

# Mass Litigation Panel

The Chairman of the Mass Litigation Panel is Judge Alan D. Moats of the Nineteenth Judicial Circuit (Barbour and Taylor Counties). Members of the panel are Judge Jay M. Hoke of the Twenty-Fifth Judicial Circuit (Boone and Lincoln Counties); Judge David W. Hummel, Jr., of the Second Judicial Circuit (Marshall, Tyler, and Wetzel Counties); Judge John A. Hutchison of the Tenth Judicial Circuit (Raleigh County); Judge James P. Mazzone of the First Judicial Circuit (Brooke, Hancock, and Ohio Counties); Judge Booker T. Stephens of the Eighth Judicial Circuit (McDowell County); and Judge Derek C. Swope of the Ninth Judicial Circuit (Mercer County).



The Mass Litigation Panel, from left: Judge David W. Hummel, Jr.; Judge Derek Swope; Judge John A. Hutchison; Mass Litigation Manager Kimberley Fields; Judge Alan D. Moats; Judge Jay M. Hoke; Judge James P. Mazzone; Judge Booker T. Stephens. Photo by Jennifer Bundy

The following is a list of Mass Litigations referred to the panel, the county in which the litigation is pending, and the judge or judges assigned to the litigation.

## **Asbestos Personal Injury Litigation**

### **Kanawha County**

Ronald C. Wilson, Presiding Judge<sup>1</sup>  
James P. Mazzone, Assisting Judge  
Mark A. Karl, Assisting Judge

## **FELA Asbestos Litigation**

### **Kanawha County**

Arthur M. Recht, Presiding Judge<sup>2</sup>  
Jay M. Hoke, Assisting Judge

## **Float-Sink Litigation**

### **Raleigh County**

John A. Hutchison, Lead Presiding Judge  
Alan D. Moats, Presiding Judge  
Derek C. Swope, Presiding Judge  
Jay M. Hoke, Lead Resolution Judge  
Booker T. Stephens, Resolution Judge  
James P. Mazzone, Resolution Judge

## **Flood Litigation**

### **Raleigh County**

John A. Hutchison, Lead Presiding Judge  
Jay M. Hoke, Presiding Judge  
Derek C. Swope, Presiding Judge  
Booker T. Stephens, Lead Resolution Judge  
Alan D. Moats, Resolution Judge  
James P. Mazzone, Resolution Judge

## **Mingo County Coal Slurry Litigation**

### **Ohio County**

James P. Mazzone, Lead Presiding Judge  
John A. Hutchison, Presiding Judge  
Jay M. Hoke, Presiding Judge  
Derek C. Swope, Lead Resolution Judge  
Alan D. Moats, Resolution Judge

## **Mountain State University Litigation**

### **Kanawha County**

Alan D. Moats, Lead Presiding Judge  
Derek C. Swope, Presiding Judge  
James P. Mazzone, Presiding Judge  
Booker T. Stephens, Lead Resolution Judge  
Jay M. Hoke, Resolution Judge  
David W. Hummel, Jr., Resolution Judge

## **Tobacco Litigation**

### **Ohio County**

Arthur M. Recht, Presiding Judge<sup>3</sup>

## **University Commons Litigation**

### **Kanawha County<sup>4</sup>**

Derek C. Swope, Lead Presiding Judge  
Alan D. Moats, Presiding Judge  
David W. Hummel, Jr., Presiding Judge  
Booker T. Stephens, Lead Resolution Judge  
John A. Hutchison, Resolution Judge

<sup>1</sup>Although First Judicial Circuit (Brooke, Hancock, and Ohio Counties) Judge Ronald C. Wilson does not currently serve on the Mass Litigation Panel, he continues to preside in the Asbestos Personal Injury Litigation, conducting trial groups of approximately twenty cases in February, June, and October each year. On September 11, 2013, Judge Wilson ordered thirty-two lung cancer cases referred to mediation, and he conducted a pre-mediation conference on October 11, 2013. Parties were to conduct certain discovery and attempt to settle their cases before mediation. Any cases not settled by the parties are to be mediated by Judge Wilson in January 2014. Cases not settled by the parties or during the course of court-ordered mediation are to be prepared to go to trial by the end of January 2014.

