MISSING THE FOREST FOR THE TREES: THE LESSONS OF LONE PINE

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Over the past three decades, Lone Pine orders have become a fixture of the mass tort landscape. Issued in large toxic tort cases, these case management orders require claimants to come forward with prima facie injury, exposure, and causation evidence by a date certain—or else face an early and unceremonious dismissal. So far, the orders have been mostly heralded as an inventive and efficient way to streamline and expedite the resolution of complex cases. They are, many believe, an antidote to the assertion of dubious claims—a useful tool to "shake the junk cases from the mass tort tree." Yet, it's not so simple. This Article identifies and analyzes various drawbacks associated with Lone Pine orders, including their inequitable and incoherent application, their incompatibility with formal procedural rules, and their focus on a question that is, at bottom, insusceptible to fast-track inquiry. It ultimately concludes that, given these problems, courts ought to scale back their use of this potent procedural device.

But that's just the half of it. Lone Pine orders are not just important because of what they do. They are also important because of where they sit: squarely at the intersection of broader currents that are quietly transforming contemporary civil litigation. These currents include the insistent rise of managerial judging, the erosion of our adversarial system of justice, the fracturing of transsubstantive procedure, the counterrevolution against federal litigation, the rise in "ad hoc" adjudication, and the rapid and seemingly insatiable growth of MDLs. Weaving these seemingly disparate currents together, Lone Pine orders offer fresh insights to deepen—and, in places, complicate—our understanding of these profoundly influential phenomena.

INTRODUCTION

Since their invention in 1986, Lone Pine orders have become increasingly popular and prevalent.[1] Though they vary on

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[1] *See supra* note __ (collecting citations).

the specifics, these case management orders generally require each plaintiff swept into a mass tort proceeding to supply prima facie evidence of injury, exposure, and causation—all by a set date, under penalty of dismissal. Authorized by Federal Rule of Civil Procedure 16, and specifically Rule 16(c)(2)(L), which permits courts to "adopt[] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties . . . or unusual proof problems," the orders act as a "procedural sieve."[2] By putting plaintiffs to an early test, and purging those who don't make the grade (or extinguishing the entire case, if all plaintiffs' submissions fall short), Lone Pine orders, it is said, help courts to zero in on, and address, gaps in the plaintiffs' evidence. This early scrutiny can, in turn, save defendants time, money, and aggravation; conserve scarce judicial resources; expedite the resolution of claims; deter the filing of groundless suits; and safeguard the integrity of trial processes.[3] Indeed, to their many enthusiastic supporters, Lone Pine orders are an inventive means to achieve the aim of the Federal Rule of Civil Procedure 1: The "just, speedy, and inexpensive determination" of burdensome and wickedly complex disputes.

That, at least, is part of the story. Even standing alone, the story is worthy of inquiry. A bill that would codify and *mandate* the use of Lone Pine orders in multidistrict litigation (MDLs), recently passed the House of Representatives,[4] and the Civil Rules Committee also appears to have Lone Pine in its sights.[5] Furthermore, even prior to getting that official approbation, Lone Pine orders have already been issued dozens of times, and they have played a role in many of the nation's most prominent mass

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[2] *See supra* note __ (collecting citations).

[3] For these and other benefits, see *infra* note __ and accompanying text.

[4] 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 (including but not limited to medical records) 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, Sec. 105.

[5] Advisory Comm. on Civil Rules, Excerpts of the Nov. 7, 2017, Civil Rules Comm. Mtg., at 160–61, 174 [hereinafter Advisory Comm. Nov. 7, 2017 Mtg.].

tort cases—cases which have, collectively, resolved the claims of hundreds of thousands of people.[6]

But in fact, the full story of Lone Pine is further reaching—and also more interesting—than the above would suggest. Viewing Lone Pine orders not in isolation, but through a wider lens, shows that this somewhat esoteric mechanism sits at the crossroads of broad currents that are collectively, churning through and quietly remaking, contemporary civil litigation. By offering a deeper account of "Lone Pine orders," then, I not only seek to inform our views on, and courts' use of, this particular case management device. I also, simultaneously, seek to enrich our understanding of these large and influential phenomena.

A study of Lone Pine orders pays other dividends too. The payoff comes because these motions are often (though not exclusively) part-and-parcel of mass tort MDLs.[7] Thus, a study of the Lone Pine mechanism compels us to consider the particular procedural context in which these motions are often made.

Once second fiddle to Rule 23 class action, MDLs—invented in 1968 and authorized by 28 U.S.C. § 1407—are having their star turn.[8] As recently as 1991, MDLs accounted for only about 1% of the open federal civil docket.[9] Now, that figure has swelled to 39%, and mass tort actions, where Lone Pine orders are centered, comprise a whopping 96% of that total and collect some 124,000 individual claims.[10]

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[6] *See infra* notes __ (collecting sources).

[7] *See In re* Fosamax Prods. Liab. Litig., 2012 WL 5877418, at *2 (S.D.N.Y. Nov. 20, 2012) (collecting examples); *infra* note __ (same).

[8] For the uninitiated, 28 U.S.C. § 1407 authorizes the Judicial Panel on Multidistrict Litigation to transfer like cases from all federal courts to one "transferee" judge for pretrial processing.

[9] Judith Resnik, *Doing the State's Business: From Collective Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts*, unpublished manuscript, Feb. 22, 2017, at 7.

[10] For the 39% figure, see Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669, 1672 (2017). If you subtract prisoner and social security cases from the total (under the theory that those cases typically require modest judicial investment), MDLs represent more than 45% of all pending civil actions. DUKE LAW SCHOOL, CENTER FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS x-xi (2014). For the 124,000 figure, see JUDICIAL PANEL ON MULTIDISTRICT LITIGATION-JUDICIAL BUSINESS 2017, http://www.uscourts.gov/statistics-

Transferee judges are tasked with managing these unruly actions, and, by all accounts, the assignment is immensely—almost absurdly—challenging.[11] The numbers alone are daunting: As of March 2015, transferee judges were overseeing twenty-three "large" MDLs, each comprised of over 1000 separate actions.[12] Some MDLs are enormous: The pelvic-mesh product liability litigation, for example, consolidates over 100,000 individual lawsuits.[13] Transferee judges' basic job description is internally inconsistent: Judges are supposed to move cases along *en masse*, and, at the same time, respect each plaintiff's personalized interest in a claim that is, and was, large enough to make it into federal court in the first instance.[14] And, the judges—who are working alongside small and mostly inexperienced staffs, under intense time pressure, and often the glare of intense public scrutiny—are supposed to do all that in a context where targeted procedural rules are vague or nonexistent; state ethics rules are generally either unhelpful or utterly beside the point; the underlying substantive law tends to vary, giving rise to vexing choice of law problems; and the claims themselves are, almost without exception, fiercely contested and technically complex.[15] Thrown into this maelstrom, transferee judges have understandably improvised. They have, as a Center for Judicial Studies report recently concluded: "developed disparate approaches . . . largely on their own" and,

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reports/judicial-panel-multidistrict-litigation-judicial-business-2017. For the 96% figure, see Thomas Metzloff, *The MDL Vortex Revisited*, 99 JUDICATURE 2, 41 (2015) (reporting data from March 2015).

[11] *See* DUKE LAW SCHOOL, *supra* note __, at xii ("Judges handling these large mass-tort MDLs are faced with an unprecedented set of management issues.").

[12] Metzloff, *supra* note __, at 42, tbl. 2.

[13] E-mail from Kevin Rothenberg (Dec. 10, 2018) (on file with author) (adding together the total number of active and closed cases consolidated in MDL 2327).

[14] *In re* Phenylpropanolamine (PPA) Prod. Liab. Litig., 460 F.3d 1217, 1231 (9th Cir. 2006) (acknowledging that "the court must figure out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality").

[15] For the classic articulation of the procedural, ethical, and choice-of-law problems endemic to mass tort litigation, see generally, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994). For an example of intense public scrutiny, see Jan Hoffman, *Judge Wants to Solve the Opioid Crisis, and Fast*, N.Y. TIMES, Mar. 5, 2018, at A1. For time constraints, see Hearing Transcript, *In re* Nat'l Prescription Opiate Litig., MDL No. 2804, Jan. 9, 2018, at 4, 13 (quoting MDL transferee Judge Polster as observing that, for every delay in the opioid litigation's resolution, hundreds, thousands, or tens of thousands of Americans will die).

using these homemade mechanisms, disposed of tens of thousands of cases "without the benefit of rules or a set of best practices."[16] Exhibiting this freewheeling, improvisational spirit, in recent MDLs, transferee judges have, among other things, worked outside of accepted channels to slash attorneys' fees,[17] reached across jurisdictional boundaries to coordinate with state-court counterparts,[18] appointed advisory panels of scientific experts,[19] and engineered settlement agreements that are "unorthodox," to put it mildly.[20]

In the academic community, this improvisation is, by turns, criticized and celebrated. Critics insist that the ad hoc nature of these judge-made procedures—which pop up not just in MDLs, but in a wide variety of cases and contexts—are *themselves* problematic, as they are inconsistent with traditional conceptions of judging, likely to erode litigants' sense of procedural justice, unlikely to take third parties' interests into account, arguably undemocratic, insensitive to separation of powers concerns, and susceptible to arbitrary or abusive action.[21] Skeptics also lament

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[16] DUKE LAW SCHOOL, *supra* note __, at xii.

[17] *E.g., In re* Zyprexa Prod. Liab. Litig., 424 F. Supp. 2d 488, 495 (E.D.N.Y. 2006); *In re* Vioxx Prod. Liab. Litig., 574 F. Supp. 2d 606 (E.D. La. 2008), *on reconsideration in part*, 650 F. Supp. 2d 549 (E.D. La. 2009); *In re* Guidant Corp. Implantable Defibrillators Prod. Liab. Litig., MDL No. 05-1708, 2008 WL 3896006, at *6 (Aug. 21, 2008).

[18] *E.g.,* Advisory Committee on Civil Rules, Draft Minutes, Apr. 10, 2018, at 16 (describing the experience of a transferee judge who "recently sat on the bench for three days with a state-court judge at a Daubert hearing").

[19] Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1983 (1999) (discussing the appointment of independent experts).

[20] *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 274–92 (2011) (critiquing the "controversial" Vioxx settlement); Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12 (same).

[21] For criticism, see Pamela K. Bookman & David L. Noll, *Ad Hoc Procedure*, 92 N.Y.U. L. REV. 767 (2017); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007); Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 558–59 (2006); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 47 (1995); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003); Judith A. Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 491 (1986). For ad hoc procedures outside the MDL context, see Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CAL. L. REV. 991, 1050–53 (2018); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261 (2010).

that *when* judges improvise, their decisions suffer from a lack of consistency, predictability, and horizontal equity (a problem we see vividly here).[22] On the other hand, one person's lawless "ad hocery" is another's commendable flexibility.[23] In other contexts (including with regard to ADR, where we famously *want* the "forum to fit the fuss"), we believe that tailored and customized procedures are a *good* thing: attuned to the interests of parties and conducive to settlement.[24] And, of course, defenders of ad hoc procedures have one final and powerful retort: What's, really, the alternative, and who's to say it wouldn't be dramatically worse?[25]

In the midst of this back-and-forth, however, there are two apparent—and crucial—points of consensus. The first is that, given the billions at stake, the scores of litigants affected, and the gaps and challenges described above, scholars ought to be doing more to help. We ought to be getting under the hood of MDLs to critically examine how these mechanisms—responsible for the adjudication and resolution of nearly half of federal civil claims in

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[22] Nora Freeman Engstrom, *The Trouble with Trial Time Limits*, 106 GEO. L.J. 933, 979 (2017).

[23] One might add that the Advisory Committee has espoused the view that, particularly in complex cases, "flexibility" is desirable. *See* FED. R. CIV. P. 16, 1983 advisory committee notes ("[T]he Committee felt that flexibility and experience are the keys to efficient management of complex cases."). The Manual for Complex Litigation similarly exhorts judges to "tailor case-management procedures to the needs of the particular litigation." FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 10.1, at 8 (4th ed. 2004). For support, see Steven S. Gensler, *Judicial Case Management: Caught in the Cross-Fire*, 60 DUKE L.J. 669, 700–01 (2010) ("At bottom, I think case management by judges, custom-fitting the procedure in the case based on the options available under the Civil Rules, remains our best strategy for seeing that cases receive the right type and amount of procedure.").

[24] *See, e.g.,* Tia S. Denenberg & R.V. Denenberg, *The Future of the Workplace Dispute Resolver*, DISP. RESOL. J., June 1994, at 48, 57 (proposing that the guiding principle in determining an appropriate dispute resolution process should be to make "the forum fit the fuss"). *Accord* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 491 (1986) ("Both the litigation management and ADR movements suggest that significant benefits can be achieved if judges and attorneys become active in tailoring procedures to meet the needs of individual disputes.").

[25] ADVISORY COMM. ON CIVIL RULES & WORKING GROUP, REPORT ON MASS TORT LITIGATION, *reprinted in* 187 F.R.D. 293, 307 (1999) [hereinafter ADVISORY COMM. REP.] (concluding an ambitious study of mass tort litigation with a plea for flexibility and case-specific experimentation).

this country—actually work.[26] Second, there is also a growing sense that, rather than casting aspersions from on high, we ought to be rolling up our sleeves to offer grounded and practical guidance.[27] This study of Lone Pine orders is part of that broader project, and it seeks to advance both aims. By canvassing and categorizing courts' current use of the Lone Pine mechanism, charting the normative landscape, and offering concrete suggestions regarding how these orders ought to be utilized (and not utilized) going forward, this Article seeks to assist transferee judges, while pointing the way to future inquiry.

The remainder unfolds as follows. Collectively, Parts I and II offer background and context. Part I explores Lone Pine orders' invention, details their contemporary operation, and distinguishes these orders from plaintiff fact sheets, another popular device that routinizes and streamlines the collection of particularized information regarding individual plaintiffs. This discussion highlights that Lone Pine orders are, to a large extent, implicitly or explicitly justified by courts' worries that nonmeritorious claims are seeping into aggregate actions. Addressing that concern head-on, Part II assembles what we know, and do not know, about groundless claiming in the mass tort ecosystem and also maps where these claims are apt to be found.

Part III then catalogs Lone Pine orders' advantages and disadvantages. As noted, the "pro" side of the ledger has been well fleshed out by Lone Pine orders' many supporters. It is fairly well established, then, that by winnowing out non-colorable claims, Lone Pine orders can conserve court and party resources, hasten

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[26] Until recently, MDLs were mostly ignored in the academic literature. *See* Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 847 (2017) ("Compared to the class action, MDL was, until recently and with notable exceptions, relatively underemphasized in academic literature."); Gluck, *supra* note __, at 1676 ("[T]here is relatively little academic work on the MDL . . . ."). Though the academic spigots are now gushing, much of the commentary continues to view MDLs from 30,000 feet. *See id*. at 1676 n.26 (collecting sources).

[27] DUKE LAW SCHOOL, *supra* note __, at ii (exhorting commentators to "begin to build a compendium of practices" and "offer[] some degree of insight on the circumstances that may favor one approach over another"); John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIGATION 26, 16, 32 (2012) (reporting experienced lawyers' belief that "transferee judges need more guidance").

case resolution, safeguard the integrity of trial processes, and, in many cases, benefit "deserving" plaintiffs, who might otherwise have to share court time, counsel table, or settlement funds with those with dodgy entitlements.[28] The con side of the ledger, however, has been inadequately explored, particularly in the academic literature where discussion has been almost entirely absent.[29] Canvassing drawbacks, Part III finds that three are most pressing. First, because Lone Pine orders are issued pursuant to judges' amorphous "managerial" authority, Lone Pine orders are all over the map in terms of when they are issued, what they say, and how much they demand. This inconsistency gives rise to serious predictability and horizontal equity problems and potentially opens the door to arbitrary or abusive decision-making. Second, Lone Pine orders are out of step with various procedural safeguards—and, indeed, turn some formal protections embedded within Rules 11, 12, and 56 on their head. Third and finally, prototypical Lone Pine orders demand individual proof of specific causation, despite the fact that, in most toxic tort cases, specific causation is unsusceptible to a binary, yes-no inquiry.

Given this mixed bag, Part IV offers a path forward. In so doing, Part IV rejects an all-or-nothing approach. It neither concludes that Lone Pine orders ought to be outlawed, nor affirms their uncritical acceptance. Rather, Part IV draws on both Part II's mapping exercise, which highlighted the ways that nonmeritorious claims are most apt to seep into the mass tort ecosystem, and Part III's discussion of problems associated with this procedural device to suggest that Lone Pine orders may be utilized, but sparingly. Furthermore, Part IV contends that, for courts justifiably eager to identify and purge dubious claims, another mechanism—plaintiff fact sheets—offers many of the benefits courts associate with Lone Pine orders but without certain of the drawbacks identified above.

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[28] *See infra* note __ and accompanying text.

[29] Many judges have voiced concerns about (as one put it) the "untethered use of the *Lone Pine* process." *In re* Digitek Prod. Liab. Litig., 264 F.R.D. 249, 257 (S.D. W. Va. 2010). However, few commentators have offered critiques. The primary exceptions are two thoughtful student notes: 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 G.W. J. OF ENERGY & ENVT'L L. 77 (2016); John T. Burnett, Comment, *Lone Pine Orders: A Wolf in Sheep's Clothing for Environmental and Toxic Tort Litigation*, 14 J. OF LAND USE & ENVT'L L. 53 (1998).

Finally, Part V steps back to reflect on the lessons of Lone Pine. Lone Pine orders are born of, and provide analytic leverage on, larger trends that are quietly transforming contemporary civil litigation, including the rise of managerial judging (still going strong in its fourth decade), the fracturing of transsubstantive procedure, the counterrevolution against federal litigation, and the growth of ad hoc procedural decisionmaking. Lone Pine orders provide a concrete illustration of these larger trends and, in places, offer insights to inform future inquiry.

I. ORIGINS, THUMBNAIL SKETCH, AND CURRENT USE

Part I offers a primer on Lone Pine. Subpart A tells an origin story; it discusses the case where, with little fanfare, Lone Pine orders made their debut. Subpart B offers a thumbnail sketch of the orders' contemporary use, including their purpose, prevalence, and legality. Finally, by juxtaposing Lone Pine orders with another procedural device—plaintiff fact sheets—Subpart C further clarifies what Lone Pine orders are and aren't.

