

Mass Litigation

The Supreme Court of Appeals of West Virginia established the Mass Litigation Panel in 1996, making it the first of its type in the United States. “Mass Litigation” is defined in Trial Court Rule 26.04(a). The panel develops and implements case management and trial methods to fairly and expeditiously resolve mass litigation referred to the panel by the chief justice, according to West Virginia Trial Court Rule 26.05(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. The chief justice designates one panel member to serve as its chair, according to W. Va. Trial Court Rule 26.02.

Chair in 2023:

Senior Status Judge Alan D. Moats was chair until his term expired on June 30. He was recalled to active service on July 7 to assist the panel in the Opioid Litigation.

Judge Joanna I. Tabit, Thirteenth Judicial Circuit (Kanawha County), was designated to serve as chair beginning July 1, 2023. She passed away on September 29.

Judge Gregory L. Howard of the Sixth Judicial Circuit (Cabell County) was designated to serve as chair from October 20, 2023, through June 30, 2024.

Panel Members:

Judge Jack Alsop, Fourteenth Judicial Circuit (Braxton, Clay, Gilmer, and Webster Counties)

Judge Jay M. Hoke, Twenty-Fifth Judicial Circuit (Boone and Lincoln Counties)

Judge Christopher J. McCarthy, Fifteenth Judicial Circuit (Harrison County), was a member until his term expired on June 30, 2023.

Judge Derek C. Swope, Ninth Judicial Circuit (Mercer County), was a member until his retirement on December 31, 2023.

Judge Robert E. Ryan, Twenty-First Judicial Circuit (Grant, Mineral, and Tucker Counties) was appointed to the panel on November 22, 2023.

Judge Jason A. Wharton, Fourth Judicial Circuit (Wirt and Wood Counties) was appointed to the panel on June 27, 2023.

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 continued to preside over that litigation in 2023.



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

Kimberley R. Fields is counsel to the Mass Litigation Panel and Debra K. Brogan is the mass litigation paralegal.

Mass Litigation Panel annual reports are available at <https://www.courtswv.gov/lower-courts/mass-litigation-panel/annual-reports>.



The Mass Litigation Panel meets regarding the anticipated distribution of settlement proceeds from the West Virginia First Qualified Settlement Fund at the Kanawha County Courthouse on October 13.

2023 Annual Report of the Mass Litigation Panel

2023 Panel Chairs:

Senior Status Judge Alan D. Moats served as Chair until his term expired on June 30, 2023.

Judge Moats was recalled to active service on July 7, 2023, to assist the Panel in the Opioid Litigation.

Judge Joanna I. Tabit, Thirteenth Judicial Circuit (Kanawha County), was designated to serve as Chair beginning July 1, 2023. Judge Tabit passed away on September 29, 2023.

Judge Gregory L. Howard, Jr., Sixth Judicial Circuit (Cabell County), was designated to serve as Chair beginning October 20, 2023.

2023 Panel Members:

Judge Jay M. Hoke, Twenty-Fifth Judicial Circuit (Boone and Lincoln Counties).

Judge Jack Alsop, Fourteenth Judicial Circuit (Braxton, Clay, Gilmer, and Webster Counties).

Judge Christopher J. McCarthy, Fifteenth Judicial Circuit (Harrison County), until his term expired on June 30, 2023.

Judge Derek C. Swope, Ninth Judicial Circuit (Mercer County), until his retirement on December 31, 2023. Judge Swope was recalled to active service February 23, 2024, to assist the Panel in the Opioid Litigation.

Judge Jason A. Wharton, Fourth Judicial Circuit (Wirt and Wood Counties).

Judge Robert E. Ryan, Twenty-First Judicial Circuit (Grant, Mineral, and Tucker Counties).

Judge Ronald E. Wilson, First Judicial Circuit (Brooke, Hancock, and Ohio Counties), is not a current member of the Panel. However, Judge Wilson was assigned to the Asbestos Personal Injury Litigation while serving on the Panel and continues to preside over that litigation.

Mass Litigations Pending in 2023:

Asbestos Personal Injury Litigation Civil Action No. 03-C-9600	Kanawha County	Ronald E. Wilson, Presiding Judge
FELA Asbestos Cases Civil Action No. 02-C-9500	Kanawha County	Jay M. Hoke, Presiding Judge
Mingo County Coal Slurry Litigation Civil Action No. 10-C-5000	Ohio County	Jay M. Hoke, Presiding Judge
Opioid Litigation Civil Action No. 19-C-9000	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, Jr., Resolution Judge

Asbestos Personal Injury Litigation

In 2023, 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, and October 2023. Although most of the cases were resolved before trial, a small number of cases were moved to future trial groups.

FELA Asbestos Cases

9 FELA Asbestos cases are currently pending on Presiding Judge Jay M. Hoke's docket: 1 case filed in 2018; 2 cases filed in 2019; 4 cases filed in 2020; 1 case filed in 2022; and 1 case filed in 2023.

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.

