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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Environmental Enforcement and Crimes Committee Newsletter

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MESSAGE FROM THE CHAIR

Bruce Pasfield
Chair, Environmental Enforcement and Crimes Committee

Welcome to the newsletter of the Environmental Enforcement and Crimes Committee. I am excited to take over as the new chair and am planning an agenda-packed year. A special thanks to past chair Tracy Hester for all his efforts including his grand finale, the Oil and Gas Enforcement Workshop in Houston last April. The meeting was well attended and informative, and we are looking to build on Tracy's momentum and hold a similar program this year. First up in 2011, though, is a committee meeting and quick teleconference in Washington that will take place on March 30. Our featured speaker will be Lisa Garcia, EPA associate assistant administrator for Environmental Justice (EJ). Lisa will speak about implementation of EPA's EJ Plan 2014 and its impacts on permits and enforcement. The meeting will be open to all members of the committee. Next is committee member Walt James's creation "Hollywood v. Reality," being presented at the Salt Lake conference in March. Walt and David Weinstein have taken clips from a number of Hollywood movies that feature environmental crimes plots and will be asking Fred Burnside, former special agent in charge of EPA's Criminal Investigation Division, and others to separate out fact from fiction in how EPA goes about investigating environmental crimes and how attorneys can best protect their client's interests. Not to be outdone, our committee is also cosponsoring a Salt Lake program entitled "There Will Be Blood or Not? Environmental Enforcement in the Gulf Oil Spill Context." Both programs should be enlightening and entertaining. Finally, to round out the spring, look for quick teleconferences that will provide guidance on the new greenhouse gas reporting rules and another focused on regulatory issues that surround the practice of hydraulic fracturing for natural gas.

On another front, we are looking to update our Web site offerings and more specifically to include jury instructions. Did you know there are no model jury instructions for federal environmental crimes? That's right; however, there is a collection of instructions that have been presented and approved in federal district courts and also some instructions that have been upheld and interpreted in circuit court opinions. We plan to put some of these on the Web site, and while these won't be "model" instructions, they should give our practitioners a place to start when crafting instructions. Look for the new content to begin showing up in early summer. We are always looking for new members to become more involved in committee events and programs. If you would like to become more involved, please send me an e-mail. I look forward to working with everyone in an event-filled 2011.

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Benjamin S. Lippard, Editor

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CALL FOR NOMINATIONS

The Section invites nominations for three awards:

The Environment, Energy, and Resources Government Attorney of the Year Award will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

The Law Student Environment, Energy, and Resources Program of the Year Award will recognize the best student-organized educational program or public service project of the year addressing issues in the field of environmental, energy, or natural resources law. Nominees are likely to be law student societies, groups, or committees focused on these three areas of law.

The State or Local Bar Environment, Energy, and Resources Program of the Year Award will recognize the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. Nominees are likely to be state or local bar sections or committees focused on these practice areas.

Nominations for all three awards are due at the ABA Section office by May 16, 2011. The awards will be presented at the ABA Annual Meeting in Toronto in August 2011. Award recipients should plan to be present at the award presentation.

For more information, visit http://www.americanbar.org/groups/environment_energy_resources/projects_awards/awards.html

SIMPLE NEGLIGENCE AND CLEAN WATER ACT CRIMINAL LIABILITY: A TROUBLESOME MIX

Bruce Pasfield and Sarah Babcock

Congress and the Obama administration have plans to amend the Clean Water Act's definition of "Waters of the United States" to provide more consistent protection of the nation's waters. Most legal scholars would agree that the U.S. Supreme Court's definition of "Waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006), is in need of a legislative fix. While Congress is at it, they may want to consider a "fix" to the negligence standard for criminal violations of the Clean Water Act, which is ambiguous at best, and at worst, criminalizes simple negligence. These two changes go hand-in-hand and should help alleviate the legal drama that has surrounded what should be a relatively straightforward environmental protection statute. If done properly, both changes would remove a great deal of uncertainty over what water bodies are regulated and what type of conduct will subject a person or company to criminal prosecution, and the act could serve as a model for other environmental statutes in need of reform. This article will leave the debate over the proper definition of "Waters of the United States" to other authors, and instead will focus on the need for a higher standard of negligence.

Under the Clean Water Act, any person whose negligence causes a discharge of pollutants from a point source into waters of the United States is subject to criminal prosecution and faces a fine of up to $25,000 per day of violation and imprisonment for one year. 33 U.S.C. §1319(c)(1). At least two federal appellate courts have interpreted the degree of negligence that triggers criminal liability as simple negligence, which can amount to no more than a plant manager's switch of the wrong valve. The Environmental Protection Agency and Department of Justice have been judicious in their use of this criminal negligence provision and one might legitimately ask why elevate the negligence standard. The rationale is several fold: 1) civil and administrative enforcement options more effectively punish simple negligence violations and equally protect the public health and the environment; 2) a higher negligence standard would reflect the greater degree of precision that the enforcement program currently employs and would allow for more efficient administration of justice; 3) none of the principles of criminal prosecution is effectively served by imposing criminal penalties for simple negligence violations, as the threat of jail time has no deterrent impact on those engaged in accidental, as opposed to intentional, knowing, or reckless conduct; 4) a simple negligence provision does more harm than good to the psyche of the vast majority of hard-working employees who may worry about going to jail because they made an honest mistake; and, 5) retaining an antiquated simple negligence standard creates an unnecessary intrusion into the average citizen's due process rights and has a grave potential for abuse.

Negligence Standard Under Clean Water Act

There is a distinct difference between the simple negligence that can lead to criminal liability under the Clean Water Act and gross negligence, which is the minimum level of negligence required for criminal liability under other statutes. The Clean Water Act does contain a provision that penalizes gross negligence, 33 U.S.C. §1321(b)(7)(D). This provision imposes civil penalties when the discharge of oil or hazardous substances into the navigable waters of the United States is the result of gross negligence or willful misconduct. Like "negligently," "gross negligence" is not defined in the Clean Water Act. Because the gross negligence provision imposes only civil penalties, it is not relevant to this article's examination of criminally punishable negligence under the Clean Water Act.

Simple negligence is "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation." Black's Law Dictionary 1061 (8th ed. 2004). Simple negligence is further defined as "[n]egligence in which

the actor is not aware of the unreasonable risk that he or she is creating, but should have foreseen and avoided it." *Id.* at 1063. In contrast, gross negligence requires the actor's reckless disregard for the consequences of his or her actions, but does not reach the level of an intentional act. Specifically, gross negligence is "a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to a party." *Id.* at 1062. Gross negligence is also termed "culpable negligence" although some jurisdictions recognize a difference between the two. *See, e.g., State v. Back,* 775 N.W.2d 866, 869 (Minn. 2009) (stating that, in the criminal context, culpable negligence is "more than" gross negligence); *Travelers Indem. Co. v. PCR Inc*., 889 So. 2d 779, 793 n. 17 (Fla. 2004) (noting a difference between gross and culpable negligence).

Courts have clarified that simple negligence and gross negligence differ in degree, not type. *Alspaugh v. Diggs*, 77 S.E.2d 362, 364 (Va. 1953); *Hastings v. Flaherty*, 73 N.E.2d 601, 603 (Mass. 1946); *see Deviner v. Electrolux Motor AB,* 844 F.2d 769, 772 (11th Cir. 1988). "Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct, which is, or ought to be, known to have a tendency to injure." *Alspaugh* at 364. Thus, while gross negligence requires more than the lack of due care, it does not include the intent required for an intentional tort.

As mentioned above, at least two federal circuit courts have interpreted the Clean Water Act as penalizing conduct evincing a lack of due care, i.e., simple negligence. Most federal courts simply have not been confronted with the question of the appropriate negligence standard under the Clean Water Act. The Clean Water Act is one of only two federal environmental statutes that impose criminal penalties for negligent acts. The Clean Air Act also contains a provision that imposes criminal penalties for negligent acts: "(4) Any person who negligently releases into the ambient air any hazardous air pollutant listed pursuant to section 7412 of this title or any extremely hazardous substance listed pursuant to section 11002(a)(2) of this title that is not listed in section 7412 of this title, and who at the time negligently places another person in imminent danger of death or serious bodily injury shall, upon conviction, be punished by a fine under Title 18, or by imprisonment for not more than 1 year, or both." 42 U.S.C.A. §7413(c)(4).

Generally, simply negligent conduct is not subjected to criminal penalties. *See, e.g., Commonwealth v. Heck*, 517 Pa. 192, 199-200 (Pa. 1987); *State v. Hamilton*, 388 So.2d 561, 563-64 (Fla. 1980). For example, the Florida Supreme Court declared unconstitutional the portion of the Florida Air and Water Pollution Control Act that penalized "mere negligent conduct." *Hamilton*, 388 So.2d at 563-64. As the court reasoned, a statute that criminalizes simple negligence fails to provide "clearly ascertainable standards of guilt by which a citizen may gauge his conduct," and is therefore unconstitutional. *Id.* Historically, there may have been a need to prosecute simple negligence pollution violations through the criminal court system, but as modern environmental law has developed, that need has diminished.

Civil, Administrative Enforcement Options

A. Early Enforcement of Pollution Statutes Resulted in Minimal Criminal Penalties

Modern day environmental enforcement now is entering its fourth decade. While the law is still maturing, there is an impressive body of case law that guides enforcement actions. Prior to the 1970s, this was not the case. What little environmental enforcement took place was on an ad hoc basis and depended on rudimentary doctrines that were ill-suited to the wide variety of environmental violations that occurred. In the absence of an administrative agency authorized to pursue violations through a civil or administrative process, the criminal court system was tasked with handling all levels of violations: strict liability, negligence, and intentional acts. This approach often resulted in penalties that were limited to fines with no imprisonment, reflecting a reticence to impose jail time for strict liability environmental crimes. Successful enforcement often relied upon courts broadly interpreting statutes and applying doctrines such as the public welfare offense to environmental violations.

