

Lone Pine Orders Are Still Useful In Fracking Litigation

Law360, New York (August 07, 2013, 12:43 PM ET) -- Plaintiffs have brought a number of gas and oil fracking-related groundwater contamination cases across the nation, and it is a safe assumption that more will follow, given the press and regulatory attention focused on this sector. The suits contend that hydraulic fracking operations caused methane and the chemicals used in drilling operations to move into the groundwater and contaminate water supply wells. A point of contention in these cases is whether plaintiffs can demonstrate a causal link between groundwater contamination and horizontal fracking operations.

Several recent scientific studies have concluded that no causal connection exists between shale gas development and groundwater contamination, although a recent report has claimed such an association.[1] The U.S. Environmental Protection Agency is engaged in a study “to better understand any potential impacts of hydraulic fracturing on drinking water and groundwater.”[2] The study, if it is ever completed, will certainly impact ongoing fracking litigation if it reaches any definitive conclusions.

The EPA was to complete the study by 2014, but the agency recently extended the deadline for public input on the study until Nov. 15 of this year, and recent reports have placed the actual publication date closer to 2016.[3]

Because there is no definitive scientific proof linking fracking with groundwater contamination (or at least because of the great uncertainty over the question), defendants have met with some success using this uncertainty to their advantage at a variety of early inflection points. For example, the more rigorous pleading standard in *Iqbal* has provided defendants a tool to convince some courts to dismiss cases before discovery.

In *Tucker v. Southwestern Energy Company*, the U.S. District Court for the Eastern District of Arkansas ordered plaintiffs to replead their case, noting that the complaint’s “[g]eneral statements about the many dangerous substances used in fracking, and conclusory statements about the migration of these substances” were not sufficient to survive a motion to dismiss.[4] To continue, the plaintiffs would need to provide “particular facts about particular fracking operations by particular fracking companies using particular substances” that allegedly caused the plaintiffs’ harm.

Lone Pine case management orders are another useful tool that can be used to force plaintiffs to establish their claims early in litigation. For the uninitiated, Lone Pine orders are a case management tool that are sought often in complex mass tort actions by the defendant and that were first used in an eponymous New Jersey state court case in 1986.[5]

The order places the onus on plaintiffs to meet a prima facie showing of liability, often requiring the production of expert reports on causation, medical evidence and environmental studies prior to full discovery. Lone Pine orders can take many shapes, depending upon the particulars of the case being addressed. In federal litigation, the orders have been approved as a legitimate tool for the management of litigation under the discretion provided to trial courts by Fed. R. Civ. P. 16.6

A recent Colorado appellate decision, however, has rejected the use of a Lone Pine case management tool in a state court fracking case. In *Strudley v. Antero Resources Corp.*, four plaintiffs brought tort claims against drill operators seeking damages for personal injury. At the request of defendants, the trial court entered a typical Lone Pine order, requiring plaintiffs to submit a list of the alleged contaminants that caused damage; reports on the actual contamination; the names of the medical providers who treated plaintiffs; and a detailed expert opinion on causation.

The trial court later dismissed plaintiffs' claims because they could not meet all of these requirements.[7] The decision had been held out by other defendants seeking other Lone Pine orders in fracking cases as a case management model.

On July 3, 2013, the Colorado Court of Appeals, Division I overturned the ruling, finding that the trial court abused its discretion in denying plaintiffs their right under Colorado law to discovery on their central claims and striking down the use of the Lone Pine order. The appeals court found that the "circumstances surrounding the case were not shown to be so extraordinary as to require departure from the existing rules of civil procedure." [8]

This conclusion, however, was driven by the court's determination that the Colorado counterpart to Fed. R. Civ. P. 16 "contains no language granting trial courts the broad discretion contemplated in the rule's federal counterpart." Therefore, the *Strudley* opinion must be viewed as particular to the Colorado rules and not directly applicable to federal courts or state courts in other jurisdictions considering the entry of Lone Pine orders.

But the *Strudley* court also relied in part on the fact that certain federal district courts had recently rejected the use of Lone Pine orders despite the more discretionary federal rules. Last year, Magistrate Judge Carlson in the U.S. District Court for the Middle District of Pennsylvania rejected the use of Lone Pine orders in two fracking groundwater cases, as did a judge in the U.S. District Court for the Southern District of West Virginia.[9]

The trial courts rejected the procedure because they found that the traditional discovery and case management techniques were sufficient, given the complexity of the allegations and the number of parties (one, two or four plaintiffs against one defendant) at issue. The Middle District of Pennsylvania

decisions also expressed a view that Lone Pine orders should only be used after some discovery has occurred.

So, are Lone Pine orders still a useful tool in fracking litigation? The answer is, of course, yes. But a defendant's success at obtaining an order is tied to the circumstances of its particular case, the judge's desire to force plaintiffs to establish some foundation for their claim before discovery commences and defense counsel's ability to convince the court of the complexity of the matter.

