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## ESSAY

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### LONE PINE ORDERS: A CRITICAL EXAMINATION AND EMPIRICAL ANALYSIS

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*Invented in 1986 and now a prominent feature of the mass tort landscape, Lone Pine orders require plaintiffs to provide to the court prima facie evidence of injury, exposure, and specific causation—sometimes early, and usually on pain of dismissal. Though they’ve taken root in a hazy space outside of the Federal Rules of Civil Procedure, these case management orders are frequently issued, and they play an important role in the contemporary litigation and resolution of mass torts. But although Lone Pine orders are common, potent, and increasingly controversial, they have mostly fallen under the academic radar. Even their key features are described inconsistently by commentators and courts. This Essay pulls back the curtain. Drawing on a unique hand-coded dataset, this Essay describes the origin and evolution of Lone Pine orders, sketches poles of the debate surrounding their use, and offers empirical evidence regarding their entry, content, timing, and effect.*

#### INTRODUCTION

A *Lone Pine* order is a case management order that typically requires plaintiffs to provide prima facie evidence of injury, exposure, and causation, generally on pain of dismissal. Originating in the 1986 New Jersey state court decision, *Lore v. Lone Pine Corp.*, these case management orders have become a familiar—and prominent—feature of the mass tort landscape.<sup>1</sup> *Lone Pine* orders have played a role in many of the most significant product liability

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<sup>1</sup> *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

cases of all time, including litigation involving asbestos,<sup>2</sup> Vioxx,<sup>3</sup> Fosamax,<sup>4</sup> Rezulin,<sup>5</sup> Celebrex,<sup>6</sup> Nimmer Nexgen knee implants,<sup>7</sup> Baycol,<sup>8</sup> Avandia,<sup>9</sup> and Fresenius.<sup>10</sup> And the orders are currently much in vogue: a bill that would codify, and even *mandate*, the use of *Lone Pine* orders in multidistrict litigation (MDL) recently passed the House of Representatives.<sup>11</sup>

Yet, notwithstanding their practical importance and current prominence, these case management orders have somehow fallen under the academic radar. Aside from a couple of student notes, *Lone Pine* orders have been the subject of remarkably little academic scrutiny.<sup>12</sup> And courts vary widely in their descriptions—and use—of this potent procedural device.

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<sup>2</sup> Amended Administrative Order No. 12, *In re Asbestos Prods. Liab. Litig.* (No. VI), 718 F.3d 236, 241 (3d Cir. 2013) (No. 01-0875).

<sup>3</sup> *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008), *aff'd*, 388 F. App'x 391 (5th Cir. 2010).

<sup>4</sup> *In re Fosamax Prods. Liab. Litig.*, No. 06-1789, 2012 WL 5877418, at \*4-5 (S.D.N.Y. Nov. 20, 2012).

<sup>5</sup> Pretrial Order No. 370, *In re Rezulin Prods. Liab. Litig.*, No. 00-2843, 2005 WL 1105067, at \*1-2 (S.D.N.Y. May 9, 2005); Pretrial Order at 1-2, *In re N.Y. Rezulin Prods. Liab. Litig.*, No. 0752000/2000 (N.Y. Sup. Ct. Aug. 11, 2004) [hereinafter N.Y. Rezulin Pretrial Order].

<sup>6</sup> Pretrial Order No. 29 at 1-4, *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, No. 05-1699 (N.D. Cal. Aug. 1, 2008).

<sup>7</sup> Pretrial Order No. 11 at 2-4, *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, No. 11-5468 (N.D. Ill. June 10, 2016).

<sup>8</sup> *In re Baycol Prods. Liab. Litig.*, No. 01-1431, 2004 WL 626866, at \*1-2 (D. Minn. Mar. 18, 2004).

<sup>9</sup> Pretrial Order No. 121 at 2-4, *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 07-1871 (E.D. Pa. Nov. 15, 2010).

<sup>10</sup> Pretrial Order No. 17 at 5-7, *In re Fresenius Granuflo/Nutralyte Dialysate Prods. Liab. Litig.*, No. 13-2428 (D. Mass. Jan. 26, 2017).

<sup>11</sup> Among other things, the bill provides that, within forty-five days of transferring a personal injury action into an MDL:

counsel for a plaintiff . . . shall make a submission sufficient to demonstrate that there is evidentiary support . . . for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.

Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 105 (2017).

<sup>12</sup> This is changing, as Nora Freeman Engstrom very recently published a piece on *Lone Pine* orders in the *Yale Law Journal* and Elizabeth Chamblee Burch has penned a response. See Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 YALE L.J. 2 (2019); see also Elizabeth Chamblee Burch, *Nudges and Norms in Multidistrict Litigation: A Response to Engstrom*, 129 YALE L.J.F. 64 (2019). Prior to those contributions, the most comprehensive treatments were authored by practitioners or students. See, e.g., Cal R. Burnton, *Narrowing the Field in Mass Torts: The Lone Pine Solution*, 19 PROD. LIAB. LITIG. REP., Apr. 2008, at 15; James P. Muehlberger & Boyd S. Hoekel, *An Overview of Lone Pine Orders in Toxic Tort Litigation*, 71 DEF. COUNSEL J. 366 (2004); William A. Ruskin, *Prove It or Lose It: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 AM. J. TRIAL ADVOC. 599 (2003); John T. Burnett, Comment, *Lone Pine Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. LAND USE & ENVTL. L. 53 (1998); Michelle Sliwinski, Note, *Addressing the Fissures in Causation Claims: A Case Against the Use of Lone Pine Orders as Procedural Hurdles in Hydraulic Fracturing Litigation*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 77

Here, we begin the process of bridging those gaps. Our analysis proceeds in three Parts. Part I offers a primer on *Lone Pine* orders. It recounts the orders' 1986 invention, traces their early adoption, and describes their purpose. Part II then briefly sketches the poles of the debate surrounding the orders' use, focusing on recent criticism of the *Lone Pine* mechanism. Part III then draws on our unique, hand-coded dataset of ninety-seven *Lone Pine* orders, issued by both state and federal trial courts from 1986 to 2019, to offer a descriptive account. Our descriptive statistics permit us to offer new, and in some cases surprising, information concerning *Lone Pine* orders' use, content, timing, and effect.

Three of our conclusions are particularly noteworthy. First, although any conclusion regarding "trends" ought to be viewed with particular suspicion, we find evidence that, from 1989 until 2014, *Lone Pine* orders were on the rise. But we find some tentative evidence that, within the past few years, their popularity may have flagged.<sup>13</sup> Second, we find that *Lone Pine* orders' timing of entry varies considerably: Some *Lone Pine* orders are issued prior to discovery; some are issued once discovery is in full swing; and some are issued at the tail-end of litigation, once a global or mass settlement agreement has been at least preliminarily forged. Contrary to the views of several judges and commentators,<sup>14</sup> then, *Lone Pine* orders are not exclusively "pre-discovery" procedural devices. Nor are they exclusively orders sought "after the settlement is consummated."<sup>15</sup> They are, for better or worse, case management orders issued at nearly any time throughout a litigation's lifecycle. Third and finally, we find that *Lone Pine* orders are potent: 61% of

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(2016); Scott A. Steiner, Note, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 71 (1999).

<sup>13</sup> For why this conclusion ought to be viewed with some suspicion, see *infra* note 78 and accompanying text.

<sup>14</sup> See, e.g., *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 n.2 (5th Cir. 2006) ("*Lone Pine* orders . . . are pre-discovery orders designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce some evidence to support a credible claim." (citation omitted)); *In re AET Inc. Ltd.*, No. 10-0051, 2018 WL 4203351, at \*2 (E.D. Tex. Feb. 13, 2018) ("*Lone Pine* orders . . . are pre-discovery orders . . ." (internal quotation marks and citation omitted)); *Modern Holdings, LLC v. Corning Inc.*, No. 13-0405, 2015 WL 6482374, at \*1 (E.D. Ky. Oct. 27, 2015) ("*Lone Pine* orders . . . are pre-discovery orders . . ." (citation omitted)); 28 JILL GUSTAFSON & ERIC C. SURETTE, FEDERAL PROCEDURE, LAWYERS EDITION § 64:56 (2019) ("A *Lone Pine* order is a pre-discovery order . . ."); 6 STEPHEN LEASE, CYCLOPEDIA OF FEDERAL PROCEDURE § 19:25 (3d ed. 2019) ("'*Lone Pine* orders' are pre-discovery orders . . ." (footnote omitted)); DANA SHILLING & BARBARA DETKIN, LAWYER'S DESK BOOK § 16.01 (2019) ("A '*Lone Pine*' order is a pre-discovery order . . .").

