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The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort

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I. Introduction

Case management orders are designed to serve a variety of pragmatic objectives. These include not only expediting and focusing the litigation, but also as the current version of the rule recognizes, facilitating settlement. We think it follows that case management is an area in which the court has “considerable discretion.”

As particular areas of litigation engender greater complexity, trial courts face the unenviable task of reconciling efficiency with fairness. Until recently, many would have thought these two goals compatible. But as time-consuming and costly litigation has become more prevalent, one may be left inquiring: Must the twin commandments with which the judiciary is charged be mutually exclusive? Without active case management, mutual exclusivity may indeed result. Still, one might think that a capable judge would have little trouble balancing efficiency with fairness in most cases.

Such a conclusion would likely have been correct, until recently, when administrative agencies and the extensive power they wield began to assert a significant role in litigation. Rules and orders promulgated by administrative agencies often enable lawsuits where no suit was possible before. For example, the government’s increased role in cataloging and monitoring industry could result in a concomitant increase in the number of litigated environmental or toxic tort cases. In addition, the adjudicative role often played by agencies

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6 J.D., University of California, Hastings College of the Law, 1999; B.A., University of California, Irvine, 1996. The author wishes to express his thanks to Professor Rochelle Wirshup, of Hastings, and to Osha R. Meserve, who both assisted in the refinement of this note. The author expresses special thanks to his wife, Caron, for her constant support.

1. United States v. Charles George Trucking, 34 F.3d 1081, 1090 (1st Cir. 1993) (citing F.R.D. R. Cir. P. 16 and quoting Germania v. First Nat’l Bank, 653 F.2d 1, 5 (1st Cir. 1981)).


3. See id. The obvious implication from this statement is that the closer government looks, the more it finds. Since increased government scrutiny reveals much more than might otherwise be known, an increased likelihood of litigation results.

4. See id.
provides an avenue of redress that previously may have been too difficult to attain.

As a result, judges are now faced with the difficult challenge of assuring fairness and rational experience in their courtrooms. Their ability to do so has increased in recent years. Throughout the 1980s, the power of the court to manage cases was widely acknowledged. In addition, changes adopted by the Federal Rules of Civil Procedure began to define just how much power the judge was afforded in controlling litigation and the preliminary stages leading to it. The efficacy of rules such as Federal Rule of Civil Procedure Sixteen became particularly recognized when complex litigation threatened to spiral out of control.

Still, abstract Rules of Civil Procedure, accepted court powers, and a general legislative trend authorizing courts to control the pace and speed of litigation only begin to hint at a more recent innovation: the case management order (“CMO”). CMOs, when applied to complex litigation, “help organize the cases and counsel, preserve evidence, set priorities for pretrial pleadings and other activity,defer unnecessary pleadings, identify preliminarily the legal and factual issues, outline preliminary discovery and motions, and direct counsel to coordinate the implementation of the order.” This general statement only summarizes the basic practical aspects of these procedural tools. The Manual for Complex Litigation provides one example of the potential general reach of case management orders. There, general notions of judicial economy were used to justify a detailed, extensive and thorough case management order.

Case management orders are already powerful and often indispensable tools, and should be made completely available to the judiciary, whose resources will be indisputably taxed to new limits in the coming years. Even though the important issue of vacancies on the federal bench, for example, has been initially addressed by the United States Senate, both federal and state judges alike face crushing case loads, increased complex litigation and greater public attention to the role the courts play.

Without case management orders, the quality of justice suffers. The case management order is usually a routine and frequently welcome guest in courtrooms across America. Yet, the issuance of CMOs still incites tension among litigants, further clogging the courts. This Note advocates for the imposition of case management orders wherever their presence benefits the legal system. Formal and unequivocal federal, state and local recognition of the validity of case management orders must be forthcoming. Challenges to the imposition of CMOs continue to arise before appellate courts, wasting judicial time and detrimentally assailing the cogency of this invaluable procedural tool. Appellate courts are too often forced to deal with adjudicating CMO matters, even though such orders are usually considered pretrial discovery orders. In addition, methods exist by which a plaintiff can avoid California’s “fast track” case management system by “not filing suit until just before the statute of limitations runs.” The legis-
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tive and judicial systems must act to close
those loopholes that enable crafty litigants to
avoid the stated purpose of delay reduction.

While the extent of judicial authority to control conventional litigation is clear, there
remains a need for specific and unclouded
authority in the field of complex litigation.
Some continue to object to CMOs as unduly
burdensome in this context. They argue that
case management orders are mere technical
procedural constraints, imposing on attorneys
and litigants alike an unfounded onus.¹⁷

Though these criticisms may be valid, the
risks of uncontrolled complex litigation are too
significant to allow judicial acquiescence to
the complaints of attorneys who may rightly
have only their client's interests in mind. As
one judge has observed: "[f]iling sand in the
finely-tuned case management gears has the
unhappy potential for bringing the entire litiga-
tion to a grinding halt."¹⁸ In addition, neither
plaintiffs, the government, nor industry profit
from litigation lasting years and accomplishing
little.

This note will explore the case manage-
ment order debate in the following manner:
Section Two will examine briefly the nature and
definition of complex litigation. A catch phrase
in modern legal circles, its name seems self-
defining. Nonetheless, there is significant con-
fusion and uncertainty surrounding the ques-
tion of just what litigation may be described as
complex. The advocacy of case management
orders made in this note is made with respect
to the area of complex litigation only. An intro-
ductory analysis will afford the reader an
understanding of why case management
orders are so necessary to the successful adju-
dication of complex litigation. This note will
also explore the fact that both plaintiffs and
defendants can be financially devastated by
protracted, uncontrolled litigation and that
both stand to benefit from the imposition of
CMOs.

Section Two of this note will also offer an
introductory analysis of one type of complex
environmental litigation: the "toxic tort." This
type of complex litigation is important in the
CMO context because it was the unwitting par-
ent of an offshoot of the case management
order, known as the "Lone Pine Order."¹⁹ A brief
introduction to the background and legal theo-
ries associated with the toxic tort will enable
the reader to better comprehend the analysis
of the case management order within the toxic
tort context.

In Section Three, this note will analyze the
legal and statutory underpinnings of the case
management order, with a particular focus on
California law. Through an analysis of case law,
statutes and judicial rules, the reader will
come to understand the particular situations
where case management orders are most
applicable, where they are not useful, and
where they cannot be applied.

In addition, Section Three will provide an
examination of the case management order in
the toxic tort context specifically. When ap-
plied in toxic tort litigation, the case manage-
ment order has come to be called a "Lone Pine
Order," for reasons fully explained below. The
CMO was initially applied in toxic torts just as
it is in other forms of complex litigation. But it
soon transformed into a new, and in many
ways more powerful, procedural tool. After
analyzing the case management order in the
toxic tort case, this note will briefly examine
the striking ultimate similarities between the
"Lone Pine Order" and another procedural tool,
the summary judgment.

