COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Court of Appeals, State of Colorado, 2012CA1251	
District Court, City and County of Denver, State of Colorado, 2011CV2218 The Hon. Ann B. Frick	▲ COURT USE ONLY ▲
Petitioners: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION, CALFRAC WELL SERVICES CORP., and FRONTIER DRILLING LLC v. **Respondents:** WILLIAM G. STRUDLEY and BETH E. STRUDLEY, Individually, and as the Parents and Natural Guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor	Supreme Court Case No.: 2013SC576
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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN FUEL AND PETROCHEMICAL MANUFACTURERS, AMERICAN CHEMISTRY COUNCIL, AMERICAN COATINGS ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND METALS SERVICE CENTER INSTITUTE IN SUPPORT OF PETITIONERS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements. Specifically, the undersigned certifies that this brief (including headings, footnotes, and quotations but excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature blocks) contains 4,209 words.

s/ Richard O. Faulk
Richard O. Faulk

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IDENTITIES AND INTERESTS OF AMICI CURIAE

The **National Association of Manufacturers** (the "NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, and has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. For more information, *see* the NAM's website, http://www.nam.org.

The **American Fuel & Petrochemical Manufacturers** ("AFPM") is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate 122 U.S. refineries comprising approximately 98 percent of U.S. refining capacity. AFPM petrochemical members support 1.4 million American jobs, including approximately 214,000 employed directly in petrochemical manufacturing plants. For more information, *see* AFPM's website, http://www.afpm.org.

The **American Chemistry Council** ("ACC") represents the leading companies engaged in the business and science of chemistry, a $770 billion enterprise and a key element of the nation's economy. ACC's mission is to deliver business value through exceptional advocacy using best-in-class member performance, political engagement, communications and scientific research. It is committed to sustainable development by fostering progress in our economy, environment and society. For more information, *see* ACC's website, http://www.americanchemistry.com.

The **American Coatings Association** ("ACA") ACA is a voluntary, nonprofit organization working to advance the needs of the paint and coatings industry and the professionals who work in it. Through advocacy of the industry and its positions on legislative, regulatory, and judicial issues at the federal, state and local levels, it acts as an effective ally ensuring that the industry is represented and fairly considered. The association also devotes itself to advancing industry efforts with regard to product stewardship, and offers essential business information to members through its publications, surveys, and business programs. For more information, *see* ACA's website, http://www.paint.org.

The **Independent Petroleum Association of America** (IPAA) is a national trade association that represents the thousands of independent oil and natural gas

producers and service companies across the United States. Independent producers develop 95 percent of domestic oil and gas wells, produce 68 percent of domestic oil, and produce 82 percent of domestic natural gas. IPAA has over 6,400 members, including companies that produce oil and natural gas ranging in size from large publicly traded companies to small businesses, companies that support this production such as drilling contractors, service companies and financial institutions. For more information, *see* IPPA's website, http://www.ipaa.org.

The **Metals Service Center Institute** ("MSCI"), more than 100 years strong, is the broadest-based, not-for-profit association serving the industrial metals industry. As the premier metals trade association, MSCI provides vision and voice to the metals industry, along with the tools and perspective necessary for a more successful business. *See* MSCI's website at http://msci.org.

Amici represent a highly diverse group of American industries, all of which are potentially impacted by the issues raised in this action. "Lone Pine" orders are not unique to the facts and circumstances of this particular case. Instead, they may arise in any litigation involving any industry where a trial court, in its discretion, may consider ordering or advancing discovery or disclosures in the interest of early case disposition. As manufacturers, producers and sellers of products and goods sold in interstate commerce, *Amici* have strong interests in the appropriate use of

active case management devices such as "Lone Pine" orders to reduce the delay and costs associated with litigation.

I. SUMMARY OF THE ARGUMENT

This case presents a critical question regarding the ability of Colorado trial courts to exercise their discretion for the purpose of managing disputes efficiently and effectively. Respondents' position seeks to "roll back the clock" to a time when the pace and progress of litigation was largely deferred to counsel, rather than courts – when judicial intervention was eschewed, instead of actively utilized to promote fair, prompt and cost-effective resolutions.

Fortunately, in Colorado and, indeed, in most courts throughout the nation, "the way we were" is no longer the "the way we are." Instead of passively entrusting parties with broad power to manage their own disputes, new rules and principles have expanded and enlarged the scope of trial court discretion. As a result, judges are empowered and encouraged to manage cases creatively in the interests of justice. By these rules, the delay and costs formerly associated with the administration of justice are reduced, access to justice is enhanced, and the resources of the parties and the public are conserved.

In this brief, *Amici* provide a historical and comparative jurisprudential analysis of "then" and "now." They trace the growth and transformation of the

adversary process over the past decades from its roots in procedural *laissez-faire* to modern case management by jurists actively involved in controlling the process to ensure the timely, efficient and cost-effective administration of justice. Colorado is certainly no stranger to this development. Indeed, it has been embraced in this Court's rulemaking and its decisions.

"Lone Pine" orders are a natural product of this expansion of trial court discretion. They rely upon the critical importance of early and carefully considered judicial intervention to achieve the most salutary goal of any judicial system – a just and prompt resolution at the lowest cost necessary to reach that end. They are not dispositive in themselves, but when issued, they offer an opportunity to identify, isolate and develop particular issues which may lead to that end. Viewed in this light, the trial court's discretionary "Lone Pine" ruling was entirely consistent with the history of active case management, the procedural underpinnings of Colorado law, and a host of decisions from other jurisdictions that have embraced similar goals.