A. *Lore v. Lone Pine Corp.*

Lone Pine orders originated in, and get their name from, an unpublished order issued by Judge William T. Wichmann in an otherwise-obscure case, *Lore v. Lone Pine Corp*., initially filed on April 23, 1985 in state court in Monmouth County, New Jersey.[30] In *Lore*, six families, three individuals, and one corporation sought compensation for damage allegedly caused by contamination oozing from the Lone Pine landfill.[31] Located in central New Jersey, the landfill (now a Superfund site) operated for two decades before it was shuttered in 1979.[32] In filing the lawsuit, plaintiffs claimed that, during the landfill's extended operation, its operators carelessly accepted and stored millions of gallons of bulk liquid chemical waste—and, over time, the waste bled from the

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[30] Lore v. Lone Pine Corp., No. L-3360685, 1986 WL 637507 (N.J. Nov. 18, 1986); *see* ADVISORY COMM. ON CIV. RULES, MDL SUBCOMM. REP. 161 (Apr. 10, 2018) ("Lone Pine orders originated 30 years ago in the New Jersey state courts . . . .").

[31] For more on the plaintiffs, see Paul D'Ambrosio, *Pollution Claims Against Lone Pine Rejected*, ASBURY PARK PRESS, Nov. 19, 1986, at A1.

[32] For more on the landfill, see *Once a Wilderness, Now a Wasteland*, N.Y. TIMES, Aug. 28, 1983, at NJ11; Leo H. Carney, *Lone Pine Landfill Called Peril to Aquifers*, N.Y. TIMES, Aug. 29, 1983, at NJ11.

landfill to pollute local water.[33] According to plaintiffs, the polluted water depressed property values and also caused them to suffer a number of maladies, including allergies and rashes.[34]

As noted, plaintiffs filed their case in the spring of 1985 and, in initiating suit, they cast the net broadly; they named some 464 defendants in their complaint, including the Lone Pine Corporation, which operated the landfill (and subsequently went belly up), eleven municipalities, one school district, and an array of generators and haulers of toxic material.[35] As of November 1985, however, it became clear that the suit had stalled. Judge Wichmann learned at a management conference that "few defendants"—out of the 464 named—"had been served."[36] At the next management conference, on January 31, 1986, defense counsel informed the court that the Environmental Protection Agency (EPA) had issued a report, which summarized sixteen studies concerning the landfill and "cataloged and evaluated all the information available on the . . . location of the resulting pollution."[37] That report undercut certain of the plaintiffs' assertions. In particular, the EPA found that the contamination that was the focus of plaintiffs' complaint was, in fact, "confined to the landfill and its immediate vicinity."[38] This finding was relevant—and, for plaintiffs, problematic—because some plaintiffs alleging contamination-related injury lived some distance away. In fact, one plaintiff's home was located twenty miles from the landfill, and two more supposedly contaminated properties were each located two miles from it "in different directions."[39]

Faced with this contradictory information—and clearly losing patience—Judge Wichmann entered a novel case management order. That order required plaintiffs to provide documentation to the court detailing, among other things, "(a) Facts of each individual plaintiff's exposure to alleged toxic substances at or from Lone Pine Landfill" along with "(b) Reports of treating physicians and medical or other experts, supporting

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[33] D'Ambrosio, *supra* note __, at A1.

[34] *Lone Pine*, 1986 WL 637507, at *1.

[35] *Id*.; D'Ambrosio, *supra* note __, at A1.

[36] *Lone Pine*, 1986 WL 637507, at *1.

[37] *Id*.

[38] *Id*. at *3.

[39] *Id*. at *3.

each individual plaintiff's claim of injury and causation by substances from Lone Pine Landfill," all "on or before June 1, 1986."[40]

In response to Judge Wichmann's January order, the plaintiffs cobbled together some information, but it was hardly comprehensive. 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."[41] Judge Wichmann agreed, observing that plaintiffs' submissions were "woefully and totally inadequate."[42] He elaborated:

> The information submitted as to personal injury claims was so inadequate as to be deemed unbelievable and unreal. Plaintiffs 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.[43]

"Thus," the court ruled, sixteen months after the action was initiated, "defendants were no better off" than when suit was first filed.[44] With no headway made, on November 18, 1986, an exasperated Judge Wichmann dismissed plaintiffs' claims with prejudice.[45] "This Court," Judge Wichmann explained, "is 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 attorney without having been put to the test."[46]

B. Lone Pine: Prevalence and Legality

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[40] *Id*. at *1–2. Judge Wichmann subsequently gave the plaintiffs an extension until August 19, 1986. Sue Epstein, *Judge Dismisses Landfill Suit, Claiming Residents Failed to Prove Damage*, STAR-LEDGER, Nov. 19, 1986, at 42.

[41] *Lone Pine*, 1986 WL 637507, at *4.

[42] Epstein, *supra* note __, at 42.

[43] *Lone Pine*, 1986 WL 637507, at *3.

[44] *Id*.

[45] *Id*. at *4.

[46] *Id*.

As the discussion above shows, Lone Pine orders originated in an exceptional case—a lawsuit that featured hundreds of litigants, seemingly dilatory lawyering on behalf of plaintiffs, and claims inching along under a cloud of suspicion, directly undercut by government study. What happened next is both practically and theoretically interesting. Writing separately, Jay Tidmarsh and Judith Resnik have both hit upon a dynamic I will dub the "contagious principle of exceptional procedure."[47] Novel solutions developed for one-off, once-in-a-career cases, they observe, have an uncanny way of worming their way into more ordinary cases.[48] In time, the extraordinary becomes the ordinary—and then, as judges "push the procedural envelope still further out," the cycle starts again.[49]

Consistent with that principle, in the decades since Judge Wichmann's novel ruling, courts around the country have taken the Lone Pine idea and run with it. According to the *Annotated Manual on Complex Litigation*, Lone Pine orders are "widely used in mass torts to isolate spurious claims."[50] Federal courts describe Lone Pine orders as a "common trial management technique,"[51] "routine,"[52] and a tool being used "[w]ith increasing frequency."[53]

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[47] Here, of course, I offer a spin on the title of Wex Malone's classic piece, *Damage Suits and the Contagious Principle of Workmen's Compensation*, 12 LA. L. REV. (1952).

[48] *See* Jay Tidmarsh, *Civil Procedure: The Last Ten Years*, 46 J. LEGAL EDUC. 503, 503 (1996); Judith Resnik, *Procedural Innovations, Sloshing Over: A Comment on Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1627, 1633 (1995). Examples abound. A particularly vivid one is the invention and then gradual acceptance of trial time limits. *See* Engstrom, *supra* note __, at 941–48. Or, active case management, originally designed for protracted and complex cases, has become assimilated into daily practice. Gensler, *supra* note __, at 670.

[49] Tidmarsh, *supra* note __, at 503.

[50] DAVID F. HERR, ANN. MANUAL COMPLEX LITIGATION § 11.34 (4th ed.).

[51] Arias v. DynCorp, 752 F.3d 1011, 1014 (D.C. Cir. 2014).

[52] *In re* Avandia Mktg., Sales Practices & Prod. Liab. Litig., 687 F. App'x 210, 214 (3d Cir. 2017); *accord In re* Vioxx Prod. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008), *aff'd* 388 F. App'x 391 (5th Cir. 2010) (suggesting that, since their 1986 invention, "Lone Pine orders have been routinely used by courts to manage mass tort cases").

[53] *In re* Fosamax Prods. Liab. Litig., 2012 WL 5877418, at *2 (S.D.N.Y. Nov. 20, 2012).

And commentators explain that Lone Pine orders are "increasingly being required"[54] and seeing "widespread use."[55]

1. Prevalence

To be sure, it is difficult to get a real handle on just how prevalent these orders are: Neither the Federal Judicial Center nor the National Center for State Courts keeps tabs, and, though a researcher could scour Westlaw to count how many times Lone Pine orders have been issued in "visible" judicial opinions and then try to chart trends, any resulting study would be susceptible to critique and hardly definitive.[56] That said, when it comes to Lone Pine orders' acceptance and prevalence, two points are clear. First, over fifty courts, in both the state and federal system, have issued Lone Pine orders.[57] Second, these orders have played a role in many of the most prominent toxic tort cases of all time including many that read like the "Who's Who" of mass disaster, including litigation involving the Love Canal,[58] asbestos,[59] Vioxx,[60] Fosamax,[61] Rezulin,[62] Celebrex,[63] Nimmer Nexgen knee

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[54] JOHN H. BEISNER & JESSICA D. MILLER, WASH. LEGAL FOUND., LITIGATE THE TORTS, NOT THE MASS: A MODEST PROPOSAL FOR REFORMING HOW MASS TORTS ARE ADJUDICATED 19 (2009).

[55] David R. Erickson & Justin W. Howard, *Fighting for a Lone Pine Order in Complex Toxic Tort Litigation*, at 7 (unpublished manuscript); *accord* Amy Schulman & Sheila Birnbaum, *From Both Sides Now: Additional Perspectives on "Uncovering Discovery,"* at 8 (unpublished manuscript) (stating that Lone Pine orders are being issued "with increasing frequency").

[56] The problem is that Westlaw captures only the tip of any litigation iceberg, and, when it comes to what subset of material Westlaw captures, there is bound to be variation over time and across space, confounding any effort to identify "trends." *See* David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1209 n.24, 1214–16 (2013). Further, even if we were to know the numerator (how many Lone Pine orders have been issued), we would not know the denominator (how many toxic tort cases are prime candidates for an order's entry).

[57] Mark D. Feczko et al., *Lone Pine or Folk Lore? A Survey of Case Developments Regarding Lone Pine Orders in Oil and Gas Litigation*, in ENERGY & MINERAL LAW INSTITUTE ch. 5, at § 5.04, at 180 (2014) (identifying fifty-three cases where Lone Pine orders were entered, out of eighty "visible" cases where they were sought).

[58] *In re* Love Canal Actions, 547 N.Y.S.2d 174, 179 (Sup. Ct. 1989), *aff'd as modified*, 555 N.Y.S.2d 519 (1990).

[59] *In re* Asbestos Prods. Liab. Litig. (No. VI), 718 F.3d 236, 241 (3d Cir. 2013).

[60] *In re* Vioxx Prod. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008), *aff'd*, 388 F. App'x 391 (5th Cir. 2010).

implants,[64] Baycol,[65] Avandia,[66] Fresenius,[67] and the Deepwater Horizon oil spill.[68]

2. Legality

The legality of these orders isn't much in doubt. Though no statute, Federal Rule of Civil Procedure, or Federal Rule of Evidence expressly permits—or even contemplates—Lone Pine orders, there is a strong consensus that courts issuing such orders do so within the bounds of their broad discretion.[69] In particular, it is said, such courts are either exercising their inherent authority or exercising authority bestowed by Federal Rule of Civil Procedure 16(c)(2)(L), a provision added in 1983, which authorizes 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."[70] Accordingly, while certain federal

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[61] *In re* Fosamax Prods. Liab. Litig., 2012 WL 5877418 (S.D.N.Y. Nov. 20, 2012).

[62] Pretrial Order No. 370, *In re* Rezulin Prods. Liab. Litig., MDL No. 1348, May 9, 2005; Pretrial Order, *In re* N.Y. Rezulin Prods. Liab. Litig., Master Index No. 752,000/00 Aug. 11, 2004, *available at* https://drive.google.com/file/d/0B0xuPGwlJiiVZk9IS3U2YWRLUTQ/edit.

[63] Pretrial Order No. 29, *In re* Bextra and Celebrex Mktg. Sales Practices & Prod. Liab. Litig., MDL No. 1699, Aug. 1, 2008, *available at* http://www.masstortdefense.com/lonepine_bextra.pdf.

[64] Pretrial Order No. 11, *In re* Zimmer Nexgen Knee Implant Prods. Liab. Litig., MDL No. 2272, N.D. Ill. June 10, 2016, *available at* https://www.druganddevicelawblog.com/wp-content/uploads/sites/30/2016/06/Nexgen-Lone-Pine.pdf.

[65] *In re* Baycol Prod. Liab. Litig., No. MDL 1431 MJD/JGL, 2004 WL 626866, at *1 (D. Minn. Mar. 18, 2004).

[66] Pretrial Order No. 121, *In re* Avandia Mktg., Sales Practices and Prods. Liab. Litig., MDL No. 1871 (E.D. Pa. Nov. 15, 2010) (on file with the author).

[67] Pretrial Order No. 17, *In re* Fresenius Prods. Liab. Litig., MDL No. 2428, D. Mass. Jan. 26, 2017.

[68] *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, 2016 WL 614690, at *5, *12 (E.D. La. Feb. 16, 2016).

[69] *In re* Digitek Prod. Liab. Litig., 264 F.R.D. 249, 256 (S.D.W. Va. 2010) (recognizing that "no federal rule or statute requires, or even explicitly authorizes, the entry of Lone Pine orders").

[70] *See, 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., 2008 WL 4066250, at *5 (N.D. Ill. Aug. 27, 2008) (same); *cf*. McMunn v. Babcock & Wilcox Power Generation Group, 896 F. Supp. 2d 347 (W.D. Pa. 2012) (citing, instead, Rule

appellate courts have ruled that, given particular circumstances, a Lone Pine order should not have issued (or should not have issued when it did), no federal appellate court—and only one state high court—has ruled that trial courts lack the authority to issue orders of this kind.[71] Indeed, as a sign of Lone Pine orders' broad acceptance, in Texas, an appellate court has gone so far as to rule that, in *failing* to issue a Lone Pine order, the trial court abused its broad discretion.[72]

C. Further Defining Lone Pine Orders and Distinguishing them from Plaintiff Fact Sheets

Still, confusion continues to swirl around the Lone Pine mechanism. Part of this confusion stems from the fact that, though courts and commentators talk about "Lone Pine orders" as if they are definable things, endowed with clear characteristics and precise attributes, in fact, particulars vary. Indeed, as I discuss in Part III.A. below, courts disagree regarding which cases are prime candidates for entry of a Lone Pine order, when in the lifecycle of a case an order should issue, and what, precisely, such an order is supposed to say. Adding to the uncertainty, Lone Pine orders are sometimes confused with another judicial invention: plaintiff fact sheets, also called plaintiff questionnaires or plaintiff profile

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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"). In state courts, authority to issue Lone Pine orders is said to emanate from a range of sources, including courts' inherent authority. *See, e.g.,* Cottle v. Superior Court, 3 Cal.App.4th 1367 (1992).

[71] For a case where the appellate court reversed the entry of a Lone Pine order as premature, see Adinolphe v. United Technologies, Inc., 768 F.3d 1161 (11th Cir. 2014). As noted in the text, Colorado's high court has held that Colorado rules "do not allow" Lone Pine orders. Antero Resources Corp. v. Strudley, 347 P.3d 149, 151 (Colo. 2015). At least two intermediate courts have also cast doubt on the Lone Pine mechanism. Downie v. Atrium Medical Corp., No. 2013-CV-00155, 2014 WL 8102958, at *1 (N.H. Super. Ct. July 28, 2014) (observing that "no New Hampshire court has ever issued a Lone Pine order" and stating that "it is, at best, questionable if the Court even has the discretion to enter a Lone Pine order"); Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 355 (Ohio App. Ct. 2007) (questioning whether Lone Pine orders are authorized "under Ohio law").

[72] *In re* Mohawk Rubber Co., 982 S.W.2d 494 (Tex. App. 1998) (conditionally granting the defendant's petition for a writ of mandamus and directing the trial court to issue a Lone Pine order).

forms.[73] Here, then, it makes sense to ensure that, to the extent possible, the two mechanisms are defined and properly distinguished.

> Lone Pine orders are case management orders issued by trial courts in complex mass tort cases, sometimes prior to, and sometimes after, the start of discovery. They typically require each plaintiff swept into an aggregate action to make three distinct evidentiary showings: (1) that she was exposed to the defendant's product or contaminant and the circumstances of this exposure, (2) that she has suffered, or is suffering, a bona fide impairment (and, often, the circumstances of her diagnosis), and (3) proof of causation—which is to say, either an expert affidavit or expert report expressly connecting (1) with (2).[74] If a plaintiff fails to submit the requested information by the court-imposed deadline, or if her submission is deficient, her suit may be dismissed with prejudice.

A plaintiff fact sheet is a standardized court-approved form, served on each plaintiff within an aggregate action that must be completed by a court-imposed deadline, often in lieu of tailored

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[73] For example, in *Silica*, described in more detail below, the court required plaintiffs to complete "Fact Sheets" supplying "information about when, where and how each Plaintiff alleged he or she was exposed to silica dust" as well as "detailed medical information concerning each Plaintiff's silica-related injury." *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 576 (S.D. Tex. 2005). Yet, subsequent cases have inaccurately described these fact sheets as Lone Pine orders. *See, e.g.,* Abbatiello v. Monsanto Co., 569 F. Supp. 2d 351, 353 n.3 (S.D. N.Y. 2008); *In re* Vioxx Prods. Liab. Litig., 557 F. Supp. 2d 741, 743 (E.D. La. 2008). Conversely, in *Avandia*, the court issued a self-described Lone Pine order that, in fact, is better described as an order requiring fact sheets. *See supra* note __ and accompanying text. For fact sheets' popularity, see Elizabeth Cabraser, *Uncovering Discovery*, unpublished manuscript, at 13 n.37 (explaining that it is now a "common practice" to utilize fact sheets in mass tort multidistrict litigation).

[74] Meghan H. Magruder, *Defending Toxic Tort Claims: Effective Strategies and Key Considerations, in* LITIGATING TOXIC TORT AND HAZARDOUS WASTE CLAIMS: LEADING LAWYERS ON EVALUATING LIABILITY, EMPLOYING EXPERTS, AND PREPARING FOR LITIGATION (2011), *available at* 2011 WL 2941019 (describing "[a] typical Lone Pine order"); Brian R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561, 572 (2012) ("*Lone Pine* orders typically require plaintiffs to provide case-specific expert reports establishing . . . that their injuries were caused by the defendant's conduct—and the scientific basis for the experts' opinions.").

interrogatories.[75] Usually answered under oath, these forms typically require each plaintiff swept into an aggregate action to submit information about her injury, the identity of the product or contaminant responsible for that injury, and the identity of the plaintiff's diagnosing physician.[76] Plaintiff fact sheets also typically include a blank authorization, which, once signed by the plaintiff, permit the defendant to collect the plaintiff's medical and employment records without running afoul of privacy laws.[77] If a plaintiff fails to complete the fact sheet by a date certain, or if her submission is deficient, as above, her suit may be dismissed with prejudice.[78]

An astute reader will see, then, that Lone Pine orders and plaintiff fact sheets share the same basic purpose: They both seek to standardize and expedite individual plaintiff-side discovery in aggregate actions. Both seek to identify and purge those plaintiffs with non-colorable claims. And, to the extent some claims remain following the Lone Pine/fact sheet process, both seek to streamline and rationalize that litigation.

