NOTES

Addressing the Fissures in Causation Claims: A Case Against the Use of Lone Pine Orders as Procedural Hurdles in Hydraulic Fracturing Litigation

Michelle Sliwinski*

Ignitable tap water,1 midwestern towns with smog levels comparable to those in Los Angeles,2 earthquakes,3 and a well blowout that resulted in the release of thousands of gallons of chemicals into a nearby stream—all these are just a few of the alleged side-effects of America’s “shale boom.”

* J.D. Candidate 2016, The George Washington University Law School; B.S. Biological Sciences, The George Washington University; Senior Notes Editor, George Washington Journal of Energy & Environmental Law. The Author wishes to extend her thanks to her family and friends for their support and encouragement, and to Mrs. Sara Vink, Ms. Jessica Monastra, and the editors of the Journal for their guidance during the writing and production process.


Hydraulic fracturing, also called “fracking” or “hydrofracking,” is a method of extracting gas from previously inaccessible shale deposits.4 Advances in technology, along with the discovery of several large reserves in the United States, have led to an exponential increase in hydraulic fracturing operations. In 2014, there were over 514,780 domestic natural gas wells in the United States5 and the U.S. Environmental Protection Agency (“EPA”) estimates that by 2020, twenty percent of the nation’s natural gas will come from hydraulic fracturing operations.6 Proponents of hydraulic fracturing point to its potential to unlock American reserves, thereby helping to achieve energy security and encourage domestic economic growth.7 In addition, natural gas burns cleaner than other fossil fuels (emitting half the amount of carbon dioxide as coal); and recent declines in energy-related carbon emissions have been attributed in part to the switch from coal to natural gas in several sectors.8 However, with the growing popularity of hydraulic fracturing, so comes skepticism in the environmental community about the effects of this extraction process on the environment and public health. In particular, enormous controversy surrounds the question of whether the process of physically creating fractures or cracks in underground shale could lead to the contamination of


groundwater by methane or chemical additives used in the extraction process. Due to gaps in federal regulation of shale gas exploration and production activities, plaintiffs alleging harm from these activities often turn to the courts to pursue common law rights of action based on theories of tort, property, or nuisance law. To date, claimants have filed at least fifty private tort actions related to hydraulic fracturing, mostly in states where large shale reserves are found, such as Texas, New York, Pennsylvania, Colorado, Ohio, West Virginia, and Louisiana. Some federal and state courts respond to these suits by imposing case management orders called “Lone Pine orders.” Lone Pine orders require plaintiffs to establish a prima facie case for demonstrating causation for a negligence claim before formal discovery is allowed. While the goal is to enable dismissal of claims that are unfounded or frivolous, these orders effectively impose a higher pleading standard on plaintiffs. Further, these orders limit plaintiffs’ access to discoverable information and often result in dismissal or function as summary judgment at the pleading stage, barring plaintiffs with legitimate claims from having the opportunity to litigate their case.

This Note will examine the current approaches taken by courts in applying Lone Pine orders in hydrofracking-related tort cases and explore the benefits and drawbacks of this approach. This Note proposes that courts reject the use of Lone Pine orders in these cases in order to more equally balance the interests of plaintiffs and defendants. Part I provides an overview of the scientific process of hydraulic fracturing, the controversies surrounding the causation of potential groundwater contamination, and the current federal regulatory framework. Part II discusses the origin and legacy of Lone Pine orders and the problems they pose in hydraulic fracturing litigation, especially in a recent high-profile case, Strudley v. Antero Resources Corp. Part III explains that courts should rely on other procedural safeguards—such as discretionary discovery rules, judicial case management tools, pleading standards, evidentiary standards, and Federal Rule of Civil Procedure 11 ("Rule 11") sanctions—in assessing causation to provide litigants a fair opportunity to be heard, while still conforming to the judicial interests of efficiency, and thereby accomplishing the same goals of a Lone Pine order.

I. Hydraulic Fracturing Overview

Hydraulic fracturing is a complicated process using a number of known or possible carcinogens and other hazardous substances to stimulate natural gas production. Environmentalists are concerned with possible environmental contamination by chemicals from hydraulic fracturing operations in the face of scientific uncertainty as to causation. A lack of federal regulatory oversight makes access to common law remedies all the more important so that victims have some avenue to seek an injunction, damages, or other relief in cases of alleged fracturing-related contamination.

A. The Process of Hydraulic Fracturing

The process of hydraulic fracturing was developed in the 1940s as a means of stimulating wells with declining oil productivity. Recent technological innovations, such as horizontal drilling, have allowed for this process to reach previously inaccessible shale formations, and has resulted in opening up several new areas to oil and gas development. Hydraulic fracturing involves pumping fluids deep into the ground to depths ranging from 1000 feet to greater than 8000 feet at extremely high pressure to create cracks or fractures in the shale rock matrix. With horizontal drilling, the fluid is injected into the ground through an L-shaped wellbore that is cased in part by cement and extends horizontally along the layer of shale rock. The injected fluid contains a number of chemicals, as well as sand, called “proppant,” that is wedged into newly formed cracks in the shale to keep the cavities from collapsing or closing. Once the pressure on the fluid is reduced, most of the water returns up the wellbore to the surface for re-use, and the natural gas flows from the fractures in the rock into the wellbore for extraction. This process can be repeated four to twenty times on each section of the well. Because shale gas is highly dispersed in the rock, rather than concentrated in one area, this method is especially efficient for recovering natural gas from shale formations.

Much of the concern over potential environmental impacts from hydraulic fracturing involves the possibility of groundwater contamination by fracturing fluid, methane, or by naturally occurring materials in the geographic formation that may be mobilized by the water returning to the surface of the well. Hydraulic fracturing is an extremely

13. See Goldman, supra note 12, at 323.
14. See id.
15. See id. at 323–24.
water-intensive process, and requires between two million and eight million gallons of fracking fluid for each well.\(^{28}\) Additionally, it is estimated that only twenty to forty percent of the injected fracking fluid returns to the surface of the well, and the rest remains underground.\(^{29}\) The water that returns to the surface, called "flowback," is typically stored on-site in pits or tanks, and then recycled, treated, or injected underground for disposal.\(^{30}\) While chemicals make up only two percent of the fracking fluid mixture, such vast amounts of fracking fluid are required that a staggering 40,000 to 160,000 gallons of chemical additives are injected underground at each well.\(^{31}\)

