COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203 COLORADO COURT OF APPEALS Case No. 2012CA1251 Opinion by Judge Taubman (Román J. and Kapelke J. concurring) DISTRICT COURT FOR CITY AND COUNTY OF DENVER Case No. 2011cv2218 The Honorable Ann B. Frick Petitioner/Appellees: ANTERO RESOURCES CORPORATION, ANTERO RESOURCES PICEANCE CORPORATION, CALFRAC WELL SERVICES, CORP., and FRONTIER DRILLING LLC v. Respondents/Appellants: WILLIAM G. STRUDLEY and BETH E. STRUDLEY, Individually, and as the Parents and Natural Guardians of WILLIAM STRUDLEY, a minor, and CHARLES STRUDLEY, a minor	COURT USE ONLY Supreme Court Case No. 2013SC576
Christopher J. Neumann, No. 29831 Gregory R. Tan, No. 38770 Harriet A. McConnell, No. 44958 Greenberg Traurig, LLP 1200 Seventeenth Street, Suite 2400 Denver, CO 80202 Telephone: (303) 572-6500 Facsimile: (303) 572-6540 E-Mail: neumannc@gtlaw.com; tangr@gtlaw.com Attorneys for *Amicus Curiae* Colorado Petroleum Association	

AMICUS CURIAE BRIEF OF THE COLORADO PETROLEUM ASSOCIATION URGING REVERSAL

Certificate of Compliance

Undersigned counsel certifies that this brief complies with C.A.R. 28 and 32, and with C.A.R. 53(a) in that it contains 5,190 words as measured by the word-count function of Microsoft Word, inclusive of footnotes, headings and quotations, and exclusive of the portions delineated at C.A.R. 53(a).

s/ Christopher J. Neumann
Christopher J. Neumann

Pursuant to C.A.R. 29, the Colorado Petroleum Association ("CPA") respectfully presents its *amicus curiae* brief in support of Petitioners-Defendants Antero Resources Corporation, Antero Resources Piceance Corporation, Calfrac Well Services Corp., and Frontier Drilling LLC. The procedural device used by the trial court in this case is a useful tool for managing complex toxic tort cases and is compatible with the Colorado Rules of Civil Procedure. Here, the trial court issued a *Lone Pine* Order after initial discovery by both parties, in a case where the Colorado Oil and Gas Conservation Commission ("COGCC") had inspected Plaintiffs' property and found no contamination – confirming baseline sampling – or other basis for their claims that Defendants' oil and gas operations caused injury to their persons or property. This order was designed to allow the court to effectively and efficiently manage discovery, avoid waste of judicial and litigant resources, and promote fair resolution of the dispute. Such an order falls within the sound discretion of the trial court.

I. INTEREST OF *AMICUS CURIAE* CPA

CPA is a non-profit organization representing Colorado's oil and gas industry before state, regional, and federal governmental entities and Colorado courts. Through these efforts, CPA has contributed to the development of, perhaps, the most robust oil and gas rules in the country. Among other things, the

Colorado Oil and Gas Rules address setbacks, disclosure of chemicals used in hydraulic fracturing, and various consultations with local governments, citizens and state environmental agencies. Important here, these rules also require baseline sampling of ground water, and provide a process for the COGCC to investigate and to pursue enforcement for precisely the type of emissions and contamination alleged by Appellees. CPA and its members helped to develop these rules in order to engage stakeholders and to avoid costly litigation.

Through these activities and the economic and charitable activity of its members, CPA works continuously to promote a strong, sustainable, and thriving energy industry and the wellbeing of communities across Colorado. CPA provides broad-based support for every sector of Colorado's oil and gas industry – including production, processing, and transportation. This industry is vital to the wellbeing of many of the citizens of Colorado and plays a crucial role in the economy of our state. Oil and natural gas production generated more than $29.5 billion worth of economic activity in Colorado in 2012. The Denver Post reported that employment on oil and gas fields in Colorado is more than 30,000 and increasing rapidly in spite of the weak economy. Mark Jaffe, *Jobs in Colorado's oil and gas fields swell to nearly 30,000*, The Denver Post, August 19, 2013, at 10A. Direct employment in the whole oil and gas industry in this state is at 51,000, and public

revenues from the industry which help fund schools and many other public services are up to $1.6 billion. *Id.* A Colorado State University economist recently estimated that 5% of the total employment in the state could be attributed to the oil and gas industry. *U.S. Chamber enters Colorado fracking battle*, Wy. Bus. Report, May 29, 2014, http://www.wyomingbusinessreport.com/article/20140529/NEWS/140529956/0/FRONTPAGE.

