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LONE PINE ORDERS: A PRACTICAL STRATEGY FOR REDUCING MDL COSTS

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TABLE OF CONTENTS

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LONE PINE ORDERS: A PRACTICAL STRATEGY FOR REDUCING MDL COSTS

INTRODUCTION

Multi-jurisdictional litigation (MDL) in the federal court system continues to expand, especially in comparison to the federal court docket as a whole. While the number of successful MDL petitions has declined over the last five years, over 45% of the total federal plaintiffs are associated with MDL proceedings consolidated for the purpose of pre-trial discovery. The Federal Rules of Civil Procedure were recently amended to ensure that discovery is proportional to the needs of the litigation, its importance, and the amount in controversy. However, when thousands of claims are filed against a defendant, considerations of proportionality may require defendants to submit to expansive discovery of documents and witnesses resulting in tens of millions of dollars in discovery costs, expenses, and attorneys' fees.

Significantly, MDL defendants are often required to expend substantial resources in discovery *well before* the constituent plaintiffs' complaints are tested for plausibility—a basic requirement of due process. With the advent of hedge fund investment in litigation, nationwide advertising for prospective claimants, and limited vetting of claims by plaintiffs' counsel before a lawsuit is filed, defendants can be forced to expend substantial resources defending a "mass tort" that is neither legitimate in substance nor scope as to the vast majority of plaintiffs. "Business as

usual" in an MDL needs to be reconsidered. *Lone Pine* orders are one option that an MDL judge can, and should, utilize to ensure that plaintiffs can produce basic evidence of a plausible claim before parties needlessly invest vast resources in discovery.

I. REVIEW OF CURRENT *LONE PINE* ORDER UTILIZATION IN MDL PRACTICE

MDL case-management and discovery strategies vary widely. That said, absent defendant advocacy, discovery typically proceeds on a dual-track course. The first, more aggressive track compels defendants to preserve and produce millions of company documents and provide dozens of corporate witnesses for deposition. That track also sets a robust discovery schedule for a small number of "bellwether" plaintiffs, including plaintiff and treating physician depositions, expert witness depositions, and the associated exchange of interrogatories and requests for production. On a second track, plaintiffs' cases that the court does not designate as bellwether prospects (typically the vast majority of MDL constituent cases) are subjected to *de minimis* discovery, frequently limited to a plaintiff fact sheet and authorizations permitting defendants to both pay for and collect relevant medical records.

While the current model disproportionately burdens defendants with large-scale discovery efforts to defend against mostly unvetted claims, an MDL court can utilize a variety of mechanisms to efficiently identify and dispose of cases lacking *prima facie* evidence of causation or product identification. Most notable of these

mechanisms is the *Lone Pine* order. Named after the New Jersey state court case in which the discovery measure originated, *Lore v. Lone Pine Corp*., 1986 WL 637507 (N.J. Sup. Ct. Nov. 18, 1986), a *Lone Pine* order requires plaintiffs to make a preliminary showing of exposure, injury, and causation before allowing full discovery to proceed.

Federal courts have recognized that, as a general matter, *Lone Pine* orders are appropriate if (1) there are multiple parties in a class action or recurring parties in similar suits; (2) the veracity of the plaintiff's allegations is questionable; (3) the case involves complex and fact-intensive issues; and (4) the case involves potentially massive discovery.[1]

While *Lone Pine* orders originated in toxic-tort litigation, judges have been employing them more frequently in pharmaceutical and medical-device litigation. *See* David F. Herr, ANN. MANUAL FOR COMPLEX LIT. § 11.34 (4th ed). This is due, in part, to the fact that an MDL allows plaintiffs to park a large volume of cases without much risk of specific attention until the time of settlement, if at all.

