



The *Lone Pine* Order As a Case Management Tool for Complex Litigation

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The past twenty years has seen a dramatic increase in the volume of mass tort and other forms of complex litigation. As the volume of litigation has grown, so too have the burdens on the judiciary and the litigants. To address this growing problem, it is imperative that modern adjudicatory tools be adopted to achieve the goal of securing the just, speedy, and inexpensive determination of every action. One such case management tool that has developed in the context of mass tort litigation – but that can be equally effective in other types of litigation – is the *Lone Pine* Order.

The term “*Lone Pine* order” refers generically to a case management order that requires the plaintiffs in potentially large or complex cases to: (1) specifically define their alleged injuries and/or damages; and (2) demonstrate at the outset some minimal level of evidentiary support for key components of their claims, usually causation of damages. The traditional rationale for such orders is that they seek to ensure that completely unsupported claims will not consume the resources of the

parties or the judiciary. As discussed below, however, *Lone Pine* orders accomplish more than that. They should, in addition, be viewed as an effective case management tool to assist the courts in defining issues, narrowing the scope of discovery, and otherwise getting control of complex litigation at the earliest possible stage of the litigation.

Lone Pine orders take their name from a case entitled *Lore v. Lone Pine Corp.*, No. L33606-85 (N.J.Super.Ct. Law Div., Monmouth Co., Jan. 1, 1986), reprinted in 1 Toxic L.Rep. (BNA) 726. *Lore v. Lone Pine Corp.*, involved toxic tort claims against a landfill operator and the generators and haulers of materials to the landfill. After the suit was filed, the court ordered the plaintiffs to submit within four months of the order documentation regarding each individual plaintiff's exposure to alleged toxic substances, reports of treating physicians and medical or other experts supporting causation, specific information concerning property allegedly damaged, and reports of real estate or other experts supporting property damage/diminution claims. The fundamental purpose of the order was to require plaintiffs to make an objective showing early in the litigation that there was a sufficient evidentiary basis to justify the continued prosecution of what would likely be lengthy, expensive, and burdensome litigation. The order turned out to be quite successful. After several extensions were granted to plaintiffs, it became clear that plaintiffs could not produce objective evidence capable of establishing anything close to a *prima facie* case for personal injuries or property damage. After reviewing the submission, the Court determined that there was not a sufficient basis to continue with the litigation and dismissed the case.

In the ensuing twenty years, other courts have gradually become aware of the usefulness of case management orders that require, as a prerequisite for continued prosecution of the suit, the production of objective evidentiary support capable of making a *prima facie* showing on the key

elements of the plaintiffs' claims. *See, e.g., Cherry v. Air Products and Chemicals, Inc.*, No. 85-447 (Ct. Common Pleas, Delaware County, Pa., Order dated June 17, 1987) (emergency personnel and others who responded to a fire at a dumpsite claimed injuries from chemical exposure, and the Court, unhappy with the failure of routine discovery to yield results, stayed all discovery pending plaintiffs' production of expert opinions that each plaintiff's exposure to the site caused his particular illness); *Adinolfe v. PJP Landfill*, No. L-066549-86 (Sup. Ct., Hudson County, New York, Order dated August 21, 1987), reported in 2 *Toxics Law Rptr.* 506, September 30, 1987 (approximately 80 residents near a landfill sued 1717 defendants alleged to have contributed waste to the site, alleging personal injuries from fumes and smoke. The trial court ordered the plaintiffs to file "certificates stating as to each defendant, and in specific detail, the factual nexus between each defendant's conduct and/or activities and the damages and injuries alleged by each plaintiff." The plaintiffs' failure to file most of the certificates, and the inadequacy of those filed, resulted in dismissal of the case without prejudice); *Pannick v. New Jersey*, No. L-86-5162 (Sup. Ct., Mercer County, New Jersey, Order dated April 28, 1989), reported in 4 *Toxics Law Rptr.* 117, July 5, 1989 (parents of a cancer-stricken child alleged that more than two dozen defendants had contaminated their well water and thus caused the cancer. The court ordered plaintiffs to show a causal connection, with medical expert testimony, between the injuries and specific contaminants); *Eggar v. Burlington Northern Railroad Co.*, 1991 U.S. Dist. Lexis 19240, No. CV 89-159-BLG-JFB (D. Mont., Order dated December 18, 1991) (railroad workers claiming damages from exposure to hazardous substances on the job; court requires each plaintiff to submit a physician's affidavit diagnosing specific illnesses, identifying the substances which "to a reasonable degree of medical certainty" caused the illnesses, and the scientific and medical basis for the physician's opinion). *Claar v. Burlington Northern*

