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TO MDL OR NOT TO MDL:

That Is The Question.

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DEAR CLIENT

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The dog days of summer are upon us! With this issue, our focus shifts to one that often "dogs" us in serial and consolidated litigation: federal multi-district litigation. Our articles offer some insights into various aspects of MDLs, along with practical takeaways to use in new or existing litigations.

In *To MDL or Not to MDL: That is the Question*, we explore competing recommendations and rationales for clients to consider regarding the relative merits of supporting or opposing the creation of an MDL. "Consolidating Catherine" and "Standalone Stan" may add a few ideas to the decision-making calculus, or highlight an opposing position not often considered.

Not every discovery loose-end is tied up by the multidistrict litigation statute. In *Streamlining MDL Subpoena Practice*, we describe the issue of document-only subpoenas in the context of centralized MDL proceedings then offer practical solutions for efficient outcomes. Along the way, we cover some potential pitfalls as well.

Weeding can be a frustrating summertime task, and that's true of meritless claims as well. In *Lone Pine Orders*, we examine recent developments leveraging the device to combat maneuvering – or abuse – of the bellwether trial process. That's encouraging news for supporters of *Lone Pine* orders.

While temperatures, daylight, and (for some of us) humidity are on the rise this summer, the stakes of our decisions in mass tort litigation can be as well. We hope this issue aids you in keeping the MDL "thermometer" lower.

Stay cool!

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TO MDL *OR NOT* TO MDL

THAT IS THE QUESTION

Today 46% of federal civil cases lie in multidistrict litigation (MDL). MDLs provide a way for the judicial system to consolidate plaintiffs from around the country when those plaintiffs share common litigation-related facts. The question for attorneys and their clients is whether to add their cases to that growing percentage. MDLs have the potential to save substantial litigation costs, but they can cause countless logistical and organizational nightmares.

"When civil actions involving one or more common questions of fact are pending in different districts, such actions can be transferred to any district for coordinated or consolidated pretrial hearings."[1] A proceeding under the MDL can be initiated by a "judicial panel on multidistrict litigation upon its own initiative" or by a "motion filed with the panel by a party."[2] If the judicial panel grants the MDL, the relevant cases are then transferred into the MDL by the panel.[3] The MDL court then hears pretrial proceedings, and it must remand the case back to the original jurisdiction "at or before the conclusion of such pretrial proceedings . . . unless [the case] shall have been previously terminated."[4] The *Manual for Complex Litigation* guides the Judicial Panel for Multidistrict Litigation in its decision-making process.[5]

MDLs are increasingly popular.[6] In 2002, MDLs made up 16% of the federal civil caseload of the entire country.[7] By 2014, that number was 36%, and if one removes "prisoner and social security cases from the total, cases that typically (though not always) require relatively little time of Article III judges, the 120,449 pending actions in MDLs represented 45.6% of the pending civil cases as of June 2014."[8]

MDLs can help or hurt a case, depending on one's perspective. Following are two competing evaluations of the MDL process and its pros and cons.

MEMORANDUM

SUBJECT: OF COURSE WE SHOULD SEEK AN MDL!
FROM: CONSOLIDATING CATHERINE

Our client should obviously request to defend the many lawsuits filed against us in an MDL. If our cases meet a few criteria (e.g. having common questions of fact, being spread across the country, having no sign of efficient disposal without transferring to an MDL) then we have good reason to petition the Judicial Panel on Multidistrict Litigation for an MDL.[9]

MDLs offer efficiency. Even the statute creating the MDL mechanism says MDLs are intended to foster "just and efficient" handling of cases.[10] One way the MDL offers efficiency is by eliminating needless duplication of discovery.[11] Working our cases through an MDL could allow our experts and company witnesses to avoid traveling around the country to testify thousands of times, and it might limit the number of times they would have to be deposed.[12] The MDL might also eliminate unnecessary "duplicative work" at the firm, too, by cutting the number of times we have to depose a witness or decreasing the number of unique pretrial motions we have to file.[13] That certainly benefits the client's bottom line.

Using an MDL can also "avoid an undesirable multiplicity of appeals on similar issues."[14] MDLs allow courts to rule on general issues – like *Daubert* motions or issues of general causation – all at once.[15]

Those who complain about the cost of transferring cases from around the country protest too much. The benefits of consolidated motions, depositions, arguments, discovery, etc. more than outweigh the inefficiencies. Once those consolidated motions and arguments are heard and ruled upon, the MDL may have culled thousands of cases down to a manageable number. We can focus our resources on those cases and avoid waste on weaker cases.[16] That efficiency saves us time and the client money.