Along with this growth, the oil and gas industry has been the subject of substantial increased litigation. *See* Jennifer Hiller, *Energy and Law: Legal issues bubble to surface; All sorts of cases related to the hydraulic fracturing boom show up in court*, HOUS. CHRON. B6 (May 28, 2013). This industry, like all industries, cannot thrive without a strong court system that provides a just and equitable forum to resolve disputes in a manner that avoids needless delay and expense. CPA believes that case management orders, such as the one issued in this case, are valuable tools for courts to use in managing their dockets and controlling the costs of groundless litigation in toxic tort and other litigation involving complex scientific and technical issues without placing any significant burden on meritorious claims. This is particularly true for claims such as the contamination from the wells alleged here, because the public enjoys the protection of an expert regulatory agency with technical expertise and broad investigative and remedial

powers, which guarantees both sides a neutral assessment of the situation by experienced specialists before they begin the slow and costly process of litigation.

II. STATEMENT OF THE CASE

When Antero Resources Piceance Corporation and the other defendants arrived in Silt, Colorado to drill the three natural gas wells that are the subject of this case, they were greeted with fierce opposition by the nearby Strudley family, who had posted large anti-drilling posters in their yard.[1] Shortly after drilling began, the Strudleys filed a complaint with the COGCC alleging that the drilling was contaminating their property. Record at 331.

The COGCC took the Strudleys' concerns seriously, and came out to their property to investigate. Record at 331. The COGCC conducted extensive testing, including water quality testing performed on the Strudleys' well, *id*. at 331-41, and informed the Strudleys that "the overall quality of water produced from your well is acceptable, [and] [t]here are no indications of any oil & gas related impacts to your well," *id*. at 340.

---

[1] John Colson, *Silt Mesa family claims gas fumes forcing them out*, POST INDEPENDENT, January 4, 2011, http://www.postindependent.com/article/20110104/VALLEYNEWS/110109981 ("Her most highly public effort involved posting large signs in her yard that proclaimed, 'Antero Is Going To Poison Our Water,' among other warnings.").

The Strudleys responded by bringing this suit, alleging personal injury, trespass, nuisance, and related claims. All parties made their initial disclosures, and Antero, in particular, produced substantial engineering and environmental compliance documents.

The trial court, noting that the COGCC had already investigated the Strudleys' claims, and determined that they were unfounded and that the complaint and the Strudley's disclosures lacked significant details that might substantiate the claims, issued an order requiring the plaintiffs to produce evidence establishing that they had a colorable ground for bringing the action. The court required this evidence within 105 days, and stayed further discovery until the evidence was received.

The plaintiffs produced only fragmentary evidence in response to the court's order. In particular, they have persistently refused to produce evidence from a doctor who had actually examined or diagnosed them, and they submitted an expert witness report from a witness who had not been provided the COGCC report or other key information. After the deadline imposed by the trial court passed, the defendants asked the court to dismiss the case, or in the alternative, to grant summary judgment in their favor. The court dismissed the case with prejudice.

The Court of Appeals reversed the trial court's decision, finding as a matter of law that the Colorado Rules of Civil Procedure forbid the use of case management orders to require plaintiffs to substantiate their claims prior to open discovery. "[A] trial court may not require a showing of a prima [facie] case before allowing discovery on matters central to a plaintiff's case – as opposed to punitive damages or other secondary matters." *Strudley v. Antero Resources Corp.*, --- P.3d ---, 2013 WL 3427901, *4 (July 3, 2013).

This decision unnecessarily curbs the discretion of the trial courts and deprives them of a tool for effectively controlling their dockets.

III. ANALYSIS

A. *Lone Pine* orders have been adopted in numerous jurisdictions throughout the United States in response to a serious and growing problem.

