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## Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation

John T. Burnett

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# Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation

## **Cover Page Footnote**

The author would like to thank Dr. Anthony Conte for his good advice.

# LONE PINE ORDERS: A WOLF IN SHEEP'S CLOTHING FOR ENVIRONMENTAL AND TOXIC TORT LITIGATION

JOHN T. BURNETT\*

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## I. INTRODUCTION

Imagine that you live twenty miles away from a chemical waste dump that receives and stores various types of toxic waste from around the country. Your home is situated in the county and you are unable to get your drinking water from the city water service. Therefore, you have to draw your water from an underground aquifer that feeds your well.

Now imagine that after about a year of drinking from your well, you and your family begin to experience nausea, headaches, rashes and other unexplained maladies. Concerned that your drinking water may be causing your unexplained symptoms, you have your water tested and find that it contains several industrial toxins not typically found in the natural environment. After seeking medical

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attention, your family doctor tells you that your symptoms are consistent with several possible causes, including the ingestion of various toxic chemicals. The doctor is not certain, but believes that chemical exposure has caused your condition. She refers you for further testing and suggests that you speak to an attorney.

Following the doctor's advice, you tell your story to an attorney. The attorney, concerned with bringing any potential causes of action before the statute of limitations runs on your claims, does as thorough an investigation as possible in the short time that he has. The attorney determines that the chemicals found in your water are also present at the toxic waste site. He then talks to a few experts and finds that the experts' initial opinions are that chemicals from the waste plant have leaked into the groundwater and are the likely cause of your injuries. With a good faith belief that the evidence found during the attorney's investigation points to the dump as the culprit, you file suit against the chemical waste dump to recover for your injuries.

Thus far, this hypothetical situation seems to be nothing more than an unremarkable toxic tort case. However, when a *Lone Pine*<sup>1</sup> order is added to the hypothetical, this garden-variety toxic tort case is transformed into an issue of great concern and controversy.

To continue with the hypothetical from above, now imagine that a case management conference is called soon after the lawsuit is filed. The judge presiding over the case is leery of toxic tort plaintiffs due to her past experience with frivolous toxic tort claims. At the case management conference, the judge issues a *Lone Pine* case management order requiring you to file affidavits that establish the following:

1. The identity and amount of each chemical to which you were exposed;
2. The precise disease or illness from which you suffer; and
3. Evidence, to a reasonable degree of medical certainty, that exposure to the defendant's chemicals caused the injuries in question.<sup>2</sup>

Given the inherent difficulty with complying with such an order at a *pre-discovery* stage of a toxic tort case,<sup>3</sup> your attorney protests to

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1. A *Lone Pine* order is an order similar to the one issued in *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. Nov. 18, 1986). The particular details of how *Lone Pine* orders operate in toxic tort litigation will be discussed later in this Note.

2. This is an example of an actual *Lone Pine*-type order issued in *Hembree v. Litton Indus., Inc.*, No. B-C-90-6, at 9.18 (W.D.N.C. Aug. 16, 1990). Although not all *Lone Pine* orders are exactly alike, the one issued in *Hembree* is illustrative of the typical elements of a *Lone Pine*-type order. See discussion *infra* Part II.A.

the judge that the *Lone Pine* order is no more than a court initiated, premature summary judgment motion. Despite your attorney's protest, the court informs you that failure to comply with the order will result in dismissal of the lawsuit with prejudice.

With such a burden placed on you at so early a stage of the litigation, the conclusion of this hypothetical is evident. You are unable to provide cause in fact causation since the only evidence available is statistical epidemiological studies. You are also not able to establish exactly which chemical caused your illness since several different chemicals, all capable of causing your injuries, were mixed together in a chemical soup at the defendant's waste storage facility. In fact, with the long latency periods of many diseases caused by toxic exposure, you are not even sure what disease or illness is causing your symptoms.<sup>4</sup> As a result, the trial judge, dismisses your case, not affording you the protections provided for in a summary judgment proceeding.<sup>5</sup>

At first blush, this hypothetical may seem far-fetched and unrealistic. However, if you are a plaintiff in a jurisdiction that uses *Lone Pine*-type case management orders, this hypothetical could be a reality to the litigation of a toxic tort case.

Part II of this Note will explain the *Lone Pine* order by examining its elements, factors that prompt its use, and how the courts use *Lone Pine* orders. Part II will also discuss and analyze how both federal and state courts have used the *Lone Pine* order to deal with environmental and toxic tort cases. Part III will introduce the basic features of toxic tort cases which distinguish them from the average tort litigation and will discuss how these differences make *Lone Pine* orders nearly impossible to fulfill in most toxic tort actions. Part IV will explore the controversy surrounding the use of *Lone Pine* orders, discussing the issues on each side of the controversy. Part V will propose that *Lone Pine* orders should not be used and that the existing legal system can deal with the problems that the *Lone Pine* order is thought to remedy. Finally, Part VI will conclude this Note.

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3. See discussion *infra* Part III.B.

4. For example, symptoms from exposure to asbestos can often take several years to manifest and can lead to progressive stages of disease. See *Celotex Corp. v. Copeland*, 471 So. 2d 533, 536 (Fla. 1985).

5. For example, having evidence viewed in a light most favorable to the non-moving party and requiring the moving party to shift its evidentiary burden. See FED. R. CIV. P. 56.

## II. THE LONE PINE ORDER

The *Lone Pine* order gets its name from the case of *Lore v. Lone Pine Corp.*<sup>6</sup> In *Lore*, 464 defendants initiated a suit against the Lone Pine landfill in New Jersey for loss of property value and personal injury caused by pollution from the Lone Pine site.<sup>7</sup> After a case management conference on January 31, 1986, the plaintiffs were ordered to submit the following to the court on or before June 1, 1986:

1. The facts of each individual plaintiff's exposure to alleged toxic substances at or from the Lone Pine Landfill;
2. Reports of treating physicians and medical or other experts, supporting each individual plaintiff's claim of injury and causation by substances from the Lone Pine landfill; and
3. 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 its causes.<sup>8</sup>

The court considered these facts and information essential to support the plaintiff's claims.<sup>9</sup>

In response to the court's order, the *Lore* plaintiffs filed a letter from a real estate expert, and a list of several illnesses that they were experiencing.<sup>10</sup> However, the plaintiffs' real estate expert stated that he only had thirty days to review the plaintiffs' claims and that he was unable to render an opinion without further investigation.<sup>11</sup> Further, the plaintiffs' doctors and treating physicians were unwilling to commit to a causal connection between the plaintiffs' symptoms and toxic exposure.<sup>12</sup>

The court found the plaintiffs' response to the case management order to be "unbelievable and unreal."<sup>13</sup> The court stated that the plaintiffs evidence of property diminution and personal injuries did not support a valid cause of action.<sup>14</sup> Therefore, the court dismissed the action with prejudice stating 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,

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6. No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. Nov. 18, 1986).

7. *See id.* at \*2.

8. *See id.* at \*3-4.

9. *See id.* at \*4.

10. *See id.* at \*5-6.

11. *See id.* at \*5.

12. *See id.* at \*7.

13. *Id.* at \*6.

14. *See id.* at \*7.

property damage and proximate cause."<sup>15</sup> In justifying the dismissal of the plaintiffs' case, the court relied on its discretionary authority to dismiss cases due to lack of compliance with discovery orders and other court rules.<sup>16</sup>

#### A. Elements of the Lone Pine Order

As seen in the original *Lone Pine* order, the fundamental elements that plaintiffs must show are (1) the identity of the chemical or substance causing the injury; (2) the specific disease, illness, or injury caused by the substance; and (3) a causal link between exposure to the substance in question and the plaintiff's injury.<sup>17</sup> As a general rule, these three requirements are present in most *Lone Pine* orders.<sup>18</sup> In addition to these three requirements, some *Lone Pine* orders require plaintiffs to provide the amount of the substance or chemical to which they were exposed,<sup>19</sup> expert medical opinions that rule out other causes,<sup>20</sup> and specific dates of exposure to the toxic substance in question.<sup>21</sup>

Typically, *Lone Pine* orders are issued as case management orders under a court's authority to govern and manage the trial process.<sup>22</sup> However, courts that use *Lone Pine* orders typically assert an array of various rule authorities and procedural devices which, arguably, give them the authority to issues such orders.<sup>23</sup>

In theory, *Lone Pine* orders can be issued at any time after a court has held a case management conference.<sup>24</sup> Under a court's case management authority, such an order could be issued well before any substantial discovery has taken place.<sup>25</sup> However, most courts will probably give plaintiffs some time to conduct discovery before issuing a *Lone Pine* order since appellate courts are more likely to

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15. *Id.* at \*9.

16. *See id.* at \*7-8.

17. *See* discussion *supra* Part I.

18. *See, e.g.,* *Hembree v. Litton Indus., Inc.*, No. B-C-90-6, at 9.18 (W.D.N.C. Aug. 16, 1990); *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, at \*4 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993).

19. *See Hembree*, No. B-C-90-6, at 9.18.

20. *See Grant*, 1993 WL 146634, at \*4.

21. *See Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1372 (Cal. Ct. App. 1992).

22. *See id.* at 1376, 1380.

23. *See id.*

24. *See* FED. R. CIV. P. 16(b).