<sup>15</sup> See, e.g., D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2175, 2186 (2017) (defining *Lone Pine* orders as orders sought "after the settlement is consummated"); see also Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 100 (2017) (defining *Lone Pine* orders as filings issued late in litigation "that impose evidentiary production requirements on non-settling plaintiffs").

the *Lone Pine* orders in our dataset (or 74% of the eighty orders for which we were able to observe whether the order had an effect) were followed by at least partial summary judgment for defendants or the dismissal of at least some of plaintiffs' claims.

## I. *LONE PINE* ORDERS: INVENTION, DEFINITION, AND PURPOSE

### A. *The 1986 Invention of a Unique Case Management Device*

*Lone Pine* orders trace their origin to *Lore v. Lone Pine Corp.*, a state court case filed in April 1985 in Monmouth County, New Jersey.<sup>16</sup> Large and messy, the lawsuit arose when a motley crew of property owners sued 464 defendants alleging property depreciation and personal injury caused by water pollution reportedly emanating from the Lone Pine Landfill—a large waste site that had operated for two decades before it was eventually shuttered in 1979.<sup>17</sup>

The suit was filed with some fanfare. But soon after its initiation, plaintiffs' case seemingly ground to a halt. After seven months of litigation, plaintiffs had served only a "few" of the 464 defendants they had originally named in their complaint.<sup>18</sup> Then, nine months in, the court became aware that the Environmental Protection Agency (EPA) had prepared a report about the landfill that severely undercut plaintiffs' claims.<sup>19</sup> Ominously for plaintiffs, the EPA found that the environmental contamination that was the target of plaintiffs' complaint (and was, in plaintiffs' telling, to blame for their various ailments) was, in fact, "confined to the landfill and its immediate vicinity."<sup>20</sup> This finding was relevant—and, for plaintiffs, deeply troubling—because some plaintiffs alleging injury lived some distance away. In fact, one plaintiff lived twenty miles from the landfill, and two more of the allegedly affected individuals resided two miles from it "in different directions."<sup>21</sup>

Both the sluggish pace of the litigation and the shadow cast by the EPA report ultimately prompted Judge William T. Wichmann to take a novel step. Following a January 1986 status conference, Judge Wichmann entered an unusual case management order, prior to the start of discovery.<sup>22</sup> This order compelled the *Lone Pine* plaintiffs to provide, under penalty of dismissal, "basic facts . . . in order to support their claims of injury and property damage" including "[r]eports of treating physicians and medical or other

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<sup>16</sup> No. L-33606-85, 1986 WL 637507, at \*1 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at \*3.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at \*1-2.

experts, supporting each individual plaintiff's claim of injury and causation by substances from Lone Pine Landfill," all "on or before June 1, 1986."<sup>23</sup>

The plaintiffs offered some information in response to Judge Wichmann's case management order, but it was far from satisfactory. As a defense lawyer put it: "With regard to the personal injuries, there is no evidence whatsoever of any toxic or chemical contamination of any of the bodies of the plaintiffs."<sup>24</sup> Judge Wichmann agreed, observing that plaintiffs' filings were "woefully and totally inadequate."<sup>25</sup> "Plaintiffs," Judge Wichmann complained, "merely listed a variety of illnesses such as allergies, itching, dryness of skin, and the like. No records were submitted to substantiate any physical problems, their duration or severity. No doctors' reports were provided."<sup>26</sup> The upshot was, although plaintiffs' lawsuit had been pending for over a year, "defendants were no better off" than when suit was first filed.<sup>27</sup> Accordingly, on November 18, 1986, an exasperated Judge Wichmann dismissed all of plaintiffs' claims with prejudice<sup>28</sup>—and, crucial for our purposes, the *Lone Pine* idea was born.

Within a few years of Judge Wichmann's ruling, the *Lone Pine* idea spread from Monmouth County, New Jersey to Niagara County, New York. There, as in *Lone Pine*, plaintiffs were alleging injury from their exposure to a noxious landfill (this time, the notorious Love Canal) and, also as in *Lone Pine*, their claims aroused judicial suspicion.<sup>29</sup> This time, suspicion arose because, among other oddities, "some plaintiffs not even born until 1980" alleged they "frequented" the contaminated area in 1980, while other plaintiffs alleged they were injured when they visited an area that was, in reality, closed and protected by an eight-foot-high fence on the dates in question.<sup>30</sup> Convinced that "a new approach to the handling of these . . . actions" was needed—and relying on both *Lone Pine* and the court's own inherent authority—on May 17, 1989, Judge Vincent Doyle issued an order similar to Judge Wichmann's novel submission.<sup>31</sup> In particular, Judge Doyle required plaintiffs to come forward with clear evidence of exposure and injury and also to file "[r]eports or affidavits of a physician or other qualified expert demonstrating that each

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at \*4.

<sup>25</sup> *Id.* at \*2.

<sup>26</sup> *Id.* at \*3.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*4.

<sup>29</sup> *In re Love Canal Actions*, 547 N.Y.S.2d 174, 175 (Sup. Ct. 1989), *modified*, 555 N.Y.S.2d 519 (App. Div. 1990).

<sup>30</sup> *Id.* at 178-79.

<sup>31</sup> *Id.* at 177-79.

injury of a plaintiff was, in fact, caused by the plaintiff's exposure to chemicals at or from the old Love Canal landfill."<sup>32</sup>

Soon thereafter, in 1991, Judge Franklin Battin of the United States District Court of Montana picked up the baton, issuing another *Lone Pine* order in another notable suit involving health effects allegedly traceable to the defendant's environmental contamination.<sup>33</sup> In *Eggar v. Burlington Northern Railroad Co.*, "twenty-seven plaintiffs filed suit against Burlington Northern" asserting that they suffered from various maladies stemming from their exposure to an assortment of chemicals seeping from Burlington Northern's Livingston shop,<sup>34</sup> a two-mile-long complex that contained a railyard alongside rail car maintenance and repair facilities.<sup>35</sup> Judge Battin expressed skepticism regarding any alleged link between Burlington and the plaintiffs' "multitude of ailments" and so, taking cues from *Lone Pine* and *Love Canal*, issued a case management order on March 6, 1991<sup>36</sup> demanding that six "test" plaintiffs file detailed affidavits from physicians.<sup>37</sup> The order further specified:

The physicians [sic] affidavit shall specify, for *each* test plaintiff, the precise injuries, illnesses or conditions suffered by that plaintiff; the particular chemical or chemicals that, in the opinion of the physician, caused each injury, illness or condition; and the *scientific and medical bases* for the physician's opinions. It will not be sufficient for the affidavit to state a "laundry list" of injuries and chemicals; each injury, illness or condition must be itemized and *specifically linked* to the chemical or chemicals believed to have caused that particular injury, condition or illness. Moreover, the statement of scientific and medical bases for the opinion shall include *specific reference to the particular scientific and/or literature* [sic] forming the basis for the opinion.<sup>38</sup>

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<sup>32</sup> *Id.* at 174. On appeal, the Appellate Division expressed uneasiness with the trial court's ruling and modified the trial court's discovery order, while cautioning "CPLR 3101(d)(1)(i) does not provide for the disclosure of expert reports as ordered by the Justice to whom the cases have been assigned for trial." *In re Love Canal Actions*, 555 N.Y.S.2d 519, 520 (App. Div. 1990).

<sup>33</sup> *Eggar v. Burlington N.R.R. Co.*, No. 89-0159, 1991 WL 315487, at \*4 (D. Mont. Dec. 18, 1991), *aff'd sub nom.* *Claar v. Burlington N.R.R. Co.*, 29 F.3d 499 (9th Cir. 1994).