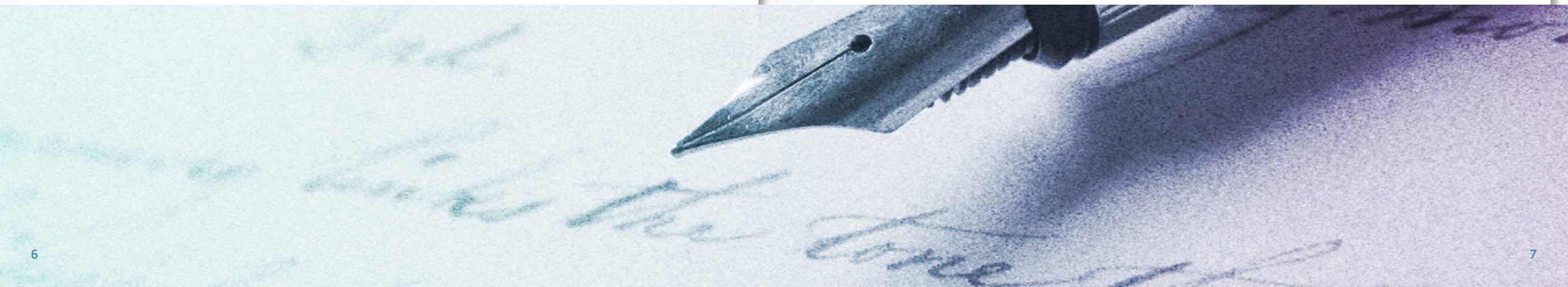
That said, transferring cases to an MDL does indeed take time, but even that may benefit us. Complex cases require competent experts, extensive document review, and lengthy trial preparation. The extra time might be useful as we attempt to evaluate all the plaintiffs filing suits while simultaneously building the best case for our client.[17]

Seeking an MDL ensures complex matters are handled by an informed judge. The Judicial Panel hand picks MDL judges for their expertise.[18] This judge will be well-prepared to handle cases with obscure or technical topics, like neurological injuries or litigation around cutting-edge technology.[19] And even if the judge is not perfectly informed, she will quickly build a familiarity with the content by handling so many similar cases. The science is on our side—why else would our client have gone to market with the product?—so smarter judges who have a more complete understanding of that science will mean better *Daubert* rulings and better rulings in general for our clients.

With strong arguments, MDLs provide a way for us to dismiss cases at the summary judgment phase, which is heard by the MDL judge.[20] MDLs present the chance to winnow the time-barred or weak cases in a more efficient manner.[21] Successful summary judgment motions could capture hundreds of plaintiffs, thus saving the client money.

Even if our summary judgment motions fail, the MDL judge will be well-positioned to facilitate an overall resolution of the matters, because she will have a full understanding of how the matters are unfolding. She will be able to separate legitimate grievances from showboating in negotiation. That makes her a quasi-mediator in this context.[22] Settlement is also easier in an MDL because we can target our settlement proposals to the reasonable plaintiffs, thereby proving our willingness to the judge to work toward a resolution and pressuring more difficult plaintiffs to come to the table.[23] Fast movement to a settlement saves time, and the faster we resolve our cases, the more our client saves.

We should also request an MDL to foster consistency. MDLs help guarantee consistent pretrial rulings.[24] Consistent rulings make for predictability for us and the client. And predictability gives us all a clearer view of the optimal strategies we should take when it comes to every aspect of the case, from saving a little time (e.g. "We have lost this motion three times in a row, so we should not file it again") to settling (e.g. "We are losing *every* motion! We should settle"). For all the reasons cited above, we should seek an MDL on behalf of our client.



MEMORANDUM

SUBJECT: ARE YOU CRAZY? DON'T SEEK AN MDL.
FROM: STANDALONE STAN

Seeking transfer to an MDL is not a good idea. Working cases through MDLs is not necessarily more efficient than handling cases individually. For instance, we lose time transferring cases to an MDL.[25] When time is lost on our end, money is lost for the client.