Precise chemical formulations of fracking fluids are largely unknown because many companies consider these ingredients protected trade secrets.\(^{32}\) Nonetheless, some companies have voluntarily disclosed information about chemical additives.\(^{33}\) A report by the EPA drawing upon industry-reported data demonstrates that companies use several known or suspected carcinogenic substances in fracking fluid, including benzene, benzyl chloride, formaldehyde, naphthalene, and lead.\(^{34}\) Several of these chemicals have also been classified as hazardous air pollutants.\(^{35}\) Other dangerous substances, such as arsenic and chromium, have been identified in flowback water,\(^{36}\) and one study suggests that uranium, found naturally in underground rocks, can be "solubilized," or dissolved in the water, and mobilized to the surface through flowback water.\(^{37}\) Additionally, a recent congressional investigation reveals that between 2005 and 2009, fourteen of the country's largest oil and gas companies used 866 million gallons of chemical additives (excluding water) in hydraulic fracturing operations, of which more than 650 of these products contained known or possible human carcinogens.\(^{38}\) There is a major concern for possible release of these chemicals into the environment because of the hazardous nature of the substances used in fracking fluids.

### B. The Scientific Uncertainties Surrounding Causation of Groundwater Contamination

The most controversial issue in the hydraulic fracturing debate is whether or not the process of creating fractures could possibly contaminate groundwater. Although studies have yet to definitively link the fractures themselves to widespread contamination, industry proponents are quick to point out the perceived physical impossibility of natural gas or contaminants traveling thousands of feet vertically through the rock to the relatively shallow groundwater aquifers.\(^{39}\) In fact, the former Chairperson of the Texas Railroad Commission, the agency that oversees oil and gas operations in Texas,\(^{40}\) Elizabeth Ames Jones, testified before Congress to this impossibility and stated in a press release that one would "have a better chance of hitting the moon with a roman candle than fracturing into fresh water zones by hydraulic fracturing shale rock."\(^{41}\) Some other prominent government officials have also held that hydraulic fracturing is unlikely to cause groundwater contamination. For example, former EPA Administrator Lisa Jackson once claimed that there is no "proven case where the fracturing process itself has affected water,"\(^{42}\) and former U.S. Bureau of Land Management ("BLM") Director Bob Abbey has said: "[BLM] has never seen any evidence of impacts to groundwater from the use of fracturing technology on wells that have been approved by [BLM] . . . We believe, based upon the track record so far, that it is safe."\(^{43}\)

There are also other, more probable routes of groundwater contamination that even industry has conceded are possible.\(^{44}\) These include a risk of contamination when the well is initially drilled through the groundwater aquifer. It is necessary that wells be properly cased with cement to prevent fluid or gas from leaking out of the well, and researchers speculate that faulty casing could result in a release of fracturing fluid or gas into aquifers.\(^{45}\) Other potential causes of groundwater contamination include surface-level mismanagement of the storage, transportation, or disposal of flowback water or fracturing fluid.\(^{46}\) Accidental spills or improperly lined pits could result in chemicals seeping into the groundwater, or washing into nearby lakes or streams. Spills and improperly constructed storage containers have, in the past, been alleged in complaints for negligence cases.\(^{47}\) It should be noted, however, that spills and improper well construction are not unique to the process of hydraulic fracturing.\(^{48}\)

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28. See Suzuki, supra note 22, at 269. Ninety-eight percent of fracturing fluid is composed of water and propping agents, while the remaining two percent contains potentially harmful chemicals. Id.

29. Id. at 270.


31. Suzuki, supra note 22, at 269.

32. Coman, supra note 5, at 136.


35. See id.

36. Id. at 106.


40. See King et al., supra note 21, at 348.

41. See id. at 350 (citing Press Release, Elizabeth Ames Jones, R.R. Comm’n of Tex., No Water Contamination Ever Due to Homegrown Technology—Hydraulic Fracturing (May 12, 2011)).

42. Pain at the Pump: Policies That Suppress Domestic Production of Oil and Gas: Hearing Before the H. Comm. on Oversight & Gov’t Reform, 112th Cong. 87 (2011).


44. See King et al., supra note 21, at 351.

45. Thiemann & Vann, supra note 18, at 5.

46. Id.


In response to the controversy surrounding a potential link between hydraulic fracturing and groundwater contamination, the EPA began an ongoing scientific study in 2011, the results of which were released in June 2015.\(^6\) The study investigated short- and long-term impacts of hydraulic fracturing on water resources and performed several retrospective case studies.\(^6\) The five retrospective sites are all locations where groundwater contamination has been reported; they include the Bakken Shale (Dunn County, North Dakota), the Barnett Shale ( Wise County, Texas), the Marcellus Shale (Bradford and Susquehanna Counties, Pennsylvania and Washington County, Pennsylvania), and the Raton Basin ( Las Animas and Huerfano Counties, Colorado).\(^6\) The study also evaluated multiple scenarios through computer modeling that could lead to groundwater contamination, including the migration of chemicals through fractures in the rock, the migration of chemicals through existing geological fault lines, the release of chemicals through poorly cemented wells, and the transfer of chemicals through surface waters.\(^6\)

The study revealed possible mechanisms by which hydraulic fracturing activities have the potential to impact drinking water resources, including through spills of hydraulic fracturing fluids and produced water, fracturing directly into underground drinking water resources, below ground migration of liquids and gases, and inadequate treatment and discharge of wastewater.\(^6\) The study even alluded to specific instances where drinking water wells were contaminated, but qualified the conclusion by stating that the number of identified cases is small compared to the number of hydraulic fracturing wells in the United States.\(^6\) Overall, the study shows that the government has not found evidence of "widespread, systematic impacts on drinking water resources,"\(^6\) but the study does show that contamination is possible, and may prove to be a valuable resource for plaintiffs in hydraulic fracturing cases seeking to establish causation.