II. THE TRIAL COURT'S "LONE PINE" ORDER IS CONSISTENT WITH THE HISTORY AND PRINCIPLES OF ACTIVE CASE MANAGEMENT.

A. The Rise of Active Case Management in State and Federal Courts

> "One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation."
>
> *Hoffmann-La Roche v. Sperling*, 493 U.S. 165, 172 (1989) (Per Kennedy, J.)

By the time Justice Kennedy wrote these words, the world of case management had changed dramatically. In earlier times, judges were relatively passive regarding the progress of cases, and lawyers generally managed their cases until they encountered a problem that required judicial attention. In those days, efforts to enhance judicial administration focused on improving structure and providing judges with resources and formal tools to solve problems of excessive delay and other administrative problems – as opposed to active case management. *See* DAVID C. STEELMAN, CASEFLOW MANAGEMENT: THE HEART OF COURT MANAGEMENT IN THE NEW MILLENNIUM xiv (2004).

By the 1970's, however, concerns regarding costs and delays began focusing attention on how cases actually *progressed* from filing to disposition – and how the overall *process* might be improved to hasten fair administration of justice. In 1973, the American Bar Association's Commission on Standards of Judicial Administration commissioned a monograph by Maureen Solomon, in which she concluded that the most effective way to reduce delay and improve the judicial

process was for *judges* to control the progress of litigation. *See* Maureen Solomon, *Caseflow Management in the Trial Court* (American Bar Association, 1973), at 29-30.[1]

Building on this foundation, the National Center for State Courts conducted a rigorous and comprehensive study that examined cases resolved by state trial courts. The study concluded that the data "strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, we have called this cluster of related factors the 'local legal culture."' Thomas Church et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts* 54 (National Center for State Courts, 1978). According to the researchers, solving the problem would "require changes in the attitudes and practices of all members of the legal community." *Id.* at 83. Significantly, their very first recommendation was to *"establish management systems by which the court, and not the attorneys, controls the progress of cases." Id.*

[1] In later years, Ms. Solomon, working as a Colorado case management consultant, maintained her opinions and continued to publish on active case management issues. See Maureen Solomon, *Fundamental Issues in Caseflow Management*, STEVEN W. HAYS AND COLE BLEASE GRAHAM, JR., HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT (1993), at 369-382.

Almost contemporaneously, a study of the federal judicial system reached similar conclusions. *See* Steven Flanders, *Case Management and Court Management in United States District Courts* ix (Federal Judicial Center, 1977) (concluding that courts that "strictly monitored" case progress, ensured completion of discovery within a "reasonable time," and initiated settlement negotiations strategically distinguished "fast" courts from other tribunals). These studies confirmed Maureen Solomon's original conclusions and set the stage for significant changes in case administration in the nation's state and federal courts. They influenced many jurisdictions to implement case management programs "emphasizing early court intervention in cases and active court oversight of their progress to disposition." *See* STEELMAN, supra at xvi.

Even before active case management was enshrined in the Federal Rules of Civil Procedure, Judge Robert Peckham found that the concept was being applied widely and successfully as a matter of judicial discretion – either intuitively or by local rules. *See* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). Remarking on the enhanced rates of disposition in the federal courts – even with a growing caseload – he ascribed the achievement to early and effective case management:

> I suggest that it is the judge's new role as case manager that has made this impressive productivity record possible. I am satisfied that the rise in judicial efficiency is primarily due to more effective use by judges of pretrial management procedures. Most important has been the increasingly widespread use of the early status conference, a device which enables a judge to *intervene soon after the filing of a case* to schedule all the activity that will occur before trial . . . Justice itself requires speedy, smooth, and inexpensive disposition of cases, because "justice delayed may be justice denied or justice mitigated in quality."

Id. at 770-71 (emphasis added). Because of his confidence in these practices, Judge Peckham recommended that the Federal Rules of Civil Procedure be amended to further empower judicial management, *id.* at 773, 788, 804, and even suggested expanding the role of sanctions in pretrial practice, foreshadowing their increased importance in disciplining obstructive behavior. *Id.* at 800-04.

True to the recommendations of Judge Peckham and others, Federal Rule 16 was "extensively rewritten and expanded" in 1983 "to meet the challenges of

modern litigation."[2] As amended, the Rule fully embraced active judicial case management:

> Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

Id. [3] Rule 26 was also amended in 1983 to, among other things, "encourage judges to identify instances of needless discovery and to limit the use of various discovery devices."[4] Amended Rule 26(b) contemplated "greater judicial involvement in the discovery process" and "acknowledged the reality that it cannot always operate on a self-regulating basis." [5] Finally, amended Rule 26(g), combined with amendments to Rule 11, "made explicit the authority judges now have to impose appropriate sanctions" and "required them to use it."[6] With these changes, active

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[2] FED. R. CIV. PROC. 16 (Advisory Committee's note to 1983 amendment).

[3] Tellingly, the Committee relied on the pioneering research done by Stephen Flanders, *see supra* at 8, to support its reasoning. *Id.*

[4] *See* FED. R. CIV. P. 26(a)(Advisory Committee Note to 1983 amendment),

[5] *See* FED. R. CIV. P. 26(b)(Advisory Committee Note to 1983 amendment).

[6] *See* FED. R. CIV. P. 26(g)(Advisory Committee Note to 1983 amendment).

case management was not only endorsed – but also grew "teeth" to motivate compliance.

The triumph of managerial judging in the federal system was marked by its recognition by the Manual for Complex Litigation which, by the 1985 edition, provided:

> [T]he propriety, if not the necessity of judicial control to promote the efficient conduct of the litigation . . . stems from an awareness that the tensions between an attorney's responsibilities as an advocate and as an officer of the court frequently are aggravated in complex litigation and that the tactics of counsel may waste time and expense if the judge passively waits until problems have arisen.