Section Four will offer a brief proposal,
arguing for a clearer and more explicit legisla-
tive and judicial position in favor of case man-
agement orders. Rather than having the issue
slowly clarified by case law and court practice,
only to be muddied once again by the occa-
sional renegade opinion, the legislature must
clarify the instances in which CMOs are appro-
priate. It must be emphasized that today,
CMOs are hardly a revolutionary idea. They are
one widely accepted feature of complex litiga-
tion, and their imposition usually goes unchal-
enged. Yet, the fact that cases continue to
come before appellate courts demonstrates

¹⁸. In re Recticel Foam Corp., 859 F.2d 1000, 1004 (1st Cir.
¹⁹. See discussion in re Section III.C.1
the need for further legislative clarification. Section Five will conclude this note with a brief summary and prediction regarding the future of the case management order.

II. Background

A. Complex Litigation: Nature and Definition

To understand the function of CMOs, one must understand the context in which they most commonly arise: complex litigation. Attempts to define this apparently self-descriptive term have been unsuccessful, if we judge success by uniformity. Still, by providing a brief introduction to some of the definitions that have been offered, the reader should achieve a basic understanding of complex litigation, rather than a meticulous mastery of the "cacophony" of definitions offered for it. Such an understanding will lead the reader to conclude that litigation defined as "complex" stands to benefit from case management that is "active," "substantive," "timely," "continuing," "firm, but fair" and "carefully prepared."

The first definition of "complex litigation" was appropriately offered in the first edition of the Manual for Complex Litigation. It stated, in part, that complex litigation included "one or more related cases which present unusual problems and require extraordinary treatment, including but not limited to the cases designated as 'protracted' and 'big.'" This unhelpful definition was abandoned in the second edition, with no attempt made to offer an alternative. The third edition observed that a "functional definition of complex litigation recognizes that the need for management does not simply arise from complexity, but is its defining characteristic."

Thus, in the view of the Manual, "[t]he greater the need for management, the more 'complex' is the litigation." This definition leaves the practitioner with the impression that complexity is solely a function of how much he or the court desires management. While broad and encompassing, this definition is vague in its simplicity. Its meaning has been ethereally tied to a "need for management." It provides no answer as to what makes litigation complex in certain circumstances and routine in others.

The Manual does go on to state, somewhat cursorily, that "litigation involving many parties in numerous related cases requires management as [does] litigation involving large numbers of witnesses and documents and extensive discovery." The inadequacy of the Manual's definition was surely intentional. Its authors likely sought to avoid a rigid definition, in order to assure the widest application of strict case management rules.

The California Standards of Judicial Administration for Complex Litigation define complex litigation as "those cases that require specialized management to avoid placing unnecessary burdens on the court or the litigants." The scope of this definition is immediately qualified, in that the Standards go on to state that complex litigation "is not capable of precise definition" and that it "may involve multiple related cases, extensive pretrial activity, extended trial times, [and] difficult or novel issues." The Standards state further that "no particular criterion is controlling and each situation must be examined separately."

A more thorough offering of factors that help us determine when the term "complexity" may be appropriately ascribed to litigation is available. Judge William Schwarzer describes complex litigation as involving:

(1) complicated and unfamiliar prac-

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21. Id. at 1692.
23. Id. at § 10.1.
24. See id.
trials, developed over a period of years, requiring extensive oral and documentary evidence on both sides; (2) proof of a pattern of conduct consisting of numerous seemingly unrelated acts or events; (3) rules of law stated with constitution-like generality, leaving the courts with little reliable guidance for judging the relevance of evidence and placing policy-making responsibility on the trier of fact; and (4) technical and economic issues foreign to [the] experience [of courts and juries].

Judge Schwarzer notes that the third and fourth factors are always present in complex cases, while the first and second are merely features of complex cases that may manifest themselves.33

One author describes litigation as complex "when the existing rules of pretrial, trial and substantive law make the principled deliberation of a dispute highly problematic."34 Under this calculus, a court would utilize CMOs, for example, to protect the hallowed goal of "principled deliberation."35

A summary of the varying definitions of complex litigation is helpful: "Complex litigation [exists] when there is (1) a need for case management, or (2) pretrial complexity; or (3) trial complexity; or (4) remedial complexity; or (5) multi-party, multi-forum litigation.36 In practice, cases typically termed complex include antitrust, mass or toxic torts, CERCLA37 litigation, employment discrimination cases and patent cases.38

After briefly describing a few definitions and explanations of the term "complex litigation," it becomes clear why no one has put forth a universally accepted definition of this increasingly prevalent feature of America's judicial system.39 Ultimately, given the fact that we are attempting to define "complex," must it follow that any definition be similarly so? Perhaps, but for the purposes of this note, the above introduction to the nature and definition of complex litigation should suffice.

B. The Toxic Tort: History and Development

The toxic tort lawsuit is a variation on a normal tort in which a plaintiff "claims injury to his health or property."40 Certainly, environmental litigation itself is nothing new, and can be traced as far back as the time of the Romans.41 The toxic tort of today differs from "pollution cases" of the past in that the materials used today for industrial, commercial, agricultural and residential purposes are much more deadly than their naturally occurring predecessors, given the advancement in synthetic chemical

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32. Tidmarsh, supra note 20, at 1717 (quoting Schwarzer, Managing Antitrust and Other Complex Litigation (1982)).
33. See id. at 1717.
34. Id. at 1718.
35. See id.
36. Id. at 1732.
37. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, 42 U.S.C. §§ 9601-9675. CERCLA is a federal law designed to mandate a uniform approach to the cleanup of hazardous and toxic waste sites. The Manual for Complex Litigation states that CERCLA's requirements have resulted in a unique form of complex litigation, and that "the number of parties and issues typically calls for treating CERCLA cases as complex litigation." Fed. Judicial Ctr., Manual for Complex Litigation, at § 33.7 (3d ed. 1995).
39. See Tidmarsh, supra note 20, at 1731.
40. The purpose of this section is merely to introduce the reader to the nascent form of environmental litigation known as the toxic tort. There exist, however, extensive analyses of toxic tort litigation, both within case law and scholarly articles. For the reader interested in pursuing a more comprehensive understanding of both the history and development of the toxic tort, as well as its nature within modern courtrooms see, Robert F. Blomquist, American Toxic Tort Law: An Historical Background, 1979-1987, 10 Pac. Envtl. L. Rev. 85 (1992); Richard J. Lippes, Environmental and Toxic Tort Litigation, C317 ALI-ABA 493, June 20, 1988; Carol E. Dinkins, et al., Overview of Environmental and Toxic Tort Litigation, SABA ALI-ABA 441, 451, March 28, 1996; Jonathan Harris, A Civil Action (1993); Shawn A. Copeland, et al., Current Issues in Toxic Tort Litigation, SC04 ALI-ABA 264, January 22, 1998.
41. Lippes, supra note 40, at 495.
42. See id.
production in recent decades. Today, severe symptoms and even death often characterize exposure to such materials. Further, given the latent effect such materials often have, illness or reactions may not manifest themselves for years. And even if death or injury results, a causal relationship may not be established for some time. Finally, given the incredibly wide-spread usage of potentially toxic manufactured materials, large numbers of people may be exposed.

These facts, coupled with often dramatic news coverage of toxic tort cases, combine to greatly heighten the frequency with which such cases present themselves in America's courts. As a result, "the complexities involved in the proof or defense of the toxic tort case, as well as the number of plaintiffs and defendants involved in such litigation, make issues of case management of paramount importance."