C. Current Federal Regulatory Framework

Much of the scholarly analysis in this field relies on the precautionary principle and centers on proposals for increased state and federal regulation of hydraulic fracturing\(^6\) as a means to prevent harm and lessen the risk of pollution. As federal law currently stands, activities related to hydraulic fracturing are largely unregulated, due in part to a series of exemptions created by the Energy Policy Act of 2005.\(^5\) One exemption, popularly referred to as the “Halliburton Loophole,”\(^5\) specifically excludes the underground storage of natural gas and injection of agents used in hydraulic fracturing from Safe Drinking Water Act regulation.\(^6\) Water resources are further unprotected by amendments to the Clean Water Act\(^6\) through the Energy Policy Act of 2005,\(^6\) which eliminated the need for National Pollution Discharge Elimination System permits for stormwater runoff from oil and gas exploration, production, processing, or treatment operations.\(^6\) Besides these recent exemptions, petroleum, natural gas, and the related fracking fluids and flowback water were specifically excluded under statutes designed to deal with hazardous waste, namely the Resource Conservation and Recovery Act\(^6\) and the Comprehensive Environmental Response, Compensation, and Liability Act.\(^6\) Other statutes designed to inform the public of potential environmental risks such as the Emergency Planning and Community Right-to-Know Act\(^6\) and the Toxic Substances Control Act\(^6\) also do not regulate hydraulic fracturing.\(^7\) Exemptions from the aggregation rule of the Clean Air Act\(^8\) also limit the regulation of Hazardous Air Pollutants that may be emitted during the hydraulic fracturing process.\(^9\) Because federal regulations fail to prevent harm from the ex-ante perspec—

58. See Brady & Crannell, supra note 17, at 43.
59. Energy Policy Act of 2005 § 322. 42 U.S.C. § 300h(d) (Supp. V 2005) (amending Safe Drinking Water Act § 1421(d), 42 U.S.C. § 300h (2012)). “(1) UNDERGROUND INJECTION.—The term ‘underground injection’—(A) means the subsurface emplacement of fluids by well injection; and (B) excludes— . . . (iii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.” 42 U.S.C. § 300h (2012).
61. See Brady & Crannell, supra note 17, at 48.
67. The Administrator of EPA has discretion to add or remove industries from the list of entities with reporting responsibilities under the Emergency Planning and Community Right-to-Know Act and has neglected to ever add the oil or gas industries. See Brady & Crannell, supra note 17, at 48. Furthermore, the Toxic Substances Control Act does not mandate disclosure of chemicals used in the fracking process, although some companies have used the website “FracFocus” to make voluntary disclosures. Out of almost 514,780 wells in the United States, only around 90,000 wells are accounted for on the “FracFocus” website. FracFocus Chemical Disclosure Register, https://fracfocus.org/ (last visited Feb. 18, 2015).
69. See 40 C.F.R. § 63.761 (2015); Brady & Crannell, supra note 17, at 50–51.
tive, it becomes imperative that plaintiffs suffering harm from hydraulic fracturing have the opportunity to effectively access remedies, through the common law tort system. The use of Lone Pine orders significantly affects the rights of plaintiffs in this respect, leaving them with no regulatory protection, compensatory damages, or equitable relief after the harm has occurred.

II. Lone Pine Orders Are Problematic in the Context of Hydraulic Fracturing Litigation

Plaintiffs bringing common law tort claims in hydraulic fracturing litigation are severely limited by the use of Lone Pine orders—case management orders that require a prima facie showing of causation before discovery is granted. While they are designed to serve legitimate goals, these orders also lack the procedural safeguards granted by the Federal Rules of Civil Procedure. These orders can be problematic in the context of hydraulic fracturing litigation, as exemplified by the Strudley case.

A. Lore v. Lone Pine Corp.

Lone Pine orders originate from the case management order issued by the judge in the 1986 environmental tort case Lore v. Lone Pine Corp. This was a suit brought against Lone Pine Corporation, the operator of a landfill, as well as 463 other hazardous waste generators and/or haulers of waste in the landfill. The Plaintiffs alleged waters polluted by the landfill caused depreciated property values and personal injuries, including allergic reactions, skin rashes, and other related ailments. Because of the complexity of the case and large number of defendants, the judge issued a case management order requiring the Plaintiffs’ attorney to provide:

(a) Facts of each individual plaintiff’s exposure to alleged toxic substances at or from Lone Pine Landfill; (b) Reports of treating physicians and medical or other experts, supporting each individual plaintiff’s claim of injury and causation by substances from Lone Pine Landfill; . . . (c) [Each Plaintiff’s address; and] (d) Reports of real estate or other experts supporting each individual plaintiff’s claim of diminution of property value, including the timing and degree of such diminution and the causation of same.

The Plaintiffs in Lone Pine had only four months to collect this information, without the use of formal discovery against the Defendants, and ultimately did not provide enough information by the court-imposed deadline to establish a prima facie case. Specifically, the Plaintiffs obtained a real estate expert who explained to the court that he only had thirty days to investigate the properties and was therefore unable to provide a detailed report. The Plaintiffs were also unable to obtain testimony from treating physicians establishing a causal connection between the Plaintiffs’ health effects and the landfill. After the Plaintiffs failed to meet the requirements of the case management order, the case was dismissed with prejudice.

The court stated a number of reasons why the case management order imposed was appropriate for the situation. The main rationale was to efficiently manage the complexity and expense of the case and the number of Defendants, as well as to put Defendants on notice of the specific allegations against them. Another, perhaps controlling reason this order was imposed, was due to the court’s concern that the Plaintiffs had brought their cause of action to intimidate Defendants into settlement. The court explained, “With the hundreds of thousands of dollars expended to date in this case. . . . [t]his court is not willing to continue the instant action with the hope that the [D]efendants eventually will capitulate.”

Scholars have summarized these rationales as efficiency, elimination of frivolous cases, fairness to defendants and as “prophylactic devices to get rid of bad cases.” Courts justify the use of Lone Pine orders as being within a court’s power under Federal Rule of Civil Procedure 16(c)(2). This rule states in part that:

At any pretrial conference, the court may consider and take appropriate action on the following matters: (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses; . . . (L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; . . . and (P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

B. The Legacy of Lone Pine Orders

Because Lone Pine orders require plaintiffs to allege specific facts and can bar plaintiffs from access to formal discovery, defendants have commonly used these orders as an effective defensive tactic in complex litigation and toxic tort cases.

Today, almost every Lone Pine case management order for...
toxic tort cases requires plaintiffs to allege: “(1) the identity of the chemical or substance causing the injury; (2) the specific disease, illness or injury caused by the substance; and (3) a causal link between exposure to the substance in question and the plaintiff’s injury.”

Because proving these elements can be extremely expensive and burdensome to plaintiffs, defense attorneys have petitioned courts to enter these orders as a means to either get a case dismissed, or to contain the expenses of a long, drawn-out discovery period.

With the recent advent of hydraulic fracturing tort cases, *Lone Pine* orders have become a popular method for dismissing cases and several experts and practitioners in the field have advocated for their use. In the recent high profile hydraulic fracturing case of *Strudley v. Antero Resources Corp.*, the district court issued a *Lone Pine* order, however, it was overturned at the appellate court. The Colorado Supreme Court recently affirmed the holding of the appellate court.