But, Lone Pine orders also differ from fact sheets in four crucial respects. First, Lone Pine orders inquire as to specific causation; they demand evidence that product or contaminant *x* actually caused injury or ailment *y*. Plaintiff fact sheets don't. Second, Lone Pine orders demand that plaintiffs supply information from qualified experts (sometimes, even, from experts whose testimony would pass muster under *Daubert* and Rule of

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[75] DUKE LAW SCHOOL, *supra* note __, at 14 ("Fact sheets are court-approved, standardized forms that seek basic information about plaintiffs' claims . . . ."); FEDERAL JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 22.83 (4th ed. 2004) (describing plaintiff fact sheets as "questionnaires directed to individual plaintiffs" that are served "[i]n lieu of interrogatories"). Just as there are plaintiff fact sheets, there are defendant fact sheets, which compel the defendant to provide basic information that it has in its possession regarding the claimant or her claim. BOLCH JUDICIAL INST., DUKE LAW SCHOOL, CALL FOR PUBLIC COMMENT: UPDATED STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS 4 (Mar. 12, 2018) (discussing defendant fact sheets in some detail).

[76] *See* DUKE LAW SCHOOL, *supra* note __, at 14 (advocating the use of "fact sheets," defined as "court-approved, standardized forms that seek basic information about plaintiffs' claims" such as "*when* and *why* the plaintiff used the product at issue and *what* injury did the plaintiff sustain as a result of using the product").

[77] Schulman & Birnbaum, *supra* note __, at 6.

[78] *See, e.g., In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217, 1224 (9th Cir. 2006).

Evidence 702).[79] Plaintiff fact sheets, by contrast, demand information from the plaintiff—and only demand information that is already in the plaintiff's possession or that she can usually assemble with reasonable effort.[80] Third, owing to their heavy reliance on notoriously pricey medical experts, Lone Pine orders are expensive; to enter a Lone Pine order is to impose a costly burden on plaintiffs. Fact sheets, by contrast, "offer plaintiffs' counsel an easy and inexpensive opportunity to satisfy initial discovery obligations."[81] A final key difference, which lurks below the surface, is that plaintiff fact sheets are relatively uncontroversial,[82] whereas particularly within the plaintiffs' bar, Lone Pine orders' reception has been decidedly mixed.

II. MASS TORTS AND THE PERSISTENT PROBLEM OF NONMERITORIOUS CLAIMS

The most frequently cited justification for Lone Pine orders is that the orders help courts "to identify and cull potentially meritless claims."[83] Or, as one defense lawyer has more colorfully put it, the orders "represent salvation from the huddled masses of meritless plaintiffs' claims lying in wait for eventual settlement

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[79] For discussion, see *infra* note __.

[80] CHARLES S. ZIMMERMAN, 1 PHARMACEUTICAL & MEDICAL DEVICE LITIGation § 13:3 (Oct. 2017 update) (explaining that plaintiff fact sheets demand "standardized information that plaintiffs' counsel have or should have readily available").

[81] U.S. CHAMBER, *supra* note __, at 17.

[82] Plaintiff fact sheets have been endorsed by RAND and also by the Bolch Judicial Institute at Duke Law School. *See* STEPHEN J. CARROLL ET AL., THE ABUSE OF MEDICAL DIAGNOSTIC PRACTICES IN MASS LITIGATION: THE CASE OF SILICA xiii, 28 (2009) (suggesting that fact sheets "help ensure adherence to defensible diagnostic practices and allow defendants to more rapidly evaluate and value claims"); BOLCH JUDICIAL INST., *supra* note __, at 2 (specifying, as Best Practice 1C(V): "In large mass-tort MDLs, a court should, on the parties' request, consider issuing a case management order approving plaintiff . . . fact sheets . . . ."). In addition, leading plaintiff-side lawyers have expressed at least tepid support. *See, e.g.,* Ctr. on Civil Justice, *supra* note __, at 26:06–26:23 (statement of Chris Seeger, Seeger Weiss LLP) ("I don't see a major problem with a plaintiff at some point early on in the case coming up with some basic documentation, like a medical record showing you were on the drug or a medical record indicating that you have at least suffered the type of injury that's at issue.").

[83] Baker v. Chevron USA, Inc., 2007 WL 315346, *1 (S.D. Ohio Jan. 30, 2007).

checks."[84] As these quotes indicate, at their core, Lone Pine orders seek to weed out non-colorable claims so those claims do not linger within, and thereby bog down or contaminate, the mass tort or MDL system.[85] As such, in order to understand the Lone Pine mechanism—and, certainly, in order to assess whether and how these orders ought to be targeted going forward (a question addressed Part IV)—one must accompany a study of Lone Pine with an inquiry into what groundless claims look like, why mass torts may attract these claims, and where, precisely, such claims are apt to exist. These are the questions to which we now turn.

A. Mass Torts and Nonmeritorious Claiming

Any discussion of fraudulent, frivolous, or otherwise nonmeritorious claiming must begin with the crucial observation that, despite the persistence and resonance of claims to the contrary, all available evidence suggests that the majority of filed tort lawsuits are genuine and meritorious. The vast majority of federal judges—the individuals arguably in the best position to assess claims' validity—believe that "groundless litigation" is either "no problem" or is a "small" or "very small" problem.[86] And, the limited evidence available generally bears out judges' assessments.[87]

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[84] Rachel B. Weil, *Knee Implant MDL Judge Enters Aggressive Lone Pine Order*, DRUG & DEVICE LAW, June 23, 2016, https://www.druganddevicelawblog.com/2016/06/10720.html.

[85] *See* ADVISORY COMM. ON CIV. RULES, MDL SUBCOMM. REP. 149 (Apr. 10, 2018) (observing that courts issue *Lone Pine* orders in response to an "abiding concern" that many MDL claimants "don't really have claims").

[86] According to a 2005 Federal Judicial Center study, 85 percent of U.S. district court judges believe that "groundless litigation" is either "no problem" or is a "small" or "very small" problem. Only 3 percent of judges believe that it is a "large" or "very large" problem. DAVID RAUMA & THOMAS E. WILLGING, FED. JUDICIAL CTR., REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCE AND VIEWS CONCERNING RULE 11, at 4 tbl. 1 (2005).

[87] In the medical malpractice context, for example, the best evidence suggests that the majority of filed claims involve both a bona fide error and a verifiable injury. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2024 (2006); *accord* HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 75 (1991) ("[T]here is no evidence to support contentions that large number[s] of [frivolous] cases actually lead to litigation.").

That said, the tort system consists of multiple "worlds."[88] And, within the broader whole, there are two areas where some non-trivial number of claimants are seeking compensation without a valid entitlement to relief: car wreck cases, and particularly those cases where the plaintiff complains of soft-tissue injuries (such as sprains, strains, contusions, and whiplash), and also mass tort cases, the subject of our current inquiry.[89]

Generally in mass tort cases, some injury victims will have suffered a bona fide impairment at the hands of at-fault defendant. But, sensing a payday, *other individuals* (no one knows how many) are also apt to be sucked in, typically claiming they have sustained an injury that is, in fact, either nonexistent, grossly exaggerated, or unrelated to the instant defendant's conduct.[90] The problem is well known and broadly acknowledged.[91] But it goes by different names. Some call it the "Field of Dreams" problem, i.e., "if you

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[88] Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 307–08 (2018).

[89] For more on the auto accident context, see Engstrom, *Retaliatory RICO*, *supra* note __, at 641, 660–61.

[90] No one knows what percentage of mass tort claims are groundless. *See id*. at 655. Adding to the uncertainty, the incidence of such claiming undoubtedly varies from case to case, based in part on the factors discussed below, including whether injuries are discernable, whether specific causation is contestable, and whether the action features hundreds, thousands, or tens of thousands of claims. *See infra* note __ and accompanying text.

[91] *See* 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."); Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399, 413 (2014) ("[M]ultidistrict litigation coaxes claimants out of the woodwork regardless of their claim's strength . . . ."); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 939, 961 (1995) ("[M]ass tort actions attract, and mass tort settlements encourage and pay, a large number of claims that are insubstantial—or, in the words of one experienced plaintiffs' lawyer, 'junk.'") (quoting plaintiffs' lawyer Paul D. Rheingold); Douglas G. Smith, *The Myth of Settlement in MDL Proceedings*, at 5 (noting the "recognized fact that many claims in MDL proceedings lack merit"); *In re* Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016) ("[B]ased on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise.").

build it, 'they' will come."[92] Others refer to the dynamic in terms of "elasticity."[93] And Judge Jack Weinstein dubs it the "vacuum cleaner" effect.[94] Whatever you call it, though, it helps to zero in on the particular conduct underlying the claims' initiation. Zeroing in, it appears that those initiating non-colorable claims most often use one of three distinct onramps into the aggregate action. These include: (1) misdiagnosis, (2) defendant manipulation, and (3) double dipping.

The first onramp, *misdiagnosis*, refers to a medical diagnosis of the claimant's injury that is fabricated or otherwise distorted.[95] Misdiagnosis has plagued numerous headline-grabbing mass torts. For example, in the *Silica* MDL (discussed in more detail below), transferee Judge Janis Graham Jack concluded that the diagnoses underlying the claims of roughly 10,000 plaintiffs were unreliable and, in fact, merely "manufactured for money."[96] The fen-phen litigation was similarly affected. There, the lead lawyer for the fen-phen class alleged that a stunning 70 percent of class claimants had diagnoses for severe heart-valve damage that were "medically unfounded and unjustified because the claimant doesn't have the condition."[97] And, misdiagnosis also played a

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[92] ADVISORY COMM. ON CIV. RULES, MDL SUBCOMM. REP. 149 (Apr. 10, 2018); Mark Herrmann, *To MDL or Not to MDL? A Defense Perspective*, LITIGATION (Summer 1998), at 43, 45 ("In an MDL, as in the Field of Dreams: 'If you build it, they will come.'").

[93] ADVISORY COMM. REP., *supra* note __, at 298–99 ("The Working Group finds that some mass torts have an 'elastic' characteristic by which the very identification of a potential mass tort or the subsequent processes of aggregation generate claims that otherwise might not have been filed.").

[94] Weinstein, *supra* note __, at 494–95. In past work, I have referred to a variant of the problem in terms of "oversubscription." Engstrom, *Retaliatory RICO*, *supra* note __, at 655–60. When speaking of "oversubscription," however, I referred only to "fraudulent" claiming, and I defined a fraudulent claim narrowly, as a claim where "the plaintiff or his or her lawyer has actual or constructive knowledge that some material element of the claim is not as it is portrayed." *Id.* at 649. Here, by contrast, I refer to all kinds of groundless litigation, regardless of whether the claim is fraudulently initiated.

[95] ADVISORY COMM. REP., *supra* note __, at 160 (observing that a "key problem" that many commentators had raised regarding MDLs "is the proliferation of claims by those who . . . have not suffered injury").

[96] *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 635–36 (S.D. Tex. 2005).

[97] Robert Lenzner & Michael Maiello, *The $22 Billion Gold Rush*, FORBES (Mar. 24, 2006, 8:20 PM), http://www.forbes.com/forbes/2006/0410/086.html (quoting Michael Fishbein). Supporting Fishbein's conclusion, a Duke University cardiologist called in to review claimants' echocardiograms chillingly concluded: "Thousands of people have been defrauded into believing

significant role in asbestos litigation, particularly among those seeking compensation for asbestosis, a lung disease that is notoriously difficult to identify.[98]

The second onramp is *defendant manipulation*. It refers to the initiation of claims against a defendant who is not liable—and, in fact, may have manufactured a product that the plaintiff never used or spread a contaminant that the plaintiff never touched—when either the tortfeasor that actually caused or contributed to the plaintiff's injury is unavailable or unattractive or, alternatively, the injury arose "naturally," so no culpable tortfeasor does or could exist.[99] Examples are again plentiful. Thus, in *Vioxx*, plaintiffs' lead lawyer recently explained that, of the roughly 48,000 claimants in the MDL, "there were a couple thousand claims of people that didn't take Vioxx, they couldn't produce a medical record that they even took the drug."[100] In the recent BP Deepwater Horizon litigation, some lawyers capitalized on the settlement's objective but flexible definition of a compensable claim to advertise to local businesses that they could "be

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that they have valvular heart disease when in fact they do not." *Id.* (quoting Dr. Joseph Kisslo).

[98] For more on asbestosis-related diagnostic difficulties, see *infra* note __ and accompanying text. For how certain litigants, lawyers, and physicians leveraged those difficulties to seek unjustified payment, see, for example, Raymark Indus., Inc. v. Stemple, No. 88-1014-K, 1990 WL 72588, at *1–2, *11 (D. Kan. May 30, 1990) (concluding that the diagnostic procedures that supported some 6000 tire workers' claims amounted to a "professional farce!"); Engstrom, *Retaliatory RICO*, *supra* note __, at 671–74 (discussing dubious diagnostic procedures that undergirded certain asbestos claims filed by the Pennsylvania law firm Robert Peirce & Associates); R. B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. OCCUPATIONAL MED. 1088, 1088–89 (1990) (reviewing 439 filed asbestos claims and finding that, at most, 3.6 percent of claimants actually had conditions consistent with asbestos exposure).

[99] *See* ADVISORY COMM. REP., *supra* note __, at 160 (observing that a "key problem" that many commentators had raised regarding MDLs "is the proliferation of claims by those who really don't have claims because they haven't used the product").

[100] Ctr. on Civil Justice at NYU Sch. of Law, MDL @ 50 – The 50th Anniversary of Multidistrict Litigation, Panel 1: Theory of Aggregation: Class Actions, MDLs, Bankruptcies, and More at 27:41–27:57 (Oct. 12, 2018), (statement of Chris Seeger, Seeger Weiss LLP), *available at* http://www.law.nyu.edu/centers/civiljustice/2018-early-fall-conference-mdl-at-50.

compensated for losses that are unrelated to the spill."[101] Or, in the course of asbestos litigation, legal observers got a behind-the-scenes glimpse into *how* defendant manipulation sometimes takes place: In the midst of litigation, a document came to light that revealed some claimants were being coached to "remember" coming into contact with the products of only certain (and solvent) asbestos manufacturers.[102]

The third onramp, *double dipping*, refers to the initiation of inconsistent claims against multiple tortfeasors. An example, once again, can be seen in *Silica*, where some plaintiffs (some 6,000, in fact) sought funds from both silica and asbestos manufacturers and therefore claimed (in separate filings) that they were suffering from silicosis or, alternatively, asbestosis, despite the fact that the two diseases have different sources of exposure, on x-rays look "vastly different," and are very rarely found in the same individual.[103] Another example came to the fore in a 2014 bankruptcy opinion concerning Garlock, a producer of asbestos-containing gaskets. In a withering opinion, Bankruptcy Judge George Hodges noted that, though "Garlock was a relatively small player in the asbestos tort system," the company had been named as a defendant in a whopping 20,000 mesothelioma cases.[104] Why? The court attributed Garlock's outsized liability to the fact that "the last ten years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers," who aimed their fire at the then-solvent Garlock rather than the actually culpable (but bankrupt) tortfeasors.[105]

B. Five Conditions Conducive to Groundless Claiming

The above presents a puzzle: Why is it that, in general, groundless tort suits are rare, whereas two areas—soft tissue auto claims and mass tort claims—stand as exceptions to that rule? To

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[101] Philip Sherwell, *Louisiana Makes a Dash for BP's Cash*, DAILY TELEGRAPH (London), Aug. 3, 2013, at 20 (quoting a solicitation letter by lawyer Kevin McLean).

[102] Engstrom, *Retaliatory RICO*, *supra* note __, at 657–58. *Id*.

[103] *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 595, 603, 628–29 (S.D. Tex. 2005).

[104] *In re* Garlock Sealing Techs., LLC., 504 B.R. 71, 82 (Bankr. W.D.N.C. 2014).

[105] *Id*.

untangle the puzzle, it helps to consider what characteristics soft tissue injury and (many) mass tort claims have in common. That inquiry, I suggest, yields the following powerful insight: Groundless claiming is most apt to proliferate when: (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. This insight is both important in its own right and also, I suggest, ought to inform Lone Pine orders' (and other disciplinary devices') deployment going forward.

First, both the soft-tissue auto cases and the heart and lung claims that have vexed the mass tort world present similar (and similarly challenging) questions of injury verification. In the former, soft-tissue injuries do not show up on x-rays, impeding verification efforts. Indeed, as insurance executives lamented more than a half-century ago: "No one can say that some 'whiplash' claims are not genuine. This is the sad part of our plight for there appears to be no absolutely sure way of separating the fake from the real."[106] In the mass tort realm, meanwhile, some damage can at least theoretically be proven, typically with x-rays or echocardiograms.[107] But reliably interpreting these scans has proved difficult, generating frequent disputes as to whether a given impairment does or does not exist. Thus, for example, in *Silica*, experts disagreed as to whether particular "shadows" on x-rays were sufficient to trigger a positive diagnosis.[108] In fen-phen, patients' echocardiograms were frequently "open to divergent interpretations."[109] And, when it comes to asbestosis—a chief ailment associated with asbestos exposure—leading expert Dr. John Parker explained that diagnosis "is in the eye, the retina, and

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[106] E. A. Cowie, *The Economics of "Whiplash," in* THE CONTINUING REVOLT AGAINST "WHIPLASH" 35, 35 (James D. Ghiardi ed., 1964)

[107] There are exceptions. For example, breast implant litigation involved certain impossible-to-verify complaints, exacerbating the above difficulties. *See generally* MARCIA ANGELL, SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE (1996).

[108] *In re* Silica Prods. Liab. Litig., 398 F. Supp. 2d 563, 625, 630–31 (S.D. Tex. 2005) (quoting Dr. John Parker).

