

# Mass Litigation

The Mass Litigation Panel develops and implements case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice of the Supreme Court of Appeals of West Virginia. West Virginia Trial Court Rule 26.05(a).

The Supreme Court of Appeals of West Virginia established the Mass Litigation Panel in 1996, making the Panel the first of its type in the United States. "Mass Litigation" is defined in West Virginia Trial Court Rule 26.04(a).

The Mass Litigation Panel consists of seven active or senior status circuit judges who are appointed by the Chief Justice with the approval of the Supreme Court of Appeals of West Virginia. Panel members serve staggered terms of three years and may serve successive terms. The Chief Justice designates one Panel member to serve as its Chair to preside over the activities of the Panel and to report to the Supreme Court of Appeals. West Virginia Trial Court Rule 26.02.



Chair of the Mass Litigation Panel, Judge Alan D. Moats, and Judge Derck C. Swope

The Chair of the Mass Litigation Panel is Judge Alan D. Moats, Nineteenth Judicial Circuit (term expires June 30, 2023). The other members of the Panel are

Judge Christopher J. McCarthy, Fifteenth Judicial Circuit (term expires June 30, 2023)

Judge Jay M. Hoke, Twenty-Fifth Judicial Circuit (term expires June 30, 2024)

Judge Jack Alsop, Fourteenth Judicial Circuit (term expires June 30, 2024)

Judge Gregory L. Howard, Sixth Judicial Circuit (term expires June 30, 2024)

Judge Derek C. Swope, Ninth Judicial Circuit (term expires June 30, 2025)

Judge Joanna I. Tabit, Thirteenth Judicial Circuit (term expires June 30, 2025)

The following staff serve the Panel:

Kimberley R. Fields, Counsel to the Mass Litigation Panel  
Debra K. Brogan, Mass Litigation Paralegal

For the full 2022 Annual Report of the Mass Litigation Panel, see <http://www.courtswv.gov/lower-courts/mlp/2022AnnualReportMLP.pdf>.



Opening arguments were held April 4, 2022, in the Kanawha County Courthouse on the first day of the Mass Litigation Panel trial involving opioid manufacturers (Kanawha County Civil Action No. 21-C-9000 MFR). WV Attorney General Patrick Morrisey kicked off arguments before Circuit Judge Derek Swope (Mercer County), who presided over the case.

## 2022 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 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 Jack Alsop of the Fourteenth Judicial Circuit (Braxton, Clay, Gilmer and Webster Counties); Judge Joanna I. Tabit of the Thirteenth Judicial Circuit (Kanawha County); Judge Christopher J. McCarthy of the Fifteenth Judicial Circuit (Harrison County); and Judge Gregory L. Howard of the Sixth Judicial Circuit (Cabell County).

Following is a list of Mass Litigations pending in 2022, the county in which the litigation is pending, and the judge or judges assigned to the litigation:

<b>Asbestos Personal Injury Litigation</b> <b>Civil Action No. 03-C-9600</b>	Kanawha County	Ronald E. Wilson, Presiding Judge <sup>1</sup>
<b>FELA Asbestos Cases</b> <b>Civil Action No. 02-C-9500</b>	Kanawha County	Jay M. Hoke, Presiding Judge
<b>Mingo County</b> <b>Coal Slurry Litigation</b> <b>Civil Action No. 10-C-5000</b>	Ohio County	Jay M. Hoke, Presiding Judge Derek C. Swope, Lead Resolution Judge Alan D. Moats, Resolution Judge
<b>Opioid Litigation</b> <b>Civil Action No. 19-C-9000</b>	Kanawha County	Alan D. Moats, Lead Presiding Judge Derek C. Swope, Presiding Judge Joanna I. Tabit, Lead Resolution Judge Jay M. Hoke, Resolution Judge Gregory L. Howard, Resolution Judge

### Asbestos Personal Injury Litigation

In 2022, Judge Ronald E. Wilson scheduled 3 trial groups, consisting of approximately 60 Asbestos Personal Injury cases – living and deceased mesothelioma cases and living lung cancer cases – and 60 Backlog Lung Cancer cases, for a total of 120 cases scheduled for trial in February, June, or October 2022. Although most of the cases were resolved before trial, the Court moved a small number of cases to future trial groups.

### FELA Asbestos Cases

7 FELA Asbestos cases are currently pending on Presiding Judge Jay M. Hoke's docket: 1 case filed in 2018; 2 cases filed in 2019; and 4 cases filed in 2020.