MANUAL FOR COMPLEX LITIGATION, SECOND, Sec. 20.1 (1985). Shortly thereafter, Judge Peckham explained that the judicial power to manage litigation is no less important than traditional legal rulings – and should be no more controversial:

> Admittedly, in limiting the scope of discovery, setting schedules, and narrowing issues, the [managerial judge] restricts somewhat the attorneys' freedom to pursue their actions in an unfettered fashion, and eliminates entirely some theories or lines of inquiry. Motions to dismiss some claims or for partial summary judgment similarly may

> result in drastic alteration of the contours of a lawsuit, yet we do not question the legitimacy of judges deciding such motions.

Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 264-65 (1985).

In the same general time frames, active case management was also studied and evaluated by the state judiciaries, notably through the National Center for State Courts and other organizations. *See generally*, STEELMAN, supra at xiv-xvii. Important retrospective reviews of these studies confirmed and emphasized that early judicial intervention was critical to efficacious judicial administration in state courts:

> A basic tenet arising from caseflow management research in the last 20 years is that the court, and not the other case participants, should control the progress of cases. The court should accept responsibility for the movement of cases from the time that they are filed, ensuring that no case is unreasonably interrupted in its procedural progress from initiation to completion of all court work.

Id. at 5. The research also demonstrated, however, that simply "taking control" of the pace of litigation through active case management was not sufficient. To be

successful, "there must be a *long-term commitment by the court to change practitioner expectations about the pace of litigation.*" David C. Steelman, *What Have We learned About Court Delay, "Local Legal Culture," and Caseflow Management Since the 1970's?*, 19 JUSTICE SYSTEM J. 145, 153 (1997)(emphasis in original).

One of the most important "expectations" established by early judicial intervention is that court events are "meaningful" because they "contribute substantially to progress toward disposition." STEELMAN, supra at 6. The expectation "ensures that the lawyers and parties will be prepared to make those events meaningful in terms of progress to appropriate outcomes." *Id.* If, however, the progress of the case is unnecessarily delayed, "the emotional and financial costs of litigation may increase because of the need to prepare for additional court appearances." *Id.* This concern demonstrates that active case management is far more than an administrative system for courts and lawyers. It is designed to serve the deeper emotional and financial interests of the *parties* involved in litigation – who are, after all, the ones for whom the entire system was created.

B. Colorado Stands Squarely in the Mainstream of American Jurisprudence Regarding Active Case Management

Caseflow management programs are now commonplace in trial courts throughout America – and Colorado is no exception. Effective case management

is part of what is considered "optimal performance" for a court in terms of service to the public. *See* Steelman, 19 JUSTICE SYSTEM J. at 161. Indeed, the ability to render just decisions in keeping with procedural fairness and in a timely manner is one of the ways that the effectiveness of individual trial judges is typically measured. *Id.* The evolution of Colorado's programs, and the rules amendments that authorized and empowered them, closely resemble the experience of the federal judiciary, a system whose appellate courts have approved "Lone Pine" motions in every instance where they have been challenged.

At the outset, the Colorado and Federal Rules share a common purpose, namely, the "just, speedy and inexpensive" resolution of disputes. *Compare* FED. R. CIV. P. 1 *with* C.R.C.P. 1(a). The Rules are also similar because they accomplish this purpose through Rules 16 and 26. *See generally,* Richard P. Holme, *Colorado's New Rules of Civil Procedure, Part I: Case Management and Disclosure*, THE COLORADO LAWYER, Vol. 23, No. 11 (Nov. 1994); Richard P. Holme, *Colorado's New Rules of Civil Procedure, Part II: Rediscovering Discovery*, THE COLORADO LAWYER, Vol. 23, No. 11 (Dec. 1994).[7] With these

[7] Petitioner's Opening Brief contains an excellent discussion of the Colorado procedural rules, how they resemble the federal rules, and how they apply to this controversy. *See* Petitioner's Opening Br. at 20-23, 26-28, 32-41. For the sake of brevity, *Amici* will not repeat that discussion here, but rather incorporate that discussion by reference.

changes, Colorado's rules "reflect an evolving effort to require active judicial management of pretrial matters to curb discovery abuses, reduce delay, and decrease litigation costs." *DCP Midstream, LP v. Anadarko Petroleum Corp.,* 303 P.2d 1187, 1190 (Colo. 2013). Given these commonalities, it is not surprising that federal appellate decisions have consistently accepted "Lone Pine" orders as appropriate case management tools.

In the most recent example, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the dismissal of claims filed by a group of Ecuadorian provinces and individual farmers. *Arias v. DynCorp*, ___ F.3d ___, 2014 WL 2219109 (D.C. Cir. May 30, 2014).[8] In *Arias,* the plaintiffs filed a putative class action on behalf of all Ecuadorians who lived within ten miles of the Colombian border. They alleged that they were injured by an anti-drug herbicide spraying operation in Colombia that was conducted by an American company.