Under Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure, courts can adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems." *Lone Pine* orders clearly fall within the rule's contemplation of cases

[1] *See, e.g., Steering Committee v. Exxon Mobil Corp*., 461 F.3d 598, 604, n.2 (5th Cir. 2006); *Acuna v. Brown & Root, Inc*., 200 F.3d 335, 340 (5th Cir. 2000); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007).

presenting "unusual proof problems," and courts have held that *Lone Pine* orders are allowed under Rule 16(c).[2]

Plaintiffs often argue that *Lone Pine* orders constitute premature summary judgment proceedings without the procedural safeguards or evidentiary standards afforded by Rule 56. Defendants contend that *Lone Pine* orders are an efficient way to identify claims that lack a good faith basis before defendants are required to spend time and resources resolving such claims. "*Lone Pine* orders are designed to handle the complex issues and potential burdens of defendants and the court in mass tort litigation." *Acuna*, 200 F.3d at 340. Recently, the U.S. Court of Appeals for the Third Circuit held that *Lone Pine* orders are "routine" and within the "wide latitude" afforded MDL courts in managing the demands of complex, multi-plaintiff litigation. *In re Avandia Marketing, Sales Practices & Products Liability Litigation*, 2017 WL 1401285, at *3 (3d Cir. Apr. 19, 2017).[3]

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[2] *See, e.g., McManaway v. KBR, Inc*., 265 F.R.D. 384, 385 (S.D. Ind. 2009) ("*Lone Pine* orders are permitted by Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure."); *Acuna v. Brown & Root Inc*., 200 F.3d 335, 340 (5th Cir. 2000) ("In the federal courts, [*Lone Pine*] orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16."). Other courts have held that such orders are consistent with the court's inherent authority to manage its docket. *See, e.g., Kamuck v. Shell Energy Holdings GP, LLC*, No. 4:11-CV-1425, 2012 WL 3864954, at *1 (M.D. Pa. Sept. 5, 2012) (denying motion for *Lone Pine* order, but acknowledging that the court has "the authority to enter a *Lone Pine* order in the exercise of [its] broad discretion to manage this civil action").

[3] Another approach to ensuring that full-scale discovery is not required to defend multidistrict litigation that lacks merit was utilized in *In re Incretin Mimetics Products Liability Litigation*, 2014 WL 2532315 (S.D. CA 2014). There, Judge Battaglia limited initial discovery to issues of general causation and federal preemption. If plaintiffs did not get past either impossibility preemption or a summary judgment on whether the products cause cancer, there was no sound basis for full-scale discovery on other unrelated and separate issues.

In evaluating a request for a *Lone Pine* order, courts have cited a number of relevant factors, including: (1) the posture of the litigation; (2) the case-management needs presented; (3) external agency decisions that may bear on the case; (4) the availability of other procedures that have been specifically provided for by rule or statute; and (5) the type of injury alleged and its cause. *Ibid. See also In re Digitek Prod. Liab. Litig*., 264 F.R.D. 249, 256 (S.D. Va. 2010).

In the past, *Lone Pine* orders have been typically "disfavored in the early stages of the proceedings where no meaningful discovery has taken place."[4] Moreover, some courts have called for the issuance of *Lone Pine* orders only "after the defendant has made a clear showing of significant evidence calling into question the plaintiffs' ability to bring forward necessary medical causation and other scientific information." *McManaway*, 265 F.R.D. at 388; *see also Hostetler v. Johnson Controls, Inc.*, No. 3:15-CV-226-JD-MGG, 2017 WL 359852, at *5 (N.D. Ind. Jan. 25, 2017).

Some circumstances support entry of a *Lone Pine* order, such as "decisions of external regulatory agencies that sound the 'all clear,' or otherwise show no exposure or possibility of injury from any exposure." *Hostetler*, at *6; citing *In re Digitek*, 264 F.R.D. at 259. Courts have also shown greater willingness to grant *Lone Pine* orders in an MDL where plaintiffs have voluntarily dismissed a large percentage of cases following preliminary discovery measures and/or preparation for trial. *See In re*

[4] *Adkisson v. Jacobs Eng'g Group, Inc*., Nos. 3:13-CV-505-TAV-HBG, 3:13-CV-666-TAV-HBG, 3:14-CV-20-TAV-HBG, 3:15-CV-17-TAV-HBG, 3:15-CV-274-TAV-HBG, 3:15-CV-420-TAV-HBG, 3:15-CV-460-TAV-HBG, 3:15-CV-462-TAV-HBG, 2016 WL 4079531, at *4 (E.D. Tenn. July 29, 2016) (citing *Simeone v. Girard City Bd. of Educ*., 872 N.E.2d 344, 352 (2007)).

