

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOOD LITIGATION

CIVIL ACTION NO. 02-C-797
Honorable Arthur M. Recht
Coal River Watershed

MEMORANDUM OF OPINION AND ORDER
(DEFENDANTS' MOTIONS TO DISMISS)

This matter is before the Court upon various motions of the Defendants denominated in various ways, many of which are motions to dismiss for failure to state a claim upon which relief can be granted. Under the circumstances, given that the complaints and amended complaints do not distinguish individual Defendants but make identical, generic allegations about general groups of them, the Court considers all of the motions collectively as motions to dismiss on behalf of all Defendants under Rule 12(b)(6) and Rule 12(c) of the West Virginia Rules of Civil Procedure. WHEREFORE, upon careful consideration of the pleadings and the arguments of counsel, the Court finds as follows:

FINDINGS OF FACT

1. Just days after severe flooding struck southern West Virginia, thousands of Plaintiffs began filing lawsuits against collections of landowners, coal companies, timber companies, and oil and natural gas companies, alleging generally that the activities of these Defendants had

exacerbated the flooding that occurred following the widespread rainstorms of July 8, 2001. Complaints and amended complaints, some of which included "class action" allegations and most of which merely named a large number of Plaintiffs, were filed in seven different circuit courts in southern West Virginia by several different law firms.

2. Many, if not most, of the Defendants own and/or operate in more than one location in the large geographic area that is at issue and have done so to some degree or another for years and years. While the complaints and amended complaints relating to the July 8, 2001 flood events all allege that Defendants are involved in some way in the ownership, extraction, and/or removal of natural resources that led to an alteration or disturbance in the natural state of the land, none of the complaints or amended complaints contains any particular allegations by any particular Plaintiff against any particular Defendant. Plaintiffs' complaints and amended complaints do not in any way specify to which location(s) or operation(s) they relate. Plaintiffs' complaints and amended complaints do not state what actionable conduct it is that any particular Defendant is alleged to have engaged in to cause or exacerbate any particular Plaintiff's alleged injuries.

3. Pursuant to Rule 26.01 of the West Virginia Trial Court Rules, certain Plaintiffs filed a Motion to Refer to Mass Litigation Panel on November 21, 2001, listing seven cases in the style, including Sandra Blake, et al. v. Bluestone Coal Corporation, et al., Fayette County Civil Action No. 01-C-221-H, and requesting that the seven flood cases then pending in various circuit courts be referred to the Mass Litigation Panel ("MLP"). By Administrative Order entered on May 16, 2002, the Chief Justice of the Supreme Court of Appeals of West Virginia ("Supreme Court") granted the Plaintiffs' motion and referred the seven pending cases to the MLP.

4. By Administrative Order entered on June 13, 2002, the Supreme Court transferred the seven cases and all other July 8, 2001 Flood Damage cases to the Circuit Court of Raleigh County. Administrative Order at 1. The Honorable Gary L. Johnson was assigned to preside over the July 8, 2001 Flood Damage cases as lead judge with the support of the Honorable John A. Hutchison and the Honorable Arthur M. Recht (collectively "Panel Judges") (id.), who together were directed "to determine and separate the various causes of action based on, but not limited to, proximate cause which may include either a watershed or a sub-watershed" and "to be sensitive to the concerns of all litigants with respect to the

cost of time and money associated with this litigation." (id. at 2).

5. Both before and after referral to the MLP, numerous similar complaints relating to the July 8, 2001 flooding were filed in southern West Virginia counties and were transferred to Raleigh County, where the Panel Judges had grouped the actions under Civil Action No. 02-C-797.

