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THE USE OF PRE-DISCOVERY ORDERS REQUIRING PLAINTIFFS TO PRODUCE EXPERT AFFIDAVITS REACHES THE WORLD OF HYDRAULIC FRACTURING LITIGATION, PROVIDING ANOTHER TOOL IN THE TOOLBOX FOR DEFENDING SUCH CLAIMS

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Consider a hydraulic fracturing lawsuit alleging toxic tort exposure, dismissed with prejudice within just over a year of filing, not for more obvious reasons such as lack of jurisdiction or statute of limitations issues, but for failure of expert proof on issues of exposure and causation. This is precisely what happened last week in Colorado, all because of a pre-discovery case management order that the plaintiffs were unable to satisfy. General counsel should take note of this decision and others like it, and discuss with their outside counsel whether a similar strategy can be employed in the cases they handle in an attempt to obtain early dismissal, or at a minimum, to significantly streamline the discovery process.

In *Strudley v. Antero Resources Corp.*, No. 2011-CV-2218 (Col. Dist. Ct. May 9, 2012), the plaintiffs asserted a variety of common law tort claims for personal injury, medical monitoring and property damage, which the plaintiffs attributed to the defendants' drilling and subsequent operation of three natural gas wells in their hometown of Silt, Colorado. "Cognizant of the significant discovery and cost burdens presented by a case of this nature" and noting that the state agency had already concluded that the plaintiffs water supply well was not impacted by the nearby well operations, the court required the plaintiffs, before full discovery and just 8 months after filing their complaint, to make a *prima facie* showing of exposure and causation, entering what is often referred to as a "*Lone Pine* order" (named after *Lore v. Lone Pine Corp.*, 1986 WL 637507, No. L.-33606-85 (N.J. Super. Ct. 1986)). Specifically, the court required the plaintiffs to provide, within 105 days of the order, expert affidavits establishing, among other things: (1) the identity of each hazardous substance to which each plaintiff was exposed; (2) whether each of those substances can cause the type(s) of disease or illness that plaintiffs claim; (3) the dose, timing and duration of exposure to each substance; (4) the precise location of exposure; (5) an identification, by reference to a medically recognized diagnosis, of the specific disease or illness from which each plaintiff allegedly suffers or for which medical monitoring is purportedly necessary; and (6) a conclusion that such disease or illness was in fact caused by such exposure.

In response to the court's order, the plaintiffs submitted a variety of maps, photos, medical records, and air and water sampling data, along with an affidavit from a medical expert, in which he opined that sufficient environmental and health information existed to merit further substantive discovery on issues such as air modeling, possible fault fracturing and/or leakage among the three wells, defendants' compliance with

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applicable law, and clinical testing of the individual plaintiffs. But the Court held that this information was not enough for plaintiffs to establish the *prima facie* elements of their claims, including exposure, injury, and both general and specific causation. According to the court, "though the evidence shows existence of certain gases and compounds in both the air and water of Plaintiffs' Silt home, there is neither sufficient data nor expert analysis stating with *any* level of probability that a causal connection does in fact exist between Plaintiffs' injuries and Plaintiffs' exposure to Defendants [sic] drilling activities." And so, just a year after the case was filed, plaintiffs' claims were dismissed with prejudice.

The use of *Lone Pine* orders such as that in *Strudley* is not new, but they are gaining in acceptance in the courts, as new theories in toxic tort litigation continue to emerge, and as judges take a more proactive role in trying to manage their increasingly large and complex dockets. In *Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828 (9th Cir. 2011), the 9th Circuit became the second federal appeals court to affirm the propriety of a Lone Pine/Cottle order in a toxic tort case, rejecting an argument advanced by the plaintiffs that the use of such an order violates established rules of procedure for discovery and summary judgment. The *Avila* court held that a *prima facie* order on exposure and causation is well within the trial court's broad discretion to manage discovery and to control the course of litigation, and is in fact consistent with the district judge's gatekeeping responsibility under *Daubert* to determine at the outset the reliability of expert testimony. The 5th Circuit has likewise considered and approved a *Lone Pine* order in a similar case that raised issues of exposure and injury from toxic emissions allegedly attributable to a uranium mining operation, holding that the district court's order – which required expert affidavits specifying, for each plaintiff, the injuries or illnesses suffered by the plaintiff that were caused by the alleged exposure, the materials or substances causing the injury and the facility thought to be their source, the dates or circumstances and means of exposure, and the scientific and medical bases for the expert's opinions – "essentially required that information which plaintiffs should have had before filing their claims." *Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000).

There is much debate among practitioners and academics alike over the propriety and fairness of *Lone Pine* orders, but from a defense counsel's point of view, a well-crafted *Lone Pine* order, as the *Acuna* court noted, requires nothing more of plaintiffs than what they should already have by the time they file their complaint. And with a growing body of case law in accord, in-house counsel should now more than ever consider advocating their use, particularly when faced with a set of ill-defined claims and serious questions concerning the evidentiary support for those claims, and even when the case is not one that would otherwise be classified as a mass tort. In this regard, one of the more notable aspects of the *Strudley* decision was the use of a *Lone Pine* order in a case that was relatively small in size. In fact, whereas both *Avila* and *Acuna* involved over 1,000 plaintiffs in a series of consolidated actions, *Strudley* involved only one family, alleging exposure in one home.

While the *Strudley* opinion will almost certainly be appealed, the legal underpinnings of the decision should remain solid regardless of the ultimate outcome of the case, with the use of *Lone Pine* orders to manage complex toxic tort cases unlikely to go away anytime soon. In-house counsel should therefore put the subject on their litigation strategy checklists, and have a dialogue with their litigation counsel about the potential efficacy of *Lone Pine* orders in the cases they are handling.