C. **Drawbacks of Lone Pine Orders**

*Lone Pine* orders lack the procedural safeguards afforded to plaintiffs by the Federal Rules of Civil Procedure, and the complex nature of hydraulic fracturing litigation exacerbates this problem. Specifically, the fact that the majority of the information needed to prove a case is solely in a defendant’s possession, and may be protected as trade secrets or otherwise unavailable without formal discovery, makes it nearly impossible for plaintiffs to satisfy these orders. In addition, the complicated process and scientific uncertainties surrounding causation necessitate the use of expert witnesses who may lack the necessary background information to make definite causal connections or diagnoses at early stages of litigation without the help of discovery.

The primary criticism of *Lone Pine* orders is that these case management orders may function as “court-imposed summary judgment.” In forcing plaintiffs to provide detailed information about causation without formal discovery, plaintiffs face the formidable task of gathering expensive expert and medical testimony about information that may be only in the defendant’s possession. If a plaintiff fails to meet the requirements of a case management order, they risk having their case dismissed, as was the situation in *Lone Pine* and *Strudley*. Some judges and scholars argue this should not be permissible because it bypasses procedural safeguards and protections granted by the Federal Rules of Civil Procedure. One judge even went as far as to decree *Lone Pine* orders in writing:

> The case management order denying Plaintiffs the opportunity to present their personal injury actions to the jury is the functional equivalent of a summary judgment motion granted without complying with the procedural protections mandated by the legislature and cannot be justified under the ‘inherent powers’ of the court or under the special standards applicable to complex litigation . . . the trial court substituted a bastardized process which had the purpose and effect of summary judgment but avoided the very procedures and protections the Legislature deemed essential.

An example of a procedural safeguard that is eliminated by the use of a *Lone Pine* order is the Federal Rule of Civil Procedure 56 standard for granting summary judgment. That standard allows a judge to decide a case as a matter of law if there is “no genuine dispute as to material fact,” but that a case should not be dismissed unless no reasonable jury could find for the plaintiff. However, with the use of *Lone Pine* orders, plaintiffs can allege a claim and include enough information so as to raise a genuine dispute of material fact, but may nonetheless be dismissed for failing to pinpoint the exact substance or date of exposure that caused their injury. It is clear that *Lone Pine* orders are problematic because they can weigh heavily against the interests of plaintiffs when other judicial procedures are otherwise available, and the complexity of hydraulic fracturing cases can exacerbate this problem.

In addition to the problems that arise from *Lone Pine* orders functioning as summary judgment, there are several attributes of hydraulic fracturing litigation that make these orders ill-suited for these types of cases. While many toxic tort or complicated environmental tort cases involve a degree of uncertainty in determining the cause of harm, this element may be magnified in the context of a complicated scientific process, with multiple potential routes of toxic exposure. One major obstacle plaintiffs face in adhering to a *Lone Pine* order in a hydraulic fracturing case is identifying the chemical that is alleged to have caused the harm, as

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88. See Burnett, supra note 70, at 57.
89. See Goldman, supra note 12, at 323 (“Perhaps one of the most successful techniques in keeping defense costs down has been the entry of a *Lone Pine* order that requires the plaintiff to make a prima facie showing of exposure and causation before full discovery is allowed.”).
95. See Simeone v. Girard City Bd. of Educ., 872 N.E.2d 344, 350 (Ohio Ct. App. 2007) (“The *Lone Pine* order has faced harsh criticism because it gives courts the means to ignore existing procedural rules and safeguards. When the *Lone Pine* order cuts off or severely limits the litigant’s right to discovery, the order closely resembles summary judgment, albeit without the safeguards that the Civil Rules of Procedure supply.”); Burnett, supra note 70, at 87 (“[C]omplex litigation does not afford a court free reign to disregard mandated rules under the guise of inherent case management authority.”).
well as the timing and dose of the alleged exposure. Because many hydraulic fracturing companies consider the chemical formulations of fracturing fluid as confidential trade secrets, plaintiffs lack access to information about the toxic chemicals that may have caused an illness. Furthermore, plaintiffs may lack access to information about the hydraulic fracturing operations themselves, and are unable to investigate the defendant’s premises, making it difficult to identify a route of exposure (for example, through faulty well construction, or incorrectly insulated storage tanks or holding ponds) to establish causation. In some states where hydraulic fracturing is very common, there may also be several wells near a plaintiff’s house, and it may be necessary for the plaintiff to sue multiple operations and use the discovery process to identify the appropriate defendants. By forcing a plaintiff to allege specific facts establishing causation at such an early stage of litigation, a plaintiff may not be able to pinpoint the proper defendants and his or her case may be dismissed altogether.

Even if plaintiffs in a hydraulic fracturing case are able to gain access to information solely in a defendant’s possession without discovery, they are also forced to expend a considerable amount of money and effort to retain experts that can fully investigate a claim in the short time the case management order prescribes. Like typical toxic tort cases, plaintiffs will need to hire medical experts to link their symptoms to a pollutant, as well as explain concepts such as relative risk, multiple regression statistics, and dose-response relationships. In hydraulic fracturing litigation, there is also the additional requirement of hiring hydrological experts that can trace the route of groundwater contamination, or other scientific professionals to explain how toxins could affect the plaintiff or their property.

Furthermore, one of the main rationales given for the issuance of a *Lone Pine* order is to simplify complex litigation that often involves multiple parties. The eponymous *Lone Pine* case itself involved 464 defendants and *Lone Pine* orders have been issued in several complicated mass tort and product liability cases. However, *Lone Pine* orders are unlikely to simplify hydraulic fracturing litigation because the majority of these cases are not mass torts, but are instead brought by a household or small group of plaintiffs against a small number of defendants. Although it is possible that a community could bring a class-action claim against one or more hydraulic fracturing operations, outside of this situation, *Lone Pine* orders only serve to obfuscate the case by denying plaintiffs access to highly technical information that lies primarily in the hands of defendants. This was the issue in the recent *Strudley v. Antero Res. Corp.* case.

