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Impact of Colorado High Court's Rejection of "*Lone Pine* Orders" Remains Open to Debate

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On April 20, 2015, the Colorado Supreme Court held in *Antero Resources v. Strudley*[1] that *pre-discovery "Lone Pine* orders" are not permitted under existing Colorado procedural law. In so doing, the court explained 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 to discovery."[2]

The decision appeared to be driven in part by the court's concern that the order came at the outset of a case that involved "only four family members, four defendants, and one parcel of land"—unlike many *Lone Pine* orders issued by other courts in later stages of more complex litigation. Nevertheless, the decision contains some troubling and more sweeping language that could lead future plaintiffs to argue that *Lone Pine* orders are generally barred in Colorado.

Background

Lone Pine orders are named after a New Jersey case that adopted this procedure whereby a plaintiff must present some basic evidence supporting her case prior to discovery.[3] "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[.]"[4] These orders are increasingly being used in large-scale mass-tort proceedings to ensure there is a good-faith basis for plaintiffs' claims before requiring the parties to engage in more complex, cumbersome discovery.

In *Strudley*, the plaintiffs, a husband and wife, initiated a toxic-tort suit against several energy companies, alleging that pollutants from natural gas drilling activities contaminated the air, water, and ground around their home, causing property damage and physical injuries to themselves and their children. The trial court issued an order requiring plaintiffs to produce basic evidence of exposure, injury, and causation prior to discovery. Finding that plaintiffs had not satisfied this requirement with respect to causation, the trial court dismissed the claims with prejudice. On appeal, both the Colorado Court of Appeals and the Colorado Supreme Court resolved that the trial court had misapplied Colorado law in requiring plaintiffs to present basic evidence in support of their claims before the commencement of full discovery.

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[1] 347 P.3d 149 (Colo. 2015).
[2] *Id.* at 153.
[3] *See Lore v. Lone Pine Corp.*, No. L 33606-85, 1986 N.J. Super. LEXIS 1626 (N.J. Super. Ct. Law. Div. Nov. 18, 1986).
[4] *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 U.S. Dist. LEXIS 6601, at *2 (S.D. Ohio Jan. 30, 2007).

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Basis for Court's Decision

The Colorado Supreme Court invalidated the trial court's order dismissing the plaintiff's claims, as well as the case-management order on which that dismissal was predicated, on the ground that no Colorado statute, rule, or precedent authorized such pre-discovery measures. The court sought to distinguish the case from other cases involving *Lone Pine* orders based on the facts that the order was entered in the very early stages of litigation, the case was not highly complex, and it only involved four plaintiffs and four defendants. The court cautioned that "if a *Lone Pine* order cuts off or severely limits the litigant's right to discovery, the order closely resembles summary judgment, albeit without the safeguards supplied by the Rules of Civil Procedure."[5]

The court also rested its ruling on the language of the Colorado Rules of Civil Procedure, which, although modeled after the Federal Rules of Civil Procedure, does not contain the same explicit grant of trial court discretion to use pre-discovery procedures to streamline complex litigation. As the court put it, "no statute, rule, or past Colorado case recognizes authority for trial courts to enter *Lone Pine* orders;" thus, "the trial court lacked authority to enter a *Lone Pine* order in this case."

Analysis

The Colorado Supreme Court's decision appears to take a restrictive view of the utility of *Lone Pine* orders, following the opinions of a handful of other courts that have concluded that *Lone Pine* and other similar case-management orders constitute a "premature" summary-judgment-type requirement prior to the close of discovery. However, these orders are an effective tool for dealing with litigation that typically accompanies a mass tort. Indeed, some courts have reasoned that a *Lone Pine* order is merely an extension of the requirements of Rule 11—*i.e.*, that the basic allegations underlying any claim must be investigated and verified *before* the suit is ever filed.[6] *Lone Pine* and other similar case-management orders can help focus the scientific and evidentiary issues posed by a mass tort and eliminate meritless cases earlier in the litigation.

The ruling's reach remains unclear. The concerns expressed by the court about the particular *Lone Pine* order issued—at the outset of litigation in a case involving only a few parties—suggest that the court might take a different view of a *Lone Pine* order issued in the context of complex litigation where many cases have been pending and the merits of the claims have been tested in bellwether trials.

Nevertheless, some of the language in the opinion could be read to suggest a broader prohibition on the use of *Lone Pine* orders due to the lack of a specific textual basis for such orders in the current procedural rules. To the extent the court intended such a broader prohibition, the decision has the potential to spur onerous and expensive discovery for frivolous lawsuits that often accompany a mass tort. The breadth of the court's rule appears to remain open to debate, particularly in light of its repeated caveat that "other procedural devices can accommodate the unique issues" presented by complex litigation.[7]

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[5] *Strudley*, 347 P.3d at 159.

[6] *Acuna v. Brown & Root, Inc.*, 200 F.3d 335, 341 (5th Cir. 2000).

[7] *Strudley*, 347 P.3d at 154; *see also id.* at 157 (listing other procedural rules); *id.* at 158 ("In Colorado, existing rules and procedural safeguards provide sufficient protection against frivolous or unsupported claims and burdensome discovery.").

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