For example, unlawful pollution of the nation's waters was prosecuted primarily under the Rivers and Harbors Act of 1899. 33 U.S.C. §§ 403 et seq. This statute, unlike the Clean Water Act, did not provide comprehensive protection of the nation's waters. However, it did have the benefit of straightforward enforcement provisions that imposed strict liability upon any person who "throw[s], discharge[s], or deposit[s] … from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description." 33 U.S.C. §407. The enforcement provision of 33 U.S.C. Section 407 did not differentiate based on the violator's level of intent. All degrees of violations, i.e., strict liability, negligence, and knowing or intentional violations, were prosecuted as Class C misdemeanors under 33 U.S.C. Section 407 from the 1950s through the 1970s. *See, e.g., United States v. White Fuel Corp.*, 498 F.2d 619, 622, (1st Cir. 1974) (noting that "the Refuse Act has commonly been termed a strict liability statute"); *United States v. Ballard Oil of Hartford, Inc*., 195 F.2d 369, 371 (2d Cir. 1952) (upholding conviction under §407 when the discharge was negligent); *United States v. U.S. Steel Corp*., 328 F. Supp. 354, 356 (N.D. Ind. 1970) (denying motion to dismiss the information for failure to allege willful behavior because 33 U.S.C. §407 does not have a scienter requirement); *United States v. Interlake Steel Corp*., 297 F. Supp. 912, 915 (N.D. Ill. 1969) (same). The Department of Justice prosecuted all violations in criminal courts because the Environmental Protection Agency did not yet exist and no other administrative agency was equipped to pursue violations through an administrative process.

In a series of early cases brought under the Rivers and Harbors Act, federal courts broadened the statute's scope to address pollution incidents that might otherwise go unpunished. For example, in *United States v. Alaska Southern Packing Co*., 84 F.2d 444 (9th Cir. 1936), the U.S. Court of Appeals for the Ninth Circuit held that the River and Harbors Act's prohibition on depositing "any refuse matter" into the navigable waters of the United States included the discharge of oil. Alaska Southern Packing argued the statute should be construed more narrowly, to prohibit only those discharges that impeded navigation. In siding with the government, the Ninth Circuit noted that the statute unambiguously prohibited "the deposit of any refuse matter of any kind or description whatever … into any navigable water of the United States." *Id.* at 446.

Thirty years later, the Supreme Court concurred with the Ninth Circuit, holding "[t]he word 'refuse' includes all foreign substances and pollutants apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." *United States v. Standard Oil Co.*, 384 U.S. 224, 230 (1966). In reaching its decision in *United States v. Standard Oil Co.*, the court relied on language from an earlier Rivers and Harbors Act case, *United States v. Republic Steel Corp*., 362 U.S. 482 (1906), noting that "the history of [the Rivers and Harbors Act] and of related legislation dealing with our free-flowing rivers `forbids a narrow, cramped reading' of §13 [of the Rivers and Harbors Act]." *Standard Oil*, 384 U.S. at 226 (*quoting Republic Steel*, 362 U.S. at 491).

The broad strict liability approach embodied in the Rivers and Harbors Act was consistent with another doctrine used for environmental enforcement in this period— the "public welfare doctrine." Under laws deemed to be public welfare statutes, the usual requirement that a criminal defendant have knowledge of his wrongdoing is all but eliminated because the risk of harm to the public posed by a violation of the statute is so high. *United States v. Staples*, 511 U.S. 600, 606-07 (1994). Courts did not need to apply the public welfare doctrine to the Rivers and Harbors Act because that statute's strict liability provision already gave the government the ability to prosecute no-fault violations through the criminal court system. In one of the seminal public welfare cases, *United States v. Dotterweich*, 320 U.S. 277 (1943), the defendant, a general manager of a food distribution company, was found guilty of violating the Federal Food, Drug, and Cosmetic Act (FFDCA) for his role in introducing misbranded drugs into interstate commerce. The Supreme Court upheld Dotterweich's conviction even though he was unaware of the misbranded nature of the product being sold. The court explained that the FFDCA "dispenses with the conventional requirement

for criminal conduct-awareness of some wrongdoing" because the regulated substances "touch phases of lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." *Id.* at 280-81. In other words, because the public health risk posed by adulterated or misbranded food or drugs is so high, "the burden of acting at hazard [is placed] upon a person otherwise innocent but standing in responsible relation to a public danger." *Id.* at 281.

The court invoked the public welfare doctrine in a later case, upholding the conviction of the president of a national food chain corporation for violations of sanitation requirements under the FFDCA because of his failure to promptly prevent or remedy the violations. *United States v. Park*, 421 U.S. 658, 661-66, 673 (1975). In *Park*, the defendant was found guilty despite taking steps to contact his subordinates in charge of sanitation for the company because, prior to the discovery of the FFDCA violations, the defendant "was on notice that he could not rely on his system of delegation to subordinates to prevent or correct unsanitary conditions." *Id.* at 678. Notably, both *Dotterweich* and *Park* resulted in fines against the individual and/or the company, but not imprisonment. *See United States v. Park*, 499 F.2d 839, 840 (4th Cir. 1974) (fine of $250 imposed); *United States v. Buffalo Pharmacal Co., Inc.*, 131 F.2d 500, 501 (2d Cir. 1942) (Dotterweich, the general manager of Buffalo Pharmacal Company, was fined $500 and sentenced to sixty days' probation). The lack of imprisonment suggests an unwritten policy that courts were willing to enforce criminal liability for public welfare offenses, but did not necessarily consider imprisonment a just punishment for strict liability, rather than intentional, offenses. This philosophy quite likely reflects the use of the public welfare doctrine to help regulatory agencies enforce important public safety laws through the court system at a time when these agencies either were nonexistent or ill-equipped to handle enforcement actions on their own.

The Supreme Court extended the public welfare doctrine to an environmental statute in *United States v. International Minerals & Chemical Corp*., 402 U.S. 558 (1971). In *International Minerals*, the court held the defendant violated 49 C.F.R. §173.427, which required a shipper to indicate the classification of any hazardous materials being transported. The authorizing statute imposed criminal liability on any person who "knowingly violates any such regulation." 402 U.S. at 559. The defendant in *International Minerals* argued that, because the company lacked knowledge of the regulation, it could not be charged under the statute for transporting a corrosive liquid without the proper classification documents. In rejecting the defendant's argument, the Supreme Court relied on the principles of the public welfare doctrine, reasoning that given the dangerous and deleterious nature of the substance, the probability of regulation was so great that anyone who knew he possessed such substances must be presumed to know of the regulation. The "knowingly" language of the statute was thus construed to mean knowledge of the hazardous nature of the substance, not knowledge of the regulation. Also consistent with the public welfare doctrine were the penalties imposed for violation of the regulation; violators could be fined up to $1000 or imprisoned for up to a year, or both.

The public welfare doctrine and strict liability approach seen in the Rivers and Harbors Act allowed courts to enforce environmental laws, but the minimal penalties in those statutes limited the government's ability to punish more serious intentional conduct. As discussed in the next section, the modern environmental statutes addressed many of these shortcomings.

B. Modern Laws Diminish Need to Punish Simple Negligence Through Criminal Court System

When modern day environmental laws and regulations were enacted, the government gained a new set of tools that allowed for a more robust and graduated approach to environmental enforcement. EPA and the states now had the ability to handle less serious environmental violations through an administrative or civil judicial process. The public welfare offense, as originally envisioned, had less significance in the environmental enforcement arena because EPA and the states gained a plethora of new tools to effect the statutes' public health purpose. No longer limited to the strict liability penalties under the Rivers and Harbors

Act, DOJ and EPA now had the flexibility to impose a range of penalties commensurate with the range of environmental violations.

The first attempt at this more graduated approach is evident in the original version of the 1972 Clean Water Act. In the act, Congress recognized that not all environmental violations were carried out with the same level of intent, and therefore they merit different levels of punishment. Violations involving no mens rea, i.e., strict liability offenses and certain negligence violations, were subject only to administrative or civil liability, while violations involving negligent or willful conduct were subject to criminal penalties. Federal Water Pollution Control Act Amendments of 1972, §309(a)(1)-(2), (c)(1) (1972). Congress recognized the important deterrent effect that criminal penalties provide and included those penalties as the ultimate enforcement hammer of these statutes. These early criminal provisions, particularly in the case of the Clean Water Act, reflected some Congressional reticence about placing environmental crimes on par with other serious crimes, as the act's penalty provisions for both negligent and knowing conduct were only misdemeanors. Nonetheless, Congress recognized that criminal sanctions for environmental violations now could be reserved for situations where the actor had some mens rea—either negligent or knowing conduct, and that EPA's civil and administrative apparatus provided more appropriate punishment for strict liability violations.

C. 1987 Amendments to the Clean Water Act Reduced Need to Criminalize Simple Negligence

In 1987, Congress proposed amendments to the Clean Water Act, recognizing that misdemeanor penalties for intentional violations might not provide a sufficient disincentive for companies that intentionally violated environmental laws. For example, in the report for the proposed Clean Water Act amendments, the Senate Committee on Environment and Public Works remarked that stronger criminal sanctions were needed to deter "knowing violations of the Act [that] have caused serious environmental harm and millions of dollars of damage to private and public property." 99 Cong. Senate Report 50, 29 (May 14, 1985). To provide stronger disincentives, the 1987 amendments bifurcated criminal penalties making "knowing" violations felonies and "negligent" violations misdemeanors.

In the years following the 1987 amendments, courts began interpreting the mens rea requirement for criminal violations of the Clean Water Act and other environmental statutes. The opinions focused almost exclusively on the definition of "knowingly," and the definition of "negligence" was rarely if ever discussed. *See, e.g., United States v. Wilson*, 133 F.3d 251, 260-63 (4th Cir. 1997); *United States v. Hopkins*, 53 F.3d 533, 539-41 (2d Cir. 1995). The few opinions that talked about negligence did so in the context of whether an indictment was duplicitous if it included both a negligence and intentional act charge in one count. *E.g., United States v. Oxford Royal Mushroom Products, Inc.*, 487 F. Supp. 852, 856-58 (E.D. Pa. 1980). A review of the reported cases reveals that the standard of negligence was rarely in issue as the prosecutors invariably had proof to support the more difficult intentional standard. *See, e.g., Hopkins*, 53 F.3d at 535, 541; *United States v. Laughlin*, 768 F. Supp. 957, 959 (N.D.N.Y. 1991).

There were, however, some important albeit unreported decisions on the negligence standard. Prosecutors in those early cases argued successfully that the standard as set forth in the amended statute was simple negligence. *See, e.g.*, Government's Trial Brief in *United States v. Sea Gleaner Marine, Inc.*, CR86-129S at 14 (Aug. 7, 1986) (on file with author) (arguing that negligence under the Clean Water Act is the failure to use reasonable care). As support for the argument that the negligence standard was simple negligence, the prosecutors pointed to the legislative history of the Clean Water Act and the public welfare doctrine.