<sup>2</sup>On January 12, 2012, the Supreme Court entered an Administrative Order recalling First Circuit Judge Arthur Recht as a Senior Status Judge to continue presiding in the Tobacco Litigation and the FELA Asbestos Litigation, effective February 1, 2012. Judge Recht conducted a status conference of the remaining FELA Asbestos Litigation cases on August 15, 2013. Most of the remaining cases are awaiting dismissal orders. One case is scheduled for trial in July 2014.

<sup>3</sup>On April 15, 2013, Judge Recht presided in the Phase I trial of the Tobacco Litigation. A defense verdict was reached on all but one question on May 15, 2013. The sole plaintiff verdict was on the question of whether plaintiffs proved all ventilated filter cigarettes manufactured and sold by the defendants between 1964 and July 1, 1969, were defective because of a failure to instruct. Post-trial motions were filed in July 2013 and a final judgment order was entered on October 28, 2013. On November 26, 2013, petitioners, Ronald Acord, et al., plaintiffs below, presented a timely and complete notice of appeal from the circuit court's October 28 order. The appeal was placed on the docket as No. 13-1204, and a scheduling order was entered on December 5, 2013.

<sup>4</sup>On May 23, 2013, Lead Presiding Judge Derek C. Swope ordered the University Commons Litigation to be transferred to the Circuit Court of Kanawha County solely for purposes of implementing electronic filing and service. All paper court files remain in the Circuit Court of Monongalia County. Electronic filing and service became effective June 24, 2013.



## Float-Sink Litigation

On December 12-14, 2012, Lead Resolution Judge Jay M. Hoke and Resolution Judges Booker T. Stephens and James P. Mazzone conducted mediation of the remaining Float-Sink Litigation cases. The mediation resulted in settlements between plaintiffs and employer defendants, but did not resolve claims against the distributor defendant or the distributor defendant's cross-claims against the employer defendants for contribution and indemnity.

Finding the settlements between plaintiffs and employer defendants constituted good faith settlements, Lead Presiding Judge John A. Hutchison entered an order granting the employer defendants' joint motion to dismiss the distributor defendant's cross-claims on February 21, 2013. The Resolution Judges reconvened mediation on February 22, 2013. The February mediation resulted in a global settlement. On March 13, 2013, the distributor defendant agreed it would not appeal the previously entered order dismissing its cross-claims against the employer defendants if its settlement with the plaintiffs was approved.

On May 3, 2013, the Presiding Judges conducted a hearing and unanimously approved the proposed allocation and distribution of the global settlement between plaintiffs and the distributor defendant. Final orders of dismissal have been entered in 121 of the 130 cases.<sup>5</sup>

On May 29, 2013, with the advice and consent of the panel, Lead Presiding Judge Hutchison granted the motion of defendant Standard Laboratories, Inc., to join Allyson Townsend v. Commercial Coal Testing, Inc., *et al.*, Kanawha County Civil Action No. 13-C-151 with the Float-Sink Litigation. Plaintiff Allyson Townsend alleges she developed medullary carcinoma of the thyroid as the result of being exposed to float-sink chemicals on her father's work clothes.<sup>6</sup> Plaintiff claims exposure to float-sink chemicals through contact with her father and in utero through her mother's contact with her father's clothes and person. Plaintiff brought suit against her father's employers and the alleged distributor of the chemicals. Motions for partial summary judgment as to all chemicals other than perchloroethylene, and to dismiss third-party defendants who allegedly supplied chemicals other than pechloroethylene, were granted during a hearing on December 23, 2013. Mediation is scheduled in this case on February 26, 2014. Trial is scheduled for July 14, 2014.