Within the last thirty years, environmental legislation and accompanying litigation have become a unique and significant area of jurisprudence. The term "toxic torts" can trace its heritage to this new area of law. Not long ago, environmental concerns were addressed by local laws and the local common law of nuisance. A nuisance claim arises when a "defendant engages in activity which significantly interferes with the plaintiff's use and enjoyment of property." Moreover, before the now broad expanse of environmental case law developed, nuisance law was typically applied to litigious issues like pollution of private property or physical injury resulting therefrom. It soon became clear that the application of nuisance doctrine was "ill-suited to urban environments with area-wide sources, and the area-wide dispersal of pollution." While pollution disputes of the past were resolved according to local nuisance laws, this changed as federal involvement in the promulgation of environmental statutes and administrative rules increased. Yet, the federal government's involvement in environmental law is also a relatively new phenomenon.

Other legal theories can serve as the basis for a "pollution" or contamination lawsuit, including trespass, inverse condemnation, negligence, strict liability and strict product liability. In a trespass action, the contamination constitutes a "direct invasion [with substantial resulting harm] of the property by the polluting substance [with] the specific intent on the part of the defendant to take that action that ultimately results in the contamination coming on the plaintiff's property." A party may bring an inverse condemnation action only against the government, and results when "government takes an action which so adversely affects a property owner's use and enjoyment of his property so that the value significantly diminishes." The strict liability for abnormally dangerous activity is also available as a potential basis for a toxic tort lawsuit. The Restatement (Second) of Torts states that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land, or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm."

The preceding history serves as the analytical framework from which modern toxic tort law emerged. It is widely acknowledged that

43. Some might argue that the issue is not the frequency of complex toxic tort cases that necessitates the use of CMOs, but rather it is the enormity of the number of claimants and the complexity and size of the individual case that requires courts to impose CMOs. The author's response to this position is partial agreement, partial disagreement. True, the size and complexity of the individual case necessitates the CMO for that case. But the need for CMOs on a systematic basis (a position which forms the basis of this note) is more attributable to the increasing number of complex toxic tort cases being litigated, rather than solely increasing complexity for a fixed number of cases.

American toxic tort law was born in 1979, during the litigation involving Agent Orange, when the term was first used in a judicial opinion. In this litigation, plaintiffs claimed exposure to the defoliant Agent Orange, used during the Vietnam War. The judge in the Agent Orange litigation made several discerning observations of the litigation before him, noting traits that would come to characterize many toxic tort cases. The court noted:

1) a large number of plaintiffs and potential plaintiffs;
2) numerous defendants;
3) plaintiffs from many states, even different countries;
4) difficult and complex causation issues;
5) numerous questions of law;
6) as yet unperceived or unknown effects of exposure;
7) numerous scientific and medical issues;
8) ambivalent or resistant involved parties;
9) significant public policy concerns;
10) a wide variety of procedural tools available for use in controlling the litigation.

After the Agent Orange litigation, courts used the now familiar phrase 'toxic tort' to describe "environmental exposure cases, occupational exposure disputes, product liability actions, and cases involving insurance claims." Not only have modern toxic torts come to often involve large numbers of both plaintiffs and defendants, the stakes are often incredibly high. Damages in toxic tort cases are renowned for their enormity. The immensity of the money damages to be won or lost in a toxic tort case serves as another reason why strict case management is needed in such cases. While avoiding unnecessary speculation as to the desperate measures to which both plaintiffs and defendants may resort with millions, even billions of dollars at stake, strict case management is clearly a necessity.

Because toxic torts involve technical factual scenarios, a large number of plaintiffs, a large number of defendants and often a large amount of money, such cases quickly become complex. As such, they are especially well suited to the advantages associated with case management orders.

III. Analysis

A. Theory and Doctrine in Complex Litigation: The California CMO

What is a case management order? What are its roots, and what are some of the reasons used to justify its application? A case management order, ideally, "lays out a clear path and timetable for the completion of all tasks necessary to ready the case for trial." The California example of case management is found in the Trial Court Delay Reduction Act. California's approach is representative of general notions of case management. It effectuates a rearrangement of responsibilities in that "[l]awyers and clients no longer control the pace of litigation it is the court's responsibility to 'actively manage' each case." Section 19 of the Standards of Judicial Administration addresses the methods by which a case management order accomplishes this objective. Specifically, section 19(g) describes some of the objectives a preliminary trial conference, one frequent requirement of the case management order, may seek to attain. The objectives of such a conference include:

56. See Blomquist, supra note 40, at 85.
57. Agent Orange, 506 F. Supp. at 783-84.
58. Blomquist, supra note 40, at 172.
59. See Robb Tretter, Stop Fishing in the Pond and Head Back to the Stream: Personal Jurisdiction in Mass Toxic Torts, 1995 ANN. SURV. AM.
(1) settle the pleadings;
(2) determine whether severance, consolidation, or coordination with other actions is desirable;
(3) schedule discovery proceedings;
(4) issue protective orders;
(5) arrange settlement conferences;
(6) appoint liaison counsel, whose responsibility it is to coordinate and/or manage the relationship between the often numerous attorneys present in complex litigation;
(7) providing for exchange of documents;
(8) require a list of deponents and a statement of the general purpose of the depositions;
(9) opening a judge’s working file;
(10) organize a comprehensive list of mail addresses and telephone numbers of counsel.66

Further elaborating on the effect and purpose of section 19, the court in Vermeulen v. Superior Court stated that “section 19 is designed to facilitate pretrial resolution of evidentiary and other issues, and to minimize the time and expense of lengthy and/or multiple trials.”67

Strict case management and its derivative, the case management order, have met with widespread judicial and legislative approval.68 In a seminal case, one California appellate court upheld the constitutionality of the California Trial Delay Reduction Act, which delegated to the judicial council and trial courts the power to experiment with case management techniques in order to reduce the delay that had come to often symbolize civil proceedings.69

Further highlighting the prevailing judicial acceptance of legislative efforts to reduce delay in the trial courts, the court in Lu v. Superior Court observed that a “case management order assists trial judges in carrying out their responsibilities.”70 The court further noted that “[u]nless managed, a complex case] with many separately represented parties has the potential for burdensome and duplicative discovery.”71 To be sure, courts confronted with complex litigation are particularly fond of CMOs. One court even termed the CMO “one of the court’s trustiest tools.”72

The voluminous nature of statutory and judicial pronouncements on the issue of complex case management is a testament to the fact that courts are fully expected to manage that litigation.73 “Case management orders also permit trial judges to carry out their responsibilities under Government Code section 68607, subdivision (a), to ‘actively monitor, supervise and control the movement of all cases’.”74

But courts have gone beyond mere tacit approval of case management orders as they are today understood. In Lu, the appellate court observed that “trial judges should be encouraged to use their inherent powers under Code of Civil Procedure section 187 to manage such complex cases in the most efficient and expeditious manner.”75 Complex cases stand to benefit from the type of authority afforded to trial courts by section 187. Since this code section is so sweeping and the need

65. Id.
70. Id. at 1269.
71. In re Recticel Foam Corp., 859 F.2d 1000, 1004 (1st Cir. 1988).
72. The number of statutes and rules promulgated by the judicial council is too numerous to be listed here, but for the reader interested in further analysis thereof, see generally Cal. Gov’t Code § 68600 (West 1998).
74. Section 187 provides: “When jurisdiction is conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.” Cal. Civ. Proc. Code § 187 (emphasis added). Section 187 is frequently cited as a powerful statutory rationale for upholding a trial court’s usage of its “inherent powers” inferred from this code section.
75. Lu, 55 Cal. App. 4th at 1271 (emphasis added).
for the unhindered management by the trial court judge presiding over a complex case is often so great, section 187 serves as a powerful rationale for permitting judges broad discretion in exercising their supervisory and managerial powers.