25. *See id.*

affirm the order if the plaintiff has been given adequate time to propound and receive discovery.<sup>26</sup>

Because the authority to issue *Lone Pine* orders typically does not come from a specific source, but instead is interpreted through a penumbra of rules and other authorities,<sup>27</sup> each *Lone Pine* order may be different due to varying jurisdictional rules of civil procedure and various state statutes. However, the reasons that *Lone Pine* orders are issued are usually quite similar throughout jurisdictions.<sup>28</sup>

### B. Factors that Prompt Courts to Issue *Lone Pine* Orders

In the original *Lone Pine* order in *Lore v. Lone Pine Corp.*, the court gave several reasons to justify the need for such an order. Among these reasons were:

1. The number of defendants involved in the suit;<sup>29</sup>
2. A report issued by the Environmental Protection Agency that was contrary to plaintiffs' claims;<sup>30</sup>
3. Lack of notice of the substance of plaintiffs' claims to the defendants;<sup>31</sup>
4. The expense and complexity of the litigation;<sup>32</sup> and
5. The fear that the plaintiffs had brought their cause of action to intimidate the defendants into settling.<sup>33</sup>

Typically, however, the reason most often given for issuing *Lone Pine* orders is that they are necessary to protect defendants from the undue and unwarranted expense of litigating complex toxic tort issues.<sup>34</sup>

26. See *Cottle*, 3 Cal. App. 4th at 1380 (reviewing the issuance of a *Lone Pine* order, the appellate court stated "[h]ad the order been made earlier in the proceedings, we would be more inclined to hold that the order was an abuse of the court's discretion").

27. See *id.* (justifying the issuance of a *Lone Pine* order by relying on the court's case management authority, the court's equitable powers, the court's power to create new procedural rules, and a county trial reduction program).

28. See discussion *infra* Part II.B.

29. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*2 (N.J. Sup. Ct. Nov. 18, 1986).

30. See *id.* at \*6.

31. See *id.* at \*7.

32. See *id.* at \*9.

33. See *id.* at \*10.

34. See, e.g., *Lore*, 1986 N.J. Super. LEXIS 1626, at \*9 (stating "[w]ith the hundreds of thousands of dollars expended to date in this case . . . [t]his court is not willing to continue the instant action with the hope that the defendants eventually will capitulate"); *Hembree v. Litton Indus., Inc.* No. B-C-90-6, at 9.16 (W.D.N.C. Aug. 16, 1990) (stating "[W]hile placing such a burden on plaintiffs is exceptional . . . Litton [Industries], Inc. has already expended enormous resources defending [a related] matter."); *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, at \*1 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993) (stating "[i]n light of the magnitude of this litigation the Court finds that entry of the following case management order is appropriate.")



Whatever reasons courts give for issuing *Lone Pine* orders, three consistent factors seem to subconsciously motivate courts to issue such orders. These factors are (1) the complexity of toxic tort actions; (2) the inordinate amount of repeat players;<sup>35</sup> and (3) the departure of toxic tort cases from normal civil litigation.<sup>36</sup>

### 1. *The Complexity of Toxic Tort Actions*

Labeling toxic tort cases as disfavored among courts, is no stretch of the imagination. Toxic tort cases can take several years to litigate, and a jury trial alone can often take up to nine months to complete.<sup>37</sup> As a result, a judge with little patience and a full docket is probably not thrilled to receive a toxic tort case. This time factor alone can be enough to move a judge toward issuing a *Lone Pine* order whether one is warranted or not.

Similarly, the sheer financial magnitude of toxic tort cases can be overwhelming. Some toxic tort cases can create attorney's fees in the range of millions of dollars.<sup>38</sup> Also, the total amount in controversy in some toxic tort cases can be in excess of a billion dollars.<sup>39</sup> With so much money at stake, courts are on guard for plaintiffs who bring cases with the hope that the defendants will settle the case to avoid further delay and expense.<sup>40</sup> If a judge suspects that such an improper motive is afoot, a *Lone Pine* order is an easy, albeit not always proper, way to expose the motive.

Finally, the complexities of the issues in some toxic tort cases virtually require the court and the parties to become semi-experts in toxicology, epidemiology, statistics, and medicine. An army of experts may be necessary just to explain such concepts as relative risk, multiple regression statistics, dose-response relationships, and other scientific issues to the jury and the court.<sup>41</sup> Thus, judges may be wary of dealing with such complex information and wish to avoid it by issuing a *Lone Pine* order early in the litigation. Although not all

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35. See discussion *infra* Part II.B.2.

36. See discussion *infra* Part II.B.1-3.

37. See *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1547 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992) (stating that the full jury trial would take six to nine months to complete).

38. See *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 151 (2d Cir. 1987) (stating that continued litigation would cost millions of dollars in attorney's fees).

39. See *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, at \*1 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993) (stating the total amount in controversy, including punitive damages, exceeded \$1.3 billion).

40. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*10 (N.J. Sup. Ct. Nov. 18, 1986).

41. Detailed explanations of the scientific terms used here are beyond the purview of this Note; however, they will be briefly explained in Part III.

judges issue unwarranted *Lone Pine* orders to avoid the complexity of toxic tort cases, these various factors probably play a significant role in the decision making process of many judges.

## 2. Repeat Players

Another factor that seems to contribute to a judge's willingness to issue *Lone Pine* orders is the "repeat player."<sup>42</sup> In toxic tort litigation, the same attorney and same defendant may appear before a court several times litigating essentially the same case.<sup>43</sup> When courts see the same faces over and over, they may come to expect higher standards from the repeat plaintiff's attorneys and begin to be somewhat sympathetic with the repeat defendants.<sup>44</sup>

For example, in the case of *In re Love Canal Actions*,<sup>45</sup> the plaintiffs' attorney had been involved in similar Love Canal cases for almost ten years.<sup>46</sup> Due to this fact, the court stated that "having been involved in these Love Canal cases for nearly 10 years, with the knowledge that expert's opinion is a necessary concomitant to proof of causation, [plaintiffs' counsel] cannot now claim prejudice or hardship if such evidence of causation must be produced prior to the time of trial."<sup>47</sup> Although the *Love Canal* court's statement may seem justified given the circumstances of that case, the court's generalizations regarding proof and evidence of causation can create a slippery slope. Since no two toxic tort cases are exactly alike, expecting a plaintiff not to be prejudiced by *Lone Pine* orders simply because the plaintiff's attorney has litigated similar cases in the past is not entirely reasonable.

Courts may also be prompted to issue unwarranted *Lone Pine* orders because they feel somewhat sympathetic for a repeat defendant. In *Hembree v. Litton Industries, Inc.*,<sup>48</sup> the court justified issuing a *Lone Pine* order because Litton Industries, Inc. was litigating a related case in the same court.<sup>49</sup> In justifying its order, the court stated:

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42. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 473 (1986). Marcus discusses how repeat players can often prompt courts to hold the repeat players to higher pleading standards due to their litigious nature. See *id.* at 473-74.

43. See *infra* text accompanying note 47.

44. See *id.*

45. 547 N.Y.S.2d 174 (N.Y. Sup. Ct. 1989).

46. See *id.* at 177.

47. *Id.*

48. No. B-C-90-6 (W.D.N.C. Aug. 16, 1990).

49. See *id.* at 9.16.

[W]hile placing such a burden on plaintiffs is exceptional, the history of related litigation, involving the same counsel, mandates implementation of procedural safeguards. Litton [Industries], Inc., has already expended enormous resources defending [the related case]. While this court does not eschew work it has been delegated, its resources are finite and have, at times, been unduly taxed through the admitted failure of plaintiffs' counsel to conduct adequate prefiling investigation in companion litigation.<sup>50</sup>

Similarly, in *Atwood v. Warner Electric Brake & Clutch Co.*,<sup>51</sup> where approximately 120 plaintiffs sued Warner Electric Brake & Clutch Company for damages sustained by exposure to trichlorethylene, the court consolidated these independent cases for the purposes of discovery.<sup>52</sup> Due to the "tremendous task discovery posed in the case and the delays which ensued,"<sup>53</sup> the court entered an order requiring the plaintiffs to certify that each plaintiff had been examined by a medical professional who evaluated the plaintiff's claim; that each plaintiff had identified all of his or her medical or personal injuries caused by defendant's activity since any non-identified injury would be barred; and that each plaintiff was ready to be deposed.<sup>54</sup> As a result of the court's order, several of the plaintiffs' claims were dismissed with prejudice for failure to provide an adequate response.<sup>55</sup>

In upholding the trial court's dismissal of some of the plaintiffs' claims, the appellate court stated that "[i]n a case such as this, where the issues are as numerous and complex as the parties are plentiful, it is important to grant the trial court flexibility in managing the discovery process."<sup>56</sup> Although the appellate court recognized that typically a sanction as drastic as dismissal is only used when a party willfully disregards a court's discovery order, it justified the trial court's actions by finding that "[w]hile it is true that the record does not reveal plaintiffs acted in willful disregard of the trial court's authority, considering the complex nature of the case and the large number of parties involved" the trial court did not abuse its discretion.<sup>57</sup> Such justification makes one wonder whether or not the

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50. *Id.*

51. 605 N.E.2d 1032 (Ill. App. 2d 1992).

52. *See id.* at 1034.

53. *Id.* at 1035.

54. *See id.* at 1035-36.

55. *See id.* at 1036.

56. *Id.* at 1037.

57. *Id.* at 1038.

appellate court would have been so eager to uphold a dismissal if the defendant had only been sued one time rather than 120 times.<sup>58</sup>

### 3. *Departure from Normal Civil Litigation*

Another factor common to all toxic tort cases is the departure of such actions from the norms of civil litigation. When compared to a typical slip-and-fall tort case, toxic cases involve different and more difficult standards of causation; require expensive and highly technical expert evidence; and require the expenditure of mass amounts of resources and time from all parties involved, including the court.<sup>59</sup>

Furthermore, toxic cases often involve hundreds of plaintiffs who have several different individual causes of action.<sup>60</sup> For example, a single incidence of a toxic substance leaking into an aquifer that supplies water for a sub-division of 200 families could potentially lead to 200 suits for trespass, public or private nuisance, strict liability, and actions under CERCLA.<sup>61</sup>

Additionally, in some toxic tort cases, the plaintiff may not even know the identity of the defendant. A toxic waste dump may receive waste from several defendants. All of this waste may be stored in a single location with no indication of whose waste belongs to whom. Also, two types of waste may combine to form a single toxic substance. Thus, a plaintiff may have to sue everyone who has contributed waste to the dump to weed out the real defendant by using discovery devices such as depositions and requests for document production.