<sup>34</sup> *Id.*

<sup>35</sup> *Burlington Northern Livingston Shop Complex CERCLA Facility*, MONTANA.GOV, <http://deq.mt.gov/land/statesuperfund/bnlivingston> [<https://perma.cc/E2SN-Q8BB>] (last visited Jan. 5, 2020).

<sup>36</sup> *Eggar*, 1991 WL 315487, at \*4; *see also Claar*, 29 F.3d at 500 (noting that the trial court issued the order "[o]ut of concern that plaintiffs might not be able to demonstrate a causal connection between their . . . chemical exposure and their injuries"). The court first issued a *Lone Pine* order on February 26, 1990 but issued a subsequent (and more substantial) order on March 6, 1991, after concluding that plaintiffs' original submissions in response to the February 1990 order were wanting as they "contained mere laundry lists of chemicals and injuries." *Eggar*, 1991 WL 315487, at \*4.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at \*5. The March 1991 order did not contain italics. *Id.* at \*4-5. Italics were added in the court's subsequent order, granting defendant's motion for summary judgment. *Id.*

The *Eggar* plaintiffs responded to the case management order by the court-imposed deadline.<sup>39</sup> But as in *Lone Pine*, the court found plaintiffs' submissions wanting. Though the plaintiffs submitted two physicians' affidavits that were "over 150 pages each," the affidavits, Judge Battin ruled, were unsatisfactory.<sup>40</sup> They "failed to *specifically* link *each* injury, illness, or condition to the specific chemical[s] believed to have caused it."<sup>41</sup> And neither affidavit "set forth the medical and scientific bases for their opinions regarding *each* plaintiff."<sup>42</sup> Thus, as in *Lone Pine*, Judge Battin terminated the plaintiffs' claims.<sup>43</sup>

### B. Contemporary Use

In the decades since these initial forays, federal and state courts around the country have taken the *Lone Pine* idea and run with it. Many courts, in many states, have issued *Lone Pine* orders, leading some to suggest that *Lone Pine* orders have become "common"<sup>44</sup>—even "routine"<sup>45</sup>—in mass tort litigation.

In federal courts, though no specific rule authorizes their entry, the orders are generally issued under the auspices of Rule 16 of the Federal Rules of Civil Procedure, specifically, Rule 16(c)(2)(L), a vague and encompassing provision added to the federal rulebook in 1983 which empowers courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems."<sup>46</sup> State courts'

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<sup>39</sup> *Id.* at \*5.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (alterations in original).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*11. There were two notable differences, however. First, in *Eggar*, the court granted defendant's summary judgment motion (rather than a motion to dismiss). Compare *id.*, with *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507, at \*4 (N.J. Super. Ct. Law Div. Nov. 18, 1986). Second, in *Eggar*, the court granted summary judgment for defendant regarding the six test cases. *Eggar*, 1991 WL 315487, at \*11. Thus, in *Eggar*, the *Lone Pine* process did not immediately terminate the entire litigation. *Id.*

<sup>44</sup> See, e.g., *Arias v. DynCorp*, 752 F.3d 1011, 1014 (D.C. Cir. 2014) (referring to *Lone Pine* orders as a "common trial management technique").

<sup>45</sup> *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 687 F. App'x 210, 214 (3d Cir. 2017) (referring to the orders as "routine"); *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (stating that the orders are "routinely used by courts to manage mass tort cases"), *aff'd* 388 F. App'x 391 (5th Cir. 2010).

<sup>46</sup> FED. R. CIV. P. 16(c)(2)(L); e.g., *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 384 (S.D. Ind. 2009) ("*Lone Pine* orders are permitted by Rule 16(c)(2)(L) of the Federal Rules of Civil Procedure . . ."); *Ramos v. Playtex Prod., Inc.*, No. 08-2703, 2008 WL 4066250, at \*5-6 (N.D. Ill. Aug. 27, 2008) ("Such orders are permitted by Rule 16(c)(2)(L) . . ."); cf. *McMunn v. Babcock & Wilcox Power Generation Grp., Inc.*, 896 F. Supp. 2d 347, 351 (W.D. Pa. 2012) (citing, instead, Rule 16(c)(2)(A), which authorizes courts to adopt procedures for the purpose of "formulating and simplifying the issues, and eliminating frivolous claims or defenses" (internal quotation marks omitted)).

authority to issue *Lone Pine* orders, meanwhile, is said to come from a range of sources, including courts' "inherent authority."<sup>47</sup>

For the most part, in actually crafting these orders, courts hew to the above early exemplars. Like the orders in *Lone Pine*, *Love Canal*, and *Eggar*, *Lone Pine* orders are typically issued only in cases involving multiple plaintiffs and complex problems of proof.<sup>48</sup> And the orders typically compel plaintiffs to offer evidence similar to what Judges Wichmann, Doyle, and Battin demanded. Namely, under a prototypical *Lone Pine* order, each plaintiff must adduce prima facie evidence: (1) that she was exposed to the defendant's product or contaminant and the circumstances surrounding this exposure, (2) that she has suffered, or is suffering, a bona fide impairment, and (3) proof of specific causation—which is to say, either an expert affidavit or expert report expressly connecting (1) with (2)—all by a court-imposed deadline.<sup>49</sup> In the event that a plaintiff fails to meet the court-imposed cutoff or fails to satisfy the order's requirements, the plaintiff's suit may be dismissed with prejudice.<sup>50</sup>

### C. Purpose

In terms of their purpose, *Lone Pine* orders are, it is commonly said, "designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation."<sup>51</sup> In others' words, they "bring[] order to chaos"<sup>52</sup> and offer a "simpler, more expeditious means" of organizing, and possibly resolving, complex civil litigation.<sup>53</sup> *Lone Pine* orders offer this assistance by acting as a "procedural sieve."<sup>54</sup> Like a kitchen colander, they

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<sup>47</sup> See, e.g., *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882, 886-87 (Ct. App. 1992) (rejecting petitioners' argument that, in issuing what was, essentially, a *Lone Pine* order, the trial court "exceeded the scope of its inherent and discretionary powers"), modified (Mar. 20, 1992). But see *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 153 (Colo. 2015) ("Colorado's Rules of Civil Procedure do not allow a trial court to issue . . . 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.").

<sup>48</sup> There are exceptions, however. See, e.g., *Meyer v. Creative Nail Design, Inc.*, 975 P.2d 1264, 1268 (Mont. 1999) (entering a *Lone Pine* order in a products liability suit involving just two plaintiffs); *Schelske v. Creative Nail Design, Inc.*, 933 P.2d 799, 800 (Mont. 1997) (concerning the entry of a *Lone Pine* order in a case with two plaintiffs).

<sup>49</sup> Engstrom, *supra* note 12, at 20.

<sup>50</sup> *Id.*

<sup>51</sup> *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000).

<sup>52</sup> Michelle Yeary, *Lone Pine by Any Other Name*, DRUG & DEVICE L., (Feb. 5, 2019), <https://www.druganddeviceblog.com/2019/02/lone-pine-by-any-other-name.html> [<https://perma.cc/N6ZP-ZVKX>].

<sup>53</sup> *Gallagher v. FibreBoard Corp.*, 641 So. 2d 953, 955 (Fla. Dist. Ct. App. 1994).

<sup>54</sup> Steiner, *supra* note 12, at 86; accord *Burnett*, *supra* note 12, at 74 ("*Lone Pine* orders can . . . be used to weed out claims that judges may consider to be frivolous or unsupported by fact.").



seek to isolate and wash away noncolorable claims, while preserving the claims of plaintiffs who can satisfy the order's requirements and, in so doing, make out a prima facie case.<sup>55</sup>

Beyond those bromides, there's an uncomfortable fact about mass tort litigation that makes *Lone Pine* orders—and their capacity to wash away noncolorable claims—particularly attractive. That fact is that, for a slew of reasons, certain mass tort suits are susceptible to being contaminated by, or even overrun with, the inclusion of plaintiffs who do not have a legitimate claim for relief. Mass tort litigation has a regrettable track record of attracting some cases that are, as plaintiffs' lawyer Paul Rheingold puts it, "junk."<sup>56</sup> Targeting that concern, *Lone Pine* orders are specially engineered to "shake the junk cases from the mass tort tree."<sup>57</sup>

## II. PROS AND CONS OF THE *LONE PINE* MECHANISM

This Part sketches the normative landscape. The pro side of the *Lone Pine* ledger is, in large measure, implicit from the discussion above. Certain mass tort litigation is prone to being overrun by dubious claims. And in this unique, and uniquely charged environment, *Lone Pine* orders may act as a critical counterweight. By putting plaintiffs to an early test and purging those who don't make the grade (or, as in *Lone Pine*, terminating the entire case, if all plaintiffs' submissions fall short), *Lone Pine* orders may help courts to zero in on, and address, gaps in the plaintiffs' evidence. This early scrutiny can, in turn, promote a number of worthy objectives. It can save defendants time, money, and aggravation, oftentimes sparing defendants from having to

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<sup>55</sup> See *Baker v. Chevron USA, Inc.*, No. 05-227, 2007 WL 315346, at \*1 (S.D. Ohio Jan. 30, 2007) ("The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims . . .").