The Court of Appeals held that, as a matter of law, a case management order requiring plaintiffs to produce evidence supporting the grounds for their claim at a point in the litigation between the initial disclosures and the start of discovery is forbidden by state law. In doing so, the court parted company with the Third Circuit, the Fifth Circuit, the Ninth Circuit, the Eleventh Circuit, the D.C. Circuit, the Southern District of New York, the Southern District of Alabama, the Southern District of Florida, the Eastern District of Missouri, the District of Nebraska, the

Southern District of Ohio, the Eastern District of Arkansas, the Western District of Texas, the Southern District of Texas, the District of Montana, the Western District of Louisiana, the Middle District of Louisiana, the Eastern District of North Carolina, the Western District of North Carolina, the Southern District of West Virginia, the Eastern District of Pennsylvania, the District of Minnesota, and the Northern District of California,[2] along with the states of Texas, Illinois, Florida, Pennsylvania, California, and New York.[3]

---

[2] *See In re Paoli, R.R. Yard PCB Litig.*, 916 F.2d 829 (3rd Cir. 1990); *Acuna v. Brown & Root Inc.*, 200 F.3d 335 (5th Cir. 2000); *Avilla v. Willets Environmental Remediation Trust*, 633 F.3d 828, 833-34 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 120 (2011); *Abuan v. Gen Elec. Co.*, 3 F.3d 329 (9th Cir. 1993); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986); *Arias v. DynCorp*, --- F.3d ---, 2014 WL 2219109 (D.C. Cir. May 30, 2014); *Abbatiello v. Monsanto Co.*, 569 F. Supp. 2d 351 (S.D.N.Y. 2008); *Adinolfe v. United Techn. Corp.*, No. 10-80840-CIV, 2011 WL 240504 (S.D. Fla. Jan. 18, 2011); *Asarco, LLC v. NL Indus., Inc.*, No. 4:11-CV-00864-JAR, 2013 WL 943614 (E.D. Mo. Mar. 11, 2013); *Avila v. CNH Am., LLC.*, Nos. 4:04CV3384, 4:07CV3170, 2009 WL 151600 (D. Neb. Jan 2, 2009); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2006 WL 2251821 (S.D. Ohio Aug. 4, 2006); *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2007 WL 315346 (S.D. Ohio Jan. 30, 2007); *Burns v. Universal Corp. Protection Alliance*, No. 4:07CV00535 SWW, 2007 WL 2811533 (E.D. Ark. Sept. 25, 2007); *Cano v. Everest Minerals Corp.*, No. Civ. A. SA-01-CA-610XR, 2004 WL 502628 (W.D. Tex. Mar. 10, 2004); *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005); *Eggar v. Burlington N. R.R. Co.*, Nos. CV 89-159-BLG-JFB, CV 89-170-BLG-JFB, CV 89-179-BLG-JFB, CV 89-181-BLG-JFB, CV 89-236-BLG-JFB and CV 89-291-BLG-JFB, 1991 WL 315487 (D. Mont. Dec. 18, 1991), affirmed *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499 (9th Cir. 1994); *Diamond v. Immunex Corp.*, No. 2:03 CV 564, Order (W.D. La. Aug. 15, 2003); *In re 1994 Chem. Plant Fire*, No. 94-MS-3-C-1, 2005 WL 6252290 (M.D. La. July 15, 2005); *Grant v. E.I. Dupont De Nemours & Co.*, Civ. A. No. 91-55-CIV-4H, 1993 WL

The sheer number of case management orders of this type that have been issued nationwide, suggests that courts that have experimented with this docket management tool have found it to be effective and appropriate for fairly managing the complex issues associated with toxic tort litigation. The increasing burden of these cases, many of which result in little or no relief to the plaintiffs, is a substantial drain on the economy and on Colorado's energy industry. A claim that is based only on a very poor scientific or evidentiary foundation may nonetheless take many years to reach trial – eating away at the financial resources of the parties, consuming judicial resources that are badly needed elsewhere, and wasting the valuable time and attention of numerous scientific experts and other witnesses.

146634 (E.D.N.C. Feb. 17, 1993); *Hembree v. Litton Indus., Inc.*, No. 2:90-cv-00006-LHT (W.D.N.C. Aug. 16, 1990); *Hagy v. Equitable Prod. Co.*, No. 2:10-cv-01372, 2012 WL 713778 (S.D. W. Va. Mar. 5, 2012); *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, No. 2:07-md-01871 (E.D. Pa. Nov. 15, 2010); *In re Baycol Prods. Liab. Litig.*, No. MDL 1431(MJD/JGL), 131, 2004 WL 626866 (D. Minn. Mar. 18, 2004) (entering *Lone Pine* order); *In re Baycol Prods. Liab. Litig.*, No. MDL 1431 MJD/JGL, 2004 WL 2578976 (D. Minn. Nov. 1, 2004) (enforcing additional compliance with *Lone Pine* order); *In re Bextra & Celebrex Marketing Sales Practices & Prod. Liab. Litig.*, MDL No. 1699, 2009 WL 1226976 (N.D. Cal. Apr. 30, 2009).