[109] Lenzner & Maiello, *supra* note __.

the brain of the person classifying the film who reaches the ultimate decision."[110]

Second and relatedly, in both the soft-tissue and mass tort realms, specific causation is often contestable and unclear. Because soft-tissue injuries are not visible, it is tough to establish not only *whether* an injury was sustained but also *when* it was sustained. In particular, it is nearly impossible to say whether the claimant's asserted injury predated, postdated, or resulted from the accident at issue. Raising the same concern, illnesses in the mass tort realm often have complex and contestable etiologies, a point I return to in Part III.B. below.

A third commonality between the soft-tissue and mass tort contexts is that, in both, defendants (or their insurers) have a reduced incentive or capacity to scrutinize claims. Most of the time, defendants demand particularized evidence to support a plaintiff's claim, minimizing the plaintiff's capacity and incentive to fabricate facts or exaggerate injuries.[111] Once again, however, soft-tissue auto and mass tort claims are different. For their part, soft-tissue claims tend to be small, often resolved for a few thousand dollars. Facing such nuisance-value demands, insurers would be foolish to fund thorough investigations into each claim's validity, and traditionally, most insurers haven't.[112] Meanwhile, the mass tort context tends to feature sizable payouts. But the sheer number of claims may overwhelm a defendant's finite investigative resources and, in so doing, effectively and predictably shield claims from individualized scrutiny.[113] Indeed, a powerful but perverse positive feedback loop may develop, as the bigger an MDL or state court consolidation gets, the less individualized

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[110] Joint Appendix at 1132, CSX Transp., Inc. v. Peirce, No. 13-2235 (4th Cir. filed June 20, 2014) (testimony of Dr. John Parker). For this reason, Dr. Parker noted, there is "disagreement between readers." *Id*.

[111] Engstrom, *Retaliatory RICO, supra* note __, at 663.

[112] Stephen Carroll & Allan Abrahamse, *The Frequency of Excess Auto Personal Injury Claims*, 3 AM. L. & ECON. REV. 228, 234 (2001) ("[B]ecause [soft-tissue injuries] are often not costly . . . claims based on them may not attract close attention or generate demands for verification. Hence, they present an opportunity to pursue a claim for a nonexistent injury."). In recent years, some insurers have become fed up with perceived abuse and have started to scrutinize such claims with more care. *See* Engstrom, *Retaliatory RICO, supra* note __, at 675–76.

[113] CARROLL ET AL., *supra* note __ at 23 (discussing this dynamic); Engstrom, *Retaliatory RICO, supra* note __, at 663 (offering examples).

scrutiny each claim aggregated therein will realistically receive, creating incentives for ever more claims to be filed.

Fourth, both auto and mass tort realms display abnormally high rates of claiming. In most areas of the tort law ecosystem, only a very small fraction of those accidentally injured ever seek third-party compensation.[114] Indeed, one of the most "remarkable features of the tort system"—and, also, one of the most durable findings *about* the tort system—is just how few plaintiffs there are in proportion to the incidence of tortious injury.[115] Yet, auto accident and mass tort claims are again exceptional. The best study of U.S. claim initiation found that, "individuals injured in motor vehicle accidents were . . . . ten times as likely as those injured in other circumstances to actually make some attempt to obtain compensation from someone they regarded as responsible for the accident."[116] The mass tort context appears to be similar.[117] Whether due to eye-catching publicity as initial plaintiffs notch their first victories; aggressive attorney advertising (which may "normalize" the act of claiming or educate the public about the compensatory opportunity); the widespread use of for-profit claim generators who identify and actively recruit "eligible" plaintiffs; the low cost and *de minimis* risk associated with submitting one new claim into an existing aggregative mechanism; claimants' fear that they ought to file now, lest the defendants' resources run dry; and/or lawyers' less stringent screening (discussed below), mass

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[114] Overall, only about 10 percent of Americans seek redress when accidentally injured, and only about 2 percent actually file suit. DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURY IN THE UNITED STATES 122 (1991).

[115] Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1183 (1992); *accord* Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443 (1987).

[116] HENSLER ET AL., *supra* note __, at 121–23.

[117] There is no study of mass tort claimants' propensity to claim, but leading experts share the view that mass tort litigation "appears to stimulate a higher rate of claiming than is associated with ordinary personal injuries." Deborah R. Hensler, *Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1598–99 (1995); *accord* Francis E. McGovern, *Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano*, 80 CORNELL L. REV. 1022, 1024 (1995) (observing that, in the mass tort realm, the "trend" is to "overclaim[] rather than underclaim[]").

tort cases appear to feature exceptionally high rates of claim initiation.[118]

Finally and crucially, both soft-tissue auto and mass tort cases arise in contexts where the typical restraints imposed by the contingency fee are either wholly inoperative or substantially relaxed. Generally, personal injury lawyers are paid via contingency fees. As such, lawyers are paid—and also typically reimbursed for out-of-pocket expenses—if and only if the case is won. This payment structure usually gives lawyers a powerful incentive to rigorously evaluate cases prior to acceptance, and consistent with expectations, evidence shows that in most areas of personal injury practice, plaintiffs' attorneys are choosy. Most plaintiffs' lawyers vet cases carefully and reject the majority (often, the *vast* majority) of would-be claimants who seek their services.[119]

There are, however, two corners of the personal injury marketplace that upend typical screening patterns. The first is the soft-tissue auto accident realm, where research shows that some lawyers are not particularly selective. Cognizant that they are investing little in a claim's development, some lawyers engage in only the most cursory of pre-retention reviews, and, not surprisingly, represent at least some claimants with dubious entitlements to relief.[120]

The mass tort realm also deviates from the typical model. Part of this departure stems from capacity: Careful screening is

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[118] For discussion of these dynamics, see ADVISORY COMM. REP., *supra* note __, at 302–04; THOMAS E. WILLGING, FED. JUDICIAL CTR., MASS TORTS PROBLEMS & PROPOSALS, A REPORT TO THE MASS TORTS WORKING GROUP 20 (1999); McGovern, *Mass Tort for Judges*, *supra* note __, at 1828; *accord In re* Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *1 n.2 (M.D. Ga. Sept. 7, 2016) (suggesting that an "onslaught of lawyer television solicitations" fueled the MDL's "explosion" from 22 cases to 850 cases); Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG.COM, Dec. 13, 2013 (discussing lead generators).

[119] *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 67–95 (2004); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 27 (1997) (reporting that plaintiffs' lawyers pointed to "lack of liability" as the dominant reason for claim rejection).

[120] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. Rev. 805, 834–35 (2011); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1499, 1522–23 (2009).

both time consuming and costly. In the mass tort realm, the sheer volume of claimants, all seeking representation more-or-less simultaneously (often in response to the same stimuli), may overwhelm a PI lawyer's capacity to perform requisite checks. At the same time, as compared to the "typical" PI lawyer, a mass tort lawyer's *incentive* to screen is also much reduced. In a typical suit, that is, the acceptance of a new client poses a degree of risk and entails a non-trivial investment, creating a powerful incentive to represent only those with meritorious claims. By contrast, once the mass tort is in full swing, costs are (basically) fixed, while rewards depend (in large measure) on claim volume—meaning, bluntly, the more the merrier.[121] This general calculation will skew *further* toward client acceptance if the marginal client's claim is added as a "tag-along" after the Judicial Panel on Multidistrict Litigation has already created an MDL. If so, individually-retained counsel will sign the client up and will stand to benefit handsomely if the client's claim is satisfactorily resolved. But, because the Plaintiffs' Steering Committee (PSC) assumes day-to-day responsibility for litigating the case, the individually retained lawyer's obligation—and particularly his obligation to invest his own time and money into the claim's development—is typically *de minimis*.[122] Beyond all that, lawyers may rationally decide it's affirmatively *advantageous* to cast the net broadly, both because defendants reportedly feel more "pressure" to settle when up against a lawyer with a "volume of cases,"[123] and because coveted and remunerative positions on the PSC are sometimes doled out based on the size of

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[121] *See* McGovern, *supra* note __, at 1026 (recognizing that, once a mass tort is underway, it becomes a matter of "the more [clients] the better"); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1031 (1993) ("[A]fter the initial investment in the litigation has been made, plaintiffs' attorney firms have incentives to identify many more claimants so they can spread their costs across this client pool, and maximize their fees."). Some lawyers, of course, will resist these incentives and make a name for themselves by representing fewer clients with particularly high-value claims.

[122] For a discussion of tag-alongs, see Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 BOS. L. REV. 109, 125 (2015). For the responsibilities of individually retained counsel, see Judith Resnik et. al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 319 (1996).

[123] *See* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1732 (2002); *accord* Keith N. Hylton, *Asbestos and Mass Torts with Fraudulent Victims*, 37 SW. U. L. REV. 575, 587 (2008) (explaining that "the addition of a fraudulent claim also enhances the likelihood of settlement").

the lawyer's case inventory.[124] In such an environment, lawyers have little reason to be selective—and, as Judge Jack Weinstein explains, some will choose to "suck up good and bad cases, hoping that they can settle in gross."[125]

C. Consequences

The upshot of all the above is that, more so than in other areas, judges overseeing mass torts are justified in scrutinizing the validity of claims. In fact, the above discussion permits us to identify, with some precision, those particular cases where particular scrutiny may be warranted. That is, special scrutiny may be justified in those mass tort cases where: (1) plaintiffs' injuries are difficult to verify; (2) specific causation is contestable and even exposure to the defendant's product or contaminant is neither evident nor obvious; and (3) claim volumes are exceptionally high.

Taken together, the first two prongs highlight that, when it comes to the potential for spurious claiming, not all mass torts are alike. If a mass tort follows on the heels of an airline crash, building collapse, plant explosion, ferry wreck, or railroad accident, the plaintiffs will generally be identifiable, and, for the most part, they will have suffered visible "bright blood" injuries (often, the easiest to identify and verify: death). The risk of spurious claiming is low, and the need for special processing is close to non-existent.[126] On the other hand, when diagnosis is debatable and specific causation is contestable, courts may be justified in taking a closer look.

The third prong, regarding claim volume, is also crucial. When there are just a few—or a few dozen or even a few hundred—claimants, typical defense- and plaintiffs' lawyer-side screens are apt to be operational and effective. On the other hand, when there are thousands or tens of thousands of claimants, the

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[124] Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 350 (2014) (observing that "highly coveted leadership positions are appointed, in part, based upon the size of counsel's inventory").

[125] Weinstein, *supra* note __, 494–95.

[126] *Accord* Francis McGovern, *An Analysis of Mass Tort for Judges*, 73 TEX. L. REV. 1821, 1826 (1995) (recognizing that mass tort claims involving "discrete disasters" have been handled "without major difficulty"); Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 6–7 (1986) (same).

sheer volume might well overwhelm the defendant's investigatory resources. The numbers may, themselves, indicate that there has been aggressive and undiscerning plaintiff recruitment. And the high claim volumes may blunt the contingency fee lawyer's ability and incentive to vet claims prior to acceptance.

III. LONE PINE ORDERS: A NORMATIVE PERSPECTIVE

Part II dissected the problem of nonmeritorius claiming in the mass tort ecosystem—essentially, it analyzed the problem Lone Pine orders seek to address. Now, Part III dissects the Lone Pine "cure," evaluating first the advantages and then the disadvantages associated with this peculiar case management mechanism.

A. On the Plus Side of the Ledger

To this point, Lone Pine orders have been mostly lauded by commentators.[127] According to these observers, Lone Pine orders have several advantages, though benefits vary some, depending on how and when the orders are utilized. Sometimes, as in *Lore v. Lone Pine* itself, the entry of a Lone Pine order results in the dismissal of all claims and, in so doing, spells a swift and decisive end to an entire litigation. Assuming the court gets it "right," these orders promote judicial economy, preserve defendant and judicial

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[127] *See, e.g.,* Michelle M. Bufano, *The Importance of the Early Disposition of Baseless Claims in New Jersey Products Liability Mass Tort Litigation*, N.J. LAW 46, 48 (2011) (purporting to weigh the "benefits and disadvantages" of Lone Pine orders, finding "the benefits . . . outweigh the risks," and concluding that the orders are "an extremely valuable tool, the use of which should be widely embraced"); Scott A. Steiner, *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, 88 (1999) (same, while declaring that "the advantages of Lone Pine Orders in toxic tort cases far outweigh the disadvantages" and concluding: "In the interests of justice, the imposition of the Lone Pine Order in toxic tort cases is, therefore, imperative."); Franklin P. Brannen, Jr. & James J. Ward, *Efficiency in a Complex World: Lone Pine After a Quarter Century*, 53 DRI FOR DEF. 45 (2011) (concluding that "a Lone Pine order is both good practice and good sense"); Cal R. Burnton, *Narrowing the Field in Mass Torts: The* Lone Pine *Solution*, 19 NO. 3 ANDREWS PROD. LIAB. LITIG. REP. 15, at *7 (Apr. 10, 2008) (concluding a study of Lone Pine with the declaration: "*Lone Pine* orders provide an efficient mechanism to get to the heart of the matter and indeed separate the wheat from the chaff."); U.S. CHAMBER, *supra* note __, at 17–19 (encouraging courts to expand the orders' use "at the outset of litigation"); *accord* JAMES T. O'REILLY, 1 TOXIC TORTS PRACTICE GUIDE § 15.9 (2018) (concluding that the orders "provide a useful method to achieve efficiency and economy for both toxic tort defendants and the judiciary").

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.[128]

On other occasions, at least some plaintiffs will be able to cobble together enough information to satisfy the court, and the litigation will carry on after the order's entry. On these occasions, the Lone Pine process still pays dividends. For one, the process is apt to precipitate the dismissal of at least some claims, which, among other benefits, promotes judicial economy, conserves the defendant's resources, deters frivolous filings, and benefits the remaining plaintiffs, who might otherwise have to share court time, counsel table, and settlement funds with those with dodgy entitlements. Further, because the order precipitates winnowing, the litigation that survives the order's entry is apt to be smaller, less cumbersome, and more manageable than it would have been in the order's absence. Last but not least, plaintiffs' submissions filed in response to the orders generate particularized information, and this information can itself promote and expedite case processing. Using plaintiffs' submissions, for example, the parties and the court can assign plaintiffs into various tracks or "baskets" based on relevant criteria (*e.g.,* diagnosis, diagnosing physician, exposure pathway, etc.); identify potential gaps in plaintiffs' evidence; and finally, tailor additional discovery (and potentially the filing of *Daubert* or Rule 56 motions) to address, or alternatively exploit, those gaps. Further, by giving parties and the court a sharper assessment of the character and quality of relevant claims, Lone Pine orders can promote settlement discussions[129] and aid in the tricky but crucial selection of representative bellwethers.[130]

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[128] To get it "right," the judge's determination must reflect a correct determination of the facts and the law and also reflect a correct application of the law to the facts. To the extent there are false positives or false negatives, any advantage dissipates.

[129] *See* Modern Holdings v. Corning, Inc., Civil No.: 13-405-GFVT, Order (Sept. 28, 2015), at 2 (declaring that Lone Pine orders "promote speedy settlements").

[130] *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2344 (2008) (noting that, in order for a bellwether trial to be useful, it must be representative, and, in order to select a representative bellwether, one must "know what types of cases comprise the MDL").

B. A More Critical Look: Three Problems with the Lone Pine Mechanism

The discussion above paints a fairly rosy portrait. The remainder of Part III identifies three problems, which, collectively, complicate that position.

1. Inconsistent and Incoherent

The first problem with Lone Pine orders is that they are so variable. Commentators talk about "Lone Pine orders," often in laudatory terms. Yet, in fact, there is strikingly little agreement about when these orders should be issued and what, exactly, they ought to say, creating deep questions of predictability, consistency, and horizontal equity. Below, I explore each contested variable.

a. Whether to Issue a Lone Pine Order

The first question that confronts courts is case selection: Which cases are appropriate for entry of a Lone Pine order? Here, there is variability along three dimensions: numerosity, articulable suspicion, and whether Lone Pine orders are generally appropriate, or only warranted in exceptional circumstances.

In terms of numerosity, courts tend to agree that Lone Pine orders are only justified in cases or MDLs featuring many litigants under the theory that "party numerosity presents unique case management challenges."[131] Hewing to that line, courts have generally declined to issue Lone Pine orders in single-plaintiff cases,[132] and Lone Pine orders are seen most frequently in cases that feature hundreds or thousands of plaintiffs.[133] But, there has

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[131] Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2016 WL 4079531, at *5 (E.D. Tenn. July 29, 2016).

[132] *See, e.g.,* Ramirez v. E.I. DuPond De Nemours & Co., 2010 WL 144866, *3 (M.D. Fla. Jan. 8, 2010) (finding defendant's motion for a Lone Pine order in a case with single plaintiff and single defendant "patently unwarranted"). For additional examples, see Kamuck v. Shell Energy Holdings GP, LLC, No. 4:11-CV-1425, 2012 WL 3864954, at *5 (M.D. Pa. Sept. 5, 2012); Smith v. Atrium Med. Corp., Civ. Action No. 14-418, 2014 WL 5364823, at *2 (E.D. La. Oct. 21, 2014). *But see infra* note __.

[133] *E.g.,* Acuna v. Brown & Root Inc., 200 F.3d 335, 337, 340–41 (5th Cir. 2000) (affirming where the trial court issued a Lone Pine order in a case involving 1,600 plaintiffs); *In re* Fosamax Prods. Liab. Litig., 2012 WL 5877418 (S.D.N.Y. Nov. 20, 2012) (entering a Lone Pine order in an MDL involving approximately 1000 cases); Abner v. Hercules, Inc., No. 2:14cv63-

been play in the joints. For example, a federal court in Mississippi recently issued a Lone Pine order despite the fact that there were "only" forty-nine plaintiffs.[134] In 2008, a federal court in New Mexico issued a Lone Pine order in a case involving twenty-eight plaintiffs.[135] In 2013, a New York court issued one in a case with only fifteen plaintiffs.[136] And, in *Miller v. Metrohealth Medical Center*,[137] *Schelske v. Creative Nail Design, Inc.*,[138] and *Asarco LLC v. NL Indus., Inc.*,[139] courts issued Lone Pine orders in cases with two plaintiffs and one plaintiff, respectively.

