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February 16, 2004

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court  
Supreme Court Building  
P. O. Box 12248  
Capitol Station  
Austin, Texas 78711

RE: Proposed Change to TRCP 166 (Comment)

Dear Justice Phillips:

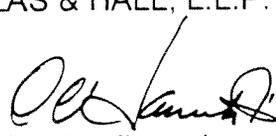
Enclosed is a proposed comment to TRCP 166 (Pretrial Conference) which has been approved for submission to the Supreme Court by the Court Rules Committee.

By copy of this letter, I am forwarding copies of this proposed rule change to Justice Hecht, Chris Griesel, and to Charles Babcock, Chairman of the Supreme Court Advisory Committee.

Sincerely,

ATLAS & HALL, L.L.P.

By:

  
O. C. Hamilton, Jr.

OCH:PGB  
Supreme Court.TRCP 166.2.16.2004

Attachment

The Honorable Thomas R. Phillips  
Chief Justice, Supreme Court  
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cc w/enclosures:

The Honorable Nathan Hecht  
Justice, Supreme Court of Texas  
Supreme Court Building  
P. O. Box 12248, Capitol Station  
Austin, Texas 78711

Charles Babcock  
901 Main Street Suite 6000  
Dallas, Texas 75202-3748

Chris Griesel  
Supreme Court Building  
P. O. Box 12248, Capitol Station  
Austin, Texas 78711

**STATE BAR OF TEXAS**

**COMMITTEE ON COURT RULES**

**REQUEST FOR NEW RULE, CHANGE OF EXISTING RULE, OR COMMENT**

**TEXAS RULES OF CIVIL PROCEDURE**

**I.** Exact Wording of Existing Rule: No existing comment.

TRCP 166. Pretrial Conference

**II.** Proposed Comment:

Comment:

1. Some cases, such as those involving mass torts or multiple parties, may particularly benefit from “Lone Pine” case management orders. See Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 Hastings W.-N.W. J. Env. L. & Pol’y 71 (1999). The trial courts may use these orders in the exercise of their discretion. *Lore v. Lone Pine Corp.*, 1986 N.J. Super. LEXIS 1626 (1986); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217 (Tex. 1999); *Able Supply Co. v. Moyer*, 898 S.W.2d 766 (Tex. 1995); *Bates v. Schneider Nat’l Carriers, Inc.*, 95 S.W.3d 309 (Tex. App. – Houston [1st Dist.] 2002, pet denied); *Martinez v. San Antonio*, 40 S.W.3d 587 (Tex. App. – San Antonio 2001, pet denied); *Williams v. Akzo Nobel Chems. Inc.*, 999 S.W.2d 836 (Tex. App. – Tyler 1999, no pet.); *In re Mohawk Rubber Co.*, 982 S.W.2d 494 (Tex. App. – Texarkana 1998, orig. proceeding); *Adjemian v. American Smelting & Refining Co.*, No. 08-00-00336-CV, 2002 WL 358829 (Tex. App. – El Paso March 7, 2002) (not designated for publication); and *Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000).

**III.** Brief Statement of Reasons for Requested New Comment:

The Committee requests that this comment be added to Tex. R. Civ. P. 166 for the following reasons:

- In proper mass tort cases, Lone Pine Case Management Orders (“CMOs”) have great utility.
- A number of Texas state district court judges apparently question whether or not they have the authority to enter such CMOs under Tex. R. Civ. P. 166, as it currently is written.
- The Committee believes that state trial courts do have such authority. Therefore, no amendment to Rule 166 is proposed.
- However, the Committee believes that an appropriate Comment will provide formal and unequivocal recognition of the validity of such CMOs.

- This will provide at least two immediate benefits. First, it will encourage the trial courts to use such CMOs in appropriate cases. Second, it will eliminate much, if not all, of the time and expense that otherwise might be devoted to challenges of such CMOs.

Case Management Orders have become increasingly common in recent years in both federal and state courts. Depending upon the jurisdiction, CMOs are based on accepted court powers, abstract rules of civil procedure, or specific legislative authorization. Most commentators seem to agree that formal and unequivocal recognition of the validity of CMOs must be forthcoming. If such authority is not provided, a great deal of judicial time and client money will be wasted as parties continue to challenge the validity and scope of such orders.

There is also a general consensus that CMOs are most appropriate within the context of complex litigation. However such litigation is defined, there is little question that toxic tort cases, as they have evolved since the Agent Orange litigation, fall within that definition. The Agent Orange court noted the following traits that have come to characterize many complex toxic tort cases:

- A large number of plaintiffs and potential plaintiffs;
- Numerous defendants;
- Plaintiffs from many states, even different countries;
- Difficult and complex causation issues;
- Numerous questions of law;
- As yet unperceived or unknown effects of exposure;
- Numerous scientific and medical issues;
- Ambivalent or resistant parties;
- Significant public policy concerns; and
- The need for a wide variety of procedural tools in order to control the litigation.

The CMO has come to occupy a special place in the world of toxic tort litigation, and it is here that a specialized CMO has become known as the “Lone Pine Order.” A good summary of the issues can be found in an article entitled *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*.<sup>1</sup> This article lists the following factors that come into play in toxic tort cases.

- Because Toxic Tort cases are so complicated, and the material so voluminous, the defendants are often confronted with a difficult dilemma of whether to (i) proceed

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<sup>1</sup> Scott A. Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort*, 6 Hastings W.-N.W.J. Env. L. & Pol’y 71 (1999).

with the litigation, possibly at a high cost, or (ii) settle the litigation prematurely.

- Plaintiffs recognize that the monumental task of responding to such complaints often leads industry to settle cases, rather than incur huge litigation costs and the possibility of negative publicity.
- The tasks of plaintiffs have been simplified since the government has undertaken the prodigious responsibility of collecting and analyzing “massive amounts of data regarding the use of hazardous materials.”
- The increasing number of materials proven by science to cause ailments has resulted in a greater number of legitimate filings by plaintiffs.
- Unfortunately, the number of invalid claims filed by plaintiffs has increased as well.
- 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.”

Several Texas state trial courts have entered variations of Lone Pine Orders. In *Abarca v. Hon. Mike Westergren*, the plaintiffs in a toxic tort case sought a writ of mandamus from a trial court’s Lone Pine Order. 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.” 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.” 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.” The Texas Supreme Court denied the plaintiffs’ request for a writ.<sup>2</sup>

Nevertheless, there are reports that some Texas district court judges have refused or hesitated to enter Lone Pine CMOs because they question whether or not they have the authority to do so under TEX. R. CIV. P. 166. Most courts and commentators agree that trial judges should be encouraged to use their inherent or rule-based powers to manage complex cases in an efficient and expeditious manner, but seem to feel that the courts need explicit authority to exercise such options. They also seem to favor a state-wide approach, in order to avoid the inconsistencies that might otherwise occur. The Committee agrees with this analysis, and believes that the proposed Comment is the best means of achieving this objective.

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<sup>2</sup> *Abarca v. Hon. Mike Westergren*, No. 96-0911 (Tex. Sup., Aug. 23, 1996) (cited in *Texas High Court Denies Leave to Seek Mandamus from Lone Pine Order*, 5 MEALEY’S EMERGING TOXIC TORTS 20, Nov. 26, 1996).