With all of the troubling features characteristic of these toxic tort cases, it is not surprising that courts have adopted *Lone Pine* orders as a way to rid themselves of these troublesome civil cases. Under the color of their discretionary powers, courts may dispense with evaluating such cases under a summary judgment or a sanctions proceeding and thus avoid dealing with the complex issues of a toxic tort case.<sup>62</sup>

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58. See *supra* text accompanying note 52.

59. See discussion *infra* Part III.

60. See, e.g., *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1371 (Cal. Ct. App. 1992) (stating that approximately 175 owners and renters of residential property sued the defendants); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032, 1034 (Ill. App.2d 1992) (stating that approximately 120 separate plaintiffs had brought suit against the defendant).

61. Comprehensive Environmental Response, Compensation and Liability Act, 15 U.S.C.A. § 2601 et seq. (1998). This statute holds responsible parties liable for the cost of cleaning up hazardous waste sites.

62. See discussion *infra* Part II.C.

### C. How Courts Use Lone Pine Orders

The specific motivation and reasoning prompting courts to issue *Lone Pine* orders varies from case to case. Courts also use *Lone Pine* orders in a variety of conditions and circumstances that also vary from case to case.

Most *Lone Pine* orders are issued pursuant to a court's case management authority and are styled as case management orders.<sup>63</sup> Since the courts typically have wide discretion in case management issues,<sup>64</sup> the courts use that authority to justify the issuance of *Lone Pine* orders. Appellate courts usually afford trial courts plenary power in their case management orders and will rarely overturn them absent a clear abuse of discretion.<sup>65</sup> Therefore, *Lone Pine* orders issued as a case management order have a presumption of validity for all practical purposes.

Another popular way that courts issue *Lone Pine* orders is through their authority to manage discovery.<sup>66</sup> Much like its case management authority, courts are typically given wide latitude when dealing with the management of discovery,<sup>67</sup> especially when the case before the court involves multiple parties or complex issues.<sup>68</sup> Under the federal discovery rules and state rules crafted in their image, courts even have the power to dismiss an action for failure to comply with a discovery order.<sup>69</sup> Naturally, if a court uses its discovery management power to issue a *Lone Pine*-type order, the order must relate somehow to discovery. However, this is usually not a problem for a court because defendants will almost always propound discovery related to causation, identification of the toxic substance, and the extent of the damages.<sup>70</sup> Thus, once the defendants have opened the door to discovery of the issues most

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63. See, e.g., *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626 (N.J. Sup. Ct. Nov. 18, 1986); *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1380 (Cal. Ct. App. 1992); *Hembree v. Litton Indus., Inc.*, No. B-C-90-6 (W.D.N.C. Aug. 16, 1990).

64. See FED. R. CIV. P. 16(c)(16) (stating "At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . such other matters as may facilitate the just, speedy, and inexpensive disposition of the action").

65. See *Youngworth v. Stark*, 232 Cal. App. 3d 395, 401 (Cal. Ct. App. 1991) (stating that a court's case management discretion will not be disturbed unless it was a clear abuse or a miscarriage of justice).

66. See, e.g., *In re Love Canal Actions*, 547 N.Y.S. 2d 174 (N.Y. Sup. Ct. 1989); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032 (Ill. App.2d 1992).

67. See, e.g., *Amoco Oil Co. v. Segall*, 455 N.E.2d 876, 883 (Ill. App. Ct. 1983) (stating that trial courts have broad powers to supervise the discovery process); *Mistler v. Mancini*, 443 N.E.2d 1125, 1128 (Ill. App. Ct. 1982) (stating that discovery rules were designed to be flexible and adaptable).

68. See *supra* text accompanying note 57.

69. See FED. R. CIV. P. 37(b)(2)(C).

70. See *Atwood*, 605 N.E.2d at 1037; *In re Love Canal Actions*, 547 N.Y.S. 2d at 176.

commonly addressed in *Lone Pine* orders, the trial court has the ability to issue such orders under its discovery management powers.

A third way the courts justify using *Lone Pine* orders is the "shotgun approach."<sup>71</sup> With this approach, courts cite every authority that even remotely gives them the ability to issue a *Lone Pine*-type order.<sup>72</sup> For example, in *Hembree v. Litton Industries, Inc.*,<sup>73</sup> the court based its authority to issue a *Lone Pine* order on Rules 1, 11 and 16 of the Federal Rules of Civil Procedure.<sup>74</sup> In doing so, the court reasoned that responding to a *Lone Pine* order would be a minimal burden "inasmuch as Rule 11, Federal Rules of Civil Procedure provides: 'The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information and belief formed after reasonable inquiry is well grounded in fact and is warranted by existing law.'"<sup>75</sup> The court also found that Rule 1's provision that aspires for a "just, speedy, and inexpensive determination of every action," and Rule 16's allowance of the court to "take early control of the litigation" furthered its power to issue a *Lone Pine* case management order.<sup>76</sup>

Another case that typifies the shotgun justification approach is *Cottle v. Superior Court*.<sup>77</sup> In affirming the issuance of a *Lone Pine* order by the trial court, the Court of Appeals for the Second District of California justified the order by relying on the lower court's case management authority given by the state rules of civil procedure; the court's equitable power to make rules for its own government; the court's power to create new rules in the absence of any previously established rules; the court's authority to exclude evidence from trials; and a county-initiated trial reduction program.<sup>78</sup>

### III. TOXIC TORT CASES AND THE *LONE PINE* ORDER

If compliance with a *Lone Pine*-type order in a normal tort case can be labeled as difficult, compliance with one in the typical toxic tort case can be deemed nearly impossible. Not only do toxic tort cases typically push the envelope in areas such as causation and

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71. The "shotgun approach" is the author's term used to describe a process by which a court expresses every possible justification to issue a *Lone Pine* order.

72. See, e.g., *Hembree v. Litton Indus., Inc.*, No. B-C-90-6 (W.D.N.C. Aug. 16, 1990); *Cottle v. Superior Court*, 3 Cal. App. 4th 1367 (Cal. Ct. App. 1992).

73. No. B-C-90-6 (W.D.N.C. Aug. 16, 1990).

74. See *id.* at 9.16-9.17.

75. *Id.* at 9.16.

76. *Id.* at 9.17-9.18.

77. 3 Cal. App. 4th 1367, 1380 (Cal. Ct. App. 1992).

78. See *id.* at 1376-79.

damages, but their unique qualities differentiate them from the average tort case.

### A. Features of a Typical Toxic Tort Case

A typical toxic tort case will have at least five major features that distinguish it from the average tort case.<sup>79</sup> Those five features are:

1. Multiple theories of recovery;
2. Long latency periods;
3. Unique causation issues;
4. An inordinate amount of expert scientific or medical testimony;
- and
5. An overlapping relationship with statutory environmental law.<sup>80</sup>

#### 1. Multiple Theories of Recovery

A single release of a toxic substance from a site may expose the site owner to claims for negligence, strict liability, trespass, both public and private nuisance, and potentially an action under CERCLA.<sup>81</sup> Thus, a single incident of toxic exposure may force a plaintiff to develop evidence to support several different types and levels of causation and damages. Although the typical tort case may also give rise to several different avenues of recovery, the toxic tort case seems inordinately fertile for multiple causes of action due to the serious nature of exposure to toxic substances.

For example, if a production plant emits a tremendous amount of noise, the plant owner may be held liable for a private nuisance for disturbing the residents of a nearby neighborhood.<sup>82</sup> Under these facts, the neighborhood residents could not maintain a strict liability, trespass, or negligence action in many jurisdictions. However, if the hypothetical plant emits chlorine gas instead of noise, then the same neighborhood residents may have causes of action for negligence due to physical symptoms, strict liability due to abnormally dangerous activity, and trespass due to the actual invasion of particulate matter.<sup>83</sup> The serious nature of most toxic torts inevitably produces a wide array of possible causes of action.

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79. See GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS, AND PROBLEMS 6-9 (1994).

80. See *id.*

81. See, e.g., *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1547 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992) (stating that plaintiffs had set forth numerous claims sounding in tort); *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 852, 856 (M.D.Pa. 1988) (stating that plaintiffs brought suit under strict liability, trespass, negligence, and nuisance).

82. See BOSTON, *supra* note 79, at 57.

83. See, e.g., *Renaud*, 749 F. Supp. at 1547; *Merry*, 684 F. Supp. at 856.

## 2. Long Latency Periods

Another feature of a toxic tort case that set it apart from a typical slip-and-fall-type tort are the long latency periods involved with toxic exposure injuries. A good description and explanation of the long latency characteristics of toxic tort injuries is as follows:

Environmental or toxic torts often involve injury or damage that remains undiscovered for years after the exposure or contamination. A shipyard worker's exposure to respirable asbestos fibers may result in asbestos-related disease only years later. An electroplating plant's contamination of its property, surrounding property, or subterranean aquifers may only be discovered when a successor owner of the property wishes to sell it years later. The Vietnam veteran or the agricultural worker exposed to a chemical herbicide may only be diagnosed with neurological disease or other illness many years thereafter.

Because environmental and toxic tort claims almost always involve injury or damage that has a long latency period before the harm manifests itself, toxic torts are distinguishable from the sporadic accident cases that were the staple of the basic torts course.<sup>84</sup>

The long latency period distinguishes toxic torts from the average tort and gives rise to many problems such as the statute of limitations and other time-sensitive procedural matters.<sup>85</sup> Therefore, such a case can easily become a procedural nightmare for a court.

