Colorado Supreme Court Forecloses *Lone Pine* Case Management Orders Under State Law

In *Antero Resources Corp. et al. v. Strudley*, 2015 WL 1813000 (Colo. Apr. 20, 2015), the Colorado Supreme Court recently affirmed an appellate court decision holding that "*Lone Pine* orders" are not permitted by Colorado law. *Lone Pine* orders are case management tools that have been used for years in complex environmental tort cases to require plaintiffs to define their alleged injuries and to make an early *prima facie* showing of exposure and causation before full discovery proceeds.

Defendants often seek *Lone Pine* orders to obtain some balancing of discovery burdens: requiring the plaintiffs (typically, a large number of individuals claiming personal injuries and property damage) to provide some reasonable proof of potential liability before requiring the defendants (typically, as here, corporations) to engage in extensive and expensive discovery, often involving review of many thousands of corporate records, among other required responses.

Though *Lone Pine* orders are established practice in federal courts and in many states, and while this particular case appears limited to Colorado law, *Strudley* joins other recent decisions in criticizing or rejecting the use of *Lone Pine* orders or similar early case management tools for streamlining litigation.

Procedural History

In tort claims brought against Antero Resources Corp., the Strudleys alleged that they suffered burning eyes, nausea, bloody noses and headaches due to alleged exposure to contaminated air, water and soil from natural gas fracking operations. At the outset of the case, the trial court issued a *Lone Pine* order requiring the Strudleys to show evidence of exposure, injury and causation.

Lone Pine orders are pre-discovery orders designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation by requiring plaintiffs to produce some evidence to support a credible claim.[1] They essentially require each plaintiff to disclose basic "information [that he] should have had before filing" a lawsuit, including "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."[2] "The basic purpose of a *Lone Pine* order is to identify and cull potentially meritless claims and streamline litigation in complex cases involving numerous claimants[.]"[3] By putting pressure up front on individual plaintiffs to deliver a threshold of evidence, these types of modified case management orders balance the otherwise asymmetric burden imposed on corporate defendants in environmental tort litigation.

When the Strudleys failed to make a sufficient showing under the court's case management order, the trial court dismissed their case. The appellate court reversed on the ground that

Colorado's Rules of Civil Procedure do not allow for *Lone Pine* orders. Despite an avalanche of *amicus curiae* briefs aimed at convincing the Colorado Supreme Court to reverse the appellate decision, the Colorado Supreme Court affirmed, thereby foreclosing the use of *Lone Pine* case management orders in Colorado state courts.

The Colorado Supreme Court's Decision

In reaching its decision that "Colorado's Rules of Civil Procedure do not allow a trial court to issue a modified case management order, such as a *Lone Pine* order, that requires a plaintiff to present *prima facie* evidence in support of a claim before a plaintiff can exercise its full rights of discovery under Colorado rules," the Colorado Supreme Court relied on differences between Federal Rule of Civil Procedure 16 and the Colorado counterpart, CRCP 16. In particular, the court noted that Colorado did not adopt FRCP 16(c)(2)(L), which grants federal courts discretion to adopt a "special procedure for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems" or FRCP 16(c)(2)(P), which allows judges to consider ways to facilitate the "just, speedy and inexpensive disposition" of cases.

In light of the different language in the rules and the fact that CRCP 16 "does not contain a grant of authority for complex cases or otherwise afford trial courts the authority to require a plaintiff to make a *prima facie* showing," the Colorado Supreme Court held that *Lone Pine* orders were not allowed under its rules. The Colorado Supreme Court was further convinced by the fact that other Colorado civil procedure rules are designed to dispose of non-meritorious claims: e.g., CRCP 11, which allows trial courts to sanction attorneys for filing frivolous claims, and CRCP 12(b)(5), which allows trial courts to dismiss claims that fail to state a claim upon which relief can be granted.

The Dissent

Criticizing the majority for its literal reading of CRCP16, the dissent argued that active case management by the judge "is essential to running an efficient docket and administrating justice. The rules encourage it, and case law, at times, demands it. Yet, today the majority taps the brakes on active case management and sends the message that unless the rules specifically authorize a docket management technique, judges lack authority to use it in handling their cases." The dissent further contended that the modified case management order at issue in this case was "expressly authorized by the plain language" of CRCP 16, citing to, for example, 16(c) which states "any of the provisions of [the rule on discovery] … may be modified by the entry of a modified case management order."