6. The Panel Judges held their first hearing on August 23, 2002, resulting in a First Flood Litigation Case Management Order ("First CMO") dated October 30, 2002 and entered on November 19, 2002. Among other things, the First CMO envisioned an initial process by which it would be determined "which of the plaintiffs' legal theories of liability, if any, [were] viable as a matter of law." Id. at ¶ III.A. The Panel Judges suggested that such an approach would assist them in deciding how these cases should proceed. The First CMO stayed (a) discovery, (b) the filing of counterclaims, cross-claims and third-party complaints, and (c) the filing of "[a]ll motions challenging the factual bases of individual complaints as to particular defendants." Id. at ¶¶ I.H, I.I, & I.J.

7. Principal among the legal theories presented by Plaintiffs was one of strict liability: that landowners, coal operators, timber companies, and oil and gas companies who had

been connected with land-disturbing activities should be held strictly liable for widespread flooding throughout southern West Virginia. Plaintiffs also presented several fault-based claims: (a) unreasonable use; (b) negligence; (c) nuisance; and (d) interference with riparian rights.

8. On August 1, 2003, after extensive briefing and hearings about Plaintiffs' legal theories, the Panel Judges drafted, answered, and certified certain questions to the Supreme Court. As explained by the Panel Judges, the certified questions were addressed as if Plaintiffs' general legal theories were considered pursuant to Rule 12(c) (motion for judgment on the pleadings) and under a set of *assumed* (not stipulated) facts - not on the basis of particular claims by particular Plaintiffs against particular Defendants for any particularized wrongful conduct. See 3M Company v. Glass, 917 So.2d 90 (Miss. 2005). 

9. On December 9, 2004, the Supreme Court issued its opinion and answered certified questions on the same Rule 12(c)/assumed facts basis as was considered by the Panel Judges. The Supreme Court expressly found that, with respect to the certified questions, there was "a sufficiently precise and undisputed factual record [the facts assumed by the Panel Judges] on which the legal issues [could] be determined, and that these legal issues substantially control[led] the case."

In Re Flood Litigation, 216 W. Va. 534, 540, 607 S.E.2d 863, 869 (2004). The Supreme Court: (a) rejected strict liability as a legal theory available to Plaintiffs in these cases, (b) recognized the potential applicability of unreasonable use, negligence, and riparian rights causes of action, and (c) determined that there was "not a sufficiently precise and undisputed factual record" to determine the applicability of a cause of action for nuisance. Id. at 542-43, 607 S.E.2d at 871-72. The Supreme Court did not hold that any particular complaint before the Panel Judges stated a cause of action against any Defendant under any of these theories.

10. It was in this context that the Panel Judges held further hearings on February 25, 2005 and June 8, 2005. During the later hearing, the Panel Judges issued their June 8, 2005 Case Management Order ("Second CMO"), which provided, among other things, (a) that the individual cases referred to the Panel Judges would be tried by watershed, (b) that the parties to the cases in each watershed (limited to the Upper Guyandotte River, Coal River, and Tug River) - all Plaintiffs and all Defendants in each such watershed - would be required to make certain initial disclosures, and (c) that disclosures for the Coal River were to be made by August 8, 2005. With respect to this Coal River proceeding, the purpose of these disclosures was to assist the Court and the parties to further

develop a plan for proceeding with a trial or trials of all cognizable claims. A trial in the Coal River proceeding was scheduled to begin in June 2006.

11. At the June 8, 2005 hearing, Plaintiffs' counsel stated their intention to dismiss all class action allegations in the referred cases then sought leave to amend their various complaints to individually name putative class members as plaintiffs. See Corrected Order Dismissing Class Action Allegations and Granting Plaintiffs' Motions for Leave to Amend their Complaints, September 30, 2005 (*nunc pro tunc* June 30, 2005). Their motion was granted, and certain amended complaints implicating the Coal River proceeding were filed. See id. and amended complaints filed on July 8, 2005, September 30, 2005, & October 25, 2005. All of the amended complaints added parties plaintiff and parties defendant, persisted in making claims for strict liability, and continued to attempt to assert claims by all Plaintiffs against all Defendants with no specific allegations about which locations or operations of the various Defendants were at issue or what actions or inactions gave rise to the Plaintiffs' claims.

