

## 2017 Annual Report of the Mass Litigation Panel

The Chair 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 John A. Hutchison of the Tenth Judicial Circuit (Raleigh County); Judge Booker T. Stephens of the Eighth Judicial Circuit (McDowell County); Judge Jay M. Hoke of the Twenty-Fifth Judicial Circuit (Boone and Lincoln Counties); Judge Derek C. Swope of the Ninth Judicial Circuit (Mercer County); Judge James P. Mazzone of the First Judicial Circuit (Brooke, Hancock, and Ohio Counties); and Judge Jack Alsop, of the Fourteenth Judicial Circuit (Braxton, Clay, Gilmer and Webster Counties).

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.

<b>Alderson Broaddus University Asbestos Litigation Civil Action No. 16-C-9000</b>	Kanawha County	Alan D. Moats, Lead Presiding Judge James P. Mazzone, Presiding Judge Jack Alsop, Presiding Judge Booker T. Stephens, Lead Resolution Judge John A. Hutchison, Resolution Judge
<b>Asbestos Personal Injury Litigation Civil Action No. 03-C-9600</b>	Kanawha County	Ronald E. Wilson, Presiding Judge <sup>1</sup> James P. Mazzone, Assisting
<b>FELA Asbestos Cases Civil Action No. 02-C-9500</b>	Kanawha County	James P. Mazzone, Presiding Judge
<b>Float-Sink Litigation Civil Action No. 11-C-5000000</b>	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
<b>Gavin Landfill Litigation Civil Action No. 16-C-8000</b>	Raleigh County	Derek C. Swope, Lead Presiding Judge John A. Hutchison, Presiding Judge Jack Alsop, Presiding Judge Booker T. Stephens, Lead Resolution Judge Alan D. Moats, Resolution Judge Jay M. Hoke, Resolution Judge
<b>Marcellus Shale Litigation Civil Action No. 14-C-3000</b>	Ohio County	Alan D. Moats, Lead Presiding Judge Derek C. Swope, Presiding Judge Jack Alsop, Presiding Judge Booker T. Stephens, Lead Resolution Judge John A. Hutchison, Resolution Judge Jay M. Hoke, Resolution Judge

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<sup>1</sup> Judge Ronald E. Wilson is not a current member of the Mass Litigation Panel. However, he was assigned to the Asbestos Personal Injury Litigation while serving on the Panel, and continues to preside in that litigation.

**Mingo County  
Coal Slurry Litigation  
Civil Action No. 10-C-5000**

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

**Tobacco Litigation**

Ohio County

Jack Alsop, Lead Presiding Judge  
Alan D. Moats, Presiding Judge  
John A. Hutchison, Presiding Judge  
Booker T. Stephens, Lead Resolution Judge  
Jay M. Hoke, Resolution Judge

**Water Contamination Litigation  
Civil Action No. 16-C-6000**

Kanawha County

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

**Yeager Airport Litigation  
Civil Action No. 16-C-7000**

Kanawha County

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

**Zolofit Litigation  
Civil Action No. 14-C-7000**

Kanawha County

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

## **Alderson Broaddus University Asbestos Litigation**

On April 12, 2017, the Presiding Judges granted the employer defendants' motions to dismiss plaintiffs' amended complaint seeking medical monitoring for alleged exposure to asbestos while working at Alderson Broaddus University. The parties reached a settlement of plaintiffs' remaining claims against Alderson Broaddus University and Dr. Richard Creehan on October 18, 2017, two days before they were scheduled to participate in mediation with the Resolution Judges assigned to the litigation. Lead Presiding Judge Alan D. Moats granted plaintiffs' motion to approve the settlement and motions for court approval of minor plaintiff settlements on February 22, 2018. This litigation will be concluded upon entry of the order approving the settlement and dismissing all claims with prejudice.

## Asbestos Personal Injury Litigation

It appears there are approximately 1300 active asbestos cases out of 25,876 cases filed since 1987.<sup>2</sup> In addition, a number of the active asbestos cases have been resolved, pending entry of final dismissal orders from numerous defendants. The number of active asbestos cases is an approximate number for two reasons. First, there is some delay between when a case is filed in a circuit court and when plaintiffs' counsel uploads the case to File & Serve*Xpress* for purposes of electronic filing and service. Second, any asbestos case filed before December 8, 2008, is not uploaded to File & Serve*Xpress* for purposes of electronic filing and service until plaintiff's counsel requests the case be assigned to a trial group.