Ultimately, the class action allegations were dropped and, to move the case forward, the district court ordered the remaining individual plaintiffs to submit answers to questionnaires regarding their injuries, which, according to the D.C. Circuit, is a "common trial management technique in toxic tort cases with multiple plaintiffs." 2014 WL 2219109 at *4. The Court explained that "[s]uch an order is

[8] A copy of the *Arias* opinion is provided in the Appendix to this brief.

sometimes called a *Lone Pine* order, in reference to *Lore v. Lone Pine Corp.*, No.L-33606-85, 1986 WL 637507 (N.J. Superior Ct. Nov. 18, 1986). It generally requires plaintiffs in a toxic tort case to produce affidavits setting forth some basic information regarding their alleged exposure and injury." *Id.* According to the court, "such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16." *Id.*

Even after the response deadlines were extended, many plaintiffs still submitted incomplete responses. After the court warned that failure to fully complete the forms would lead to dismissal with prejudice, the judge extended the deadline yet again. After plaintiffs' repeated failures to adequately complete the responses – and three deadline extensions – the district court "ultimately exercised its Rule 37(b) prerogative to sanction the plaintiffs by dismissing the case." *Id.* at *5.[9]

On appeal, the dismissed plaintiffs argued that dismissal was "too harsh of a sanction" and that the trial court should have considered "less dire alternatives." *Id.* But the court of appeals disagreed:

[9] Significantly, plaintiffs in the present case did not request any extension of the 105-day period allowed for compliance with the trial court's order. *See* Petitioner's Br. at 13.

> The court gave the plaintiffs every opportunity to complete their responses. Indeed, the court appears to have been, if anything, too patient, applying no sanctions at all for the plaintiffs' earlier failures. Only when further extensions were obviously futile did the court dismiss these cases.

2014 WL 2219109 at *6. Based on this record of non-compliance, the appellate court ruled that it was "impossible to conclude that the judge abused his discretion" by dismissing the claims with prejudice. *Id.*

This ruling was consistent with two other federal appellate decisions that previously addressed "Lone Pine" situations. *See Avilla v. Willets Environmental Remediation Trust*, 633 F.3d 828, 833-834 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 120 (2011) ("No basis appears for us to cordon off one type of order – a prima face order on exposure and causation in toxic tort litigation from the universe of case management orders that a district court has discretion to impose."); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000) (affirming dismissal for failure to comply with "Lone Pine" order because "[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.").[10]

Although the present case involves a smaller group of claimants than *Arias, Avilla* and *Acuna*, plaintiffs' failure to provide adequate information is equally profound. Although the Colorado Oil and Gas Conservation Commission ("COGCC") investigated plaintiffs' claims before the lawsuit was filed, the COGCC found no evidence of contamination from oil and gas operations. Faced with this "uphill climb," as well as disclosure requirements under Rule 26 and, ultimately, a "Lone Pine" case management order rendered by the trial court, plaintiffs still produced no expert evidence that (i) their air and water was contaminated by any particular hazardous substance; (ii) they sustained any particular dose or level of exposure to any specific hazardous substance; (iii) they had been medically diagnosed with any particular injury or illness; (iv) any specific injuries or illnesses from which they allegedly suffered could be caused or were actually caused by any specific hazardous substance. Ultimately, the *only* expert affidavit produced by plaintiffs was entirely *silent* on these points – and

[10] By concentrating on federal appellate decisions as comparable to this controversy, *Amici* do not discount the importance of decisions by federal district courts and state appellate courts. For purposes of brevity, however, it suffices to note that those decisions are ably discussed in Petitioner's opening brief. *See* Petitioner's Opening Br. at 23-26. Accordingly, those arguments and authorities are incorporated by reference and not repeated here.

merely concluded that sufficient evidence existed to "merit future substantive discovery."[11] Under the circumstances, the trial court's decision to dismiss plaintiffs' claims was consistent with not only the Colorado Rules of Civil Procedure, but also the tradition of active case management upon which they were founded.

C. "Lone Pine" case management orders have been applied to a variety of controversies beyond toxic tort litigation.

Finally, it is important to note that "Lone Pine" orders are not limited to toxic tort litigation. Virtually any type of complex claim involving any type of product or industry is subject to these tools if, in the trial court's discretion, their implementation will advance the interests of fair and prompt administration of justice.

For example, courts presiding over pharmaceutical product liability claims have used similar orders effectively. *See, e.g., In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2009 WL 1158887 (E.D. La. Apr. 28, 2009), *aff'd,* 388 Fed. App'x 391 (5th Cir. 2010)(dismissal affirmed when plaintiffs failed to submit court-ordered doctor's reports); *In re Phenylpropanolamine Prod. Liab. Litig.,* 460

[11] This summary is fully substantiated in Petitioners' Opening Brief. *See* Petitioner's Opening Brief, at 6-17. For the sake of brevity, that substantiation is incorporated by reference and is not repeated here.

F.3d 1217 (9th Cir. 2006)(affirming dismissal of claims when plaintiffs failed to submit court-ordered "fact sheets").

The orders have also been applied to trade secrets claims and the complications of contribution and cost-recovery claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). See *United Serv. Auto. Ass'n v. Mitek Sys., Inc.*, No. SA-12-CV- 282-FB, 2013 WL 625419, at *5 (W.D. Tex. Feb. 15, 2013) (citing "Lone Pine" cases in support of order requiring plaintiff to identify (1) alleged trade secrets claimed to be misappropriated, and (2) "claims with sufficient particularity so that the reader understands how each claim differs from public domain information."); *Asarco, LLC v. NL Indus., Inc.*, No. 4:11-CV-00864-JAR, 2013 WL 943614, at *3 (E.D. Mo. Mar. 11, 2013)(granting "Lone Pine" order until such time as [Plaintiff] establishes a prima facie case."). For additional examples, *see* David B. Weinstein and Christopher Torres, *An Art of War Lesson Applied to Mass Torts: The Lone Pine Strategy*, 14 ABA ENVTL. ENF. & CRIMES COMM. NEWSLETTER, 14, 15-16 (2013). In view of the utility of these and similar orders in many types of litigation potentially concerning *Amici* and their members, *Amici* strongly urge the Court to recognize the viability of these valuable case management tools.

