From left to right: Mass Litigation Panel Judges Jay M. Hoke, Derek C. Swope, Alan D. Moats, James P. Mazzone, and John A. Hutchison presided in a Status and Scheduling Conference in the Mingo County Coal Slurry Litigation on August 20 in the Ohio County City/County Building in Wheeling. *Photo by Fred Connors,* The *[Wheeling]* Intelligencer

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 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 Thomas C. Evans, III, of the Fifth Judicial Circuit (Jackson and Mason Counties).

The following is a list of mass litigation referred to the panel, the county in which the litigation is pending, and the judge or judges assigned to preside in the litigation:

Asbestos Personal Injury Litigation
Kanawha County
- Ronald C. Wilson, Presiding Judge
- James P. Mazzone, Assisting Judge
- Mark A. Karl, Assisting Judge

Asbestos FELA Litigation
Kanawha County
- Arthur M. Recht, Presiding Judge
- Jay M. Hoke, Assisting Judge

Digitek® Litigation
Kanawha County
- Alan D. Moats, Lead Judge
- Booker T. Stephens, Presiding Judge
- Derek C. Swope, Presiding Judge

Float-Sink Litigation
Raleigh County
- John A. Hutchison, Lead Judge
- Derek C. Swope, Presiding Judge
- Thomas C. Evans, III, Presiding Judge
- Jay M. Hoke, Lead Resolution Judge
- Booker T. Stephens, Resolution Judge
- James P. Mazzone, Resolution Judge

Flood Damage Litigation
Raleigh County
- John A. Hutchison, Lead Judge
- Derek C. Swope, Presiding Judge
- Thomas C. Evans, III, Presiding Judge
- Jay M. Hoke, Lead Resolution Judge
- Booker T. Stephens, Resolution Judge
- James P. Mazzone, Resolution Judge

Mingo County Coal Slurry Litigation
Ohio County
- James P. Mazzone, Lead Judge
- John A. Hutchison, Presiding Judge
- Jay M. Hoke, Presiding Judge
- Derek C. Swope, Lead Resolution Judge
- Alan D. Moats, Resolution Judge

Overweight Trucks Litigation
Lincoln County
- Jay M. Hoke, Presiding Judge

Tobacco Litigation
Ohio County
- Arthur M. Recht, Presiding Judge

Digitek® Litigation

Throughout the West Virginia Digitek® Litigation, the Mass Litigation Panel has actively cooperated with the Digitek® Federal Multi-District Litigation pending in the United States District Court for the Southern District of West Virginia, and other state courts handling Digitek® Litigation. At the end of 2010, all but a few of the West Virginia Digitek® cases have been dismissed or plaintiffs have agreed to participate in the settlement program established by defendants and the Plaintiffs' Steering Committee in the Digitek® Federal Multi-District Litigation.

Float-Sink Litigation

The Float-Sink Litigation was referred to the panel by Administrative Order entered by Chief Justice Robin Jean Davis on November 23, 2010. The Supreme Court of Appeals of West Virginia authorized the panel to transfer and join with the existing mass litigation any similar or related actions subsequently filed in any circuit court, as provided in West Virginia Trial Court Rule 26.09.

This litigation consists of 129 cases[1] filed in seventeen different circuit courts in West Virginia. Plaintiffs allege they used or were otherwise exposed to various toxic chemicals, predominantly perchloroethylene ("PCE" or "Perc") in the course of their work in float-sink labs in West Virginia. Plaintiffs assert "deliberate intent" claims against employer defendants pursuant to West Virginia Code § 23-4-2(d)(2)(ii) and causes of action for strict products liability, negligence for failure to warn, and medical monitoring against manufacturer and distributor defendants.

Flood Litigation

Subrogation issues between certain plaintiffs and the Federal Emergency Management Agency have been resolved in the flood litigation. Proposed orders approving settlement and dismissing those cases are forthcoming. A dispute regarding certain express indemnity claims has also been resolved, and a dismissal order has been submitted to the Supreme Court. The panel will conclude this litigation with an accounting of any unclaimed settlement checks.

Mingo County Coal Slurry Litigation

The Mingo County Coal Slurry Litigation was referred to the Mass Litigation Panel by Administrative Order entered by Chief Justice Davis on March 31 and amended by Administrative Order entered on April 28. The Mass Litigation consists of 369 cases[2] originally filed in the Circuit Court of Mingo County. More than seven hundred plaintiffs allege their well water was contaminated when defendants Rawl Sales & Processing Company and Massey Energy Company stored coal slurry in underground mine workings and an above-ground impoundment. Plaintiffs seek damages for personal injury and property damage, injunctive relief in the form of medical monitoring, and environmental remediation for public and private nuisance, compensatory damages for annoyance and inconvenience, punitive damages, statutory attorneys' fees, expert witness fees, other litigation expenses, costs and interest. Defendants deny liability to plaintiffs and assert their storage of coal slurry was consistent with good mining practices. A third-party insurance coverage action was also filed by defendants against numerous primary and excess insurance carriers.