The dissent also maintained that the *Lone Pine* order at issue in the case required little more than Rule 11: it "required the Strudleys to produce … proof that their own land had been contaminated, that they had been exposed to chemicals, and that these chemicals caused them to suffer injuries. This information was so central to their claims … that the Strudleys should have had it before even filing their case." Although the dissent didn't mention it, the majority's emphasis on the difference between the state and federal versions of Rule 16 overlooks the mandate in Rule 1—which is the same in both the state and federal versions—that the rules "shall be liberally construed to secure the just, speedy, and inexpensive determination of every action."

Other Recent Cases Rejecting or Criticizing *Lone Pine* Orders

Strudley is one of several recent cases criticizing or rejecting *Lone Pine* orders, though others have not gone so far as to find them wholly impermissible under state law. In *Adinolphe v. United Technologies, Inc.*, 768 F.3d 1161 (11th Cir. 2014), the Eleventh Circuit reversed a

district court's *Lone Pine* order issued prior to motions to dismiss. The court explained:

> As a general matter, we do not think that it is legally appropriate (or for that matter wise) for a district court to issue a Lone Pine order requiring factual support for the plaintiffs' claims before it has determined that those claims survive a motion to dismiss .... It is one thing to demand that plaintiffs come forward with some evidence supporting certain basic elements of their claims as a way of organizing (and maybe bifurcating) the discovery process once a case is at issue, and dealing with discrete issues or claims by way of partial summary judgment motions. It is quite another to begin compiling, analyzing, and addressing evidence (pro and con) concerning the plaintiffs' allegations without reciprocal discovery before those allegations have been determined to be legally sufficient under Rule 12(b)(6).4

Other recent decisions similarly have rejected *Lone Pine* orders in favor of traditional case management tools. On court held, for example, that "[r]esorting to crafting and applying a *Lone Pine* order should only occur where existing procedural devices explicitly at the disposal of the parties by statute and federal rule have been exhausted or where they cannot accommodate the unique issues of this litigation."[5]

In another case involving fracking operations like *Strudley*, a court denied a request for a *Lone Pine* order, explaining that it would rely on traditional case management tools, address discovery disputes as they arise, and rule on any dispositive motions warranted in the event plaintiffs failed to develop evidence to support their claims.[6]

Another federal court recently denied defendants' request for a *Lone Pine* order because (i) the case involved only a handful of plaintiffs rather than hundreds, (ii) there had been no meaningful discovery, (iii) the plaintiffs had not had time to gather all of their evidence and (iv) the complaint contained sufficient allegations to place defendants on notice of the nature of the alleged illnesses, the circumstances of the alleged exposure and the basis for plaintiffs' belief that defendants were responsible for the injuries.[7]

Conclusion

While *Strudley*'s precedential effect is limited to Colorado law, it joins other recent decisions to take a narrow view of what case management tools are appropriate in environmental exposure and tort cases, notwithstanding that such cases often present unique challenges that could benefit from creative case management to avoid unnecessary expense and time.

For more information about the topics raised in this legal update, please contact any of the following lawyers.

Mark R. Ter Molen
+1 312 701 7307
mtermolen@mayerbrown.com

Jaimy L. Hamburg
+1 312 701 8624
jhamburg@mayerbrown.com

Sarah E. Reynolds
+1 312 701 7644
sreynolds@mayerbrown.com

Endnotes

[1] *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 n.2 (5th Cir. 2006). These orders derive their name from the New Jersey case believed to have originated the concept. *See Lore v. Lone Pine Corp.*, L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986).

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

[3] *Baker v. Chevron USA, Inc., 105-CV-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 20, 2007).*

[4] *Id.* at 1168.

[5] *In re Digitek Product Liability Litigation*, 264 F.R.D. 249, 259 (S.D. W.Va. 2010); *see also Hamilton v. Miller*, 15 N.E.3d 1199, 1203-04 (N.Y. 2014) (under New York law, the trial court abused its discretion in requiring plaintiffs to provide medical evidence of each alleged injury and causation or be precluded from offering evidence at trial, on the basis that causation is appropriate for expert discovery and, if warranted, summary judgment).

[6] *See Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 300 (M.D. Pa. 2012).

[7] *Manning v. Arch Wood Protection, Inc.*, 40 F. Supp. 3d 861 (E.D. Ky. 2014); *see also Smith v. Atrium Med. Corp.*, 2014 WL 5364823 (E.D. La. Oct. 21, 2014) (denying *Lone Pine* request in products liability case between a single plaintiff and single defendant "when adherence to the Federal Rules of Civil Procedure can ensure that this case proceeds in an efficient manner").