Yet, as courts have not merely expressed tacit approval, neither have they stopped at encouraging compliance with a particular rule of court, as in Lu. Indeed, courts have gone as far as to encourage novel, creative approaches for trial courts handling complex cases.16 One author has further observed that case management orders should be "the product of the attorneys' and the court's creativity." The appellate court in Cottle v. Superior Court validated such a "flexible" approach when it observed that "[c]ase law and various statutory provisions give courts broad and inherent powers and serve as the sources for the authority to issue such an order."17

Thus, the case management order is a powerful tool commonly utilized by the trial court in handling complex litigation. It gives the court the authority to control the litigation to a greater extent than it would be able to do were that authority not present. It is a tool that finds the greatest utility in cases classified as complex, and its application is generally limited to such classifications. And it is in this field of litigation, so daunting in what it typically encompasses, where it is of such great use. It is a powerful tool, but it is also one whose validity, though seemingly now resolved by the courts, discontented parties continue to challenge in appellate courts, even in jurisdictions extraordinarily friendly to the "pragmatic objectives" they serve.18 Lu is one of a host of opinions that generally address the applicability and suitability of case management orders.

Lu involved a construction defect case, designated as complex.4 Upon this designation by the court, a case management order was accordingly issued. Petitioner Lu objected to that imposition, and particularly to the appointment of a discovery referee whose role included mediation. It should be noted that "[a]ll parties, except [Lu], agreed to the terms of the case management order and urged its adoption."20 This should come as no surprise since most litigants appreciate the presence of the court's guiding hand, especially in complex litigation.

 Courts and parties alike stand to benefit from the imposition of case management orders, and most such parties recognize this and willingly accept the imposition thereof. Indeed, most litigants probably realize this, as evidenced by the Lu case, and refrain from bringing challenges to CMOs. Such an assumption is inferentially confirmed by the fact that while courts impose a large number of CMOs, relatively few find their way into appellate challenges.

Indeed, the appellate court in Lu observed that a complex case "presents case management problems which make it beneficial for the parties as well as the court to employ the level of case management contemplated by the com-

77. Dedrick, supra note 13, at 547.
78. 3 Cal. App. 4th at 1376.
80. 55 Cal. App. 4th 1264.
81. Id.
82. See Charles George Trubitsky, supra note 1.
83. Though Lu is not a toxic tort case, the Justifications for CMOs that it provides are easily applied to such cases, since the underlying procedural argument is the same.
84. 55 Cal. App. 4th at 1266.
85. See id. at 1267.
86. Id. (emphasis added).
plex litigation standard." Moreover, the court observed that the case management order was "a useful tool, employed by many judges managing complex litigation." Speaking directly to the issue raised by the petitioner on appeal, the court stated that "a trial court has authority to appoint a discovery referee, even in the absence of a current discovery dispute." The petitioner's claim that the court lacked the authority to appoint a discovery referee by way of a case management order was therefore rejected outright.

Thus, Lu v. Superior Court stands for the principle that case management orders are both valid and useful. It also articulates the legal justifications for the imposition of a CMO. It serves as a fundamental example of why clearer and more explicit legislative action is needed, both to respond to and allow similarly well-reasoned judicial responses to attacks on the case management order.

2. Limitations on the Imposition of a Case Management Order

While the power of the courts to manage cases before them is extensive, as exemplified by Code of Civil Procedure section 187, limitations exist, and like most powers of government, the authority of the judiciary does not go unchecked. Thus, while such limitations are few, knowing these limits is necessary to an understanding of the scope and role of the case management order.

For the sake of space, one major limitation can only be discussed briefly, but is worth noting since it often plays a role in whether case management orders may be applied to a particular form of complex litigation. Certainly, the legislature in its wisdom recognized that while the reduction of delay was of paramount interest, especially in complex cases, certain exceptions would sometimes be warranted, given particular circumstances. California Rule of Court 2105 describes a system of designating the length of time provided for trial commencement, based on a showing by the litigants that the statutorily prescribed limit is inapplicable to their particular case. The Rule recognizes that certain forms of complex litigation will be "so unique" as to be exempt from case management treatment where "they cannot be ready for trial within twenty-four months." In such a case "the court shall estimate the maximum time that will reasonably be required to dispose of each case in a just and efficient manner."

Rule 2106 provides a list of factors that the court should use in making a determination as to whether a case before it is sufficiently "unique" to warrant the special treatment the rule contemplates. The following factors determine whether a case designated as complex will be subject to an exemption or additional time to commence trial:

1) the type of action and the subject matter of the action;
2) the number of causes of action or affirmative defenses alleged;
3) the number of parties or groups of parties with separate interests;
4) the number of cross-complaints, types action and the subject matter;
5) the complexity of substantive and procedural issues, including issues of first impression;
6) the difficulty in identifying, locating, and serving adverse parties;
7) the nature and extent of discovery anticipated;
8) the number and location of percipient and expert witnesses;
9) the estimated length of trial or successive trials;
10) whether some or all issues can be arbitrated;

87. Id.
88. Id.
89. Id. at 1266.
90. See id. at 1267.
91. See discussion supra note 72.
93. Id.
94. Id.
11) statutory priority for some or all of the
issues;
12) the likelihood of writ or other appellate
proceedings,
13) the amount in controversy and the type
of remedy sought, including measure
of damages.96

The factors listed in Rule 2106 constitute
one important manner by which case manage-
ment orders may be deemed inapplicable by a
trial or appellate court. As a consequence,
these factors will, if determined applicable,
abrogate the use and efficacy of case man-
agement orders, altering or eliminating entirely
the exacting deadlines which a strict case man-
agement philosophy seeks to meet.

