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Lone Pine Order Forces Plaintiffs to Ante Up

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Last week, the court in *In re: Fosamax Products Liability Litigation* granted Defendant Merck & Co.'s motion for a *Lone Pine* order. No. 06 MD 1789 (S.D.N.Y. Nov. 20, 2012). *Lone Pine* orders are valuable tools in defending mass tort and product liability litigation, forcing each plaintiff to demonstrate evidence of scientific proof of their claim before their claim is allowed to progress.

Lone Pine orders originate from a 1986 New Jersey state court case, *Lore v. Lone Pine Corporation*, No. L-33606-85 (N.J. Sup. Ct. Law Div.) . There, the court issued a case management order requiring plaintiffs to provide expert reports supporting a causal link between their claimed injuries and exposure to defendant's landfill. *See Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Sup. Ct. Law Div. Nov. 18, 1986) (dismissing plaintiffs' cases where they had failed to provide adequate expert evidence for their claims).

Federal courts have returned repeatedly to this type of case management order, citing FRCP 16(c)(2)(L) for the authority to do so. The rule gives courts broad authority 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."

This case management authority has been particularly useful in toxic tort litigation as a way of handling complex issues such as identifying the substance that allegedly caused harm and providing evidence that a causal link exists. *See, e.g., Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000).

Lone Pine orders were slower to catch on in pharmaceutical product liability cases, where the identity of the allegedly harmful substance is not generally at issue. However, causation in pharmaceutical litigation is often fraught with uncertainty, and MDL courts have been issuing *Lone Pine* orders with increasing frequency as a tool to untangle the issues surrounding causation. *See, e.g.*, *In re Avandia Mktg*., *Sales Practices and Prods. Liab. Litig*., MDL No. 1871, No. 2007-MD-1871 (E. D. Pa. Nov. 15, 2010) (entering *Lone Pine* order); *In re Bextra and Celebrex Mktg. Sales Practices and Prod. Liab. Litig*., MDL No. 1699, No. M:05-CV-01699-CRB (N.D. Cal. Aug. 1, 2008) (entering *Lone Pine* order); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 557 F. Supp. 2d 741 (E.D. La. 2008) (affirming *Lone Pine* order entered Nov. 9, 2007); *In re Rezulin Prods. Liab. Litig*., MDL No. 1348, No. 00 Civ. 2843 (LAK), 2005 WL 1105067 (S.D.N.Y. May 9, 2005) (entering *Lone Pine* order); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431, (D. Minn. Feb. 8, 2006) (entering *Lone Pine* order).

Last week's opinion in the *Fosamax* MDL was the latest of these pharmaceutical MDL orders, issued in response to Merck's third *Lone Pine* request. The court denied Merck's first two requests, which had asked for an order applying only to plaintiffs alleging injuries other than osteonecrosis of the jaw ("ONJ"). But the court granted Merck's third request, albeit with some limitations. Most notably, though Merck had asked for the order to apply to all plaintiffs, the court stuck to the confines of Merck's earlier requests and limited the *Lone Pine* order to plaintiffs not alleging osteonecrosis of the jaw.

The court identified five factors relevant to determining whether a *Lone Pine* order should issue: (1) the status of discovery, (2) the need for case management tools, (3) external agency decisions, (4) the availability of other case management procedures, and (5) the nature of injury and its cause.

Several factors convinced the *Fosamax* court that a *Lone Pine* order was appropriate here. First, Merck had already produced over 11 million pages of documents and submitted to 24 corporate depositions, and the parties had conducted extensive fact discovery in 12 cases. A *Lone Pine* order would "impose a minimal burden on plaintiffs, as it merely asks them to produce information they should already have."

Second, the court suspected that "spurious or meritless cases are lurking" in the docket. More than 50 percent of cases set for trial and 31 percent of cases selected for discovery had been dismissed. The parties were wasting time and money on case-specific discovery, only to result in dismissals.

Third, the *Lone Pine* order would boost efficiency whether the individual cases were settled or remanded. Meritless cases would not be compensated in settlement, and only viable cases would be remanded to the transferor courts.

The order requires each plaintiff to submit a Rule 26(a)(2) expert report, signed and *sworn to*. The expert report must contain a number of statements, including "[w]hether the expert believes to a reasonable degree of medical certainty that Fosamax caused Plaintiff's alleged injury."

The *Fosamax* order suggests some strategy for defendants seeking *Lone Pine* orders. First, it makes clear that defendants can make multiple requests for a *Lone Pine* order, since the analysis is highly dependent on the posture of the case. As the case evolves, so will the argument for a *Lone Pine* order. Second, defendants should take care to be consistent with their *Lone Pine* requests. If the proposed order changes, defendants should be sure to provide sound reasoning for the change. Third, the *Fosamax* order supports the position that *Lone Pine* orders can increase efficiency, regardless of whether the cases are headed toward a global settlement or toward remand and trial. Finally, *Lone Pine* orders continue to be a powerful tool whose utility is increasingly understood and appreciated by the courts. In fact, there is no reason why these orders should be limited to mass torts or multidistrict litigation. Indeed, defendants may be able to avoid burdensome litigation and discovery by seeking *Lone Pine* orders in any cases where plaintiffs have made broad assertions regarding causation that are unlikely to withstand scrutiny.

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