# *LONE PINE* LOSS: SUPREME COURT OF COLORADO SAYS STATE RULES DON'T ALLOW USE OF *LONE PINE* ORDERS IN NATURAL GAS DRILLING CASE

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## INTRODUCTION

Earlier this week, the Supreme Court of Colorado issued its long-awaited decision in *Antero Resources Corp. v. Strudley* and held that the Colorado Rules of Civil Procedure do not allow a trial court to issue a modified case management order (known as a *Lone Pine* order) requiring a plaintiff to present *prima facie* evidence in support of a claim before full discovery is allowed.[1] The decision is the first from a state supreme court holding that the *Lone Pine* case management tool is not allowed under their rules of civil procedure.

Given the unique nature of Colorado's procedural rules that limit a trial court's discretion, however, the decision may not foreclose the future use of *Lone Pine* orders in complex cases with multiple parties, including oil and gas contamination cases, in federal courts or in state courts with rules similar to the federal rules. Nonetheless, even plaintiffs in those courts will likely rely on this decision going forward in an attempt to avoid the issuance of *Lone Pine* orders.[2]

## *LONE PINE* ORDERS

"*Lone Pine*" orders are modified case management orders designed to promote judicial efficiency and economy by requiring plaintiffs to produce a measure of evidence to support their claims early in a case, before or during discovery. Typically, the orders require plaintiffs to produce (1) evidence of exposure to chemicals (identity and quantity); (2) a diagnosis of disease, illness, or property damage; and (3) expert reports or affidavits supporting causation. *Lone Pine* orders are most often used in complex litigation to identify meritless claims and to streamline the litigation.

Courts most often rely on Federal Rule of Civil Procedure 16 or similar state rules as providing the authority for issuing *Lone Pine* orders. For example, Federal Rule of Civil Procedure 16(c)(2)(L) and analogous state rules allow the court to "consider and take appropriate action on . . . adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems." Rule 16 also allows the court to take appropriate action for "simplifying the issues . . . and eliminating frivolous claims or defenses," as well as "facilitating in other ways the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(2)(A) & (P).

## PROCEDURAL HISTORY OF *ANTERO RESOURCES CORP. V. STRUDLEY*

In *Strudley*, plaintiffs, Mr. and Mrs. Strudley and their two minor children, brought various tort claims against Antero Resources and other oil and gas related defendants seeking damages for personal injuries and property damage allegedly arising out of natural gas drilling operations near their home.[3] After initial disclosures were served by both plaintiffs and defendants, defendants moved for a modified case management order requiring "the Strudleys to present prima facie evidence to support their claims before full discovery could commence."[4] Defendants emphasized the complex nature of the case and the associated costs to the parties during prolonged discovery. Plaintiffs, on the other hand, argued that under Colorado law, they had a right to discovery before the merits of their case were tested.

The court issued a *Lone Pine* order requiring plaintiffs to submit all of the information traditionally required by *Lone Pine* orders, including (1) expert reports identifying hazardous substances, general causation, details regarding exposure, medical diagnosis of disease or illness, and specific conclusion that any illness was caused by exposure; (2) all reports and studies finding contamination on plaintiffs' property; (3) a list of all medical providers and a release of all medical records; and (4) the identity and quantity of contamination on plaintiffs' real property attributable to defendants.[5] Although plaintiffs responded with some limited information, the court dismissed their claims with prejudice for failure to comply with the *Lone Pine* order's required submissions.

Plaintiffs appealed the dismissal to the Colorado Court of Appeals and that court, agreeing with plaintiffs, reversed the dismissal, stating that "such orders are not permitted as a matter of Colorado law."[6] The Court of Appeals focused on "substantial" differences between Rule 16 of the Federal Rules of Civil Procedure and Rule 16 of the Colorado Rules of Civil Procedure, which gives Colorado judges less discretion to issue such orders.[7] Additionally, the Court of Appeals noted that Colorado case law disfavors a required *prima facie* showing before allowing discovery on matters central to a plaintiff's claims.[8] The Supreme Court of Colorado granted *certiorari* to determine whether a court in Colorado is barred as a matter of law from entering a modified case management order requiring the plaintiffs to produce evidence essential to their claims after initial disclosures but before discovery.[9]

## SUPREME COURT OF COLORADO DECISION

In a 6-1 decision, the Supreme Court of Colorado agreed with the Court of Appeals and held 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 the Colorado Rules."[10] The Supreme Court of Colorado, like the Court of Appeals, focused heavily on the differences between Rule 16 of the Federal Rules of Civil Procedure and Rule 16 of the Colorado Rules of Civil Procedure.