## 3. Unique Causation Issues

Using the traditional slip-and-fall tort as an example, causation is a relatively straightforward issue. A jury that hears such a case can simply ask, "But for the employee's failure to mop up water on the floor, would the plaintiff have fallen and injured herself?" However, in toxic tort cases, causation is rarely that simple. The foundation of most toxic tort causation is probabilistic evidence.<sup>86</sup> Therefore, in a judicial system that all but demands "but for" causation, the idea of deciding legal responsibility with probabilistic evidence may seem quite foreign or unfair to some judges or juries.

Two major causation questions must be determined in most toxic tort cases. First, is the toxic substance in question capable of causing the harm of which the plaintiff complains? Second, did that toxic substance actually cause the plaintiff's harm? These two questions

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84. BOSTON, *supra* note 79, at 7.

85. A more detailed discussion of these problems is found *infra* Part III.B.

86. See BOSTON, *supra* note 79, at 340.



are usually answered by the use of toxicology and epidemiology.<sup>87</sup> In fact, probabilistic evidence such as toxicology and epidemiology will sometimes be the only evidence of causation that a plaintiff can provide.<sup>88</sup>

A toxicologist usually examines how certain substances affect animals or cellular tissue.<sup>89</sup> The toxicologist will typically determine a dose-response relationship<sup>90</sup> with the toxic substance and the affect it has on the test subject.<sup>91</sup> The toxicologist then attempts to make an extrapolative model that can be compared to the human population.<sup>92</sup>

Epidemiology deals with human subjects, and epidemiological tests usually consist of either case control studies or cohort studies.<sup>93</sup> A case control study is where injured humans are compared with non-injured humans to establish commonalties within the injured group that are not present in the control group.<sup>94</sup> These commonalties can often point to the cause of the injury in question. A cohort study is where a group of humans who have been exposed to a toxic substance are compared prospectively with a group of non-exposed humans over time.<sup>95</sup> The epidemiologist then compares any abnormalities in the exposed group with the control group. The comparison is usually done by examining a relative risk factor, which shows the chance of the exposed group to contract a particular disease or injury in relation to any other non-exposed person.<sup>96</sup> Relative risk attempts to factor out any risk of contracting a given disease that may exist in the general population due to factors unassociated with the defendant's toxic substance.<sup>97</sup>

When dealing with causal relationships developed by such studies, other factors have to be considered before a solid causal link can be established. Factors such as the strength of the association,

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87. See *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 311 (5th Cir. 1989) (stating that scientific evidence such as epidemiology is the most useful and conclusive type of evidence in a toxic tort case).

88. See *BOSTON*, *supra* note 79, at 340.

89. See *id.* at 349.

90. "[A] response exhibits a dose-response relationship when a consistent, mathematical relationship describes the proportion of individuals responding for a given dosage interval for a given exposure period." Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181, 216 (1993).

91. See *BOSTON*, *supra* note 90 (containing an excellent discussion of toxicology and epidemiology).

92. See *BOSTON*, *supra* note 79, at 351.

93. See *id.* at 352.

94. See *id.* at 352-53.

95. See *id.*

96. See *id.* at 354.

97. See *id.*

consistency of the association, specificity, temporality, dose-response relationships, biological plausibility, and coherence should be considered when determining the veracity of epidemiological evidence.<sup>98</sup> Given that this brief description of toxicology and epidemiology could be confusing to the layperson, one can clearly see how toxic tort causation is distinguished from garden-variety causation.

Furthermore, causation in a toxic tort case may not be limited to one single incidence of causation.<sup>99</sup> Causation may exist in a sort of causal web or constellation of causes when dealing with exposure to a toxic substance, whether the injury is to land or to people. For example, an average smoker may have a one in fifty chance of developing lung cancer. If that smoker is exposed to asbestos fibers, then that chance may rise to a forty in fifty chance. If the smoker develops lung cancer, the cause could be the smoking, the asbestos fibers, or both. Determining the actual cause of the smoker's cancer may be almost impossible since it could have been the result of more than one factor.

*Stubbs v. City of Rochester* illustrates the difficulty of pinpointing an exact cause of injuries due to toxic substances.<sup>100</sup> In *Stubbs*, the plaintiff brought a suit against the city claiming that the city water system had been contaminated with sewage and had caused the plaintiff to contract typhoid fever.<sup>101</sup> In defense of the city, an expert witness testified that there were at least eight other plausible causes of typhoid fever that could have caused the plaintiff's illness.<sup>102</sup> These causes included impure raw fruits and vegetables, infected milk, certain flies, and contact with an infected person.<sup>103</sup> Proving that the city water was the proximate cause of the plaintiff's injuries was a difficult task, which resulted in the plaintiff appealing the lower court's verdict against him.<sup>104</sup>

#### 4. *The Role of Scientific and Medical Testimony*

As noted above, probabilistic scientific and medical evidence usually forms the backbone of toxic tort causation. As a result, sometimes an army of experts will be needed to put such evidence into understandable terms that can be presented to the court or to the

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98. *See id.* at 355-357.

99. *See id.* at 342-43 (stating that part of the causation inquiry in a toxic tort case is to determine whether the plaintiff's harm was caused by the defendant's toxic substance or by another source).

100. 124 N.E. 137 (N.Y. 1919).

101. *See id.* at 138.

102. *See id.*

103. *See id.*

104. *See id.* at 137.

jury. While most simple tort cases can be tried without expert testimony, "expert opinion is a necessary concomitant to proof of causation" in toxic tort cases.<sup>105</sup>

Whether dealing with contamination of land or with illness caused by toxic substance exposure, expert's testimony must establish that the toxic substance in question is capable of causing the alleged harm, did cause the alleged harm, and that other background factors in the environment did not cause the harm.<sup>106</sup> Expert medical testimony is also a typical requirement in cases where plaintiffs allege physical injury from toxic substance exposure.<sup>107</sup>

With this inordinate need for expert testimony, courts that hear toxic tort cases are forced to deal with great amounts of collateral procedural issues that are inherent with expert testimony. For example, depending on the jurisdiction, a court hearing a toxic tort case may have to deal with several *Frye*<sup>108</sup> or *Daubert*<sup>109</sup> evaluations of an expert's opinion.<sup>110</sup> Also, given the amount of expert testimony that may be used in a toxic tort case, simple issues of discovery may require several pre-trial motions and hearings.<sup>111</sup> With the exceptional nature of toxic tort cases, it becomes apparent to see why expert testimony is the rule and not the exception in most environmental and toxic tort cases.

##### 5. *Overlapping Relationship with Statutory Environmental Law*

Not only is a typical toxic tort defendant subject to an array of common law causes of action, but the average toxic tort will also expose the defendant to several statutory environmental laws. Depending on the circumstances, a single incidence of a toxic discharge from a defendant's property may expose him to actions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"),<sup>112</sup> the Toxic Substances Control Act ("TSCA"),<sup>113</sup> the

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105. *In re Love Canal Actions*, 547 N.Y.S. 2d 174, 177 (N.Y. Sup. Ct. 1989).

106. *See, e.g., Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir. 1989); *Stubbs v. City of Rochester*, 124 N.E. 137 (N.Y. 1919); *In re Love Canal Actions*, 547 N.Y.S. 2d at 174.

107. *See Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987) (stating that expert medical testimony was not only essential to prove plaintiffs' injuries but was necessary to prove the need for future medical surveillance).

108. *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

109. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

110. *Frye* and *Daubert* deal with the determination of the scientific validity of an expert's opinion.

111. For example, FED. R. CIV. P. 26(b)(4) makes a distinction between experts retained for trial preparation and experts who will testify at trial. Given the fact that in many cases each side will attempt to retain several experts on a single subject, pre-trial issues under Rule 26(b)(4)(B) may come into play.

112. 7 U.S.C. §§ 136-136(4) (1998).

National Environmental Policy Act ("NEPA"),<sup>114</sup> the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),<sup>115</sup> the Occupational Safety and Health Act ("OSHA"),<sup>116</sup> or the Federal Water Pollution Control Act ("FWPCA")<sup>117,118</sup> Not only will the court have to deal with the claims brought against the defendant by various plaintiffs, the court may also have to address statutory enforcement or penalty actions brought in related actions by the government or private citizens under federal or state environmental law.<sup>119</sup> As a result, the potential for multiple avenues of liability in both the common law and statutory realm distinguish the toxic tort case from the run-of-the-mill tort.

*B. How the Distinct Features of a Toxic Tort Case Make Compliance with a Lone Pine Order Difficult*

As discussed, *Lone Pine*-type orders typically require (1) the identity of the chemical or substance causing the injury; (2) the specific disease, illness, or injury caused by the substance; and (3) a causal link between exposure to the substance in question and the plaintiff's injury.<sup>120</sup> In addition to these three requirements, some *Lone Pine* orders require plaintiffs to provide the amount of the substance or chemical to which they were exposed,<sup>121</sup> expert medical opinions that rule out other causes,<sup>122</sup> and specific dates of exposure to the toxic substance in question.<sup>123</sup> *Lone Pine* orders may be issued as case management orders early in the litigation before the plaintiff has had the opportunity to propose any significant discovery. Given the unique features of the typical toxic tort case, compliance with such orders is sometimes next to impossible.

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113. 15 U.S.C. §§ 2601-2692 (1998).

114. 42 U.S.C. §§ 4321-4370(d) (1998).

115. 42 U.S.C. §§ 9601-9675 (1998).

116. 29 U.S.C. §§ 651-678 (1998).

117. 33 U.S.C. §§ 1251-1376 (1998).

118. See BOSTON, *supra* note 79, at 9.

119. See BOSTON, *supra* note 79, at 497 (stating that many landowners institute private cost recovery actions under CERCLA to help them obtain contribution).

120. See discussion *supra* Part II.A.

121. See *Hembree v. Litton Indus., Inc.*, No. B-C-90-6, at 9.18 (W.D.N.C. filed Dec. 7, 1989).

122. See *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, at \*4 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993).