12. With further regard to the Coal River proceeding, a status conference was held on February 22, 2006. At the conference, Liaison Counsel for Plaintiffs represented, among other things, that: (a) "[t]hese cases have been in

litigation now for five years [and] . . . are not complicated cases in spite of all of the moving parts." Tr. at 20; (b) ". . . plaintiffs . . . will be prepared to go forward in June [in reference to the June trial date]." id.; (c) ". . . any relaxation of this schedule merely plays into the hands of delay, which is always most generally to the advantage of the defendants" id.; and (d) "The plaintiffs just want to stick with this schedule. It's working for us." id. at 21.

13. During the conference, in light of the Supreme Court's ruling that the Defendants may not be held strictly liable for their activities or the conditions their activities create, In Re Flood Litigation, 216 W. Va. 534, 544, 607 S.E.2d 863, 874 (2004); in light of the fact that an individual Defendant may own and/or operate all over southern West Virginia and be involved in more than one component of the extractive industries about which the Plaintiffs generally complain; because Plaintiffs lump together innumerable claims against scores of Defendants without distinguishing or delineating them in any way; and because the Panel Judges are charged with organizing these cases for further proceedings and/or trial, this Court required Plaintiffs to provide three basic types of core information within thirty days of the hearing: (a) the specific defendant that is being challenged

by each plaintiff, (b) the specific operation or specific properties which each plaintiff contends caused harm, and (c) the activities in which the defendant allegedly engaged that the plaintiffs claim was tortious. Tr. at 27-28 & 39-40.

14. Liaison Counsel for Plaintiffs then indicated that they were working on this very detail for the Coal River proceeding and could have this information finished within thirty days. Id. at 27-28. This Court deferred ruling on other matters to await Plaintiffs' expected submissions. Id. at 41-42.

15. Before this particular colloquy on the Coal River proceeding, the Panel Judges had determined that this three-part inquiry should be undertaken to require Plaintiffs to identify basic elements of their claims - elements that must be included in all complaints. The reasoning behind the three-part inquiry was that (a) this information was something that Plaintiffs should have known at the time they instituted their suits and not something that they could rely upon the discovery process to formulate, and (b) based upon the response of the Supreme Court to the certified questions, this information was necessary for the Court to be able to align Plaintiffs against Defendants and assess the factual basis upon which each Plaintiff was asserting a fault-based cause of action against each Defendant in these flood cases.

Principally, the three-point inquiry was designed to distinguish each Plaintiff's specific allegations against each Defendant and determine whether such allegations stated claims within the causes of action approved by the Supreme Court in In Re Flood Litigation. See September 30, 2006 Hearing Transcript at 15-16.

16. Following the In Re Flood Litigation decision, the Panel Judges ordered Plaintiffs to provide more definite statements of their claims as a matter of fairness to the Defendants and for the benefit of those judicial officers charged with organizing these cases for trial so that all could know at the outset which Plaintiffs were suing which Defendants relative to which land/operation(s) and, most important, what liability-producing activities were alleged as to each.

17. Despite representations that the disclosures or more definite statements were forthcoming, and despite their professed readiness to try the Coal River claims in June 2006, Liaison Counsel for Plaintiffs submitted on March 21, 2006 a motion for an indefinite extension of time to file their Coal River disclosures. On March 27, 2006, Plaintiffs submitted a motion for a generalized continuance of the June 2006 trial date.

18. In an Order granting Plaintiffs a brief extension of time, this Court reiterated the critical three-part inquiry and ordered Plaintiffs to provide the following information on or before April 7, 2006:

- 1) The identity of the specific defendant that is being challenged by each plaintiff;
- 2) The specific operation or specific properties which each plaintiff contends caused harm; and
- 3) The activities [in] which the defendant allegedly engaged that the plaintiffs claim related to that harm.

