

TOXIC AND HAZARDOUS SUBSTANCES LITIGATION

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IN THIS ISSUE

Niall A. Paul and Timothy D. Houston discuss the use of Lone Pine case management orders in mass tort litigation.

Checking Meritless Mass Tort Claims at the Door – Lone Pine Case Management Orders Reinforce the Obligation of Plaintiffs' Counsel to Have a Case Before Filing Suit

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In an unpublished 1986 opinion from the Superior Court of New Jersey, the Honorable Judge Wichmann stood firm against a surge of what were, by most accounts, frivolous mass tort cases intended to generate quick, albeit substantial, settlements. In a single case, Judge Wichmann dismissed claims against 464 defendants when plaintiffs failed to comply with a case management order and provide sufficient evidence, after nearly two years of litigation, to establish a prima facie case. In what amounted to a call-to-arms against an influx of frivolous mass tort cases, Judge Wichmann declared “it is time that prior to the 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.”¹

Premised on the bedrock principle that the burden in the adversarial system rests squarely on plaintiffs to prove the validity of their claims, rather than defendants to prove that a plaintiff has no case or to otherwise appease a plaintiff through a monetary settlement,² Lone Pine orders trace their origin to Judge Wichmann’s declaration in Lore v. Lone Pine Corporation.³ Quite succinctly, “a Lone Pine order is a pre-discovery order[] designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce

evidence to support a credible claim,” specifically on the issues of (i) exposure, (ii) causation, and (iii) damages.⁴ Since its inception, the Lone Pine order has evolved into a practical and beneficial strategic procedural device utilized by defendants in mass tort litigation to “require plaintiffs . . . to substantiate their claims early in the litigation”⁵ with basic evidence to support a prima facie case that plaintiffs should have had even before filing suit.⁶ A plaintiff’s failure to comply with a Lone Pine order can and has proved fatal to the continued vitality of many a claim.

The bottom-line practicality inherent in Lone Pine orders, however, cannot be understated. A Lone Pine order can facilitate the isolation and elimination of frivolous claims before a defendant is forced to undergo the financial rigors of protracted discovery and invest hundreds of thousands of dollars and irrecoverable time only to face the stark reality that plaintiffs are devoid of credible evidence – be it scientific, medical or both – to establish exposure, injury or causation.⁷

¹ Lore v. Lone Pine Corporation, 1986 WL 637507, *4 (N.J. Super. Ct. Law Div. 1986).

² Judge Wichmann noted that “[t]his Court is not willing to continue the instant action with the hope that the defendants eventually will capitulate and give a sum of money to satisfy plaintiffs and their attorney without having been put to the test of proving their cause of action.” Lone Pine, 1986 WL 637507, at *4.

³ 1986 WL 637507, *4 (N.J. Super. Ct. Law Div. 1986).

⁴ Steering Committee v. Exxon Mobil Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006); see also Ramos v. Playtex Products, Inc., 2008 WL 4066250, *6 (N.D.Ill. 2008).

⁵ Beth L. Kaufman & David Black, Lone Pine Orders Increase Judicial Efficiency, 27 No. 1 LJN Prod. Liab. L. & Strategy 1 (2008).

⁶ See Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000); see also James P. Muehlberger & Boyd S. Hoekel, An Overview of Lone Pine Orders in Toxic Tort Litigation, 71 Def. Couns. J. 366 (2004).

⁷ Ramos, 2008 WL 4066250, at *7; Kinnick v. Schierl, Inc., 541 N.W.2d 803, 806 n.1 (Wis. Ct. App. 1995) (providing that “Lone Pine orders are useful to achieve efficiency and economy in toxic tort cases”). In Lone Pine, the court stated that “[w]ith the hundreds of thousands of dollars expended to date in this case, it appears that plaintiffs’ counsel is moving things along without complying with discovery orders, hoping that some of the defendants, to avoid further delay and expense, would recommend a settlement of the case.