123. See *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1372 (Cal. Ct. App. 1992).

### 1. Identity of the Substance

Again, in the hypothetical slip-and-fall case, identification of the substance that caused the harm is elementary. Obviously, the water, which was negligently left on the floor, would be the substance that caused the plaintiff to slip and fall. However, in a toxic tort case, exact identification of the culprit substance may be impossible.

In *New York v. Schenectady Chemicals, Inc.*,<sup>124</sup> the defendant, Schenectady Chemicals, manufactured paints, alkyl phenols, and other chemicals.<sup>125</sup> As a by-product, the Schenectady plant was left with waste including "phenol, benzene, toluene, xylene, formaldehyde, vinyl chloride, chlorobenzene, dichlorobenzene, trichloroethylene, chloroform, ethyl benzene, nethylene chloride, dichloroethane, lead, copper, chromium, selenium, and arsenic."<sup>126</sup> The plant hired an independent contractor, Dewey Loeffel, to remove this waste and dispose of it.<sup>127</sup> From the 1950's until the mid-1960's, Loeffel basically dumped all these waste products together in a thirteen acre area which happened to be a lagoon that fed the local fresh water aquifer.<sup>128</sup> In essence, Loeffel created a toxic soup of dangerous waste products that caused a serious threat to the local residents.<sup>129</sup>

If the plaintiffs in *Schenectady* were forced to identify the exact toxic substance that caused their harm before any substantial discovery had been done, compliance with that order would have been impossible. Not only were all the offending chemicals mixed together, but some of the chemicals may have even combined to produce new waste that was not even present at the Schenectady plant. To make the situation even more severe, imagine if the court ordered the *Schenectady* plaintiffs to identify the amount of each chemical they were exposed to or the dates on which they were exposed.<sup>130</sup>

Another factor to consider is whether the Loeffel site contained waste from other plants as well as from Schenectady. A mixture of wastes would make the plaintiff's job of identifying the proper defendant and the exact culprit chemical even more difficult. Such

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124. 459 N.Y.S. 2d 971 (N.Y. Sup. Ct. 1984).

125. *See id.* at 974.

126. *Id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See Hembree v. Litton Indus., Inc.*, No. B-C-90-6, at 9.18 (W.D.N.C. Aug. 16, 1990) (requiring plaintiffs to identify the amount of each chemical they were exposed to and the dates of exposure); *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1372 (Cal. Ct. App. 1992) (requiring plaintiffs to state date or dates of chemical exposure).

considerations illustrate why compliance with a seemingly reasonable *Lone Pine* order may be next to impossible in toxic cases.

## 2. Identity of the Specific Injury

If a hypothetical plaintiff falls and hurts her leg, the injury that follows is usually easily diagnosed. Any family doctor can probably narrow the plaintiff's potential injuries from the fall in a matter of minutes. Now consider a situation where the same plaintiff mysteriously becomes ill with symptoms that can be attributed to several different causes. For instance, the inhalation of asbestos fibers can produce at least four different types of lung and breathing related diseases.<sup>131</sup> The early symptoms of each of these maladies, such as shortness of breath and dry coughing, may be the same.<sup>132</sup> A plaintiff who is in the early stages of lung cancer may not be able to say for certain that he is not suffering from asbestosis or another lung related disease caused by asbestos exposure. Therefore, identification of the plaintiff's exact disease may be difficult if not impossible until the plaintiff has fully developed a specific asbestos-related disease.

Some *Lone Pine* orders require plaintiffs to come forward with expert medical testimony that rules out other causes of their symptoms.<sup>133</sup> With some illnesses such as lung-related diseases, it may be impossible to rule out non-asbestos related causes of the plaintiff's symptoms without undertaking serious medical procedures or even surgery.<sup>134</sup> For example, some later symptoms of emphysema are identical to early symptoms of asbestosis.<sup>135</sup> Therefore, it may be impossible to get a medical expert to commit to one specific cause of symptoms when such diseases are in their early stages, thus making compliance with a *Lone Pine* order impossible.<sup>136</sup>

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131. These are asbestosis, lung cancer, mesothelioma, and pleural plaque. See OCCUPATIONAL SAFETY AND HEALTH, New Zealand Dep't of Labour, Pamphlet No. 7, *What Every Employee Should Know About Asbestos* (1991).

132. See *id.*

133. See *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, at \*4 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993).

134. See C. EVERETT KOOP, M.D. ET AL., DR. KOOP'S SELF-CARE ADVISOR: THE ESSENTIAL HOME HEALTH GUIDE FOR YOU AND YOUR FAMILY 88-89 (1996). "By the time [emphysema] is diagnosed, most people have lost 50 to 70 percent of their lung capacity." *Id.*

135. See *id.*

136. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*7 (N.J. Sup. Ct. Nov. 18, 1986).

### 3. *Causation Between the Toxic Substance and the Injury*

As previously discussed, proving causation in a toxic tort case is very different from proving causation in an average tort case.<sup>137</sup> In the early stages of a toxic tort case, the plaintiff may only have sparse bits of epidemiological data showing a causal link between the toxic substance and his injury. Although the data and causal evidence the plaintiff has in the early stages of litigation may be enough to fulfill the good faith pleading requirement imposed by most jurisdiction's rules of civil procedure,<sup>138</sup> it may not be enough to satisfy a *Lone Pine* order issued before the plaintiff has had an opportunity for reasonable discovery. Furthermore, if the judge who issues a *Lone Pine* order rebukes the validity of circumstantial causation evidence such as toxicological and epidemiological studies and requires evidence of traditional but for causation, no amount of causation evidence could fulfill the court's order in some types of toxic cases. Therefore, *Lone Pine* orders can be incompatible with the principles of toxic tort causation.

## IV. THE PROS AND CONS OF THE *LONE PINE* ORDER

As with any subject, the use of *Lone Pine* orders has both positive and negative ramifications. Proponents of *Lone Pine* orders may see them as an efficient case management tool that allows courts to nip frivolous cases in the proverbial bud. Others may see *Lone Pine* orders as an abuse of judicial discretion and a tool by which judges may bypass legally mandated procedural safeguards. Regardless of one's views, both sides of the *Lone Pine* argument warrant discussion.

### A. *The Pro Side of the Lone Pine Argument*

One of the major justifications for using the *Lone Pine* order is that it provides a "simpler, more expeditious means" of dealing with complex litigation.<sup>139</sup> Toxic tort cases can take several years to litigate, and a jury trial alone can take up to nine months to complete.<sup>140</sup> Thus, judges may feel that case management orders like the *Lone Pine* order can work to streamline the issues of complex litigation.

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137. See discussion *supra* Part III.A.3.

138. See FED. R. CIV. P. 11 (requiring all allegations to have factual support or to have a likelihood of having evidentiary support after a reasonable opportunity for further investigation).

139. *Gallagher v. FibreBoard Corp.*, 641 So. 2d 953, 955 (Fla. 3d DCA 1994).

140. See *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1547 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992).

In most cases, efficiency and case management are the primary justifications for the issuance of *Lone Pine* orders.<sup>141</sup> As a general rule, courts are usually afforded great latitude in controlling the litigation before them.<sup>142</sup> Courts are also afforded much discretion when dealing with the admission of evidence and discovery matters.<sup>143</sup> In fact, when dealing with complex litigation, some courts are vested with the power to fashion new procedure to manage and control the case before it.<sup>144</sup> With all this discretionary power, courts may find *Lone Pine* orders to be a wonderful way of moving the docket along.

*Lone Pine* orders can also be used to weed out claims that judges may consider to be frivolous or unsupported by fact.<sup>145</sup> In fact, some courts go so far as to issue omnibus *Lone Pine* orders that apply to all toxic tort cases of a given type that are brought under the court's jurisdiction.<sup>146</sup> In essence, some courts find *Lone Pine* orders to be convenient prophylactic devices to get rid of bad cases.<sup>147</sup>

Finally, some courts feel that *Lone Pine* orders can be used to promote fairness and to administer justice evenhandedly.<sup>148</sup> If a court feels that the defendant in a toxic case has not been provided with adequate information to form a defense, it may enter a *Lone Pine* order to make the plaintiff come forward with the information that the court feels is missing.<sup>149</sup> In summary, the three major justifications for *Lone Pine* orders are, (1) efficiency, (2) the elimination of frivolous claims, and (3) fairness.

### B. *The Con Side of the Lone Pine Argument*

Two major criticisms of *Lone Pine* orders are that, (1) they allow courts to ignore existing procedural rules and safeguards; and (2)

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141. See, e.g., *Hembree v. Litton Indus., Inc.*, No. B-C-90-6, at 9.17 (W.D.N.C. Aug. 16, 1990); *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1380 (Cal. Ct. App. 1992); *Lore*, 1986 N.J. Super. LEXIS 1626, at \*2.

142. See, e.g., FED. R. CIV. P. 16; *Cottle*, 3 Cal. App. 4th at 1376.

143. See *Cottle*, 3 Cal. App. 4th at 1378.

144. See *id.* at 1379.

145. See *Gallagher v. FibreBoard Corp.*, 641 So. 2d 953, 954 (Fla. 3d DCA 1994) (stating that potential asbestos plaintiffs are required to fill out "exposure sheets" listing the identification of the product causing their illness, the dates on which they were exposed, and the names of witnesses to such exposure).

146. See *id.* (stating that an omnibus order is in effect in Dade County, Florida that applies to all asbestos litigation).

147. See discussion *supra* Part II.B.3.

148. See *Hembree v. Litton Indus., Inc.*, No. B-C-90-6, at 9.18 (W.D.N.C. Aug. 16, 1990) (relying on FED. R. CIV. P. 1's "just . . . determination" language to justify a *Lone Pine* order).

149. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*4-5 (N.J. Sup. Ct. Nov. 18, 1986).



they lack consistency in their use and application, and are thus not equally applied.