## Flood Litigation

The panel recommended, approved, and ordered that unclaimed settlement funds be subject to *cy pres* awards, and determined the percentages of such *cy pres* award for each of the counties affected by the July 8, 2001, flooding event. Lead Presiding Judge Hutchison then contacted the chief judge in each affected county to obtain recommendations

regarding appropriate *cy pres* award recipients. The order approving *cy pres* award was entered on July 25, 2013, and the award checks were issued by the general receiver. The final order dismissing the Flood Litigation and removing the cases from the Court's docket was entered on December 18, 2013.

## Mingo County Coal Slurry Litigation

Lead Presiding Judge Mazzone continues to enter final orders of dismissal as individual releases are signed and settlement money is distributed. The Court also continues to work through various post-settlement motions.

## Mountain State University Litigation

On December 6, 2012, the Supreme Court referred the Mountain State University Litigation to the Mass Litigation Panel. The litigation consists of 282 cases from four circuits alleging harm caused to plaintiffs as the result of Mountain State University's loss of general accreditation, special accreditations in its nursing and nurse anesthetist programs, and any other educational programs that require independent accreditation. The litigation was transferred and consolidated in Kanawha County Circuit Court to facilitate the panel's case management and trial methodologies. The litigation is subject to electronic filing and service, effective February 1, 2013.

On February 1, 2013, the Presiding Judges and the Resolution Judges held a status conference and ruled, among other things, that all Rule 12(b) motions to dismiss for improper venue were denied as moot, and subject complaints were to be answered in ten days; plaintiffs were to file a declaratory judgment action seeking a determination of insurance coverage within fifteen days; all fact sheets were to be completed within 120 days; and all financial information of defendants Mountain State University, Inc., and Charles Polk was to be provided within thirty days. The Panel subsequently ruled that discovery regarding the claims for declaratory judgment was to be completed by July 31, 2013.

The Resolution Judges conducted mediation August 26-28, 2013, but mediation did not result in resolution of the litigation. On November 15, 2013, the Presiding Judges heard motions for summary judgment on the declaratory judgment actions filed by plaintiffs and United Educators, Mountain State University's insurance company. The Presiding Judges unanimously granted in part and denied in part plaintiffs' motion to the extent the Court found there was insurance coverage in the amount of \$10 million under the terms of the 2010-2011 insurance contract between United Educators and Mountain State University for the nursing program cases. The Presiding Judges unanimously granted in part and denied in part United Educator's motion to the extent the Court found there was not insurance coverage in the amount of \$30 million for the nursing program cases. A

<sup>5</sup>Eight of the plaintiffs in the Float-Sink Litigation were employed by Patriot. Because their claims against Patriot are stayed by the bankruptcy of Patriot Coal Corporation, *et al.*, case number 12-51-502-659, currently pending in the United States Bankruptcy Court for the Eastern District of Missouri, their cases will remain open on the Court's docket. There also is an active case that has not settled.

<sup>6</sup>Plaintiff's father, David Townsend, was a plaintiff in one of the Float-Sink Litigation cases referred to the panel. Mr. Townsend's case was settled and subsequently dismissed with prejudice on June 17, 2013.

final judgment order with findings of fact and conclusions of law was entered on December 17, 2013. The Presiding Judges held a status conference on December 23, 2013, to discuss pre-trial discovery, further mediation, and the trial format for the nursing program cases.<sup>7</sup>

## University Commons Litigation

On March 28, 2013, the Supreme Court answered a certified question from Monongalia County Circuit Judge Susan B. Tucker in *University Commons Riverside Home Owners Association, Inc. v. University Commons Morgantown, LLC, et al.*, No. 11-1577. The Court determined W. Va. Code § 36B-3-102(a)(4)(2011), "which authorizes a unit owners' association to institute litigation in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community, confers standing on the unit owners' association to assert claims on behalf of two or more unit owners with respect to matters affecting their individual units." See Syl. pt. 4. Finding it unnecessary to address the remaining questions, the Court concluded the case should proceed in accordance with Rule 26 of the West Virginia Trial Court Rules. *Id.*, p. 2. Because the case was before the Court upon questions certified from the circuit court, "upon receipt of a Motion to Refer to the Mass Litigation Panel as provided by Rule 26.06 from the circuit judge, which should be filed and transmitted to the Clerk of this Court forthwith, the appropriate action will be taken." *Id.*, p. 17.