Other weaker limitations on the applicabil-
ity of case management orders also exist. In
one case, DeBlase v. Superior Court, an indigent
plaintiff objected to the appointment of a dis-
covery referee.97 Such an appointment is one
manner in which case management orders typ-
ically manifest themselves. The appellate court
vacated the trial court's order of appointment,
stating specifically that given the petitioner's
indigence, and the fact that discovery issues
did not raise complex or time-consuming
issues, the trial court should not have ordered
the appointment.98 DeBlase has been interpret-
ed to provide that "[i]f a party demonstrates
that the costs associated with a [CMO] impose
a significant hardship, it would be inappropri-
ate for the court to order that party to con-
tribute" to the costs associated with, for exam-
ple, the appointment of a referee.99

Further examples of limitations on the
court's ability to manage cases before it are
available. For instance, in Kirschenman v. Sup-
erior Court, the court attempted to compel the
parties to participate in the private mediation
to which they had earlier agreed, but where
one party had later reconsidered.100 The court
then sanctioned the parties for their failure to
participate. The California appellate court stat-
ed that "the [trial] court had no statutory
authority to require the parties to participate in
mediation."101

Support for the position taken by the
appellate court is found in Business and
Professions Code section 467.7, which effec-
tively allows the parties to withdraw from
mediation regardless of whether or not the
judge wishes the parties to continue.102 This
seeming restraint placed on trial courts was
distinguished in Lu, however, when the court
stated that it did "not think it appropriate to
extend Kirschenman to complex litigation...."103
Thus, while statutory restraints on the ability of
the court to compel participation in mediation
admittedly exist, no drastic inference of the
judge's overall ability to control the proceed-
ings of a complex case should be drawn, other
than those specifically mandated by statute.104

Another example of a restraint placed on
the judicial power to control cases subject to it
comes from Hogoboom v. Superior Court.105 There,
courts were prohibited from requiring the par-
ties to pay a referee's fees in family law and
domestic violence cases. Both the Legislature
and the Judicial Council have more extensive
rules, discussed below, related to the underly-
ing issue raised in Hogoboom. Namely, these
rules are that certain types of cases are not
arguably subject to the same sorts of policy
rationale justifying the imposition of CMOs in
complex litigation.106

The delay reduction theories that serve as
the legal foundation of case management
orders have been statutorily ruled inapplicable
to certain types of cases. These include domestic
relation proceedings, probate, juvenile,
guardianship, conservatorship, family law and small claims appeals.\textsuperscript{107} Beyond state and judicial exclusions are local exclusions, which may elaborate and expand on the limitations imposed by the legislature or the state judiciary.\textsuperscript{108}

There is logic to the decision by many California jurisdictions to exclude certain types of litigation from the delay reduction treatment that accompanies formal case management orders. Typically, cases falling under the designations enumerated above would rarely be classified as the sort of "complex" litigation to which case management orders so well apply. Therefore, any advocacy of CMOs in such types of litigation is not only misplaced, but unnecessary. Even if such a case were classified as "complex," the decision not to subject it to stringent case management standards would nonetheless be sensible.

The classes of cases listed above have a common theme, easily perceptible. They all involve, in one form or another, cases directly affecting individuals whose need for protection from the court outweighs the interest of the State in speedy adjudication. And the legislature has determined, wisely it seems, that to apply case management deadlines to such cases would be inappropriate.

3. CMOs in the Context of California’s Local Rules

Understanding the relationship between state and judicially imposed case management techniques and the local rules which modify and expand upon them is key to understanding CMOs and case management in general. What is the general position of the courts with regard to the enforceability of local case management rules, especially as compared to sometimes conflicting or dissimilar state rules? For example, under what conditions may a trial court validly dismiss an action before it for violation of local case management rules, and when are such dismissals typically set aside?

That a local trial court may "adopt its own procedures, standards and policies for delay reduction" is undisputed.\textsuperscript{109} In addition, as discussed below, case law reveals that trial courts have great latitude both in the adoption and enforcement of local rules of court. Still, the enforcement of local rules may be restrained at times. Before examining such instances however, it may be of some use to provide the reader with an example of a local rule of case management.

One such example may be found in Orange County Superior Court Rule 450, which orders that a "final case management conference" must be held, wherein the parties and the court "meet and conduct an issue conference."\textsuperscript{110} At this conference, the parties:

1. exchange exhibits and inspect photos and diagrams (to be submitted on the date of trial), excluding those contemplated to be used for impeachment or rebuttal;
2. stipulate to all facts amenable to stipulation;
3. prepare a Joint Statement of the Case;
4. prepare a Joint Witness List, excluding impeachment or rebuttal witnesses;
5. prepare a Joint List of Controverted Issues (required for both jury and nonjury trials);
6. exchange motions in limine;
7. prepare voir dire questions for the court to include in its voir dire (jury trials only);
8. execute the Statement of Compliance.\textsuperscript{111}

Two important cases demonstrate that trial courts employing conflicting local and state case management rules may have the authority to manage cases limited, while courts employing harmonious state and local rules domain to adoption and uninsured motorist cases).

\textsuperscript{107} In addition, the Judicial Council includes a "catchall" in the form of excluding "other civil petitions," which apply to topics as varied as temporary restraining orders to name changes. See id. at § 12:23 (citing CAL. RULE OF CT. 2103 (West 1998); STANDARDS OF JUD. ADMIN. § 2.11(c) (West 1998)).

\textsuperscript{108} See, e.g., ORANGE COUNTY SUP. CT. RULE 431 (West 1998) (excluding cases ranging from personal injury and eminent domain to adoption and uninsured motorist cases).

\textsuperscript{109} WEIL & BROWN, supra note 16, at § 12:48, (citing CAL. GOV'T CODE § 68612 (West 1998)).

\textsuperscript{110} Id. at § 12:88.5 (citing ORANGE COUNTY SUP. CT. RULE 450 (West 1998)).

\textsuperscript{111} ORANGE COUNTY SUP. CT. RULES, RULE 450 (West 1998).
The Automobile Club of Southern California v. Faura provides an example of a court employing conflicting local and state case management rules. There, the court held that "the trial court abused its discretion by requiring parties to attend a status conference after they had complied with California Rules of Court, rule 525(c)." Thus, the court held that the trial court could not superimpose local rules onto parties who had already met the requirements of a state statute, when doing so would yield a conflicting result. As the court directly observed, "requiring that the parties utilize a local 'suggested' procedure will not trump rule 525(c)."

The court in Faura acknowledged that Government Code Section 68608(b) could be viewed as permitting broad application of local rules. Yet, the important message of Faura is that while a local rule may indeed be broadly enforced, such enforcement is less likely where doing so would result in the subordination of a state rule. And indeed, such an assertion is in line with the legally recognized reality of local versus state law. For example, in Hock v. Superior Court, the court correctly observes that generally local rules are invalid if inconsistent with higher law.

A case nearly indistinguishable from Faura on its facts, but which nevertheless achieved a different result, offers an example of the exception to the above rule. In California Casualty Indemnity Insurance Company v. Mendoza, the appellate court upheld a trial court's decision to dismiss for violation of a local rule. The difference here was that the state and local rules were not in conflict. No party had complied with a state rule but failed to comply with a local rule, as in Faura. Rather, in this case, counsel attempted to "dictate what hearings a trial court may hold . . . and to bypass the trial court to challenge the necessity of court appearances." Despite the conflicting approaches that courts sometimes take in determining the enforceability of local case management rules, the legislature, through California Civil Procedure section 575.2(b) has made clear that where counsel is responsible for the failure to comply with local rules, penalties may be imposed accordingly. This pronouncement is not as helpful as it could be, and courts have split on the issue of counsel violating local "fast track" rules. Some case law has interpreted California Civil Procedure section 575.2(b) as disallowing courts to dismiss cases for violation of local rules, including local rules designed to expedite the progress of the case, for example.

While substantial limitations imposed on the trial court are rare with regard to case management, such limitations nevertheless exist, and case management is by no means the perfect solution by which trial courts may extinguish the antagonistic presence of delay. This underlying conflict between the growing pressure on the judiciary to expedite cases and severe sanctions would not be effective. Judges are encouraged to impose sanctions to achieve the purposes of this article." Cal. Gov't Code § 68608(b) (West 1998).