Much is made over having an "expert judge" to hear many similar cases in these complex matters, but it is much ado about nothing. Judges are not scientists, and their role in litigation is not particularly scientific. The judge only interprets the law.

And if the judge's job is to interpret the law, MDLs make that job harder. For example, in MDLs, judges apply the choice of law provisions of the original jurisdiction.[26] MDLs thus ask judges to repeatedly apply law with which they are unfamiliar. The stakes of every decision are high because state law differs dramatically in mass tort cases.[27] Volatile decisions on important questions make for uncertain outcomes for clients.

Funneling our cases through one judge presents administrative problems in dealing with the courts. We cannot blame the court's clerks for being overloaded; MDLs are a new creation, and the court system is not built to handle these "super-cases."[28] It does not matter how well-equipped the chosen judge may be. She simply may not be surrounded by the support staff needed to handle the MDL in an efficient way.

Overloaded judges and lawyers provide less effective oversight of plaintiffs, too. For instance, plaintiffs in MDLs often must submit "plaintiff fact sheets" describing the basics of their claim. But the fact sheets are notoriously inconsistent and even inaccurate.[29] If courts handled claims individually, they would allow fewer mistakes and have stronger oversight.

If we seek and receive a transfer of our cases into an MDL, the MDL judge will only hear the pretrial portion of the case. The Supreme Court demands that cases be remanded back to the original jurisdiction for trial.[30] If the court does not dispose of all of our cases at the pretrial phase, then we will be forced to educate two judges – the MDL judge and the judge with original jurisdiction – about the material.[31] And then we will still try the case in its home venue, eviscerating the benefit of the consolidation. No matter how you dress it up – either as "multidistrict litigation" or just "litigation" – a lawsuit by any other name is still a lawsuit, and we will still have to try that suit in its original jurisdiction.

Proponents of MDLs say that MDLs allow a single judge to rule on general issues that apply to all or most of the cases at once. That raises the stakes on each of those decisions. If we lose once, the court may exact more than the pound of flesh for that case. Thousands of cases could hinge on a single call. Also, pro-MDL attorneys argue that MDLs can decide on common issues of fact. But many of our clients are in the healthcare industry, where cases are as unique as the human bodies at issue, and "no case is ever truly representative."[32] Judges may make erroneous assumptions about the common factors allegedly linking hundreds of plaintiffs together—and then make a poor ruling that is magnified by the MDL. One judge making high-stakes decisions that dictate the outcome of every ruling afterward presents obvious dangers.

It is also not clear that MDLs are good for us in the long-run, so we should not feed them in the short-run. MDLs allow plaintiff's attorneys to file weak cases because MDLs allow those attorneys to spread the cost of litigation over many plaintiffs.[33] We should not march into the MDL breach, because the breach will swallow us up, forcing us to defend against plaintiffs who could be ferreted out in a single case, but may be insulated in an MDL.

Some say MDLs facilitate settlement, but settlement-by-MDL is not a panacea. High-profile MDL settlements might trigger regulatory actions or even additional suits. "Indeed, shortly after BP announced its DOJ settlement, it was hit with sanctions by the EPA . . ."[34] Sometimes what's past is prologue in the MDL game.

The venue we might be assigned for the MDL could be inconvenient at best and catastrophic at worst. The Judicial Panel is not guided by any clear set of factors or the *Manual for Complex Litigation* when it assigns cases to an MDL court.[35] Uncertainty over which court may receive the case may mean nothing more than our firm booking every available flight to Wyoming, or it might mean hearing thousands of critical cases in front of an unfriendly judge. Seeking an MDL is akin to putting it all on black.

Given the sheer number of cases in many MDLs, we will also likely have to work with attorneys from other firms if we seek consolidation.[36] The added logistical difficulties of communicating and working across firms on omnibus motions or consolidated discovery could lead to mistakes. The client may be better off having each firm fully handle cases individually. If it is not clear by now, it should be: MDLs are overrated.

CONCLUSION

MDLs are an increasingly popular way to handle a large number of suits, but that does not mean they are appropriate for every case or controversy. While the memos above illustrate two approaches to the question of whether to seek an MDL, attorneys and clients need to carefully consider how these factors and others apply to their litigation. ■

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1 28 USCS § 1407.

2 *Id.*

3 *Id.*

4 *Id.*

5 Federal Judicial Center, Manual for Complex Litigation, (April 11, 2016), http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/470.