D. The Strudley v. Antero Resources Corp. Case

One case that has garnered considerable attention in recent years and showcases the popularity of *Lone Pine* orders in hydraulic fracturing litigation is *Strudley v. Antero Res. Corp.* This case was brought by the Strudley family in Colorado against Defendants that operated three nearby hydraulic fracturing wells after the family suffered skin rashes, constant headaches, nausea, burning eyes and throat, coughing bouts and bloody noses, and noticed that their well water was visibly polluted and had a bad odor. These problems became so severe that the family moved, after which their medical symptoms subsided. The family sued the hydraulic fracturing operation for personal injuries, the loss of enjoyment of their property, a diminution in value of property, and loss of quality of life under theories of negligence, negligence per se, nuisance, strict liability, and trespass. In their complaint, the Plaintiffs alleged that their health injuries were caused by exposure to air and water contaminated by the Defendants with “hazardous gases, chemicals and industrial wastes,” including “hydrogen sulfide, hexane, n-heptane, toluene, propane, isobutene, n-butane, isopentane, n-pentane and other toxic hydrocarbons and combustible gases and hazardous pollutants and industrial and/or residual waste.”

At the Defendants’ request, the court issued a *Lone Pine* order requiring the Plaintiffs to provide the following within 105 days:

Expert opinion(s) . . . that establish for each Plaintiff (a) the identity of each hazardous substance from Defendants’ activities to which he or she was exposed and which the Plaintiff claims caused him or her injury; (b) whether any and each of these substances can cause the type(s) of disease or illness that Plaintiffs claim (general causation); (c) the dose or other quantitative measurement of the concentra-
tion, timing and duration of his/her exposure to each substance; (d) if other than the Plaintiffs’ residence, the precise location of any exposure; (e) an identification, by way of 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 (f) a conclusion that such illness was in fact caused by such exposure (specific causation).

The Strudley family also had to provide detailed information about contamination of their property. The Plaintiffs submitted documents from an expert concluding that the contamination present in the Strudley family’s well water was consistent with contamination from gas and oil wells, but that further discovery was needed. The family also consulted with a doctor that concluded “sufficient environmental exposure and health information exists to merit further substantive discovery,” and recommended including modeling of plumes from the wellheads, information about nearby fault lines, defendant’s compliance with environmental laws, inspections of the well, and evaluations by a dermatologist and neuropsychologist, but was unwilling to state a definitive causal link to the Plaintiffs’ symptoms. In spite of this evidence, the trial court dismissed all of the Strudleys’ claims with prejudice, finding that the plaintiffs failed to establish a prima facie case for causation.

On appeal, the court reversed, finding that the trial court erred in issuing a Lone Pine order because the facts surrounding the case were not “so extraordinary as to require departure from the existing rules of civil procedure,” and that by entering the order, the trial court unduly interfered with the Strudleys’ opportunity to prove their case. The court relied on a body of case law outside of the context of hydraulic fracturing that generally rejects Lone Pine orders and supports the use of existing procedural rules to accomplish the same goals as a Lone Pine order without placing an undue burden on the plaintiff to produce a prima facie case without discovery. In these cases, as well as in three district court hydraulic fracturing cases, the courts rejected Lone Pine orders on the grounds that they amount to summary judgment, and that alternative means should be used to dismiss frivolous claims, limit expense and complexity, and force the plaintiffs to allege sufficient facts to support causation.

The Colorado Court of Appeals rejected Lone Pine orders in Strudley because of a fear that these case management orders amount to summary judgment, while “existing statutes, rules, and procedures provide sufficient protection against frivolous or unsupported claims and burdensome discovery.” In particular, the court addressed judicial control of discovery, and the court’s “flexibility and discretion to address discovery disputes as they arise” as a preferable alternative to entering a “rigid and exacting Lone Pine order.”

The Colorado Court of Appeals also relied heavily upon a similar hydraulic fracturing case from a Pennsylvania district court, Roth v. Cabot Oil & Gas Corp. There, the court rejected the Defendant’s request for a Lone Pine order when Plaintiffs alleged water contamination from a nearby hydraulic fracturing operation resulting from contact with hazardous flowback wastewater due to holes in waste pit liners and improperly cased wells. The court denoted a number of factors to consider when assessing the propriety of entering a Lone Pine order, including the posture of the litigation, the case management needs presented, the availability of other procedures that have been specifically provided for by rule or statute, and the type of injury alleged and its cause. Weighing these factors, the court found that “[c]laims of efficiency, elimination of frivolous claims and fairness are effectively addressed using the existing and standard means.”

The Colorado Court of Appeals also relied upon principles of Colorado State law in deciding Strudley. For instance, the court cited a case that did not directly involve a Lone Pine order, but instead addressed the appropriateness of imposing a prima facie requirement on a party before discovery occurred. The court found the imposition of this requirement contrary to the basic principles of discovery, namely that:

(1) Discovery rules should be construed liberally to effectuate the full extent of their truth-seeking purpose. (2) In close cases, the balance must be struck in favor of allowing discovery. (3) The party opposing discovery bears the burden of establishing good cause exists for the entry of a protective order.

The Colorado Supreme Court affirmed the judgment of the Court of Appeals in April 2015, but relied on different grounds. Justice Hobbs wrote that the court shares the concerns of other courts that a Lone Pine order “cuts off or severely limits the litigant’s right to discovery” and that “the order closely resembles summary judgment,” the court based its decision on a difference in the wording of the Colorado Rules of Civil Procedure. Specifically, the court examined Rule 16 of the Federal Rules of Civil Procedure to that of the state equivalent, finding that the state rule omitted certain grants of authority to the courts to "adopt[ ]

113. Strudley, 350 P.3d at 876.
114. Id. at 877.
115. Id.
116. Id.
117. Id.
118. Id. at 883.
121. Strudley, 350 P.3d at 880.
122. Id. (citing In re Digitek, 264 F.R.D. at 259).
124. Id. at 296.
125. Id. at 298 (citing In re Digitek, 264 F.R.D. at 256).
126. Id. at 299 (citing In re Digitek, 264 F.R.D. at 259).
127. Strudley, 350 P.3d at 890 (citing Direct Sales Tire Co. v. Dist. Court, 686 P.2d 1316, 1321 (Colo. 1984)).
129. Id. at 159.
130. See id. at 157.
special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems” or to “formulate and simplify[,] the issues, and eliminate[,] frivolous claims or defenses.”

Interestingly, the court does not opine whether this distinction means that *Lone Pine* orders are implicitly permissible or justified in federal courts because of the inclusion of this language. How courts interpret federal and state procedural rules and judicial authority in future cases may greatly impact how and where litigants strategically bring suit, and could lead to forum shopping. It is notable that one Justice dissented in the case, writing that active judicial case management is essential for judges to run an efficient docket, and that a specific grant of authority in the Colorado procedural rules for *Lone Pine* orders is not necessary for judges to exercise this power.