An examination of the Clean Water Act's legislative history reveals that there was not much forethought behind the negligence standard. The Congressional debates on the bill contain no real discussion of the degree of negligence intended or the potential consequences of a simple negligence standard. *See* 92 Cong. Rec. 118, 9419-10746 (1972). While the

Clean Water Act was being drafted in committee, a Congressman moved to amend the committee bill to include language that anyone who "willfully or negligently" violated an order issued by the Administrator would be subject to criminal penalties. *Id.* at 10643. Congressman Harsha opposed the language and stated, I would like to call to the attention of my colleagues the fact that in this legislation we already can charge a man for simple negligence, we can charge him with a criminal violation under this bill for simple negligence. When a violation occurs, the Administrator or the State, whoever may be involved, can either file a criminal charge under this law if there is negligence or if there is a willful violation of the law.

While that amendment ultimately was rejected, it reflects the uncertainty behind the drafting of criminal sanctions for negligent violations. The legislative history of the 1987 amendments similarly reveals little discussion of the negligence standard. Instead, commentary focused on the elevation of penalties for knowing violations and noted simply that misdemeanor penalties were "retained to address those negligent violations which merit lesser punishment." 99 Cong. Senate Report 50, 29

As for the argument that the public welfare doctrine supported a simple negligence standard, prosecutors made a convincing case that the line of Supreme Court decisions starting with *Dotterweich*, *Park*, and *International Minerals* all supported such a standard. On the surface, these cases certainly reflect the view that courts needed to interpret the statutory penalty provision broadly to effect its public health purpose. However, as discussed, courts had to stretch the limits of the statutes in these early cases because adequate public health statutes and agencies were lacking. The advent of EPA and its administrative and civil regimes reduced the need for such stretching by courts. While the public welfare doctrine appeared to fit environmental crimes and prosecutors made a strong argument for its application in those cases, the Clean Water Act granted EPA broad public welfare power that could be exercised outside the criminal justice system. Thus, the courts and EPA no longer needed to rely on the public welfare doctrine to achieve the same results; simple negligence and strict liability violations charged previously in the criminal system could be handled through administrative or civil processes. Judicial and prosecutorial support for application of the public welfare doctrine to the Clean Water Act may be waning. For example, in *United States v. Ahmad*, the U.S. Court of Appeals for the Fifth Circuit rejected the applicability of the public welfare doctrine to the Clean Water Act and refused to apply a lowered intent standard to knowing violations based on the public welfare doctrine. 101 F.3d 386, 391-92 (5th Cir. 1996). This holding contradicted other circuits, which had held that knowledge of the regulatory status of the discharged substance was not a requirement for conviction. *See, e.g., United States v. Self*, 2 F.3d 1071, 1091 (10th Cir. 1993).

More Efficient Administration of Justice

By the early 1990s, environmental crimes prosecutions had become a mainstay of the EPA's enforcement program, and the role of the simple negligence standard in criminal environmental law was further diminished. This diminished role is clearly reflected in a 1994 memorandum by the then-Director of the EPA's Office of Criminal Enforcement, Earl Devaney. *See* Devaney Memorandum, Jan. 12, 1994, available at http://ehscenter.bna.com/pic2/ehs.nsf/id/KFEN-6DJGQN?OpenDocument. Devaney's memorandum was a landmark moment in the development of DOJ's and EPA's criminal enforcement program. The memorandum was the first written policy that provided comprehensive guidance on the exercise of investigative discretion to agents and prosecutors. Until that time, the criminal case selection process had been shrouded in mystery and was not well understood or applied by DOJ or EPA. Devaney's memorandum provided clear guidance in written form, which was much-needed as the program grew to 200 agents. The guidance in Devaney's memorandum continues to be relevant and is still in use today.

Devaney's memorandum established a policy of investigative discretion in criminal enforcement actions. Given the limited resources of the agency, Devaney made it clear that only the most significant and egregious violators should be targeted. *Id.* at 10644. Before a case would even be considered for

prosecution, Devaney's memorandum required that each case go through a multi-factor case selection process. *Id.* at 4-5. The two most prominent factors were the significance of the environmental harm and the culpability of the conduct.

The stated emphasis on culpable conduct diminished the role of simple negligence in the criminal program. Although the government still advocated for a simple negligence standard, it was clear from this enforcement policy that a case based solely on simple negligence was rarely if ever to be pursued. As Steven Solow and Ronald Sarachan found in their study of criminal negligence prosecutions brought under the Clean Water Act, the cases that included a charge of simple negligence fell into four distinct categories: Extraordinary harm cases; very serious harm and gross negligence; compromise cases where negligence charges serve as a means to achieve a plea agreement; and, combination cases in which simple negligence charges are combined with felony charges under environmental statutes and/or traditional title 18 charges. *See* Solow and Sarachan, Criminal Negligence Prosecutions under the Federal Clean Water Act: A Statistical Analysis and an Evaluation of the Impact of Hanousek and Hong, 32 ELR 11153 at 11158 (Oct. 2002).

Thus, except in cases of extraordinary harm, Devaney's memorandum envisioned prosecution of simple negligence cases only when the negligent conduct was combined with other more culpable conduct that warranted criminal prosecution. As discussed in more detail later in this article, the one rare exception to this rule, extraordinary harm simple negligence cases, are precisely the cases where investigative discretion has the greatest potential for abuse and where due process violations are most likely to occur. Adoption of a gross negligence standard would actually promote evenhanded negligence prosecutions under the Clean Water Act by insulating DOJ and EPA from public pressure to pursue simple negligence violations in extraordinary harm cases, but still allowing them where gross negligence was present. In this way, a gross negligence standard in the Clean Water Act is consistent with the principles in Devaney's memorandum.

The memorandum focused on factors that by definition would not apply to simple negligence violations, such as a history of repeated violations, failure to report discharges, and concealment of misconduct. Absent such additional culpable conduct, a simple negligence violation was unlikely to result in a criminal prosecution under the policy outlined in Devaney's memorandum. This stated policy was no doubt influenced by the civil and administrative penalties readily available to EPA as an alternative to prosecuting simple negligence violations.

Principles of Federal Prosecution Not Served

Not only is a gross negligence standard consistent with EPA's investigative discretion policy, it also consistent with DOJ's Principles of Federal Prosecution. The United States Attorneys' Manual states that prosecution should be declined when "[n]o substantial Federal interest would be served by prosecution; [t]he person is subject to effective prosecution in another jurisdiction; or [t]here exists an adequate non-criminal alternative to prosecution." United States Attorneys' Manual 9-27.220. "Substantial Federal interests" include the nature and seriousness of the offense, the deterrent effect of prosecution, and the person's culpability in connection with the offense. *Id.* at 9-27.230. These same federal interests generally are reflected in Devaney's memorandum. Agents were instructed to focus on those cases with a high degree of environmental harm and/or culpable conduct. The directives of Devaney's memorandum thus dovetail with the principles of federal prosecution.

Simply put, pure simple negligence violations do not advance federal prosecution principles. The threat of prosecution cannot be a deterrent for accidental violations, and the level of culpability in a simple negligence case does not rise to a level of intent that is capable of being deterred through criminal prosecution. Even if simple negligence conduct could be deterred, the threat of criminal prosecution would be low on the list of factors that an actor would consider before engaging in simply negligent conduct. For example, in simple negligence cases, the sheer cost of a cleanup

operation serves as a better deterrent for corporations than jail time. As the recent oil spill in the Gulf of Mexico demonstrates, the costs of a cleanup operation after a discharge can be enormous. As of September 1, 2010, BP already had spent approximately $6.1 billion on its Gulf of Mexico cleanup operations. Jennifer Dlouhy, Houston Chronicle, BP Ad Tally: Nearly $100 Million, available at http://www.chron.com/disp/story.mpl/business/7182730.html (Sept. 1, 2010). *See also*, "BP Well Permanently Killed, but Cleanup, Assessment of Damage Far From Over," (181 DEN A-11, 9/21/10).

Whatever fine might be imposed in any ensuing criminal case will pale in comparison to these costs. For individuals, professional licensing and continued employment will likely be more prominent in their minds than the threat of criminal prosecution. Thus, in focusing prosecutors' efforts on cases involving a higher degree of culpable conduct than simple negligence, the Principles of Federal Prosecution promote prosecution of those cases in which the prosecution could actually serve a deterrent effect.

Standard Does More Harm Than Good

Simply stated, criminal penalties for simple negligence acts do not serve as an effective deterrent because the punished behavior is by definition unintentional. The broad reach of the Clean Water Act's simple negligence provision therefore serves to create anxiety for the vast majority of hard working employees performing ordinary tasks while failing to incentivize better behavior. Furthermore, criminalizing simple negligence can have the unintended consequence of paralyzing decisionmakers who may be afraid to act because of the threat of potential jail time. Ultimately, this hurts businesses by encouraging them to devote an inordinate amount of time and resources to ordinary decisions out of fear. These actors may fear jail time if they are perceived to have so much as failed to use ordinary care. The better course is to punish simple negligence through a civil or administrative process and restrict criminal prosecutions to grossly negligent violations or worse. This scheme would alleviate the anxieties of environmental managers and ensure that criminal prosecution is used when it can actually serve to deter the prosecuted conduct.

Outdated Standard Makes Potential for Abuse

Keeping an antiquated criminal simple negligence provision in the Clean Water Act creates a grave potential for abuse of due process. Four aspects of the provision demonstrate that potential. First, the CWA's simple negligence provision requires the discharge of a "pollutant." Pollutant is defined using a long list of substances and waste streams that are subject to regulation. The term includes: "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. §1362(13). As written, this term could include virtually any item that is placed into a water of the United States. This broad definition of "pollutants" is vastly different from most other environmental statutes that regulate substances such as hazardous waste (Resource Conservation and Recovery Act), hazardous substances (Comprehensive Environmental Response, Compensation, and Liability Act), or toxic substances (Toxic Substance Control Act). By their very nature, the substances regulated under these statutes put a person on notice of the probability of regulation. *See International Minerals*, 402 U.S. at 565. In contrast, under the Clean Water Act's broad definition of pollutant, the average citizen may not be on notice that the particular substance or waste stream he is depositing into waters of the United States is subject to regulation.

Second, simple negligence most often is defined as the failure to exercise the standard of care that a reasonably prudent person would have exercised in the same situation. *See United States v. Ortiz*, 427 F.3d 1278, 1282-83 (10th Cir. 2005); *United States v. Hanousek*, 176 F.3d 1116, 1120-21, (9th Cir. 1999). This definition raises the question of what standard of care should apply; that of persons working in a heavily regulated industry or the average citizen doing ordinary work? The government may argue that the standard is

really intended for those working in a heavily regulated industry that are on notice of the probability of regulation. Unfortunately, that is not how the statute is written and as it written it can just as easily be applied to the average citizen doing ordinary work.