6 Martin H. Redish & Julie M. Karraba, One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism, 95 B.U.L. Rev. 109, 110 (2015).

7 Duke Law Center for Judicial Studies, Standards and Best Practices for Large and Mass-Tort MDLs, December 19, 2014 at x. https://law.duke.edu/sites/default/files/centers/judicialstudies/standards_and_best_practices_for_large_and_mass-tort_mdls.pdf.

8 *Id. at x-xi.*

9 *In re Concrete Pipe*, 302 F. Supp. 244, 255 (J.P.M.L. 1969).

10 28 USCS § 1407.

11 Courtney E. Silver, Note: Procedural Hassles in Multidistrict Litigation: A Call for Reform of 28 U.S.C. § 1407 and the Lexecon Result, 70 Ohio St. L.J. 455, 459 (2009).

12 *In re Concrete Pipe*, 302 F. Supp. at 255.

13 *See id.*

14 *In re Concrete Pipe*, 302 F. Supp. at 255.

15 Jaime Dodge, The 2014 Randolph W. Thrower Symposium, American Dispute Resolution in 2020: The Death of Group Vindication and the Law?, Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation, 64 Emory L.J. 329, 346 (2014).

16 *Id. at* 376.

17 *Id. at* 347.

18 28 USCS § 1407.

19 Dodge, *supra*, at 331.

20 Redish & Karraba, *supra*, at 118.

21 Silver, *supra*, at 459.

22 Dodge, *supra*, at 331.

23 *Id. at* 381.

24 *In re Radiation Incident at Washington*, 400 F. Supp. 1404, 1406 (J.P.M.L. 1975).

25 *In re Concrete Pipe*, 302 F. Supp. at 255.

26 Andrew D. Bradt, The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation, 88 Notre Dame L. Rev. 759, 763 (2012).

27 *Id.*

28 Dodge, *supra*, at 331.

29 *Id. at* 352.

30 *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (U.S. 1998).

31 *In re Concrete Pipe*, 302 F. Supp. at 255.

32 Dodge, *supra*, at 378.

33 *Id. at* 348.

34 *Id. at* 380.

35 Redish & Karraba, supra, at 120.

36 *Id. at* 112.

By Shad White

STREAMLINING *MDL SUBPOENA* PRACTICE

The formation of an MDL for product liability litigation concerning your company's product comes with obvious downsides: the centralized proceedings give an air of legitimacy to the cases (even if the cases are decidedly illegitimate), which in turn attracts additional media attention, advertising by plaintiff firms, and lawsuits. On the other hand, an MDL eliminates duplicative discovery, coordinates scheduling deadlines, ensures consistent rulings on pretrial matters, and thus has the potential to reduce overall litigation costs.

If an MDL is formed, steps can be taken to maximize the efficiency of centralization while minimizing the risks – for example, short form pleadings; federal/state coordination; *Lexecon* waivers; Lone Pine orders; and statute of limitations "bar dates." However, one common perpetrator of increased complexity and litigation costs has received little attention from litigants and the courts: nonparty subpoenas and their resulting decentralized, multijurisdictional "satellite" litigation. This inefficiency is only becoming more pronounced as mass tort litigants increasingly rely on evidence from nonparty academics and scientific researchers.

THE PROBLEM

Rule 45 provides that a subpoena "must issue from the court where the action is pending."[1] In the context of an MDL, the issuing court is the MDL transferee court (the MDL court). However, any motions to quash, modify, or enforce a subpoena must be filed in "the court for the district where compliance is required."[2] For subpoenas seeking the production of documents, the place of compliance must be "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(2)(A). Thus, when an MDL court issues subpoenas to multiple nonparties across the country, the issuing party can expect to engage in (often protracted) litigation on multiple fronts, despite the existence of an MDL created precisely for the purpose of centralizing litigation.

The multidistrict litigation statute does not explicitly address this problem. However the statute does address a nearly identical problem: the need for the MDL court to oversee depositions conducted in other districts. On this issue, the statute grants MDL courts "the powers of a district judge in *any* district for the purpose of conducting pretrial depositions".[3] Fortunately, the overwhelming weight of authority has interpreted this power to include the power to enforce document-only subpoenas *not* associated with a deposition in any district.[4]

THE SOLUTION(S)

While the MDL court would likely find that it has jurisdiction to decide motions related to your subpoenas, how do you ensure any motions to quash that are filed by the nonparties land in the MDL court to begin with? Three strategies have emerged, each with different levels of precedent and efficiency.