The Strudley line of cases and Roth do not indicate that use of *Lone Pine* orders is never warranted. Instead, the courts found that generally *Lone Pine* orders were better suited for mass tort claims, but that the “untethered use” of these orders should be avoided. Furthermore, the Roth court concluded that resorting to a *Lone Pine* order should only occur when “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.” The Strudley and Roth courts found these orders should only be issued “in the exceptional case” and that even when they are issued, the “court should strive to strike a balance between efficiency and equity.” The reasoning of these courts is correct—the goal of efficiency should be sought by using alternate means to the *Lone Pine* order, in the interests of judicial fairness and preserving plaintiffs’ access to the court system.

### III. Alternative Methods for Promoting Efficient, Cost-Effective, and Fair Resolutions

The goals of a *Lone Pine* order—efficiency, cost-reduction, simplification of complex cases, and the elimination of meritless claims—may be served by using widely approved procedural and evidentiary methods prescribed by the Federal Rules of Civil Procedure and Federal Rules of Evidence.

While some hydraulic fracturing litigation claims may be brought in state court, rather than in federal court, comparable state rules may address these same concerns. Judges can use case management authority to reduce costs by ordering limited discovery, simplify complex cases by bifurcating proceedings or designating bellwether plaintiffs, and dismissing meritless claims by enforcing pleading standards established in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. In addition, judges may impose Rule 11 sanctions on attorneys for bringing frivolous cases, and must scrutinize expert testimony as to causation by applying *Daubert v. Merrell Dow Pharmaceuticals, Inc.* standards under Rule 702 of the Federal Rules of Evidence. Because there are multiple judicial devices at a court’s disposal for achieving the same goals as a *Lone Pine* order, and these options are less problematic to the interests of plaintiffs, courts should reject the use of *Lone Pine* orders.

#### A. Case Management Tools

By virtue of judges’ case management authority granted by Rule 26 of the Federal Rules of Civil Procedure, courts may curb unduly expensive or cumbersome discovery by issuing orders limiting discovery in scope or duration, bifurcating proceedings to simplify complex cases, and designating bellwether plaintiffs in large class actions.

While *Lone Pine* orders may function as a cost-saving mechanism, this same goal can be achieved through less restrictive case management orders, which still allow plaintiffs to gather enough information to have an opportunity to investigate their claims. Pursuant to Federal Rule of Civil Procedure 26(b), judges may issue court orders limiting the scope of discovery, on a motion or on its own, and they must limit the extent of discovery if they determine the expense of the proposed discovery outweighs its likely benefit. Rule 26(b) was amended in 1993 to confer greater discretion to manage discovery, as was Federal Rule of Civil Procedure 1, which provides that the rules be construed and administered to secure “just, speedy, and inexpensive determination[s].” By limiting the scope or duration of discovery pursuant to Rule 26, courts may more fairly balance the interests of the

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143. *Id.; see Fed. R. Evid. 702."


parties by allowing plaintiffs access to information to develop factual claims and sparing defendants from undue or excessive expenses.

Courts may also simplify issues and reduce costs in complicated hydraulic fracturing litigation by bifurcating proceedings. Bifurcation refers to splitting a case into parts and typically involves having separate trials on the issues of liability and damages. Judges can exercise authority to bifurcate proceedings pursuant to Federal Rule of Civil Procedure 42(b), which reads: “[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.”156 Bifurcation can take a variety of forms, and there is no set principle for separating claims, which makes this an incredibly flexible tool for enhancing efficiency.157 In the context of hydraulic fracturing litigation, where the most contentious issue is typically causation, it would be efficient to bifurcate proceedings into separate trials for causation, and for other elements of the case such as liability and damages. This way, if the plaintiff lost at the first trial on the issue of causation, then the other elements would not need to be proven and significant costs may be saved in not investigating or litigating these issues. Used in conjunction with limited discovery on the issue of causation, courts may effectively limit the time and money spent by companies defending against weak claims.

A third method for simplifying complex cases and reducing expenses is designating bellwether plaintiffs in class action cases. In the 1986 Lone Pine case, one of the rationales for issuing the case management order was to simplify the claims brought by several plaintiffs against over 400 defendants.158 Although much of the hydraulic fracturing litigation to date has involved a small group of plaintiffs, it is possible that alleged groundwater contamination could affect a larger group of individuals, perhaps several neighboring homes or the residents of a town. In cases such as these, a small number of representative plaintiffs, called bellwether plaintiffs, may be selected as a way to limit the initial scope of discovery and litigation159 in order to evaluate and resolve the broader class of personal injury claims.160 Although the designation of bellwether plaintiffs is not specifically prescribed by any rules of civil procedure,161 courts have generally accepted the use of bellwether plaintiffs.162 It is important that the select sample of bellwether plaintiffs is representative of the class, so as to maintain the parties’ due process rights.163

Used in combination, limited discovery, bifurcated proceedings, and bellwether plaintiffs can be extremely effective methods of reducing expenses and complexity in litigation, while still allowing plaintiffs to access the information necessary to make a claim and attempt to remedy their injury. In Morgan v. Ford Motor Co.,164 a New Jersey district court did just that—issued a case management order that divided the proceeding into phases, and limited initial discovery to certain issues for five bellwether plaintiffs.165 This case concerned claims of property damage and personal injury resulting from alleged contamination from a landfill (much like the Lone Pine case) and involved a number of consolidated cases brought by over 700 individuals.166 In issuing this order, the court refused to enter the Lone Pine order that the defendants requested, finding that “parties must be given an opportunity to conduct discovery and contest the reasonableness of their adversary’s experts” and that plaintiffs were “not required to prove a prima facie case without the benefit of any discovery from [the defendants].”167 By applying widely accepted judicial tools, the court was able to effectively manage a complex case, controlling complexity and efficiency, without intruding on any substantive rights of the parties.

B. Procedural Rules and Standards

Courts may also eliminate meritless claims through other procedural rules and standards. For instance, courts must evaluate complaints using the “plausibility standard” set out in Rule 8 of the Federal Rules of Civil Procedure and refined by Twombly168 and Iqbal.169 Courts also have the authority to dismiss frivolous cases and sanction attorneys under Rule 11.