Next, there is disagreement concerning articulable suspicion and, in particular, whether suspicion concerning plaintiffs' claims is a prerequisite or merely a plus factor. On this score, judges tend to agree that if they are skeptical of plaintiffs' claims—particularly if credible evidence undercuts plaintiffs' key assertions (as there was in *Lore v. Lone Pine* itself, where, recall, certain plaintiffs' contentions were contradicted by an EPA report)—that skepticism militates in favor of an order's entry.[140] Conversely, if there is no reason to be wary, courts seem to agree that that fact ought to militate against an order's issuance.[141] But, courts disagree on the crucial question of whether a Lone Pine

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KS-MTP, 2014 WL 5817542, at *3 (S.D. Miss. Nov. 10, 2014) (finding that case management needs favored entry of a Lone Pine order because the proceeding involved "more than 400 Plaintiffs"); Tatum v. Pactiv Corp., No. 2:06 CV 83 LES, 2007 WL 60931, at *1 (M.D. Ala. Jan. 8, 2007) (entering a Lone Pine order in a case with "approximately 1,425 plaintiffs"); *accord* Feczko et al., *supra* note __, at § 5.04, at 180 (conducting an informal study and finding that the majority of Lone Pine orders involve cases with 100 or more parties).

[134] Ashford v. Hercules, Inc., No. 2:15CV27-KS-MTP, 2015 WL 6118387, at *2 (S.D. Miss. Oct. 16, 2015).

[135] Wilcox v. Homestake Mining Co., 2008 WL 4697013 (D. N.M. 2008).

[136] Baker v. Anschutz, No. 11-CV-6119-CJS, 2013 WL 3282880, at *1, 4 (W.D.N.Y. June 27, 2013).

[137] Case Nos. 1:13 CV 1465, 2014 WL 12589121, at *1 (N.D. Ohio Mar. 31, 2014).

[138] 933 P.2d 799, 802 (Mont. 1997).

[139] No. 4:11-CV-00864-JAR, 2013 WL 943614, at *3 (E.D. Mo. Mar. 11, 2013).

[140] As a district court has observed: "[C]ourts considering Lone Pine orders have considered the defendant's ability to produce evidence demonstrating the plaintiff's claims as dubious." Russell v. Chesapeake Appalachia, LLC, 305 F.R.D. 78, 84 (M.D. Pa. 2015). As discussed in more detail in Part IV.A., some courts consider this question but address it narrowly, assessing only whether there are "external agency decisions impacting the merits of the case." *In re* Digitek Prod. Liab. Litig., 264 F.R.D. 249, 256 (S.D.W. Va. 2010).

[141] *See supra* note __ and *infra* note __.

order should *ever* issue, absent gaps or anomalies in plaintiffs' evidence.[142]

Finally, courts disagree as to whether Lone Pine orders are broadly permissible or, alternatively, permissible only in "exceptional circumstances" when, for example, the defendant is able to demonstrate that traditional filtering mechanisms (such as those provided for by Rules 12(b)(6) and 56) have been exhausted or are otherwise insufficient.[143] Taking the latter tack, numerous courts suggest that Lone Pine orders are "extraordinary procedure[s]"[144] and are, and ought to be, orders of last resort—issued only when "existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of [the] litigation."[145] But, other courts have dispensed with similar analysis. Indeed, some have gone so far as to deem the issuance of a Lone Pine order customary or, as the Third Circuit recently put it, "routine."[146]

b. Timing: Pre or Post-Discovery?

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[142] For the harder-edged position, see, for example, *McManaway v. KBR, Inc*., where the court explained: "A Lone Pine order should issue only . . . after the defendant has made a clear showing of significant evidence calling into question the plaintiffs' ability to bring forward necessary medical causation and other scientific information." 695 F. Supp. 2d 883, 888 (S.D. Ind. 2010).

[143] Trujillo v. Ametek, Inc., No. 3:15-CV-1394-GPC-BGS, 2016 WL 3552029, at *2 (S.D. Cal. June 28, 2016) ("Courts have differed on whether the use of Lone Pine orders should be considered 'routine,' or 'exceptional.'") (internal quotation marks and citations omitted).

[144] Armendariz v. Santa Fe County Bd. of Commn'rs, 17cv339-WJ-LF, 2018 WL 377199, *2 (D. N.M. Jan. 11, 2018) ("extraordinary procedure") (quotation marks omitted); Manning v. Arch Wood Prot., Inc., 40 F. Supp. 3d 861, 868 (E.D. Ky. 2014) (same).

[145] Nolan v. Exxon Mobil Corp., No. CV 13-439-JJB-EWD, 2016 WL 1213231, at *11 (M.D. La. Mar. 23, 2016) (quotation marks omitted); *see, e.g.,* Hostetler v. Johnson Controls, Inc., No. 3:15-CV-226-JD-MGG, 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"); Manning v. Arch Wood Prot., Inc., 40 F. Supp. 3d 861, 868 (E.D. Ky. 2014) (rejecting entry of an order absent a showing "that existing procedural devices provided by the federal rules have either been exhausted or shown to be ineffective").

[146] *In re* Avandia Mktg., Sales Practices & Products Liab. Litig., 687 Fed. Appx. 210, 214 (3d Cir. 2017); *see also supra* notes __.

Just as there is disagreement concerning *whether* a case merits entry of a Lone Pine order, there is disagreement concerning *when* such an order ought to issue. On one end of the continuum, some courts enter Lone Pine orders early in the litigation, before plaintiffs have had any opportunity to conduct discovery.[147] Several courts and commentators, in fact, *define* Lone Pine orders as "pre-discovery" orders.[148] Other courts weigh the posture of a case, and whether discovery has or has not commenced, as one of several factors that bear on an orders' propriety: The further along the litigation is, these courts reason, the more appropriate a Lone Pine order may be.[149] Going a step further, other courts insist that pre-discovery orders are not only disfavored, they are outright impermissible.[150] Finally, at the furthest end of the continuum, some MDL transferee courts reserve the order's entry until the twilight of litigation, when discovery has concluded, the dust has settled, and the ink is dry, or nearly dry, on a global settlement.[151] These "twilight" orders are directed not at everyone, but only at those plaintiffs who "elect not to participate in the voluntary

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[147] Prominent examples include Acuna v. Brown & Root, Inc., 200 F.3d 335, 340–41 (5th Cir. 2000); Modern Holdings, LLC v. Corning Inc., Civ. No. 13-405-GFVT, 2015 WL 6482374, at *1 (E.D. Ky. Oct. 27, 2015); Ashford v. Hercules, Inc., 2:14cv27-KS-MTP, 2015 WL 6118387, at *3–4 (S.D. Miss. Oct. 16, 2015); Asarco LLC v. NL Indus., Inc., No. 4:11-CV-00864-JAR, 2013 WL 943614, at *3 (E.D. Mo. Mar. 11, 2013); Burns v. Universal Crop Protection Alliance, Case No. 4:07CV00535, at *2 (E.D. Ark. Sept. 25, 2007). *Accord* Feczko et al., *supra* note __, § 5.04, at 181 (identifying twenty pre-discovery Lone Pine orders); M. Bernadette Welch, *Propriety and Application of* Lone Pine *Orders Used to Expedite Claims and Increase Judicial Efficiency in Mass Tort Litigation*, 57 A.L.R.6th 383 (2010) ("Many courts dealing with complex mass tort litigation have turned to using Lone Pine case management orders in the prediscovery phase of litigation . . . .").

[148] *See, e.g.,* Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604 n.2 (5th Cir. 2006); *Acuna*, 200 F.3d at 340; *Modern Holdings, LLC*, 2015 WL 6482374, at *1; Jill Gustafson & Eric C. Surette, *Pretrial Practice in Complex Litigation*, 28 FED. PROC., L. ED. § 64:56 (updated, 2018).

[149] *See infra* note and accompanying text __ (discussing the *Digitek* factors); *see also* Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2016 WL 4079531, at *4 (E.D. Tenn. July 29, 2016) ("[G]enerally, Lone Pine orders are disfavored . . . where no meaningful discovery has taken place.").

[150] *See, e.g.,* Roth v. Cabot Oil & Gas Corp., 287 F.R.D. 293, 300 (M.D. Pa. 2012); Simeone v. Girard City Bd. of Educ., 872 N.E. 2d 344, 351 (Ohio Ct. App. 2007).

[151] *See* D. Theodore Rave, *Closure Provisions in MDL Settlements*, 85 FORDHAM L. REV. 2176, 2186 (2017) (defining Lone Pine orders as orders sought "after the settlement is consummated").

settlement program."[152] As such, they act as both a filter (in that they ensure that only those who can actually make out a prima facie case get a return ticket back to the transferor court), and, it should be noted, a none-too-subtle signal to wavering plaintiffs, that they might be wise to accept the settlement terms already on offer.[153]

c. Content: What Should a Lone Pine Order Say?

Last but not least, if a court decides to issue a Lone Pine order, the court must decide how much information to demand. There is again variance. Some so-called Lone Pine orders, which really resemble the plaintiff fact sheets described above, are bare-bones, requiring each plaintiff to divulge information about her diagnosis and when, where, and how she was exposed to the defendant's product—all information that is, or easily can be, in a responsible plaintiff's possession. Thus, for example, in the *Avandia* MDL, the court merely required plaintiffs to provide their names, addresses, and dates of birth; proof of Avandia usage; proof of qualifying injury (identified from a court-provided list[154]); and information concerning the time that elapsed between injury onset and the discontinuation of product use.[155]

Most orders, however, are more demanding. They require plaintiffs to color in the causal arrow: to proffer expert evidence (which, depending on the court, may or may not have to pass muster under *Daubert* and Federal Rule of Evidence 702[156]) to

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[152] *In re* Pradaxa (Dabigatran Etexilate) Prod. Liab. Litig., No. 312CV60081DRHSCW, 2015 WL 5307473, at *1 (S.D. Ill. Sept. 10, 2015); *see also, e.g., In re* Fresenius Prods. Liab. Litig., MDL No. 2428, Case Mgmt. Order No. 17 (D. Mass. Jan. 26, 2017).

[153] *See* Brian Amaral, *Judge Wants More Info From Fresenius Dialysis Patients*, LAW360, Dec. 14, 2016 (quoting defense counsel as stating that Judge Woodlock issued a Lone Pine order at the twilight of the *Fresenius* litigation, in part, in order to "encourage some plaintiffs to settle").

[154] The list contained "a list of injuries alleged by plaintiffs to be related to Avandia use." *In re* Avandia Mktg., Sales Practices & Prod. Liab. Litig., No. 2007-MD-1871, 2010 WL 4720335, at Ex. A (E.D. Pa. Nov. 15, 2010).

[155] *Id.* at *1. The court demanded evidence of specific causation only if the plaintiff suffered a qualifying injury after "more than one year after cessation of Avandia usage." *Id.*

[156] Some courts have held that plaintiffs' submissions need not be "sufficient to survive a *Daubert* challenge." *In re* Vioxx Prod. 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. 2:14-CV-63-KS-MTP, 2017 WL 4236584, at *9

support a clear connection between the plaintiff's injury and the defendant's allegedly tortious conduct.[157] Taking this tack, for example, a 1997 Lone Pine order from a state court in Oklahoma required each plaintiff to supply 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 tha[n] exposure to [the toxin at issue].[158] In the *Fosamax* MDL (where the "twilight" order was issued late in the litigation), the transferee court required non-settling plaintiffs to present "a case-specific expert discovery report from a qualified medical expert attesting that the injury Plaintiff suffered was caused by Fosamax."[159] Or, in a 1991 case out of Montana, the court issued an order requiring plaintiffs to submit expert affidavits identifying "the precise injuries, illnesses, or conditions suffered . . . ; 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."[160]

2. Out of Step with the Formal Procedural Scheme

A second concern is that Lone Pine orders are not just innovative; they don't just operate in the *interstices* of existing rules. They are, in fact, *in tension* with certain crucial procedural requirements. In particular, as I discuss below, they represent an end-run around Rules 56 and 12 and a clear extension of Rule 11.

a. At Odds with Rules 12(b)(6) and 56

(S.D. Miss. Sept. 25, 2017). Other courts, by contrast, have dismissed plaintiffs' claims because their Lone Pine submissions are "wanting under Federal Rule of Evidence 702 and *Daubert*." *See, e.g.,* Avila v. Willits Envtl. Remediation Tr., 633 F.3d 828, 833–34, 836–40 (9th Cir. 2011).

[157] Steven Boranian, *Lone Pine Order Reversed: Rocky Mountain Low*, DRUG & DEVICE LAW May 1, 2015, https://www.druganddevicelawblog.com/tag/lone-pine-order/ ("They come in various forms, but Lone Pine orders most often require that the plaintiff submit . . . a certification from a medical expert stating that the use or exposure caused the plaintiff's injury.").

[158] Ruskin, *supra* note __, at 609 (quoting Wilson v. Public Serv. Co. of Okla., No. CJ-96-564 (Tulsa Cty. Dist. Ct. 1997)).

[159] *In re* Fosamax Prod. Liab. Litig., No. 06 MD 1789 JFK, 2012 WL 5877418, at *1 (S.D.N.Y. Nov. 20, 2012).

[160] Eggar v. Burlington N. R.R. Co., 1991 WL 315487, at *4–5 (D. Mont. Dec. 18, 1991) (emphasis in original).

Lone Pine orders extinguish claims while depriving plaintiffs of the procedural and substantive protections embedded within Rule 12(b)(6) and Rule 56. Numerous courts have recognized this oddity, and the temptation it may supply. Thus, for example, the Eleventh Circuit recently cautioned that Lone Pine orders "should not be used as (or become) the platforms for pseudo-summary judgment motions."[161] Colorado's intermediate court recently declined defendants' invitation to supplant the procedures set forth in Rules 56 and 12(b) with "ad hoc procedures not otherwise provided for under Colorado law."[162] And, in unusually blunt language, a dissenting appellate court judge in California has chided his colleagues for affirming the dismissal of plaintiffs' case for failure to comply with a Lone Pine order, dubbing the termination "a bastardized process which had the purpose and effect of summary judgment but avoided the very procedures and protections the Legislature deemed essential."[163]

Fair enough. But in fact, a procedural innovation that permits courts to extinguish well-pleaded complaints for insufficient evidence, while side-stepping Rule 56, is perhaps even more troubling than the above commentary suggests. Three concerns merit attention.

First, as compared to Rule 56, Lone Pine orders shuffle evidentiary burdens. It is black-letter law that when a party moves for summary judgment, that party must show that there is no genuine dispute as to any material fact" and that she "is entitled to judgment as a matter of law," recognizing that the court will view all facts and resolve all doubt in favor of the non-moving party.[164] Rule 56, in other words, makes continued litigation—the slow march to trial—the default. If a party seeks to halt her opponent's slow march, Rule 56 establishes that *that* party bears the burden of

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[161] Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1168 (11th Cir. 2014).

[162] Strudley v. Antero Resources Corp., 350 P.3d 874, 883 (Colo. App. 2013). Affirming, the Colorado Supreme Court reiterated this concern: "[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." Antero Res. Corp. v. Strudley, 347 P.3d 149, 159 (Colo. 2015).

[163] Cottle v. Superior Court, 3 Cal. App. 4th 1367, 1398 (1992), *modified* (Mar. 20, 1992) (Johnson, J., dissenting).

[164] FED. R. CIV. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.")

doing so. Lone Pine orders are different. Unlike Rule 56, they impose *on plaintiffs* an affirmative and unilateral obligation to come forward with satisfactory prima facie evidence not to halt litigation—but merely to continue it. And, the orders, simultaneously, relieve defendants of any obligation to come forward with evidence to demonstrate that the plaintiffs' claim lacks evidentiary support. In so doing, in a sharp departure from Rule 56, Lone Pine orders place the "onus of proving the viability of the claim . . . on the party seeking to litigate the claim at trial."[165]

It is also black-letter law that a court cannot grant a party's motion for summary judgment without giving the opposing party a reasonable opportunity to complete discovery.[166] As utilized by some courts, however, Lone Pine orders demand showings similar to what would be demanded via summary judgment. But, plaintiffs' discovery rights are infringed or nullified.[167]

Third, and perhaps of gravest concern, using Lone Pine, a trial judge can terminate a case, while insulating herself from meaningful appellate review. Typically, of course, a trial judge who extinguishes a claim prior to trial (whether pursuant to Rule 12(b) or Rule 56) has her determination reviewed de novo.[168] The appellate court reviews the matter from scratch and gives no

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[165] *Cottle*, 3 Cal. App. 4th at 1398 (Johnson, J., dissenting); *Strudley*, 350 P.3d at 883 ("If we were to allow Lone Pine orders, and the subsequent dismissal of cases under those orders . . . we would eliminate the protective requirement under C.R.C.P. 56 that the moving party carry the initial burden to prove that a claim lacks evidentiary support.").

[166] *See, e.g.,* Jones v. City of Columbus, Ga., 120 F.3d 248, 253 (11th Cir. 1997) ("The law in this circuit is clear: the party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion.").

[167] *See supra* note __ and accompanying text (noting that at last twenty courts have issued Lone Pine orders prior to discovery). Other courts have denied defendants' motions for Lone Pine orders, while citing this concern. *See, e.g.,* Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2016 WL 4079531, at *6 (E.D. Tenn. July 29, 2016) (denying defendant's motion because "issuing a Lone Pine order at this juncture would" require plaintiffs "to set forth the same level of proof that a motion for summary judgment would require but without the benefit of first conducting discovery"); Morgan v. Ford Motor Co., No. 06-1080JAP, 2007 WL 1456154, at *8 (D. N.J. May 17, 2007) (same).

[168] *See, e.g.,* Ellis v. England, 432 F.3d 1321, 1325 (11th Cir. 2005); Edwards v. Marin Park, Inc., 356 F.3d 1058, 1061 (9th Cir. 2004).

deference to the lower court.[169] By contrast, when a trial judge terminates a claim using the Lone Pine mechanism, that determination is typically made under Rule 16(f)(1)(C), which authorizes a trial court to issue "any just order[] . . . if a party or its attorney fails to obey a . . . pretrial order."[170] As such, the trial court's decision is not reviewed de novo; instead, it is reviewed for abuse of discretion, the most deferential standard of review, second only to no review at all.[171]

b. Beyond Rule 11

Pre-discovery Lone Pine orders also impose a weightier burden than that imposed by Federal Rule of Civil Procedure 11. Rule 11, of course, is a disciplinary device; it authorizes the imposition of sanctions in order to promote pre-filing investigation and "deter baseless filings in district court."[172] It tries to get "litigants to 'stop-and-think' before initially making legal or factual contentions."[173] Crucially though, in mandating this reflection, Rule 11 stops short of requiring counsel to certify that a given allegation *has* evidentiary support. To the contrary, Rule 11(b)(3) merely requires the attorney to certify, "if specifically so identified," that the allegation "will *likely have* evidentiary support after a reasonable opportunity for further investigation or

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[169] 36 C.J.S. FEDERAL COURTS § 640 (2018 update).