1. MOTION TO THE MDL COURT FOR CENTRAL ENFORCEMENT OF SUBPOENAS:

The most efficient approach is to file a motion with the MDL court requesting central enforcement of all nonparty subpoenas before those subpoenas are served. While this is an uncommon approach, it is not unprecedented. In recent years, at least two MDL courts have entered unpublished orders providing for the central enforcement of subpoenas issued by those MDL courts and directing that any objections or motions to quash the subpoenas must be filed directly in the MDL court.[5] In both of these instances, the orders have provided that attorneys representing the subpoenaed nonparties may make a limited appearance in the MDL court for purposes of contesting a subpoena without being deemed to otherwise consent to the jurisdiction of the MDL court.

The most efficient approach is to file a motion with the MDL court requesting central enforcement of all nonparty subpoenas before those subpoenas are served.

As long as there is no reason to believe the MDL court would be hostile to your subpoenas, this strategy is the best approach. The primary advantage is that, if successful on the motion, the MDL court's order could be served on the nonparties along with the subpoenas, thus heading off any attempts by the nonparties to oppose the subpoenas in their local district courts rather than in the MDL court. This would accomplish streamlined and consistent rulings by one court that is already familiar with the issues in your litigation.

There are two notable disadvantages to filing a motion for centralization, however. First, plaintiffs' counsel may use the opportunity to oppose not only the centralization of subpoena-enforcement, but the subpoenas themselves. Any such attempts should be easily rebuffed however, since, in most cases, only the nonparties receiving the subpoenas would have standing to challenge them. Secondly, if the MDL court denies the motion to centralize enforcement, the MDL court's order may later be used by nonparties seeking to persuade their local compliance courts not to transfer their motions to quash.

2. MOTIONS TO THE JPML FOR INDIVIDUAL TRANSFER ORDERS:

In cases in which centralization through the MDL court is not likely to occur or has been denied, the next-best strategy may be to seek individual transfers by the Judicial Panel on Multidistrict Litigation (JPML). This is another uncommon approach, but it is also not unprecedented. On at least two occasions, the JPML has transferred actions involving motions to quash a subpoena from a compliance court to an MDL court.[6] However, the JPML has also stated that its decisions on such transfers are made on a case-by-case basis, and it has thus declined to issue orders directing that all future third-party disputes be filed in the MDL transferee court.[7]

The main drawback of this approach is increased motion practice. The subpoena-issuing party would need to file separate motions with the JPML for transfer of any motions to quash filed by nonparties. For any nonparties who opposed the clerk's conditional transfer order (CTO), the issue would have to be briefed to the JPML. Moreover, local counsel would need to be obtained in each of the compliance districts, and if any of the compliance courts did not issue an order staying the proceedings before them, additional briefing and argument on the motions would continue in those district courts simultaneously with the briefing to the JPML. Another concern is whether the timing of the motions would allow for transfer by the JPML. The JPML meets and issues orders infrequently, and some compliance courts may issue an order on the motion to quash before it has been transferred by the JPML.

The advantage of seeking transfer through the JPML is that, assuming the timing of the subpoenas and related motions can be successfully navigated, all of the decisions on transfer would be decided consistently.

3. MOTIONS TO THE COMPLIANCE COURTS FOR INDIVIDUAL TRANSFER ORDERS:

If centralization cannot be achieved through the MDL court or the JPML, individual transfer of subpoena-related motions may still be pursued in the local compliance courts. Rule 45 provides that a compliance court may transfer a subpoena-related motion to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.[8] The rule does not define "exceptional circumstances," but the Advisory Committee notes explain that transfer may be appropriate "to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts."[9] The Court must weigh the burden on the party responding to the subpoena in the event of a transfer against factors such as "judicial economy, docket management, and the risk of inconsistent rulings."[10]

Seeking transfer in the local district court of each nonparty receiving a subpoena is the least favored approach for purposes of streamlining subpoena practice. However, in the absence of other options, it will usually be worthwhile to pursue individual transfers to obtain consistent rulings on the underlying subpoenas from the MDL court that is familiar with your litigation. You may also benefit from some decrease in the time and expense necessary to litigate any motions that are successfully transferred, simply because the MDL court will not need to be educated on the issues and likely will dispatch the motions in an efficient and predictable manner.