Opioid Litigation

All matters in controversy between all Plaintiffs and all Defendants have been resolved. During 2023, consent judgment orders were entered in the cases involving Teva,¹ Rite Aid,² Janssen,³ the Allergan Defendants,⁴ Walmart,⁵ CVS,⁶ Kroger,⁷ Walgreens.⁸ Dismissal orders were entered in the cases involving Mylan,⁹ Amneal,¹⁰ and various local pharmacies.¹¹ The Hospital Cases were dismissed, without prejudice, by Order entered May 2, 2023, pursuant to a motion filed by the Hospital Plaintiffs.¹² The NAS cases were dismissed, with prejudice, subject to appeal, by Orders entered May 31, 2023,¹³ and June 27, 2023,¹⁴ pursuant to motions to dismiss filed by all Defendants. Plaintiffs filed Notices of Appeal on June 29, 2023,¹⁵ June 30, 2023,¹⁶ and July 14, 2023.¹⁷

¹ *Consent Judgment as to Teva* (Transaction ID 68915677) entered January 18, 2023.

² *Consent Judgment as to Rite Aid* (Transaction ID 69703197) entered March 31, 2023.

³ *Consent Judgment as to Janssen* (Transaction ID 69829020) entered April 14, 2023.

⁴ *Consent Judgment as to Allergan Defendants* (Transaction ID 69989201) entered May 10, 2023.

⁵ *Consent Judgment as to Walmart* (Transaction ID 69989906) entered May 10, 2023.

⁶ *Consent Judgment as to CVS* (Transaction ID 69990761) entered May 10, 2023.

⁷ *Consent Judgment as to Kroger* (Transaction ID 70766802) entered September 1, 2023.

⁸ *Consent Judgment as to Walgreens* (Transaction ID 70842354) entered September 12, 2023.

⁹ *Dismissal Order as to Mylan Pharmaceuticals Inc.* (Transaction ID 70645860) entered August 16, 2023.

¹⁰ *Stipulation and Order of Dismissal with Prejudice as to Amneal Defendants* (Transaction ID 70644474) entered August 16, 2023.

¹¹ *Stipulation and Order of Dismissal with Prejudice as to Defendant Rhonda's Pharmacy, LLC* (Transaction ID 70070780), *Stipulation and Order of Dismissal with Prejudice as to Defendant Bypass Pharmacy, Inc.* (Transaction ID 70071146), and *Stipulation and Order of Dismissal with Prejudice as to Defendant Fruth Pharmacy, Inc.* (Transaction ID 70071374), entered May 23, 2023.

¹² *Order Granting Plaintiffs' Motion to Dismiss Without Prejudice* (Transaction ID 69936033) entered May 2, 2023.

¹³ *Order Granting Defendants' Motions to Dismiss* (Transaction ID 70112431) entered May 31, 2023.

¹⁴ *Order Regarding Motions to Dismiss* (Transaction ID 70266225) entered June 27, 2023.

¹⁵ Notice of Appeal filed June 29, 2023, *A.D.A. as next friend of L.R.A. v. Johnson & Johnson, et al.*, C.A. No. 21-C-110 MSH (Transaction ID 70288606). *See also*, No. 23-ICA-275 (Transaction ID 70287681).

The State and Local Governments entered into the West Virginia First Memorandum of Understanding (“MOU”)¹⁸ regarding the division of monetary amounts obtained through settlement or judgment, which was adopted by the Court.¹⁹ According to the terms of the MOU, 72.5 % will be distributed to the West Virginia First Foundation, which has been incorporated and approved by the West Virginia Legislature,²⁰ and 24.5 % will be paid to the Local Governments and divided pursuant to a formula agreed to by all parties. The remaining 3% will be held in escrow by the State for expenses incurred related to opioid litigation. If the 3% is not spent by December 31, 2026, then 1% goes to the Local Governments and 2% goes to the West Virginia First Foundation.²¹ Many of the consent judgment orders provide for settlement funds to be paid over a period of years. No funds will be disbursed except upon order of the Court until the West Virginia First Foundation is fully operational. To date, settlement agreements total approximately 950 million dollars.

A qualified settlement fund has been established, a Fund Administrator has been appointed, and a banking institution has been designated in which settlement funds will be deposited.²² The Presiding Judges review the quarterly reports for the West Virginia First Qualified Settlement Fund, jointly filed by the Fund Administrator and the Custodial Bank and enter orders regarding payment of administrative costs.²³

After entry of the consent judgment orders and dismissal orders, the Presiding Judges conducted a hearing on October 13, 2023, regarding distribution of settlement proceeds from the West Virginia First Qualified Settlement Fund.²⁴ On October 18, 2023, the Presiding Judges ordered the Fund Administrator to: 1) distribute attorney fees and costs from the available settlement funds in accordance with the Common Benefit Fund Commissioner’s September 21, 2023, recommendations²⁵ adopted by

¹⁶ Notice of Appeal filed June 30, 2023, *A.N.C. as next friend of J.J.S. v. Johnson & Johnson, et al.*, C.A. No. 22-C-73 MSH (Transaction ID 70292268). *See also*, No. 23-ICA-276 (Transaction ID 70290811). Notice of Appeal filed June 30, 2023, *Travis Blankenship, Next Friend and Guardian of Minor Child Z.D.C., et al., v. McKesson Corporation, et al.*, C.A. Nos. 22-C-5 MSH, and 22-C-20 MSH through 22-C-36 MSH. *See also*, No. 23-ICA-287 (Transaction ID 70291818).