<sup>56</sup> Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 961 (1995) (quoting plaintiffs' lawyer Paul D. Rheingold); see also Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 688 (1989) ("[M]ature mass torts generate an overabundance of plaintiffs . . . including a substantial number of false positive claims."). For more evidence of this reality and a discussion of why, exactly, certain mass torts might become overrun with nonmeritorious claims, see Engstrom, *supra* note 12, at 22-33; Nora Freeman Engstrom, *Retaliatory RICO and the Puzzle of Fraudulent Claiming*, 115 MICH. L. REV. 639, 660-66 (2017).

<sup>57</sup> JOHN H. BEISNER & JESSICA D. MILLER, LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED 23 (2009), <https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/beisner09.pdf> [<https://perma.cc/MRS3-RKFM>]. Or, in another's equally colorful description: "They help clean house; shake off free-riders hoping to hang in until a settlement." Yeary, *supra* note 52; accord ADVISORY COMM. ON RULES OF CIVIL PROCEDURE, ADVISORY COMMITTEE ON CIVIL RULES 149 (2018), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf> [<https://perma.cc/D35M-VYLV>] (observing that courts issue *Lone Pine* orders in response to an "abiding concern" that many MDL claimants "don't really have claims").

engage in costly, intrusive, and burdensome civil discovery.<sup>58</sup> It can conserve scarce judicial resources and streamline and expedite the resolution of litigation.<sup>59</sup> By extinguishing baseless claims, scrutiny can preserve the integrity of trial processes.<sup>60</sup> And *Lone Pine* orders can even benefit “deserving” plaintiffs, who might otherwise have to share court time, counsel table, or even scarce settlement funds with those with dubious entitlements.<sup>61</sup>

But just as *Lone Pine* orders are, in many quarters, lauded, they have also been subject to criticism. Many judges, in fact, have—particularly in recent years—voiced concerns about the “untethered use of the *Lone Pine* process.”<sup>62</sup> Critics raise five main objections.

First, some worry about cost. *Lone Pine* orders generally require plaintiffs to prepare individualized expert reports, and experts—particularly scientific experts—are expensive. Thus, to enter a *Lone Pine* order is to impose a heavy (and lopsided) financial burden on plaintiffs.<sup>63</sup>

Second, critics worry that *Lone Pine* orders are “inconsistently applied.”<sup>64</sup> The record of this inconsistency is plain: In our review, we found that some courts stressed that the orders ought to be rarely issued and reserved for “exceptional” circumstances,<sup>65</sup> while other courts, by contrast, seemed to issue *Lone Pine* orders almost as a matter of course.<sup>66</sup> Compounding the inconsistency, when *Lone Pine* orders are issued, they

<sup>58</sup> See, e.g., *Miller v. Metrohealth Med. Ctr.*, No. 13-1465, 2014 WL 12589121, at \*1 (N.D. Ohio Mar. 31, 2014) (entering a *Lone Pine* order to “prevent needless expense and time consuming discovery . . . where the plaintiff has not offered any substantive information as to the basis for his or her claim”); Michelle M. Bufano, *Food for Thought: The Importance of the Early Disposition of Baseless Claims in New Jersey Products Liability Mass Tort Litigation*, N.J. LAW., Aug. 2011, at 36, 37 (suggesting that *Lone Pine* orders relieve defendants from having to “spend time and money defending claims that have no merit”).

<sup>59</sup> See David B. Weinstein & Christopher Torres, *An Art of War Lesson Applied to Mass Torts: The Lone Pine Strategy*, ENVTL. ENFORCEMENT & CRIMES COMMITTEE NEWSL. (Am. Bar Ass’n), Mar. 2011, at 19, 20, [https://www.americanbar.org/content/dam/aba/publications/nr\\_newsletters/eccc/201103\\_eccc.pdf](https://www.americanbar.org/content/dam/aba/publications/nr_newsletters/eccc/201103_eccc.pdf) [<https://perma.cc/DT6E-AZDT>] (“*Lone Pine* orders can also . . . achiev[e] judicial economy by avoiding unnecessary discovery, expert work, *Daubert* challenges, or other evidentiary proceedings.”).

<sup>60</sup> See Bufano, *supra* note 58, at 36 (suggesting that *Lone Pine* orders “curtail and discourage baseless claims”).

<sup>61</sup> See *id.* at 37 (“[L]egitimate plaintiffs also benefit from *Lone Pine* orders. For those plaintiffs that truly have a colorable cause of action supported by basic proofs, unsupported claims filed by other plaintiffs in the mass tort are detrimental. Frivolous claims divert everyone’s resources—including those of plaintiffs’ counsel—and clog up the litigation.”).

<sup>62</sup> *In re Digitek Prod. Liab. Litig.*, 264 F.R.D. 249, 257 (S.D. W. Va. 2010).

<sup>63</sup> Engstrom, *supra* note 12, at 36.

<sup>64</sup> See, e.g., *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 350 (Ohio Ct. App. 2007) (“[M]any *Lone Pine* orders are inconsistently applied, which further confuses their purpose.”).

<sup>65</sup> See, e.g., *Hostetler v. Johnson Controls, Inc.*, No. 15-0226, 2017 WL 359852, at \*4, \*6 (N.D. Ind. Jan. 25, 2017) (calling the entry of a *Lone Pine* order a “dramatic imposition” that “should be issued only in exceptional cases”).

<sup>66</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008) (referring to the orders as “routinely used by courts to manage mass tort cases”).

differ along myriad dimensions, including in regard to the precise evidence they demand and the penalties they trigger in the event of noncompliance.<sup>67</sup> This variability raises normative concerns, as it means that *Lone Pine* orders' utilization impairs horizontal equity and injects a degree of uncertainty, inconsistency, and unpredictability into court proceedings.<sup>68</sup> Like litigants are supposed to be treated alike by the court system. Contemporary application of *Lone Pine* orders threatens that principle.

Third, in many cases, *Lone Pine* orders demand what amounts to an impossible and unrealistic level of certainty. The orders, very often, ask plaintiffs to supply a yes-or-no, black-or-white answer to a question regarding specific causation: Did *X* contaminant actually cause plaintiff's *Y* injury? But this question calls for an answer that is, in many cases, invariably and inescapably grey.<sup>69</sup>

Fourth, there is a deep and legitimate worry that *Lone Pine* orders are sometimes used as pseudo-summary judgment motions.<sup>70</sup> As we explain in greater detail below, some *Lone Pine* orders function like summary judgment motions but simultaneously deprive plaintiffs of fundamental protections that Rule 56 generally affords.<sup>71</sup> As such, to quote the Ohio Court of Appeals, the orders can "give[] courts the means to ignore existing procedural rules and safeguards."<sup>72</sup>

Fifth and finally, as we also discuss in more detail below, there is a worry that other *Lone Pine* orders—and, in particular, those orders issued in

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<sup>67</sup> Engstrom, *supra* note 12, at 37-42 (discussing the uncomfortable variability among individual *Lone Pine* orders in regard to whether an order should be issued; if so, at what point the order should issue; and what, exactly, the order should say).

<sup>68</sup> Cf. Burnett, *supra* note 12, at 76 ("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 activity." (footnote omitted)).