### 1. *Ignoring Existing Procedural Rules and Safeguards*

One of the major benefits to having a system of justice like the one used in this country is that parties to litigation can go before the court with the knowledge that the court has to follow certain rules and principles to guide its rulings and decisions. For the most part, devices such as rules of civil procedure, rules of evidence, and principles such as *stare decisis* prevent courts from making arbitrary decisions and from making rulings inflamed with personal ideology and prejudice. In many cases, rules that govern the courts are promulgated by the legislature and act to uphold the system of checks and balances that is the backbone of our American government. In the absence of such rules and principles, our court system would lack consistency and validity.<sup>150</sup>

In almost every case cited within this Note, courts that have used *Lone Pine* orders have interpreted their right to do so from procedural rules that do not specifically grant the authority for the courts to issue such an order.<sup>151</sup> Thus, almost all *Lone Pine* orders are derived from other procedural rules which, as the issuing court will claim, give the court inherent authority to issue such orders.<sup>152</sup> Rather than resorting to amorphous concepts such as inherent case management authority, courts, when faced with a *Lone Pine* situation, must first look to existing procedural devices to resolve the problem. In other words, courts can not simply ignore existing procedural rules and safeguards merely because toxic tort cases are different from normal tort cases and tend to be more time-consuming. *Lone Pine* orders allow courts to ignore existing procedural rules, and are thus subject to criticism.

### 2. *Lack of Consistency and Equal Application*

For rules and regulations to have validity, they must be applied equally to all people under their purview.<sup>153</sup> If those who administer the rules make exceptions every time a rule becomes uncomfortable or laborious to apply, then the rules, in reality, have no purpose.

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150. See *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349,1349 (6th Cir. 1992) (stating that our judicial system is "founded on the premise that justice and consistency are related ideas").

151. See discussion *supra* Part II.B.

152. See discussion *supra* Part II.B.

153. See *United States v. Browner*, 937 F.2d 165, 172 (5th Cir. 1991) (stating that "[l]egal rules must be applied equally to all parties").

Therefore, procedural devices such as summary judgment, motions to dismiss, motions for sanctions, and other similar rules must be used consistently by the courts rather than resorting to inherent case management powers. *Lone Pine* orders are created under a court's inherent case management authority as opposed to hard and fast procedural rules. As a result, courts could interpret such inherent powers very differently from case to case. With no real guidelines to control the parameters and scope of *Lone Pine* orders, they are fertile grounds for inconsistency, personal prejudice, and ultra vires<sup>154</sup> activity. This criticism of *Lone Pine* orders is not meant to suggest that courts act improperly every time they issue *Lone Pine* orders. Nor is it meant to suggest that courts should not have discretion and latitude in certain matters that require the perspective that a trial court has with issues such as the admissibility of evidence and the like. However, when dealing with the issues that are usually addressed in *Lone Pine* orders, a court's subjective authority must yield to the consistency of mandated rules and procedures.

An excellent example illustrating both of the *Lone Pine* order's two major criticisms can be found in *Cottle v. Superior Court*.<sup>155</sup> In *Cottle*, approximately 175 owners and renters of residential property sued various defendants due to injuries sustained from a site that had been used as a dumping ground for hazardous waste for many years.<sup>156</sup> After some discovery, the court issued a case management order requiring the plaintiffs to present evidence of:

1. The toxic substance to which the plaintiff was exposed;
2. The dates and place of the exposure;
3. The method of exposure;
4. The nature of the plaintiff's injury; and
5. The identity of each medical expert who would support the claim.<sup>157</sup>

The plaintiffs responded that given the nature of the toxic exposure of which they complained, any evidence they could submit would be insufficient and compliance with the court's order would be "virtually impossible."<sup>158</sup> The court responded by stating that the plaintiff's evidence failed to establish a prima facie case and dismissed all of the plaintiffs' personal injury claims.<sup>159</sup>

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154. Ultra vires is defined as "[a]n act performed without any authority to act on a subject." BLACK'S LAW DICTIONARY 1057 (6th ed. 1991).

155. 3 Cal. App. 4th 1367 (Cal. Ct. App. 1992).

156. See *id.* at 1371.

157. See *id.* at 1373.

158. *Id.* Apparently, plaintiffs expressed many of the problems discussed in Part III.B.

159. See *id.* at 1374-75.

On appeal, the plaintiffs sought to have the trial court's order vacated on the grounds that the trial judge essentially had abused his discretionary powers by granting a motion for summary judgment without following summary judgment rules or formal procedures.<sup>160</sup> The appellate court disagreed, stating that the lower court's action was an "order excluding evidence" and not a summary judgment order.<sup>161</sup> Relying on the trial court's power to "make rules for its own government" and other "inherent power" arguments, the appellate court upheld the lower court's order.<sup>162</sup> Oddly enough, the appellate court seemed to second-guess its ruling throughout the opinion as if it was not sure it had made the right decision.<sup>163</sup> In fact, at one point, the appellate court even concedes that part of the lower court's order was based on the fact that there was no factual issue for the jury to decide.<sup>164</sup> By making such a statement, the appellate court all but confirms the plaintiffs' assertion that the lower court used a summary judgment standard in ruling on its order.<sup>165</sup>

The appellate court's tenuous majority opinion was followed by a strong dissent from Associate Justice Johnson.<sup>166</sup> Justice Johnson summarized the majority's error: "California standards do not confer authority to terminate causes of action for lack of proof before trial without complying with the summary judgment procedure the Legislature specifically enacted for that purpose."<sup>167</sup> Justice Johnson quickly recognized that the trial court's attempt to classify its order as an "order excluding evidence" was a legal fiction, stating that "[n]othing in the Evidence Code or otherwise authorizes a trial court to terminate a cause of action *in limine* by excluding *any and all* evidence that might be offered to prove that cause of action."<sup>168</sup> Furthermore, the dissent recognized that a "trial court's inherent authority to craft new rules of civil procedure" is based on the predicate fact that there is an "absence of any statute or rule governing the

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160. *See id.* at 1376.

161. *Id.*

162. *Id.* at 1367-80.

163. For example, the court states "Had the order been made earlier in the proceedings, we would be more inclined to hold that the order was an abuse of the court's discretion." *Id.* at 1380. "Although given the caldron of chemicals present at the Dunes, the initial order of the court may have been too demanding." *Id.* at 1384.

164. *See id.* at 1386.

165. According to the dissent, California's summary judgment standard adheres to the same basic premise as Rule 56 of the Federal Rules of Civil Procedure that summary judgment is proper when there is not a genuine issue of material fact for trial. *See id.* at 1393.

166. *See id.* at 1389-1406.

167. *Id.* at 1389.

168. *Id.* at 1390.

situation."<sup>169</sup> Justice Johnson illustrates the inherent danger in the lower court's order by stating:

Had the procedural guidelines for summary judgment been followed, the defendants would have had to have initiated the process and have supplied evidence [that] causation could *not* be proved. Strictly construing these moving papers and liberally construing plaintiffs' documents in opposition to the motion, the court would have then decided whether there remained any triable issues of material fact as to causation. [citations omitted] However, the trial court here did not employ the statutory provision for summary judgment with its built-in procedural safeguards. In its place the trial court substituted a bastardized process which had the purpose and effect of summary judgment but avoided the very procedures and protections the Legislature deemed essential.<sup>170</sup>

In summary, the *Cottle* example illustrates the *Lone Pine* order's two major criticisms. *Cottle* shows how a court can abuse its inherent authority to sidestep procedural safeguards set forth by the legislature as a check and balance on the judicial system. *Cottle* also shows how the validity and integrity of procedural rules can be put to question when they are used selectively by the courts. Despite these facts, *Cottle* does give rise to the question of whether the existing system of procedural rules and devices can accommodate the unique features of toxic tort litigation.

## V. WHY *LONE PINE* ORDERS SHOULD NOT BE USED

### A. *Existing Procedural Rules can Adequately Address any Problems Lone Pine Orders are Thought to Remedy*

Keeping in mind the problems discussed, courts should not use *Lone Pine* orders because existing procedural devices can effectively deal with any problems that *Lone Pine* orders are thought to remedy without the dangers that *Lone Pine* orders bring. The original *Lone Pine* court gave several reasons to justify the need for such an order. These reasons were (1) the number of defendants involved in the suit;<sup>171</sup> (2) a report issued by the Environmental Protection Agency that was contrary to plaintiffs' claims;<sup>172</sup> (3) lack of notice of the substance of plaintiffs' claims to the defendants;<sup>173</sup> (4) the expense

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169. *Id.* at 1391.

170. *Id.* at 1393.

171. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*2 (N.J. Sup. Ct. Nov. 18, 1986).

172. See *id.* at \*5.

173. See *id.* at \*7.

and complexity of the litigation;<sup>174</sup> and (5) the fear that the plaintiffs had brought their cause of action to intimidate the defendants into settling.<sup>175</sup> If each of these concerns can be addressed with existing procedural devices, it becomes apparent that *Lone Pine* orders are unnecessary.

### 1. *The Number of Defendants in a Suit*

A single toxic exposure event may give hundreds of plaintiffs a right to sue one or several defendants.<sup>176</sup> Each one of the hundreds of plaintiffs may have specific facts or circumstances that distinguish his cause of action from another plaintiff's.<sup>177</sup> Thus, whether toxic tort cases are brought as consolidated or class actions or individual suits, courts may feel legitimate concern over the sheer number of parties involved against one or a few defendants. With this in mind, courts may issue *Lone Pine* orders in an attempt to deal with the issue of numerosity.

