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11th Circ. Message: Be Careful With Lone Pine Orders

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Courts and practitioners have long used Lone Pine case management orders successfully to manage toxic tort and other putative class and mass actions.[1] Such orders often require plaintiffs to substantiate key aspects of their claims, either before general discovery has taken place or in the early stages of discovery process. In a recent published opinion, the Eleventh Circuit rejected a Florida's district court's use of a Lone Pine order to dismiss a class of plaintiffs. The Eleventh Circuit did not question the use of a Lone Pine order generally, but rather addressed the narrow issue of whether Lone Pine orders are appropriate before a district court has considered the adequacy of a plaintiff's complaint.

When entered, most Lone Pine orders require submissions by the plaintiff to provide a prima facie showing in support of its claims — in order words, details of the alleged physical injury or diminution in value to property and a substantiated theory of causation linking the defendant's actions to the injury.[2]

Often used in mass tort settings, Lone Pine orders are most commonly used to mitigate the costs of discovery and address the burden of complex issues in such cases. Lone Pine orders may also be used to narrow issues for trial and to counteract the potential for high discovery costs to influence a defendant into a settlement.[3] A district court's authority to enter a Lone Pine order stems from Federal Rule of Civil Procedure 16(c)(12),[4] and a federal district court is afforded broad discretion in crafting and enforcing such case management orders.[5]

In Adinolfe v. United Technologies Corp.,[6] hundreds of residents of an area of Palm Beach County, Florida, claimed that a facility operated by Pratt & Whitney caused surface and groundwater contamination.[7] The district court dismissed the plaintiffs' initial complaint without prejudice in January 2011.[8] Soon after, the court granted the defendant's motions for Lone Pine case management orders, in which the district court stayed all discovery and required the plaintiffs to provide, within 60 days, an evidentiary submission including expert statements and "all evidence they contend supports the prima facie elements of contamination and causation for the property damages claims ... [including] disclosure of any testing for contaminants conducted on each plaintiff's property, and disclosure of any contaminants found on each plaintiff's property (as well as information about when they were found)."[9]

After another couple of rounds of amended complaints, P&W moved to dismiss pursuant to Rule 12(b)(6) in June 2012.[10] P&W also filed a motion to dismiss the case for failure to comply with the court's Lone Pine order — styled as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of standing: "Plaintiffs' Lone Pine responses confirm that plaintiffs' case has no foundation. The vast majority of plaintiffs have not tested their properties for contamination, cannot demonstrate that their properties are contaminated and therefore have no standing to sue."[11]

Significantly, P&W did not bring its motion to dismiss for failure to comply with the court's Lone Pine order under Rule 16(f), which allows the court to "issue any just orders" if a party "fails to obey a scheduling or other pretrial order."[12] Motions to dismiss for failure to comply with a Lone Pine order are often brought as motions pursuant to Rule 16.[13] For example, in Acuna, the Fifth Circuit, reviewing for abuse of discretion, affirmed a district court's determination that plaintiffs had failed to comply with the court's Lone Pine order pursuant to Rule 16. Although it considered the plaintiffs' alleged failure to meet its Lone Pine order, the district court in Adinolfe granted P&W's Rule 12(b)(6) motion to dismiss, and denied as moot P&W's Rule 12(b)(1) motion.[14]

Upon considering the plaintiffs' appeal, Circuit Judge Adalberto Jordan, writing for a unanimous panel of the Eleventh Circuit, expounded a lengthy discussion on the district court's use of a Lone Pine order **before** adjudicating the sufficiency of the plaintiffs' complaint. In dicta,[15] Judge Jordan did not mince words: "As a general matter, we do not think that it is legally appropriate (or for that matter wise) for a district court to issue a Lone Pine order requiring factual support for the plaintiffs' claims before it has determined that those claims survive a motion to dismiss under Twombly."[16]