113. Id. at 844. California Rule of Court 525 provides in relevant part: "(a) If a case is settled, plaintiff shall immediately give the court and any arbiter written notice. The plaintiff shall also immediately give oral notice if a hearing, conference, or trial is imminent . . . (c) If the settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be performed within 45 days after the dates of settlement, the notice settlement shall specify the date dismissal is to be filed." (West 1998). It is worthy to note that in Keers Inc' the court recognized that Rule 525 adequately reconciles "the need for expeditious processing of civil matters with the rights of individual litigants." 208 Cal. App. 3d at 1004 (quoting Moyal v. Lanphere, 208 Cal. App. 3d 491, 500 (1989)).
114. Faura, 44 Cal. App. 4th at 843.
115. Section 68608(b) provides in relevant part: "Judges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions if it appears that less
the desire to maintain the role of the courts as an arena for conflict resolution stands as one of the greatest tasks facing the judiciary today. Indeed, one court neatly phrased the challenge facing the judiciary when it noted that a “balance must be struck between the trial court’s right to run a tight ship and its obligation to provide a meaningful forum for litigants.”

Nevertheless, reflecting the general state of conflict on the issue of whether or not courts may dismiss cases for violations of local rules, some courts have interpreted Government Code section 68608(b), rather than California Civil Procedure section 575.2(b), to allow courts to dismiss for violations of local rules. Other courts have ruled that a trial court should only dismiss where it finds that less severe sanctions would likely be ineffective in securing conformity with local case management rules.

Further elaboration on this “local rules” trend may be found in Simmons v. City of Pasadena. There, the court set aside a dismissal ordered when the litigants violated a local “fast track” rule. The court in Simmons ruled that such local rules are unenforceable unless adopted under California Civil Procedure section 575.1. Finally, in Estate of Meeker v. Kleinbauer, the court stated that it could find “no authority for the proposition that disobedience of an informally distributed memorandum explaining the court’s requirements justifies the [dismissal] imposed in this case.”

This dispute between the courts of appeal was recently addressed. The California Supreme Court at least partially resolved the split amongst the lower courts in Garcia v. McCutchen. There, the Court stated that “under the governing statutes, a court may not impose this sanction [dismissal] if noncompliance is the responsibility of counsel, not of the litigant.” Thus, it is the position of the Court that any attempt to portray section 68608(b) “as creating a dismissal power that is both independent of and greater than the court’s power under section 575.2(b)” is inconsistent with the legislature’s intent behind CCP section 575.2.

Despite the kaleidoscope of local rules of case management, and the seeming conflict among the courts as to their enforcement, one may generally expect courts ruling on the enforceability thereof to affirm. As demonstrated above, most local rules do not result in conflict with state case management statutes and rules. Typically, such local rules merely complement or modify statewide rules. As some of the preceding cases illustrate, however, reviewing courts will not hesitate to proscribe the enforcement of local rules where conflict would result, or where they would be inappropriate under applicable statutes.

C. CMOs: Industry’s Darling in Toxic Tort Cases?

I. The “Lone Pine Order”

The case management order has come to occupy a special place in the world of toxic tort litigation. As the section detailing the background of the toxic tort describes, this type of complex litigation is especially well suited to the function that case management orders serve. Early on, a toxic tort case proceeded, as

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124. See supra note 115.
125. See supra note 120.
130. Section 575.1 of the California Code of Civil Procedure provides that “proposed revisions be published and submitted to local bar for consideration, and when final, copies to be filed with the Judicial Council and all county law libraries.” Wul & Brown, supra note 16, at ¶ 12:51.1.
132. 16 Cal. 4th 469 (1997).
133. Id. at 471.
134. Id.
135. See supra Section II.B.
...does most litigation, with discovery coming before trial. Yet, the technical nature of trying a toxic tort case and the significance of mastering the voluminous material that accompanies such litigation often presented defendants with a sort of "cruel trilemma." Should a) the litigation proceed, possibly at a high cost; or b) should the litigation be settled; or c) should the defendant merely "hold out" against the plaintiff, hoping the plaintiff will drop the case? Clearly, plaintiffs recognized that the monumental task of responding to a complaint often led industry to settle cases, rather than incur huge litigation costs and face possibly negative publicity.

Indeed, since toxic tort cases typically involve highly complex and technical issues, the task of plaintiffs has been simplified since the government has undertaken the prodigious responsibility of collecting and analyzing the "massive amounts of data regarding the use of hazardous materials." Such a simplification, coupled with an increasing number of materials proven by science to cause ailments, naturally results in a greater number of legitimate filings by plaintiffs. Still, the mere availability of information does not make the plaintiff's job an easy one. In environmental litigation, for example, plaintiffs are often represented by non-profit, financially weak public interest groups, attempting to litigate against corporations with market capitalizations well into the billions.

Though unfortunate, the number of invalid claims filed by plaintiffs looking to industry as a deep pocket would necessarily increase as well, if only as a function of the greater number overall of toxic tort claims before the courts.

Trial courts and defendants alike are confronted with the responsibility of sorting out claims based on injury and reality from those based on avarice and myth. They must make such a determination while simultaneously avoiding the sort of protracted procedural wrangling that so often seems to characterize complex litigation.

Counsel representing industry, assisted by a judiciary eager to discourage questionable and false claims marching under a toxic tort banner, have sufficiently manipulated the notion of case management so that plaintiffs who are unable to make a prima facie case of their injuries face likely dismissal. It is also permissible for courts to require expert testimony from a plaintiff to establish his prima facie claim of injury. One author described the purpose of this new form of CMO thusly: "[t]o separate real claims from those that are feigned or frivolous, the courts developed a requirement that plaintiffs seeking recovery for mental harm must produce some form of objective corroboration of their subjective complaints." Truly, the ultimate purpose of the toxic tort CMO is to "force[] plaintiffs to substantiate exposure, injury and causation." Within the context of toxic torts, CMOs assume a more powerful form than in conventional complex cases. They go beyond the established purposes of general case management orders. Indeed, when applied in the complex toxic tort, their purpose is to screen invalid or unsubstantiated claims. Generally, a court may require that a plaintiff in a toxic tort case present prima facie evidence "that defendants caused plaintiffs' exposure to toxic contamination and that the exposure caused, good and sufficient on its face [evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence." Black's Law Dictionary 1190 (6th ed. 1990).

See Laswell et al., supra note 2.


Liniebaum, supra note 137, at 445.

Kinnick, 197 Wis. 2d at 863, n.1 (quoting D. Alan Rudin, Strategies in Litigating Multiple Plaintiff Toxic Tort Suits, in Envir. L. 122, 137 (Janet S. Kole, et al. eds., 1991)).
or contributed to, plaintiffs' injuries." A consequential result of this purpose is to discourage the bringing of weak or questionable claims, as well as those whose motivation may be less a quest for justice and more a manifestation of greed.

The first well-known example of such an effort came in 1985, when a New Jersey court entered what has come to be known as a "Lone Pine Order."

This order marked the beginning of the application of a particularized form of CMO in toxic tort cases, one which functions in toxic tort cases as "a supervisory pretrial order that requires plaintiffs to show a prima facie case before other pretrial activity begins."

