

# 2020 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).

The following is a list of Mass Litigations pending in 2020, the county in which the litigation is pending, and the judge or judges assigned to the litigation:

<b>Asbestos Personal Injury Litigation Civil Action No. 03-C-9600</b>	Kanawha County	Ronald E. Wilson, Presiding Judge <sup>1</sup>
<b>FELA Asbestos Cases Civil Action No. 02-C-9500</b>	Kanawha County	Jay M. Hoke, Presiding Judge
<b>Gavin Landfill Litigation Civil Action No. 16-C-8000</b>	Raleigh County	Derek C. Swope, Lead Presiding Judge Jack Alsop, Presiding Judge Alan D. Moats, Resolution Judge Jay M. Hoke, Resolution Judge
<b>Marcellus Shale Litigation Civil Action No. 14-C-3000</b>	Ohio County	Derek C. Swope, Lead Presiding Judge Midstream Cases Jack Alsop, Lead Presiding Judge Well Pad Cases Alan D. Moats, Presiding Judge Jay M. Hoke, Lead Resolution Judge Joanna I. Tabit, Resolution Judge
<b>Mingo County Coal Slurry Litigation 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 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 Debra Scudiere, Resolution Judge Gregory L. Howard, Resolution Judge <sup>2</sup>

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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.

<sup>2</sup> The judgeship of the Honorable Debra Scudiere ended on June 26, 2020, thereby creating a vacancy on the Mass Litigation Panel. By Administrative Order of the Supreme Court of Appeals of West Virginia entered on June 29, 2020, the Honorable Gregory L. Howard was appointed to serve on the Mass Litigation Panel for the duration of Judge Scudiere's term. Judge Howard was appointed to serve as a Resolution Judge in the Opioid Litigation on July 21, 2020.

**Raleigh Heart Clinic Litigation  
Civil Action No. 18-C-5000**

Raleigh County

Jay M. Hoke, Lead Presiding Judge  
Derek C. Swope, Presiding Judge  
Alan D. Moats, Resolution Judge  
Jack Alsop, Resolution Judge

**Tobacco Litigation  
Civil Action No. 00-C-5000**

Ohio County

Jack Alsop, Lead Presiding Judge  
Alan D. Moats, Presiding Judge  
Jay M. Hoke, Resolution Judge

## **Asbestos Personal Injury Litigation**

In 2020, Judge Ronald E. Wilson conducted three trial groups, consisting of 60 Asbestos Personal Injury cases – living and deceased mesothelioma cases and living lung cancer cases – and 60 Back Log Lung Cancer cases, for a total of 120 cases. The February 2020 trial group was conducted in Ohio County, as scheduled. However, due to the COVID-19 pandemic, the June 2020 trial group was not conducted in Kanawha County; the August 2020 and October 2020 trial groups were conducted in Ohio County; and the February 2021 trial group has been moved to June 14, 2021 in Kanawha County. To underscore the work involved in this litigation, from January 1, 2020, through December 31, 2020, a total of 5087 orders were entered in all Mass Litigation cases. 4729 of those orders were entered in the Asbestos Personal Injury Litigation.

### **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.

### **Gavin Landfill Litigation**

Distributions from the Qualified Settlement Fund were made to all plaintiffs, and dismissal orders have been entered in all but 2 of the 40 cases in this Mass Litigation. The 2 remaining plaintiffs are in active, post-payment appeals with Medicare regarding subrogation liens against their settlements.

### **Marcellus Shale Litigation**

#### *Midstream Cases*

Lead Presiding Judge Derek C. Swope entered case management orders scheduling 4 Midstream Cases trial groups for trial in 2020, and 2 Midstream Cases trial groups for trial in 2021. Throughout 2020, the parties conducted discovery and motion practice, Lead Presiding Judge Swope issued numerous rulings on motions and conducted several pretrial conferences, and Lead Resolution Judge Jay M. Hoke and Resolution Judge Joanna I. Tabit conducted numerous mediations of the Midstream Cases, including a mediation conducted by video conference in November 2020 because of the continuing public health crisis caused by the COVID-19 pandemic. As a result of these combined efforts, all Midstream Cases trial groups scheduled for trial in 2020 and one Midstream Cases trial group scheduled for trial in January 2021 have settled. The last Midstream Cases trial group is scheduled for trial in August 2021. On December 28, 2020, defendant filed a motion to add claims of 11 more plaintiffs to this trial group.

## ***Well Pad Cases***

Lead Resolution Judge Jay M. Hoke, Resolution Judge Joanna I. Tabit and then Resolution Judge Debra Scudiere conducted mediation of all Well Pad Cases on January 16-17, 2020, resulting in resolution of certain cases in the Oxford Road Trial Group, and continuing discussions among the parties regarding resolution of all remaining Well Pad Cases. Thereafter, all Oxford Road Trial Group cases were resolved. In June 2020, Lead Presiding Judge Jack Alsop entered case management orders scheduling 4 Well Pad Cases trial groups for trial in 2021 and 2 Well Pad Cases trial groups for trial in 2022. An additional group of Well Pad Cases was joined with the Marcellus Shale Litigation on November 20, 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.