On average, 115 new asbestos cases have been filed per year, since 2009: 92 cases in 2009; 111 cases in 2010; 105 cases in 2011; 148 cases in 2012; 109 cases in 2013; 176 cases in 2014; 99 cases in 2015; 99 cases in 2016; and 120 cases in 2017. From December 8, 2008, to October 17, 2017, there were 275 asbestos cases filed prior to 2009 that were assigned to a trial group and uploaded to File & Serve*Xpress*: 40 cases in 2008; 26 cases in 2009; 6 cases in 2010; 3 cases in 2011; 3 cases in 2012; 9 cases in 2013; 120 cases in 2014; 2 cases in 2015; 66 cases in 2016; 0 cases from January through October 17, 2017.

As reported by Heather Wood, former Law Clerk to Judge Ronald E. Wilson, the procedure for management of the asbestos cases is dictated by the Court's case management order. Cases are originally filed in any circuit in West Virginia, but they are transferred to Kanawha County when identified as an asbestos personal injury case subject to mass litigation. Judge Wilson designates 3 regular Asbestos Personal Injury trial groups of twenty 20 cases each year. Each case represents one plaintiff who has sued multiple, sometimes hundreds, of defendants. Plaintiffs' counsel meet in advance of the date of designation for each trial group and confer regarding which cases should be designated in the trial group. Living mesothelioma cases are given first priority, followed by deceased mesothelioma cases, then other asbestos-related diagnoses. The final designation of plaintiffs for each trial group is electronically filed by Plaintiffs' Coordinating Counsel. Any objection to the final designation is resolved by the Court.

In 2014, Judge Wilson implemented a process to address backlogged lung cancer cases. Beginning in 2015, Judge Wilson has designated 3 groups of backlog lung cancer cases each year, in addition to the 3 regular Asbestos Personal Injury trial groups. The backlog lung cancer cases are ordered to be mediated first. Any cases remaining after mediation are set for trial. The number of backlog lung cancer cases designated in each group varies, depending on the age of the cases, with as many as forty 40 cases designated per group.

To facilitate management and designation of lung cancer cases, Judge Wilson requires all plaintiffs' counsel to report to the Court when a lung cancer case is filed. Judge Wilson and his Law Clerk collect that data in a spreadsheet in order to track whether the case is active, settled, or has been designated in a trial group. As of October 10, 2017, 147 of 311 lung cancer cases have been designated for an upcoming trial group. Because this management tool has proven to

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<sup>2</sup> The Clerk of the Kanawha County Circuit Court reports that 25,876 asbestos personal injury cases have been filed in that circuit from January 1, 1987, to October 2017.

be so effective, Judge Wilson is considering requiring plaintiffs' counsel to report mesothelioma and other nonmalignant filings in a similar format.

From January 2016 to October 24, 2017, 98 regular trial group cases have been settled. Additionally, 146 back log lung cancer cases have been settled. Prior to each trial, clerks review thousands of documents filed by the parties. To underscore the work involved in this litigation, from January 2017 through December 2017, a total of 5,185 orders were entered in all Mass Litigation cases. 4,998 of those orders were entered in the Asbestos Personal Injury Litigation.

## **Assignment of Panel Judges to Tobacco Litigation and FELA Asbestos Cases**

On October 17, 2017, the Supreme Court entered an Administrative Order assigning *In Re: Tobacco Litigation*, Ohio County Civil Action No. 00-C-5000 and *In Re: FELA Asbestos Cases*, Kanawha County Civil Action No. 02-C-9500, to the Mass Litigation Panel. The Mass Litigation Panel Chair entered an order assigning Panel judges to the Tobacco Litigation on October 24, 2017, and assigning a Panel judge to the FELA Asbestos Cases on October 27, 2017.