Lead Resolution Judge Derek C. Swope (right) and Resolution Judge Alan D. Moats (center) conducted mediation in the Mingo County Coal Slurry Litigation at the Charleston Civic Center on November 15 and 16. They were assisted by Mass Litigation Manager Kim Fields (left). The judges began the day by explaining the mediation process to plaintiffs, counsel, and corpoorate representatives of defendants. *Photo by Jennifer Bundy*

[1]This number includes the master case file in which orders and other documents generally applicable to the litigation are filed.

[2]This number includes the master case file in which orders and other documents generally applicable to the litigation are filed, and the third-party insurance coverage action.

Mass Litigation Manager Kim Fields (left) selected Debra K. Brogan as Administrative Assistant to the panel. *Photo by Michael Switzer*

With the advice and consent of the panel, Chairman Moats on May 27 assigned Judge Mazzone as Lead Presiding Judge, with Judge Hutchison and Judge Hoke assisting him with the trial aspects of the litigation. Judge Swope was assigned as Lead Resolution Judge, with Judge Moats assisting him with the mediation and settlement aspects of the litigation. The litigation became subject to electronic filing and service beginning June 28. Judge Mazzone convened a Status and Scheduling Conference on August 20 to discuss the status of pending motions and a proposed schedule of hearings on such motions; the status of pretrial discovery, including a proposed schedule of hearings on pending discovery disputes; a proposed trial schedule; and prior mediation and settlement efforts.

Judge Swope and Judge Moats conducted mediation of these cases on November 15 and 16 at the Charleston Civic Center. Hundreds of plaintiffs were required to register and be present for an initial meeting on the first day of mediation in which Judge Swope, Judge Moats, and Chief Justice Davis spoke to plaintiffs, all counsel, and corporate representatives of defendants regarding the mediation process and the work of the Mass Litigation Panel.[3] The Resolution Judges conducted extensive mediation sessions with counsel and corporate representatives over the next one and a half days. Although the mediation was ultimately unsuccessful, the Resolution Judges felt significant progress was made, and mediation should be reconvened in early 2011. A case management order governing the third-party insurance coverage action was entered on November 24, 2010, scheduling trial on January 23, 2012, or as soon thereafter as the court deems appropriate.

Overweight Trucks Litigation

Dismissals are pending as the result of settlement in some of these cases. Presiding Judge Jay M. Hoke is prepared to move forward with trial of the remaining cases.

[3]The Panel extends its thanks to Steve Canterbury, Kim Fields, Debra Brogan, Alison Chambers, Vickie Miller, and the many volunteers from the Administrative Office for their assistance with the registration process at the Charleston Civic Center. A little over one hour after their arrival, more than six hundred plaintiffs were registered and seated in the Civic Center Little Theater for the initial meeting with the Resolution Judges.

Amendments to Rules Governing Mass Litigation

On March 11, the Supreme Court provisionally approved amendment of Rule 26.08 of the West Virginia Trial Court Rules, adding subsection (e), which gives the Presiding Judge sole authority to supervise the jury selection process, to disqualify a prospective juror from jury service, and to excuse jurors from jury service in Mass Litigation to which the Presiding Judge has been assigned. The period of public comment regarding the amendment concluded on April 12 and the amendment was approved on April 15.

Hiring of Administrative Assistant to the Mass Litigation Panel

After conducting an extensive search and numerous interviews, Mass Litigation Manager Kim Fields hired Debra K. Brogan as Administrative Assistant to the panel and to Ms. Fields, effective October 18. The Administrative Assistant travels with the assigned judge(s) for proceedings and trials in mass litigation cases; acts as a courtroom clerk in mass litigation cases, including, but not limited to administration of oaths to witnesses, jury selection and the identification and admission of evidence; coordinates services as required for courtroom preparedness; provides general administrative support to the panel chairman, judges and the Mass Litigation Manager; and provides support, as needed, to circuit clerks' offices where electronic filing and service have been implemented in mass litigation cases.

Electronic Filing and Service in Mass Litigation

From January 2010 through December 2010 in mass litigation cases subject to electronic filing and service, 52,264 documents were e-filed and 1,765,674 documents were e-served using LexisNexis File & Serve®. According to LexisNexis, these statistics represent total volume of all the Asbestos Personal Injury, Digitek®, Flood, Mingo County Coal Slurry, and Tobacco Personal Injury Litigation cases. It includes 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.

From January 2010 through December 2010, a total of 10,077 orders were entered in mass litigation cases subject to electronic filing and service. That includes bench orders entered by the judge but filed by a circuit clerk or attorney and orders denying motions as moot or withdrawn.

The chart to the right is a breakdown of orders by each mass litigation subject to electronic filing and service.

	Jan-Dec 2010
Tobacco	18
Coal Slurry	18
Flood	12
Digitek	9
Asbestos	10,020
TOTAL	**10,077**

Hundreds of plaintiffs in the Mingo County Coal Slurry Litigation attended a mediation session November 15 and 16 at the Charleston Civic Center. They were required to register and be present for an initial meeting on the first day of mediation. *Photo by Kenny Kemp,* The Charleston Gazette