### Mingo County Coal Slurry Litigation

Presiding Judge Jay M. Hoke continues to monitor the Mingo County Coal Slurry Litigation Medical Monitoring Program's Irrevocable Medical Care Trust.

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

# Opiod Litigation

## Phase I Liability Trials Against Manufacturer, Distributor and Pharmacy Defendants

Lead Presiding Judge Alan D. Moats and Presiding Judge Derek C. Swope scheduled 3 Phase I Liability Trials to be conducted in 2022: 1) trial of the State of West Virginia's public nuisance and West Virginia Consumer Credit and Protection Act ("WVCCPA") claims against certain manufacturers of prescription opioids on April 4, 2022; 2) trial of the City/County plaintiffs' public nuisance claims against certain distributors of prescription opioids on July 5, 2022; and 3) trial of the State's public nuisance and WVCCPA claims against certain pharmacies that distributed and dispensed prescription opioids on September 26, 2022.<sup>2</sup>

Presiding Judge Derek C. Swope conducted a bench trial of the State's public nuisance and WVCCPA claims against certain manufacturers of prescription opioids from April 4, 2022, to May 25, 2022.<sup>3</sup> Although this Phase I Liability Trial required almost 8 weeks to conduct, the State and the manufacturer defendants were able to resolve all claims prior to presentation of closing arguments on May 25.

On July 5, 2022, Lead Presiding Judge Alan D. Moats and Presiding Judge Derek C. Swope continued the Phase I Liability Trial of the City/County plaintiffs' public nuisance claims against certain distributors of prescription opioids to allow the parties to finalize resolution of these cases. The Panel entered a stipulation dismissing with prejudice the City/County plaintiffs' claims against certain distributors pursuant to settlement agreement on October 12, 2022.<sup>4</sup>

The State filed a civil action against Kroger in the Circuit Court of Putnam County, West Virginia, asserting claims for violation of the WVCCPA and for common law public nuisance arising from dispensing and distribution of prescription opioids in West Virginia on August 23, 2022.<sup>5</sup> Finding the State's case against Kroger involved the same or similar commons questions of law or fact as the Opioid Litigation, the Panel ordered the State's case against Kroger transferred to the Panel and joined with the Opioid Litigation on September 14, 2022.<sup>6</sup> To promote judicial economy and prevent waste of judicial resources, the Panel ordered the September 26, 2022, Phase I Liability Trial of the State's case against Walgreens continued;<sup>7</sup> ordered a joint Phase I Liability Trial of the State's cases against

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<sup>2</sup> Discovery Commissioner Christopher C. Wilkes handled numerous discovery disputes and other matters, as directed by the Presiding Judges, during this time.

<sup>3</sup> Lead Presiding Judge Alan D. Moats was appointed to sit by temporary assignment on the Supreme Court of Appeals of West Virginia from February 7, 2022, through April 26, 2022, after the resignation of Justice Evan Jenkins on February 4, 2022. Consequently, Judge Moats did not participate in the Opioid Litigation during that time.

<sup>4</sup> *Stipulation Dismissing with Prejudice Claims Pursuant to Settlement Agreement* (Transaction ID 68240914).

<sup>5</sup> *State of West Virginia ex rel. Patrick Morrissey v. The Kroger Co., et al.* ("Kroger"), Civil Action No. 22-C-111.

<sup>6</sup> *Order of Transfer to the Mass Litigation Panel* (Transaction ID 68102889).

<sup>7</sup> *State of West Virginia ex rel. Patrick Morrissey v. Walgreens Boots Alliance, Inc., et al.* ("Walgreens"), Civil Action No. 20-C-82 PNM. Because certain other pharmacy defendants reached agreements in principle to resolve the State's claims against them, the Presiding Judges entered orders staying proceedings against those defendants. *Order Staying Proceedings Against Rite Aid* (Transaction ID 67867052) entered on July 27, 2022; *Order Staying Proceedings Against Walmart* (Transaction ID 68099861) entered on September 14, 2022; *Order Staying Proceedings Against CVS* (Transaction ID 68113547) entered on September 16, 2022.



