The Forest, the Trees, and Lone Pine Orders

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Nora Freeman Engstrom, *The Lessons of* Lone Pine, 129 **Yale L.J.** 2 (2019).

1986 wasn't just a big year for Mets fans. It was a big year for civil procedure. The Supreme Court decided the summary judgment trilogy—*Anderson*, *Celotex*, and *Matsushita*—two of which would go on to become the most frequently cited Supreme Court cases in history. Earlier that year—but with considerably less fanfare at the time—Monmouth County Superior Court Judge William Wichmann issued an unusual order in a case about alleged contamination from the Lone Pine Landfill in Freehold Township, New Jersey. He set a deadline by which the plaintiffs had to provide documentation supporting their exposure to substances from the landfill and the injuries that were caused as a result. Later that year—just three weeks after Jesse Orosco struck out Marty Barrett for the final out of Game 7—Judge Wichmann found the plaintiffs' submissions inadequate and dismissed their claims with prejudice.

Judge Wichmann's order would come to bear the name of that case (and that landfill) and it spawned a revolution in civil procedure—particularly in the mass-tort context. As Nora Freeman Engstrom's excellent article explains at the outset, *Lone Pine* orders have featured in a "Who's Who" of mass-tort cases—including "Love Canal, asbestos, Vioxx, Fosamax, Rezulin, Celebrex, Zimmer NexGen knee implants, Baycol, Avandia, Fresenius, and the Deepwater Horizon oil spill." Her must-read piece is a comprehensive dive into the use of *Lone Pine* orders, their advantages and disadvantages from a practical and theoretical perspective, and the lessons that can be drawn for civil litigation more broadly.

This topic prompts an important definitional question: what exactly is a *Lone Pine* order? Although Engstrom describes considerable variation on the details of particular orders in particular cases, she defines it as an order requiring a plaintiff to make an early evidentiary showing regarding three issues: (1) her exposure to the defendant's product or contaminant; (2) the impairment she has suffered as a result; and (3) specific causation, typically supported by qualified experts. As in the eponymous New Jersey litigation, failure to provide sufficient information on these issues can result in dismissal of a plaintiff's claim with prejudice.

From a policy standpoint, *Lone Pine* orders are viewed as a solution to the problem of nonmeritorious mass-tort claims. Of course, the weight of the evidence indicates that groundless tort claims are the exception rather than the rule. But Engstrom identifies five conditions that characterize tort claims where nonmeritorious suits are more likely to be a concern. These conditions are: "(1) injuries are hard to discern; (2) specific causation is contestable; (3) defendants have a diminished incentive or capacity to scrutinize claims prior to payment; (4) filing rates are unusually high; and, perhaps most importantly, (5) restraints typically imposed by the contingency fee are relaxed or altogether inoperative." With respect to the last condition, Engstrom notes how the sheer *mass* of mass torts affects the economics of litigation: "once the mass tort is in full swing, costs are essentially fixed, while rewards depend largely on claim volume—meaning, bluntly, the more the merrier."

Engstrom recognizes that *Lone Pine* orders, when properly used, can "promote judicial economy, preserve defendant and judicial resources, safeguard the integrity of trial processes, and allay concerns that MDLs (or their state-court counterparts) are a repository of—or breeding ground for—dubious

filings." They can also facilitate the processing of claims, as well as their ultimate resolution and settlement. That said, Engstrom identifies several problems with *Lone Pine* orders. Insofar as they require costly expert reports at an early stage in the litigation, they impose significant burdens on plaintiffs. They are hard to square with the structure of the Federal Rules of Civil Procedure, particularly the summary judgment process set forth in Rule 56, the obligations imposed on plaintiffs by Rule 11, and Rule 37's regime for imposing sanctions for noncompliance with discovery orders. Engstrom also highlights a trend in MDL cases of issuing "twilight" *Lone Pine* orders to plaintiffs who decline to opt into a settlement program negotiated during the MDL proceedings; such orders impose added pressure on plaintiffs to accept the settlement rather than assert their right to litigate their individual claims in the courts where they initially filed suit.

In light of these concerns, Engstrom argues that *Lone Pine* orders should be "exceptional," employed only when two conditions are met. First, "other procedures explicitly sanctioned by rule or statute are practically unavailable or patently insufficient." Second, it must be the case that "substantial evidence casts doubt upon some or all plaintiffs' entitlement to relief and/or some or all plaintiffs have displayed a marked and unjustifiable lack of diligence in pursuing the action." This would give *Lone Pine* orders a more limited role than some courts currently allow, but Engstrom proposes that plaintiff fact sheets can be used to achieve some of the goals of *Lone Pine* orders in a less costly fashion. The distinction between *Lone Pine* orders and plaintiff fact sheets is an important one, although as Elizabeth Burch argues in her response essay (which is worth a read in its own right), practice regarding such fact sheets varies widely—in some instances, courts have insisted on fact sheets that are no less burdensome than a typical *Lone Pine* order.

Engstrom concludes with several lessons we can draw from *Lone Pine*, situating the use of *Lone Pine* orders in the broader evolution of civil litigation over the past several decades. One lesson involves managerial judging, a trend Judith Resnik identified in the 1980s,which has been further amplified by the MDL process—particularly the tendency of the Judicial Panel on Multidistrict Litigation to choose managerially active judges to supervise MDL pretrial proceedings. Another is the general anti-access shift in civil procedure, as chronicled by Steve Burbank and Sean Farhang's work on the retrenchment of private enforcement of substantive law in federal court and Arthur Miller's critique of the myriad "procedural stop signs" that have metastasized throughout the federal pretrial process. *Lone Pine* orders also exemplify the increasing customization of procedure, which not only flouts the Federal Rules' ostensibly transsubstantive nature but can evade institutional constraints that might otherwise police inappropriate procedural "ad hocery."

When it comes to the past, present, and future of *Lone Pine* orders, it is crucial to see both the forest and the trees. Engstrom's terrific article does precisely that. She lays a sophisticated foundation for better appreciating the advantages and disadvantages of such orders and provides a coherent framework for evaluating their use going forward.

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