Third, simple negligence is governed by civil common law concepts that are not well suited to determinations of guilt or innocence in criminal court. For example, many oil spills are the result of vessel collisions where the operator of one vessel or both may have caused the accident that resulted in the spill. Determining whose simple negligence was the cause in fact and proximate cause of the accident is a tort law concept that is ill suited for the criminal court system and adds to the due process concerns already in play.

Finally, the public welfare offense doctrine, which the government continues to invoke in Clean Water Act criminal negligence prosecutions, is subject to abuse. *See Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J. dissenting). If the Clean Water Act by virtue of its status as a public welfare statute, should be given its broadest application, the act's simple negligence standard could approach a strict liability standard. The DOJ implicitly acknowledged this concern about the public welfare doctrine in its brief in United States v. Hanousek. Rather than arguing in the main section of its brief that the public welfare doctrine provides support for application of a simple negligence standard under the Clean Water Act, DOJ relegated that argument to a footnote. *United States v. Hanousek*, Brief for the United States as Appellee, 1998 WL 34078917, at 16 n. 12. This soft-pedaling of the public welfare doctrine by DOJ may indicate that the government is concerned about how closely a public welfare offense can resemble a strict liability crime, and recognizes the accompanying potential for abuse. At the very least, DOJ appears to be wary of relying on the public welfare offense as a cornerstone of its argument for a simple negligence standard in the Clean Water Act. Such broad liability presents a trap for the average citizen who based on the above, may not know that his conduct is unlawful.

This is precisely the danger that Supreme Court Justice Clarence Thomas warned about in his in his dissent from the Supreme Court's denial of certiorari in *Hanousek v. United States*. In *Hanousek*, the U.S. Court of Appeals for the Ninth Circuit upheld the federal district court's simple negligence jury instruction, as opposed to the gross negligence instruction proposed by Hanousek. 176 F.3d at 1120-21. In dissenting from the Supreme Court's denial of certiorari, Thomas expressed concern about what he interpreted as an unwarranted expansion of the public welfare doctrine, and warned that such an expansion of the doctrine could lead to "criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities." *Hanousek*, 120 S.Ct. at 861. *Hanousek*, and two other recently reported Clean Water Act simple negligence cases all support the proposition that simple negligence is unnecessary in modern day environmental criminal law. *See Ortiz*, 427 F.3d 1278; *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001).

The facts in *Hanousek* reflect that Hanousek and another railroad employee had attempted to cover up a heating oil spill into the Skagway River as a result of a backhoe operator's puncture of an oil pipeline. 176 F.3d at 1119. The conduct surrounding the puncture of the pipeline was charged under the Clean Water Act's simple negligence misdemeanor, while the conduct surrounding the attempted cover-up was charged under Title 18 felony statutes including conspiracy, false statement, and obstruction of justice. *Id.* Hanousek was not convicted of any felony conduct, and while his co-defendant was convicted on two charges, the co-defendant chose not to appeal those convictions with Hanousek. Thus, at first blush, the facts as presented in the Ninth Circuit decision could lead one to believe that Hanousek's simple negligence charge was brought alone and not in connection with the more serious felony conduct. Absent the more serious felony conduct, the authors believe that Hanousek's case would have been handled by a civil or more likely administrative process and not through the criminal courts. Similarly, in both *Hong* and *Ortiz*, the government presented evidence that each defendant had been put on notice that their conduct would be in violation of law before engaging in their unlawful conduct. *Ortiz*, 427 F.3d at 1280-81; *Hong*, 242 F.3d at 530, 532. The authors believe that if Hong or

Ortiz had ceased their conduct after being put on notice, the violations would been handled through civil or administrative penalties, not criminal prosecution. Thus, these cases demonstrate that absent more serious felony conduct, simple negligence conduct alone is not pursued as a criminal offense.

Prosecutors and investigators understandably may be unwilling to see the simple negligence standard leave their arsenal of potential charges. However, DOJ's and EPA's enforcement priorities in this area are unlikely to change, and limited agency resources more than anything else will continue to restrict simple negligence prosecutions. *See* Solow and Sarachan, Criminal Negligence Prosecutions Under the Federal Clean Water Act, 11160. Further, prosecutors still could pursue the overriding majority of the cases that meet the standards set out in the Devaney memorandum through gross negligence charges. The only category of simple negligence prosecutions that might be impacted is cases involving extraordinary environmental harm but only simple negligent conduct by a defendant. *Id.*

It is precisely that arena, extraordinary environmental harm, where the simple negligence standard has the most potential for injustice. Consider a release of a hazardous substance that causes a significant fish kill in a popular fishing venue. The anger and emotion that such an event generates in the community can easily create a lynch mob mentality that will put significant pressure on EPA investigators and DOJ prosecutors to seek scapegoats against whom they can seek the maximum penalty. A simple negligence standard used in conjunction with the public welfare offense doctrine or the responsible corporate officer doctrine would allow prosecutors to present charges against anyone remotely responsible for the release. Such charges have the grave potential to create a miscarriage of justice. As the adage goes, bad facts make bad law. Raising the bar from simple negligence to gross negligence in an extraordinary harm case would provide an element of protection against this potential injustice.

Conclusion

Enforcement of the laws protecting the waters of the United States has come a long way since the Rivers and Harbors Act of 1899. The Clean Water Act is a tremendous improvement over that statute, and punishments can now be calibrated to fit the crime. DOJ and EPA can seek severe criminal penalties for knowing conduct that leads to great environmental harm. However, as this article has demonstrated, the other end of the Clean Water Act culpability spectrum needs refinement. Replacing the simple negligence standard applied to criminal violations in several circuits with a clear, national gross negligence standard would be an important step in the right direction. Eliminating criminal penalties for simple negligence violations would ensure that the laws have an actual deterrent effect and incentivize the desired behavior. Heightening the negligence standard also removes simple negligence cases from an overburdened criminal justice system and redirects them to the civil and administrative arena, where they can be adequately addressed. Elimination of the simple negligence standard would align the statutory scheme with the EPA's enforcement priorities, without impacting the EPA's enforcement ability. It also would provide much needed protection from overzealous prosecutions in the very situation—the extraordinary harm case—where the potential for abuse is most ripe. Finally, it would allow the regulated community to make everyday business decisions without the fear that an honest mistake will land them in jail.

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WHO'S SUING WHOM—THE LATEST EPA, DOJ, AND CITIZEN GROUP ENVIRONMENTAL ENFORCEMENT INITIATIVES

Ryan Becker

At the American Bar Association's Section of Environment, Energy, and Resources 19th Section Fall Meeting on October 1 in New Orleans, one of the highlights included a panel discussion with the leading environmental enforcement attorneys for EPA, DOJ, and the Environmental Integrity Project. The panel discussed "What's New in Environmental Enforcement Under the Obama Administration," and it was moderated by professor Tracy Hester from the University of Houston Law Center. The speakers provided a capsule summary of the key enforcement priorities and initiatives for the next year.

EPA's Perspective. The panel began with a presentation by Catherine McCabe, the principal deputy assistant administrator in EPA's Office of Enforcement and Compliance Assurance (OECA). Her speech touched on EPA's enforcement priorities under the Obama administration, which include (1) managing climate change, air quality, and chemical safety, (2) protecting the waters of the United States, (3) cleaning up communities, and (4) strengthening tribal partnerships. These larger enforcement priorities, however, provided a framework for three more focused enforcement goals that EPA intends to pursue:

- Making a difference in communities. Under this goal, EPA will focus on aggressively enforcing matters under both civil and criminal authorities that involve the most serious violations. McCabe noted that EPA will pay attention to communities that present environmental justice concerns.

- Tending the state relationship. McCabe observed that EPA seeks a joint commitment regarding enforcement initiatives with the states. As it stands, the states already do 90 percent of the enforcement. By focusing the objectives among the EPA program offices and the states, efficiency in enforcement measures can be achieved.

- Informing the public. Last, McCabe emphasized that EPA wishes to increase transparency for its enforcement activities by providing more information to the public. "Enforcement is no longer in the background at the EPA," she said, and "the American people can be better served by knowing that polluters are being held accountable."

Beyond these general goals, McCabe described in detail some of EPA's new national enforcement initiatives (NEI) for 2011 through 2013. These initiatives resulted from extensive consultations and public comment procedures that lasted over three years, so EPA has a great deal of confidence in them. EPA kicked off the new NEI priorities on October 1, and it will immediately begin to focus on the most serious problems. The NEI priorities included water enforcement (primarily combined sewer overflows and sanitary sewer overflows, animal wastes in surface water and groundwater), air enforcement (with a strong interest in the use of flares and the ongoing New Source Review initiatives against coal, cement, and acid plants), and general NEI goals targeting mineral processing and the energy extraction sector.

Two of McCabe's concluding comments bear special notice. First, she discussed EPA's approach to enforcement at oil and gas production sites that use fracking, a process that involves fracturing geologic formations of dense rock containing trapped gas. McCabe emphasized that fracking was a positive development, but that EPA needed to assure that it did not cause pollution. According to McCabe, EPA has seen a great deal of concern over the Marcellus Shale in Pennsylvania and New York. This situation has led EPA to study potential groundwater contamination, and McCabe pointedly added that EPA would also look at these operations from the enforcement side under existing laws. She added that EPA is taking a similar approach in Barnett Shale in Texas, although she noted that additional issues arose in Texas where the surface owners have been surprised by mineral rights development without their consent or notification.

McCabe concluded by describing OECA's views on the enforcement of greenhouse gas rules. She emphasized that OECA would start with compliance concerns over pending greenhouse gas reporting requirements, and EPA will look for inaccurate reporting (although EPA's criminal team will focus on knowing violations). McCabe observed as well that EPA's tailoring rule will take effect in 2011, and any facility whose modifications cause an increase in greenhouse gas emissions exceeding 75,000 tons per year will need to "come in." She said that these efforts were not "a big initiative," but OECA will make its presence known in this area.

DOJ's Perspective. Thomas Mariani Jr., the assistant section chief of DOJ's Environmental Enforcement Section, spoke next. His remarks focused primarily on the interaction between EPA and DOJ on enforcement matters, and he divided his thoughts into three topics: how DOJ fits into EPA's enforcement priorities; the new work DOJ has received from EPA; and a quick summary of a few interesting cases and settlements.

