that requires plaintiffs to produce basic information before discovery starts. Years of experience shows that such Lone Pine Orders will weed out weak and factually unsupported claims – leaving only those claims that merit the burden and expense of modern discovery.

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