CONCLUSION

WHEREFORE, National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, American Chemistry Council, American Coatings Association, Independent Petroleum Association of America, and Metals Service Center Institute respectfully request that the Court reverse the Court of Appeal's decision.

Respectfully submitted this 18th day of June, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of June, 2014, the foregoing **Brief of Amici Curiae National Association of Manufacturers, American Fuel and Petrochemical Manufacturers, American Chemistry Council, American Coatings Association, Independent Petroleum Association of America, and Metals Service Center Institute in Support of Petitioners** was filed and served electronically via ICCES on the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing Parties.

APPENDIX

--- F.3d ----, 2014 WL 2219109 (C.A.D.C.)
(Cite as: 2014 WL 2219109 (C.A.D.C.))

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Only the Westlaw citation is currently available.

United States Court of Appeals,
District of Columbia Circuit.
Venancio Aguasanta ARIAS, husband, on behalf of himself, as guardian of his four minor children, and on behalf of all others similarly situated, et al., Appellants
v.
DYNCORP, et al., Appellees.

Nos. 13–7044, 13–7045.
Argued April 14, 2014.
Decided May 30, 2014.

Background: Ecuadorian citizens and domiciliaries brought action against herbicide sprayer hired by the Department of State (DOS) to eradicate Colombian cocaine and heroin poppy plantations, alleging personal injury and property damage. The United States District Court for the District of Columbia, Richard W. Roberts, J., 677 F.Supp.2d 330, dismissed citizens who had not completed discovery questionnaires, 738 F.Supp.2d 46, dismissed domiciliaries for lack of Article III standing, and, 928 F.Supp.2d 1, granted summary judgment in sprayer's favor. Citizens and domiciliaries appealed.

Holdings: The Court of Appeals, Silberman, Senior Circuit Judge, held that:
(1) provinces' claims of direct monetary damages did not satisfy injury-in-fact requirement for Article III standing;
(2) provinces' direct expenditures were not "fairly traceable" to spraying of pesticides;
(3) citizens who filed incomplete questionnaire responses were properly dismissed;
(4) failure to provide expert testimony as to general causation for claims of property damage warranted dismissal of negligence claims, and
(5) expert testimony was not necessary to prove Ecuadorian citizens' claims for battery, nuisance, and intentional infliction of emotional distress.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Federal Civil Procedure 170A 1925.1

170A Federal Civil Procedure
170AXIV Pre-Trial Conference
170Ak1925 Scope
170Ak1925.1 k. In General. Most Cited Cases

A *Lone Pine* order, which generally requires plaintiffs in a toxic torts case to produce affidavits setting forth some basic information regarding their alleged exposure and injury, is issued under the wide discretion afforded district judges over the management of discovery. Fed.Rules Civ.Proc.Rule 16, 28 U.S.C.A.

[2] Agriculture 23 9.5

23 Agriculture
23k9.2 Pesticides and Herbicides
23k9.5 k. Tort Liability. Most Cited Cases

Several unknown factors could have caused budget deficits of which Ecuadorian provinces complained, and therefore provinces' claims of direct monetary damages did not satisfy injury-in-fact element of Article III standing in tort action against companies which, pursuant to contract with United States government, sprayed pesticides over cocaine and heroin farms in Colombia that allegedly entered into Ecuador. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[3] Federal Civil Procedure 170A 103.2

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 k. In General; Injury or Interest. Most Cited Cases

Lost tax revenue is generally not cognizable as

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an injury-in-fact for purposes of standing.

[4] Agriculture 23 ⚷9.5

23 Agriculture
23k9.2 Pesticides and Herbicides
23k9.5 k. Tort Liability. Most Cited Cases

Ecuadorian provinces' direct expenditures on facilities like health centers were not "fairly traceable" to spraying of pesticides, as required to establish Article III standing in tort action against companies which, pursuant to contract with United States government, sprayed pesticides over cocaine and heroin farms in Colombia that allegedly entered into Ecuador. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[5] Federal Civil Procedure 170A ⚷1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

Those Ecuadorian citizens who had failed to provide complete questionnaire responses as to their location at time of pesticide spraying or as to their specific damages were properly dismissed with prejudice, pursuant to rule allowing discovery sanctions for failing to comply with court order, from action against company, which had sprayed pesticide to destroy Columbian cocaine and heroin crops under United States government contract, where court gave citizens every opportunity to complete their responses, had applied no sanctions at all for earlier failures, and only dismissed citizens when earlier extensions were obviously futile. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

[6] Negligence 272 ⚷404

272 Negligence
272XIII Proximate Cause
272k404 k. Dangerous Instrumentalities and Substances. Most Cited Cases

In a toxic torts case, proof of general causation is proof that the substance in question is capable of causing the particular injuries complained of.

[7] Agriculture 23 ⚷9.5

23 Agriculture
23k9.2 Pesticides and Herbicides
23k9.5 k. Tort Liability. Most Cited Cases

Failure by Ecuadorian citizens and domiciliaries to provide expert testimony as to general causation for claims of damage to farm animals, fish, or crops allegedly caused by herbicide sprayer hired by the Department of State (DOS) to eradicate Colombian cocaine and heroin poppy plantations warranted dismissal of their negligence action under District of Columbia law seeking to recover for property damage.

