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IN THIS ISSUE

In this issue, Tony Hopp and David Cummings discuss lessons learned from Zimmer MDL for case management issues in general and Lone Pine orders in particular. They provide several practice tips for obtaining such orders and making them effective.

Case Management Lessons Learned from the *Lone Pine* Controversy in the *Zimmer* MDL

ABOUT THE AUTHORS

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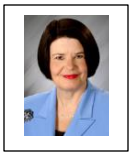

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Introduction

The *Zimmer* MDL[1], currently pending in the Northern District of Illinois, presents some important lessons with respect to when, how and why *Lone Pine* orders should be used in multi-district litigation. Since the case was filed in 2011, 129 bellwether plaintiffs have voluntarily dismissed their claims, or have seen their claims dismissed on summary judgment. In the first bellwether case to go to trial, the jury found for the defendant. A second bellwether case proceeded on summary judgment, also ending in a defense verdict. A third bellwether trial, before a jury, once again resulted in a defense verdict. After the first trial, plaintiffs' counsel withdrew from dozens of cases, leaving their clients *pro se.* The *pro se* litigants wrote letters to the judge, complaining about the litigation process. Five years into the case, after repeated requests from the defense, the judge ordered the parties to craft a *Lone Pine* order. Over 900 of the original 1,400 claimants have now been dismissed or voluntarily withdrawn their complaints. In hindsight, an early *Lone Pine* order in the *Zimmer* MDL could have avoided much of the unnecessary effort, cost and uncertainty which followed.

This article will briefly address *Lone Pine* orders generally and the history of the *Lone Pine* issue in *Zimmer*. It will conclude with practice tips for obtaining *Lone Pine* orders and making them effective.

The *Lone Pine* Doctrine

Lone Pine case management orders require plaintiffs to produce evidence of a good faith basis for their claims before discovery begins. While there is no formula for a *Lone Pine* order, the order generally requires plaintiffs to submit reports, statements from treating physicians, or expert affidavits identifying the product or substance allegedly causing each plaintiff's injury and information relating to the alleged causal link between the product and the injury. Plaintiffs often argue that *Lone Pine* orders constitute premature summary judgment proceedings without the Rule 56 procedural safeguards or evidentiary standards. Defendants contend that a *Lone Pine* order is a way to identify claims which lack a good faith basis before the defendants are required to spend time and resources on such claims. *Lone Pine* orders originated in toxic tort litigation, but they have occasionally been used in medical device and pharmaceutical cases.[2]

Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure allows courts to adopt "special procedures for managing potentially difficult or protracted actions that may involve

[1] *In Re: Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, Case No. 1:11-cv-05468 (N.D. Ill.) (hereafter "*Zimmer*").

[2] *See*, *e.g.*, *In re Fosamax Prods. Liab. Litig*., No. 06 MD 1789 JFK, 2012 WL 5877418 (S.D.N.Y. Nov. 20, 2012); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 2007-MD-1871, 2010 WL 4720335 (E.D. Pa. Nov. 15, 2010); *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741 (E.D. La. 2008).

complex issues, multiple parties, difficult legal questions or unusual proof problems."[3] *Lone Pine* orders clearly fall under the "unusual proof problems" category, and courts have held that *Lone Pine* orders are allowed under Rule 16(c).[4] Other courts have held that such orders are consistent with the court's inherent authority to manage its docket.[5]

Not all courts accept the *Lone Pine* order as an appropriate case management tool. Some question the trial court's authority to issue such an order, while others dispute the need given the other avenues available for plaintiffs to prove their claims.[6] For example, in *Antero Resources Corporation v. Strudely*[7], the Supreme Court of Colorado held the trial court lacked the discretion under Colorado Rule 16(c) to issue an order that "requires a plaintiff to present *prima facie* evidence in support of a claim before a plaintiff can exercise its full rights of discovery . . . ."[8] The court reasoned that, although the Colorado state equivalent of Rule 16 allows for active judicial case management, the rule "does not provide a trial court with authority to fashion its own summary judgment-like filter and dismiss claims during the early stages of litigation."[9]

The *Zimmer Lone Pine* Controversy

The *Zimmer* MDL at one time included over 1,400 plaintiffs.[10] It currently includes approximately 500.[11] In general, the plaintiffs have claimed that they received certain knee implants manufactured by Zimmer which "loosened" prematurely.[12] When a knee implant loosens, it can allegedly cause difficulty walking or standing, pain and swelling, and "popping" or "clicking" noises in the knee. Patients who experience premature loosening often need corrective surgery to remedy the issue.