CONCLUSION

Before issuing subpoenas to geographically dispersed nonparties, MDL litigants should consider strategies to reduce the time and expense of litigation associated with the subpoenas. The most efficient approach is to file a motion with the MDL court to centralize the enforcement of the subpoenas. If such a motion is denied or is not pursued, individual transfer of any subpoena-related motions can still be sought through the JPML or in the nonparties' local district courts. In most cases, centralized enforcement of the subpoenas by the MDL court will result in consistent decisions on issues raised by the nonparties, and will eliminate duplicative discovery efforts in multiple district courts. ■

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1 Fed. R. Civ. P. 45(a)(2).

2 Fed. R. Civ. P. 45(c)(3)(A).

3 28 U.S.C. § 1407(b) (emphasis supplied).

4 *See e.g. U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp. 2d 270, 273 (D.D.C. 2002); *In re Asbestos Prods. Liab. Litig.*, 256 F.R.D. 151, 154 (E.D. Pa. 2009); *In re New England Compounding Pharmacy, Inc. Products Liab. Litig.*, 2013 WL 6058483, at *2 (D. Mass. Nov. 13, 2013); *In re Neurontin Marketing, Sales Practices, and Products Liability Litigation*, 245 F.R.D. 55 (D. Mass. 2007); *In re Clients & Former Clients of Baron & Budd, P.C.*, 478 F.3d 670, 671 (5th Cir.2007); *In re Subpoena Issued to Boies, Schiller & Flexner LLP*, 2003 WL 1831426 (S.D.N.Y. Apr. 3, 2003); *In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 586 (E.D. Pa. 1989); *In re Welding Rod Prod. Liab. Litig.*, 406 F. Supp. 2d 1064, 1065 (N.D. Cal. 2005); *HCA, Inc. v. U.S. ex rel. Pogue*, 2002 WL 31953748 (M.D. Tenn. Nov. 21, 2002); In re San Juan Dupont Plaza Hotel Fire Litig., 117 F.R.D. 30, 32–33 (D. P.R. 1987); *but see VISX, Inc. v. Nidek Co.*, 208 F.R.D. 615, 616 (N.D. Cal. 2002) ("§ 1407(b) expands a transferee court's discovery powers only to pretrial depositions. Had Congress wanted to expand these powers to document subpoenas, it would have said so.").

5 *See* Order on Central Enforcement of Subpoenas (Dkt. No. 193), *In re New England Compounding Pharmacy, Inc. Products Liab. Litig.*, No. MDL 13-2419-RWZ (D. Mass. June 21, 2013) *available at* https://www.gpo.gov/fdsys/pkg/USCOURTS-mad-1_13-md-02419/pdf/USCOURTS-mad-1_13-md-02419-7.pdf (last visited June 3, 2016); Order on Central Enforcement of Subpoenas (Dkt. No. 220), *In re Niaspan Antitrust Litigation*, MDL 2460 (E.D. Pa. June 9, 2015).

6 *See In re: Online DVD Rental Antitrust Litig.*, 744 F. Supp. 2d 1378 (U.S. Jud. Pan. Mult. Lit. 2010) (ordering transfer and finding that "[t]he deposition testimony sought from [nonparty] Blockbuster involves questions of fact relating to the conspiracy alleged in MDL No. 2029. Indeed, the transferee judge has identified Blockbuster as an important third-party with information central to the issues in MDL No. 2029. Moreover, requiring a judge in the Northern District of Texas to learn the particulars of MDL No. 2029 would not promote the just and efficient conduct of this action or the litigation as a whole when the transferee judge is so thoroughly familiar with the issues in this litigation. Rather, this litigation would be best served by allowing the transferee judge to determine the scope of discovery in the MDL."); *see also In re Fosamax Prods. Liab. Litig.*, MDL No. 1789, Transfer Order (J.P.M.L. June 9, 2009) (unpublished order).

7 *In re: Online DVD Rental Antitrust Litig.* 744 F. Supp. 2d at 1378-1379.

8 Fed. R. Civ. P. 45(f).

9 Fed. R. Civ. P. 45(f) advisory committee's note.

10 *Agincourt Gaming, LLC v. Zynga, Inc.*, 2014 U.S. Dist. LEXIS 114348, at *16 (D. Nev. Aug. 15, 2014).