Mariani began by observing that "EPA sets the table at DOJ for environmental issues." He drew an analogy for this process: if the two agencies were painting a picture, EPA picks the medium, size, and style of the picture. This broad description has exceptions, of course, and Mariani noted that DOJ has its own interests in promoting cases that affect environmental justice issues. Other events can also reshape the agencies' agendas, such as the Deepwater Horizon. Smaller events can also reshift priorities, including bankruptcy declarations or the pending expiration of a statute of limitation.

The new work that EPA has recently referred to DOJ reflects EPA's existing priorities and work flow. Broad EPA enforcement goals generally lead to referrals of cases needed to vindicate those priorities. As a result, DOJ is seeing a growing use of water referrals and Resource Conservation and Recovery Act cases. Air enforcement cases have not seen a similar increase because those referral rates are already high. Mariani added that these initiatives were bearing fruit, particularly with mineral waste enforcement cases and referrals dealing with discharges of untreated wastes to U.S. waters (including a $2 billion settlement with Kansas City, Missouri).

Last, Mariani noted several interesting cases and settlements that DOJ had recently handled. These cases included Excel Energy (D. Minn.), in which DOJ obtained an injunction to force an energy company to provide answers to EPA's section 114 information request; *United States v. Citgo Petroleum* (D. La), where a district court refused to give Citgo summary judgment on its claim that a prior spill's resolution should preclude enforcement or require penalty relief for a subsequent spill under analogous circumstances; and several Comprehensive Environmental Response, Compensation, and Liability Act cases on joint and several liability in the aftermath of the *Burlington Northern* decision by the U.S. Supreme Court in 2009.

Perspectives from the Environmental Integrity Project. Eric Schaeffer, the executive director for the Environmental Integrity Project in Washington, D.C., spoke last. His presentation began by noting that both EPA and DOJ acknowledge the importance of consistency and steady enforcement goals. As a result, EPA's and DOJ's enforcement priorities and practices did not vary dramatically between cycles (and rightly so, according to Schaeffer). Schaeffer therefore wanted to discuss ways to adjust EPA's and DOJ's implementation of priorities rather than criticize the priorities themselves.

Schaeffer began by pointing to concentrated animal feeding operations (CAFOs). He noted that EPA had made CAFOs an enforcement priority since 1988, but that EPA's and DOJ's efforts had not had much effect. He suggested that EPA and DOJ should instead go after the large corporations that integrate the vertical chain of production and therefore exercise control. According to Schaeffer, these integrators manage the entire chain of operation from hatching through growth to slaughter and then market. While suing small farmers would have little effect, going after Tyson and Purdue would make a difference. Environmental groups have tried this strategy, but largely without government assistance.

Schaeffer next discussed enforcement issues related to coal-fired power plants. These plants have a huge environmental footprint, but EPA has historically focused on their nitrogen oxides and sulfur dioxide emissions. While this approach has yielded big settlements and substantial environmental benefits, it has left particulate matter (PM) as an orphan pollutant. Monitors at coal-fired power plants would have a significant effect on verifying their PM emissions, and PM reductions would quickly justify the cost of the monitors (particularly because EPA has concluded that one pound of PM reduction yields $500,000 in health benefits). Power plants also have sizable water discharges from landfills and surface impoundments that contain coal ash, and those units frequently leak into nearby water bodies. Schaeffer concluded that most courts with these scenarios would find that EPA had jurisdiction to act because of the direct discharges into waters of the United States (which would not pose any problems under *Rapanos*).

Power plants, according to Schaeffer, place second only to the mining industry for discharges of metals, and they contribute to substantial contaminated groundwater influxes into surface water. This situation needs enforcement, and that enforcement should be coordinated and global. "We don't do this industry any favors by doing it piecemeal," Schaeffer added, because the coal industry is now facing a day of reckoning due to media-specific regulations. The toxic metals leaking into water originated from huge piles of ash that were in turn created by scrubbers mandated for air pollution control. After including its bag house facility to capture particulate pollution, its scrubber, and its ash pond, one large Virginia power plant had dedicated 90 percent of its site to pollution control. This situation resulted from piecemeal regulation by EPA and the state.

Last, Schaeffer emphasized the importance of monitoring for future enforcement on air toxics and pollution "spikes" in communities. He pointed out that EPA currently does not require continuous monitoring for organic air toxics such as benzene, and it only requires little intermittent monitoring. By relying on rough emission factors with large margins of error, at least one facility discovered that it had substantially underestimated actual emissions because the emission factor allowed for "immaculate combustion." He also added that EPA was doing "interesting work" on flares and had discovered large gaps between rated combustion efficiency and actual flare performance.

Schaeffer concluded by making three points. First, he suggested that EPA should create cross-sector priorities for future enforcement and that one such priority should focus on monitoring. Second, he requested that EPA "actually litigate a few cases." While most cases settle, EPA will still need to make law through enforcement because Congress has not passed any significant new environmental statutes in twenty years. And last, Schaeffer pointed out that permitting and enforcement teams need to coordinate their efforts. A bad permit will invariably confound enforcement, and EPA needs to speak with one voice.

CRIMINAL ENFORCEMENT UNDER THE PLANT PROTECTION ACT OF 2000: A "NEW" WEAPON IN THE ENVIRONMENTAL ENFORCEMENT ARSENAL

Lathrop B. Nelson III

A package arrives at a local post office labeled "toys, gifts, and gellies," yet when postal workers examine the package, they hear scratching sounds and, upon opening, discover twenty-five live beetles. The beetles from the package feed on the aerial portion of plants, while the larvae feed on roots, such that if they were to escape, they could cause serious economic and environmental harm. To prosecute such a crime, the government turns to a relatively obscure sanction that is increasingly the subject of criminal actions by the Department of Justice: the criminal provisions within the Plant Protection Act of 2000 (PPA), 7 U.S.C. § 7734. *United States v. DiLullo*, No. 08-cr-761 (E.D. Pa.).

Plant pests and invasive plants cause considerable damage to the country's agricultural base and other natural resources. Pests such as citrus canker, boll weevil, Asian long-horned beetle, and emerald ash borer have cost hundreds of millions of dollars, destroyed thousands of trees, and infected crops throughout the United States. In response to such threats, the federal government enacted the PPA, which consolidated various environmental statutes and enhanced regulation of interstate and foreign commerce of agricultural products to prevent the further introduction and dissemination of plant pests or noxious weeds.

As part of the enhanced regulatory regime, the PPA increased both the civil and criminal penalties previously available under its predecessor statutes. Moreover, since the enactment of the PPA, the enforcement provisions have been amended twice: first in 2002 to add a felony provision; and again in 2008 to increase the corporate penalties for willful violations.

Despite the PPA's existence for nearly ten years, the Department of Justice has only recently turned to the PPA as a weapon in its arsenal in the prosecution of environmental crimes. Such prosecutions shed light on the types of criminal actions that can be expected by the Department of Justice under the PPA and further raise questions as to how courts may interpret the act.

The Plant Protection Act

The PPA regulates the importation, entry, exportation, or movement in interstate commerce of any plant pest (defined as any living stage of numerous categories of living organisms that "can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product"). 7 U.S.C. § 7711(a). The PPA also authorizes the secretary of the Department of Agriculture to prohibit or restrict the importation, exportation, or interstate movement of any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the secretary determines that the regulation is necessary to prevent the introduction or dissemination of a plant pest or noxious weed into or within the United States. 7 U.S.C. § 7712(a). Pursuant to these sections, the secretary has promulgated extensive regulations governing the importation of plant pests, plants, and plant products. 7 C.F.R. § 300 et seq.

Significantly, the PPA imposes criminal liability for violations of the act and the regulations promulgated pursuant to it. Upon enactment, the PPA established a misdemeanor offense for any person who "knowingly violates" the act or "knowingly forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this title." 7 U.S.C. § 7734(a)(1)(A). In 2002, the PPA was amended to add a felony offense, punishable of up to five years' imprisonment, for anyone who "knowingly imports, enters, exports, or moves any plant, plant product, biological control organism, plant pest, noxious weed, or article, for distribution or sale, in violation of this chapter." 7 U.S.C. § 7734(a)(1)(B). Second (and subsequent) convictions carry a maximum sentence of 10 years. 7 U.S.C. § 7734(a)(2).

In addition to criminal penalties, the PPA provides for civil penalties. 7 U.S.C. § 7734(b). Penalties shall not exceed $50,000 (or $1000 for an initial violation for the movement of articles not for monetary gain) for an

individual. Penalties for a corporation shall not exceed $250,000 for each violation, with a maximum of $500,000 for all violations in a single proceeding if not willful. If willful, a corporation faces a maximum of $1,000,000 for all violations in a single proceeding. Alternatively, civil penalties may equal twice the gain or loss for any violation if greater than the statutory amounts. In determining whether to assess a penalty, the secretary shall take into account the nature, circumstance, extent, and gravity of the violations, and may consider (1) ability to pay; (2) effect on ability to continue to do business; (3) any history of prior violations; (4) the degree of culpability; and (5) any other factors the secretary considers appropriate. 7 U.S.C. § 7734(b)(2).

The PPA also imposes vicarious liability on corporations for violations of the act. Under the PPA, "the act or omission, or failure of any officer, agent, or person acting for or employed by any other person within the scope of his or her employment or office, shall be deemed also to be the act, omission, or failure of the other person." 7 U.S.C. § 7734(c).

Prosecutions Under The PPA

Within the past few years, the Department of Justice has increased the use of the criminal provisions within the PPA for environmental enforcement. Although the PPA passed in 2000, the first criminal prosecution involving the PPA occurred five years later in *United States v. Morimoto*, No. 05-cr-496-SI (N.D. Cal.), a prosecution of a Japanese farmer who had improperly imported citrus budwood cuttings in packages labeled "candies & chocolate" and/or "books and chocolates." One such shipment of cuttings tested positive for citrus canker, a potentially devastating agricultural pest of citrus crops. The defendant pleaded guilty to a criminal complaint alleging a single smuggling violation under 18 U.S.C. section 545 of knowingly importing the cuttings contrary to regulations promulgated under the PPA and was sentenced to one month's imprisonment, a $5000 fine, and community service. Although this is the first known prosecution involving the PPA, the Department of Justice did not actually charge the defendant under the criminal provisions of the PPA, but instead relied upon a smuggling charge pursuant to 18 U.S.C. section 545.