[8] Federal Courts 170B ⚷3418(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BXVII(D)2 Particular Grounds of Review
170Bk3406 Matters of Procedure
170Bk3418 Judgment and Relief
170Bk3418(2) k. Summary Judgment. Most Cited Cases

Ecuadorian citizens failed to preserve for direct appeal their claim that district judge improperly granted summary judgment against the non-test plaintiffs, along with the test plaintiffs, in tort action against companies which, pursuant to contract with United States government, sprayed pesticides over cocaine and heroin farms in Colombia that allegedly entered into Ecuador, where citizens failed to bring the issue to district judge's attention through a motion to alter or amend the entry of judgment. Fed.Rules Civ.Proc.Rule 59(e), 28 U.S.C.A.

[9] Federal Courts 170B ⚷3391

170B Federal Courts
170BXVII Courts of Appeals

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170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BXVII(D)1 In General
170Bk3391 k. In General; Necessity. Most Cited Cases

Although arguments must be presented in the same proceeding in order to preserve the issue for appeal, they need not be presented in a single filing.

[10] Assault and Battery 37 ⚿2

37 Assault and Battery
37I Civil Liability
37I(A) Acts Constituting Assault or Battery and Liability Therefor
37k1 Nature and Elements of Assault and Battery
37k2 k. In General. Most Cited Cases

Damages 115 ⚿192

115 Damages
115IX Evidence
115k183 Weight and Sufficiency
115k192 k. Mental Suffering and Emotional Distress. Most Cited Cases

Nuisance 279 ⚿49(5)

279 Nuisance
279I Private Nuisances
279I(D) Actions for Damages
279k49 Evidence
279k49(5) k. Weight and Sufficiency. Most Cited Cases

Expert testimony on issue of harm was not necessary to prove Ecuadorian citizens' claims for battery, nuisance, and intentional infliction of emotional distress in action against companies which, pursuant to contract with United States government, sprayed pesticides over cocaine and heroin farms in Colombia that allegedly entered into Ecuador, and thus such claims should not have been dismissed on such basis.

[11] Damages 115 ⚿57.16(2)

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.13 Negligent Infliction of Emotional Distress
115k57.16 Nature of Injury or Threat
115k57.16(2) k. Physical Illness, Impact, or Injury; Zone of Danger. Most Cited Cases

To recover for negligent infliction of emotional distress, plaintiffs must prove that they were within the "zone of physical danger" created by the defendant's negligent action.

Appeals from the United States District Court for the District of Columbia, (No. 1:01–cv–01908), (No. 1:07–cv–01042).Christian Levesque argued the cause for appellants. With her on the briefs were Terrence Collingsworth and Eric Hager.

Eric G. Lasker argued the cause for appellees. With him on the brief were Joe G. Hollingsworth and Rosemary Stewart.

Before TATEL, Circuit Judge, and SILBERMAN and SENTELLE, Senior Circuit Judges.

Opinion for the Court filed by Senior Circuit Judge SILBERMAN.

SILBERMAN, Senior Circuit Judge:

***1** Appellants, a group of Ecuadorian provinces and individual farmers, alleged that they were injured by an anti-drug herbicide spraying operation in Colombia, conducted by an American company. In a series of rulings, the district judge dismissed all claims. Some of those are appealed. We affirm

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all but one.

I.

Since the late 1990s, the United States and Colombia have cooperated in a program known as "Plan Colombia," which encompasses a range of policies designed to combat Colombian drug cartels. That includes aerial herbicide spraying targeting illegal coca crops. Defendant DynCorp, an American contractor, conducted these spraying operations using an herbicide called glyphosate.

On September 11, 2001, plaintiffs filed a putative class action on behalf of all Ecuadorians who lived within ten miles of the Colombian border. They alleged that herbicide had drifted across the border from Colombia and that the planes themselves had actually crossed the border and sprayed in Ecuador. The plaintiffs invoked the district court's diversity jurisdiction and asserted a wide variety of tort claims for alleged injuries to health, property, and financial interests, relying on both Ecuadorian and District of Columbia law. All parties apparently agree now, however, that D.C. substantive law governs. For reasons that are not entirely clear to us, the case proceeded at a glacial pace.

In 2006 and 2007, additional cases were filed in the Southern District of Florida, on behalf of other individual plaintiffs, as well as three Ecuadorian provinces. Those cases were transferred to our district court, where they were consolidated with the original suit. The initial plaintiffs dropped their class action demand at this time, and discovery then proceeded.

[1] In 2007, the district court attempted to move the proceedings along by employing a requirement that plaintiffs submit answers to questionnaires concerning their alleged injuries—a common trial management technique in toxic torts cases with multiple plaintiffs. Such an order is sometimes called a *Lone Pine* order, in reference to *Lore v. Lone Pine Corp.*, No. L–33606–85, 1986 WL 637507 (N.J. Superior Ct. Nov. 18, 1986). It generally requires plaintiffs in a toxic torts case to produce affidavits setting forth some basic information regarding their alleged exposure and injury. "In 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." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir.2000). Even after an extension of the response deadline, numerous plaintiffs submitted incomplete responses. The court warned the plaintiffs that a failure to fully complete the forms by November 19, 2008, would lead to a dismissal with prejudice. The judge apparently relented, however, extending the deadline again to January 21, 2009. Then, a year later, in January of 2010, the court finally dismissed (with prejudice) those plaintiffs who had failed to submit complete responses to the questionnaires.

***2** The court proceeded to hold that the Ecuadorian provinces had failed to demonstrate Article III standing. The provinces claimed that their budgets had been harmed by reduced tax revenue and by necessary expenditures to address a public health crisis supposedly caused by the Plan Colombia spraying. But the court concluded that the provinces had either failed to demonstrate an injury cognizable for purposes of standing, or failed to demonstrate that DynCorp was the cause of the alleged injuries.