Notably, the Supreme Court of Colorado stated that Federal Rule of Civil Procedure 16(c) "explicitly grants trial courts substantial discretion to adopt procedures to streamline complex litigation in its early stages."[11] As a result, the Court stated that (i) "Federal Rule of Civil Procedure 16(c) authorizes [the use of *Lone Pine* orders] in complex federal cases to reduce potential burdens on defendants, particularly in mass tort litigation," and (ii) "federal courts have discretion to use such orders in complex cases when discovery would likely be challenging, protracted, and expensive."[12]

On the other hand, the Court stated that "[w]hile many revised Colorado Rules are patterned from Federal Rules, revised C.R.C.P. 16 contains critical differences from Fed. R. Civ. P. 16."[13] Specifically, the Court stated that "in revising C.R.C.P. 16 in 2002, we did not adopt a counterpart to Fed. R. Civ. P. 16(c), which explicitly grants trial courts substantial discretion to adopt procedures to streamline complex litigation in its early stages, 'at any pretrial conference.'"[14]

As a result, the Colorado Supreme Court held that Colorado Rule 16, unlike Federal Rule 16, does not authorize the use of *Lone Pine* orders. The Court stated that Colorado Rule 16 "provides a tool for the court to manage discovery while efficiently advancing the litigation toward resolution . . . [but] Rule 16 does not . . . authorize a trial court to condition discovery upon the plaintiff establishing a prima facie case."[15] The Court reasoned that its interpretation of the rule and its prohibition of *Lone Pine* orders under that rule is consistent with previous Colorado precedent regarding when a plaintiff can be required to present a *prima facie* case.[16]

As a final matter, the Court pointed out that "this case involves only four family members, four defendants, and one parcel of land, yet the trial court labeled it a 'complex tort action.'"[17] As a result, the Court stated that "this case is not as complex as cases in other jurisdictions in which *Lone Pine* orders were issued."[18] Accordingly, the Supreme Court affirmed the Court of Appeals, and the case will now return back to the trial court.

## THE DISSENTING OPINION

The dissent offered several counterpoints. First, the dissent emphasized that the "trial court's [*Lone Pine* order] . . . was simply the trial court exercising its discretionary authority" under Colorado Rule of Civil Procedure 16(b) and "moving up the time for disclosures and moving back the time for the commencement of discovery."[19] Second, the dissent viewed the existing Colorado precedent on Rule 16 and *prima facie* cases as inapposite because "when the court rendered those decisions, there was no language in Rule 16 giving trial courts the ability to change the timeline for disclosures and discovery."[20] The dissent, therefore, would have upheld the use of *Lone Pine* orders in Colorado state court proceedings.

## CONCLUSION

Although the Supreme Court of Colorado's decision forecloses the use of *Lone Pine* orders in Colorado state court cases, its impact should necessarily be limited because it is based on the unique language of Colorado Rule of Civil Procedure 16. As a result, the decision should not impact the use of *Lone Pine* orders in federal courts and state courts that have procedural rules similar to the federal rules because even the Supreme Court of Colorado acknowledged that the Federal Rules of Civil Procedure explicitly authorize the use of *Lone Pine* orders. Accordingly, companies defending a complex case in Colorado state court should consider whether the case can be removed to federal court to preserve their right to seek a *Lone Pine* order.

Therefore, despite this decision, federal district courts and other state trial courts with rules similar to the federal rules should continue to consider requests to enter *Lone Pine* orders. Suchorders can be particularly useful in oil and gas contamination cases that, like the seminal *Lone Pine* case, often involve complex issues, multiple parties, and the prospect of burdensome discovery for defendants and the court. As a result, companies facing such claims in federal courts and other states should still consider the careful and skilled use of this valuable but underutilized case management tool.

 

**Notes:**

[1] Antero Res. Corp. v. Strudley, No. 13SC576, 2015 WL 1813000 (Colo. April 20, 2015).

[2] Mark D. Feczko, Bryan D. Rohm, & Travis L. Brannon, *Lone Pine* or Folk *Lore*: A Survey of Case Developments Regarding Lone Pine Orders in Oil and Gas Litigation, 35 Energy & Min. L. Inst. §5 (2014) (providing detailed discussion regarding the use of *Lone Pine* orders with a particular emphasis on oil and gas litigation); *see also* Mark D. Feczko, Katherine M. Gafner, & Bryan D. Rohm, K&L Gates Oil & Gas Alert, Use of *Lone Pine* Orders in Methane Migration and Other Groundwater Contamination Litigation, available at http://www.klgates.com/use-of-lone-pine-orders-in-methane-migration-and-other-groundwater-contamination-litigation-11-06-2012/

[3] Strudley v. Antero Resources Corp., No. 12CA1251, 2013 WL 3427901 (Col. App. July 3, 2013).

[4] *Id*. at *2.

[5] *Id*.

[6] *Id*. at *3.

[7] *Id*. at *8.

[8] *Id*. at *4.

[9] *See, e.g.*, Brief of Amicus Curiae American Petroleum Institute in Support of Petition for Writ of Certiorari, Strudley v. Antero Resources, No. 13SC576 (Colo. Aug. 30th, 2013).

[10] *Antero*, No. 13SC576, 2015 WL 18130000, at ¶3.

[11] *Id*. at ¶22.

[12] *Id*. at ¶¶1, 16.

[13] *Id.* at ¶19.

[14] *Id*. at ¶22.

[15] *Id*. at ¶26.

[16] *Id*. at ¶29-33.

[17] *Id*. at ¶34.

[18] *Id*.

[19] *Id*. at ¶40.

[20] *Id*. at ¶42.

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