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Third Circuit Decision Upholds *Lone Pine* Order Resulting in Dismissal of 1,189 Cases

by Carter F. Thurman

In a significant ruling, the U.S. Court of Appeals for the Third Circuit upheld the dismissal of 1,189 cases in the Zostavax Multidistrict Litigation (MDL), setting a key precedent for the rigorous examination of meritless claims. The Eastern District of Pennsylvania dismissed these cases after plaintiffs failed to provide evidence establishing a causal link between Merck & Co., Inc.'s shingles vaccine to their alleged injuries. This decision highlights the judiciary's essential role in filtering unsupported claims early in litigation and reinforces the importance of maintaining high evidentiary standards, ensuring that only well-founded cases move forward—particularly in Multidistrict litigation. By closely examining plaintiffs' inventory early in centralized proceedings, courts can prevent the legal system from being overwhelmed by baseless litigation, thereby preserving resources and ensuring justice is administered effectively and efficiently. The decision also highlights the need for proposed Rule 16.1, which, if adopted, may help address the underlying problem in this MDL—meritless claims.

The origins of this decision are typical of the process in many federal MDLs. In 2018, the Judicial Panel on Multidistrict Litigation centralized over 2,000 cases in which plaintiffs claimed Merck's Zostavax vaccine, developed to prevent shingles in adults over 50, caused shingles and other injuries. *In re: Zostavax Prods. Liab. Litig.*, No. 23-1032, 2024 WL 3423709, *1 (3d Cir. Jul. 16, 2024). The MDL was overseen by the Eastern District of Pennsylvania, where cases were divided into groups based on the alleged injuries. One group contained 1,189 cases involving only shingles or shingles-related injuries.

After three years of extensive discovery, Merck successfully moved to exclude plaintiffs' specific causation expert, who failed to differentiate between the shingles caused by the vaccine strain and the wild-type virus. Because all five bellwether plaintiffs had contracted chickenpox earlier in life, the plaintiffs' expert had to perform a "differential diagnosis" on each to rule out the reactivation of the wild-type virus as the cause of shingles. *Id.* The District Court concluded that the plaintiffs' expert could not offer a reliable opinion on specific causation. *Id.* Notably, none of the five bellwether plaintiffs had undergone a polymerase chain reaction (PCR) test, which reliably discerns between the live-attenuated virus in the vaccine and the wild-type strain. *Id.* As a result, the District Court entered summary judgment in favor of Merck in all five cases. *Id.*

Merck then sought a *Lone Pine* order requiring PCR test results from all plaintiffs. *Id.* at *2. Plaintiffs argued that PCR testing was not feasible because none of them had undergone the test, and it must be conducted while a rash is still present. *Id.* Most, if not all, of the plaintiffs' rashes had healed. *Id.* Nevertheless, the District Court granted Merck's request for a *Lone Pine* order, giving

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plaintiffs 90 days to produce PCR test results. The court determined that the plaintiffs' inability to provide PCR tests was their own problem. *Id.* Merck had presented "compelling medical authority" showing that a PCR test is the only way to determine whether shingles was caused by the wild-type virus or the vaccine strain. Plaintiffs, on the other hand, offered no medical literature, expert opinion, or any alternative method to proceed with their cases. *Id.*

When plaintiffs failed to comply with the *Lone Pine* order, the District Court dismissed 1,189 cases with prejudice. *Id.* The court noted that it was undisputed that PCR testing was the only way to prove whether Zostavax or the wild-type virus caused the plaintiffs' shingles. *Id.* Plaintiffs had been given ample opportunity to present prima facie evidence of causation but failed to do so. *Id.* Plaintiffs then appealed, arguing that the District Court erred by basing the *Lone Pine* order on an "assumption" that PCR testing was the only way to prove causation and by requiring non-existent evidence. *Id.*

The Third Circuit rejected these arguments for three reasons. *Id.* First, it held that the *Lone Pine* order was not "based on mere assumption." *Id.* at *3. Plaintiffs were aware from the outset that they would need to account for, and rule out, the wild-type virus as the obvious alternative cause of shingles. *Id.* Despite "three years of litigation, plaintiffs had not drummed up a single piece of medical literature or expert medical opinion explaining how it can be determined that Zostavax and not chickenpox caused a person to contract shingles other than through PCR testing." *Id.* Therefore, the *Lone Pine* order was "premised on uncontradicted record evidence . . . that PCR testing is the only way to establish specific causation." *Id.*

Second, the Third Circuit ruled that the District Court did not abuse its discretion by requiring plaintiffs to produce evidence that did not exist. The purpose of a *Lone Pine* order is to "winnow non-compliant cases" from an MDL. *Id.* If such an order could only require the production of pre-existing evidence, it would fail to serve its intended goal. MDL courts have broad discretion to issue *Lone Pine* orders that drive cases toward resolution on the merits.

Finally, the Third Circuit disagreed with plaintiffs' claim that the District Court abused its discretion by dismissing their cases with prejudice and denying them the right to proceed to summary judgment. The panel found that the District Court had given plaintiffs ample opportunity to provide evidence. While plaintiffs claimed their experts could prove causation using differential diagnosis techniques, they failed to identify any experts or explain how these techniques would work. Plaintiffs even claimed that such evidence "had been introduced and was being briefed in New Jersey." *Id.*at 4. But the Third Circuit found it "puzzling" that plaintiffs would "'share their allegedly critical and supportive evidence' in New Jersey but not in the MDL." *Id.* Given the lack of any prima facie evidence of causation, the Third Circuit held allowing the cases to proceed to summary judgment would have been pointless. *Id.*

The Third Circuit's decision highlights the importance of rigorous evidentiary standards in mass tort litigation. MDL courts, responsible for managing large numbers of claims, should be urged to identify and dismiss baseless cases early in the process. Proposed Federal Rule 16.1 would formalize early exchanges of information and will allow courts to "employ expedited methods to resolve claims or defenses not supported after the required information exchange." By upholding strict requirements for scientific evidence and expert testimony, courts can deter frivolous litigation and preserve the integrity of the legal system. This approach ensures that only well-supported claims proceed, ultimately protecting judicial resources and ensuring that justice is served efficiently.