As for the remaining individual plaintiffs, the parties agreed that the court should focus on a limited number of "test plaintiffs," but disagreed as to how they would be chosen. Appellee argued they should be chosen half by the plaintiffs and half by defendant, but the court ultimately sided with plaintiffs who were to choose all the test plaintiffs. In their brief arguing for their position, the plaintiffs included a footnote (which is now hotly disputed) asserting that if the defendant's proposed test plaintiff selection method were accepted by the court, "no binding effect could be given to the outcome of the remaining claims," thereby, at least, implying that if the court accepted the plaintiffs'

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position, the result would bind all plaintiffs.

The court ultimately dismissed all of the remaining claims applicable to individual plaintiffs—both test and non-test plaintiffs—because they failed to provide expert testimony regarding the effects of glyphosate.

II.

The plaintiffs advance a number of arguments. The Ecuadorian provinces insist that they do have Article III standing. The non-test plaintiffs argue that the court improperly extended its summary judgment beyond the test plaintiffs. Those plaintiffs who were dismissed for failing to submit complete responses to the questionnaires argue that dismissal was too harsh of a sanction, and all of the individual plaintiffs contend that expert testimony was unnecessary to show that glyphosate had damaged the plaintiffs' crops, or to prove the torts of trespass, battery, nuisance, intentional infliction of emotional distress, or negligent infliction of emotional distress.

A.

We first consider the Ecuadorian provinces' Article III standing. They claim that the aerial spraying has caused health problems and driven large numbers of people away from the affected areas, which in turn forced the provinces to invest in additional schools, health centers, and other infrastructure along the border. The spraying allegedly has also cost them tax revenue—which can be estimated by comparing their annual budget deficits with their generally balanced budgets before the aerial spraying began. Indeed, it is asserted that the provinces' entire budget deficits are attributable to DynCorp's actions.

[2][3] The district court correctly concluded, however, that the provinces had either failed to allege an injury-in-fact, or failed to present facts sufficient to demonstrate that these financial injuries were fairly traceable to DynCorp's spraying. *See Sierra Club v. E.P.A.*, 292 F.3d 895, 898 (D.C.Cir.2002). Lost tax revenue is generally not cognizable as an injury-in-fact for purposes of standing. *Pennsylvania v. Kleppe*, 533 F.2d 668, 672 (D.C.Cir.1976). And the provinces' own expert noted that there are a number of economic and environmental factors that were responsible for the provinces' budget deficits, including labor disputes, difficulty collecting taxes, and even a volcanic eruption. Although the provinces generally allege that land and crops were damaged, they never claim to actually own the land or crops at issue.

***3** [4] To be sure, the provinces' direct expenditures on facilities like health centers could theoretically constitute an injury-in-fact for standing purposes, but the provinces failed to show that these injuries were "fairly traceable" to the defendants' actions. For example, the provinces contended that health centers were needed to address a high infant mortality rate and a number of prevalent diseases, but they do not even claim that these medical issues are a result of the spraying. Other testimony referred to explosions, grenades, and mortars across the border in Colombia, which are not even asserted to be DynCorp's responsibility. A defendant in a tort suit can, of course, be liable without being the sole cause of a plaintiff's injury, but the provinces have failed to demonstrate that DynCorp was any kind of cause of their alleged financial injuries. So we agree with the district court that the provinces lack standing.

B.

[5] Turning to the individual plaintiffs, we easily reject the challenge brought by the 163 plaintiffs who were dismissed for failure to provide complete responses to the court-ordered questionnaires. As we noted, the court had ordered these plaintiffs to submit written statements detailing what specific damages they suffered and where they were located when they were allegedly exposed to the herbicide. After plaintiffs' repeated failures to adequately complete the responses—and three deadline extensions—the district court ultimately exercised its Rule 37(b) prerogative to sanction the plaintiffs by dismissing the case.

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These plaintiffs argue that dismissal was too harsh of a sanction—that the judge abused his discretion. According to them, the district court failed to consider, as it was required to do under our precedent, whether "less dire alternatives" would be adequate. *See Bonds v. D.C.,* 93 F.3d 801, 808 (D.C.Cir.1996). Yet the court gave the plaintiffs every opportunity to complete their responses. Indeed, the court appears to have been, if anything, too patient, applying no sanctions at all for the plaintiffs' earlier failures. Only when further extensions were obviously futile did the court dismiss these cases. It would, thus, be impossible to conclude that the judge abused his discretion.

C.

[6] The district court dismissed all individual plaintiffs' claims for crop damages because they failed to provide expert testimony demonstrating "general causation." In a toxic torts case, proof of general causation is proof that the substance in question is capable of causing the particular injuries complained of.[FN1]

[7] The plaintiffs argue that the district court erred in requiring such an expert. They claim—correctly—that there is no dispute as to whether glyphosate-based herbicides kill plants. But they attack a straw man. The district court required expert testimony not to prove that herbicides kill plants, but to determine whether the specific herbicide at issue was capable of causing the *specific kinds of injuries* complained of. For example, plaintiffs claimed that the aerial spraying caused black spots to appear on their crops, but the defendant presented unrebutted expert testimony that glyphosate does not cause spotting. Because District of Columbia law requires expert testimony where the parties offer competing causal explanations for an injury that turn on scientific information, the district judge appropriately dismissed these claims. *See Baltimore v. B.F. Goodrich Co.,* 545 A.2d 1228, 1231 (D.C.1988). A general causation expert would also, presumably, have been able to testify as to: the concentration of herbicide necessary to produce varying effects, the susceptibility of various types of plants, and the potential for the herbicide to drift outside of the immediate vicinity of a spraying operation. These are all issues that are not within the ken of the average lay juror.