On May 1, 2013, Judge Tucker filed a motion to refer the University Commons litigation to the panel. On May 3, 2013, the Supreme Court granted the motion to refer and authorized the panel to transfer and join with the existing Mass Litigation any similar or related actions pending or subsequently filed. Judge Derek C. Swope was assigned as Lead Presiding Judge, with Judge Alan D. Moats and Judge David W. Hummel, Jr., assisting him. Judge Stephens was assigned as Lead Resolution Judge, with Judge Hutchison assisting him.

On May 23, 2013, Judge Swope ordered *University Commons Riverside Home Owners Association, Inc., on Its Own Behalf and on Behalf Of Its Members and Individual Unit Owners v. R.E. Crawford Construction, Inc., et al.*, Civil Action No. 10-C-637, a related declaratory judgment action pending in the Circuit Court of Monongalia County before Judge Philip D. Gaujot, to be consolidated with the University Commons Litigation. Judge Swope transferred both cases to the Circuit Court of Kanawha County, with all paper court files to remain in the Circuit Court of Monongalia County. Electronic filing and service became effective June 24, 2013.

On July 9, 2013, the Presiding Judges and the Resolution Judges held a status conference during which the panel lifted all stays of discovery; ordered affected parties

to meet and confer in order to resolve a discovery dispute; required plaintiffs to make an accounting of all settlement proceeds disbursed to date; and prohibited distribution of funds from settlement proceeds without prior Court approval; required plaintiffs to serve completed Plaintiff Fact Sheets and a quote to repair alleged systemic problems at the University Commons Riverside Condominium Complex on all parties by August 30, 2013; ordered any defendant with a pending settlement to e-file a motion detailing the terms of the proposed settlement; and scheduled mediation.

On August 21, 2013, the Court entered a case management order requiring mediation to be conducted October 28-30, 2013, in Morgantown, and setting a trial date on August 25, 2014. As the result of mediation conducted by Lead Resolution Judge Stephens and Resolution Judge Hutchison, a global settlement was reached between the plaintiffs and the remaining defendants in the litigation. A hearing on Plaintiffs' Motion to Approve Settlement is scheduled on January 15, 2014.

## Electronic Filing and Service in Mass Litigation

From January 2013 through December 2013 in all mass litigation cases subject to electronic filing and service, 89,208 documents were e-filed and 2,665,997 documents were e-served. The statistics include items rejected in the clerk review process in order to capture all work performed in the various circuit court clerks' offices in these litigations, as well as orders, which do not go through the clerk review process.

During 2013, the number of pages electronically filed in all mass litigation cases subject to electronic filing and service totaled 524,562, which equals almost 219 boxes of paper documents, based on 2,400 pages per box. From December 2008, when electronic filing and service was first implemented in certain mass litigation cases, through the end of December 2013, there were 341,914 documents filed electronically, totaling 2,111,737 pages. This translates to almost 880 boxes of paper documents.

From January 2013 through December 2013, a total of 14,465 orders were entered in mass litigation cases subject to electronic filing and service. That number includes bench orders entered by a judge but filed by a circuit clerk or attorney and orders denying motions as moot or withdrawn. Of the 14,465 orders, 13,968 were in asbestos cases; sixty were in float-sink cases; three were in flood cases; 134 were in Mingo County Coal Slurry cases; 253 were in Mountain State University cases; twenty-three were in tobacco cases, and twenty-four were in University Commons cases.

<sup>7</sup>The Court's order did not address whether there is insurance coverage for the limited number of cases referred to the Mass Litigation Panel that arise from MSU's Certified Nurse Anesthetist Program ("CRNA Program"), or that arise from *Dale Burger, et al. v. Mountain State University, Inc., et al.*, Civil Action No. 12-C-1293 KAN, the putative class action arising from MSU's loss of its school-wide accreditation, as no declaratory judgment actions were filed in those cases, notwithstanding the Court's order that such actions be filed within fifteen days of February 1, 2013.