[170] *E.g., In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, No. MDL 2179, 2016 WL 614690, at *7 (E.D. La. Feb. 16, 2016). Sometimes, courts fashion the dismissals as coming under Rule 37 or 41(b), but, for our purposes, the effect (appellate review for abuse of discretion, rather than de novo) remains the same.

[171] *See In re* Vioxx Prod. 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."); Welch, *supra* note __, at § 2 ("Review of a *Lone Pine* order is subject to an abuse of discretion standard, and courts, in large part, have been found to have wide discretion in their use of Lone Pine orders."); *see, e.g.,* Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000) (reviewing pursuant to the abuse of discretion standard); Atwood v. Warner Elec. Brake & Clutch Co., 605 N.E.2d 1032, 1037 (Ill. App. Ct. 1992) (same). For the fact that "[a]buse of discretion is the most deferential standard of review available with the exception of no review at all," see *In re* S.D. Microsoft Antitrust Litig., 657 N.W.2d 668, 678 (S.D. 2003).

[172] Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990).

[173] FED. R. CIV. P. 11, advisory committee notes to the 1993 Amendments.

discovery."[174] According to the Advisory Committee, this latitude is necessary because "sometimes a litigant may . . . need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation."[175]

It bears emphasis: Rule 11 does not compel the plaintiff to have prima facie proof of causation prior to—or contemporaneously with—the initiation of suit.[176] Nevertheless, in *Acuna v. Brown & Root*, the Fifth Circuit declared that Lone Pine orders "essentially require[] that information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)."[177] Not surprisingly, others have seized on that assertion and run with it.[178] But *Acuna* is wrong. The court both undersells the demands of many Lone Pine orders and oversells the demands of Rule 11. And, indeed, the gap between what many Lone Pine orders demand and the "flexibility" Rule 11 explicitly affords ought to give courts pause.[179]

3. Specific Causation Is Not Susceptible to Easy Resolution

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[174] FED. R. CIV. P. 11(b)(3) (emphasis added). Even if the assertion is not identified as needing further evidentiary support, "[a] fact assertion does not violate Rule 11(b)(3) if there was at least some support for it at the time the assertion was made, even if the support was weak or inferential." STEVEN S. GENSLER, 1 FEDERAL RULES OF CIVIL PROCEDURE, RULES AND COMMENTARY, RULE 11 (2018 updated).

[175] FED. R. CIV. P. 11, advisory committee notes to the 1993 Amendments; *accord* Rotella v. Wood, 528 U.S. 549, 560 (2000) (recognizing that Rule 11(b)(3) offers litigants "flexibility" by "allowing pleadings based on evidence reasonably anticipated after further investigation or discovery").

[176] Of course, if evidentiary support is not obtained after a reasonable opportunity to conduct discovery, the party may not persist with the unsupported allegation. *See* FED. R. CIV. P. 11, advisory committee notes to the 1993 Amendments.

[177] Acuna v. Brown & Root Inc., 200 F.3d 335, 340 (5th Cir. 2000).

[178] *See, e.g.,* McMunn v. Babcock & Wilcox Power Generation Grp., Inc., 896 F. Supp. 2d 347, 351 (W.D. Pa. 2012) (citing *Acuna* while issuing a pre-discovery Lone Pine order on the theory that the order "essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed. R. Civ. P. 11(b)(3)"); Schulman & Birnbaum, *supra* note __, at 9 (citing *Acuna* while stating that the "burden on plaintiffs" in responding to Lone Pine orders is "*de minimis* because the evidence necessary to satisfy Lone Pine orders should have already been collected *prior* to the filing of the complaint").

[179] *Rotella*, 528 U.S. at 560 (recognizing that Rule 11(b)(3) permits litigants to file "pleadings based on evidence reasonably anticipated after . . . discovery").

A third and final problem with Lone Pine orders is that, as noted above, many courts use the orders to probe contested questions of specific causation. Like the order imposed in the *Love Canal* litigation, courts require plaintiffs to supply "Reports or affidavits of a physician or other qualified expert demonstrating that each injury . . . was, in fact, caused by the plaintiff's exposure to chemicals at or from the old Love Canal landfill."[180] In so doing, Lone Pine orders demand of plaintiffs an unrealistic level of certainty.

Specific causation is the bugaboo of mass torts.[181] The problem is that, in order to prevail under the formal law, a plaintiff must show that the defendant caused her harm by the preponderance of the evidence.[182] But, except on those rare occasions when exposure to a toxic agent manifests as a "signature disease"—as DES exposure while in utero (sometimes) manifested as vaginal adenocarcinoma, asbestos exposure (sometimes) manifested as asbestosis, fen-phen use (sometime) manifested as Primary Pulmonary Hypertension, and exposure to Agent Orange (sometimes) manifested in chloracne—we, as a society, lack the ability to trace a particular substance to a particular individual's illness or injury.[183] We are reasonably good at assessing general causation, (i.e., that defendant's toxic agent has the capacity to cause a particular disease), though assembling relevant evidence often requires significant effort, ample time, and considerable

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[180] Muehlberger & Hoekel, *supra* note __, at 371–72.

[181] *See* PETER SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 185 (1987) (referring to specific causation as "the most troublesome, least tractable feature of mass toxic tort cases").

[182] Once a plaintiff overcomes that threshold, she is entitled to a full recovery, even if she barely clears it, and the jury is only 50.01% convinced that defendant's toxic agent caused the harm at issue. SCHUCK, *supra* note __, at 185.

[183] For more on signature diseases, see Michael D. Green, *Causation in Pharmaceutical Cases*, SL038 ALI-ABA 139, 166 (Aug. 18–19 2005). The repeated caveats reflect the fact that, even when a toxic agent causes a signature disease, it often also causes non-signature diseases. Thus, for example, asbestos manifests as asbestosis (signature) as well as lung cancer (non-signature), and DES manifests as vaginal adenocarcinoma (signature) as well as a host of other ailments "many of them . . . quite common in the general population." Nat'l Inst. of Health, News Release, *Women Exposed to DES in the Womb Face Increased Cancer Risk*, Oct. 5, 2011, https://www.nih.gov/news-events/news-releases/women-exposed-des-womb-face-increased-cancer-risk.

expense.[184] But, except for signature diseases, specific causation remains stubbornly speculative—and that's true regardless of whether the matter is assessed in a generalized or specialized tribunal, even when exposure and injury are not at issue, and even when the plaintiff's case is otherwise strong.[185]

The obstacles are seemingly insoluble: Toxics don't leave tell-tale scars, and because they operate at a microscopic or submicroscopic level, there is no eye witness to relevant "events."[186] Compounding the difficulty, epidemiological statistics, which constitute the gold standard of available evidence, can, if the stars align, offer evidence about the "excess risk" created by the toxic agent as against the "background risk" that confronts the population as a whole, which, again if the stars align, may support a statistical inference that the toxic agent was or was not more-likely-than-not responsible for the plaintiff's condition.[187] But at least currently, epidemiology simply cannot go further or say more.[188]

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[184] *See* ADVISORY COMM. REP., *supra* note __, at 311 ("When large populations have experienced the exposure, it is possible, at considerable expense and usually after a lengthy period of time, to develop reliable epidemiological evidence to support or refute the causal claim.").

[185] For how these problems persist, even in specialized tribunals, see Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. PA. L. REV. 1631, 1699–1700 (2015).

[186] Cottle v. Superior Court, 3 Cal. App. 4th 1367, 1399–1401 (1992) (Johnson, J., dissenting).

[187] Michael D. Green et al., *Reference Guide on Epidemiology*, in ANNOTATED REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 335, 384–85 (2d ed. Michael J. Jaks, et al. eds.) (explaining that some courts use "relative risk" and, in particular, a "relative risk greater than 2.0" to support an inference "that an individual plaintiff's disease was more likely than not caused by the implicated agent"). A theoretically better way to assess causation would be to carry out randomized controlled trials and assign certain individuals to be exposed to toxic substances while others stay clear, but it should go without saying that ethical issues prevent such experimentation.

[188] The Advisory Committee on Civil Rules concluded as much in its ambitious 1999 study: "Legal rules demand a level of certainty that science cannot deliver immediately and often cannot deliver at all." ADVISORY COMM. REP., *supra* note __, at 311; *accord* WILLGING, *supra* note __, at 10–11 ("Even when science provides a clear answer that a product has the capacity to cause particular types of injuries, those scientific findings do not determine whether a plaintiff's exposure to a product was the proximate cause of this plaintiff's injuries."); Green, *supra* note __, at 384–85 (acknowledging that "specific causation, is beyond the domain of the science of epidemiology").

An example of how these dynamics play out in practice is the *Vioxx* litigation, which made headlines in the early 2000s. General causation was quickly established. It was basically uncontested that Vioxx—a prescription-grade pain reliever marketed by Merck and prescribed to some 20 million Americans—significantly increased one's odds of suffering a heart attack or stroke.[189] Based on authoritative studies, experts calculated that, in the United States, tens of thousands of individuals who took Vioxx (maybe as many as 139,000), suffered cardiac events that they would not have suffered absent Vioxx exposure.[190] But who? When considering the enormous universe of Vioxx users and, within it, the sizable cohort of users who suffered a time-consistent cardiac event, no one—not Merck's experts, not plaintiffs' experts, and not independent experts—could reliably distinguish between those for whom Vioxx was a but-for cause (i.e., those who died or had a stroke or heart attack because of their Vioxx use) and those who would have suffered that same fate, absent Vioxx exposure.[191]

In cases like *Vioxx*, offering truly satisfying evidence of specific causation is virtually impossible. So, what to do? Many options are, of course, available, and they have been thoroughly vetted and much discussed.[192] But the reality—though it is

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[189] Eric J. Topol, *Failing the Public Health—Rofecoxib, Merck, and the EPA*, 351 NEW ENGL. J. OF MED. 1707, 1707 (2004) (reporting that Vioxx caused "an excess of 16 myocardial infarctions [heart attacks] or strokes per 1000 patients").

[190] *FDA, Merck, and Vioxx: Putting Patient Safety First?, Hearing Before the S. Comm. on Finance*, 108th Cong. 14, 26, 125 (2004) (testimony of David J. Graham, Associate Director for Science, FDA) (estimating that Vioxx caused between 88,000 and 139,000 excess cardiac events in the United States).

[191] *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, SUP. CT. REV. 183, 216 (2008).

[192] Some suggest that, given these challenges, we ought to employ aggregative tools to achieve collective purposes. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). Others favor retention of the current private law frame but contend that our approach to causation ought to be explicitly probabilistic. Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779 (1985). Others favor discarding tort law entirely, in favor of a "national administrative scheme." Weinstein, *supra* note __, at 566; Troyen A. Brennan, *Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation*, 73 CORNELL L. REV. 469 (1988). Still others caution (rightly, in my view) that such a scheme would be no panacea. Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

infrequently acknowledged—is that, when confronted with *Vioxx*-like situations, what courts and litigants *have done* is to gather as much information as possible and then, if the litigation has legs, fashion rough and sensible compromises.[193] If plaintiffs are able to clear a series of hurdles (including, often, that they amass sufficient credible evidence of general causation to survive summary judgment), mass tort cases tend to settle. And, they tend to settle using grids, matrices, or point systems whereby compensation to those who qualify (i.e., those who satisfy the settlement agreement's sometimes onerous eligibility requirements) will rise or fall based on (among other things) the observed likelihood that the claimant's injury was actually caused by the defendant's tortious conduct.[194]

Thus, to return to the *Vioxx* example, after a series of bellwether trials, some of which plaintiffs won and some of which defendant won, and after months of hard bargaining, the sprawling litigation ultimately settled for $4.85 billion. The settlement agreement itself contained strict eligibility requirements that gestured toward specific causation: A plaintiff was entitled to

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[193] If plaintiffs' claims do not stand up to scrutiny (because, for example, plaintiffs fail to assemble sufficient evidence of general causation), courts can—and will—extinguish the litigation, using traditional mechanisms. *See, e.g.,* Turpin v. Merrell Down Pharm., Inc., 959 F.2d 1349, 1361 (6th Cir. 1992) (affirming the trial court's decision to grant summary judgment to defendants in the *Bendectin* litigation because of insufficient general causation evidence); *In re* Zoloft Prods. Liab. Litig., 858 F.3d 787 (3d Cir. 2017) (affirming the transferee court's grant of summary judgment, thus terminating the *Zoloft* litigation); Meridia Prods. Liab. Litig. v. Abbott Labs., 447 F.3d 861 (6th Cir. 2006) (affirming the transferee court's grant of summary judgment, thus terminating the *Meridia* litigation); *In re* Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig. (No II) MDL 2502, 892 F.3d 624, 631 (4th Cir. 2018) (affirming the transferee court's grant of summary judgment, thus terminating the *Lipitor* litigation).

[194] *See* PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 9:13 (updated 2018) (explaining that mass torts settle using grids or matrices and that, when the parties establish these grids, they often vary payments based on "the strength of causation" so that "a more serious injury with less proof of causation might get no more on a grid than a lesser injury with better causal relation"); Hensler, *supra* note __, at 1613–15 (observing that mass tort settlements tend to take the form of a "grid or matrix" which award claimants "different cash values on the basis of evidence of causation, disease, or injury severity"); Paul D. Rheingold, *Mass Torts—Maturation of Law and Practice*, 37 PACE L. REV. 617, 632 (2017) (same, while adding the more recent invention of point systems "where the claimant may obtain or lose points, depending on factors felt to be significant to determining damages").

payment if and only if she could show that she suffered a qualifying injury (defined as a heart attack, sudden cardiac death, or an ischemic stroke) while taking, or within weeks or months of having taken, a sufficient quantity of Vioxx.[195] Then, for those qualifying, the *amount* of payment varied based, in part, on injury severity and claimant-specific causation-related determinants such as whether the claimant smoked, had a family history of heart disease, or had certain defined preexisting conditions.[196]

The crucial point is that in *Vioxx*, and often in mass torts, through the alchemy of private administration, the impossible-to-satisfy on-off switch of specific causation under the formal law yields to an informal system that is explicitly probabilistic and sensitive to scientific uncertainty.[197] In the system that results, cut points are smoothed and softened. And, for those who satisfy the settlement agreement's eligibility requirements, payment becomes proportionate rather than binary—a question of "more or less," rather than "all or none." Though surely imperfect, the informal system that has developed is stable, relatively efficient, morally defensible, equitable, and broadly consistent with tort's twin aims of deterrence and compensation.[198]

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[195] Vioxx Claims Administrator Court Report No. 29, July 27, 2010, at 33 [hereinafter Vioxx Report]. It bears emphasis that eligibility requirements are often rigorous. In *Vioxx*, only 33,075 claimants out of 48,362 satisfied the criteria. *Id*. at 36. Or, in the *Propulsid* litigation, 6,012 plaintiffs sought compensation from a global settlement, but, at the end of the day, only thirty-seven plaintiffs (0.6 percent) actually qualified for payment. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 70, 74–75 (2017).

[196] Vioxx Report, *supra* note __, at 17.

[197] As Nathaniel Donahue and John Witt observe, the resulting dynamic, in some ways, echoes our experience with contributory negligence, the dusty tort doctrine that long barred a plaintiff from recovering for her injuries if her negligence, however slight, contributed to her predicament. There, for decades, observers of the tort system recognized that the formal law imposed an unjustifiably harsh burden. But observers also recognized that the harshness of the formal law was mitigated by juries who, behind closed doors, softened the law's rough edges, by reducing, but not eliminating, recovery for negligent plaintiffs. *See* Charles L.B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 674 (1934) (discussing juries' "notorious" inability to "perceive contributory negligence"). Here, by contrast, it's not juries, but rather, settlement systems that have "displaced the binary law of causation with statistical aggregation in private administration." Nathaniel Donahue & John Fabian Witt, *Torts as Private Administration*, at 48 (working paper, 2018).

[198] The alternative, of course, is to insist that a tortfeasor ought to escape liability simply because it was lucky enough to manufacture a substance that manifested

Heavy reliance on Lone Pine—which engrafts a binary filter onto a question that isn't susceptible to a binary answer—represents a sharp departure from all that. The burden that results is unrealistic, and the exercise is onerous but unrewarding. Indeed, perhaps recognizing just what a weighty burden Lone Pine orders impose, one commentator perhaps says too much, insisting that Lone Pine orders are "particularly well suited to chemical exposure cases where causation may be difficult for plaintiffs to prove" since "even if the chemical is identified, linking the injury to the plaintiffs' [toxic] exposure may be virtually impossible."[199]

IV. LONE PINE AND A POSSIBLE PATH FORWARD

Mass toxic tort cases are complicated and sprawling. Further, as Part II shows, certain mass torts, with certain definable features, can become a magnet for nonmeritorious claims. Judges need to have resources at their disposal to identify and extinguish these groundless claims as early, easily, and efficiently as possible. The question, though, is what those mechanisms ought to be and how they can be fashioned to minimize their potential for abuse. That is the matter to which we now turn.

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in a non-signature, rather than signature, disease. On the other side of the coin, a hardline position would also mean that a DES daughter diagnosed with vaginal adenocarcinoma would obtain a full recovery, but her sister who miscarried or developed breast cancer (also powerfully associated with DES), ought to walk away empty-handed, since we cannot *know* that DES caused those latter maladies. *See* Nat'l Inst. of Health, *supra* __.

As noted in the text, a proportionality rule promotes efficient deterrence because it gives firms incentives to take optimal care, whereas, when general causation is shown, a rule of no liability (because no *particular* plaintiff can show she was more-likely-than-not harmed by defendant) creates inadequate incentives. *See* Rosenberg, *supra* note __, at 866; *accord* Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1337 (2015); William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economics Approach*, 12 J. LEGAL STUD. 109, 123–24 (1983).

[199] Ruskin, *supra* note __, at 604; *accord* Richard J. Lippes, *Toxic Torts: A Plaintiff's Perspective, in* TOXIC TORT LITIGATION 43 (1991) (observing that, in some cases, Lone Pine orders impose an "unrealistic" burden); Cottle v. Superior Court, 3 Cal. App. 4th 1367, 1399 (1992), *modified* (Mar. 20, 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* . . . —evidence a given toxic or combination of toxics was the *cause in fact* of a given disease or other condition in a specific individual").