See March 27, 2006 Memorandum Opinion and Order. This Court considered this to be "basic or core information" that should have been known to Plaintiffs prior to filing their complaints and included therein, not information to be determined through discovery. See Harold's Auto Parts, Inc. v. Mangialardi, 889 So.2d 493 (Miss. 2004).

19. On April 7, 2006, Plaintiffs submitted a pleading entitled "Preliminary Unified Client-Defendant Disclosures."

20. During an April 21, 2006 status conference, this Court offered Defendants until May 12, 2006 to file responses or objections to the Plaintiffs' Preliminary Unified Client-Defendant Disclosures and gave Plaintiffs until May 23, 2006 to respond to those objections and responses. The Court further held that Plaintiffs' April 7, 2006 Preliminary Unified Client-Defendant Disclosures could "not be amended

except to refine or clarify information already contained in them without leave of Court granted upon good cause shown by Plaintiffs." The Court was required to continue the June 2006 trial to September 5, 2006. See May 19, 2006 Order (signed on May 5, 2006).

21. On May 12, 2006, within the time frame established by the Court, Defendants submitted "Defendants' Motions in Response to Plaintiffs' Preliminary Unified Client-Defendant Disclosures Dated 7 April 2006," which they supplemented on May 15 and May 31, 2006 with "Defendants' Supplemental Motions in Response to Plaintiffs' Preliminary Unified Client-Defendant Disclosures Dated 7 April 2006" and "Defendants' Second Supplemental Motion in Response to Plaintiffs' Preliminary Unified Client-Defendant Disclosures dated 7 April 2006." Plaintiffs failed to respond to any of these motions.

22. Defendants' May 12, 2006 filing requested, among other things, that Plaintiffs' April 7, 2006 submission, which was merely a reaffirmation of the generic allegations set forth in Plaintiffs' complaints and amended complaints, be stricken and dismissed or, in the alternative, that Plaintiffs be compelled to provide the basic, core information previously ordered by this Court. Defendants' Motions in Response to Plaintiffs' Preliminary Unified Client-Defendant Disclosures

Dated 7 April 2006 at 3. Defendants maintained that in the absence of strict liability, which the Supreme Court had rejected in In Re Flood Litigation, it was insufficient for Plaintiffs merely to allege that they had claims against landowners, coal mining companies, and timbering companies simply because Plaintiffs reside downstream from Defendants' various properties or operations. Id.

23. At the June 1, 2006 hearing, the Court addressed the insufficiency of the Plaintiffs' Preliminary Unified Client-Defendant Disclosures. Having filed no responses to Defendants' motions, counsel for Plaintiffs argued that their Preliminary Unified Client-Defendant Disclosures met the requirements of the Court's March 27, 2006 Order by explaining the general allegations Plaintiffs were advancing against all Defendants. Every argument, however, inevitably returned to the theory of strict liability ("they are liable because they disturbed the land") - a theory the Supreme Court specifically foreclosed in In Re Flood Litigation, 216 W. Va. 534, 607 S.E.2d 863 (2004). Plaintiffs' counsel's argument to the Court admitted as much:

Mr. Calwell: . . . Now, there are two categories of defendants here; coal-mining defendants, timbering defendants. Presumably each defendant knows what's going on in each defendants' operation.

Surely Mr. Emch's clients know whether they're in the coal-mining business or not.

Surely the timbering people know whether they're in the timbering business or not. So we say, as to each of those people, that's what you did.

If the Court wants to us [sic] make a list and say: Ajax Coal Company, you engaged in mining; Simms Timbering Company, you cut trees, and everything that you did with mining and cutting trees caused "extensive attendant valley fills, haul roads and landing areas," we can do that, but surely --

The Court: That's not going to be enough, Mr. Calwell, and you know it, sir.

Mr. Calwell: What else is there?

The Court: That's just simply a generic -- we're now getting ready to try a lawsuit. The defendant has to be able to know what it is that you claim has caused the harm.