In 2013, after the parties had conducted initial discovery and Zimmer had produced

[3] FED. R. CIV. P. 16(c)(2)(L).
[4] *See*, *e.g.*, *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 385 (S.D. Ind. 2009) ("*Lone Pine* orders are permitted by Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure"); *Acuna v. Brown & Root Inc*., 200 F.3d 335, 340 (5th Cir. 2000) ("In the federal courts, [*Lone Pine*] orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16.").
[5] *See*, *e.g.*, *Kamuck v. Shell Energy Holdings GP, LLC*, No. 4:11-CV-1425, 2012 WL 3864954, at *1 (M.D. Pa. Sept. 5, 2012) (denying motion for *Lone Pine* order, but acknowledging that the court has "the authority to enter a *Lone Pine* order in the exercise of [its] broad discretion to manage this civil action").
[6] *See* arguments raised in: John T. Burnett, Lone Pine *Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. LAND USE & ENVTL. L. 53 (1998).
[7] 347 P.3d 149 (Co. 2015).
[8] *Id*. at 151.
[9] *Id*.
[10] *Zimmer*, Memorandum in Support of Zimmer's Motion for Entry of a *Lone Pine* Order (Dkt. 1160), p. 1.
[11] *See* Dani Kass, *Zimmer Wants Claims Limited in Knee Implant Trial*, LAW360 (Jan. 23, 2017), *available at* https://www.law360.com/classaction/articles/883701/zimmer-wants-claims-limited-in-knee-implant-trial?nl_pk=4f20ccf8-2e5a-49f0-b968-dcfb440c36b9&utm_source=newsletter&utm_medium=email&utm_campaign=classaction.
[12] *Zimmer*, Dkt. 1160, p. 2.

millions of pages of documents from over 100 custodians (and after plaintiffs had already voluntarily dismissed nine "trial ready" cases), Zimmer moved for a *Lone Pine* order contending that "this litigation is rampant with facially unsupportable claims that should never have survived the due diligence that plaintiffs' attorneys must apply before filing a claim."[13] Zimmer identified several categories of suspect claims, including: (1) claims that appeared to be barred by the applicable statutes of limitations; (2) cases in which the plaintiff had not experienced loosening; (3) cases in which the plaintiff had not received one of the implants at issue, but rather a different implant; and (4) cases in which the plaintiff had not had corrective surgery.[14] Zimmer asked the court to use its authority under Rule 16(c) to require plaintiffs to provide "certain basic documentation" confirming that their allegations of legally actionable injury had a reasonable basis in fact.[15]

The plaintiffs vehemently opposed Zimmer's request. They argued that dismissal of certain cases is an "ordinary occurrence" in mass tort litigation, and that Zimmer's requested *Lone Pine* order was intended to create busy work so that plaintiffs' counsel would "take an eye off the bellwether process."[16] Plaintiffs' response mainly focused on the argument that plaintiffs had adequately plead their causes of action and theories of liability in their Master Long Form Complaint and elsewhere and that Zimmer understood the nature of those claims.[17] They did not squarely address Zimmer's claim that the MDL still included an unknown number of claims which lacked a good-faith basis.

Plaintiffs criticized Zimmer for choosing bellwether cases that were not representative and would not likely survive summary judgment, and took credit for "discontinuing" 98 of the 1,400 cases they originally filed.[18] Ultimately, plaintiffs contended that the *Lone Pine* order Zimmer had requested would not promote efficiency and should be denied.[19] The court implicitly agreed, repeatedly postponing determination of the need for the *Lone Pine* order,[20] and the case proceeded through expert discovery, dispositive and *Daubert* motions, and a first bellwether trial, which resulted in a defense verdict.[21]

It was after the defense verdict in late 2015 that the plaintiffs' lawyers withdrew from dozens of cases and the court began to receive letters from disappointed litigants.[22] After being bombarded with these unwanted and inappropriate communications, the court instructed the

[13] *Id*., pp. 3, 4.
[14] *Id*., pp. 10-14.
[15] *Id*., p. 4.
[16] *Zimmer*, Plaintiff's Memorandum in Opposition to Zimmer's Motion for Entry of a *Lone Pine* Order (Dkt. 1173), p. 1.
[17] *See generally id*.
[18] *Id*., p. 7.
[19] *Id*., p. 16.
[20] *See*, *e.g.*, *id.*, Dkts. 1209, 1210.
[21] *See Batty, et al. v. Zimmer, et al.*, Case No. 1:12-cv-06279 (N.D. Ill.) (Dkt. 141).
[22] *See*, *e.g.*, *Zimmer*, Dkts. 1816, 1909.

parties to agree to the language of a *Lone Pine* order.[23]

After ruling on another series of *Daubert* motions[24] the court entered summary judgment in Zimmer's favor on the claims of a second set of bellwethers.[25] Currently, Zimmer is seeking summary judgment in the MDL in an attempt to get all 142 Track Two cases – those cases where the alleged injuries are not related to high flexion – dismissed.[26] A third bellwether trial concluded on January 26, 2017, resulting in yet another jury verdict for the defense.[27] As of the date of this article, a *Lone Pine* order has not yet been agreed upon or entered in the case. Zimmer appears to be prevailing on the unworthy claims without a *Lone Pine* Order, but it seems clear that much of Zimmer has gone through in the past five years could have been avoided had the court entered the order when Zimmer first requested it.