Railroad Co., 29 F.3d 499, 500 (9th Cir. 1994) (“[o]ut of concern that plaintiffs might not be able to demonstrate a causal connection between their workplace chemical exposure and their injuries, the district court issued a case management order consolidating the twenty-seven cases for pretrial purposes. The order required plaintiffs to submit affidavits describing their exposure to the chemicals they claim harmed them, and affidavits from physicians listing each plaintiff's specific injuries, the particular chemical(s) that in the physician's opinion caused each injury, and the scientific basis for the physician's conclusions.”)

More recently, the United States Fifth Circuit Court of Appeal expressly approved the use of a *Lone Pine* order to get control of mass tort litigation. In *Acuna et al. v. Brown & Root, et al.*, 200 F.3d 335 (5th Cir., 2000), approximately 1,600 plaintiffs in two separate actions filed suit claiming they were exposed to and injured by the defendants' uranium mining and processing activities. Some of the plaintiffs worked in uranium mines or processing plants while others alleged exposure to radiation or uranium dust or tailings through contact with family members who worked in the mines or through environmental factors, such as wind and groundwater. To get early control of the litigation, the district court issued pre-discovery scheduling orders that required plaintiffs to establish certain elements of their claims through expert affidavits. Specifically, the affidavits had to identify, for each plaintiff: (1) the injury or illness suffered by the plaintiff; (2) the materials or substances that caused the injury; (3) the facility thought to be the source of the materials or substances; (4) the dates or circumstances and means of exposure to the materials; and (5) the scientific and medical bases for the expert's opinions. The plaintiffs responded by submitting approximately 1,000 form affidavits from a single expert. The form affidavit generally identified illnesses and effects that can occur from exposure to uranium, stated that the relevant plaintiff

suffered from some or all of these illnesses, and stated that the expert had reviewed the plaintiff's medical data and concluded that exposure to uranium and its byproducts had reached clinically significant doses. The affidavits also generally listed all of the mining facilities covered in the lawsuit as responsible for causing each plaintiff's exposure, and identified the routes of exposure as including inhalation, ingestion, and direct skin contact.

The court found that the affidavits did not comply with the pre-discovery order and gave the plaintiffs an additional month to comply. Plaintiffs then submitted additional affidavits. Although some of the plaintiffs were identified as having specific diseases, specificity was not provided as to the other elements required in the order. As a result, the district court dismissed the case, and the plaintiffs appealed.

On appeal, the plaintiffs argued that the pre-discovery orders requiring expert support for the details of each plaintiff's claim imposed too high a burden for the early stage of the litigation. The Fifth Circuit rejected the argument and affirmed the dismissal of the case. The Court recognized that "Lone Pine orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." 200 F.3d at 339. It held that such orders "... are issued under the wide discretion afforded district judges over the management of discovery under Fed.R.Civ.P. 16." (*Id.*) Addressing the argument that the order was required too early in the litigation, the Court noted that the order simply required that information which the plaintiffs should have developed as part of their pre-filing obligation to make a reasonable inquiry as to the evidentiary support for their allegations. The court explained:

... Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which facilities were alleged to have caused those injuries. It was within the court's

discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require.

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The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed.R.Civ.P. 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries. (*Id.*) (Internal citations omitted).

