

2016 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). The other 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 David W. Hummel, Jr. of the Second Judicial Circuit (Marshall, Tyler and Wetzel Counties).

The following is a list of Mass Litigations pending before the Panel in 2016, the county in which the litigation is pending, and the judge or judges assigned to the litigation:

Alderson Broaddus University Asbestos Litigation Civil Action No. 16-C-9000	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
Carbon Monoxide Litigation Civil Action No. 14-C-8000	Kanawha County	John A. Hutchison, Lead Presiding Judge Alan D. Moats, Presiding Judge Jay M. Hoke, Presiding Judge Booker T. Stephens, Lead Resolution Judge Derek C. Swope, Resolution Judge David W. Hummel, Jr., Resolution Judge
Float-Sink Litigation Civil Action No. 11-C-5000000	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
LPG Land Litigation Civil Action No. 15-C-4000	Ohio County	David W. Hummel, Jr., Lead Presiding Judge Alan D. Moats, Presiding Judge Derek C. Swope, Presiding Judge Booker T. Stephens, Lead Resolution Judge Jay M. Hoke, Resolution Judge
Gavin Landfill Litigation Civil Action No. 16-C-8000	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
Marcellus Shale Litigation Civil Action No. 14-C-3000	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

**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

**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

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

Kanawha County

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

Alderson Broaddus University Asbestos Litigation

On September 16, 2016, then Chief Justice Menis E. Ketchum, II granted the Honorable Alan D. Moats' motion to refer *Troy Lee McCartney, Sr., et al. v. Sodexo, Inc., et al.*, Barbour County Civil Action No. 16-C-35, to the Mass Litigation Panel. This litigation consists of 16 civil actions originally filed in the Circuit Court of Kanawha County in which plaintiffs allege they were either exposed to asbestos while removing asbestos containing ceiling tiles from the library of Alderson Broaddus University, or because they are a family member of a worker plaintiff who brought asbestos home. Plaintiffs claim they should receive medical monitoring and damages because of exposure to asbestos, but do not claim to have any present physical injury.

On September 28, 2016, then Chief Justice Ketchum Amended the Supreme Court's Administrative Order to provide that, "all pending and subsequently filed cases in West Virginia asserting claims for personal injury and damages caused, in whole or in part from exposure to asbestos and asbestos-containing materials are referred to the Mass Litigation Panel and automatically transferred to the Circuit Court of Kanawha County for coordinated or consolidated resolution in In re: Asbestos Personal Injury Litigation, Kanawha County Civil Action No. 03-C-9600, the Honorable Ronald E. Wilson presiding."

This litigation was designated for electronic filing and service, judges were assigned, and the initial status conference was conducted by all assigned judges on December 9, 2016, in Charleston, West Virginia. The Presiding Judges are reviewing the employer defendants' motions to dismiss and have ordered reply memoranda to be filed no later than February 1, 2017.

Carbon Monoxide Exposure Litigation

On June 6, 2016, Lead Presiding Judge John A. Hutchison entered the *Final Order Dismissing Carbon Monoxide Litigation and Removing Cases from the Court's Docket*, concluding this litigation.

Float-Sink Litigation

On November 2, 2016, the Panel entered an *Order Granting Plaintiffs' Motion for Authorization to Disburse the Remainder of the Qualified Settlement Fund*. Because 7 plaintiffs have 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, those cases remain open on the Court's docket.

Gavin Landfill Litigation

On April 14, 2016, pursuant to *State of West Virginia ex rel. American Electric Power Co., et al. v. Honorable David W. Nibert, Judge of the Circuit Court of Mason County, et al.*, No. 15-0819 (W.Va. Feb. 10, 2016), and invoking its inherent authority pursuant to the Constitution of West Virginia, the Supreme Court referred Mason County Civil Action Nos. 14-C-101 through 14-C-139 to the Panel. This litigation arises out of the plaintiffs' alleged personal injury as the result of exposure to coal combustion waste at the Gavin Residual Waste Landfill ("Gavin Landfill") located in Gallia County, Ohio. These cases were designated for electronic filing and service, judges were assigned, and the initial status conference was conducted by all assigned judges on June 10, 2016, in Charleston, West Virginia.