In the Lone Pine case, the Superior Court entered a case management order that required the plaintiffs to medically document their claimed exposure to toxic material from a landfill.

When the plaintiffs failed to satisfy this requirement, the court dismissed the case with prejudice for their failure "to provide sufficient information to establish the existence of a prima facie case."

The case management order, as a result, evolved into a more powerful form. Rather than merely requiring the litigants to meet the objectives stated above, it was used as a procedural sieve. If the court had not entered the case management order that it did, the case would almost certainly have continued, even though the plaintiffs' failure to sufficiently comply with the court's requirements clearly demonstrated the insufficiency of their claim.

And while the summary judgment motion is available, the procedural safeguards associated with that device are significant, and may result in inadequate screening of weak toxic tort claims.

Few would dispute the benefits garnered from excluding from the courts those who are unable to demonstrate a prima facie case, but who are more than willing to subject wealthy defendants to years of protracted litigation. Yet, unfortunately, appellate courts still occasionally reverse trial courts for dismissals entered for plaintiffs' failure to comply with a Lone Pine Order.

Doubtless, some of these reversals are merited, but they nevertheless serve to inhibit the successful general application of strict case management techniques. The resulting uncertainty could be avoided entirely if state legislatures and judicial councils were to clarify the statutes and rules permitting the application of CMOs.

Still, the Lone Pine case marked a new beginning for case management orders. It signified a new and bold attempt by the courts to contain a tide of possibly frivolous claims. The notion that defendants in toxic tort actions should not be forced to litigate baseless or weak claims has taken hold. As indicated by the widespread support that Lone Pine Orders enjoy, most courts reject the common argument that such orders are unfair to plaintiffs because they withhold from plaintiffs the opportunity to even make a case.

Thus, not only have Lone Pine Orders
enjoyed widespread judicial approval, they have, in a more practical sense, seen increasing use.\textsuperscript{160} Case law provides many instances where courts employ Lone Pine Orders or the functional equivalent thereof. In the Love Canal litigation, a court employed a Lone Pine Order, determining that its utility in avoiding the costs and delay of pretrial procedure and discovery made it indispensable.\textsuperscript{161} In \textit{Robinson v. Monsanto Co.}, the defendant argued that a “CMO would promote efficiency, eliminate baseless claims, force the plaintiffs to undergo an examination by a toxicologist who could testify to the chemical at issue, and provide the circumstances of each exposure.”\textsuperscript{162} Before the court could rule on the CMO motion, the case settled. Another case, in \textit{In re Hanford Nuclear Reservation Litigation}, applied a toxic tort CMO in a nuclear and hazardous waste contamination case.\textsuperscript{163} In addition, one defendant in a toxic tort case argued for a case management order by stating that such orders are “well recognized by state and federal practice in ‘toxic tort’ cases.”\textsuperscript{164}

In \textit{Abarca v. Hon. Mike Westergren}, a plaintiff in a toxic tort case sought a writ of mandamus from a trial court’s Lone Pine Order.\textsuperscript{165} The plaintiffs argued that the court “denied plaintiffs reasonable opportunity to develop the merits of their case and compromised their ability to present viable claims at trial.”\textsuperscript{166} The defendants argued that they “should not be required to spend enormous sums of money to defend against claims of individuals who have no reasonable basis in fact for their claims.”\textsuperscript{167} The defendants further argued that “the case management order is within the trial court’s broad discretion to manage discovery and is consistent with other Lone Pine-type orders.”\textsuperscript{168} The Supreme Court of Texas denied the plaintiffs’ request for a writ.\textsuperscript{169}

In \textit{Schelske v. Creative Nail Design},\textsuperscript{170} the Montana Supreme Court upheld the dismissal of a toxic tort suit filed by an ex-beautician who claimed exposure to cosmetics had caused her “digestive disorders.”\textsuperscript{171} The Montana Supreme Court held that “the plaintiff had not sufficiently complied with a case management order that mandated that she plead each chemical that allegedly caused harm and provide a physician’s opinion as to a causal link between each exposure and injury.”\textsuperscript{172} As a result, it upheld the trial court’s grant of summary judgment.\textsuperscript{173}

In \textit{Cottle v. Superior Court}, a California court of appeal upheld a trial court’s application of a case management order, despite a forceful dissent that argued that the effects of such orders were too similar to the summary judgment order without any of the accompanying procedural safeguards.\textsuperscript{174} There, the court held that “a court may order the exclusion of evidence if the plaintiffs are unable to establish a prima facie claim prior to the start of trial.”\textsuperscript{175}

\textbf{2. Advantages of the Lone Pine Order}

While disadvantages no doubt exist, Lone Pine Orders have essentially enjoyed great approbation. They are viewed as “effective tool[s] for achieving efficiency and economy for parties and the judiciary,” alike.\textsuperscript{176} They are predictably popular amongst industry defense counsel who seek to both deter groundless cases and to preserve the economic resources...
of their clients.

Lone Pine Orders help to avoid redundancy, requiring plaintiffs to identify the nature and substance of their claim, rather than permitting a plaintiff to file a complaint and then sit back and wait. Plaintiffs frequently complain that such orders force them to "pre-try" their claims. Indeed, one author states that expecting plaintiffs to comply with a Lone Pine Order can often be "unrealistic and almost impossible." In defense of the Lone Pine Order, if the plaintiffs have a valid claim, organizing and presenting the evidence the court demands should not present too difficult a task. This is especially true considering the requirement that plaintiffs have evidence to support their claims before filing suit in the first place. When one considers the immense task and risk facing defendants in such suits, establishing a minimum threshold for plaintiffs in the form of the Lone Pine Order seems only fair.

Another argument in support of CMOs is that the disclosure of evidence, which the Lone Pine Order effectuates, necessarily encourages settlement. This argument is supported by the fact that courts have broad discretion to modify preexisting CMOs to encourage settlement. Conversely, forcing plaintiffs to disclose evidence they do not possess because of claim invalidity will discourage the very bringing of false claims, an estimable goal.

An argument against the Lone Pine Order objects to the consequences of noncompliance. For example, in the actual Lone Pine case, the plaintiffs' case was dismissed with prejudice. Thus, the argument goes that the doors of the court are wrongly closed to plaintiffs, who necessarily lose the opportunity to ever bring that claim again, even though no finder of fact made an adjudication on the merits. One solution proposed in response to this argument is to dismiss such claims without prejudice, thereby enabling the plaintiff to bring his claim again if it is indeed valid but was merely hamstrung by some other factor. Defendants would likely respond that a dismissal with prejudice is entirely appropriate if plaintiffs are unable to even make a prima facie case of their injuries or exposure.

This note takes the position that the advantages of Lone Pine Orders in toxic tort cases far outweigh the disadvantages. True, the consequences of noncompliance are harsh, but harsh they must be if the role of the courts is to be maintained as forums for legitimate conflict resolution. The filter that Lone Pine Orders represent is specially designed to screen from the court system those claims that have no right to be there. Legitimate plaintiffs have little to fear when a court imposes a CMO in the form of a Lone Pine Order. Neither should plaintiffs be surprised by the fact that not only are defendants widely expected to request Lone Pine Orders, courts are predisposed to grant such requests. Establishing a prima facie case is a simple procedure, hardly one to which a plaintiff about to expose a defendant to costly and time-consuming litigation should object. In the interests of justice, the imposition of the Lone Pine Order in toxic tort cases is, therefore, imperative.