<sup>69</sup> See, e.g., Cottle v. Superior Court, 5 Cal. Rptr. 2d 882, 902 (Ct. App. 1992) (Johnson, J., dissenting) (chastising the majority for affirming the case's dismissal pursuant to a *Lone Pine*-style order, while noting that "what the trial court sought was an *impossibility* in this as in virtually all toxic tort cases—evidence a given toxic or combination of toxics was the *cause in fact* of a given disease or other condition in a specific individual"), modified (Mar. 20, 1992); Engstrom, *supra* note 12, at 46-52 (criticizing *Lone Pine* orders for "engraft[ing] a binary filter onto a question that is not susceptible to a yes-or-no answer").

<sup>70</sup> Cottle, 5 Cal. Rptr. 2d. at 897 (Johnson, J., dissenting) (explaining that a case's termination pursuant to a *Lone Pine* process may have "the purpose and effect of summary judgment but avoid[] the very procedures and protections the Legislature deemed essential"); Antero Res. Corp. v. Strudley, 347 P.3d 149, 159 (Colo. 2015) ("[I]f a *Lone Pine* order cuts off or severely limits the litigant's right to discovery, the order closely resembles summary judgment, albeit without the safeguards supplied by the Rules of Civil Procedure.").

<sup>71</sup> These safeguards include access to discovery and the right to de novo appellate review. See *infra* notes 93-94 and accompanying text.

<sup>72</sup> Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 350 (Ohio Ct. App. 2007).

MDLs at the twilight of litigation—might unduly strongarm claimants to accede to settlements they might rather refuse.<sup>73</sup>

### III. OFFERING MORE DETAIL: OUR DATASET

In order to say more about *Lone Pine* orders—including when they are commonly issued and what their effect might be—we built a dataset of ninety-seven *Lone Pine* orders.<sup>74</sup> We assembled the dataset, comprised of both published and unpublished orders, from Westlaw searches, by conducting a comprehensive literature review, and by corresponding with—and obtaining information from—dozens of attorneys involved in potentially relevant litigation.<sup>75</sup>

We begin with a few notes regarding our methodology. First, because *Lone Pine* orders are themselves so variable, we struggled with the determination of whether a particular case management order fairly qualified as a *Lone Pine* order for purposes of inclusion within our dataset. We ultimately included in our dataset any case management order that either (1) required a plaintiff to provide prima facie evidence of exposure, injury, and causation under threat of some penalty, often dismissal,<sup>76</sup> or (2)

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<sup>73</sup> See *infra* note 95 and accompanying text.

<sup>74</sup> We have posted many of the orders included in our dataset online at *Lone Pine Orders*, STAN. L. SCH., <https://lonepineorders.law.stanford.edu> [<https://perma.cc/XVR4-YJGW>] (last updated Jan. 6, 2020).

<sup>75</sup> We particularly benefited from, and are grateful to, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019); Ruskin, *supra* note 12; Michele Yeary, *Lone Pine Cheat Sheet*, DRUG & DEVICE L. (Nov. 30, 2012), <https://www.druganddevicelawblog.com/2012/11/lone-pine-cheat-shee.html> [<https://perma.cc/W45U-6CZH>]. Despite the hundreds of hours we have spent crafting our dataset from publicly and nonpublicly available sources, the dataset almost certainly fails to capture all *Lone Pine* orders issued since 1986. Furthermore, the subset of orders we have captured may be unrepresentative; “visible” orders might differ from invisible orders in important—but impossible-to-discern—ways. Because of these limitations, we do not suggest that our dataset is a representative sample of all *Lone Pine* orders issued nationally; as a consequence, the generalizability of our findings remains uncertain.

<sup>76</sup> Thus, we include orders meeting these criteria that may have arisen independently of *Lore v. Lone Pine*, such as the order discussed in *Cottle v. Superior Court*, 5 Cal. Rptr. 2d 882 (Ct. App. 1992), and its progeny. At the outer limits of orders included in our dataset are orders requiring a narrower showing, where one or more of the elements of exposure, causation, and injury were not contested. However, we excluded various orders that failed to compel plaintiffs to make a prima facie showing. *E.g.*, Order to Show Cause, *In re Human Tissue Prods. Liab. Litig.*, No. 06-0135 (D.N.J. July 22, 2010). Nor did we include within our dataset orders requiring the submission of plaintiff fact sheets. Usually answered under oath, plaintiff fact sheets typically require each plaintiff swept into an aggregate action to submit basic information about her background, her injury, any past claims she has lodged seeking compensation, and the identity of her diagnosing physician. Engstrom, *supra* note 12, at 20. Unlike *Lone Pine* orders, then, plaintiff fact sheets do not require a prima facie showing of causation. *Id.* at 21. For more on plaintiff fact sheets, see generally MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.83 (2004); MARGARET S. WILLIAMS ET AL., FED.

was referred to as a “*Lone Pine* order” by the trial or appellate court.<sup>77</sup> As noted, these efforts yielded a dataset of ninety-seven orders. After compiling these orders and associated explanatory information, we hand-coded relevant data, including the following:

1. The type of suit (e.g., product liability, environmental contamination, or other);
2. The date the *Lone Pine* order was issued;
3. Whether the order required a showing of specific causation;
4. Whether the order required a plaintiff to submit an expert report or affidavit and, if so, whether the court required a report or affidavit sufficient to survive a *Daubert* challenge;
5. When in the course of the litigation the order was issued, and, in particular, whether the *Lone Pine* order was issued (i) prior to discovery, (ii) during discovery, or (iii) in the “twilight” phase of litigation, which is to say, toward the end of litigation, when a settlement had been forged and the key question was whether each individual claimant would opt into that settlement; and
6. The observed effect or effects of the order. When available from the record or correspondence with attorneys involved in the litigation, we also recorded the number of plaintiffs affected by each order.

Our review yielded five key findings concerning *Lone Pine* orders’ incidence, when in the course of litigation *Lone Pine* orders are issued, the content of the orders, and the orders’ observed effects.

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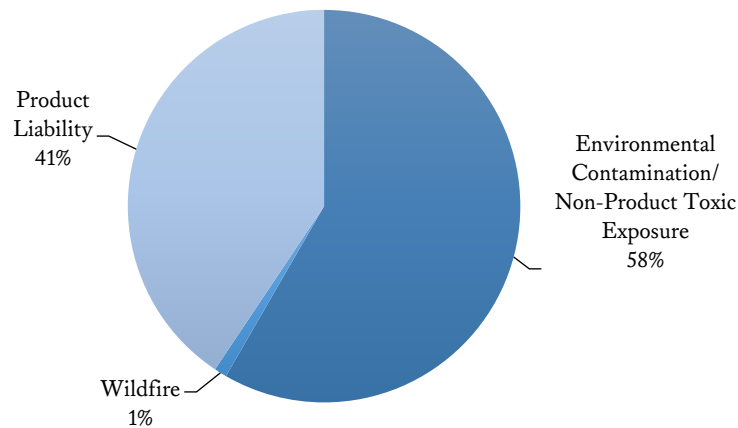
JUDICIAL CTR., PLAINTIFF FACT SHEETS IN MULTIDISTRICT LITIGATION: PRODUCTS LIABILITY PROCEEDINGS 2008–2018 (2019), <https://www.fjc.gov/sites/default/files/materials/49/PFS%20in%20MDL.pdf> [<https://perma.cc/8YVX-AVDT>]; Engstrom, *supra* note 12, at 19–22. A final note is that we excluded from our dataset cases where the defendant’s motion for a *Lone Pine* order was granted, but for one reason or another, the order never issued. *E.g.*, *In re* 1994 Exxon Chem. Plant Fire Litig., No. 94-MS-3-C-1, 2005 WL 6252291, at \*1 (M.D. La. Apr. 29, 2005) (granting the defendant’s motion for a *Lone Pine* order but declining to issue the order until the defendant identified those plaintiffs who would be subject to it); *cf.* *In re* 1994 Chem. Plant Fire, No. 94-MS-3-C-1, 2005 WL 6252290, at \*1 (M.D. La. July 15, 2005) (declining to certify for interlocutory appeal the trial court’s grant of defendant’s motion for a *Lone Pine* order because “the order has not yet been entered”).