Lead Presiding Judge Derek C. Swope entered a case management order governing all pre-trial and trial activities for Phase I of the litigation on June 16, 2016, which order was amended at the parties' request on July 18, 2016, and again on October 20, 2016. On October 21, 2016, the Panel denied defendants' motion to dismiss plaintiffs' amended complaint. Defendants' filed a verified petition for writ of prohibition seeking interlocutory review of the Panel's order on December 12, 2016. Plaintiffs filed a response to the petition on January 10, 2017. A rule to show cause was awarded on January 25, 2017, and the Supreme Court will hear oral argument under Rule 19 of the Rules of Appellate Procedure on March 8, 2017.

On December 20, 2016, the Presiding Judges conducted an extensive hearing regarding numerous discovery motions filed by the parties and required counsel to work together to resolve their discovery disputes with judicial supervision. As a result, the Panel entered an agreed order regarding deposition and site inspection schedules on January 3, 2017. At the parties' request, the Panel entered a Third Amended Case Management Order providing an additional 90 days to file any declaratory judgment action regarding insurance coverage; extending pretrial discovery 90 days, scheduling mediation with the Resolution Judges on April 27 and 28, 2017, and scheduling the Phase I trial on February 5, 2018.

LPG Land Litigation

Lead Resolution Judge Booker T. Stephens and Resolution Judge Jay M. Hoke conducted mediation on February 24 and 25, 2016, in Morgantown, West Virginia, resulting in settlement of all cases. On May 5, 2016, Lead Presiding Judge David W. Hummel, Jr. granted plaintiffs' motion to

disburse settlement proceeds. Chair Alan D. Moats entered an *Agreed Order of Dismissal* on October 14, 2016, dismissing the LPG Land Litigation with prejudice.¹

Marcellus Shale Litigation

On January 11, 2016, Lead Presiding Judge Alan D. Moats entered an order designating the Oxford Road and Halls Run Road Trial Groups with trials scheduled to commence on November 7, 2016, and March 6, 2017, respectively. The parties submitted proposed Case Management Orders for these trial groups requesting, among other things, that trial of the Oxford Road Trial Group be moved to March or April, 2017, and that trial of the Halls Run Road Trial Group be moved to July 17, 2017.

On February 26, 2016, Presiding Judges Alan D. Moats, Derek C. Swope and David W. Hummel, Jr. heard defendants' motions for summary judgment in the Harrison County Cherry Camp Trial Group. At the conclusion of the hearing, the Presiding Judges agreed to withhold ruling on the motions to give the parties time to engage in a second round of mediation. Resolution Judges Booker T. Stephens, John A. Hutchison and Jay M. Hoke reconvened mediation on April 7 and 8, 2016. However, despite extensive negotiation, settlement was not achieved.

On April 18, 2016, the Presiding Judges denied plaintiffs' and defendants' requests to file supplemental briefs on defendants' motions for summary judgment as untimely filed, and granted defendants' motions for summary judgment on the ground that Defendants were operating within the scope of defendant Antero Resources' leasehold rights to develop oil and gas underlying the properties that are the subject of plaintiffs' complaint, as well as various surface-use and right of way agreements Antero executed with several plaintiffs, or the owners of the properties on which plaintiffs reside. Defendants filed a proposed final order granting summary judgment, with detailed findings of fact and conclusions of law on May 2, 2016, and plaintiffs filed a notice of objection on May 4, 2016. Defendants filed a joint response to plaintiffs' notice of objection on May 6, 2016, and plaintiffs filed a reply on May 10, 2016. The Presiding Judges took the proposed final order, as well as all objections and responses, under advisement.

Because the Resolution Judges determined that a third round of mediation should be conducted on October 6 and 7, 2016, the Presiding Judges ordered their detailed, final order granting summary judgment in favor of defendants in the Harrison County Cherry Camp Trial Group held in abeyance, and all deadlines for the Oxford Road Trial Group and the Halls Run Road Trial Group stayed, pending the outcome of the mediation. Upon learning that the mediation was not successful, the Presiding Judges entered the final order granting defendants' motions for summary judgment in the Harrison County Cherry Camp Trial Group on October 11, 2016. On October 25, 2016, plaintiffs filed a "Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment." The Presiding Judges denied plaintiffs' motion on January 11, 2017.