Walgreens and Kroger to be conducted on June 5, 2023; and directed the Discovery Commissioner to meet with the parties and prepare a proposed case management order for submission to the Panel no later than October 14, 2022.<sup>8</sup> The Panel further ordered the State to file any other civil action against any potential defendant, including, but not limited to, manufacturers, distributors, or pharmacies, involving the same or similar common questions of law or fact as the Opioid Litigation no later than September 30, 2022.<sup>9</sup>

Lead Resolution Judge Joanna I. Tabit, Resolution Judge Jay M. Hoke, and Resolution Judge Gregory Howard conducted mediation on February 3-4, 2022, prior to the April 4, 2022, trial of the State of West Virginia's claims against certain manufacturers of prescription opioids.<sup>10</sup> The Resolution Judges conducted mediation of the City/County plaintiffs' claims against certain distributors of prescription opioids on June 22-23, 2022, prior to trial scheduled to be conducted on July 5, 2022.<sup>11</sup> The Resolution Judges also conducted mediation of the State of West Virginia's claims against certain pharmacies that distributed and dispensed prescription opioids on September 12-13, 2022, prior to trial scheduled to be conducted on September 26, 2022.<sup>12</sup> Lead Resolution Judge Tabit also met with the parties on numerous other occasions to assist them in their efforts to resolve these cases.

As a result of the concerted efforts of the Presiding Judges, the Resolution Judges, and the Discovery Commissioner most, if not all, of the claims of the State and the City/County plaintiffs against manufacturer, distributor, and pharmacy defendants have been resolved.

### **Cases Regarding Remnant Manufacturer and Pharmacy Defendants**

Having identified certain "remnant" manufacturer and pharmacy defendants in this litigation, the Presiding Judges ordered a meeting with the Discovery Commissioner regarding a proposed schedule for a Phase I Liability Trial, directed the Discovery Commissioner to submit a proposed case management order, and scheduled a status conference regarding these defendants.<sup>13</sup> Thereafter, the Panel entered orders granting Rule 41(a)(2) motions to dismiss some of the remnant defendants.<sup>14</sup> The status conference was subsequently rescheduled and conducted on October 7, 2022.<sup>15</sup> Finding many concerns and objections expressed by the remnant defendants regarding the Panel's July 12 Order and

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<sup>8</sup> *Order Continuing September 26, 2022, Trial of the State of West Virginia's Cases Against Pharmacies* (Transaction ID 68120458) entered on September 19, 2022.

<sup>9</sup> *Order* (Transaction ID 68124687) entered on September 19, 2022.

<sup>10</sup> *Order Reconvening Mediation on February 3-4, 2022* (Transaction ID 67209555) entered on January 4, 2022.

<sup>11</sup> *Order Reconvening Mediation on June 22-23, 2022* (Transaction ID 67634682) entered on May 18, 2022.

<sup>12</sup> *Order Scheduling Mediation on September 12-13, 2022* (Transaction ID 67821221) entered on July 14, 2022.

<sup>13</sup> *Order Requiring Certain Defendants to Meet with Discovery Commissioner Regarding Proposed Schedule for Phase I Liability Trial* (Transaction ID 67811496) entered on July 12, 2022.

<sup>14</sup> *Order Granting Plaintiffs' Rule 41(a)(2) Motion to Dismiss Certain Remnant Defendants* (Transaction ID 67902735) and *Order Granting Plaintiffs' Rule 41(a)(2) Motion to Dismiss Certain Remnant Defendants* (Transaction ID 67902746) entered on August 4, 2022.

<sup>15</sup> *Order Rescheduling Status Conference from September 19, 2022, to October 7, 2022* (Transaction ID 68122004) entered on September 19, 2022.

the Discovery Commissioner's proposed case management order to be well-taken, the Panel ordered plaintiffs' counsel and counsel for the remnant defendants to meet in person with the Discovery Commissioner to discuss case management and early resolution of these cases.<sup>16</sup> The Resolution Judges ordered early mediation of cases filed by plaintiffs against the identified remnant manufacturer and pharmacy defendants to be conducted on November 9-10, 2022.<sup>17</sup> However, the mediation was cancelled until further notice.<sup>18</sup>

### **NAS Cases**

On August 9, 2022, Chief Justice John A. Hutchison entered an Administrative Order granting motions to refer and transferring 19 Marshall County civil actions to the Panel involving claims for damages against manufacturers and distributors of certain prescription opioid pain medications and other defendant parties allegedly involved in the distribution or dissemination of such medications, alleged exposure to which caused minor plaintiffs to suffer from Neonatal Abstinence Syndrome ("NAS"). The Administrative Order also authorized the Panel to transfer and join with the existing Mass Litigation any civil actions involving the same or similar common questions of law or fact subsequently filed in any circuit court of West Virginia, or that are remanded to any circuit court in West Virginia from federal court.