## **FELA Asbestos Cases**

On December 7, 2017, Presiding Judge James P. Mazzone conducted a scheduling and status conference in these cases. Thereafter, voluntary dismissal orders were entered in the *Sowards* case on December 11, 2017, and the *Ross* case on January 24, 2018, leaving 5 FELA Asbestos Cases currently pending.

## **Float-Sink Litigation**

This litigation is concluded, with the exception of 7 plaintiffs with claims 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.

## **Gavin Landfill Litigation**

On June 14, 2017, the Supreme Court granted defendants' Petition for Writ of Prohibition in *State of West Virginia ex rel. American Electric Power Co., Inc., et al. v. The Honorable Derek C. Swope*, No. 16-1148, and remanded the matter for further proceedings consistent with the Court's Opinion. Upon issuance of the Supreme Court's Mandate, the Presiding Judges granted defendants' motion to dismiss the claims of 12 non-working direct claim plaintiffs, with prejudice, pursuant to Ohio's Mixed Dust Statute, Ohio Rev. Code §§ 2307.84, *et seq.* on July 27, 2017.

On August 11, 2017, the Presiding Judges conducted a status conference and, among other things, heard *Defendants' Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, Pursuant to the Doctrine of Forum Non Conveniens*. The Presiding Judges gave the parties 60 days to conduct jurisdictional discovery, and scheduled an evidentiary hearing on October 23, 2017. However, on October 20 defendants withdrew their motion and confirmed

their withdrawal was with prejudice on October 23. The Presiding Judges granted *Defendant Doug Workman's Motion for Judgment on the Pleadings*, pursuant to Ohio's Mixed Dust Statute, Ohio Rev. Code §§ 2307.84, *et seq.* on November 8, 2017.

The Resolution Judges conducted mediation on February 1 and 2, 2018. However, despite concerted effort, mediation did not result in settlement. Pursuant to the Court's case management order, all discovery is closed in this litigation on May 1, 2018; *Daubert* motions will be heard on June 29, 2018; dispositive motions and motions *in limine* will be heard on August 2, 2018; the pretrial conference will be conducted on September 7, 2018; and trial begins on September 17, 2018.

## **Marcellus Shale Litigation**

### ***Horizontal Well Drilling /Well Pad Cases Cherry Camp Trial Group***

The Presiding Judges entered a final order granting defendants' motions for summary judgment in the Harrison County Cherry Camp Trial Group cases on October 11, 2016, and an order denying *Plaintiffs' Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* on January 11, 2017. Plaintiffs filed a Notice of Appeal on February 10, 2017, which was placed on the Supreme Court's docket as No. 17-0126. All horizontal well drilling/well pad cases in this litigation are on hold until the appeal is decided.

### ***Midstream Cases***

The midstream cases are factually and legally distinct from the horizontal well drilling/well pad cases in that they claim private nuisance and negligence allegedly resulting from construction, and operation of midstream processing and/or compressor facilities. There are 33 midstream cases pending against defendant Williams Ohio Valley Midstream, LLC (WOVM), which originated in the Circuit Court of Marshall County, West Virginia.

On January 11, 2017, the Presiding Judges conducted a status conference in the midstream cases filed against WOVM. The parties were ordered to submit a topographical map showing the location of each plaintiff and the 5 processing and/or compressor facilities operated by WOVM by April 7, 2017, and plaintiffs were ordered to serve completed Plaintiff Fact Sheets no later than May 22, 2017. The Presiding Judges then designated the Burch Ridge Trial Group for pretrial discovery. On February 6, 2018, the Presiding Judges granted plaintiffs' motion to substitute expert witnesses and modify the scheduling order for the Burch Ridge Trial Group, extending the fact discovery completion deadline to April 13, 2018; the expert discovery completion deadline to April 27, 2018; and mediation to on or before May 11, 2018. The Presiding Judges will hear dispositive motions and motions *in limine* on June 22, 2018; conduct the pretrial conference on August 10, 2018; and begin trial of this group of cases on August 20, 2018.

On October 3, 2017, the Presiding Judges ordered 4 cases filed against defendant Antero Resources Corporation joined with the midstream cases. These cases assert claims of private nuisance and negligence relating to construction, operation and maintenance of the North Canton Compressor Station in Doddridge County, West Virginia.