Judge Jordan drew a distinction between using a Lone Pine order to manage or truncate discovery and using such an order to assess with finality a party's factual allegations: "It is one thing to demand that plaintiffs come forward with some evidence supporting certain basic elements of their claims as a way of organizing (and maybe bifurcating) the discovery process once a case is at issue, and dealing with discrete issues or claims by way of partial summary judgment motions. It is quite another to begin compiling, analyzing and addressing evidence (pro and con) concerning the plaintiffs' allegations without reciprocal discovery before those allegations have been determined to be legally sufficient under Rule 12(b)(6)."[17]

Requiring compliance with a Lone Pine order before ruling on the sufficiency of the complaint led "everyone at the motion to dismiss hearing [to] repeatedly intermingle[] legal arguments going to the sufficiency of the second amended complaints with factual arguments derived from the expert testimony and other evidence produced pursuant to the Lone Pine orders."[18] The court noted further that Lone Pine orders "should not be used as (or become) the platforms for pseudo-summary judgment motions at a time when the case is not at issue and the parties have not engaged in reciprocal discovery."[19]

Judge Jordan's robust critique of the district court's actions in this case may run counter to — or at least brush up against — the approach taken by other circuit courts. For instance, in Acuna, the Fifth Circuit validated the use of Lone Pine orders in part because the "orders issued below essentially required that information which plaintiffs should have had **before filing their claims** pursuant to Rule 11(b)(3). Each plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances and the basis for believing that the named defendants were responsible for his injuries."[20]

The Adinolfe Court did not pass judgment on the underlying efficacy of Lone Pine orders or on the type of information such orders can require of plaintiffs. Rather, the court restricted the use of such orders before a court determines whether a plaintiffs has stated his claim adequately in accordance with the Iqbal/Twombly standards.

Given the broad discretion of district courts to manage litigation efficiently and appellate courts' general unwillingness to "second-guess the district court's discretionary judgment,"[21] the administration of Lone Pine orders remains variable. It is important to keep in mind that courts have taken different approaches regarding the proper timing for entry of a Lone Pine order — with some indicating that such orders are appropriate **before** some discovery has taken place,[22] while others indicating that they are not appropriate **until** some discovery has taken place,[23] while still others indicating that they are not appropriate **because** some discovery has taken place.[24] Nonetheless, practitioners before district courts in the Eleventh Circuit should heed the warning of the Adinolfe Court.

A potentially more effective approach for a defendant may be to wait to file a motion for a Lone Pine order until after a district court has passed judgment on the defendant's motion to dismiss. If a plaintiff fails to comply with the court's order, a defendant would then seek to dismiss the claim through a motion for sanctions for failure to comply with the court's discovery order pursuant to Rule 16. Another benefit of this approach is that appellate review of a district court's dismissal of a claim pursuant to Rule 16 is for abuse of discretion,[25] while review of a district court's dismissal of a claim pursuant to Rule 12(b)(6) is de novo.[26] To be sure, many courts consider dismissal pursuant to Rule 16 as a last resort when compliance is not otherwise achievable. However, taking the approach advanced by the defendant in Adinolfe could fail to realize the desired results of a Lone Pine order.

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[1] A Lone Pine order is named for an unpublished New Jersey Superior Court opinion, Lore v. Lone Pine Corp. 1986 U.S. Dist. LEXIS 1626 (N.J. Super Ct. Law Div. Nov. 18, 1986)

[2] In the face of this order, the plaintiffs in Lone Pine "failed to provide anything that resembles a prima facie cause of action based upon property diminution or personal injuries" and the court dismissed the case with prejudice, holding that "prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause." Lone Pine, U.S. Dist. LEXIS 1626, at *3-4

[3] See Lone Pine, 1986 U.S. Dist. LEXIS 1626, at *4, (stating that the court was "not willing to continue the instant action with the hope that the defendants eventually will capitulate and give a sum of money to satisfy plaintiffs and their attorneys without having been put to the test of proving their cause of action")

[4] "[T]he court may take appropriate action with respect to ... the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple

parties, difficult legal questions or unusual problems of proof."