A case in the U.S. District Court for the Western District of New York provides a good example of a fracking case that used a Lone Pine order to force plaintiffs to pick a story early in litigation.[10] Unlike the cases in Pennsylvania and West Virginia, this case was brought by 15 different plaintiffs, as opposed to four or fewer.

During the second phase of discovery, the defendants obtained an order that required the plaintiffs to produce expert opinions identifying every hazardous substance to which they were exposed, the location of exposure and an explanation of causation. The defendants requested the order because the plaintiffs had not identified specific contaminants or a theory of contamination in response to initial discovery requests.

On June 27, 2013, the court denied the defendants' motion to strike the plaintiffs' expert reports, holding that the plaintiffs had complied with the Lone Pine order: "Though Plaintiffs' expert reports, especially the Rubin Report, are far from models of clarity, they meet the essential requirements imposed by the Lone Pine Order. As to their admissibility, the Court will leave that issue for another day." [11]

Although the court did not take the ultimate step of dismissing plaintiffs' claims, the Lone Pine order still achieved a key litigation purpose: The plaintiffs were forced to pick a theory and live with it, providing defendants with a target for later discovery and expert attacks. The tone of Judge Siragusa's opinion indicates a deep skepticism of the plaintiffs' expert case that may eventually result in successful Daubert motions.

Either in federal court or in state courts other than Colorado (unless the Colorado Supreme Court addresses the Strudley issue), Lone Pine orders remain a viable case management tool. Fracking defendants facing claims from a few litigants in a single litigation may face an uphill battle as courts have shown skepticism when dealing with only a few plaintiffs rather than a mass tort.

In requesting the order, defendants must convince the court of the complexities inherent in the plaintiffs' claims (for instance, causation, multiple chemicals or groundwater anomalies) that are not dispelled because only a single plaintiff or family is bringing the claims. Because issuing a Lone Pine order is left to the trial court's discretion, the challenge lies in convincing the judge that the Lone Pine order is necessary to protect the defendants' interests while not unfairly prejudicing plaintiffs.

As an alternative, defendants can choose to wait until early written discovery is complete, using the Lone Pine procedure instead to resolve deficiencies identified in plaintiffs' responses. In this manner, the Lone Pine order serves as an information-forcing device to confine plaintiffs to a particular story.

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[1] The U.S. Department of Energy recently found that no connection exists. See <http://www.law360.com/articles/458671/doe-study-says-no-groundwater-pollution-at-pa-fracking-site>. The National Ground Water Association examined over 1,700 wells in one Marcellus Shale county in Pennsylvania, finding that, on a regional scale, "methane concentrations are best correlated to topographic and hydrogeologic features, rather than shale-gas extraction." National Ground Water Association, 51 Groundwater 333, 347 (May -June 2013). See also T.M. Kresse, N.R. Warner, P.D. Hays, A. Down, A. Vengosh, and R.B. Jackson, Shallow Groundwater Quality and Geochemistry in the Fayetteville Shale Gas-Production Area, North Central Arkansas, U.S. Geological Survey Scientific Investigations Report 2012-5273, *31 (2012) (finding no connection). But see Robert B. Jackson, et.al., Increased Stray Gas Abundance in a Subset of Drinking Water Wells Near Marcellus Shale Gas Extraction, Proceedings of the National Academy of Science (June 24, 2013), available at <http://www.pnas.org/content/early/2013/06/19/1221635110.full.pdf+html?sid=46f41612-d993-414f-a81f-7049ac9e905d> (claiming a connection).

[2] United States Environmental Protection Agency, EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources, <http://www2.epa.gov/hfstudy> (last updated May 22, 2013).

[3] "EPA Schedule for Final Fracking Study: Slips to 2016 from Original 2014 Target," Env't Rep. (BNA) No. 122, at A-14 (June 24, 2013).

[4] Tucker v. Sw. Energy Co., 2012 U.S. Dist. (E.D. Ark, Feb. 17, 2012).

[5] Lore v. Lone Pine, No. L-33606-85 (N.J. Super. Ct. Nov. 18, 1986).

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

[7] No. 2011-CV-2218 (Col. Dist. Ct. Denver City May 9, 2012).

[8] 2013 COA 106, No. 12CA1251, available at <http://www.cobar.org/opinions/opinion.cfm?opinionid=9023&courtid=1>

[9] See, e.g., Roth v. Cabot Oil & Gas Corp., No. 12-2004 (M.D. Pa. Oct. 15, 2012); Kamuck v. Shell Energy Holdings GP, LLC, No.4:11-1425 (M.D. Pa. Sept. 5, 2012); Hagy v. Equitable Production Co., No. 2-1372 (S.D. W.Va. June 29, 2012).

[10] Baker, et. al. v. Anshutz Exploration Corp., No. 11-06119 (W.D. NY) (Doc. 83, filed Sept. 25, 2012)

[11] Baker, et. al. v. Anshutz Exploration Corp., No. 11-06119 (W.D. NY) (Doc. 112, filed June 27, 2013)

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