On January 31, 2018, defendant M3 Appalachia Gathering, LLC filed a motion to join in existing mass litigation three midstream cases asserting claims of private nuisance and negligence relating to construction, operation and maintenance of the Lumberport Booster Station in Harrison County, West Virginia. The deadline for responding to the motion was February 23, 2018.

## **Mingo County Coal Slurry Litigation**

On May 17, 2017, the Presiding Judges granted plaintiffs' motion for payment of the Fund Administrator from the Mingo County Coal Slurry Litigation Qualified Settlement Trust. The Presiding Judges continue to review and decide petitions requesting release of settlement trust proceeds of minor plaintiffs. On October 23, 2017, the Presiding Judges heard one such petition, and conducted a hearing to discuss the Conservator's reports of net settlement proceeds of certain minor plaintiffs.

## **Tobacco Litigation**

The Panel Judges assigned to the Tobacco Litigation conducted a status conference on December 14, 2017. On January 19, 2018, the Presiding Judges heard a motion to dismiss the 41 smokeless tobacco claims without prejudice. The Court ordered the plaintiffs with smokeless tobacco claims to appear on March 23, 2018, in order to advise the Court whether: 1) they intend to hire other counsel and pursue their smokeless tobacco claims; or 2) they agree to dismiss their smokeless tobacco claims with prejudice.

On February 1, 2018, the Presiding Judges amended the case management order for the cases with claims against defendant Liggett Group LLC requiring, among other things: Plaintiff Fact Sheets to be filed by February 12, 2018; plaintiffs and Liggett to be ready to conduct mediation with the Resolution Judges by May 15, 2018; discovery to be concluded on May 25, 2018; a hearing on all pretrial motions and dispositive motions on or after January 14, 2019; and trial to be determined.

## **Water Contamination Litigation**

The parties reached a tentative class action settlement in *Crystal Good, et al. v. American Water Works Company, Inc., et al.*, Civil Action No. 2:14-01374, now pending in the United States District Court for the Southern District of West Virginia, on October 25, 2016. The proposed settlement includes all claims against both the West Virginia-American Water Company (along with American Water Works Company, Inc., and American Water Works Service Company, Inc.) and Eastman Chemical Company. The proposed settlement class includes all residents, businesses (and associated hourly wage earners) served by the Kanawha Valley Water Treatment Plant during the January 9, 2014, water contamination including, but not

limited to, plaintiffs in all pending cases in both state and federal court, and any persons or businesses that previously opted out of the *Good* action.

On September 21, 2017, the United States District Court for the Southern District of West Virginia entered an order granting preliminary approval of the amended *Good* class settlement agreement, directing notice to the class, and scheduling a final fairness/approval hearing on January 9, 2018. On January 9, 2018, the district court held the scheduled hearing to consider final approval of the class action settlement and took the matter under advisement. On January 22, 2018, the Presiding Judges extended the stay of state court proceedings for an additional 90 days to permit effectuation of the *Good* class settlement.

On June 12, 2017, the Presiding Judges granted motions to join *County Commission of Lincoln County, West Virginia v. West Virginia-American Water Works Company, Inc., et al.*, Lincoln County Civil Action No. 17-C-41, with *In re: Water Contamination Litigation*, Civil Action No. 16-C-6000, and granted motions to stay all proceedings in that civil action pursuant to the Panel's orders staying the Water Contamination Litigation while the parties worked to effectuate the *Good* class settlement. The Presiding Judges denied the County Commission of Lincoln County's motion for reconsideration of the Panel's ruling on July 12, 2017. The County Commission of Lincoln County moved the Panel to lift the stay of the state court proceedings as it relates to that case and remand the case to the Circuit Court of Lincoln County, West Virginia on January 26, 2018.

## **Yeager Airport Litigation**

The Panel Judges assigned to this litigation conducted a status conference on February 17, 2017. The Presiding Judges ruled on motions filed in the property owner cases regarding the applicability of punitive damages and subrogation to the Central West Virginia Regional Airport Authority ("Airport Authority").