¹⁷ Notice of Appeal filed July 14, 2023, *Trey Sparks v. Johnson & Johnson, et al.*, C.A. No. 23-C-14 MSH (Transaction ID 70396729). *See also*, No. 23-ICA-307 (Transaction ID 70395956).

¹⁸ Attached as Exhibit A to *Motion to Adopt the West Virginia First Memorandum of Understanding* (Transaction ID 68760098) filed January 4, 2023.

¹⁹ *Order Adopting the West Virginia First Memorandum of Understanding* (Transaction ID 68796699)

²⁰ W. Va. Code § 5-31-1 to § 5-31-5 (eff. March 10, 2023).

²¹ West Virginia First Memorandum of Understanding, Section B.2.b.i.-iii.

²² *Order Establishing West Virginia First Qualified Settlement Fund and Appointing Settlement Fund Administrator* (Transaction ID 68247796) entered October 13, 2022; and *Order Regarding the West Virginia First Qualified Settlement Fund Custodial Bank and Administrator Duties* (Transaction ID 68524883) entered December 7, 2022.

²³ *See e.g.*, the November 1, 2023, *Order Regarding the West Virginia First Qualified Settlement Fund Quarterly Report for the Quarter Ended September 30, 2023, and Request for Payment of Administrative Costs* (Transaction ID 71279957).

²⁴ *Notice of Hearing Regarding Distribution of Settlement Proceeds from the West Virginia First Qualified Settlement Fund* (Transaction ID 70951334) entered September 26, 2023.

²⁵ *Common Benefit Fund Commissioner’s Recommendations Regarding Attorney Fees and Expenses* (Transaction ID 70922195).

Order entered October 9, 2023;²⁶ 2) distribute Three Hundred Million Dollars to the State and Local Governments and the West Virginia First Foundation in accordance with the West Virginia First Memorandum of Understanding and Amended Exhibit C filed on September 29, 2023; and 3) distribute such further settlement funds received in the future periodically in accordance with this Order and/or as otherwise directed by the Court.²⁷ The Presiding Judges entered an Order approving and endorsing the Special Commissioner's recommendations regarding assessments and non-shared litigation costs on December 28, 2023.²⁸

The Opioid Litigation was referred to the Panel on June 7, 2019, and took 4 years to resolve. Lead Presiding Judge Alan D. Moats and Presiding Judge Derek C. Swope were assisted by Counsel to the Mass Litigation Panel, Kimberley R. Fields, and Mass Litigation Paralegal, Debra K. Brogan, throughout the litigation. Lead Resolution Judge Joanna I. Tabit, Resolution Judge Jay M. Hoke, and Resolution Judge Gregory L. Howard, Jr. conducted countless mediation sessions, resulting in resolution of most if not all cases by agreement of the parties.

The Opioid Litigation has been exceedingly complex, intense, and time consuming. The Panel utilized the services of Discovery Commissioner/Special Commissioner Christopher C. Wilkes in new and innovative ways. The litigation required daily oversight as the result of countless discovery objections and issues dealing with millions of documents. Hundreds of motions were filed, many involving novel issues, had to be dealt with on an expedited basis.

After months of preparation, Presiding Judge Derek C. Swope presided over a trial in the Manufacturer Cases for over 8 weeks in April and May 2022 that settled the day prior to closing arguments. The Presiding Judges prepared several weeks for trial in the Distributor Cases that settled the opening day of trial on July 5, 2022. The Presiding Judges prepared for 2 months for the Pharmacy Cases that partially settled just prior to trial on September 26, 2022. The Presiding Judges and Resolution Judges worked on a daily basis to resolve the remaining Pharmacy cases, all of the Remnant Cases, the Hospital Cases, and the NAS cases.

The Panel dealt with hundreds of lawyers from all over the country during the past 4 years, devoting its full attention to resolving the Opioid Litigation as expeditiously as possible while honoring the rights of all parties. The decision by the Supreme Court in *State ex rel. AmerisourceBergen Drug Corporation v. Moats*, 859 S.E. 2d 374 (2021) gave the Panel the means to navigate and guide the litigation and gave the parties valuable insight.

²⁶ *Order Approving Common Benefit Fund Commissioner's Recommendations Regarding Attorney Fees and Expenses* (Transaction ID 71045714).

²⁷ *Order Regarding Distribution of Opioid Settlement Funds* (Transaction ID 71124408) p. 2, Paragraphs 1-3. Pursuant to Paragraph 2, "such funds shall not be distributed to the West Virginia First Foundation until an appropriate depository account has been established to receive such funds."

²⁸ *Order Approving Special Commissioner's Recommendations Regarding Assessments and Non-Shared Litigation Costs and Expenses* (Transaction ID 71701668).