Since then, however, the Department of Justice has prosecuted successfully several individuals under the criminal provisions of the act. In *United States v. Ramirez*, No. 08-cr-524 (S.D. Tex.), the United States charged the owner of a pest control service company and several plant protection and quarantine (PPQ) officers with a conspiracy to violate the PPA, underlying PPA violations, and several additional criminal violations. The government charged that the defendants did not properly fumigate infected agricultural products or allowed the products to leave the fumigation station knowing that they had not been properly treated. Following guilty pleas on the PPA conspiracy and substantive counts, the company owner was sentenced to a year and a day and $39,541.91 in restitution and a PPQ officer was sentenced to a 10-month split sentence with $19,770.46 in restitution. A third defendant, a PPQ officer, pleaded guilty to a one count superseding criminal information of a misdemeanor violation of the PPA for a violation of allowing a truck with plants infested with a plant pest to leave the fumigation station knowing that it had not been properly fumigated.

The next charges brought by the Department of Justice under the PPA, *United States v. DiLullo*, No. 08-cr-761 (E.D. Pa.), are the subject of this article's opening example. A Pennsylvania "wildlife enthusiast" received a shipment of 25 live beetles without a permit required by PPA regulations. The defendant pleaded guilty under the PPA's misdemeanor provision of knowingly importing plant pests without the required permit and received a sentence of three months' probation and a $5000 fine.

In *United States v. Economy Cash & Carry, Inc.*, No. 09-mj-6732-NJG (W.D. Tex.), the Department of Justice brought PPA charges against a nonprescription drug and food distributor for knowingly counterfeiting a stamp that certified the heat treatment of wood pallets for exportation or importation. The company received a fine of $22,000. In addition, in *United States v. Sayklay*, No. 09-cr-3209-KC (W.D. Tex.), the government charged a company executive with making a false statement under 18 U.S.C. section 1001(a)(1) for the same conduct charged against the company under the PPA. The defendant was sentenced to two years' probation

and ordered to pay an $8000 fine. Although the Department of Justice press release lauds the conviction of ECC as the "first" under the PPA, the conviction was the first under the specific regulation relating to the heat treatment of wood packing materials, 7 C.F.R. section 319.40-3(b), and not, as detailed above, under the PPA itself.

Most recently, in *United States v. Prime Airport Services, Inc.*, No. 10-cr-20671 (S.D. Fla.), the United States obtained a maximum $1,000,000 fine against a ground cargo carrier at Miami International Airport for two felony violations of the PPA. The company pleaded guilty to one count of knowingly releasing unfumigated hydrangeas containing the plant pest coleoptera (beetles) even after the hydrangeas were subject to an emergency action notice that required them to be treated, returned to the country of origin, or destroyed. The company also pleaded guilty to knowingly discarding a shipment of Peruvian asparagus that had missed its international connecting flight into a runway dumpster, without following the safeguards required by regulations promulgated pursuant to the PPA.

Future PPA Developments

Although there have been an increasing number of PPA prosecutions, no court has yet analyzed the contours of the PPA's criminal provisions. As a result, there are open issues regarding their interpretation. One such open issue that will undoubtedly be litigated as the Department of Justice increases the use of these criminal sanctions is the mens rea requirement for a felony conviction. Although the misdemeanor provision of the PPA is clear that it requires a "knowing violation," the felony section provides less clarity, although a further evaluation suggests that conviction of a felony imposes the same scienter requirement as that for a misdemeanor offense.

The felony provision imposes criminal liability on "a person that knowingly imports, enters, exports, or moves any plant, plant product, biological control organism, plant pest, noxious weed, or article, for distribution or sale, in violation of this chapter." 7 U.S.C. § 7734(a)(1)(B). The term "knowingly" does not immediately precede the word "violation" as in the misdemeanor provision. Guidance from the Supreme Court in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), and *Liparota v. United States*, 471 U.S. 419 (1985), however, suggests that "knowingly" should be applied to each element within the statute so as to not criminalize otherwise innocent conduct. Indeed, without requiring that the individual defendant knows the conduct violates the statute, an individual could be subject to substantial criminal liability without even being aware that he or she was transporting restricted plant materials.

Further, there is nothing in the legislative history of the 2002 amendment adding the felony provision to suggest that Congress intended to remove the mens rea required for a misdemeanor offense. Rather, the congressional committee report noted only that the amendment included a provision "to establish increased criminal penalties in cases of violations of the Plant Protection Act involving persons knowingly destroying records or moving plant pests in commerce for distribution." H. Rep. No. 107-424, as reprinted in 2002 U.S.C.C.A.N. 141, 397–98. Such a generalized statement does not provide guidance as to the mens rea of a felony violation, let alone support that Congress intended to impose a lower mens rea requirement for a felony than a misdemeanor violation of the PPA. This question, however, remains to be addressed by the courts, as do other such provisions, including the reach of the vicarious liability provision within the penalties section of the PPA.

Conclusion

With the increasing threat of plant pests infecting the country's agricultural base and imposing significant economic harm, the Department of Justice has uncovered a new weapon in environmental enforcement. As the Department of Justice increases its enforcement of the PPA, we shall expect to see a wider variety of prosecutions and greater attention paid to the act.

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AN ART OF WAR LESSON APPLIED TO MASS TORTS: THE *LONE PINE* STRATEGY

David B. Weinstein and Christopher Torres

Sun-tzu observed that "the wise general will concentrate on securing provisions from the enemy. One bushel of the enemy's foodstuffs is worth twenty of ours . . ." SUN TZU, THE ART OF WAR 174 (Ralph D. Sawyer trans., Westview Press 1994). These words were written sometime in the sixth century BCE. And, based on "Sun-tzu's discussion of the fiscal difficulties and impact of mobilizing a hundred-thousand-man army accompanied by two thousand chariots" some scholars believe that the scope of warfare was substantial during that period. The more things change, the more they stay the same.

Today, we face the challenge of efficiently resolving disputes over alleged harms resulting from mass production, mass marketing, and mass consumption. The mass tort is one of the vehicles through which these disputes are resolved. Mass torts may be precipitated by government enforcement, particularly those that receive publicity through mass media, and mass communications such as e-mail, blogs, and nongovernmental and government Web sites. And when governments take enforcement actions, which may be administrative, civil, or criminal, eager eyes in the plaintiffs' bar or public interest groups are likely to be watching.

Mass torts are complex, time-consuming, and generally very expensive litigations. As a result, plaintiffs' counsel have sometimes exploited mass torts as tactical tools to extract settlements that are not otherwise justified by the facts. There is, however, a strategy that is consistent with the 2500-year-old *Art of War*, which shifts a significant burden of the conflict back to plaintiffs in these cases—the *Lone Pine* order.

The *Lone Pine* Order

A *Lone Pine* order is a case management tool that takes its name from a 1986 New Jersey environmental mass tort case in which a court required plaintiffs to substantiate their allegations of personal injury, property damage, and causation. *See Lore v. Lone Pine Corp*., 1986 WL 637507 (N.J. Super. Ct. Nov. 18, 1986). *Lone Pine* orders promote a civil justice function of achieving judicial economy by eliminating frivolous claims and reducing unnecessary litigation. This is accomplished by shifting to plaintiffs the threshold burden of demonstrating prima facie evidence of injury and causation, which should have been known as a result of their pre-suit investigation. *Id.* at *4. ("[I]t is time that prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause.") By requiring a prima facie showing of injury and causation, the *Lone Pine* order reduces the incidence of plaintiffs' counsel using the mass tort as a device for extracting unmerited settlement value. *Id.* ("This Court 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 of proving their cause of action.")

The *Lone Pine* Case

In the *Lone Pine* case, plaintiffs sued 464 defendants, one that operated a landfill and others that were alleged generators or haulers of toxic materials. Plaintiffs claimed that they suffered personal injuries as a result of exposure to contamination, such as allergies and skin rashes, and that their properties had depreciated in value due to the contamination. An EPA record of decision summarizing 16 studies on the *Lone Pine* landfill, however, suggested that contamination was confined to the landfill and its immediate vicinity, and "that there was no problem with ground water contamination, nor indeed with the transport of pollution by air, ground water or surface water." *Id.* at *2. The "R.O.D. catalogued and evaluated all the information available on the *Lone Pine* problem and the location of the resulting pollution." *Id.* at *1.

Because of the suspect nature of the claims, the *Lone Pine* court ordered that plaintiffs asserting personal injury claims substantiate them by providing (1) facts of an individual plaintiff's exposure to alleged toxic substances, and (2) a report of a treating physician and

medical or other experts supporting the claims of injury and causation by substances from the landfill. For property damage claims, the court ordered plaintiffs to provide (1) property location, including tax block and lot number, and (2) reports of real estate or other experts supporting diminution in property value, including the timing, degree, and cause for such diminution. After granting an extension of time to produce this information, the court concluded that plaintiffs' production "was woefully and totally inadequate." *Id.* at *2. The personal injury information was unaccompanied by any expert opinion or records substantiating "any physical problems, their duration or severity." *Id.* at *3. Moreover, the property damage information "provided no evidence of contamination of plaintiffs' properties and no evidence that any such contamination is causally related to *Lone Pine*." *Id.* Accordingly, the court concluded that the plaintiffs failed to substantiate their allegations:

> Thus defendants were no better off at the end of the seven months allowed plaintiffs to substantiate their cases then when the suit was instituted.
>
> In light of the foregoing, it is clear that the plaintiffs have not established by expert evidence or the R.O.D. report that they were damaged. Sixteen months after the start of the suit, plaintiffs' counsel has failed to provide anything that resembles a prima facie cause of action based upon property diminution or personal injuries.

Id. As a result of the plaintiffs' inability to substantiate their allegations of injury and causation, the court dismissed the lawsuit with prejudice.

A Number of Courts Have Embraced *Lone Pine* Orders as a Case Management Tool

Courts have broad discretion to enter orders to manage their cases. Rules of civil procedure give courts broad discretion to proactively manage their cases. *See, e.g.*, Fed. R. Civ. P. 15. *Lone Pine* orders assist with this management by requiring plaintiffs to substantiate their allegations of injury and causation before continuing with litigation. *Lone Pine* orders can demonstrate the absence of prima facie evidence substantiating plaintiffs' allegations of injury and causation, as well as the failure of plaintiffs' counsel to perform an adequate pre-suit investigation. *Lone Pine* orders can also resolve inconsistencies between plaintiffs' allegations and an administrative record that contradicts those allegations while also achieving judicial economy by avoiding unnecessary discovery, expert work, *Daubert* challenges, or other evidentiary proceedings.