Fosamax Products Liability Litigation, 2012 WL 5877418, at *3 (S.D.N.Y. 2012).[5] Other courts have declined to enter *Lone Pine* orders for reasons including the timing of the motion, the stage of the litigation, or as a result of other factual circumstances of the case.[6]

II. FOUR EXAMPLES ILLUSTRATE EFFECTIVE *LONE PINE* ORDER USE

Because MDL litigation is lengthy, expensive, and unwieldly, *Lone Pine* orders provide a unique opportunity to winnow the cases filed to those presenting legitimate and plausible claims. Below are four examples where *Lone Pine* orders, or court orders analogous to *Lone Pine* orders, were effectively deployed.

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[5] While *Lone Pine* orders have been deployed before, during, and after discovery, it should be noted that pre-discovery *Lone Pine* orders have been found to be *per se* impermissible by at least one state court (Colorado Supreme Court). *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 151 (Colo. 2015) ("We hold that Colorado's Rules of Civil Procedure do not allow a trial court to issue a modified case management order, such as a *Lone Pine* order, that requires a plaintiff to present *prima facie* evidence in support of a claim before a plaintiff can exercise its full rights of discovery under the Colorado Rules.").

[6] *See, e.g., Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1167-69, 1175-76 (11th Cir. 2014) (finding that it is both legally inappropriate and unwise for trial courts to issue *Lone Pine* orders before determining whether plaintiffs' claims could survive a motion to dismiss); *In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 259 (S.D. W.Va. 2010) (declining to enter a *Lone Pine* order at relatively early stage in litigation, favoring instead "available procedural devices such as summary judgment, motions to dismiss, motions for sanctions and similar rules" to achieve the goals of efficiency, elimination of frivolous claims, and fairness); *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 388 (S.D. Ind. 2009) (granting in part and denying in part a request for a *Lone Pine* order and noting that "[a] *Lone Pine* order should issue only in an exceptional case and after the defendant has made a clear showing of significant evidence calling into question the plaintiffs' ability to bring forward necessary medical causation and other scientific information"); *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 350 (Ohio Ct. App. 2007) (reversing and remanding trial court's entry of *Lone Pine* order and noting that "[t]he *Lone Pine* order has faced harsh criticism because it gives courts the means to ignore existing procedural rules and safeguards," including when the order "cuts off or severely limits the litigant's right to discovery, [thereby] closely resembling summary judgment, albeit without the safeguards that the Civil Rules of Procedure supply"); *see also cf. In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008) (affirming *Lone Pine* order, but noting that "*Lone Pine* orders may not be appropriate in every case and, even when appropriate, they may not be suitable at every stage of the litigation").

A. Fosamax

The transferee court implemented a *Lone Pine* order in the *Fosamax* MDL (*In re Fosamax Products Liability Litigation*, 2012 WL 5877418 (S.D.N.Y. 2012)), which consolidated 1,094 cases in the Southern District of New York. In 2012, at the conclusion of all other pre-trial proceedings, defendant Merck moved the court to enter an order requiring all plaintiffs to provide "(1) a completed Plaintiff Profile Form along with records and an execution of release of medical records; (2) a case-specific expert discovery report from a qualified medical expert attesting that the injury Plaintiff suffered was caused by Fosamax; and (3) a signed statement from Plaintiff that he or she is willing to proceed with the case upon remand." *Id*. at *1. In support of its motion, Merck asserted that, as cases in the MDL were more likely to be dismissed by a plaintiff after receiving closer scrutiny, a *Lone Pine* order would ensure that only those cases with qualified plaintiffs would remain in the MDL. *Ibid*.