The Panel transferred the cases identified in the August 9 Administrative Order to the Circuit Court of Kanawha County, joined the cases with the Opioid Litigation, and ordered that the NAS Cases shall not be consolidated.<sup>19</sup> The Panel further ordered the cases to be subject to electronic filing and service, beginning September 30, 2022; ordered the parties to meet, confer and file a report setting forth the parties' knowledge of any other pending cases involving the same or similar common questions of law or fact that should be transferred to the Panel; and ordered the NAS Cases to be stayed up to and including December 30, 2022, to facilitate implementation of electronic filing and service and the uploading of all previously filed documents.<sup>20</sup> On October 19, 2022, the Panel granted a motion to transfer 16 additional cases from the Circuit Court of Marshall County to the Circuit Court of Kanawha County and ordered the cases joined with *In re: Opioid Litigation*, Civil Action No. 22-C-9000 NAS.<sup>21</sup> Thereafter, 15 of the cases were removed to the United States District Court for the Southern District of West Virginia.<sup>22</sup> The Panel amended its transfer order to require the 1 remaining case to be subject to e-filing beginning on November 16, 2022.<sup>23</sup>

### **West Virginia First Qualified Settlement Fund**

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<sup>16</sup> *Order Regarding October 7, 2022, Status Conference* (Transaction ID 68229837) entered on October 7, 2022.

<sup>17</sup> *Order Scheduling Early Mediation on November 9-10, 2022* (Transaction ID 67832184) entered on July 18, 2022.

<sup>18</sup> *Order Cancelling Mediation on November 9-10, 2022* (Transaction ID 68334952) entered on November 2, 2022.

<sup>19</sup> *Order Transferring Neonatal Abstinence Syndrome ("NAS") Cases to the Circuit Court of Kanawha County and Designating NAS Cases for Electronic Filing and Service* (Transaction ID 67932827) entered on August 15, 2022.

<sup>20</sup> *Id.*

<sup>21</sup> *Order Granting Motion to Transfer NAS Cases* (Transaction ID 68276375) entered on October 19, 2022.

<sup>22</sup> *Notice of Filing of Notice of Removal* (Transaction ID 68312668) filed on October 27, 2022.

<sup>23</sup> *Amendment to Order Granting Motion to Transfer NAS Cases* (Transaction ID 68324694) entered on October 31, 2022.

On October 7, 2022, the Panel heard the State's *Motion to Establish the West Virginia First Qualified Settlement Fund and Appoint Settlement Fund Administrator* (Transaction ID 67898482). Finding that the immediate purpose of the motion was to establish a Qualified Settlement Fund; approve a financial institution that will hold any monies deposited into the Qualified Settlement Fund on an interim basis until further Order of the Court; and appoint an interim administrator to take such steps as are necessary to establish the Qualified Settlement Fund, including but not limited to setting up the necessary bank accounts and Tax Identification Numbers, with the remaining terms and conditions of the Administrator's appointment to be determined by further Order of the Court; the Panel granted the State's motion in part. The Panel ordered the West Virginia First Qualified Settlement Fund established; appointed a financial institution to hold any monies deposited into the Fund on an interim basis; appointed a Fund Administrator on an interim basis; required Plaintiffs to direct that any sums arising from opioid claims recovered by way of settlement, judgment or bankruptcy claim be deposited into the Fund and directed the interim Administrator not to disburse any funds pending further order of the Court.<sup>24</sup>

The Panel further ordered Counsel for the State, Co-Lead Counsel for the City and County Plaintiffs, and Lead Counsel for the Manufacturer Defendants, Distributor Defendants, and Pharmacy Defendants who have settled with the State and the City and County Plaintiffs to meet, confer, and file and serve a joint report to the Court with their recommendations concerning: 1) the financial institution that will hold any monies deposited into the Fund thereafter; 2) the terms and conditions of the Administrator's duties; and 3) any other recommendations the parties deem appropriate.<sup>25</sup> The parties filed their Joint Report and Recommendation on November 21, 2022, and on December 7, 2022, the Panel entered an *Order Regarding the West Virginia First Qualified Settlement Fund Custodial Bank and Administrator Duties* (Transaction ID 68524883).

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<sup>24</sup> *Order Establishing West Virginia First Qualified Settlement Fund and Appointing Settlement Fund Administrator* (Transaction ID 68247796) entered on October 13, 2022.

<sup>25</sup> *Id.*