By Aaron Rice

LONE PINE ORDERS

Meritless lawsuits are a common frustration in mass tort litigation. Whenever hundreds or thousands of cases are joined together, there are bound to be a few frivolous ones in the pile. However, this problem has been compounded by misleading lawyer advertising designed to both terrify and entice the public, as well as the advent of litigation-driven, junk science. Fortunately, defendants can try to winnow down these lawsuits through a Lone Pine order. This article discusses the history of Lone Pine orders, including recent cases in which they have been utilized.

"Of all the trees we could've hit, we had to get one that hits back."

– J.K. Rowling

THE HISTORY AND PURPOSE OF LONE PINE ORDERS

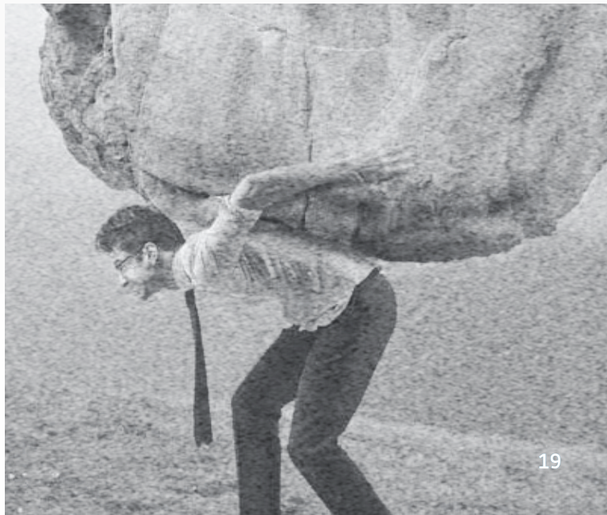
Some courts, often in toxic tort cases with massive numbers of plaintiffs (and defendants), have utilized a procedure referred to as a *Lone Pine* order to require the plaintiffs to provide basic facts in the form of expert reports early in the case—or run the risk of dismissal.[1] This concept originated from a New Jersey case, *Lore v. Lone Pine Corp.*,[2] which involved property damage and personal injury claims arising out of exposure to polluted waters from the Lone Pine Landfill. Plaintiffs sued more than 400 defendants and, to streamline the case, the court entered a case management order requiring plaintiffs to prove certain facts early in the case, including proof of causation of injury. Plaintiffs were ordered to provide (1) facts establishing their exposure to alleged toxic substances from the site and (2) reports from treating physicians or other experts to support injury and causation.[3]

Lone Pine orders are designed to identify and cull potentially meritless claims and streamline litigation in the mass tort environment.[4] Courts have increasingly recognized 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."[5] The propriety of entering a *Lone Pine* order usually involves the following factors: (1) posture of the action, (2) the "peculiar case management needs presented," (3) external agency decisions, (4) availability of other procedures provided by federal rules or statutes, and (5) the type of injury alleged by the plaintiffs and its cause.[6]

Application of these factors reveals some trends. For instance, courts have held that *Lone Pine* orders should not be implemented before the complaint has been found to be legally sufficient.[7] Courts have also determined that *Lone Pine* orders are not suitable at early stages of the case where no discovery has taken place.[8] In contrast, *Lone Pine* orders are best suited where the case involves a large number of plaintiffs and/or defendants.[9] *Lone Pine* orders are also appropriate if a governmental agency has determined that "causation is unlikely and the risk of injury is small."[10]

Lone Pine case management orders are a means to improve efficiency, especially where there is a critical question about "missing links" in causation. Nevertheless, *Lone Pine* orders have been criticized because they give the court "the means to ignore existing procedural rules and safeguards."[11] The main safeguard implicated with *Lone Pine* orders is the similarity of the order to summary judgment, "albeit without the safeguards that the Civil Rules of Procedure supply."[12] Some courts have cautioned that *Lone Pine* orders "should not be used as (or become) the platforms for pseudo-summary judgment motions" and that they "might become the practical equivalent of a heightened, court-imposed quasi-pleading standard, something the Supreme Court has frowned on."[13] But this view overlooks the unwieldy nature of mass torts and the ability of meritless claims to lurk in the shadows. And the likelihood of such meritless claims impacts the entire litigation, including the possibility of settlement.

Courts continue to use *Lone Pine* orders as a means to weed out meritless cases and to ensure the orderly progression of mass tort dockets.