In *Fosamax*, the court observed that "[w]ith increasing frequency, courts overseeing complex pharmaceutical MDLs are using *Lone Pine* orders to streamline the docket." *Id*. at *2.[7] The court granted defendants' motion for a *Lone Pine* order,

[7] *See In re Avandia Marketing, Sales Practices & Products Liab. Litig.*, 2017 WL 1401285, at *3; *In re Pradaxa (Dabigatran Etexilate) Products Liab. Litig.*, MDL No. 2385, slip op. at 2, 5 (S.D. Ill. May 29, 2014); *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, MDL No. 1871 (E.D. Pa. Nov. 15, 2010); *In re Zyprexa Prods. Liab. Litig.*, MDL No. 1596 (E.D.N.Y. June 2, 2010); *In re Bextra and Celebrex Mktg. Sales Practices and Prod. Liab. Litig*., MDL No. 1699 (N.D. Cal. Aug. 1, 2008); *In re Vioxx Prods. Liab. Litig*., MDL No. 1657 (E.D. La. Nov. 9, 2007, July 6, 2009); *In re Rezulin Prods. Liab. Litig*., MDL No. 1348 (S.D.N.Y. May 9, 2005); *In re Baycol Prods. Liab. Litig*., MDL No. 1431 (D. Minn. Mar 18, 2004).

permitting the requested discovery from a limited group of plaintiffs alleging one type of injury.

The *Lone Pine* order in *Fosamax* required, pursuant to Federal Rules of Civil Procedure 16 and 26, production of the following:

1. Completed Plaintiff Profile Forms and executed Authorizations for Release of Medical Records.

2. A Rule 26(a)(2) Expert Report, signed and sworn to by a qualified physician or other medical expert ("the expert") that included the dates during which the Plaintiff used Fosamax and references to the evidence relied upon to determine such use (either the actual pages or the Bates stamped numbers); the name(s) of the physician(s) who prescribed Fosamax to the Plaintiff; whether the expert believes to a reasonable degree of medical certainty that Fosamax caused Plaintiff's alleged injury, and if so, the factual and medical/scientific bases for that opinion; and the date, at least by month and year, when the expert believes to a reasonable degree of medical certainty the Plaintiff first developed the injury alleged to have been caused by Fosamax.

3. A signed statement from each Plaintiff affirming that he/she was willing to proceed with the case upon remand.

The failure to comply with the terms of the court's *Lone Pine* Order expressly provided that it could lead to the dismissal of the delinquent Plaintiffs' actions with prejudice.

All of the information required to be submitted was the type of basic evidence necessary for a *prima facie* case. This *Lone Pine* order resulted in over 400 voluntary dismissals of cases that should never have been filed.

The *Fosamax* defendants requested a second, broader *Lone Pine* order applicable to plaintiffs (1) who failed to produce medical records evidencing diagnosis of a broader category of injury; (2) who could establish only minimal usage (less than

one year of use based on pharmacy records); or (3) whose last usage was extremely remote from their injury (no prescriptions filled within three years of alleged onset). The court denied that request. *Fosamax*, 2013 WL 4494427, at *1. In support of its denial, the court asserted that issuing a *Lone Pine* order for plaintiffs who could only establish minimal usage would "(a) eschew [the] Court's stated goal of safeguarding plaintiffs' rights, and (b) ignore other courts' admonishments to devise *Lone Pine* orders that reflect a balance between efficiency and equity." *Id*. at *2. The court was clear that while the *Lone Pine* order issued previously was meant to ensure plaintiffs with non-specific diagnoses fit the criteria for inclusion in the MDL, it would be inappropriate to use such an order to "direct extra scrutiny on certain plaintiffs based on fact-based judgments regarding the effect of exposures to Fosamax or the interpretation of medical records." *Ibid*. The court observed that such issues were matters for summary judgment rather than a *Lone Pine* order.

B. Zimmer Nexgen

Another example can be found in recent developments in *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig*., Case No. 1:11-cv-05468 (N.D. Ill.). After the parties completed initial discovery and Zimmer had produced millions of pages of documents, the defendant requested that the court issue a *Lone Pine* order requiring plaintiffs to provide "certain basic documentation confirming that their allegations had a reasonable basis in fact." *In re Zimmer*, Memorandum in Support of Zimmer's Motion for Entry of a Lone Pine Order (Dkt. 1160), at 4. Zimmer argued that "this

litigation is rampant with facially unsupportable claims that should never have survived the due diligence that plaintiffs' attorneys must apply before filing a claim." *Id*. at 3-4. In its request for a *Lone Pine* order, Zimmer highlighted a number of issues it argued were common among the constituent actions, including cases barred by the statute of limitations, cases lacking evidence of injury, and plaintiffs who did not confirm use of the Zimmer product. *Id*. at 10-14.