The original *Lone Pine* order required that the plaintiffs produce facts of each plaintiff's exposure, proof of medical causation of injuries, plaintiffs' exact amount of damages, and reports from real estate experts.<sup>178</sup> However, it is questionable what the information required by the original *Lone Pine* order does to help the court or the defendant better deal with the large number of plaintiffs involved in the case. If all the *Lone Pine* plaintiffs produced the requested information to the court's satisfaction, all of them would have remained in the case and the court and defendant would have had to contend with the exact same number of plaintiffs. If some or all of the plaintiffs failed to comply adequately with the court's order, then those plaintiffs would have been dismissed. Therefore, the only way the original *Lone Pine* order could have dealt with the problem of numerosity is if some or all of the plaintiffs could not have complied with the order.

The most realistic reason why some of the plaintiffs did not comply with the order is that the *Lone Pine* plaintiffs simply did not have the information the court wanted.<sup>179</sup> With this in mind, the court and the defendants could have used several existing

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174. See *id.* at \*9.

175. See *id.* at \*10.

176. See discussion *supra* Part II.

177. See discussion *supra* Part II.

178. See *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*3-4 (N.J. Sup. Ct. Nov. 18, 1986).

179. See *id.* at \*6-7 (stating plaintiffs could not obtain real estate reports and medical affidavits).

procedural devices to deal with the plaintiffs' deficiency. For example, if the court felt that the plaintiffs' had violated a discovery request proposed by the defendant, the court could have used discovery sanction rules, such as Rule 37 of the Federal Rules or its state counterparts, to deal with the problem.<sup>180</sup> By doing so, the court would have had to follow the procedural safeguards that attach to the use of such rules.<sup>181</sup> Also, the defendant could have moved for summary judgment if it felt that there was no disputed issue of material fact for the jury to decide.<sup>182</sup> By using the summary judgment process, the court and the parties would be bound by the procedural safeguards built-in to most summary judgment rules.<sup>183</sup> In either case, existing procedural devices could have easily dealt with the true problem at issue—the plaintiff's lack of factual proof. Therefore, when the numerosity justification is examined and removed from the list of the *Lone Pine* order's miracle cures, it is evident that such orders can do no more to ease the burden of numerosity than any other existing procedural device. When used to remedy the problem of numerosity, the *Lone Pine* order provides no advantage over existing procedural devices and allows the court and the defendant to dispense with mandated procedural devices that are found in existing procedural rules.

## 2. Evidence Contrary to the Plaintiff's Claims

The original *Lone Pine* court also supported its *Lone Pine* order by stating that one of the plaintiffs' expert's assertions was "completely contrary" to EPA studies.<sup>184</sup> Thus, the court can be understood to say that because other evidence contradicted the plaintiffs' evidence, the plaintiffs' claims should be dismissed. Given the nature of our

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180. Arguably, the *Lone Pine* court did rely on a discovery violation rule to dismiss plaintiffs' claims, but had the court not issued its order in the first place, there would have been no order to violate. See *id.* at \*7. The example noted contemplates a normal civil action where the court's case management discovery orders are limited more to when and how as opposed to what.

181. It is interesting to note that the *Lone Pine* court chose to impose the most drastic discovery sanction of dismissal. See *id.* at \*10. Other more reasonable courts only employ such a drastic sanction if a plaintiff has willfully disregarded a discovery order or has engaged in obstinate behavior. See *Bellflower v. Cushman & Wakefield, Inc.*, 510 So. 2d 1130, 1131 (Fla. 2d DCA 1987) (stating that a discovery sanction as severe as a default should only be imposed in extreme circumstances such as deliberate and obstinate disregard of the trial court's authority).

182. See FED. R. CIV. P. 56.

183. Such as construing all evidence in a light most favorable to the non-moving party and accepting the non-moving party's factual allegations as true. See *Serrano-Perez v. FMC Power Corp.*, 985 F.2d 625, 626-27 (1st Cir. 1993).

184. *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*5-6 (N.J. Sup. Ct. Nov. 18, 1986).

adversarial system of jurisprudence, such a provision hardly seems supportable.

If a court is faced with a situation where a party resisting a motion for summary judgment has such weak evidence that no reasonable jury could find for that party, the court should enter summary judgment against that party.<sup>185</sup> However, if a reasonable jury could find for either the moving or the non-moving party, neither party's claims should be summarily dismissed.<sup>186</sup> At least under a summary judgment standard, the only way the *Lone Pine* court's order can be supported by the fact that plaintiffs' evidence conflicted with an EPA study is if no reasonable jury could have found for the plaintiffs given that the conflict existed. Therefore, if the *Lone Pine* court is given the benefit of the doubt, it must be assumed that the court found that no reasonable jury could have found for the plaintiffs. If not, then the *Lone Pine* court effectively said that since it preferred the EPA's evidence, it could dismiss the plaintiffs' cause of action. Needless to say, such an assertion raises serious questions about the role of a jury and the court's inherent authority. Even if the *Lone Pine* court did find that the plaintiffs' evidence was a mere scintilla against the EPA study, one must wonder why the court addressed this issue outside of the legislatively mandated procedure of summary judgment.<sup>187</sup>

### 3. *Lack of Notice of the Substance of Plaintiffs' Claims to the Defendant*

To use the federal system as an example, Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint set forth a "short and plain statement of the claim showing that the pleader is entitled to relief."<sup>188</sup> This sort of pleading has been called "notice pleading" as it puts the defendant on notice of the claims against it.<sup>189</sup> If a complaint fails to give such notice, a defendant may move to dismiss for failure to state a cause of action,<sup>190</sup> move for a more definite statement,<sup>191</sup> or move to strike portions of the pleading.<sup>192</sup> Thus, if a toxic tort defendant is sued in federal court, and in most state courts,

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185. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

186. See *id.*

187. As Justice Johnson stated in *Cottle*, "the trial court substituted a bastardized process which had the purpose and effect of summary judgment but avoided the very procedures and protections the Legislature deemed essential." *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1393 (Cal. Ct. App. 1992).

188. FED. R. CIV. P. 8(a).

189. RICHARD L. MARCUS ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* 124 (1995).

190. See FED. R. CIV. P. 12(b)(6).

191. See FED. R. CIV. P. 12(e).

192. See FED. R. CIV. P. 12(f).

that defendant has several procedural options at its disposal to deal with insufficient notice from the time the plaintiff's complaint is filed and served. A toxic tort defendant's procedural options could include having a plaintiff's improperly plead claim modified or dismissed before the court even has an opportunity to issue a *Lone Pine* order. Taking this into account, it is difficult to understand how *Lone Pine* orders would be superior or even adequate ways of dealing with lack of notice of the substance of a plaintiff's claim.

In the original *Lone Pine* case, the court stated that "defense counsel required sufficient information to provide defenses" and that the defendants "were no better off at the end of the seven months allowed plaintiffs to substantiate their cases than when the suit was instituted."<sup>193</sup> However, if the plaintiffs were unable to substantiate their cases and if the defendants did not have sufficient information to provide defenses, then it is curious why the plaintiffs' claims were dismissed for failing to comply with a case management order rather than under a motion to dismiss or a motion for summary judgment. The *Lone Pine* court stated that plaintiffs' claims were dismissed, *inter alia*, for "fail[ing] to plead a claim upon which relief may be granted."<sup>194</sup> Yet, if the plaintiffs plead a claim upon which relief could not have been granted, the plaintiffs should not have been given seven months to substantiate their cases. Furthermore, if the plaintiffs truly failed to plead a cause of action, their complaints should have been dismissed on a motion to dismiss initiated by the defendant. If there were a problem with the substance of plaintiffs' claims as opposed to the way the claims were actually plead, then the substance issues should have been addressed by a motion for summary judgment initiated by the defendant.

Basically, there is no reason for a court to issue a subjective case management order, evaluate the adequacy of substance and pleading by that order's standards, and then dismiss claims due to non-compliance with that order. Hopefully, such freedom of action is not contemplated in a court's inherent case management authority. If notice of the substance of a plaintiff's claim is a true concern, then the concerned party should move to dismiss or modify the claim against it. Current procedural rules exist to accomplish this task and the use of *Lone Pine* orders to deal with lack of notice is both unnecessary and inefficient.<sup>195</sup>

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193. *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*4-7 (N.J. Sup. Ct. Nov. 18, 1986).

194. *Id.* at \*1 (emphasis added).

195. Such procedural rules include FED. R. CIV. P. 12(b)(6), 12(e), and 12(f).



#### 4. *The Expense and Complexity of the Litigation*

No doubt exists that toxic tort cases can be complex and expensive. The total amount in controversy in some toxic tort cases can be in excess of one billion dollars,<sup>196</sup> and some toxic tort cases can take several years to litigate.<sup>197</sup> A toxic tort jury trial itself can often take up to nine months to complete.<sup>198</sup> Therefore, sometimes courts will have to find new and inventive ways to deal with the special expense and complexity of toxic cases. In fact, some jurisdictions allow courts to "create new forms of procedure in particular pending cases . . . where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function."<sup>199</sup> However, when courts are given the power to create new forms of procedure, they must first look to existing procedural rules to solve the problem at hand.<sup>200</sup> Courts should not be afforded the ability to ignore existing procedural rules and create new ones just because the use of the existing rule may lead to a different result than the court wants. Therefore, before a court relies on inherent power devices such as *Lone Pine* orders to deal with the expense and complexity of toxic cases, the court should first exhaust any existing procedural devices at its disposal.

Secondly, as noted above, *Lone Pine* orders typically ask plaintiffs to come forward with facts and proof of specific elements of their claim. If the plaintiff can comply with the order, the defendant is provided the information and proof the court deemed necessary, and no extra time and expense is needed to compel the plaintiff to come forward with that information. If the plaintiff fails to comply with the order, the plaintiff's claim is dismissed, and the defendant no longer has to spend time and money defending the claim. Similarly, if a plaintiff complies with the standards set forth in a motion for summary judgment, the plaintiff comes forth with facts and proof that there is still a material controversy for the jury to decide. Thus, no extra time and expense is needed to compel the plaintiff to come forth with that information. If the plaintiff fails to comply with the

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196. See *Grant v. E.I. DuPont De Nemours & Co.*, 1993 WL 146634, at \*1 (E.D.N.C. Feb. 17, 1993), *aff'd*, 1993 WL 146638 (E.D.N.C. Mar. 26, 1993) (stating that the total amount in controversy, including punitive damages, exceeded \$1.3 billion).