[3] *See Adjemian v. Am. Smelting and Ref. Co.*, No. 08-00-00336-CV, 2002 WL 358829 (Tex. Ct. App. Mar. 7, 2002); *Atwood v. Warner Elec. Brake & Clutch Co.*, 605 N.E.2d 1032 (Ill. App. Ct. 1992); *Bessie Kennon Bender v. KC Indus., LLC*, Case No. 53-2007 CA-006859-0000-00, Case Management Order (Fla. 10th Cir. Ct. Dec. 1, 2010); *Cecil Gill v. Airco Prods.*, No. 2005-538 (Pa. Ct. Com. Pleas Mercer Co., June 28, 2006); *Cottle v. Superior Ct.*, 3 Cal. App. 4th 1367 (Cal. Ct. App. 1992); *In re Love Canal Actions*, 547 N.Y.S. 2d 174 (N.Y. Sup. Ct. 1989).

Although it is difficult to obtain detailed empirical data about litigation costs, which are often confidential, a 2010 survey of Fortune 200 companies revealed that the companies spent an average of $115 million on litigation in 2008, a 73 percent increase from 2000. Litigation Cost Survey of Major Companies, for presentation to Committee on Rules of Practice and Procedure Judicial Conference of the United States (May 10-11, 2010), at 4. The companies' average discovery costs per case ranged from $621,880 to $2,993,567. *Id*. These numbers, of course, do not take into account the costs to the plaintiffs or the strain on judicial resources.

Unsurprisingly, these costs often drive defendants to settle on bases that do not reflect the merits of the case, a result inconsistent with the objectives of Colorado's civil justice system; a result this Court has recently recognized should not be fostered or endorsed by Colorado courts. "The increased costs associated with protracted litigation may force a party into an unwarranted settlement or may deter a party from bringing a viable claim." *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 303 P.3d 1187, 1194 (Colo. 2013). CPA submits it would be reasonable for a court to require as a matter of case management a *prima facie* showing of some nexus between plaintiffs' injuries and defendants' oil and gas operations before the parties engage in costly discovery beyond the initial

disclosures—especially when the state's oil and gas experts have concluded no such nexus exists.

As oil and gas activity continues to grow rapidly, the industry is facing a very similar new litigation trend. *See generally* R. Schick et al., Shale Related Litigation and Regulatory Developments, TSUX05 ALI-ABA 1 (Jan. 23, 2013). The *Lone Pine* order provides an effective method for courts to manage their expanding dockets of oil and gas cases so they can focus resources on ensuring valid claims receive full and careful consideration and businesses can spend their money hiring engineers and technicians, not lawyers and expert witnesses.

The purpose of a "*Lone Pine*" order, such as the one issued in this case and others, is to manage discovery so that defendants are not forced to expend substantial resources before they, or the court, even know if the plaintiff has been exposed to a harmful substance, or has suffered an injury, or whether there is a doctor or other expert who will be willing to state that plaintiffs' injuries were caused by defendants' operations. *Abbatiello v. Monsanto Co*., 569 F. Supp. 2d 351, 353 (S.D.N.Y. 2008) ("The purpose of *Lone Pine* style CMOs, requiring early individual causation expert evidence, is to protect defendants and the Court from the burdens associated with potentially non-meritorious mass tort claims."). Ideally, if the plaintiffs had fulfilled their ethical duty to ensure that their claims

had evidentiary foundation before filing, this order would place little burden on meritorious, well-supported claims. *Acuna v. Brown & Root Inc*., 200 F.3d 335, 340 (5th Cir. 2000). If the decision below stands, however, Colorado courts faced with complex, expert-heavy cases that they suspect may be largely unsubstantiated will have few options to address these concerns short of immediate, open, liberal discovery. Engineers and specialists would be required visit the well sites and conduct time consuming and expensive testing. Scientific experts would then need to review these reports and prepare reports of their own. Attorneys would accrue significant billable hours in preparing for and conducting the depositions of the experts. Everybody involved would be required to divert time otherwise spent in activity that actually added value to drafting affidavits and attending depositions.

These activities are all perfectly necessary and appropriate for litigation, of course (within reason), but it is strange to interpret the rules of procedure so that they must be carried out before the plaintiffs have produced such simple materials as a diagnosis from a doctor who has physically examined their condition. "No basis appears for us to cordon off one type of order—a prima facie order on exposure and causation in toxic tort litigation—from the universe of case management orders that a district court has discretion to impose." *Avila v. Willits Envtl. Remediation Trust*, 633 F.3d 828, 833-34 (9th Cir. 2011).