<sup>77</sup> In this circumstance, we included case management orders that do not clearly fit our formal definition of a *Lone Pine* order. *E.g.*, *In re* Jobe Concrete Prods., Inc., No. 08-01-00351-CV, 2001 WL 1555656, at \*2-3, \*5 (Tex. App. Dec. 6, 2001) (referring to the trial court’s order for plaintiffs to “designate a group of 12 Plaintiffs” to be subject to a special inquiry as a “*Lone Pine* order”).

### A. Case Type

First, we found that the vast majority of *Lone Pine* orders were issued in mass tort litigation. In our dataset, 58% of *Lone Pine* orders were issued in lawsuits alleging environmental contamination or non-product toxic exposure, and 41% were issued in product liability lawsuits.

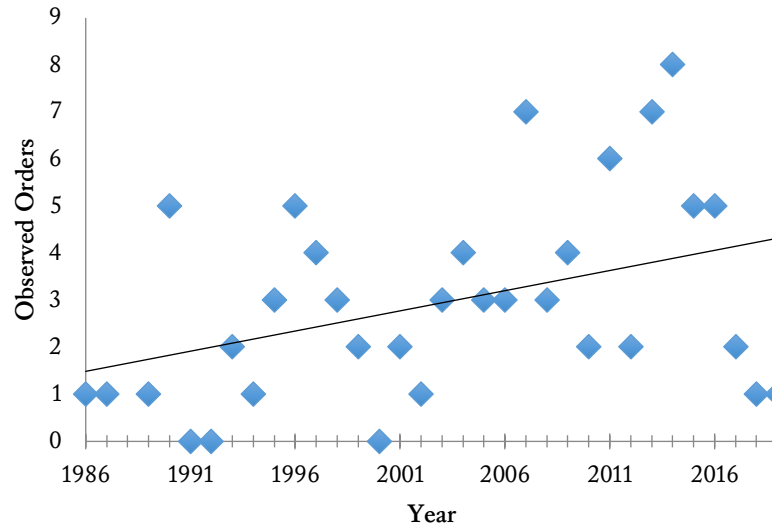
Figure 1: *Lone Pine* Orders by Case Type



### B. Frequency

Second, it appears that, from 1986 through 2014, *Lone Pine* orders were issued with increasing frequency. Further, from 2015 through 2019, it appears possible that the orders' popularity has flagged. But as Figure 2 indicates, the data is noisy, and given the limitations of our dataset, any conclusion regarding relative incidence ought to be viewed with caution.<sup>78</sup>

<sup>78</sup> As of the time of writing (August 2019), we cannot be sure how many *Lone Pine* orders will issue during the latter half of 2019. Further, when looking for trends, it bears noting that recently filed *Lone Pine* orders are particularly likely to be missed by our data-collection procedures. That's so because some unpublished orders only became Westlaw "visible" due to subsequent commentary or subsequent litigation of the same case. More broadly, when assessing incidence, two additional caveats are in order. First, as noted above, because our sample is almost certainly incomplete, see *supra* note 75, any finding regarding incidence ought to be viewed with caution. It could conceivably be that *Lone Pine* orders' issuance has stayed relatively constant over the past thirty years, but that, over time, the orders have simply become more and then less "visible" to researchers. Second, in the vast majority of cases (ninety-one out of ninety-seven), we were able to identify the precise year of each order's issuance. In a small minority of cases, however, we could only place the issuance of a *Lone Pine* order within a range of dates. For those six orders, Figure 2 represents our best estimation of the year during which each *Lone Pine* order was issued.

Figure 2: Annual Entry of *Lone Pine* Orders

### C. Content of Lone Pine Orders

Third, when it comes to what precisely *Lone Pine* orders say, approximately three-quarters of the orders in our dataset required at least some plaintiffs to offer expert testimony (typically, an expert affidavit or report) regarding specific causation (i.e., that product or contaminant *X* actually caused injury or ailment *Y*).<sup>79</sup>

Digging deeper, most *Lone Pine* orders mandated attestation of specific causation to “a reasonable degree” of scientific certainty.<sup>80</sup> Taking this tack, for example, in the *Fosamax* MDL, plaintiffs were required to offer a sworn expert report attesting “[w]hether 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.”<sup>81</sup>

Beyond that, some orders were satisfied by expert attestation that the defendant’s product or contaminant “substantially contributed to the personal

<sup>79</sup> Admittedly, this finding is in some ways circular, given our definitional screen described above.

<sup>80</sup> See, e.g., Order, *In re* AET Inc. Ltd., No. 10-0051, 2018 WL 4203351, at \*2 (E.D. Tex. Feb. 13, 2018) (requiring the submission of “an [expert] opinion, based on a reasonable degree of medical or scientific probability, that any injury, illness, or condition suffered by the claimant was caused by the exposure to petroleum and/or petroleum-based products spilled from the Eagle Otome, or caused by the collision”).

<sup>81</sup> Order, *In re* Fosamax Prods. Liab. Litig., No. 06-1789, 2014 WL 12748902, at \*2 (S.D.N.Y. July 30, 2014).

injury alleged by Plaintiff.”<sup>82</sup> Demanding more, others sought a showing of specific causation without qualification.<sup>83</sup> A small minority went so far as to require the expert to rule out other possible causes of the plaintiff’s injury.<sup>84</sup>

Interestingly, too, some *Lone Pine* orders that required an expert report further specified that the expert’s testimony must be sufficiently reliable to survive a *Daubert* challenge.<sup>85</sup> Zeroing in, the vast majority of *Lone Pine* orders in our dataset did not address whether or not the plaintiff’s expert needed to pass muster under *Daubert*. Of the twelve orders that did address this critical question, four explicitly disavowed the requirement. Judge Eldon Fallon ruled in the *Vioxx* MDL, for example: “[T]he Court is not requiring that Plaintiffs provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial.”<sup>86</sup> Ratcheting up scrutiny, eight of the twelve orders required the plaintiffs’ evidence to be sufficient to survive a *Daubert* challenge.<sup>87</sup>

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<sup>82</sup> *E.g.*, Order Regarding Preservation of Records and Prima Facie Evidence of Usage, Injury and Causation Requirements for Pending Cases Not Participating in the Nuvaring Resolution Program and Newly Filed or Transferred Cases at 4, *In re Nuvaring Prods. Liab. Litig.*, No. 08-1964 (E.D. Mo. Feb. 7, 2014).

<sup>83</sup> *E.g.*, Pretrial Order No. 8 at 3, *In re Tex. State Vioxx Litig.*, No. 2005-59499 (Harris Cty. Dist. Ct. Nov. 9, 2007) (requiring expert attestation “that the Plaintiff suffered an injury and . . . that Vioxx caused the injury”).

<sup>84</sup> *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 351 (Ohio App. Ct. 2007) (discussing the trial court’s pre-discovery order, which compelled plaintiffs to “provide sworn statements from experts that to a reasonable degree of medical probability, the [plaintiffs’] illnesses, injuries, and conditions could not have been caused but for that exposure”); *Ruskin*, *supra* note 12, at 609 (reporting a *Lone Pine* order as requiring an “affidavit of a physician or other expert, which shall include . . . [a] differential diagnosis which establishes that the physician or expert has formed an opinion that, more probably than not, the plaintiffs’ illness did not have some etiology” other than exposure to defendant’s contaminant (quoting Order, *Wilson v. Pub. Serv. Co. of Okla.*, No. CJ-1996-564 (Tulsa Cty. Dist. Ct. 1997))).

<sup>85</sup> In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court established that district court judges ought to be “gatekeep[ers]” to ensure that expert testimony is both relevant and reliable. 509 U.S. 579, 597 (1993). Essentially codifying *Daubert* and its progeny, Federal Rule of Evidence 702 now establishes that expert testimony is admissible if and only if

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

<sup>86</sup> *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008), *aff’d*, 388 F. App’x. 391 (5th Cir. 2010); *see also, e.g.*, *Abner v. Hercules, Inc.*, No. 14-0063, 2017 WL 4236584, at \*9 (S.D. Miss. Sept. 25, 2017) (“The Court did not require Plaintiffs to provide expert reports sufficient to survive a *Daubert* challenge or even provide an expert who will testify at trial.” (internal quotation marks omitted)).