## **Opioid Litigation**

As agreed by the parties, Lead Resolution Judge Joanna I. Tabit, Resolution Judge Jay M. Hoke and then Resolution Judge Debra Scudiere conducted early mediation of all state and federal West Virginia opioid cases on February 26-27, 2020. Judge Tabit, Judge Hoke and Resolution Judge Gregory L. Howard conducted additional mediation on August 26-27, 2020. After the Supreme Court ordered the stay of the lower court proceedings lifted for the limited purpose of allowing mediation to proceed, the Resolution Judges conducted a third round of mediation by video conference on December 18, 2020, because of the continuing public health crisis caused by the COVID-19 pandemic.

After extensive motion practice, Lead Presiding Judge Alan D. Moats and Presiding Judge Derek C. Swope entered numerous orders denying motions to dismiss. On February 19, 2020, the Presiding Judges found plaintiffs' claims for abatement of public nuisance are equitable claims to which a right to jury trial does not attach, and ordered a Phase I, non-jury trial on the issue of liability for public nuisance to be conducted after a reasonable period of discovery. The Presiding Judges conducted a status conference on March 13, 2020, during which they scheduled the Phase I trial on March 22, 2021, recognizing that continuing public health concerns regarding the COVID-19 pandemic may impact the trial date; allowed the parties to file any briefs pertaining to certain Defendants' motion for reconsideration of the Panel's order regarding trial of liability for public nuisance; and appointed the Honorable Christopher C. Wilkes to serve as Discovery Commissioner.

On July 23, 2020, the Presiding Judges denied certain defendants' motion for reconsideration, finding that a Phase I trial of plaintiffs' public nuisance claims is workable and not contrary to law, a bifurcated non-jury trial of liability for public nuisance is permissible, and the Panel's orders provide for appropriate Phase I discovery. On July 29, 2020, the Presiding Judges granted plaintiffs' motion to strike defendants notices of non-party fault, finding that W. Va. Code § 55-7-13d and its predecessor, W. Va. Code § 55-7-24 (collectively, the "Apportionment Statutes") do not apply to Plaintiffs' equitable claims of public nuisance. On August 4, 2020, the Presiding Judges likewise granted the State of West Virginia's motion to strike notices of non-party fault, finding the Apportionment Statutes are not applicable to the State's claims, which are limited to equitable claims for abatement of public nuisance and claims for equitable relief and civil penalties for violations of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101, *et seq.*

On October 13, 2020, the Presiding Judges granted Defendants' motion to continue, ordered the Phase I, non-jury trial of liability for public nuisance to be continued to November 1, 2021, and ordered the parties to meet and confer, and to file and serve proposed interim deadlines on October 30, 2020. On November 4, 2020, the Presiding Judges ordered the parties to meet and confer with the Discovery Commissioner regarding the status of discovery conducted to date; the parties' recommendations regarding completion of discovery by the proposed deadline; and the parties' recommendations regarding what, if any, modifications of the trial format should be made. The Discovery Commissioner provided his report and recommendations to the Presiding Judges on November 25, 2020.

Certain defendants filed petitions for writ of prohibition on September 10, 2020, *State ex rel. AmerisourceBergen Drug Corp., et al. v. Hon. Alan D. Moats, et al.*, No. 20-0694, and September 25, 2020, *State ex rel. Johnson & Johnson, et al. v. Hon. Alan D. Moats, et al.*, No. 20-0751. On December 3, 2020, the Supreme Court awarded a Rule to Show Cause as to the petitions, consolidated the cases for purposes of oral argument, consideration and decision, and scheduled oral argument under Rule 20 of the Rules of Appellate Procedure on February 17, 2021. On December 16, 2020, the Supreme Court ordered the automatic stay of the lower court proceedings lifted for the limited purpose of allowing mediation to proceed, but otherwise refused to lift the stay.

## **Raleigh Heart Clinic Litigation**

Lead Presiding Judge Jay M. Hoke entered an agreed order dismissing plaintiffs' claims against defendant Cardinal Health 414, LLC on January 13, 2020, leaving only Cardinal Health's crossclaim against defendant Thair Barghouthi, M.D. still pending. On July 6, 2020, Judge Hoke entered an agreed order dismissing Cardinal Health 414, LLC's crossclaim, and a final order dismissing the Raleigh Heart Clinic Litigation in its entirety on July 7, 2020.

## **Tobacco Litigation**

Lead Presiding Judge Jack Alsop granted plaintiffs' motion to approve settlement with the Liggett Defendants on January 10, 2020, and entered a final order dismissing the entire litigation on March 6, 2020.

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

97,362 documents were electronically filed, and 3,290,141 documents were electronically served from January 2020 through December 2020 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 cases, as well as orders, which do not go through the clerk review process.

670,935 pages were electronically filed in all Mass Litigation cases subject to electronic filing and service during 2020. This translates to over 279 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 2020, a total of 1,088,803 documents were electronically filed, and 7,097,349 pages were electronically filed in all Mass Litigation cases subject to electronic filing and service. This translates to over 2,957 boxes of paper.

From January 1, 2020, through December 31, 2020, a total of 5,087 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 chart is a breakdown of orders entered in each Mass Litigation subject to electronic filing and service in 2020:

<b>Litigation</b>	<b>Jan-Dec 2020</b>
Asbestos Personal Injury Litigation	4,729
FELA Asbestos Cases	3
Gavin Landfill Litigation	2
Marcellus Shale Litigation	116
Mingo County Coal Slurry Litigation	0
Opioid Litigation	225
Raleigh Heart Clinic Litigation	5
Tobacco Litigation	6
Yeager Airport Litigation	1
<b>TOTAL NUMBER OF ORDERS</b>	<b>5.087</b>