The Resolution Judges conducted mediation of all property owner cases on April 27-28, 2017. Progress was made, including settlement of *Regina Adkins, et al. v. Central West Virginia Regional Airport Authority, et al.*, Civil Action No. 17-C-75 KAN. The Resolution Judges scheduled additional meetings with counsel in June to work through numerous issues that arose during the April mediation, including whether objections to Triad Engineering's offer of insurance policy limits could be resolved to prevent further erosion of its policy. As a result of the additional meetings, settlement was reached with Triad Engineering, and the parties agreed to continue working toward resolution of the other property damage cases.

On July 11, 2017, the Presiding Judges scheduled a bifurcated trial on declaratory judgment in *Theodore & Rebecca Carter v. Nationwide Mutual Fire Ins. Co., et al.*, Civil Action No. 15-C-1074 KAN, with trial scheduled to begin on October 16, 2017. The Resolution Judges conducted mediation in the *Carter* case on September 22, 2017, and on September 25, 2017, plaintiffs agreed to settle their claims against defendant Nationwide Mutual Fire Insurance Company.

On October 17, 2017, the Presiding Judges conducted a status and scheduling conference to discuss the status of settlement negotiations in all cases, the parties' proposed case management orders, and to hear a number of pending motions. On November 9, 2017, the Presiding Judges entered a case management order scheduling a damages-only trial of the property damage cases, with trial scheduled to begin on March 19, 2018. On February 1 and 2, 2018, the Resolution Judges reconvened mediation of the property damage cases and resolved all but 2 of those cases.

On January 26, 2018, the Presiding Judges entered a case management order addressing liability in all cases and damages in the Airport Authority's case. At the parties' request, the Presiding Judges amended the Scheduling Order on February 28, 2018, to among other things, move the deadline for declaratory judgment motions to October 5, 2018; the deadline for dispositive motions to December 31, 2018; the pretrial conference to February 8, 2019; and trial to March 4, 2019.

## **Zoloft Litigation**

**M.M. v. Pfizer, Inc. et al., No. 16-0927** – On November 1, 2017, the Supreme Court affirmed the Panel's August 30, 2016, order granting summary judgment for respondents and defendants below, Pfizer, Inc., et al.

**J.C. and I.H. v. Pfizer, Inc., et al., No. 17-0282** – Petitioners and plaintiffs below, J.C. and I.H., minors, appeal the Mass Litigation Panel's February 15, 2017, order granting summary judgment for respondents and defendants below, Pfizer, Inc., et al., on the ground that petitioners could not meet their burden of proof regarding adequacy of the Zoloft label without expert testimony.

## **Electronic Filing and Service in Mass Litigation**

110,684 documents were electronically filed and 3,483,831 documents were electronically served from January 2017 through December 2017 in all Mass Litigation cases subject to electronic filing and service. These statistics include items rejected in the clerk review process in order to capture all work performed in the three circuit court clerks' offices handling Mass Litigation, as well as orders, which do not go through the clerk review process.

686,518 pages were electronically filed in all Mass Litigation cases subject to electronic filing and service during 2017. This translates to a little over 286 boxes of paper, based on 2400 pages per box. From December 2008, when electronic filing and service was first implemented in certain Mass Litigation cases, through the end of December 2017, there were 761,639 documents filed electronically, and 4,750,267 pages electronically filed. This translates to over 1,979 boxes of paper.

From January 2017 through December 2017, a total of 5,185 orders were entered in Mass Litigation cases subject to electronic filing and service. This includes bench orders entered by the judge but filed by a circuit clerk or attorney. The following is a breakdown of orders by each Mass Litigation subject to electronic filing and service:



<b>Litigation</b>	<b>Jan-Dec 2017</b>
Alderson Broaddus University Asbestos Litigation	15
Asbestos Personal Injury Litigation	4,998
FELA Asbestos Cases	10
Gavin Landfill Litigation	24
Marcellus Shale Litigation	16
Mingo County Coal Slurry Litigation	8
Tobacco Litigation	16
Water Contamination Litigation	9
Yeager Airport Litigation	85
Zoloft Litigation	4
<b>TOTAL</b>	<b>5,185</b>