In Subpart A, I draw upon the lessons above to offer explicit guidance to courts. Relying in part on the "*Digitek*" factors, I propose that Lone Pine orders ought to be (1) exceptional and utilized only when other procedures explicitly sanctioned by rule or statute are practically unavailable or patently insufficient, and (2) utilized only when substantial evidence casts doubt upon plaintiffs' (or certain plaintiffs') entitlement to relief and/or plaintiffs (or certain plaintiffs) have displayed a marked and unjustifiable lack of diligence in pursuing the action. In Subpart B I observe that, for courts justifiably eager to facilitate particularized fact-finding, plaintiff fact sheets offer many of the benefits courts associate with Lone Pine orders but come with few of the attendant disadvantages.

A. Lone Pine Orders Ought to be Cautiously Utilized

Given the problems associated with the Lone Pine mechanism, it is tempting to say that this management device ought to be outlawed. That step, however, is difficult to justify. As the Ninth Circuit has observed: "No basis appears for us to cordon off one type of order—a *prima facie* order on exposure and causation in toxic tort litigation—from the universe of case management orders that a district court has discretion to impose."[200] Lone Pine orders are, it seems, here to stay. But, of course, whether to cabin their use is another matter entirely.

To assess whether or not to issue a Lone Pine order, in recent years, roughly a dozen courts have applied a five-factor test, first developed by transferee judge Joseph Goodwin in 2010 in the midst of the *Digitek* litigation.[201] Pursuant to these "*Digitek*

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[200] Avila v. Willits Envtl. Remediation Tr., 633 F.3d 828, 834 (9th Cir. 2011).

[201] *In re* Digitek Prod. Liability Litig., 264 F.R.D. 249, 256 (S.D. W.Va. 2010); *see, e.g.,* Armendariz v. Santa Fe County Bd. of Commn'rs, 17cv339-WJ-LF, 2018 WL 377199, *2 (D. N.M. Jan. 11, 2018); Marquez v. BNSF Ry. Co., No. 17-CV-01153-CMA-MEH, 2017 WL 3390577, at *2 (D. Colo. Aug. 8, 2017); Hostetler v. Johnson Controls, Inc., No. 3:15-CV-226-JD-MGG, 2017 WL 359852, at *5-7 (N.D. Ind. Jan. 25, 2017); Adkisson v. Jacobs Eng'g Grp., Inc., No. 3:13-CV-505-TAV-HBG, 2016 WL 4079531, at *3 (E.D. Tenn. July 29, 2016); Nolan v. Exxon Mobil Corp., No. CV 13-439-JJB-EWD, 2016 WL 1213231, at *10 (M.D. La. Mar. 23, 2016); Russell v. Chesapeake Appalachia, LLC, 305 F.R.D. 78, 83 (M.D. Pa. 2015); Smith v. Atrium Medical Corp., 2014 WL 5364823, at *1 (E.D. La. Oct. 21, 2014); Manning v. Arch Wood Prot., Inc., 40 F. Supp. 3d 861, 863-64 (E.D. Ky. 2014); Kamuck v. Shell Energy Holdings, No. 4:11-CV-1425, 2012 WL 3864954, at *4 (M.D. Pa. Sept. 5, 2012); Abner v.

factors," in weighing whether to issue a Lone Pine order, courts consider:

> (1) the posture of the action, (2) the peculiar case management needs presented, (3) external agency decisions impacting the merits of the case, (4) the availability and use of other procedures explicitly sanctioned by federal rule or statute, and (5) the type of injury alleged by plaintiffs and its cause.[202]

Judge Goodwin's invention marks an admirable first step, but the factors' adoption has been spotty, and the test provides insufficient guidance. (Indeed, some of the variability discussed in Part III.B.1 may be seen as a testament to the *Digitek* factors' shortcomings.) Some factors are under-specified: *How exactly* should the court assess the "case management needs presented"? Others are undertheorized: By what metric should the court evaluate the type of injury alleged and its cause—and why in the world should that matter? Other factors are unduly circumscribed: Why should a court consider whether "external agency decisions impact[] the merits of the case" but ignore other credible evidence that casts doubt on the plaintiffs' contentions? Beyond that, the *Digitek* factors represent a totality-of-the-circumstances test, and, as is typical with such tests, courts have struggled with the weight each factor should be due, impairing consistency and predictability.[203]

Rather than adhere to the *Digitek* factors as written, I suggest that courts blend certain factors and harden them into prerequisites. In particular, courts ought to combine factors (2) and (4) to establish that Lone Pine orders (i.e., case management orders that demand particularized, prima facie evidence of specific causation) ought to be exceptional and utilized only when other procedures explicitly sanctioned by rule or statute are unavailable or are patently insufficient, given the litigation's particular case

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Hercules, 2:14cv63-KS-MTP, 2014 WL 5817542, at *2 (S.D. Miss. Nov. 10, 2014); Roth v. Cabot Oil & Gas Corp., 287 F.R.D. 293, 298 (M.D. Pa. 2012).

[202] *Digitek*, 264 F.R.D. at 256.

[203] United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) (deriding "th'ol' 'totality of the circumstances'" as "that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect)"); Bone, *supra* note __, at 2016–17 (identifying problems with multi-factor balancing tests).

management needs. At the same time, courts ought to expand *Digitek* factor (3) to create a second hard limit, namely: Lone Pine orders ought to be utilized only when substantial evidence casts doubt upon plaintiffs' (or certain plaintiffs') entitlement to relief and/or the plaintiffs (or certain plaintiffs) have displayed a marked and unjustifiable lack of diligence in prosecuting the action.

The first restriction—that Lone Pine orders should be orders of last resort—is already embraced by some courts.[204] It is also consistent with how courts utilize, and, according to the Supreme Court, are supposed to utilize, their interstitial authority.[205] Generally, the formal rules are, and are supposed to be, the go-to; interstitial or inherent authority is supposed to be a backstop.[206] Applying that familiar principle here means that Lone Pine may be in the toolkit, but it should be an instrument used only when other formally-sanctioned mechanisms are not practically available or are tried but fail.[207]

The second guidepost looks to Lone Pine orders' articulated purpose: "to identify and cull potentially meritless claims and to streamline litigation in complex cases."[208] Starting there, it directs courts to evaluate whether (a) substantial, credible evidence casts doubt upon plaintiffs' (or certain plaintiffs') entitlement to relief and/or (b) in prosecuting the action, the

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[204] *See* Part III.B.1.a.iii; *accord* Hagy v. Equitable Production Co., Civ. Action No. 2:10-cv-01372, 2012 WL 713778, at *4 (S.D. W. Va. 2012) ("Given a choice between a 'Lone Pine order' created under the court's inherent case management authority and available procedural devices such as summary judgment, motions to dismiss, motions for sanctions and similar rules, I believe it more prudent to yield to the consistency and safeguards of the mandated rules.") (quotation marks omitted).

[205] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (cautioning that "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power").

[206] *See* F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1136–37 (9th Cir. 2001) (observing that "it is preferable that courts utilize the range of federal rules and statutes dealing with misconduct and abuse of the judicial system" before they act pursuant to ad hoc, unwritten, or inherent authority).

[207] It bears emphasis: If a judge concludes an entire litigation—or, alternatively, a batch of claims—lacks merit, expressly sanctioned mechanisms exist to terminate the litigation. For examples, see *supra* note __.

[208] Baker v. Chevron USA, Inc., 2007 WL 315346, *1 (S.D. Ohio Jan. 30, 2007).

plaintiffs (or certain plaintiffs) have displayed a marked and unjustifiable lack of diligence.[209] Subpart (a) echoes but expands up on the third *Digitek* factor, which directs courts to consider whether external agency decisions impact the merits of the case. Expansion is necessary because, on some occasions, there is reason to be dubious of plaintiffs' claims, but the skepticism derives not from a governmental study but, rather, some other fact or circumstance—such as, for instance, the fact that certain plaintiffs alleging injury didn't live in the contaminated area,[210] weren't yet born,[211] or evidence an unfortunate "habit" of dismissing cases as soon as those cases start to draw scrutiny.[212] Subpart (b)—lack of diligence—is not a factor courts currently address. But, it is a consideration that lurks behind several courts' orders, including in *Lore v. Lone Pine* itself.[213] And, such consideration is warranted, as the orders exist, in part, to expedite litigation and promote judicial economy.[214] They may be used, therefore, when the litigation stalls due to plaintiffs' dilatory conduct.

Finally, drawing on *Digitek* factor (1), when imposing Lone Pine orders, courts ought to remain mindful of the action's posture and relative maturity and seek to "strike a balance between efficiency and equity."[215] As Judge Eldon Fallon explained in

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[209] If only a subset of claims engenders suspicion or only a subset of plaintiffs have displayed a lack of diligence, then the order should be targeted to demand disclosures from only that claimant population.

[210] Avila v. Willits Environmental Remediation Trust, 633 F.3d 828, 834 (9th Cir. 2011).

[211] *In re* Love Canal Actions, 547 N.Y.S.2d 174, 178-79 (Sup. Ct. 1989), *aff'd as modified*, 555 N.Y.S.2d 519 (1990).

[212] *In re* Fosamax Prod. Liab. Litig., No. 06 MD 1789 JFK, 2012 WL 5877418, at *3 (S.D.N.Y. Nov. 20, 2012).

[213] In one recent case, for example, the court granted a Lone Pine order while lamenting the case's "chronically stagnant posture." Modern Holdings v. Corning, Inc., Civil No.: 13-405-GFVT, Order (E.D. Ky. Sept. 28, 2015), at 5. Likewise, a Ohio court recently granted a Lone Pine order in a case with only two plaintiffs where those plaintiffs had failed to offer even partial responses to interrogatories, plaintiffs' counsel had been a no-show at a scheduled status conference, and, as the court noted in exasperation, "[a]lmost 11 months [had] passed since this case was originally filed and Plaintiffs have failed to articulate" any connection between their injuries and the defendants' product. Miller v. Metrohealth Medical Ctr., Case Nos. 1:13 CV 1465, 2014 WL 12589121, at *1 (N.D. Ohio Mar. 31, 2014).

[214] Baker v. Chevron USA, Inc., 2007 WL 315346, *1 (S.D.Ohio Jan.30, 2007).

[215] *In re* Vioxx Prod. Liab. Litig., 557 F. Supp. 2d 741, 744 (E.D. La. 2008), aff'd, 388 F. App'x 391 (5th Cir. 2010)

Vioxx, a Lone Pine order that is unreasonable prior the start of reciprocal discovery when the case is in its "embryonic stage" may well be reasonable when issued in the twilight hour.[216]

B. Plaintiff Fact Sheets Can Fulfill Many of the Aims of Lone Pine Orders But at Lower Cost and with Fewer Drawbacks

Above, I suggest that courts ought to harden certain factors into prerequisites. In so doing, I advocate cabining courts' discretion and also limiting courts' reliance on, and issuance of, Lone Pine orders. But, that doesn't mean I support a restriction on defendants' ability to engage in particularized factfinding. The point, instead, is that another vehicle offers many, if not all, of the legitimate benefits Lone Pine orders supply with few of the attendant disadvantages.

It is and ought to be uncontroversial that, even in mass tort cases, defendants are entitled to claimant-specific discovery.[217] In non-aggregate actions, plaintiffs must produce relevant information; there is little basis to relieve plaintiffs of that burden simply because a claim is part of an aggregate action or has been transferred into an MDL.[218] Furthermore, the requirement is broadly beneficial: Knowing who has suffered which injury and based on what evidence helps litigants and the court assess the litigation's strength, composition, and character.

Plaintiff fact sheets, introduced above, which, in the words of leading defense lawyer Sheila Birnbaum, offer "a relatively clear and objective snapshot of the merits underlying each claim" offer an efficient vehicle to obtain this valuable information.[219]

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[216] *Vioxx*, 557 F. Supp. 2d at 744; *see also* Paul D. Rheingold & Laura Pitter, *Lone Pine Orders: An Abused Remedy*, 9 MASS TORTS 1, 18 (Fall 2009) 18 ("By the time a mass tort case is winding up, the *Lone Pine* approach is of undeniable value.").

[217] BOLCH JUDICIAL INST., *supra* note __, at 1 (specifying, as Best Practice 1C(IV): "Individual claimants should be required to produce information about their claims.").

[218] DUKE LAW SCHOOL, *supra* note __, at 13-14 ("In non-MDL cases, plaintiffs are required to produce information about their claims from the outset, and that practice should not change simply because a claim has been transferred into an MDL proceeding.").

[219] Schulman & Birnbaum, *supra* note __, at 6; *id*. at 7 (explaining that fact sheets "aid the parties in categorizing and organizing plaintiffs" and "reveal new common issues associated with large groups of similarly situated plaintiffs");

> Plaintiff fact sheets can inquire as to the following:
>
> (1) Cognizable Injury – Identification of the plaintiff's injury, illness, or condition, including basic information regarding the diagnosis and treatment thereof;
>
> (2) Exposure – Underlying facts or data relied upon when forming the opinion that the plaintiff was exposed, or was likely exposed, to the defendant's product or toxic agent;
>
> (3) Past Claiming – When warranted, whether the plaintiff has previously sought compensation for the instant injury, illness, or condition, and the precise compensation sought and obtained.

These inquiries demand that the plaintiff supply information that she should already have in her possession, or that she could have in her possession with relatively little effort. And, crucially, all three zero in on the three areas—(1) misdiagnosis, (2) defendant manipulation, and (3) double dipping—that, as discussed in Part II, appear to constitute the bulk of overclaiming activity.

Further, though fact sheets are less expensive, expansive, and demanding than Lone Pine orders, it appears that, in the past, they've effectively culled meritless claims. *Silica* provides a useful example. Early in that MDL, transferee Judge Janis Graham Jack ordered each plaintiff to submit a fairly bare-bones fact sheet to "develop the factual basis for the claims of each plaintiff."[220] In particular, plaintiffs had to specify their "diagnosis and pertinent medical and diagnostic information, as well as the results of B-reads [diagnostic interpretations] of chest x-rays."[221] Once submitted, however, the fact sheets revealed several suspicious patterns—including the fact that the over 9,000 plaintiffs were under the day-to-day care of approximately 8,000 different physicians but were *diagnosed with silicosis* by only a dozen

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Smith, *supra* note __, at 25 (extolling the virtues of plaintiff fact sheets, which "require early disclosure of key information").

[220] CARROLL ET AL., *supra* note __, at 7.

[221] *Id.* at ix–x. A B-reading is a specialized interpretation of a chest x-ray. *See* Dep't of Energy, Office of Environment, Healthy, Safety & Security, Chest x-Rays, https://www.energy.gov/ehss/chest-x-rays (last visited Nov. 11, 2018).

practitioners.[222] Fact sheets in hand, the defendants began deposing the handful of doctors who had supplied the diagnoses at issue, and, once under oath, the physicians essentially recanted, and plaintiffs' case promptly crumbled.[223] At the end of the day, commentators agreed that Judge Jack's decision to require fact sheets was key to "uncovering diagnostic irregularities" and bringing that litigation to a swift and decisive end.[224]

In other contexts, plaintiff fact sheets have been similarly effective. In the *Phenylpropanolamine* litigation, for example, the trial court was able to use fact sheets to weed out more than 850 claims that had otherwise languished on the court's docket.[225] In the *Welding Fumes* MDL, transferee Judge Kathleen O'Malley required each plaintiff to provide a fact sheet certifying that she had been examined by a licensed physician and that the physician had diagnosed her with a qualifying manganese-induced neurological disorder. Taking cues from *Silica*, the fact sheets also inquired as to whether "the medical conclusion by the above-named doctor [was] made at a screening[.]"[226] This no-frills order reportedly cut the number of pending cases in half.[227] And, in the *Avandia* litigation, described above, the court's so-called Lone Pine order—which was more accurately described as a straightforward plaintiff fact sheet—prompted the termination of roughly half of the 2000 cases then pending.[228]

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[222] *In re* Silica Prod. Liab. Litig., 398 F. Supp. 2d 563, 580 (S.D. Tex. 2005). There was also a suspicious overlap in personnel: In particular, many of the physicians who figured prominently in the silica litigation had also been heavily involved in asbestos litigation. CARROLL ET AL., *supra* note __, at 8.

[223] One physician who had diagnosed 3,617 plaintiffs with silicosis admitted: "I can't diagnose silicosis on the basis of the chest x-ray . . . and I didn't intend to. . . ." *Silica*, 398 F. Supp. 2d at 581. Others said much the same. *Id*. at 587–89. Following these explosive revelations, Judge Jack "ordered every doctor who diagnosed silicosis in any of the plaintiffs . . . to testify at a Daubert hearing." CARROLL ET AL., *supra* note __, at x.

[224] CARROLL, *supra* note __, at xi.

[225] *In re* Phenylpropanolamine (PPA) Prod. Liab. Litig., 460 F.3d 1217, 1227 n.4 (9th Cir. 2006).

[226] Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221, 1294–97 (2008).

[227] BEISNER & MILLER, *supra* note __, at 22; Schulman & Birnbaum, *supra* note __, at 10.

[228] Glaxosmithkline LLC's Reply in Further Support of Mot. for a Lone Pine Case Mgmt. Order at 4, In re Avandia Litig. No. 0802-2733 (Phila. Ct. of Com. Pl. Jan. 28, 2011).

To be sure, fact sheets are only useful to the extent they are narrowly tailored to address pertinent questions; scattershot or expansive disclosures are wasteful and self-defeating.[229] Likewise, to be useful, fact sheets must be completed fully, truthfully, and expeditiously. To deter dithering, prevarication, and gamesmanship, courts ought to set clear expectations, impose firm deadlines, specify procedures for addressing deficiencies, and delineate clear consequences for non-compliance.[230] Indeed, bringing us full circle, courts might choose to ratchet up those consequences, with a first step being that non-compliant plaintiffs will face entry of a Lone Pine order, and those who don't comply with *that* order will see their claims dismissed with prejudice.[231]

V. THE LESSONS OF LONE PINE

In this final Part, we step back to consider the many lessons of Lone Pine.

First, courts' use of Lone Pine orders illustrates, and offers further evidence of, what Judith Resnik has famously dubbed "managerial judging."[232] In her seminal 1982 article, Resnik observed that, over the preceding few years, judges had "departed from their earlier attitudes" characterized by "[d]isengagement and

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[229] Cabraser, *supra* note __, at 13 n.37 (describing some bloated fact sheets that span for "20 pages or more"); Schulman & Birnbaum, *supra* note __, at 7 ("[D]efendants should be judicious in seeking truly relevant data.").