<sup>87</sup> *E.g.*, *Avila v. Willits Envtl. Remediation Tr.*, 633 F.3d 828, 833-34, 836-40 (9th Cir. 2011) (affirming a dismissal, where the district court dismissed plaintiffs’ claims because their *Lone Pine*



D. *Timing: Prior to Discovery, During Discovery, or During the Twilight Phase of Litigation*

Fourth, we examined *when* in the course of litigation *Lone Pine* orders are issued. We found great variation along this dimension.

We were able to pinpoint when in the litigation's lifecycle eighty of the ninety-seven *Lone Pine* orders in our dataset were entered. (For the remaining seventeen orders, timing was unclear.) Of those eighty orders, thirty (37.5%) were issued prior to discovery, thirty (37.5%) were issued during discovery, and twenty (25%) were issued during the twilight stage of litigation. Generally, these twilight orders were issued in the MDL context, after the lead plaintiffs' attorneys had hammered out a tentative settlement agreement and were, often in concert with the defendant, trying to corral the remaining plaintiffs to opt in.<sup>88</sup>

In some ways, the relative frequency of both pre-discovery *Lone Pine* orders and twilight orders is, and ought to be, unsurprising. As to the former, as noted above, numerous courts and commentators *define Lone Pine* orders as "pre-discovery" orders.<sup>89</sup> The orders' frequent issuance prior to discovery, then, is hardly revelatory. As to the latter, other courts and commentators have, similarly, come to conceive of—and describe—*Lone Pine* orders as "mop up procedure[s]"<sup>90</sup> or orders sought "after the settlement is consummated."<sup>91</sup> Yet, we find *Lone Pine* orders' incidence on both sides of the litigation continuum noteworthy as, in our view, both pre-discovery and twilight orders raise significant—and, heretofore underappreciated—normative concerns.

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submissions were "wanting under Federal Rule of Evidence 702 and *Daubert*"); Order on PSO's Motion for Scheduling Order at 5, *Wilson*, No. CJ-1996-564 (Tulsa Cty. Dist. Ct. Apr. 8, 1997) ("[T]he court finds the *Daubert* test to be the appropriate test which will govern scientific evidence proffered in this matter").

<sup>88</sup> See Order, *supra* note 81, at \*1 (reporting that *Lone Pine* orders "are frequently granted after the parties have agreed to a mass settlement program"); BURCH, *supra* note 75, at 33 (explaining that, in the *Yasmin/Yaz* MDL, the *Lone Pine* order was used to "fortif[y] attorneys' efforts to herd plaintiffs" into the global settlement); Burch, *supra* note 15, at 99-100 (explaining that, in the *Vioxx* MDL, Merck's motion for a twilight *Lone Pine* order was "unopposed" and likely helped lead to the settlement's high participation rate); Brian Amaral, *Judge Wants More Info From Fresenius Dialysis Patients*, LAW360 (Dec. 14, 2016, 6:19 PM), <https://www.law360.com/articles/872889/judge-wants-more-info-from-fresenius-dialysis-patients> [<https://perma.cc/8PNC-SV6H>] (quoting defense counsel as stating that Judge Woodlock issued a *Lone Pine* order at the tail end of the *Fresenius* litigation, in part, in order to "encourage some plaintiffs to settle").

<sup>89</sup> See *supra* note 14 and accompanying text.

<sup>90</sup> E.g., Order, *supra* note 81, at \*1 (recounting the *Fosamax* Plaintiffs' Steering Committee's argument that "*Lone Pine* is appropriately used as a 'post-settlement mop-up procedure utilized to address those cases which either were not eligible for compensation through the MDL settlement program or which had opted out of participation in the MDL settlement program").

<sup>91</sup> E.g., Rave, *supra* note 15, at 2186 (defining *Lone Pine* orders as orders sought "after the settlement is consummated").

### 1. Prediscovery Orders

As noted above, prediscovery *Lone Pine* orders—which, again, comprised 37.5% of the orders in our sample—arguably permit the trial court to make an end-run around Federal Rule of Civil Procedure 56 (or state-court counterparts), while depriving plaintiffs of certain procedural protections that Rule 56 (or state-court counterparts) would otherwise afford. The problem arises because the rules are clear that summary judgment is not appropriate unless and until the party opposing the motion for summary judgment is afforded an adequate opportunity to conduct discovery.<sup>92</sup> Prediscovery *Lone Pine* orders function an awful lot like orders issued pursuant to Rule 56. But plaintiffs' prejudgment discovery rights, jealously guarded by Rule 56, are, in the *Lone Pine* context, infringed or nullified.

Add to that, a court's decision to grant summary judgment for a defendant pursuant to Rule 56 is reviewed de novo.<sup>93</sup> But a court's decision to terminate a case for noncompliance with a *Lone Pine* order is often reviewed pursuant to the far more lenient abuse of discretion standard.<sup>94</sup> That means that, by opting to extinguish a case via *Lone Pine* rather than Rule 56, a trial court can go a long way toward insulating its termination decision from meaningful appellate review.

Beyond the potential for procedural funny business, we fear that the significant expense of complying with *Lone Pine* orders and the difficulty of acquiring evidence of specific causation without access to discovery mean that the orders are apt to precipitate the premature and unwarranted dismissal of at least some meritorious claims.

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<sup>92</sup> See, e.g., *Moore v. Shelby Cty., Ky.*, 718 F. App'x 315, 320 (6th Cir. 2017) (finding that "the district court abused its discretion by granting summary judgment for Defendants before permitting the parties any discovery" because "[c]ommon sense dictates that before a district court tests a party's evidence, the party should have the opportunity to develop and discover the evidence"); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) ("[S]ummary judgment should only be granted if *after discovery*, the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." (alterations in original) (internal quotation marks omitted)).

<sup>93</sup> See, e.g., *Brooks v. Roy*, 776 F.3d 957, 959 (8th Cir. 2015) (stating that a grant of summary judgment is reviewed de novo).

<sup>94</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 388 F. App'x 391, 397 (5th Cir. 2010) ("A district court's adoption of a *Lone Pine* order and decision to dismiss a case for failing to comply with a *Lone Pine* order are reviewed for abuse of discretion."); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (reviewing for abuse of discretion); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032, 1037 (Ill. App. Ct. 1992) (same); *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 348 (Ohio App. Ct. 2007) (same).

## 2. Twilight Orders

Twilight orders—issued during the sunset of litigation, which comprise nearly a quarter of our sample—raise a different but equally troubling set of normative and ethical concerns. Twilight orders are often issued by transferee courts in MDL proceedings once a comprehensive settlement has been forged and individual plaintiffs are assessing whether or not to opt in to that settlement. As such, they affect those plaintiffs who are weighing whether to, on the one hand, accede to the negotiated deal, or, on the other, reject it, in favor of further litigation back in the transferor court. The problem is that, given the demands they impose and the circumstances surrounding their imposition, *Lone Pine* orders can put a heavy—and, in some instances, too heavy—thumb on the scale in favor of the former, unduly deterring plaintiffs from insisting on their day in court.<sup>95</sup>

The concern arises due to the combined influence of three stubborn facts. The first fact is that, as noted above, compliance with *Lone Pine* orders is expensive. Approximately three-quarters of the orders in our dataset required each plaintiff to hire an expert to attest to specific causation (among other things). Orders also frequently demanded that the plaintiff satisfy additional burdensome requirements, such as gathering years of pharmacy receipts and medical records.<sup>96</sup> Fact two is that, in many cases, plaintiffs must satisfy these onerous requirements on a short fuse: case-specific expert reports can be due in as few as thirty days.<sup>97</sup> The third and final fact is that twilight orders are sometimes issued alongside global settlement agreements that contain (1) attorney-recommendation provisions, wherein, as part of the settlement, plaintiffs' lawyers promise to "recommend that their clients enter the settlement program," (2) attorney withdrawal provisions, wherein, as part of

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<sup>95</sup> The "thumb" may, in fact, become coercive, in arguable contravention of the Model Code of Judicial Conduct, which advises: "A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement." MODEL CODE OF JUDICIAL CONDUCT R. 2.6(B) (AM. BAR ASS'N 2011); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2013) ("A lawyer shall abide by a client's decision whether to settle a matter."). For further discussion of how twilight *Lone Pine* orders can coax plaintiffs to relinquish their claims, see Burch, *supra* note 15, at 68-78; Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 155 (2012); Rave, *supra* note 15, at 2185.