Mingo County Coal Slurry Litigation

On May 24, 2016, Plaintiffs' Counsel filed the Fund Administrator's final accounting of the Mingo County Coal Slurry Litigation Qualified Settlement Fund, along with accompanying bank statements. Because the Presiding Judges continue to hear petitions for release of settlement trust

¹ Judge Hummel resigned from the Panel on October 7, 2016. On October 11, 2016, then Chief Justice Menis E. Ketchum, II appointed The Honorable Jack Alsop to serve on the Panel for the duration of Judge Hummel's unexpired term.

proceeds of minor plaintiffs periodically, the Fund Administrator recommended that a balance be retained in the Qualified Settlement Fund account to pay future expenses that may arise on behalf of minor plaintiffs with funds held in independent accounts.

On or about September 27, 2016, Lead Presiding Judge James P. Mazzone received a report from the Administrator of the Mingo County Coal Slurry Litigation Medical Monitoring Program recommending modifications to the program. By letter dated November 1, 2016, Judge Mazzone advised the Administrator that, pursuant to the terms of the Irrevocable Medical Care Trust, the Court cannot make any modifications or changes to the Medical Monitoring Program.

Water Contamination Litigation

On January 28, 2016, then Chief Justice Menis E. Ketchum, II entered an Administrative Order granting the motion to refer the Water Contamination Litigation to the Mass Litigation Panel. The judges assigned to the litigation conducted the initial status conference on March 18, 2016. Among other things, the Panel ordered the parties to notify the Court in writing whether they agreed to mediation of all state and federal water contamination cases, including but not limited to *Crystal Good, et al. v. American Water Works Company, Inc., et al.*, Civil Action No. 2:14-01374, pending in the United States District Court for the Southern District of West Virginia. The Panel also ordered the completion of Plaintiff Fact Sheets for all plaintiffs in filed and non-filed cases.

Plaintiffs electronically filed and served their consolidated, amended class action complaint on May 2, 2016; their second consolidated amended class action complaint on June 6, 2016; and motion for class certification on July 25, 2016. Defendant West Virginia-American Water Company filed its Answer on July 6, 2016, and a partial motion to dismiss on September 14, 2016.

On October 25, 2016, the parties reached a tentative class settlement in *Crystal Good, et al. v. American Water Works Company, Inc., et al.*, Civil Action No. 2:14-01374. 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 class settlement is intended to include all residents and businesses (and associated hourly wage earners) served by the Kanawha Valley Water Treatment Plant during the January 9, 2014 water contamination of the Elk River and the water system, including, but not limited to, the plaintiffs in all pending cases in both state and federal court and any persons or businesses that previously opted out of the *Crystal Good* action. On November 3, 2016, Lead Presiding Judge Alan D. Moats entered an agreed order staying proceedings before the Panel for 90 days to permit the parties to concentrate their efforts on effectuating the class settlement in the *Crystal Good* action. On January 31, 2017, Judge Moats entered an agreed order staying proceedings for an additional 90 days.

Yeager Airport Litigation

On November 18, 2016, then Chief Justice Menis E. Ketchum, II ordered the Panel or a designated member thereof to conduct a hearing to receive evidence and entertain arguments by the parties or any judge, and submit findings of fact and a recommendation as soon as practicable as to whether civil actions arising from the March 12, 2015, failure of the mechanically stabilized earth retention structure at the end of Runway 5 of the Charleston West Virginia Regional Airport Authority's Yeager Airport should be referred to the Panel or consolidated before a judge of the Thirteenth Judicial Circuit under Rule 42 of the West Virginia Rules of Civil Procedure.

On December 9, 2016, Panel Chair Alan D. Moats and Panel Member Jack Alsop conducted a hearing, with Panel Member John A. Hutchison and Panel Member Derek C. Swope also present for oral argument. On December 15, 2016, Judge Moats and Judge Alsop transmitted their findings of fact and recommendation that the Chief Justice refer these civil actions to the Mass Litigation Panel, and authorize the Panel to transfer and join with the existing Mass Litigation any similar cases currently pending, as well as any subsequently filed cases. On December 16, 2016, then Chief Justice Ketchum granted the motion to refer, and authorized the Panel to transfer and join with the existing Mass Litigation any civil actions currently pending, as well as any subsequently filed actions. On December 19, 2016, Chair Alan D. Moats entered an order assigning judges to the litigation, designating the litigation for electronic filing and service, and scheduling an initial status conference on February 17, 2017.