Having been used by a number of federal and state courts, *Lone Pine* orders are no longer uncommon. *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 2010 WL 2802352 (5th Cir. 2010); *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598 (5th Cir. 2006); *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000); *Abbatiello v. Monsanto Co.*, 569 F. Supp. 2d 351 (S.D.N.Y. 2008); *Burns v. Universal Crop Prot. Alliance*, 2007 WL 2811533 (E.D. Ark. Sept. 25, 2007); *Schwan v. CNH Am. LLC*, 2007 WL 1345193 (D. Neb. Apr. 11, 2007); *Baker v. Chevron USA, Inc.*, 2007 WL 315346 (S.D. Ohio Jan. 30, 2007); *Tatum v. Pactiv Corp.*, 2007 WL 60931 (M.D. Ala. Jan. 8, 2007); *In re 1994 Chem. Plant Fire*, 2005 WL 6252290 (M.D. La. July 15, 2005). Recognizing their value as case management tools, courts have expanded the use of *Lone Pine* orders beyond the scope of environmental cases. *See, e.g., In re Vioxx Prods. Liab. Litig.*, 2009 WL 1158887 (E.D. La. Apr. 28, 2009); *In re Bextra & Celebrex Mktg. Sales Practices & Prods. Liab. Litig.*, 2009 WL 1226976 (N.D. Cal. 2009); *In re Rezulin Prods. Liab. Litig.*, 441 F. Supp. 2d 567 (S.D.N.Y. 2006).

Recently, in *In re Vioxx Products Liability Litigation*, 2010 WL 2802352 (5th Cir. 2010), the Fifth Circuit affirmed the dismissal of a group of plaintiffs who failed to comply with a district court's *Lone Pine* order. The plaintiffs argued to the circuit court that the district court's requirement that the plaintiffs serve case-specific expert disclosures was an abuse of discretion because "Merck was aware of the nature of their alleged injuries and the injuries' purported link to Vioxx." *Id.* at *5. Plaintiffs also argued that the requirement violated the Erie doctrine because New York law required "no expert opinion as part of the evidence to support the claim." *Id.* The

circuit court noted that *Lone Pine* orders had been used in the circuit previously and that "[i]n the federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed.R.Civ.P. 16." *Id.* (quoting *In re Vioxx Prods. Liab. Litig.*, 557 F. Supp. 2d 741, 744 (E.D. La. 2008)). Moreover, "it is within a court's 'discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require.'" *Id.* at *6 (quoting *Acuna*, 200 F.3d at 340).

Lone Pine Orders Require Plaintiffs to Make a Prima Facie Showing of Injury and Causation

Lone Pine orders require plaintiffs to provide evidence sufficient to show a prima facie case of injury and causation before proceeding with litigation. Courts entering them may direct plaintiffs to present expert testimony on matters such as the pathway, timing, extent, and significance of each plaintiff's exposure; the resulting dose each plaintiff received of each contaminant of concern; the plaintiff's injury or illness; and causation:

> They require plaintiffs to produce evidence to support a credible claim relating to each plaintiff's exposure and causation. Plaintiffs must submit reports (or even affidavits) identifying the chemical or substance causing a particular plaintiff's injury, means of exposure, the illness or injury caused by the substance, and information relating to the causal link between the dose and the injury.

Burnton, *Narrowing the Field in Mass Torts: The Lone Pine Solution*, 26 ANDREWS TOXIC TORT LITIG. REP., no. 2, Feb. 27, 2008, at 13.

In *Acuna*, the court required expert affidavits specifying for each plaintiff, "[1] the injuries or illnesses suffered by the plaintiff that were caused by the alleged . . . exposure, [2] the materials or substances causing the injury and [3] the facility thought to be their source, [4] the dates or circumstances and [5] means of exposure to the injurious materials, and [6] the scientific and medical bases for the expert's opinions." 200 F.3d at 338. In addition, any substantiation should demonstrate, with an appropriate degree of sufficiency, a causal connection between exposure and injury:

> Despite the clear mandate of this Court to specifically link each ailment to the chemical(s) believed to have caused it, the affidavits simply list the injuries and chemicals and state in a cursory manner that the chemicals "contributed and together caused his present condition." There is absolutely no indication of which particular chemical(s) caused which particular ailments or how the dose of each chemical to which each plaintiff was exposed caused the plaintiff's alleged ailment(s). Because the doctors did not set forth their reasoning processes or specifically state the medical and scientific bases for their opinions as to each plaintiff, the Court is left with nothing more substantive than that the plaintiffs were exposed to a multitude of chemicals and thereafter suffered from a multitude of ailments.

Eggar v. Burlington N. R.R. Co., 1991 WL 315487 at *5 (D. Mont. Dec. 18, 1991); *see also Schelske v. Creative Nail Design, Inc.*, 933 P.2d 799, 801 (Mont. 1997) ("It will not be sufficient for the affidavit to state 'a laundry list' of injuries and chemicals. Each injury, illness or condition must be itemized and specifically linked to the chemical or chemicals believed to have caused that particular injury, condition or illness.").

Sanctions for Failing to Comply with L*one Pine* Orders

While courts are empowered to fashion a broad array of remedies for failure to comply with their orders, *Lone Pine* orders sometimes provide that the failure to submit the required information may result in the dismissal of some or all of plaintiffs' claims. *See, e.g.*, *Adjemian v. Am. Smelting and Refining Co.*, 2002 WL 58829 (Tex. Ct. App. Mar. 7, 2002); *Grant v. E.I. DuPont de Nemours & Co.*, 1993 WL 146634 (E.D.N.C. Feb. 17, 1993). Courts may also dismiss claims if plaintiffs provide conclusory or vague submissions in response to a *Lone Pine* order, submit affidavits or expert reports that do not link the

plaintiffs' injuries to the alleged exposure with specificity, or fail to submit the required affidavits or expert reports at all. *See, e.g.*, *Lone Pine*, 1986 WL 637507; *Acuna*, 200 F.3d 335; *Schelske*, 933 P.2d 799; *Atwood v. Warner Electric Brake and Clutch*, 605 N.E.2d 1032 (Ill. App. Ct. 1992). Finally, courts may allow a defendant to move for summary judgment on the ground that plaintiffs failed to present evidence supporting their allegations. *See, e.g.*, *Abuan v. Gen. Elec. Co.*, 3 F.3d 329 (9th Cir. 1993); *McManaway v. KBR, Inc.*, 265 F.R.D. 384 (S.D. Ind. 2009).

Factors That Should Be Addressed When Seeking a *Lone Pine* Order

A review of cases involving *Lone Pine* orders suggests that courts may grant or deny motions to enter such orders based on a case-specific analysis. The case law, however, highlights certain factors that should be considered when seeking a *Lone Pine* order—all of which relate to a fair and effective case management process.

The Number of Parties

While there is no specific threshold for the number of parties necessary for a *Lone Pine* order, it seems clear that a *Lone Pine* motion is strongest when the case is, indeed, a mass tort. In *Lone Pine*, there were 464 defendants. In *Acuna*, there were approximately 1600 plaintiffs and more than 100 defendants. *In Bell v. ExxonMobil Corp.*, 2005 WL 497295 at *1 (Tex. Ct. App. Mar. 3, 2005), there were 50 plaintiffs and one defendant. On the other hand, in a recent case with one plaintiff and one defendant, *Ramirez v. E.I. DuPont De Nemours and Co.*, 2010 WL 144866 at *3 (M.D. Fla. Jan. 8, 2010), the district court held that a request for a *Lone Pine* order was "patently unwarranted." The court reasoned that it was "not a mass toxic-tort case, and there is no need for a specialized case management order to streamline or otherwise organize the issues presented in this case." *Id.*

The Absence of Common Issues

The absence of common issues relating to injury and causation lend themselves to the mass tort device. Factors may include the number of plaintiffs; the number of defendants; the constituents to which plaintiffs allege exposure; the timing of the alleged exposures; different exposure pathways; varying doses; the timing of alleged injuries; different manifestations of alleged injuries; plaintiffs' lifestyles, their family and medical histories; and potential alternate causes of the alleged injuries. The absence of common issues is a factor that courts analyze when considering the entry of *Lone Pine* orders. For example, cases involving personal injuries are more likely to be subject to *Lone Pine* orders due to the varied nature of personal injury and its causation:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Steering Committee, 461 F.3d at 604. *See also Acuna*, 200 F.3d 335; *Baker*, 2007 WL 315346 (S.D. Ohio Jan. 30, 2007). The absence of commonality may also arise in cases involving multiple media. *See Adjemian*, 2002 WL 58829 at *1 (claim of "discharge of hazardous toxic chemicals into the air, soil, sub-soil, ground, and under-ground water."). And the absence of commonality may also arise in cases involving multiple manufacturers that bring causation into question. In *Burns v. Universal Crop Protection Alliance*, 2007 WL 2811533 at *2 (E.D. Ark. 2007), a case involving alleged damage to cotton crops from herbicides, the court noted that publicly available documents relevant to plaintiffs' theory of general causation "shed no light on how plaintiffs will show that a specific product manufactured by a specific defendant caused injury to a particular plaintiff's cotton crop."

Suspect Claims

Lone Pine orders are appropriate in cases involving suspect claims. In *Lone Pine* itself, plaintiffs' claims were inconsistent with the findings of 16 studies on the *Lone Pine* landfill, which raised suspicion. In addition

to claims that appear inconsistent with known facts or recognized studies, "cookie-cutter" causes of action may also raise suspicion. In *Atwood*, 605 N.E.2d at 1034–35, a case with 120 plaintiffs, the court noted that the first complaints "alleged one cause of action against defendants, rather than individualized causes of action . . . Thus, each plaintiff alleged identical injury."

In *McManaway*, 265 F.R.D. at 388, the court stated that "[a] *Lone Pine* order should issue only in an exceptional case and 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." Because defendants brought forward a report showing that "blood tests . . . were marginally above, at, or below the detection limit of the test method," the court issued a *Lone Pine* order:

> [I]n order to promote efficiency in the resolution of the case, an order on Plaintiffs' FED. R. CIV. P. 26(b) expert disclosures should issue directing Plaintiffs to provide expert disclosures in the three areas of inquiry defendants requested (exposure, injury, and causation). Specifically, as a part of its expert disclosures, Plaintiffs' experts shall identify what evidence in the form of medical findings or test results establish—for each plaintiff—that a detectable amount of sodium dichromate has been found in blood or tissue samples. Absent evidence of a detectable amount of that substance within blood or tissue samples, Plaintiffs' expert shall address how a judge or jury can conclude that any medical conditions allegedly sustained by Plaintiffs can be said to have been caused by exposure to the chemical at issue.