Practice Tips for Effective *Lone Pine* Orders

Complying with a *Lone Pine* order is by nature (and intent) time-consuming and difficult. For this reason, plaintiffs generally claim that it is a premature summary judgment vehicle and that the court should let discovery play out. Even when a *Lone Pine* order is entered, some plaintiffs will attempt to satisfy their obligation by supplying boilerplate responses that recite a litany of potential ailments and, in a generic way, state that the plaintiff suffered one or more ailments as a result of the defendants' conduct. Other plaintiffs will contend that they cannot comply because the responsive information is in the defendants' possession. If the defendants and the court do not press for good-faith compliance, however, the *Lone Pine* order will have failed in its essential purpose, and the exercise will have been a waste of time. Avoiding such a result requires up-front communication and planning, as well as diligent follow-through.

The first question a defense lawyer confronts in these situations is how to convince the court that a *Lone Pine* order is appropriate. Despite their obvious utility, *Lone Pine* orders are the exception rather than the rule, and many courts will assume that the plaintiffs' counsel have complied with Rule 11 by filing only good-faith, well-screened cases. A good rule of thumb is: the larger number of claimants, the greater the likelihood of inappropriate claims and the greater the need for a *Lone Pine* order. Particularly in MDLs or similar mass tort situations where referral services run television and radio ads seeking claimants, and lawyers file hundreds or thousands of claims at once, it stands to reason that the plaintiffs' lawyers lack the time and resources to screen each claim. It is beyond dispute that in any case involving hundreds or thousands of plaintiffs, some do not

[23] *Id.*, Dkt. 1918.
[24] *Id.*, Dkt. 2094.
[25] *See Joas, et al. v. Zimmer, et al.*, Case No. 1:13-cv-09216 (N.D. Ill.) (Dkt. 165).
[26] *See*, *e.g.*, *Zimmer*, Dkt. 2106.
[27] *See Goldin v. Zimmer, et al.*, Case No. 1:12-cv-02048 (N.D. Ill.) (Dkt. 132).

belong. The question for the court is whether to make all plaintiffs prove the good-faith basis for their claims up front in order to ferret out the unworthy ones. In these situations, a *Lone Pine* order should be an easy sell, but often is not.

Defense counsel should stress to the court that it is in the court's *own interest* to make sure that the only cases before the court are the ones that deserve to be there. The administrative burden on the judge and the court staff can be greatly reduced if plaintiffs' counsel are only allowed to pursue cases in which each claimant can make a threshold showing of legitimacy. If all else fails, tell the *Zimmer* story. No court will want to see abandoned plaintiffs or be inundated with letters from *pro se* litigants.

The next step for ensuring the desired outcome is to make sure that the *Lone Pine* order is not unreasonably burdensome. A plaintiff may, with some justification, ask to be excused from producing ten years of medical records and answering twenty interrogatories as a part of a *Lone Pine* procedure. The proposed order should be narrowly tailored to obtain objective proof of a good-faith basis for the claim. For example, an order could require the plaintiff to present a sworn statement or an affidavit from a medical doctor stating that the plaintiff has a clear medical diagnosis, and that a recognized association exists between the plaintiff's disease or condition and the defendants' product. Asking for too much more than that risks bogging the process down with objections and creates potentially legitimate excuses for noncompliance.

The final step is relentless follow-through. Naturally, the plaintiffs most likely to attempt to evade the *Lone Pine* process are the ones whose claims would be dismissed if they complied. That is, a determined illegitimate plaintiff may look for ways to avoid being thrown out of the lawsuit. A common tactic is for the plaintiff to complain that he or she cannot comply because the defendants are withholding "crucial" information. Defense counsel must be prepared to respond, to force the plaintiffs to comply, and to seek dismissal of those who do not.

Courts understandably give plaintiffs the benefit of every doubt before dismissing their cases for failure to comply with a Rule 16 order. It may be necessary, therefore, to file repeated motions to compel before a judge will conclude that the non-compliant plaintiffs' cases should be dismissed. In order to obtain dismissal for non-compliance, a defendant must be prepared to build a solid record. Motion practice can be expensive, but the motion practice necessary to enforce a *Lone Pine* order is normally less expensive than: (a) conducting medical and expert discovery on dozens or hundreds of plaintiffs, or (b) paying uninjured plaintiffs through a global settlement.

Conclusion

The *Zimmer* story may be an outlier, and that may be because, as plaintiffs contend, defense counsel chose the weakest bellwethers as a means of proving to the court that the case contained a high level of unworthy claims. Still, defense counsel in almost any MDL or other mass tort case containing hundreds or thousands of claims would likely find unworthy plaintiffs if they worked to uncover them. *Zimmer* should serve as a lesson to courts and counsel that *Lone Pine* orders should be entered more frequently and earlier to make sure that the parties and the court do not spend time and money dealing with cases that never should have been filed.

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