In Lone Pine, the plaintiffs filed a toxic tort action against 464 defendants, alleging personal injury and property damage caused by contaminated groundwater from defendants' use and operation of a landfill.⁸ The trial court entered a case management order requiring plaintiffs to proffer evidence of "the basic facts [they] must present in order to support their claims of [personal] injury and property damage."⁹ The case management order required plaintiffs to produce documentation concerning:

- (a) Facts of each individual plaintiff's **exposure to alleged toxic substances at or from Lone Pine Landfill**;
- (b) Reports of treating physicians and medical or other experts, **supporting each individual plaintiff's claim of injury and causation by substances from Lone Pine Landfill**;
* * *
- (c) Each individual plaintiff's address, including tax block and lot number, for the property alleged to have declined in value;
- (d) Reports of real estate or other experts supporting each individual plaintiff's claim of diminution of property value, including the timing and degree of

such diminution and the causation of same.¹⁰

Following a series of extensions for plaintiffs to produce the requested information, matters came to a head when plaintiffs' proffer on the issue of property damages failed to establish causation or contamination of plaintiffs' properties. Similarly, the plaintiffs' proffer on personal injuries – no medical records, no expert or medical reports, only a list enumerating medical conditions that the plaintiffs *might* have – was "so inadequate as to be deemed unbelievable and unreal."¹¹ The court noted that "in such a case as this, preliminary reports should have been obtained prior to filing suit."¹² The plaintiffs' failure to adhere to the requirements of the order by presenting evidence to substantiate a prima facie case on exposure, causation and injury resulted in dismissal with prejudice, a result that would reoccur in future cases where Lone Pine orders were similarly employed and ignored.

At its most very basic nature, a Lone Pine order is "designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation" by requiring plaintiffs to present prima facie evidence of their claims.¹³ By requiring "early individual causation expert evidence, [Lone Pine orders] protect defendants and the Court from the burdens associated with

However, **there is nothing to be settled because there is [a] total and complete lack of information as to causal relationship and damages.**" Lone Pine, 1986 WL 637507, at *4 (emphasis added).

⁸ Lone Pine, 1986 WL 637507, at *1.

⁹ Id. at *2.

¹⁰ Id. at *1-2 (emphasis added).

¹¹ Id. at *3.

¹² Id. (emphasis added).

¹³ Acuna, 200 F.3d at 340. See Able Supply Company v. Moye, 898 S.W.2d 766, 771 (Tex. 1995) (recognizing that in a case involving more than 3,000 plaintiffs and 300 defendants, requiring plaintiffs to present evidence "linking each plaintiffs' injuries with a particular [defendant] will simplify the case, streamline costs to both plaintiffs and defendants, conserve judicial resources, and aid the trial court in preparing a plan for the trial of these cases").

potentially non-meritorious mass tort claims.”¹⁴ Lone Pine orders are traditionally granted pursuant to a court’s inherent power to manage its docket or based on a rule of civil procedure.¹⁵ While nuanced aspects of Lone Pine orders – such as time for compliance – unquestionably vary, the information that is generally sought – relating primarily to specific causation and injury – has been consistent.¹⁶ Typically, a Lone Pine order will require plaintiffs to provide a report or affidavit, often from a medical professional or an expert, detailing “(1) the identity and amount of each chemical [or product] 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 [or product] caused the injury”¹⁷

¹⁴ Abbatiello v. Monstanto Co., 569 F. Supp. 2d 351, 354 (S.D.N.Y. 2008).

¹⁵ In Ramos v. Playtex Products, Inc., 2008 WL 4066250, *6 (N.D.Ill. 2008), the district court recognized that Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure affords the district court broad discretion to “adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.” Similarly, a number of authorities have recognized a court’s inherent authority to manage the court’s docket. See Acuna, 200 F.3d at 340; In re Love Canal Actions, 547 N.Y.S.2d 174 (1989); See also James P. Muehlberger & Boyd S. Hoekel, An Overview of Lone Pine Orders in Toxic Tort Litigation, 71 Def. Couns. J. 366, 368-370 (2004).