[5] Steering Comm. v. Exxon Mobil, 461 F.3d 598, 605 (5th Cir. 2006) (noting that "where the district court has been careful to manage the litigation efficiently through the judicious use of consolidated summary judgments and other tools such as Lone Pine orders, [an appellate court] will not second-guess the district court's discretionary judgment."); Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000) (noting that "Lone Pine orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation. In the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under [rule] 16.")

[6] No.12-16396 and 12-16397, 2014 U.S. App. LEXIS 18996 (11th Cir. Oct. 6, 2014)

[7] Adinolfe v. United Techs. Corp., No. 10-80840-CIV, Plaintiffs' Second Amended Complaint ¶¶ 233, 235 (Dkt. No. 102) (S.D. Fla. May 16, 2012) (hereinafter "Second Amended Complaint")

[8] 2014 U.S. App. LEXIS 18996 at *4

[9] 2014 U.S. App. LEXIS 18996 at *5

[10] Adinolfe, No. 10-80840-CIV, Defendant's Motion to Dismiss Second Amended Complaint (Dkt. No. 105) (S.D. Fla. June 22, 2012)

[11] Adinolfe, No. 10-80840-CIV, Defendant's Motion to Dismiss for Lack of Standing and Failure to Comply with Lone Pine Scheduling Order (Dkt. No. 106) (S.D. Fla. June 22, 2012)

[12] Fed. R. Civ. P. 16(f)(1)(C)

[13] Acuna, 200 F.3d at 340

[14] Adinolfe, No. 10-80840-CIV, Order Granting Motion to Dismiss Second Amended Complaint (Dkt. No. 122) (S.D. Fla. Nov. 13, 2012)

[15] 2014 U.S. App. LEXIS 18996 at *14 ("[T]he general propriety and/or utility of Lone Pine orders [are] matters we do not pass on today . . . .")

[16] 2014 U.S. App. LEXIS 18996 at *12

[17] 2014 U.S. App. LEXIS 18996 at *12-13

[18] 2014 U.S. App. LEXIS 18996 at *13-14

[19] 2014 U.S. App. LEXIS 18996 at *14; see also Morgan v. Ford Motor Co., 2007 U.S. Dist. LEXIS 36515, at *39-40 (D.N.J. May 17, 2007) (holding that, in a mass action, "[d]efendants are not entitled to file what amounts to a summary judgment motion without first allowing the party opposing the motion a chance to conduct discovery" and instead mandated that plaintiffs provide only "a simple statement from each plaintiff pursuant to Rule 26(a)(1) identifying the 'nature and extent of injuries suffered'" and also granted a request for the use of bellwether plaintiffs as a case management tool)

[20] Acuna, 200 F.3d at 340 (emphasis added)

[21] Steering Comm., 461 F.3d at 605

[22] See e.g., Burns v. Universal Crop Protection Alliance, 2007 U.S. Dist. LEXIS 71716, at *3 (W.D. Ark. 2007) (granting a Lone Pine order before commencing discovery); see also Acuna, 200 F.3d at 340–41 (affirming a lower court grant of a Lone Pine order before commencing discovery)

[23] See, e.g., Morgan, 2007 U.S. Dist. LEXIS at 39-40; Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 352 (Ohio Ct. App., Trumbull County 2007) (overturning a trial court's grant of a Lone Pine order as an abuse of discretion because "the timing of the issuance of the 'Lone Pine' order ... [before discovery] effectively and inappropriately supplanted the summary judgment procedure" and shifted the usual burdens of proof onto the non-moving party)

[24] See, e.g., Abrams v. Ciba Specialty Chemical Corp., 2008 U.S. Dist. LEXIS 86487, at *18 (S.D. Ala. Oct. 23, 2008) (declining to issue a Lone Pine order precisely because some discovery had already occurred: "Lone Pine orders are 'pre-discovery' orders. ... [T]he entry of a Lone Pine order is unwarranted [in this case because] the properties of each plaintiff have been tested for the presence of [the chemical substance] DDTr and defendants have been provided with the results.")

[25] United States v. Duran Samaniego, 345 F.3d 1280, 1284 (11th Cir. 2003)

[26] 2014 U.S. App. LEXIS 18996 at *16