3. The Lone Pine Order: Summary Judgment Incognito?

One author has stated two principle differences between summary judgment motions and Lone Pine Orders in the following manner:

First, the showing required to satisfy a Lone Pine Order may be less than the quantum of evidence required to create a fact question in response to a motion for summary judgment. Second, a judge hearing a motion for summary judgment may allow the plaintiffs to proceed with discovery in order to obtain evidence for use in opposing the motion.

Thus, CMO seems to arrive at the same

177. See id.
178. Lippes, supra note 40, at 520.
179. See id.
180. See Lindheim, supra note 137, at 452.
181. See id.
result as the summary judgment. This similarity alone is not problematic. However, some have lamented\textsuperscript{186} that this similarity is untenable given the lack of "procedural safeguards" when a Lone Pine Order is applied, compared to the safeguards that exist in summary judgment proceedings.\textsuperscript{187} For example, in ruling on a summary judgment motion, evidence of the party moving for summary judgment is strictly construed while that of the party opposing the summary judgment is liberally construed.\textsuperscript{188}

In \textit{Cottle v. Superior Court}, where a dismissal was upheld for failure to comply with a Lone Pine type order, the dissent argued that the defendant there was able to enjoy all the benefits of a summary judgment without having to satisfy any of the statutorily mandated requirements.\textsuperscript{189} There, the dissent pointed out that if "the procedural guidelines for summary judgment had been followed, the defendants would have had to have initiated the process and have supplied evidence [that] causation could not be proved."\textsuperscript{190} The dissent observed that instead of abiding by the statutory requirements of summary judgment, the trial court imposed a "bastardized" case management order "which had the purpose and effect of summary judgment but avoided the very procedures and protections the Legislature deemed essential."\textsuperscript{191} The majority was unpersuaded by the dissent's arguments, ruling that the trial court "properly used the court's inherent powers to manage the complex litigation case before her."\textsuperscript{192}

Thus, one may conclude that a Lone Pine Order or its equivalent produces a result very similar to the result produced by the summary judgment. Nevertheless, courts have been willing to uphold their application. \textit{Cottle} is a good example of how courts seem to uphold the Lone Pine Order as within the "inherent powers" of the trial court, irrespective of its functional similarity to a summary judgment.\textsuperscript{193} Plaintiffs should take cautious note of this trend. Still, such orders usually find application only in complex litigation, such as the toxic tort. Therefore, it appears unlikely that the Cottle dissent's fear that a "bastardized" equivalent of summary judgment will assert itself throughout civil litigation.

\section*{IV. Proposal}

\subsection*{A. Summary of Benefits and Drawbacks}

As the legal system wrestles with the difficult issue of balancing efficiency with equity, the importance of maintaining the accessibility of case management orders while taking caution not to trample on the rights of the litigants cannot be cast aside. Case management orders have many desirable attributes and some less desirable attributes. They undoubtedly make complex litigation more efficient. In doing so, it may be argued that they serve to keep the judicial system accessible. Truly, without case management techniques, the delay and cost that would result could make the courts inaccessible to many parties. There can be no doubt that case management techniques generally, and case management orders specifically, are here to stay. In a few years they have "evolved from an option to an acknowledged judicial responsibility."\textsuperscript{194}

Of course, in its zeal to eradicate unnecessary delay and cost, a court employing a case management order must exercise caution and due care. The purpose of keeping the courts efficient is frustrated if the very parties for whom the courts strive to maintain access turn away in frustration. But, with careful balancing, most judges should be able to achieve the difficult equilibrium of efficiency and fairness.

\subsection*{B. The CMO: An Essential Tool for Simplifying and Expediting Complex Litigation}

The legislature and judiciary must make every effort to complete the circle of case management evolution. To be sure, once initiated within a case, the CMO must be quick to

\begin{footnotesize}
189. See 3 Cal. App. 4th 1389 (Johnson, J., dissenting).
190 Id at 1393.
191 Id.
192 Id at 1381.
193 See supra note 72.
\end{footnotesize}
change, when necessary, and must be adaptable to varying situations. Yet, the case management order is a young creation, and the last decade has signified its turbulent adolescence. It has recently emerged as a widely practiced, widely accepted and widely enjoyed procedural tool. Still, uncertainties as to its nuances remain, and they must be resolved. Complex litigation generally, and toxic torts specifically, are becoming more and more common. The time for making the final clarifications is now. Obviously, case management orders are not the panacea of delay reduction. They do however serve well in meeting that goal. While principles of justice must supersede any procedural tool, the case management order still suffers the indignities of young law, even though it is widely perceived by those who employ it as a sage of civil procedure.

V. Conclusion

After an extensive analysis, it is easy to become so consumed with procedural details that one fails to recall the greater purpose behind the existence of our legal system. In Estate of Meeker v. Kleinbauer, the court notes that the judiciary exists “to serve the public and that this cannot be done when judges are inundated with fast track statistics and cheerleader attitudes about case disposition numbers which never seem to take into account the rights of the parties.”

The court in Estate of Meeker is obviously correct when it states that the function of the judiciary and the legal system is to serve the public. This noble goal, however, cannot be met when courts are “inundated” with seemingly endless and costly litigation. Perhaps those advocating the case management order do fall prey to a “cheerleader” attitude at times, but this attitude stems not from any desired disregard of “the rights of the parties.” Rather, it comes from a celebration of the fact that the courts now seem to be empowered to run a case efficiently, in a time when doing so is paramount to the successful and equitable administration of justice. No longer is the judicial system hopelessly encumbered with a proverbial procedural albatross. The courts now have greater power to administer justice with fairness and efficiency.

The introduction posed the following question: “Must the twin commandments with which the judiciary is charged be mutually exclusive?” Happily, the case management order demonstrates that the answer to this question is plainly “no.” Efficiency and fairness may indeed coexist in the microcosm of the courtroom, but only if judges are empowered and wise enough to assure their equal presence.

Resource Guide

The Case Management Order.

Use and Efficacy in Complex Litigation and the Toxic Tort


Provides a discussion of the pros and cons of the Lone Pine Order, an offshoot of the case management order. Outlines how distinct features of a toxic tort case makes compliance with the Lone Pine Order difficult and unnecessary.


Discusses the way in which case management orders have been used in the insurance context to limit discovery to those issues related to the forum. Argues that standardization of case management orders is necessary to prevent “judge shopping” within a jurisdiction.


Describes the concept of pharmacokinetics, the study of how animals process and metabolize chemicals. Pharmacokinetic data is often useful to prove whether certain chemicals caused the plaintiff’s injuries in toxic tort cases.


Includes a discussion of the Civil Justice Reform Act and the use of case management plans. Contends that individual judges should have discretion in crafting case management plans.

Richard E. Poole, Techniques for Efficient Litigation Management, 598 PL/Lit 259 (1999).

Discuss the advantages of using case management orders in insurance coverage litigation.
Believe one who knows: You will find something greater in woods than books. Trees and stones will teach you that which you can never learn from masters.

Bernard of Clairvaux, 1090 - 1153