The court postponed ruling on Zimmer's motion for a *Lone Pine* order, instead proceeding though expert discovery, dispositive motions, *Daubert* motions, and the first bellwether trial. After Zimmer won a defense verdict in the first bellwether trial, plaintiffs suddenly withdrew from dozens of cases and advised that two trials would not proceed due to problems with plaintiffs' central theory of liability. Taking this as a clear indication that evidentiary issues likely existed throughout the broader group of remaining cases, the court promptly instructed the parties to come to an agreement about the terms of a *Lone Pine* order to be implemented.

In June 2016, the court effectuated a *Lone Pine* order imposing new demands on bellwether-track plaintiffs, requiring that they identify the specific nature of the alleged injury and produce a signed expert declaration specifying the theory of causation they intended to advance at trial. Significantly, the court entered this order contemporaneous with its statement of commitment to full resolution of the MDL by the end of 2017, laying out a bellwether trial schedule and global mediation strategy.

C. Darvocet/Darvon/Propoxyphene

In early 2012, Judge Reeves of the Eastern District of Kentucky entered a detailed case management order (CMO 5) in the Darvocet MDL that had the flavor and effect of a *Lone Pine* order. *In re Darvocet, Darvon, Propoxyphene Prods. Liab. Litig.,* MDL No. 2226 (E.D. Ky. May 25, 2012). Specifically, the court required each plaintiff whose claims alleged ingestion of a propoxyphene-containing pain product along with a "contemporaneous injury," to provide:

1. The dates of ingestion of a relevant product;
2. "Prima facie evidence of acquisition of a [p]roduct" (*i.e.*, pharmacy records with National Drug Codes; pill bottles with the plaintiff's name, NDC or manufacturer name, and product name clearly visible; or a pharmacist's affidavit stating that the drug was dispensed to the plaintiff; but not medical records denoting a prescription, an affidavit from a healthcare provider attesting to prescribing the product to the plaintiff, or an affidavit from the plaintiff attesting that he or she ingested the drug); and
3. *Prima facie* evidence of the alleged injury in the form of a medical record containing the date of the injury or a signed affidavit from a physician attesting to the alleged injury and the date. *Id*. at 3.

The court required even more comprehensive evidence from those plaintiffs claiming a "cumulative or latent injury." *Id*. at 3-4. The cumulative or latent injury requirement was based on a statement by a Food and Drug Administration (FDA) physician that propoxyphene could not cause a latent injury or cumulative injury that was not contemporaneous with its ingestion. The court's action placed the burden on the plaintiffs to provide evidence that propoxyphene was capable of causing a latent cumulative injury. While demonstrating a court's broad discretion to manage

discovery matters, the judge in *Darvocet* achieved the same ends as have been accomplished by *Lone Pine* orders within the bounds of a carefully-tailored case management order.

D. Nexium (Esomeprazole)

While not a *Lone Pine* order, a case management order compelling early disclosure of product identification and injury records effectively weeded out non-meritorious cases in *In re Nexium (Esomeprazole) Prod. Liab. Litig.*, MDL No. 2404 (C.D. Cal. Aug. 21, 2013). There, the court dismissed a majority of plaintiffs' constituent claims (well over 1,000 claims) early in MDL proceedings after the court entered a case management order requiring production of evidence of product identification and proof of injury. *See id*. The order revealed the plaintiffs' widespread inability to meet the *prima facie* evidentiary requirements, resulting in dismissals based on deficiencies including inability to demonstrate that a plaintiff had taken the subject medication and failure to demonstrate that a plaintiff's injuries were consistent with those for which the JPML created the MDL in the first place.

III. OVERCOMING MDL COURTS' RESISTANCE TO EARLY *LONE PINE* ORDERS

In the past, *Lone Pine* orders have been the exception rather than the rule, with courts operating under the assumption that plaintiffs' counsel have complied with Rule 11 by filing only good-faith, well-screened cases. However, as MDL judges have observed trends of abuse that have become commonplace, they have increasingly responded with measures to combat exploitation of consolidated

litigation, including *Lone Pine* orders. Product-liability lawsuits involving pharmaceuticals and medical devices are particularly appropriate for *Lone Pine* orders that require a showing of product use or ingestion, general causation, and a plausible claim that can survive legal defenses such as statute of limitations and preemption.