¹⁶ See Kinnick, 541 N.W.2d at 806 n.1 (stating that “[a] Lone Pine CMO forces plaintiffs to substantiate exposure, injury and causation.”).

¹⁷ James P. Muehlberger & Boyd S. Hoekel, An Overview of Lone Pine Orders in Toxic Tort Litigation, 71 Def. Couns. J. 366 (2004) (citing John T. Burnett, Lone Pine Orders: A Wolf in Sheep’s Clothing for Environmental & Toxic Tort Litigation, 14 Land Use & Env’tl. L. 53, 54 (1998)); see Ramos, 2008 WL 4066250, at *7 (recognizing that “case management orders generally require plaintiffs to submit affidavits from qualified experts, such as

As mentioned earlier, one of the inescapable benefits associated with obtaining a Lone Pine order is cost management – specifically, keeping the ever increasing cost to defend a mass tort action on budget by potentially obviating the necessity of protracted discovery. By requiring plaintiffs to substantiate their cause of action *before* “embarking on a costly lawsuit with numerous defendants and attorneys,”¹⁸ Lone Pine orders foster judicial economy, substantially reduce the costs incident to defending a mass tort action, and, incidentally, reduce litigation expenses incurred by plaintiffs’ counsel in prosecuting mass tort actions.¹⁹

To the extent multiple plaintiffs and defendants are involved – more often the case than not in the mass tort context – “discovery is difficult to control, and a case management order . . . can regulate the process.”²⁰ In Acuna v. Brown & Root Inc.,²¹ a case involving more than 1,600 plaintiffs “suing over one hundred defendants for a range of injuries occurring over a span of up to forty years,” the United States Court of Appeals for the Fifth Circuit approved a Lone Pine order on the issues of causation and injury in order

physicians or scientists, supporting plaintiffs’ claims of exposure . . . and consequent harm”); See also In re Vioxx Products Liability Litigation, 557 F. Supp. 2d 741, 743 (E.D.La. 2008) (recognizing that Lone Pine orders require a plaintiff to “provide some basic facts in the form of expert reports or run the risk of having their case dismissed”).

¹⁸ Morgan v. Ford Motor Co., 2007 WL 1456154, *7 (D.N.J. May 17, 2007).

¹⁹ See In re Vioxx, 557 F. Supp. 2d at 745 (stating that “Lone Pine orders often benefit the Plaintiffs as well as the Defendants. Based on the Court’s experience in the six Vioxx trials, these cases are difficult and costly. It seems reasonable that, before both sides start incurring the costs involved with taking a Vioxx case to trial, the Plaintiffs show that there is a basis for the Plaintiffs’ claims.”); see also Able, 898 S.W.2d at 771.

²⁰ Kinnick, 541 N.W.2d at 806 n.1.

²¹ 200 F.3d 335 (5th Cir. 2000).

to “manage the complex and potentially very burdensome discovery that the cases would require.”²² Through use of a Lone Pine order, parties are able to “avoid duplication of effort by allowing common issues and claims to be identified and addressed en masse,”²³ a feat that can reign in the scope and breadth of issues in conflict and thereby narrow the focus of the court and parties for purposes of future discovery and trial.

The benefits associated with obtaining a Lone Pine order – cost savings, control over discovery, and clarification of the issues in dispute – make entry of such an order an appealing prospect. However, perhaps the most attractive aspect of a Lone Pine order for defendants is the very real potential for a very abrupt end to the litigation should plaintiffs fail to present prima facie evidence of causation or injury. Dating back to the initial dismissal with prejudice in Lone Pine, a number of courts have been steadfast in their position that “before these suits were filed, and at least after the many years since filing them, one would expect that the plaintiffs would have some concrete, factual basis to support their claims.”²⁴ To that end, courts have not been receptive to plaintiffs’ inability to comply with an order that requires production of information regarding causation and injury, “which plaintiffs should have had before filing their claims” pursuant to Rule 11.²⁵ On more than one occasion, a plaintiff’s failure to comply with the requirements of a Lone Pine order has been met with the dismissal of a plaintiff’s claim.²⁶

²² Acuna, 200 F.3d at 340.