[230] This admonition echoes Duke's proposed Standards and Best Practices, which encourages courts to "articulate clear expectations and impose clear timelines . . . together with clear procedures and timelines for addressing deficiencies." BOLCH JUDICIAL INST., *supra* note __, at 6; *see also id*. at 6–7 ("The transferee judge should deal with fact sheet non-compliance directly and promptly . . . ."). In terms of "gamesmanship," plaintiffs' lawyer Elizabeth Cabraser reports that some lawyers have cynically used "shotgun 'deficiencies' (including typographical errors, failure to provide information as to questions marked 'N/A,' missing middle initials, etc.) to prolong the process and . . . to set up motions for dismissal." Cabraser, *supra* note __, at 13 n.37. Courts should be alert to, and show no tolerance for, such abusive tactics.

[231] Applying the guideposts above, such a court would be within its rights to issue a Lone Pine order because (1) the order would be issued after another mechanism is tried but fails, and (2) a plaintiff's failure to answer simple questions to substantiate her claim might fairly generate suspicion regarding the claim's validity.

[232] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

dispassion" and had instead adopted "a more active, 'managerial' stance."[233] No longer content to sit passively and resolve discrete issues served up by litigants, managerial judges, she wrote, were getting off the sidelines and starting to take upon themselves the larger and more amorphous task of controlling the pace, content, and character of litigation.[234]

Reflecting both hands-on management and seat-of-the-pants improvisation, Lone Pine orders are a product of this era (recall, they were invented in 1986, and they took hold soon thereafter), and they embody it. After all, when a judge issues a Lone Pine order, he is no disengaged or passive umpire. Instead, he reaches around the written rules to insert himself into the (traditionally binary, litigant-driven) discovery process—and, in so doing, compels plaintiffs to supply the precise information that *he* has identified as important, at a specific time *he* has chosen as convenient, and in the precise form *he* has set forth. Further, if he's unsatisfied with the plaintiffs' submission, he'll dismiss claims, sometimes entire cases, outside the auspices of either Rule 12 or Rule 56. A lesson of Lone Pine, then, is that, for better or worse, well into its fourth decade, the "managerial judge" remains a central fixture of the American legal landscape. And, echoing an observation made by Peter Schuck, the mass tort realm gives judges an arguably unprecedented opportunity to flex their managerial muscles.[235]

Second, Lone Pine orders offer a window into the fracturing of American civil procedure. In the United States, we continue to cling to the notion that our procedural rules are transsubstantive; the same rules, many insist, apply to all cases, regardless of the size or the nature of claims.[236] Indeed, many believe that the one-size-fits-all nature of our Rules is the key to

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[233] *Id*. at 376.

[234] For more on "managerial judging," see Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 63–76 (1995); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

[235] Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 490 (1998) ("In no area of litigation is managerial judging more obvious and central than in mass torts.").

[236] Brief of Law Professors as Amici Curiae in Support of Respondents, China Agritech, Inc. v. Resh, 2018 WL 1156639 (2018) ("[A]ll of the Federal Rules of Civil Procedure are transsubstantive.").

the Rules' genius; their transsubstantive nature is "one of the major achievements of the Federal Rules of Civil Procedure,"[237] in part, because generally-applicable procedures supply a crucial bulwark against "interest group politics."[238]

Yet, as we've seen, Lone Pine orders are not transsubstantive. They are almost exclusively reserved for, and issued in, mass tort cases. And, in terms of *non*transsubstantive procedure, Lone Pine orders are hardly alone. State and federal rules are positively littered with entitlement-specific requirements, the vast majority of which impose extra burdens on particular plaintiffs: Per Federal Rule of Civil Procedure 9(b), plaintiffs asserting federal fraud claims must plead those claims with specificity,[239] as must civil RICO plaintiffs, in several states.[240] Owing to the Prison Litigation Reform Act, prisoners seeking relief must clear onerous requirements,[241] and different rules govern habeas proceedings, too.[242] Securities plaintiffs have to overcome hurdles imposed by the Private Securities Litigation Reform Act of 1995.[243] Admiralty and maritime claims face special requirements.[244] Patent plaintiffs confront both restrictive joinder rules and limited venue provisions.[245] Many medical malpractice plaintiffs must contend with state-imposed professional screening panels and certificate-of-merit requirements.[246] In the majority of states, those complaining of

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[237] Margaret B. Kwoka, *Judicial Rejection of Transsubstantivity: The FOIA Example*, 15 NEV. L.J. 1493, 1496 (2015).

[238] Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 303–04.

[239] FED. R. CIV. P. 9(b).

[240] Darrel C. Menthe, *Avoiding the Pitfalls of Pleading Civil RICO*, PRAC. LITIGATOR, May 2007, at 55, 56.

[241] Pub. L. No. 104-134, 110 Stat. 1321.

[242] 28 U.S.C. § 2254.

[243] Pub. L. No. 104-67, 109 Stat. 737.

[244] FED. R. CIV. P. A–F.

[245] 35 U.S.C. § 299 (curtailing patent plaintiffs' ability to join "accused infringers"); 28 U.S.C. § 1400(b) (providing that civil actions for patent infringement may only be initiated "in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business").

[246] Roughly half of states impose an affidavit or certificate of-merit requirement, while approximately seventeen states use screening panels to vet claims. *See* Engstrom, *Retaliatory RICO*, *supra* note __ (collecting sources).

defamation, slander, or libel, have to comply with anti-SLAPP (strategic lawsuits against public participation) legislation, which subjects such plaintiffs to expedited dismissal and liability for defendants' attorneys' fees, unless they can make out a prima facie case when put to an early and onerous test.[247] In several states, asbestos plaintiffs have to make an accelerated showing of credible impairment,[248] and, in several others, they have to reveal to defendants all asbestos claims they have previously filed.[249] In adjudicating FOIA claims, courts impose a separate set of procedures (though, like Lone Pine, they do so in the shadow of formal processes).[250] Different intervention rules govern certain federal environmental suits.[251] And, on top of all that, components of Federal Rules 4, 4.1, 5.2, 12, 23.1, 26, and 71.1 all deviate, in one way or another, from the transsubstantive script.[252]

Lone Pine orders help to show that, though many continue to insist that our procedural rules are transsubstantive, the reality is that the transsubstantive ship has, for better or worse, sailed.[253] We may be ready, then, to move to a second-order debate, where we consider not whether to *retain* transsubstantive procedure but, instead, whether to jettison or modify the tailored rules we've already got or, alternatively, whether we would be wise to create ever more case- and substance-specific procedural requirements.[254]

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[247] Laura Lee Prather & Justice Jane Bland, *Bullies Beware: Safeguarding Constitutional Rights Through Anti-SLAPP in Texas*, 47 TEX. TECH L. REV. 725, 731, 734–36 (2015).

[248] *E.g.,* Ga. Code Ann. §§ 51-14-1 to -10 (2007); Kan. Stat. Ann. §§ 60-4901 to - 4911 (2006); S.C. Code Ann. §§ 44-135-30 to -110 (2006); Tex. Civ. Prac. & Rem. Code Ann. §§ 90.001 to .012 (2005).

[249] *E.g.,* Ariz. Rev. Stat. Ann. § 12-782 (2015); Ohio Rev. Code Ann. §§ 2307.951 to .954 (West 2013); Okla. Stat. tit. 76, §§ 8189 (2013); W. Va. Code Ann. §§ 55-7F-1 to -11 (2015); Wis. Stat. § 802.025 (2014).

[250] *See generally* Kwoka, *supra* note __.

[251] Kwoka, *supra* note __, at 1498 (compiling "several environmental statutes" that allow for "broader intervention . . . than the Federal Rules provide").

[252] *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376, 413 (2010) (offering authority); FED. R. CIV. P. 26(a)(1)(B) (exempting nine types of proceedings from mandatory disclosures).

[253] Some have already said as much. *E.g.,* Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2131 (1989) (contending that "trans-substantive rulemaking in fact has been eroded").

[254] For why we may benefit from still more procedural tailoring, see, for example, Stephen N. Subrin, *The Limitations of Transsubstantive Procedure:*

Next, Lone Pine orders are not symmetric; they do not affect plaintiffs and defendants equally and, in fact, are sometimes approvingly described as a "weapon" that defendants can wield, or, more accurately, induce courts to wield, against plaintiffs.[255] Seen in this light, Lone Pine orders fit into, and elucidate, a larger story of plaintiff retrenchment—or what Stephen Burbank and Sean Farhang dub the "counterrevolution against federal litigation."[256] Over the past four decades, that is, courts and policymakers have radically altered the law's fabric, but they have done so, not by curtailing or erasing substantive rights.[257] Rather, they've done so quietly, by fraying and tearing holes in the fabric of private enforcement.[258] This retrenchment is seen about everywhere, and it has affected about everything, including *Lujan's* and *Lyons's* restrictive conception of Article III standing,[259] *Daubert's* imposition of gatekeeping requirements on expert testimony,[260] the Supreme Court's seemingly reflexive enforcement of even lopsided arbitration agreements,[261] statutory and court-created

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An Essay On Adjusting the "One Size Fits All" Assumption, 87 DENV. L. REV. 377 (2010); Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 333 (2008); Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27, 50 (1994).

[255] William A. Ruskin, *Prove It or Lose It: Defending Against Mass Tort Claims Using Lone Pine Orders*, 26 AM. J. TRIAL ADVOC. 599 (2003); *accord* Russell v. Chesapeake Appalachia, LLC, 305 F.R.D. 78, 84 (M.D. Pa. 2015) (referring to the orders as a "one-sided burden").

[256] STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017).

[257] There are limited exceptions. *E.g.,* Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109–92, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901–7903) (insulating most manufacturers and sellers of firearms from civil liability).

[258] BURBANK & FARHANG, *supra* note __, at 16 ("The counterrevolution strategy was to leave substantive rights in place while retrenching the infrastructure for their private enforcement."); Jack B. Weinstein, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 BROOK. L. REV. 827, 831–32, 836 (1993) (observing that "many of the recent procedural reforms appear to me to be surrogates for direct curtailment of substantive rights").

[259] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); City of Los Angeles v. Lyons, 453 U.S. 1308 (1981).

[260] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[261] American Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

limitations on class certification,[262] "*Twiqbal's*" imposition of heightened pleading standards,[263] Rule 26's new proportionality requirement,[264] and the broad expansion of summary judgment, following the *Celotex* trilogy.[265]

As Arthur Miller has observed, the immediate effect of these myriad changes has been clear: to transform the "uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points."[266] The *broader* effect is equally obvious: The changes above have, collectively, restricted plaintiffs' ability to obtain a judgment on the merits and increased the cost and risk associated with taking claims to trial.[267]

In erecting yet another "procedural stop sign" plaintiffs must clear, courts' acceptance of Lone Pine orders ought to be seen as a new verse in this now-familiar tune.[268] Provocatively, though, the verse is in a new register, for a lesson of Lone Pine is that, for all of our fretting about how the Supreme Court and the Rules Committee have erected stop signs and friction points, with far less fanfare, obscure judge-made procedures may be doing much the same. Further, and perhaps more ominously, for all the consternation surrounding the "vanishing trial," the goal line may be shifting.[269] Courts' views of, and tolerance for, far more

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[262] Class Action Fairness Act of 2005 ("CAFA"), Pub.L. No. 109–2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Amchem Prod., Inc. v. Windsor, 521 U.S. 591 (1997).

[263] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[264] Hon. Craig B. Shaffer, *Deconstructing "Discovery About Discovery*," 19 SEDONA CONF. J. 215, 229 (2018) (discussing the "renewed emphasis on proportionality in Rule 26(b)(1)").

[265] Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[266] Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 309 (2013)

[267] *See generally id*.

[268] Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 LA. L. REV. 739, 802, 806 (2018) (discussing "procedural stop signs"). For the fact that some courts impose Lone Pine orders prior to discovery, see *supra* note __ and accompanying text.

[269] For statistics regarding the "vanishing trial," see generally Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

preliminary factfinding may also be undergoing a subtle metamorphosis: Like trial before it, *discovery* might be starting to be viewed, not as a right that's freely given and broadly available, but instead, a *benefit* that must be earned, by first convincing the court of a claim's legitimacy.

Last but not least, Lone Pine orders invite us to reflect on the virtues and vices of what some have come to call "ad hoc procedure"—and the orders can even assist in the development of metrics to evaluate the propriety of these procedures going forward. As noted at the outset, "ad hoc procedure"—which is to say judge-made procedure "designed to address a procedural problem that arises in a pending case or litigation"—is much discussed and hotly debated.[270] To this point, however, much of the debate is broad-brush and acontextual. Ad hoc procedure is celebrated or condemned, but often in a one-size-fits-all format.[271]

Breaking with that mode, this study considers a *particular* judge-made mechanism. This grounded inquiry gives us leverage to evaluate, not the broad question of whether ad hoc procedure (writ large) is good or bad, as that determination involves idiosyncratic value judgments and depends on as-yet-unresolved empirical questions. Rather, it provides leverage on a question that is still important but somewhat more tractable: *When precisely* might ad hoc procedural innovation cause particular concern? Addressing *that* question, the above suggests that procedural innovation is most worrisome on two occasions: when it permits trial courts to (1) evade traditional institutional constraints and/or (2) subvert the limits imposed by existing law.

Regarding institutional constraints, in their adjudication of civil claims, trial courts are traditionally hemmed in on three sides. They are limited by juries, who, per the Seventh Amendment, are supposed to have the final say. They are limited by precedent, which, under the doctrine of *stare decisis*, is supposed to guide and cabin court discretion. And, they are limited, of course, by upper-level appellate review.[272] In issuing a Lone Pine order, however, a

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[270] For the definition, see Bookman & Noll, *supra* note __, at 772-73. For critical commentary, see *supra* note __ and accompanying text.

[271] *See supra* notes __ and accompanying text.

[272] *See* Peterson, *supra* note __, at 47 ("The framers relied on precedent, appellate review, and the institution of the jury trial to provide substantial checks upon the arbitrary exercise of power by federal trial court judges.").

trial judge can effectively bypass all of the above. The jury is a nullity; the whole point of a Lone Pine order is that, if the plaintiffs' submissions aren't up to snuff, the case will be dismissed. Precedent does little: Though some appellate courts have weighed in to bless the Lone Pine mechanism, no appellate court has (so far) set up detailed guideposts to abridge or channel the mechanism's use. Lastly, as noted in Part III, when trial courts issue Lone Pine orders, and even when they extinguish claims or entire cases for deficient submissions, the exercise is reviewed not de novo (i.e., how a pretrial termination is typically reviewed) but rather, under the extremely deferential abuse of discretion standard.[273] Lone Pine orders, in other words, give trial courts freedom they would not otherwise have—and trial courts can, consequently, use the Lone Pine mechanism to aggrandize their own power at the expense of other institutional actors.[274]

While liberating trial courts from institutional constraints, Lone Pine orders also permit courts to dodge the limits imposed by formal law. When courts exercise ad hoc authority, they often operate in clear "decision-spaces" carved out by statute or procedural or evidentiary rule—or at least in the interstices of such authority. When issuing Lone Pine orders, however, courts don't operate within an existing rule (save the essentially unbounded authority of Rule 16), and, in fact, as explained in Part III.B.2, their actions stand in tension with specific requirements. Indeed, on some occasions, courts reach the *same result* as they would, under the formal law (i.e., termination of a plaintiff's claim for insufficient evidence, as under Rule 56) but in a *manner* that departs from the law's command.

The upshot is that, going forward, when assessing the promise and pitfalls of ad hoc procedure, it may be useful to evaluate this flavor of judicial discretion along two dimensions.

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[273] *See supra* note __ and accompanying text.

[274] In so doing, courts' actions lend support to a claim Stephen C. Yeazell made many years ago, in his classic piece, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631. There, Yeazell noted that "the past seventy-five years," had witnessed a reshuffling of "the power relationships of civil litigation" as trial courts had come to claim ever-greater power, relative to their appellate-side counterparts. *Id.* at 631. *Accord* Marc Galanter, *Makers of Tort Law*, 49 DEPAUL L. REV. 559, 562 (1999) ("The expansion of managerial judging enlarges the discretion of trial judges and diminishes the control of appellate judges.").

First, notwithstanding her procedural innovation, is the trial judge still subject to traditional institutional constraints (i.e., juries, precedent, or meaningful appellate review)? To the extent those constraints remain, concerns are alleviated. To the extent those constraints are minimized or sidelined, concerns become more acute. Second, we might ask whether the judge is (purposefully or not) using ad hoc authority to make an end-run around the formal law. In particular: Is the judge achieving the same ends as she might under the formal law but, by using a tool that's improvised rather than off-the-shelf, is the judge depriving one party or another of rights or protections that the formal law would otherwise afford? Where, as here, the judicial action stands in tension with formal requirements, judicial legitimacy, separation of powers, and rule of law concerns become more acute.

CONCLUSION

Mass torts pull some plaintiffs with nonmeritorious claims out of the proverbial woodwork. Once swept into the litigation, these nonmeritorious claims impose discernable costs: They clog courts, waylay settlements, and divert scarce resources away from those with genuine entitlements and urgent financial need. Understandably, judges overseeing complex litigation want these questionable claims *gone*.[275] Casting about for a way to hasten the claims' identification and speedy elimination, dozens of judges have, in recent years, settled on the Lone Pine mechanism. This, too, is understandable: Lone Pine orders are legal, permissible, and heavily touted by commentators. Yet, as I explain above, these orders have drawbacks that ought to give courts pause, particularly since there is another cheaper and more narrowly tailored mechanism that appears to offer similar advantages but come with fewer drawbacks.

But, with this Article, I have other ambitions, too. Most notably, Lone Pine orders sit at the intersection of broad currents that are coursing through the contemporary civil justice system. Moving fast and seemingly picking up speed, these currents—the

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[275] *Accord In re* Mentor Corp. Obtape Transobturator Sling Prod. Liab. Litig., No. 4:08-MD-2004 (CDL), 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016 (bemoaning the fact that MDLs seem to be "populated with many non-meritorious cases" and observing that "transferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly").

rise of managerial judging, the fracturing of transsubstantive procedure, the counterrevolution against federal litigation, the rise in ad hoc procedure, and, as discussed in the Introduction, the recent, dizzying growth of big MDLs—are, even considered individually, inadequately understood. By pulling back the curtain on an obscure mechanism that sits at the crossroads of these currents, this study seeks to enrich our understanding of these broad and consequential phenomena.