I. Pleading Standards

One alternative to using Lone Pine orders to dismiss meritless claims is to dismiss cases on a motion for “failure to state a claim upon which relief may be granted.”170 This may be done by evaluating the sufficiency of the pleading in the initial complaint, traditionally governed by Rule 8 of Federal Civil Procedure, which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”171 However, two landmark cases have transformed

151. See Steven S. Gensler, Bifurcation Unbound, 75 Wash. L. Rev. 705, 705–06 (2000); see also Hydrite Chem. Co. v. Calumet Lubricants Co., 47 F.3d 887, 891 (7th Cir. 1995) (“[T]here is no rule that if a trial is bifurcated, it must be bifurcated between liability and damages. The judge can bifurcate (or for that matter trifurcate, or slice even more finely) a case at whatever point will minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication.”).
156. See In re Chevron U.S.A., Inc., 109 F. 3d 1016, 1019 (5th Cir. 1997) (“The notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar.”).
157. See id. at 1021.
159. Id. at **41–42.
160. Id. at **17–18.
161. Id. at **36–37, 39.
164. Fed. R. Civ. P. 12(b)(6). The motion must be brought by the opposing party.
this standard to create “a new system of ‘plausibility’ pleading
designed to curb discovery abuse and weed out frivolous
lawsuits.” 166 Considered a “more heightened form of pleading,”
these cases require plaintiffs to allege more than the mere
possibility of relief to survive a motion to dismiss. 167 This
“plausibility standard” compels plaintiffs to include
enough factual matter in their complaints to “nudge[] their
claims across the line from conceivable to plausible.” 168

In refining this pleading standard, the Supreme Court
held in Iqbal that mere conclusory statements or “threadbare
recitals” of claims are insufficient to meet this standard, and
that a well-pleaded complaint must contain factual allega-
tions to support any conclusions drawn. 169 In practice, this
has led courts to apply a multipart test. First, courts must
identify and disregard conclusory statements within a com-
plaint because such statements are not entitled to the assump-
tion of truth. 170 Then, courts must assume the veracity of
well-pleaded factual allegations and determine whether the
 allegations plausibly give rise to the entitle ment of relief. 171
This heightened pleading standard makes it difficult for
plaintiffs to bring claims at initial stages of litigation, before
discovery is allowed, much like Lone Pine orders. However,
instead of requiring specific information, such as the exact
chemical and dosage that a plaintiff was exposed to as a
child, the court may impose sanctions on the attorney, including payments of penalties to the court or
payment of reasonable attorney’s fees to the opposing party. 176 Typically, an attorney will be provided with twenty-one
days notice as a “safe harbor period,” during which they may
either withdraw or correct the challenged paper, or be sanc-
tioned. 177 Rule 11 sanctions can be particularly effective in
cases where plaintiffs bring cases for the purpose of intimi-
dating defendants into settling. 178

Rule 11 sanctions have been used in the context of envi-
ronmental and toxic tort cases before, especially where causa-
tion claims or the proof of injury is dubious. For example, in
Baker v. Chevron U.S.A., Inc. 179 an appellate court approved
the trial court’s issuance of Rule 11 sanctions for the plain-
tiffs’ attorney. 180 The Plaintiffs sued for toxic torts and prop-
erty damages resulting from activities at a Chevron refinery
that allegedly polluted the groundwater supply, and requested
medical monitoring expenses for 118 plaintiffs as part of the
requested relief. 181 However, there was no evidence in the
record suggesting the Plaintiffs were at an increased risk of
any disease. Nor was there any effort to obtain individual-
ized exposure data requisite to justify medical monitoring. 182
Therefore, the court ruled that it was inappropriate to issue
sanctions when the attorney refused to dismiss a claim after
becoming aware that it lacked merit, 183 dismissed the claim
for medical monitoring, and awarded the defense $250,000
in attorney’s fees. 184 In doing so, the court also held that Rule
11 sanctions are warranted if an attorney’s actions are objec-
tively unreasonable and it imposes an ongoing obligation
on attorneys to refrain from pursuing frivolous claims. 186

In the context of hydraulic fracturing litigation, it is clear
that if attorneys bring claims that are patently unwarranted
or designed to intimidate defendants into settling without
any plausible evidence, then courts may effectively remedy
this problem with Rule 11 sanctions, rather than barring
plaintiffs from accessing any information at the pleading
stage with a Lone Pine order. Many of these cases will hinge
on the evidence provided by expert testimony linking defen-
dants’ activities to plaintiffs’ injuries, and thus another way to
deal with meritless claims judicially is to properly police the
use of expert testimony by applying evidentiary standards.

2. Rule 11 Sanctions

Another way for courts to eliminate meritless claims is to
bring Rule 11 sanctions against attorneys in cases where a
pleading or motion is made in bad faith. Under Rule
11(b)(1), attorneys are required to certify that the action
they are filing has not been made to “harass, cause unneces-
sary delay, or needlessly increase the cost of litigation.” 173
If, on a motion for sanctions from opposing counsel, 174 or on
the court’s own initiative, 175 the court finds that Rule 11(b)
has been violated, the court may impose sanctions on the
attorney, including payments of penalties to the court or
payment of reasonable attorney’s fees to the opposing party.
176 Typically, an attorney will be provided with twenty-one
days notice as a “safe harbor period,” during which they may
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use of expert testimony by applying evidentiary standards.

C. Evidentiary Standards

In litigation where causation is a particularly contentious
issue, especially in complex and toxic tort cases, a trial may
be won or lost in a “battle of the experts.” 187 Both parties will