197. See *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1547 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992) (stating that the full jury trial alone would take six to nine months to complete).

198. See *id.*

199. *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1377 (Cal. Ct. App. 1992), *citing James H. v. Superior Court*, 77 Cal. App. 3d 169, 175 (Cal. Ct. App. 1978).

200. See *id.* (stating that courts have this power only in the absence of existing procedural rules).

summary judgment standard of proof, then its case is dismissed and the defendant no longer has to defend against the case. Comparing the differences between the procedures of a *Lone Pine* order and existing procedural rules shows that a *Lone Pine* order can do nothing more to save time and money than a motion for summary judgment. The only difference is that a *Lone Pine* order does not have the inherent procedural safeguards that a summary judgment procedure has and the court is free to arbitrarily dismiss the plaintiff's claims.

### 5. *The Fear of Bad Faith Litigation*

A final fear expressed by the original *Lone Pine* court was that the plaintiffs had brought their claims "with the hope that the defendants eventually will capitulate and give a sum of money to satisfy the plaintiffs."<sup>201</sup> Thus, the court implicitly suggests that the plaintiffs' claims were brought in bad faith to pressure the defendants into settling. However, rather than addressing this concern of bad faith with a procedural rule designed to deal with bad faith claims, the court dismissed the plaintiffs' claims with prejudice for failing to comply with a case management order.<sup>202</sup>

To use the federal system as an example again, Rule 11(b)(1) of the Federal Rules of Civil Procedure requires parties to sign pleadings, motions, and other papers put before the court to certify that "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."<sup>203</sup> Rule 11 also goes on to state that a sanctions proceeding may be brought on motion by a party or on the court's initiative if there is reason to believe a violation has occurred.<sup>204</sup> Thus, if the court or a defendant believes that a plaintiff has brought a claim in bad faith, either one can bring forth sanctions proceedings against the plaintiff. Therefore, there is no need for courts to use *Lone Pine* orders to deal with problems for which procedural remedies already exist. Once again, the use of *Lone Pine* orders to deal with bad faith claims does nothing more than bypass procedural safeguards and allow courts to have unbridled discretion.<sup>205</sup>

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201. *Lore v. Lone Pine Corp.*, No. L-03306-85, 1986 N.J. Super. LEXIS 1626, at \*10 (N.J. Sup. Ct. Nov. 18, 1986).

202. *See id.* at \*7.

203. FED. R. CIV. P. 11(b)(1).

204. *See* FED. R. CIV. P. 11(c)(1)(A) and (B).

205. For example, FED. R. CIV. P. 11(c)(1)(A) requires that the party accused of bad faith must have notice of the sanctions proceeding and be provided a reasonable opportunity to respond. The rule also provides a twenty-one day safe haven for the accused party to withdraw the offending paper before sanctions are issued.

*B. Modern Toxic Tort Cases Demonstrate that Lone Pine Orders are Unnecessary*

The best evidence that *Lone Pine* orders are unnecessary can be found in toxic tort cases where courts have relied on conventional rules of procedure to resolve any *Lone Pine* type concerns. Such cases show that there is no need or justification for courts to resort to inherent power devices such as *Lone Pine* orders.

In *Serrano-Perez v. FMC Power Corp.*,<sup>206</sup> the plaintiffs filed suit against the FMC Corporation claiming that their son had been exposed to unknown chemicals manufactured by FMC, and that as a result of that contact, he died of aplastic anemia.<sup>207</sup> FMC moved for summary judgment after discovery had been conducted, and the trial court granted FMC's motion finding that:

Plaintiffs in this case have offered no evidence, no expert testimony, and no epidemiological data that would prove that defendants' insecticides caused [the decedent's] aplastic anemia. Nor have they submitted evidence that defendants' insecticides can cause aplastic anemia at all. Plaintiffs have failed to set forth any specific facts that show a genuine triable issue as to the causation of [the decedent's] illness.<sup>208</sup>

On appeal, the lower court's order was upheld.<sup>209</sup>

The *Serrano-Perez* case is a prime example of how courts can achieve the same results that *Lone Pine* orders produce by complying with mandated rules of procedure. Whether there had been two or two hundred plaintiffs in *Serrano-Perez*, the bottom line was that the plaintiffs failed to produce sufficient evidence to show a disputed material issue for the jury to decide. The defendants saw this deficiency and moved for summary judgment. The court applied the protections inherent in the summary judgment procedure and still found that the plaintiffs had not fulfilled their burden of production. Thus, the plaintiffs' case was dismissed.<sup>210</sup>

If the *Serrano-Perez* court had issued a *Lone Pine* case management order requiring the plaintiffs to produce specific evidence of causation, the court would have relieved the defendants of their summary judgment burden to come forth and show that no issue of material disputed fact remained. In other words, the court would have

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206. 985 F.2d 625 (1st Cir. 1993).

207. *See id.* at 626.

208. *Id.* at 627.

209. *See id.*

210. *See id.* at 629.

automatically assumed that the plaintiffs' case was deficient without any action on the part of the defendant.

Further, depending on how harsh the court was, the plaintiffs may or may not have been given the same amount of time to propound discovery if the court used a *Lone Pine* order. In the absence of a motion for summary judgment initiated by the defendants, discovery may have continued for years before the plaintiffs were forced to come forward with causation evidence.<sup>211</sup> However, under the court's case management order, the plaintiffs would surely have been given a specific date by which they had to present their causation evidence.

Additionally, once the plaintiffs had presented their evidence to the court in an attempt to comply with the *Lone Pine* order, the court would have unbridled discretion to decide whether the plaintiffs had made a sufficient showing. Unlike summary judgment, a court using a *Lone Pine* order would not be compelled to assume the plaintiffs' facts as true and construe all evidence in a light most favorable to the plaintiffs. In fact, other than abuse of discretion, the court would not be bound to any evaluation standards at all.

Ironically, if the *Serrano-Perez* court had used a *Lone Pine* order, the end result would have been the same as if the court had used summary judgment. The plaintiffs' case would have been dismissed. As previously noted, the only real difference would have been that under summary judgment the court would have obeyed procedural rules.

In *Renaud v. Martin Marietta Corp.*,<sup>212</sup> twelve plaintiffs brought suit against the Martin Marietta Corporation claiming that water contaminated by Martin Marietta caused various injuries ranging from cancer to birth defects of the heart.<sup>213</sup> The court estimated that a full jury trial would take between six to nine months.<sup>214</sup> The court found that the most efficient way to deal with such an arduous case was to hold a series of summary judgment hearings where the plaintiffs would present causation evidence as if they were presenting it at trial.<sup>215</sup> This method was adopted from a suggestion made by the defendant.<sup>216</sup> Before the summary judgment mini-trials took

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211. In fact, the *Serrano-Perez* plaintiffs were apparently afforded almost two years worth of discovery before the defendants moved for summary judgment. *See id.* at 626. It is noteworthy to mention that the defendants could have brought a motion for summary judgment any time after the commencement of the action. *See* FED. R. CIV. P. 56(b).

212. 749 F. Supp. 1545 (D. Colo. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992).

213. *See id.* at 1547.

214. *See id.*

215. *See id.* at 1547-48.

216. *See id.*

place, defendants were required to move formally for summary judgment.<sup>217</sup> Before ruling on the motions, the court noted that "[b]ecause [summary judgment] is a drastic remedy, defendants must establish beyond a reasonable doubt that they are entitled to summary judgment."<sup>218</sup> With this standard in mind, the court evaluated evidence put forth from *both sides* and determined that the plaintiffs had failed to present a *prima facie* case of causation.<sup>219</sup>

The *Renaud* case is an excellent example of how a court can deal with complex litigation by being creative with *existing procedural rules*. The *Renaud* court used the procedurally mandated summary judgment standard to streamline a trial that could have taken months to complete. In doing so, the court did not depart from any established rules or statutes and maintained the validity and integrity of the legal process. Where it would have been easy to issue a *Lone Pine* order, the court chose instead to follow the mandated procedural rules. Even though the *Renaud* court was innovative in its application of the summary judgment device, it still required the defendants to file formal summary judgment motions and evaluated those motions by the strict summary judgment standard. The court heard evidence from *both parties* and made an informed and procedurally sound decision in dismissing the plaintiffs' claims. Thus, *Renaud* proves that the complexity of a toxic tort case does not require a court to depart from existing procedural rules.

## VI. CONCLUSION

There is no doubt that as society becomes more complex, litigation will follow suit. As technology increases and populations grow, environmental and toxic tort cases may begin to increase exponentially. However, complex litigation does not afford a court free reign to disregard mandated procedural rules under the guise of inherent case management authority. When courts depart from mandated rules and use devices such as *Lone Pine* orders, they diminish the legitimacy of the legal process by adding uncertainty and inconsistency to an otherwise regimented system. Furthermore, courts that use *Lone Pine* orders negate the checks and balances and safeguards that are inherent in properly promulgated rules of procedure. Although courts may dress *Lone Pine* orders in the sheep's clothing of their inherent case management authority, one must look beyond and see the wolf that lies within. *Lone Pine* orders

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217. *See id.* at 1548.

218. *Id.* at 1551.

219. *See id.* at 1555.

are insufficient to deal with the complex and unique features of toxic tort litigation, and they ignore the fundamental precepts of the adversarial system. Therefore, before courts choose to rely on their inherent case management powers, they should examine the effectiveness of existing procedural rules and not let justice fall prey to convenience.