B. *Lone Pine* orders have proven to be an effective method of quickly resolving frivolous toxic tort and mass tort cases.

The reason that so many jurisdictions have adopted this procedure is that it has a strong track record. Practical experience has shown that these orders are effective at eliminating the sort of baseless toxic tort claim that everyone agrees is an abuse of our judicial system without placing any substantial burden on legitimate claims.

Perhaps the most vivid illustration of the potential value of *Lone Pine* orders comes from the nationwide silicosis litigation epidemic – and its abrupt conclusion. Silicosis is a serious but rare condition, claiming 148 lives in 2002. Mark Behrens, *RAND Institute for Civil Justice Report on the Abuse of Medical Diagnostic Practices in Mass Tort Litigation: Lessons Learned from the 'Phantom' Silica Epidemic that May Deter Litigation Screening Abuse*, 73 Alb. L. Rev. 521, 523 (2003). However, after years when a handful of claims trickled through the court system, in 2002 through 2004 a full 20,479 silicosis cases were filed in Mississippi alone, a hundredfold or even thousandfold increase in claims. *Id*. Thousands of these cases were consolidated in federal court and assigned to a judge with a medical background, who instantly saw that the trend in cases defied medical explanation. *Id*. at 542. She ordered each plaintiff to produce a signed fact sheet with medical and diagnostic information. *Id*. at 524-25. Reviewing the

information, the court found that the experts had "utilized shockingly relaxed standards of diagnosing that they would never have employed on themselves, their families or their patients in their clinical practices." *In re Silica Products Liab. Litig*., 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005). The court went on to observe that the litigation had already cost the defendants millions of dollars and put the plaintiffs through the terror of being wrongly diagnosed with a very serious condition. *Id*. Nationwide silicosis claims dropped a hundredfold almost immediately after the court released this order. Behrens, *supra*, at 529.

Similarly, in *Acuna*, there were "approximately one thousand six hundred plaintiffs suing over one hundred defendants for a range of injuries occurring over a span of up to forty years" from uranium processing. 200 F.3d at 340. The court asked the plaintiffs to submit expert affidavits listing the illnesses they were suffering that they believed were caused by uranium exposure, along with the location and dates where they believed the exposure occurred. *Id*. at 338. Instead of submitting individualized affidavits for each plaintiff, their attorneys submitted a single form affidavit listing all the ailments that could be caused by uranium exposure, followed by a list of the defendants' facilities. *Id*. After providing the plaintiffs additional time to comply, the court dismissed the case. *Id*. The Fifth Circuit affirmed, holding that "*Lone Pine* orders are designed to handle the

complex issues and potential burdens on defendants and the court in mass tort litigation," and that it "was within the court's discretion to take steps to manage the complex and potentially very burdensome discovery that the cases would require." *Id*. at 340.

These orders do not, and cannot, unduly burden legitimate claims. They only require plaintiffs to disclose information that they should have collected before filing suit and would certainly be required to produce before trial:

> Plaintiffs' claims are based on the alleged exposure to harmful substances—in some cases identified, and in some cases not—which exposure caused them a variety of personal injuries and property damages. Before these suits were filed, and at least after the many years since filing them, one would expect that the remaining plaintiffs would have some concrete, factual basis to support their claims. Plaintiffs do not contend that in the absence of a *Lone Pine* order they would not be asked to identify their health care providers, particularly any who treated them after their alleged exposure, and to produce medical records of such treatment, along with any medical evidence which establishes a causal link between the alleged exposure and the claimed injuries. The same is also true for alleged financial losses and property damage claims.

In re 1994 Exxon Chem. Plant Fire, 94-1668, 2005 WL 6252312 (M.D. La. Apr. 7, 2005), *modified sub nom. In re 1994 Exxon Chem. Plant Fire Litig.*, 94-MS-C-1, 2005 WL 6252291 (M.D. La. Apr. 29, 2005). And, in fact, plaintiffs with legitimate, or at least colorable claims can and do successfully comply with these orders. *See*, *e.g*., *Baker v. Anschutz Exploration Corp*., 11-CV-6119 CJS, 2013

WL 3282880 (W.D.N.Y. June 27, 2013) ("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."); *O'Connor v. Boeing N. Am., Inc.*, CV 97-1554 DT(RCX), 2004 WL 5532395 (C.D. Cal. Aug. 2, 2004). These case management orders only weed out the very worst, most baseless claims, but, even so, they can save both the courts and parties very significant time and money.

