



District Court Decision Reminds Defendants that They Should Revisit Case Management Orders

by Carter F. Thurman

A recent district court opinion highlights some of the unfairness faced by defendants in multidistrict litigations (“MDL”) and offers a reminder that early, and late, motions practice can help shed light on weak claims. Although the district court got the issue right, it took nearly four years of defendants’ persistence to reach a reasonable, common-sense result—an order requiring plaintiffs to provide proof that they were diagnosed with the injury they allege. In theory, MDL proceedings should enhance the efficiency of the legal process for cases with common factual issues. In practice, however, commentators worry that MDLs can promote illegitimate claims. For instance, MDLs lower the barriers of entry, encouraging plaintiffs to join existing litigation with weak or less substantiated claims. Once in an MDL, individual claims can be lost within the larger pool of litigation, making it easier for unmeritorious claims to hide. Defendants are often left to rely on plaintiff facts sheets to uncover such claims.

In the nearly decade-old MDL *In Re: Taxotore (Docetaxel) Products Liability Litigation*, plaintiffs allege that they have permanent chemotherapy-induced alopecia (“PCIA”) caused by Taxotere. To succeed, each plaintiff will have the burden to prove a diagnosis of that specific injury. Recognizing that many plaintiffs had not produced evidence of such a diagnosis, beginning in 2020, defendants moved the court for an order requiring plaintiffs to provide proof that they have, in fact, been diagnosed with their alleged injury. MDL No. 16-2740, 2024 WL 718698, at *2 (E.D. La. Feb. 21, 2024). The court, however, deferred ruling on defendants’ motion. Defendants advanced the issue in 2022, but again the court did not rule. *Id.*

Late last year, nearly four years after defendants first raised the issue, defendants raised for a third time plaintiffs’ inability to establish a fundamental element of their claims. *Id.* Specifically, defendants moved the court to enter a *Lone Pine* order. *Id.* Defendants argued that even after *Daubert* motions, dispositive motions, and two bellwether trials, “more than 80% of the cases in this MDL involve plaintiffs who have never been diagnosed with the alleged injury, PCIA, and/or have never sought treatment for PCIA.” *Id.*

On February 21, the court granted, in part, defendants’ motion to require plaintiffs to provide such basic information—“information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3).” *Id.* at *3. Citing “numerous roadblocks” in the litigation—including failure to establish product identification, failure to provide photographs, and subject matter jurisdiction issues—the court belatedly recognized that plaintiffs inventory was potentially

Carter F. Thurman is a Partner with Hollingsworth LLP. He serves as the *WLF Legal Pulse* blog's Featured Expert Contributor on Litigation Strategies.

rife with unmeritorious claims. *Id.* at *1-2. Given that defendants and certain plaintiffs had reached an agreement in principle to resolve a large portion of pending cases, the court finally agreed it was time for the remaining plaintiffs to provide basic information that should have been in their possession since day one. *Id.* at *2.

As the court noted, in entering *Lone Pine* orders, courts “should strike a balance between efficiency and equity.” *Id.* at *3. Here, defendants requested that each plaintiff provide certification of a willingness to proceed, updated authorizations and fact sheets, and an expert medical declaration with a diagnosis; defendants also asked each plaintiff to participate in limited discovery. *Id.* Plaintiffs, on the other hand, argued that defendants’ request for a “*Lone Pine* order [was] an extraordinary procedure” and “could potentially undermine settlement negotiations and stall the remand process.” *Id.*

The court disagreed with plaintiffs and entered a *Lone Pine* order. *Id.* at *4. Although the court did not require full expert reports or proof of causation, the court did require each plaintiff to come forward with proof of diagnosis in the form of an expert declaration. *Id.* (requiring that the declaration must be signed by a qualified physician and must state that the expert is prepared to testify to a reasonable degree of medical probability that plaintiff has suffered permanent PCIA). The court noted that “*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation.” *Id.* at *2.

The court recognized that *Lone Pine* orders are not only useful early in a case but can also be useful near the end of litigation. *Id.* at *3. Indeed, district courts often implement such orders before remand to ensure either that “transferor courts receive only viable cases,” or that “only plaintiffs with meritorious cases are compensated” if the parties ultimately reach a settlement. *Id.* Perhaps recognizing the defendants were seeking basic information, the court noted that *Lone Pine* orders often require plaintiffs to provide “information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3).” *Id.* The court pointed out that “courts in other jurisdictions have imposed *Lone Pine* orders that ‘require plaintiffs to furnish specific evidence like proof of a medical diagnosis, with the goal of winnowing non-compliant cases from the MDL’—which is exactly what [defendants are] requesting in the present case.” *Id.* at *4. As the court put it, “[a]fter years of discovery, two bellwether trials, and initiation of the remand process, it is time for Plaintiffs to come forward with an affirmative diagnosis—which would otherwise be required to prove their injuries.” *Id.*

Although the court’s ruling was undoubtedly influenced by the recent settlement discussions between the parties, the court’s order in *In Re: Taxotore (Docetaxel) Products Liability Litigation* should serve as a reminder to defendants of the usefulness of *Lone Pine* orders—as well as the importance of revisiting certain earlier rulings in the MDL. Defendants in MDLs can strategically utilize *Lone Pine* orders to streamline complex proceedings and mitigate the burdens of expansive discovery processes. This preliminary proof can effectively sift through and dismiss meritless claims, conserving judicial and party resources. For defendants, advocating for these orders can significantly reduce litigation costs and exposure to unfounded allegations by compelling plaintiffs to substantiate their claims upfront. This approach not only expedites the litigation process but also deters the filing of speculative or fraudulent claims, fostering a more focused and efficient resolution of genuinely contested issues. By strategically requesting *Lone Pine* orders, defendants in MDLs can shift the litigation landscape in their favor, emphasizing evidence-based claims and promoting judicial efficiency.