Such pitfalls have even caused some plaintiff's lawyers to recognize the need to fashion some process to establish claims early in the litigation:

> In other situations, at the start of massive litigation, if a court views the claims with suspicion or if the defendant has brought concerns to the attention of the court, the court can rightly consider various devices to force plaintiffs to lay more of their cards on the table. This need not be a full-blown *Lone Pine* order requiring individual expert reports. As tailored to the situation at hand, it might require only that all medical records be turned over, showing proof of exposure and injury; that more comprehensive interrogatories be required; or that the defendant be allowed to undertake selective medical examinations of claimants.[14]

While defendants would usually prefer a *Lone Pine* order mandating fulsome disclosure of information along with expert reports, even something less than a "full-blown" *Lone Pine* order can be instrumental in moving the litigation forward as it would require plaintiffs to produce at least some core information that is necessary to evaluate whether they are proper plaintiffs and the viability of their claims.[15]

In today's litigation climate, *Lone Pine* orders are an especially valuable tool in mass tort cases where causation is questionable or where plaintiffs engage in delay tactics.

A RECENT EXAMPLE OF LONE PINE ORDERS

Courts continue to use *Lone Pine* orders as a means to weed out meritless cases and to ensure the orderly progression of mass tort dockets. A recent example of this is found in *In Re: Zimmer Nexgen Knee Implant Products Liability Litigation*.[16] Plaintiffs dismissed fifteen bellwether cases. Then when the court learned in early June that two more bellwether cases set for trial either would not proceed or would not address the plaintiff's central theory of liability, the court ordered the parties to negotiate the terms of a *Lone Pine* order – over plaintiff's "vehement" objection. The resulting *Lone Pine* order entered in late June noted the need for additional information from plaintiffs if the cases were to be fully resolved by the end of 2017, as the Court intended. In order to ensure that certain cases[17] "have sufficient merit to proceed to trial," plaintiffs were ordered to provide an Expert Declaration supporting any of the three main defect theories that they intend to pursue at trial. Plaintiffs that fail to meet this requirement will either be prohibited from pursuing certain liability theories at trial or will have their cases dismissed.

CONCLUSION

Lone Pine orders can be tailored to fit the particular needs of any litigation. In today's litigation climate, *Lone Pine* orders are an especially valuable tool in mass tort cases where causation is questionable or where plaintiffs engage in delay tactics. Judges should take a more positive view of these orders in order to control their mass tort dockets and to make settlement a more reasonable possibility. ■

1 *See, e.g., In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008).

2 *Lore v. Lone Pine Corp.*, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986)

3 *See, e.g., In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 250 n.1 (S.D. W.Va. 2010) (explaining *Lone Pine*).

4 *In re Vioxx*, 557 F. Supp. 2d at 743; *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000).

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

6 *In re Digitek*, 264 F.R.D. at 256.

7 *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1168 (11th Cir. 2014).

8 *See In re Vioxx*, 557 F. Supp. at 744; *Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828, 834 (9th Cir. 2011); *Adinolfe* 768 F.3d at 1168.

9 *See Avila*, 633 F.3d at 834; *Acuna*, 200 F.3d at 340 (approving use of a *Lone Pine* order in case involving 1600 plaintiffs and more than 100 defendants for injuries occurring over a span of nearly 40 years).

10 *See In re Digitek*, 264 F.R.D. at 254.

11 *See In re Digitek*, 264 F.R.D. at 257.

12 *Id.*

13 *Adinolfe* 768 F.3d at 1168.

14 Paul Rheingold & Laura Pitter, *Lone Pine Orders: An Abused Remedy?*, Mass Torts, Vol. 8, No. 1, Fall 2009, at 1, 19.

15 *See, e.g., Arias v. DynCorp*, 752 F.3d 1011, 1015-16 (D.D.C. 2014) (dismissal was appropriate when plaintiffs failed to comply with the *Lone Pine* order by filling out questionnaires regarding their claims and damages); *Bilal v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, 499 Fed. Appx. 362 (5th Cir. 2012) (dismissal was appropriate where defendant failed to comply with the *Lone Pine* order by providing information concerning his injuries and their relation to the product).

16 *In Re: Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, No. 1:11-cv-05468 (N.D. Il., June 24, 2016).

17 Cases were divided *into* "Track One" and "Track Two." The *Lone Pine* ordered applied to "Track One" cases.

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