The Court's recognition that, at their core, *Lone Pine* orders simply require production of that which plaintiffs ought to have obtained before filing suit points to a problem that is all too common in complex litigation – a vague petition followed by onerous discovery requests and time consuming litigation as the plaintiffs attempt to use “discovery” to do that which should have been done before suit was filed. In this regard, the opinion in *Acuna* can be viewed more broadly as a reminder to litigants that the “reasonable inquiry” requirement of Rule 11 is not simply window dressing – it is a real obligation, and the *Lone Pine* order can be used to enforce it.

The critical point to remember with *Lone Pine* orders is that whatever perceived burdens they place on the plaintiffs must be weighed against the burdens protracted litigation will impose on the court system and the defendant. They do not, as plaintiffs often argue, unfairly require the plaintiffs to prove their case before proceeding with the lawsuit. They merely require plaintiffs to define their claims clearly and to demonstrate that there is some competent evidentiary support to justify proceeding with time consuming, burdensome, and complex litigation.

Thus, *Lone Pine* orders are perfectly consistent with the principles espoused in the Federal Judicial Center's Manual for Complex Litigation. The Manual for Complex Litigation discusses

several key management issues that should be employed in managing complex litigation, all of which can be effectuated through a carefully considered *Lone Pine*-type Order.

First, the Manual recognizes and encourages courts to use “... the numerous grants of authority that supplement the court’s inherent power to manage litigation.” (Manual for Complex Litigation, Fourth, §10.1.) One of these specific grants of authority is Federal Rule Civ. Proc. 16(c)(12), which encourages courts to adopt “special procedures” to manage appropriate cases. It provides:

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

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(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems....

Second, the Manual recognizes that effective judicial management is “active” and “substantive.” (*Id.*, at § 10.13.) The management should be “active” in the sense that the judge will anticipate crucial issues before they arise “... rather than await passively for counsel to present them.” (*Id.*) It should be “substantive” by allowing the court to become familiar with the key substantive issues at an early stage so that the court can make informed rulings on issue definition and narrowing. (*Id.*) To accomplish this, the court should seek specific information and require the attorneys, at the earliest possible stage, to “... describe the material facts they intend to prove and how they intend to prove them.” (*Id.*, at § 11.33.)

Third, the Manual recognizes that the best time to adopt “special procedures” to manage potentially difficult or protracted litigation is during the very early stages. “Judicial supervision is most needed and productive early in the litigation.” (*Id.*, at §10.1.) One of the key components of

effective litigation management is a plan that requires the early identification of the key material facts and legal issues that will dictate the direction of the litigation. As recognized by the Manual for Complex Litigation, “[t]he *sine qua non* of managing complex litigation is defining the issues in the litigation. The materiality of facts and the scope of discovery (and the trial) cannot be determined without identification and definition of the controverted issues....” (*Id.*, at §11.31.)

An effective *Lone Pine* order accomplishes all of these goals. The two-fold requirement that plaintiffs identify specifically their injuries and produce some form of objective evidence of causation has the effect of quickly defining where the critical litigation issues will lie. This, in turn, allows the court, very early, to determine how pre-trial motions and discovery should be scheduled, and gives the court the type of concrete information it will need to address discovery disputes that inevitably arise in complex litigation.

Although plaintiffs often complain that the orders are one-sided, they are only “one-sided” to the extent that the law places the burden of proof on the plaintiff in litigation. Plaintiffs control the timing of when a lawsuit is filed, so it is not unreasonable to require the initial production of concrete information to be provided by the plaintiffs.

Furthermore, plaintiffs often lose sight of the fact that effectively responding to a *Lone Pine* order can help their own cause immeasurably. An effective response communicates to the defendant and to the court that the plaintiffs have “done their homework” and are prepared to present an effective case. This can foster early and meaningful alternative resolution methods that might not otherwise be undertaken until long after the parties have spent considerable time and money.

Thus, *Lone Pine* orders should be viewed as more than tools to “weed out” baseless claims at an early stage of litigation. Creative variations of the *Lone Pine* order should be used more

frequently as a case management tool in complex litigation to help define issues, streamline discovery, and allow the court to take control of the litigation at the earliest possible stages.

About the Author:

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