C. Other procedural mechanisms are not a substitute for these orders.

The Court of Appeals ruled that *Lone Pine* orders are not necessary because other procedural mechanisms serve the same function as a *Lone Pine* order: "Motions to dismiss under C.R.C.P. 12(b) and motions for summary judgment under C.R.C.P. 56 provide adequate procedures for challenging claims lacking in merit." *Strudley*, 2013 WL 3427901, *8. However, while there are some superficial similarities between a *Lone Pine* order and these other procedural mechanisms, a closer review of the ways courts have used *Lone Pine* orders shows that they serve a different purpose than these other motions and, in practice, are often used in conjunction with them. Motions to dismiss, motions for summary judgment, and motions for sanctions are not adequate substitutes for a *Lone Pine* case management order.

A motion to dismiss, for example, is a very efficient mechanism for challenging claims where there is no jurisdiction, or where the complaint is so poorly written that it fails to state a claim, but it cannot, and should not, be used to judge the evidentiary base of claims. C.R.C.P 12(b). So long as the plaintiff provides "[a] short and plain statement advising the defendant of the relief sought" the complaint will survive a motion to dismiss. *Hemmann Mgmt. Servs. v. Mediacell, Inc*., 176 P.3d 856, 859 (Colo. Ct. App. 2007).

A motion for summary judgment is more closely analogous to the *Lone Pine* order, as employed here, but it is not a clear substitute. A defendant cannot file a motion for summary judgment asserting that the plaintiff has failed to produce evidence that the plaintiff suffered pre-existing injuries, or that the plaintiff's property was previously contaminated, or that this contamination came from other sources, until after the point in the litigation when the plaintiff is required to produce evidence regarding his injuries and property damage. One purpose of a *Lone Pine* order is to move that moment to an earlier stage in the litigation, so that if there is truly little or no evidence supporting the plaintiffs' claims the summary judgment stage can be reached before a significant number of expert witnesses are retained, draft their reports, and are deposed.

Rather than a substitute for a summary judgment motion, a *Lone Pine* order is frequently used in conjunction with a summary judgment motion. In cases where the plaintiff attempts to comply with the court's order but fails to provide evidence supporting a nexus between defendants' activities and his claim, the defendant can respond by moving for summary judgment. *See, e.g.*, *In re Paoli, R.R. Yard PCB Litig.*, 916 F.2d 829, 836 n.4 (3rd Cir. 1990); *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993) (addressing the sufficiency of the plaintiffs' response to a *Lone Pine* order after the defendants filed for summary judgment).

The Court of Appeals treats *Lone Pine* orders as a substitute for summary judgment, when really they are better viewed as a species of discovery order. *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 388 (S.D. Ind. 2009). Instead of allowing open ended discovery on every issue simultaneously, the trial court used an effective docket control procedure to focus on the critical fact in dispute—the fact made doubtful by the administrative investigation the plaintiffs requested—and ordered the party best situated to produce evidence on that point to go first. "If a *Lone Pine* order is to be entered, it should be structured in a manner that assists

the parties in focusing and narrowing areas where further discovery is needed." *Id*.[4]

The dismissal of the case, then, was a result of plaintiffs' failure to obey the court's discovery order, not for failure to allege and support an adequate case. In their motion, Defendants also asked the court, in the alternative, for summary judgment. If the court had found that the plaintiffs' response was sufficient to be in compliance with the case management order, the court would then have turned to the summary judgment motion, and Defendants would have born the burden of showing that they were entitled to summary judgment.

A recent case from the Southern District of New York demonstrates the nature of *Lone Pine* orders as discovery tools. The court determined that the case would progress more efficiently if the parties conducted discovery on one potentially dispositive issue at a time and asked both parties to submit proposed "modified *Lone Pine* style orders, requiring Plaintiffs to come forward with proof of their *prima facie* claims at a reasonably early phase of the proceedings." *Abbatiello v. Monsanto Co*., 569 F. Supp. 2d 351, 353 (S.D.N.Y. 2008). The court

[4] The Southern District of Indiana, when issuing a *Lone Pine* order, specified that the court would not dismiss the case "automatical[ly]" for failure to "sufficient evidence of exposure or causation" without a motion for summary judgment. *Id*. at 388.