<sup>96</sup> BURCH, *supra* note 75, at 33.

<sup>97</sup> *See, e.g.*, Pretrial Order No. 236 at 3, *In re Avandia Mktg., Sales Practices Prods. Liab. Litig.*, No. 07-1871 (E.D. Pa. Apr. 16, 2015) (imposing a thirty to sixty-day deadline depending on plaintiff's status plus a fourteen-day cure period); Case Management Order No. 78, at 5-6 *In re Pradaxa (Dabigatran Etexilate) Prods. Liab. Litig.*, No. 12-2385, (S.D. Ill. May 29, 2014) (imposing a thirty-day deadline with a twenty-day cure period); Pretrial Order No. 4F at 3, *In re Chantix (Varenicline) Prods. Liab. Litig.*, No. 09-2039 (N.D. Ala. Mar. 12, 2013) (imposing a thirty-day deadline with no cure period); N.Y. Rezulin Pretrial Order, *supra* note 5, at 3 (imposing a sixty-day deadline with no cure period).

the settlement, plaintiffs' lawyers pledge to withdraw from representing nonsettling plaintiffs, and also (3) nonsolicitation provisions, wherein, as part of the settlement, the lawyer agrees not to recruit or accept any new client.<sup>98</sup>

Putting those three facts together means that some plaintiffs who wish to refuse a settlement offer will face a *Lone Pine* order that demands detailed and expensive proof, at the very moment they've lost their old lawyer and cannot find new qualified counsel. In such a situation, a claimant who prefers not to release her claims is put in an awkward and arguably impossible position: she may reluctantly acquiesce to the settlement or, alternatively, reject it, which means she has limited time to scramble to try to comply with a *Lone Pine* order with no lawyer to assist her in locating a qualified scientific expert or compiling requisite proof.<sup>99</sup>

### E. *Observed Effects*

Last but not least, we examined the effect or effects that each *Lone Pine* order appeared to have upon the litigation. This investigation proved challenging. The difficulty arose because, although the effects of *Lone Pine* orders were crystal clear in some cases (*e.g.*, *Lone Pine* order *X* triggered the entire case's termination or *Lone Pine* order *Y* had no discernable effect), in many other cases, an order could have a range of effects, impacting different plaintiffs differently. For example, in a given case, Plaintiff *A* might be able to muster enough proof to comply with the *Lone Pine* order rendering the order's entry little more than a pricey speedbump, while Plaintiff *B*'s submission might fall short, triggering *B*'s dismissal.

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<sup>98</sup> These "closure mechanisms," made famous in the *Vioxx* litigation, are ethically dubious but according to Elizabeth Chamblee Burch, quite common. BURCH, *supra* note 75, at 44-45; Burch, *supra* note 12, at 73-74 (describing the use of "clauses that require plaintiffs' attorneys to recommend that all of their clients settle and to withdraw from representing clients who refuse" and further noting that "these mandatory recommendation and withdrawal provisions tend to appear alongside simultaneous agreements for attorneys not to solicit or accept new clients"); Burch, *supra* note 15, at 99-101 (describing the recommendation and attorney-withdrawal mechanisms in the *Fosamax*, *Vioxx*, *Propulsid*, and *Pelvic Mesh* settlement agreements).

<sup>99</sup> See BURCH, *supra* note 75, at 118 (explaining that, after the settlement is inked, "both sides use *Lone Pine* orders to send a pointed message to nonsettling plaintiffs: accept the deal or prepare for what may be a short-fused evidentiary burden"); see also Burch, *supra* note 12, at 74 (describing how plaintiffs may be forced to proceed pro se if they opt out of a settlement agreement which contains a mandatory withdrawal clause); Grabill, *supra* note 89, at 154-55 (noting that the additional burdens on nonsettling plaintiffs "deter additional litigation and maximize the degree of closure that defendants obtain through settlement"). For a fuller discussion of these normative and ethical considerations, see generally Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011) (defining certain mass tort settlements as "lawyer-empower[ing]," as opposed to litigant-empowering, using *Vioxx* as a case study); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1076 (1984) (discussing the asymmetric balance of power in settlement situations).

Further, the orders may also have *invisible* or *contested* effects. Thus, we strongly suspect that twilight *Lone Pine* orders have caused some plaintiffs to accede to settlements that they (1) would have preferred to refuse and (2) actually would have refused, in the orders' absence. But proving that Plaintiff *C*'s decision to settle was driven by the twilight order, Plaintiff *D*'s decision was gently influenced by the twilight order, while Plaintiff *E*'s decision was made independently of that twilight order is not possible, at least with the data we have.

With those caveats, however, we can make a few tentative claims regarding *Lone Pine* orders' observed effects. We were able to observe whether the *Lone Pine* order had an effect in eighty of the orders in our dataset. Of these eighty ("effect-coded") orders, forty-five orders (56%) precipitated the dismissal of at least some claims, and twenty orders (25%) precipitated summary judgment for at least some defendants on at least some claims. Once we eliminated double-counting, we observed that 74% of the eighty effect-coded orders (or 61% of all orders in our dataset) resulted in the dismissal of some plaintiffs' claims or the grant for defendants of at least partial summary judgment.<sup>100</sup> In only 19% of the eighty effect-coded orders (or, 16% of all cases in our dataset) does it appear that the court found that plaintiffs had substantially complied with the order.

Then, when we examined the "when" question, addressed above in Section E, alongside the effect question, we found that the likelihood that a *Lone Pine* order would result in the dismissal of some plaintiffs' claims varied with the stage in litigation when the *Lone Pine* order was issued. As noted above, the most common observed consequence of a *Lone Pine* order's entry was the dismissal of at least some plaintiffs' claims. However, the observed dismissal rate of the eighty effect-coded orders was higher when a *Lone Pine* order was issued during the prediscovery (57%) and twilight (77%) phases than when the order was entered in the midst of discovery (43%).<sup>101</sup> Meanwhile, the observed rate of settlement was significantly higher when a *Lone Pine* order was issued in the twilight phase of litigation (35%). Settlements were, it appears, less frequent when the order was issued before or during discovery (which yielded observed settlement rates of 7% and 4%, respectively).

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<sup>100</sup> This figure counts an order resulting in both dismissal and summary judgment *once*, meaning it avoids the double-counting that would arise were one to add the observed dismissal rate with the observed summary judgment rate. All our calculations of dismissals exclude one case that was dismissed for lack of personal jurisdiction for reasons unrelated to the *Lone Pine* order's entry.

<sup>101</sup> We calculated these figures by, first, identifying each order for which we observed some effect and categorizing these "effect-coded" orders by the stage of litigation during which they issued. Then, we divided the number of orders in each "stage-category" that precipitated the dismissal of some claims by the total number of effect-coded orders in the same stage-category. We were able to determine the effect of twenty-eight of the thirty prediscovery and discovery orders and seventeen of the twenty orders issued during the twilight phase.

## CONCLUSION

Since their inception, *Lone Pine* orders have become, by some accounts, “routine.”<sup>102</sup> Yet we have found that case management orders imposed under the auspices of *Lore v. Lone Pine* admit of considerable variation in their terms and conditions of their issuance. *Lone Pine* orders are also very powerful: 74% of the effect-coded orders (or 61% of all orders in our study) were followed by a grant of at least partial summary judgment for defendants or by the dismissal of at least some of the plaintiffs’ claims. Given the power they hold, and the few rules that constrain (or even govern) their use, we recommend that courts proceed cautiously and consider carefully the equity of imposing *Lone Pine* orders, especially in the pre-discovery and twilight phases of litigation.<sup>103</sup>

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<sup>102</sup> *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 687 Fed. App’x. 210, 214 (3d Cir. 2017) (deeming the filing of a *Lone Pine* order “routine”).

<sup>103</sup> For further concrete guidance regarding *Lone Pine* orders’ future use, see Engstrom, *supra* note 12, at 52-60.