166. Rakesh N. Kilaru, The New Rule 12(b)(6): Twombly, Iqbal, and the Paradigm of
Pleading, 62 STAN. L. REV. 905, 906 (2010).
170. Id. at 679–80; Fowler, 578 F.3d at 210–11; Santiago v. Warminter Twp., 629
F.3d 121, 130 (3d Cir. 2010).
171. See Iqbal, 556 U.S. at 680.
172. See Twombly, 550 U.S. at 544 (holding that allegations of parallel conduct by
telephone companies was not sufficient in proving illegal collusion was plau-
sible); see also Iqbal, 556 U.S. at 662 (holding that allegations of discrimination and
confinement on the basis of race by federal officials following a terrorist
attack were not plausible).
174. Id. t r. 11(b)(2).
175. Id. t r. 11(b)(3).
176. Id. t r. 11(c)(1).
177. Id. t r. 11(c)(2).
178. See Burnett, supra note 70, at 84.
180. Id. at 526–27.
181. Id. at 511, 517.
182. Id. at 526–28.
183. Id. at 528.
184. Id. at 511.
185. Id. at 526; see also Andretti v. Borla Performance Indus., Inc., 426 F.3d 824,
833 (6th Cir. 2005).
186. See Baker, 533 F. App’x at 528; see also Merritt v. Int'l Ass'n of Machinists &
Aerospace Workers, 613 F.3d 609, 627 (6th Cir. 2010).
187. See Suzanne Orofino Galbato, Multiple Chemical Sensitivity: Does Daubert v.
Merritt Dow Pharmaceuticals, Inc. Warrant Another Look at Clinical Ecology?,
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present witnesses from the scientific or medical community to establish causal links or refute them, and it may be up to the jury to decide which “expert” to believe. Courts have interpreted Rule 702 of the Federal Rules of Evidence to confer a “gatekeeping” function to the trial courts in determining what types of scientific expert testimony are admissible at trial.\textsuperscript{188} Given the importance of expert testimony in hydraulic fracturing litigation, courts should apply the relevant federal or state standards in ensuring that only credible, reliable experts are allowed to testify, and in doing so, deprive any meritless claims from surviving a motion for summary judgment or at trial.

Rule 702 of the Federal Rules of Evidence requires, in part, that an expert’s testimony must be based on sufficient facts and data, is the product of reliable principles and methods, and that the expert has applied those principles and methods to the facts of the case.\textsuperscript{190} In its decision in Daubert, the Supreme Court found that in applying Rule 702, judges should consider a number of nonexclusive factors to determine whether scientific testimony is reliable, and therefore admissible.\textsuperscript{190} These include, for example, whether a technique has been tested in actual field conditions, was subject to peer review and publication, has a known or potential rate of error, is generally accepted within the relevant scientific community, and whether standards exist for the control of the technique’s operation.\textsuperscript{191}

Since 1993, all federal courts have adopted the Daubert standards in interpreting Rule 702, and a majority of state courts have adopted Daubert or similar tests.\textsuperscript{192} A minority of state court jurisdictions have declined to adopt the Daubert standards, and instead retain the earlier Frye v. United States test,\textsuperscript{193} which places the inquiry on whether an expert’s technique or methodology is generally accepted in the field.\textsuperscript{194} Expert testimony may be challenged on the grounds that the witness is not qualified to be an expert, the testimony is not relevant, or that the testimony is not reliable due to the methodology used or its application to the case.\textsuperscript{195} Regardless of the jurisdiction, the trial judge will have some set of standards to assess the appropriateness of admitting expert testimony, and an obligation to keep junk science out of the courtroom.

In hydraulic fracturing litigation, there are typically two types of experts that are necessary for establishing causation for tort claims: scientists and engineers to link defendants’ activities to alleged environmental contamination or property damage, and medical professionals to link alleged contamination to plaintiffs’ personal injury.\textsuperscript{196} In order to establish a causal route of exposure, plaintiffs need to hire hydrologists that study the movement and distribution of water\textsuperscript{197} and hydrogeologists that study the distribution of groundwater in the soil and subterranean rocks.\textsuperscript{198} In assessing potential environmental contamination, scientists often use MODFLOW, a computer program developed by the U.S. Geological Survey in 1983, which simulates the flow of groundwater through aquifers.\textsuperscript{199} MODFLOW is sanctioned by the EPA, subject to peer-review, and is considered a standard modeling tool in the field.\textsuperscript{200} Conflicts sometimes arise between the data that is projected by the computer model and actual data taken from the physical site (i.e., water samples taken from an allegedly contaminated well), in which cases a Daubert assessment is particularly useful.\textsuperscript{201}

Plaintiffs claiming personal injury must also present medical experts to link plaintiffs’ injuries with defendants’ activities.\textsuperscript{202} In the context of hydraulic fracturing litigation, this usually involves toxicologists, epidemiologists, oncologists, or other doctors that specialize in the types of injuries that specific plaintiffs sustain.\textsuperscript{203} Toxicologists play a particularly important role in establishing causation and evaluating present and future damages, by testifying as to the negative or carcinogenic effects of certain chemicals that plaintiffs may be exposed to in contaminated groundwater.\textsuperscript{204} The majority of Daubert challenges brought against medical experts concern the reliability of the methodologies used.\textsuperscript{205} For example, the Ninth Circuit upheld a trial court’s exclusion of expert witness testimony because the doctor failed to take into account outside sources of dioxin exposure (i.e., cigarettes, smoke inhalation) in establishing a causal link to a chrome-plating factory, despite a lack of evidence that dioxins were ever present at the facility.\textsuperscript{206} In another case concerning alleged contamination from a landfill, a court excluded expert testimony of an inhalation toxicologist that made assumptions about the amount of water and air that plaintiffs were exposed to over the course of years as “mere conjecture.”\textsuperscript{207} The court found that there was “too great of an analytical gap in the expert’s methodology for his opinion to be admissible at trial.”\textsuperscript{208}

Due to the scientific uncertainties involved with hydraulic fracturing, a plaintiff’s case may rest upon the admissibility of expert witness testimony that identifies a possible route of exposure or contamination. In assessing these cases, courts should apply the standards set forth in Rule 702 or the applicable state rule to apply the appropriate amount of scrutiny to expert testimony. By relying on evidentiary standards in this gatekeeping function, the court will more fairly balance...
the interests of the parties by allowing plaintiffs to gather the necessary information through discovery to inform expert opinion, while assuring that meritless cases or merely speculative claims do not succeed at trial.

IV. Conclusion

As leading attorneys in the field of environmental law continue to encourage defendants to seek Lone Pine case management orders, injured plaintiffs seeking remedy through common law tort claims may be barred from accessing discovery and proving their claims. This issue has only become more contentious with the Colorado Supreme Court’s recent decision in Antero Resources Corp. v. Strudley and with the EPA’s release of its study on alleged groundwater contamination caused by the hydraulic fracturing process.

When faced with the damaging blow of a Lone Pine order, plaintiffs should look to courts that have rejected this defensive strategy as court-imposed summary judgment and advocate for the use of firmly established judicial rules and standards to ensure that cases are decided on the merits, rather than a lack of accessible information. Courts should reject and restrict the use of Lone Pine orders in hydraulic fracturing toxic tort and property damage cases in favor of using these federally-approved standards and techniques, in order to balance the equities at stake and to ensure just, speedy, and inexpensive litigation in accordance with Rule 1 of the Federal Rules of Civil Procedure.