D.

***4** [8] More troubling is the plaintiffs' claim that the district judge improperly granted summary judgment against the non-test plaintiffs, along with the test plaintiffs, because the former never agreed to be bound by the latter's prospects. DynCorp contends that the fatal footnote constitutes consent—at least by implication—and that plaintiffs are therefore estopped. Although we doubt the footnote is sufficient to constitute formal consent, it certainly could have given that impression to the district judge.

Indeed, the plaintiffs never brought to the judge's attention their claim that they now assert on appeal, and, of course, we will not ordinarily consider an issue not presented below. Even if the plaintiffs were "surprised"—which may be doubtful—by the scope of the judge's order, that does not excuse their failure to bring the issue to the judge's attention through a Rule 59(e) motion (to alter or amend the entry of judgment). We have squarely held that a party must preserve an issue for appeal even if the only opportunity was a post-judgment motion. *See Jones v. Horne,* 634 F.3d 588, 603 (D.C.Cir.2011). And the misleading footnote makes the plaintiffs' failure to bring such a motion particularly egregious.

E.

[9] The individual plaintiffs do present one winning argument. They assert that the district court was wrong to dismiss claims that do *not* require expert testimony, namely, claims for trespass, battery, nuisance, and emotional distress; which do not need proof of actual damage from glyphosate. The defendant contends that the plaintiffs have waived these arguments by failing to present them first to the district court. But, as the defendant concedes, the plaintiffs did raise at least most of these

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arguments; they merely did so in a separate summary judgment motion. Although arguments must be presented in the same *proceeding* in order to preserve the issue for appeal, *United States v. British Am. Tobacco (Investments) Ltd.*, 387 F.3d 884, 887–88 (D.C.Cir.2004), they need not be presented in a single *filing*.

Not so, regarding simple trespass on plaintiffs' property; that argument was not presented at all before the district court. The plaintiffs argue in their appellate briefs that the tort of trespass does not require proof of actual damage. But this argument does not appear in their summary judgment motion. Rather, the plaintiffs only argued below that their trespass injury was crop damage, which could, they claimed, be demonstrated without expert testimony. As we noted, *supra*, the district court properly rejected that argument.

[10] Plaintiffs' claims for battery, nuisance, and intentional infliction of emotional distress stand on different footing; none of those claims requires proof of physical harm, and we see no reason why expert testimony should be necessary to prove these claims. *See Evans v. Washington Ctr. for Internships & Academic Seminars*, 587 F.Supp.2d 148, 150 (D.D.C.2008) (Battery requires a showing of a harmful *or offensive* touching.); *Homan v. Goyal*, 711 A.2d 812, 817 (D.C.1998) (A defendant is liable for intentional infliction of emotional distress when the plaintiff proves that the defendant's conduct was outrageous, intentional or reckless, and that it caused the plaintiff severe emotional distress .); *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 882 (D.C.1982) ("A public nuisance is an unreasonable interference with a right common to the general public," and "private nuisance is a substantial and unreasonable interference with private use and enjoyment of land.") (citing Rest.2d Torts §§ 821B(1), 821D (1979)). Of course, we do not mean to suggest as a matter of law that expert testimony is *always* unnecessary where these torts are concerned. We simply recognize that the defendant has presented no persuasive arguments as to why expert testimony is necessary here. Accordingly, the district court erred in dismissing these claims—at least on the basis of a failure to produce expert testimony.[FN2]

***5** [11] By contrast, plaintiffs' claim for *negligent* infliction of emotional distress is more vulnerable. To recover under this tort theory, plaintiffs must prove that they were within the "zone of physical danger" created by the defendant's negligent action. A classic example is that of the reckless driver who speeds by a pedestrian, missing her by only inches. *See, e.g., Quinn v. Turner*, 155 Ariz. 225, 226, 745 P.2d 972 (Ct.App.1987). But under District of Columbia caselaw a plaintiff must be in actual physical danger to recover. The question is not the reasonableness of the plaintiff's distress, but rather the unreasonableness of the defendant's conduct. For example, it may be entirely reasonable for a plaintiff to suffer severe emotional distress at seeing a relative injured, but a defendant does not breach a duty to plaintiffs unless he *actually* exposes them to danger. *Williams v. Baker*, 572 A.2d 1062, 1064 (D.C.1990). Because expert testimony is necessary to determine whether any plaintiffs were actually in the zone of physical danger, we affirm the district court's dismissal of the negligent infliction of emotional distress claims.[FN3]

* * *

We remand for consideration of the individual plaintiffs' claims for battery, nuisance, and intentional infliction of emotional distress. In all other respects, the judgment of the district court is affirmed.

So ordered.

FN1. Proof of specific causation is still required to show that the substance in question did, in fact, cause the injuries. *Young v. Burton*, 567 F.Supp.2d 121, 138 (D.D.C.2008) *aff'd*, 354 F. App'x 432 (D.C.Cir.2009). The distinction is important, because if the plaintiffs cannot show general causation, that is a reason to dis-

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miss *all* of the crop damage claims, whereas proof of specific causation might be expected to vary from case to case.

FN2. It is entirely possible that plaintiffs may be unable to produce enough evidence relating to other elements of these torts, but that is an issue for the district court to consider in the first instance.

FN3. A toxic exposure case differs from that of the reckless driver who barely misses a pedestrian because toxic torts plaintiffs will likely not know for certain, at the moment of exposure, whether they have had a close call. It is not until the nature of the substance is determined that it is possible to say for certain whether a plaintiff was within a zone of physical danger. That a plaintiff might be quite reasonably distressed at being sprayed with an unknown substance does not affect the result.

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