then issued an order, requiring the plaintiffs to provide individualized evidence of exposure, injury, and causation, and the plaintiffs responded by asking the court to vacate this *Lone Pine* order and instead issue an order requiring the parties to focus all their discovery efforts on the plaintiff-friendly issue of whether the defendants were aware of the health risks of their product at the time they were producing it. *Id*. The court observed the plaintiffs' alternative plan would "involve[] hundreds of thousands of documents, and . . . comprised of complicated factual and legal issues that occurred over the course of more than forty years within a period which possibly ended over thirty years ago," and that "[g]ranting th[e] motion would certainly delay the resolution of all numerous claims outstanding against [defendant] and possibly other defendants in this action." *Id*. The court found that requiring discovery on these issues before the defendant had completed some discovery on the basic questions of injury and causation was highly prejudicial.

The court thus used its case management powers to require the plaintiffs to produce evidence that was in their sole control, that should already have been collected before the suit was brought,[5] and that they would eventually be required

[5] A year later the defendants moved for Rule 11 sanctions after learning that the plaintiffs had not done any individualized investigation before filing suit, but the court found that they had not demonstrated "circumstances sufficiently extraordinary to satisfy the rigorous test defining the type and degree of misconduct that warrants Rule 11 sanctions." *Corlew v. Gen. Elec. Co*., 06 Civ.

to produce, finding that it was appropriate for them to produce this basic material before they went on a multi-million document fishing expedition—or, more likely, settled the case for some fraction of the litigation costs. Where the absence of a *Lone Pine* order may promote unjust settlements, its entry may promote meritorious ones. If a plaintiff responds to a *Lone Pine* order with evidence establishing a *prima facie case*, the defendant, seeing the merits of the plaintiff's case, will be strongly motivated to reach a settlement to avoid the time and costs necessary to proceed with such a case.

A motion for sanctions, likewise, is not a substitute for a *Lone Pine* order. Motions for sanctions punish parties for abusing the system, but they do not restore spent resources to the parties or the courts. Sanctions may be an effective deterrent against repeat players and wealthy parties, but they are unlikely to prevent highly motivated litigants from filing suit. Moreover, parties are loath to file, and most courts are reluctant to grant, such motions for sanctions.

A good example of how these procedural mechanisms work together is *Baker v. Chevron* where, at the outset of the suit over a chemical plume from a refinery, the district court required all the personal injury plaintiffs to submit the names of their diagnosing physician and required the property damage plaintiffs to

---

0266 (VM), 2009 WL 130214 (S.D.N.Y. Jan. 14, 2009).

submit the full street address of their properties. *Baker v. Chevron USA, Inc.*, No. 1:05-CV-227, 2006 WL 2251821, *1 (S.D. Ohio Aug. 4, 2006). The adults who refused to comply were dismissed from the litigation. *Id.* at *2. This dismissal eventually proved to be a blessing for these plaintiffs and their attorneys because years later, when the case was finally dismissed, the court imposed Rule 11 sanctions on the remaining plaintiffs. *Baker v. Chevron U.S.A. Inc.*, No. 11-4369, 2013 WL 3968783, *17-*18 (6th Cir. 2013) (unpublished). The plaintiffs who were dismissed early in the litigation for failure to provide medical records or the address of the property that was allegedly damaged escaped paying legal fees later.

The *Lone Pine* order is not a substitute for a motion to dismiss because it tests the evidentiary support for a case, rather than the sufficiency of the pleadings, and it is not a substitute for a motion for summary judgment because it simply requires the plaintiff to produce basic evidence which may or may not then become the basis for a summary judgment motion filed by one or both parties. Rather, the *Lone Pine* order is a more forward-looking, and less punitive, approach to groundless claims than the imposition of sanctions.

IV. Conclusion

Lone Pine-style case management orders have proven effective at managing toxic tort and complex tort cases, efficiently identifying suspect claims at an early

stage in the proceedings without placing a significant burden on valid, or even colorable claims. They are a valuable to tool available to our courts as they work "to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1.

For these reasons, CPA respectfully supports Defendants' request that this Court reverse the Court of Appeals and affirm the trial court's order of dismissal.