²³ Kinnick, 541 N.W.2d at 806 n.1.

²⁴ In re 1994 Exxon Chemical Plant Fire Litigation, 2005 WL 6252313, *2 (M.D.La. 2005).

²⁵ Acuna, 200 F.3d at 340 (emphasis added).

²⁶ See Acuna v. Brown & Root Inc., 200 F.3d 335 (5th Cir. 2000); See also Baker v. Chevron USA, Inc., 2007 WL 315346 (S.D. Ohio 2007); Bell v. ExxonMobil Corporation, 2005 WL 497295 (Tex. App. 2005);

In In re Vioxx Products Liability Litigation, the District Court for the Eastern District of Louisiana offered guidance on the scope and breadth of evidence required to satisfy a Lone Pine order:

the Court is not requiring that [p]laintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial. Rather, the Court is requiring [p]laintiffs to make a minimal showing consistent with Rule 26 that there is some kind of scientific basis [that the defendant’s chemical or product] could cause the alleged injury.²⁷

However, courts have cautioned on the need to balance concerns of efficiency and equity in granting a Lone Pine order, recognizing that “Lone Pine orders may not be appropriate in every case, and even when appropriate, they may not be suitable at every stage of the litigation.”²⁸ Despite these words of caution, objections to the entry of Lone Pine orders on the grounds that such orders greatly restrict and potentially eliminate the formal discovery process,²⁹ or that entry of a Lone Pine order is

Martinez v. City of San Antonio, 40 S.W.3d 587 (Tex. App. 2001).

²⁷ In re Vioxx, 557 F. Supp. 2d at 744.

²⁸ Id. The Vioxx Court noted that “in the present [case a] Lone Pine order may not have been appropriate at an earlier stage before any discovery had taken place since little was known about the structure, nature and effect of Vioxx by anyone other than perhaps the manufacturer of the drug.” Id.

²⁹ See Martinez v. City of San Antonio, 40 S.W.3d 587, 591 (Tex. App. 2001).

premature pending class certification,³⁰ have proved unsuccessful.

Lone Pine orders vary by jurisdiction, however, a sampling of decisions adequately demonstrates the various considerations at play in the issuance and application of such orders. Burns v. Universal Crop Protection Alliance³¹ is a prime example of the use of a Lone Pine order to isolate the issue of specific causation. In Burns, eighty-two cotton farmers filed suit against five herbicide manufacturers alleging property damage caused by herbicides manufactured by the defendants that drifted from their point of aerial dispersion and onto plaintiffs' crops.³² Arguing that a number of variables contributed to a causation analysis which, in turn, could require substantial discovery as well as third party discovery, the defendants moved for entry of a Lone Pine order to require plaintiffs to "present evidence showing which, if any, of the [d]efendants' products came into contact with each [p]laintiff's . . . cotton crop."³³

Plaintiffs attempted to defeat defendants' motion by introducing evidence relevant to general causation – that herbicides containing a similar chemical to that contained in the herbicides manufactured by the defendants damaged plaintiffs' crops. However, the Burns Court recognized that plaintiffs' proffer failed to shed light on the issue of specific causation – "[whether] a specific product manufactured by a specific

defendant caused injury to a particular plaintiff's cotton crop."³⁴ In granting defendants' motion and entering a Lone Pine order, the district court found that "a preliminary showing on causation is necessary for efficient case management."³⁵

In Martinez v. City of San Antonio,³⁶ roughly six hundred plaintiffs filed suit alleging injuries from exposure to lead contaminated soil released during the excavation of a foundry incident to the construction of the Alamodome.³⁷ After entering a Lone Pine order "selecting fifty plaintiffs for full discovery, including expert reports," to be produced within ninety days, the trial court granted defendants' no-evidence motions for summary judgment when plaintiffs failed to advance evidence of causation.³⁸ Plaintiffs' contended that entry of a Lone Pine order and dismissal before the close of discovery prevented plaintiffs from conducting the discovery necessary to overcome summary judgment.³⁹ The Court of Appeals of Texas disagreed, concluding that plaintiffs had "adequate time to conduct discovery during the five years the case was pending" and were "presumed to have duly investigated their case before filing suit," including causation.⁴⁰