Id. at 388–89. The court also ordered that while the failure to address causation would not, alone, serve as grounds for immediate dismissal, "failure to make such a disclosure, combined with an ultimate granting of summary judgment on that basis, may cause the court to consider whether Plaintiffs should bear the costs and attorney fees incurred by Defendants arising out of the necessity of filing such a motion." *Id.* at 389.

As in the *Lone Pine* case itself, an administrative record could be helpful in the defense of a mass tort if that record contains information that either contradicts plaintiffs' allegations or highlights inconsistencies in those allegations. Such information may serve as a basis for the entry of a *Lone Pine* order, particularly when that information is derived from independent sources. Examples of such information might be public health studies performed by the Agency for Toxic Substances and Disease Registry concluding that there is no public health risk, governmental studies showing no impacts to surrounding communities, or independently generated data on alleged contaminants that are inconsistent with plaintiffs' claims. Consequently, an administrative record associated with a case should be reviewed for such information, which may support the request for a *Lone Pine* order.

Impact on Case Management

"*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation." *Acuna*, 200 F.3d at 340; *see also Baker*, 2007 WL 315346 at *1 ("The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants, such as this one"); ENVIRONMENTAL LITIGATION 137 (Kole & Espel eds., ABA 1991) ("If enforced by the court, a *Lone Pine* CMO can save the court and the defendant time and money by eliminating baseless claims from the litigation at an early stage."). This can be accomplished by requiring plaintiffs to come forward with prima facie evidence of injury and causation, which can be in the form of expert reports, affidavits, or opinions, or something lesser, such as questionnaires or medical records. *See, e.g.*, *Acuna*, 200 F.3d at 338 (expert affidavits); *Bell*, 2005 WL 497295 at *1 (expert reports); *Tatum*, 2007 WL 60931 at *1 (sworn questionnaires). A basis of authority is the duty of plaintiffs' counsel to perform an adequate pre-suit investigation. *See Acuna*, 200 F.3d at 340 ("[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries."). An administrative record from an enforcement action that

contradicts plaintiffs' allegations could provide a basis for inferring that plaintiffs' counsel failed to perform an adequate pre-suit investigation.

A *Lone Pine* order is unlikely to be entered if it is perceived as potentially having a negative effect on case management. In *Abrams v. CIBA Specialty Chemicals*, 2008 WL 4710724 (S.D. Ala. 2008), a case in which plaintiffs asserted diminution in property values only, the court, on plaintiffs' motion requesting that a certain number of test plaintiffs be selected for trial, denied a responsive request for entry of a *Lone Pine* order. After discussing its broad discretion over case management under Rule 16, the court noted that "the factual allegations and legal theories posited by Plaintiffs in this action are strikingly similar to those litigated before this Court" in another action. *Id.* at *3. The court also noted that in the other action, the parties reached a settlement "after four years of extensive litigation." *Id.* In a case with 271 plaintiffs, the court pointed out that (1) it had "grave concerns that allowing full scale discovery and motions . . . with regard to all 271 Plaintiffs in this case would strain resources," and (2) "much of the evidence and arguments with respect to . . . causation will be substantially the same for all 271 Plaintiffs." *Id.* at *4. Even though all that defendants requested with respect to their *Lone Pine* order was that each plaintiff "produce information regarding ownership of their subject property, the value of their subject property, and the sampling results for their subject property," the court nevertheless concluded that a *Lone Pine* order was unwarranted. *Id.* at *5. The court's logic was that the properties had already been tested and the defendants had the results. Thus, because the court had determined that it would proceed with test cases, the *Lone Pine* order would not "advance the goal of focusing the parties' attention and efforts on the efficient resolution of the test case." *Id.*

In In re Avandia Marketing, Sales Practices and Products Liability Litigation, 2010 WL 4720335 (E.D. Pa. Nov. 15, 2010), a district court deemed it necessary to issue a *Lone Pine* order "in furtherance of settlement agreements, for the selection of cases for bellwether trials, and for the timely remand of cases to the sending courts for resolution." This was required by plaintiffs' failure to serve adequately supported plaintiff fact sheets. The district court stated that its order "merely requires information which plaintiffs and their counsel should have possessed before filing their claims: proof of Avandia usage, proof of injury, information about the nature of the injury, and the relation in time of the injury to the Avandia usage." *Id.* (Specifically, the court required, among other things, that plaintiffs serve physician certifications demonstrating that the plaintiffs used Avandia and dates of usage, demonstrating that the plaintiffs suffered one or more of a pre-identified list of injuries within one year of usage and if more than one year, that the Avandia usage caused the injury, identifying the records the physicians relied on to determine usage, dates of usage, and identification of injury, and providing copies of those records.) The consequence of failing to comply with the court's order was dismissal of plaintiffs' claims with prejudice.

Proper Timing

While *Lone Pine* orders are recognized as pre-discovery orders and have been granted as such, some courts have expressed concern that such orders should not be granted without any opportunity for discovery. Noting factual distinctions vis-à-vis *Lone Pine*—that the *Lone Pine* plaintiffs' allegations were "in direct conflict" with the R.O.D. and that a number of plaintiffs lived at a distance beyond any known contamination—the court in *Morgan v. Ford Motor* denied a request for a *Lone Pine* order, holding as follows:

> Plaintiffs are not required to prove a prima facie case without the benefit of any discovery from Defendants. Therefore, Plaintiffs must not be required to produce complete medical and real estate expert affidavits before any discovery, thereby giving Defendants an opportunity to attack the affidavits based on that justification for the lawsuit. Similar to Defendants, Plaintiffs must have an opportunity to contest the reasonableness of any experts relied on by their adversary. Requiring Plaintiffs to produce affidavits would also be unnecessarily costly at this juncture of the case. However, Defendants are entitled to some specific information that supports Plaintiffs' claims and damages to allow this matter to move forward

> without wasteful, costly, or inefficient discovery. Accordingly, the Court will require a simple statement from each Plaintiff pursuant to Rule 26(a)(1) identifying the "nature and extent of injuries suffered."

2007 WL 1456154 at *9 (D.N.J. 2007). Another court found that the entry of a *Lone Pine* order in the absence of any discovery "effectively and inappropriately supplanted the summary judgment procedure provided in Civ. R. 56" and resulted in a denial of its procedural protections. *Simeone v. Girard City Bd. of Educ.*, 872 N.E. 344, 352 (Ohio App. Ct. 2007). And recently, a court held that a *Lone Pine* order was premature until standard case management tools had been used.

In *In re Digitek Products Liability Litigation*, 264 F.R.D. 249 (S.D. W. Va. 2010), a district court denied without prejudice a motion to enter a *Lone Pine* order as premature. The case involved a cardiac glycoside drug with "a limited margin between effectiveness and toxicity" in which an excessive dose could "result in serious health problems and death." *Id.* at 251. Defendants sought a *Lone Pine* order on the grounds, among others, that (1) plaintiffs' claims of nonconforming tablets were suspect, (2) they were experiencing difficulties and delays in getting plaintiffs' fact sheets, (3) plaintiffs filed complaints without having any supporting medical records, (4) medical records defendants obtained showed no elevated toxicity, (5) the expense of the litigation was depleting insurance proceeds, and (6) there was an FDA putative determination that likelihood of harm caused by the drug was small. *See id.* at 254. Plaintiffs argued that *Lone Pine* orders (1) are "not explicitly sanctioned by either federal statute or rule," (2) are like summary judgments without the protections of summary judgment or the opportunity for discovery, (3) should only be entered after protracted discovery, among other things, and (4) were unnecessary where standard case management tools were being used, such as the plaintiff fact sheets. *See id.*

The district court concluded that *Lone Pine* orders were legitimate case management tools, but that the entry of a *Lone Pine* order in that case would be premature where (1) a pretrial order was already entered that addressed many of the defendants' concerns, (2) a master complaint was filed that withstood Rule 12(b)(6) scrutiny, (3) the pretrial order required plaintiffs to provide (a) plaintiff fact sheets "governed by the standards applicable to written discovery under Rules 26 through 37 [that] must be answered essentially without objection," (b) "authorizations for release of medical records and to reimburse reasonable copying costs," and (c) "any documents . . . showing the fact and dates of [the drug] prescriptions, proof the prescriptions were filled and refilled, and medical records documenting the alleged injury suffered as a result of ingesting the drug," and (4) sanctions were available and had, in fact, been used to dismiss meritless claims and even impose monetary sanctions. *Id.* at 258. Given the district court's pending pretrial order, the early stage of discovery (only basic fact discovery had been completed in one group of cases), the fact that the FDA report was not definitive, and the fact that a Daubert hearing was scheduled in a year to address the "causal relationship between the allegedly defective [drug] and the adverse outcomes allegedly suffered by the affected plaintiffs," the district court denied the *Lone Pine* without prejudice. *Id.* at 259. The district court noted, however, that "[t]his is not to say that, at a later point in the litigation, that the need for this type of case management tool within the discretion of the court, might not arise." *Id.*

In a case precipitated by an enforcement action, information produced to the government may counter arguments raised by plaintiffs that a *Lone Pine* order is premature because adequate discovery had not been conducted, if it can be shown that discovery in the enforcement action addresses the substantive issues raised by the plaintiffs. Accordingly, in cases related to enforcement actions, defendants may be well advised to consider the discovery conducted in the enforcement action to belie the argument that the entry of a *Lone Pine* order is premature.

A Negotiated *Lone Pine* Case Management Process

Sometimes parties are willing to negotiate a *Lone Pine*-type order, in which case their agreement should

be enforced in the event of a requested deviation. In *Abbatiello*, 569 F. Supp. 2d at 354, the parties negotiated a *Lone Pine*-styled order over the period of a year, and the court found no reason to "put aside the parties' agreed on and Court-ordered CMOs and require Defendants to conduct discovery on a single affirmative defense and to stay discovery on Plaintiffs' prima facie case."

Conclusion

Lone Pine orders can be powerful tools to shift back to plaintiffs the prima facie burden of substantiating their allegations of injury and causation—which should have been part of their pre-suit investigation. Many courts have accepted *Lone Pine* orders as efficient case management devices capable of weeding out frivolous cases and protecting and improving the civil justice system in a mass production, mass marketing, mass consumption, mass communication, and mass tort society. Courts have considered *Lone Pine* orders based on the number of parties, the absence of common issues, the suspect nature of alleged claims, the benefits to case management and economy, and the timing of discovery and other pretrial procedures. Ironically, while a government enforcement action may precipitate a mass tort litigation, it may also provide grounds to support the entry of a *Lone Pine* order. Where such grounds exist, the *Lone Pine* order can be a very potent strategy for a wise general to employ in "securing provisions [e.g., prima facie evidence] from the enemy."

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