Dated this 18th day of June 2014.

s/ Christopher J. Neumann
Christopher J. Neumann, No. 29831
Gregory R. Tan, No. 38770
Harriet A. McConnell, No. 44958
Greenberg Traurig, LLP
1200 Seventeenth Street, Suite 2400
Denver, CO 80202
Telephone: (303) 572-6500
Facsimile: (303) 572-6540

Attorneys for *Amicus Curiae*
Colorado Petroleum Association

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2014, a true and correct copy of the above ***AMICUS CURIAE*** **BRIEF OF THE COLORADO PETROLEUM ASSOCIATION URGING REVERSAL** was served via ICESS to the following:

Daniel J. Dunn Andrew C. Lillie David A. DeMarco HOGAN LOVELLS US LLP One Tabor Center, Suite 1500 Denver, CO 80202 E-mail: dan.dunn@hoganlovells.com E-mail: andrew.lillie@hoganlovells.com E-mail: david.demarco@hoganlovells.com Catherine E. Stetson HOGAN LOVELLS US LLP Columbia Square 555 Thirteenth Street, NW Washington, DC 20004 E-mail: cate.stetson@hoganlovells.com Robert M. Schick James D. Thompson III VINSON & ELKINS LLP 1001 Fannin, Suite 2500 Houston, TX 77002-6760 E-mail: rschick@velaw.com E-mail: jthompson@velaw.com ***Attorneys for Petitioners Antero Resources Corporation and Antero Resources Piceance Corporation***	Gail L. Wurtzler Shannon Wells Stevenson Davis Graham & Stubbs LLP 1550 Seventeenth Street, Suite 500 Denver, CO 80202 E-mail: gail.wurtzler@dgslaw.com E-mail: shannon.stevenson@dgslaw.com ***Attorneys for Petitioner Calfrac Well Services Corp.*** Matthew B. Dillman Sarah M. Shechter Burns Figa & Will P.C. 6400 S. Fiddler's Green Cr., Ste. 1000 Greenwood Village, CO 80111 E-mail: mdillman@bfw-law.com E-mail: sshechter@bfw-law.com ***Attorneys for Petitioner Frontier Drilling LLC***

Corey T. Zurbuch Frascona, Joiner, Goodman and Greenstein, P.C. 4750 Table Mesa Drive Boulder, CO 80305 E-mail: corey@frascona.com Peter W. Thomas Thomas Genshaft LLP 39 Boomerang Road, Suite 8130 Aspen, CO 81611 E-mail: peter@thomasgenshaft.com Marc Jay Bern Tate J. Kunkle Napoli Bern Ripka & Associates, LLP 350 Fifth Avenue, Suite 7413 New York, NY 10118 E-mail: mbern@napolibern.com E-mail: tkunkle@napolibern.com ***Attorneys for Respondents Beth E. Strudley and William G. Strudley, individually and as the parent and natural guardian of William Strudley and Charles Strudley, both minors***	Lee Mickus, No. 23310 Jessica E. Yates, No. 38003 Snell & Wilmer L.L.P. 1200 17th Street, Suite 1900 Denver, CO 80202 Telephone: (303) 634-2000 Facsimile: (303) 634-2020 **Attorneys for *Amici Curiae* Colorado Civil Justice League Denver Metro Chamber of Commerce, Chamber of Commerce of the United States of America, Coalition For Litigation Justice, Inc., and American Tort Reform Association**

Terry Cipoletti Fennemore Craig, P.C. 1700 Lincoln Street, Suite 2900 Denver, CO 80203 E-mail: TCIPOLET@FCLAW.com Richard Faulk Hollingsworth LLP 1350 I Street, NW Washington, DC 20005 ***Attorneys for Amici Curiae American Chemistry Council, American Coatings Association, American Fuels and Petrochemical Manufacturers, Independent Petroleum Association of America; and National Association of Manufacturers*** E-mail: rfaulk@Hollingsworthllp.com	Bennett Cooper Steptoe & Johnson LLP 201 E. Washington Street, Suite 1600 Phoenix, AZ 85004-2382 E-mail: bcooper@steptoe.com Mark Fitzsimmons Jared Butcher Steptoe & Johnson LLP 1330 Connecticut Avenue, NW Washington, DC 20036 E-mail: mfitzsimmons@steptoe.com E-mail: jbutcher@steptoe.com ***Attorneys for Amicus Curiae American Petroleum Institute***
Jeffrey Clay Ruebel Ruebel & Quillen, LLC 9191 Sheridan Blvd., Suite 205 Westminster, CO 80031 E-mail: Jeffrey@rq-law.com ***Attorneys for Amicus Curiae Colorado Defense Lawyers Association***	

s/ Susan Law
Susan Law