An order entered by Judge Clay D. Land of the Middle District of Georgia in his management of *In re Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig*. reflects growing concerns over plaintiffs' failure to abide by their Rule 11 obligations:

> It has been the undersigned's experience that notwithstanding the many benefits of MDL consolidation, such consolidations are not without unintended consequences. Although one of the purposes of MDL consolidation is to allow for more efficient pretrial management of cases with common issues of law and fact, the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action.
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> * * *
>
> The undersigned has not conducted any empirical analysis to support the thesis suggested in this order, partly because the undersigned has been preoccupied with deciding summary judgment motions in marginal cases. But based on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.

MDL No. 2004, 2016 WL 4705827 (M.D. Ga. Sept. 7, 2016).

In order to overcome some MDL judges' reticence to impose discovery requirements on plaintiffs at the outset of an MDL, a proposed *Lone Pine* order must

be closely tailored to reduce excessive demands on the court and the parties while collecting objective proof of a good-faith basis for both the mass tort allegations and the individual allegations of a plaintiff.

The following factors should be considered before seeking a *Lone Pine* order:

A. Posture of the Litigation

Courts have been more willing to grant *Lone Pine* orders several years into an MDL proceeding, once cases have completed preliminary discovery and defendants have undertaken more extensive discovery in advance of bellwether trials. At such later junctures, the balance typically favors defendants who have been subjected to extensive fact discovery, especially where the requirements of a *Lone Pine* order are reasonably limited to the production of basic information or documents plaintiffs should reasonably have in their possession.

However, waiting for one or two years to implement a *Lone Pine* order requiring evidence of product identification or basic medical causation translates into discovery expenses and attorneys' fees for litigation that may be lacking merit in its entirety or litigation in which vast numbers of claims have no plausible basis on which to proceed. Opportunities to winnow out "junk" cases should be considered early, especially when there is mass advertising or significant causation issues.

B. Voluntary Dismissals

A high rate of voluntary dismissal among bellwether pool cases lends support for the expansion of scrutiny through the closely-tailored requirements of a *Lone Pine*

order. High attrition rates reasonably compel the transferee court to question the viability of the claims that linger outside of the court's early attention, and thus judges are more likely to act in the interest of efficiency and conservation of court resources. As the court noted in *Fosamax*, "Plaintiffs' habit of dismissing cases after both parties have expended time and money on case-specific discovery demonstrates that this MDL is ripe for a *Lone Pine* order." *In re Fosamax Prod. Liab. Litig.*, No. 06 MD 1789 JFK, 2012 WL 5877418, at *3 (S.D.N.Y. Nov. 20, 2012).

C. External Agency Decisions

As was critical in obtaining a *Lone Pine* order in *Fosamax* and *Darvocet*, the nature of the alleged injury and plaintiffs' theory of liability/causation heavily influence a court's willingness to impose an order. Thus, FDA or other regulatory agency decisions rebutting plaintiffs' theory of causation can inform the requirements of a *Lone Pine* order, be it through the contents of an expert report or specifics of product use/identification.

D. Availability of Other Procedures

Defendants must be cognizant of the particular demands of a *Lone Pine* motion. Courts must not perceive such efforts as duplicating or mimicking summary judgment. Rather, *Lone Pine* orders should be crafted to highlight the presence or absence of evidence of basic facts which is objectively necessary to the viability of a given claim, facts which are often absent from the plaintiff's complaint. Other options include limiting discovery to general causation, preemption, or other issues

that could be dispositive of the litigation as a whole, before permitting full-scale discovery against defendants on all issues.

CONCLUSION

The effectiveness of *Lone Pine* orders in weeding out meritless claims makes this tool particularly useful in an MDL with a large volume of plaintiffs, many of whom have not been vetted through a responsible intake process. Such orders should not be characterized as adding to or expanding existing discovery obligations. Instead, they should be presented as simply requiring what plaintiffs' lawyers should have obtained before commencing the suit. Courts should be encouraged to use *Lone Pine* orders to prevent plaintiffs from shifting the potentially immense burden of vetting their clients' claims to the defense.