Most recently, in In re Vioxx Products Liability Litigation,⁴¹ the district court entered a Lone Pine order in a case that was

³⁰ See In re 1994 Exxon Chemical Plant Fire Litigation, 2005 WL 6252312,*2 (M.D.La. 2005) (rejecting plaintiffs' claim that entry of a Lone Pine order was premature pending class certification, stating that "[w]hether a class is certified or not, the plaintiffs will still be required to produce evidence to support their claims").

³¹ 2007 WL 2811533 (E.D.Ark. 2007).

³² Burns, 2007 WL 2811533, at *1.

³³ Id. at *2.

³⁴ Id. at *3.

³⁵ Id.

³⁶ 40 S.W.3d 587 (Tex. App. 2001).

³⁷ Martinez, 40 S.W.3d at 589.

³⁸ Id. at 590, 591 n.1.

³⁹ Id. at 591.

⁴⁰ Id. at 591-92. Additionally, the Court of Appeals reasoned that the evidence discoverable through the Lone Pine order was evidence plaintiffs could have used to overcome no-evidence summary judgment.

⁴¹ 557 F. Supp. 2d 741 (E.D.La. 2008).

“no longer in its embryonic stage.”⁴² In entering a Lone Pine order, the Vioxx Court recognized that: the case had been ongoing in state court for over seven years and in federal court for more than three, the defendant had produced over 22 million pages of documents, hundreds of depositions had been conducted, and the court had ruled on roughly one thousand pre-trial motions and reviewed in excess of “500,000 pages of documents claimed to be subject to the attorney-client privilege.”⁴³ The Vioxx Court concluded that “at this advanced stage of the litigation, it is not too much to ask a [p]laintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury [I]f [p]laintiffs’ counsel believes that such claims have merit, they must have some basis for that belief [and] it is reasonable to require Plaintiffs to come forward and show the basis for their beliefs and [some] basic evidence of specific causation.”⁴⁴

That is not to say that Lone Pine orders are granted in all circumstances. In Ramos v. Playtex Products, Inc.,⁴⁵ the District Court for the Northern District of Illinois denied a defendant’s motion for a Lone Pine order. The motion sought implementation of a Lone Pine order to require plaintiffs to produce evidence of “actual exposure to lead (i.e., human contact with lead in [defendant’s] product) . . . [and] the nature and extent of such exposure to lead.”⁴⁶ Plaintiffs contended that entry of a Lone Pine order was inappropriate because (i) plaintiffs’ complaint sounded in consumer fraud rather than toxic tort, and (ii) rather than alleging actual exposure to lead, plaintiffs were alleging “exposure to the risk of actual exposure to

lead.”⁴⁷ Accepting plaintiffs’ representations, the district court denied the defendant’s motion, finding little use for such a Lone Pine order when plaintiffs were not required to establish actual exposure or consequent harm in order to prevail on their claims.

In conclusion, from its creation in Lone Pine to its modern application in mass tort litigation, Lone Pine orders have become, and will continue to become, an indispensable procedural mechanism to combat plaintiffs’ claims in the mass tort arena. By forcing plaintiffs to establish early on whether their claims for specific causation and injury have any medical or scientific support, defendants can save themselves, as well as the court, an unnecessarily long and, without question, unnecessarily expensive journey to reach the conclusion that a plaintiff’s case is without merit.

⁴² In re Vioxx, 557 F. Supp. 2d at 744.

⁴³ Id.

⁴⁴ Id. (emphasis added).

⁴⁵ 2008 WL 2066450 (N.D.Ill. 2008).

⁴⁶ Ramos, 2009 WL 2066450, at *6.

⁴⁷ Id. at *7.



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