Zoloft Litigation

Resolution Judges Booker T. Stephens, Alan D. Moats and Jay M. Hoke conducted mediation of the four remaining Zoloft cases on August 5, 2016. However, settlement was not achieved. Presiding Judges James P. Mazzone, Derek C. Swope and David W. Hummel, Jr. heard oral argument of defendants' motion for summary judgment in the *Maskill* case on August 8, 2016, and entered a final order unanimously granting defendants' motion and dismissing the *Maskill* case on August 30, 2016. Plaintiff below, petitioner filed a notice of appeal of the Panel's order on September 29, 2016 (No. 16-0927). The Supreme Court granted petitioner's request for an extension of time until January 17, 2017, to perfect the appeal. Respondent's brief is due March 3, 2017, and petitioner's reply brief is due March 23, 2017.

On September 9, 2016, the Presiding Judges unanimously granted defendants' motion to exclude plaintiffs' expert, Adam C. Urato, M.D., granted plaintiffs' motion seeking leave to designate a replacement expert for Dr. Urato in the *Cook* and *Hughes* cases, and ordered plaintiffs to designate a replacement expert for Dr. Urato no later than September 16, 2016. On September 21, 2016, the Court continued the October 24, 2016, trial date to January 17, 2017, to allow additional time for discovery of plaintiffs' replacement expert, Dr. David Kessler.

On September 19, 2016, the Presiding Judges heard dispositive motions and motions *in limine* in the *Cook*, *Hughes* and *Brumfield* cases, and issued rulings from the bench on all motions. On October 5, 2016, the Presiding Judges entered a final order in the *Brumfield* case, unanimously granting Defendants' motion to exclude the specific causation opinions of plaintiffs' expert, Robert M. Cabrera, Ph.D., denying defendants' motion to exclude the general causation opinions of Dr. Cabrera, and granting summary judgment for defendants because plaintiffs were unable to meet their *prima facie* burden of proof without expert testimony on specific causation.

On October 5, 2016, the Presiding Judges also entered an order unanimously denying defendants' motion to exclude general causation opinions of plaintiffs' experts in the *Cook* and *Hughes* cases, denying their motion to exclude the specific causation opinions of Dr. MacGregor and Dr. Abdulla in *Cook* and *Hughes*, and for the same reasons as those set forth in *Brumfield*, granting the motion to exclude the specific causation opinions of Dr. Cabrera. Having also denied Defendants' renewed motion for separate trials, the Presiding Judges ruled that the *Cook* and *Hughes* cases, both of which involve West Virginia plaintiffs, would proceed to trial in January 2017.

On December 23, 2016, Presiding Judges James P. Mazzone and Derek C. Swope unanimously granted defendants' motions for summary judgment filed in the *Cook* and *Hughes* cases, advised the parties that a final judgment order for purposes of appellate review would be forthcoming, and vacated the January 2017 trial. Defendants were ordered to file and serve a proposed final order with detailed findings of fact and conclusions of law no later than January 20, 2017, and plaintiffs were ordered to file and serve any objection to the defendants' proposed final order no later than February 3, 2017.

Electronic Filing and Service in Mass Litigation

93,255 documents were e-filed and 2,939,588 documents were e-served from January 2016 through December 2016 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.

598,467 pages were electronically filed in all Mass Litigation cases subject to electronic filing and service during 2016. This translates to more than 249 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 2016, 650,955 documents were filed electronically, and a total of 4,063,749 pages were filed. This translates to over 1,693 boxes of paper.

From January 2016 through December 2016, a total of 6825 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:

Litigation	Jan-Dec 2016
Alderson Broaddus University Asbestos	2
Asbestos	6,633
Carbon Monoxide	38
Float-Sink	4
Gavin Landfill	16
LPG Land	2
Marcellus Shale	33
Mingo County Coal Slurry	5
Tobacco	10
Water Contamination	10
Zoloft	72
TOTAL	6,825