Mr. Calwell: Right, we claim it was a disturbance of the land.

The Court: Unfortunately, this case may have been a lot easier to try if the Supreme Court had said that they're going to recognize a strict liability concept. It would have made it easier for -- but they didn't. . . .

See June 1, 2006 Hearing Transcript at 25-27. In effect, Plaintiffs' Disclosures merely identified that a Plaintiff or group of Plaintiffs located downstream from holdings of a Defendant or group of Defendants asserted claims against that Defendant or group of Defendants; instead of identifying any fault-based claim against each Defendant, Plaintiffs continued to swim in a sea of strict liability.

24. Due to the insufficient information submitted by Plaintiffs, the Court provided a second opportunity for Plaintiffs to comply with this Court's March 27, 2006 Order by submitting more definite statements of their claims within ten days of the June 1, 2006 hearing. See June 1, 2006 Hearing Transcript at 41-42; June 21, 2006 Order at 1-2.

25. On June 12, 2006, McGraw Law Offices submitted "The McGraw Plaintiffs' More Definite Statement of Defendants [sic] Misconduct," James F. Humphreys & Associates, L.C. filed "Plaintiffs' Unified More Definite Statement," and The Calwell Practice filed "Plaintiffs' Memorandum in Support of the Sufficiency of the Calwell Plaintiffs' More Definitive Statements of the Defendants' Misconduct."

26. The McGraw Plaintiffs' More Definite Statement of Defendants [sic] Misconduct generically grouped Defendants into three basic categories: landowner defendants; coal mining defendants; and timber defendants. It averred, still upon information and belief, that every operation of every Defendant within each Defendant group was deficient in exactly the same generic way.

27. The Humphreys Plaintiffs' Unified More Definite Statement generically grouped Defendants into the same three basic categories of landowner defendants, coal mining defendants, and timber defendants. It averred, still upon

information and belief, that every operation of every Defendant within each Defendant group was deficient in exactly the same generic way.

28. The Calwell Plaintiffs' Memorandum in Support of the Sufficiency of the Calwell Plaintiffs' More Definitive Statements of the Defendants' Misconduct was of equal quality, grouping Defendants into landowner defendants, coal mining defendants, and timber defendants. All of the allegations against the landowners who allowed timbering to occur on their property were identical; all of the allegations against landowners who allowed coal mining to occur on their property were identical; all of the allegations against coal mining defendants were identical; and all of the allegations against timbering defendants were identical. The Calwell Memorandum averred, again upon information and belief, that every operation of every Defendant within each Defendant group was deficient in exactly the same way.

29. In response thereto, among other filings, Defendants jointly submitted on June 19, 2006 their "Response to Plaintiffs' 'More Definite Statements'."

30. Defendants maintain that the Plaintiffs do not allege more than ownership and/or operation related to the extraction and removal of natural resources by Defendants and the generic contention that the extraction and removal of natural

resources may produce ancillary conditions that exacerbate naturally-occurring flooding - which states a claim only under a strict liability theory.

31. At the June 21, 2006 hearing, the Court invited all Defendants to file preliminary dispositive motions in response to the Plaintiffs' More Definite Statements, and the Court reinstated the discovery stay because these basic issues relating to the sufficiency of Plaintiffs' pleadings still had not been resolved. See June 21, 2006 Hearing Transcript at 17-18 & 43; July 6, 2001 Order.

32. Within the time prescribed by the Court, Defendants filed various dispositive motions, which this Court has considered pursuant to Rules 12(b)(6) and 12(c) of the West Virginia Rules of Civil Procedure. Generally, these motions focused on the legal insufficiency of the complaints and amended complaints, Preliminary Unified Client-Defendant Disclosures, and More Definite Statements, arguing that "there was no way for any defendant to divine which (if any) of the Plaintiffs actually was claiming against it, which of its properties or interests might be involved with respect to that claim, or what things it did or did not do that Plaintiffs claim made it liable" (Introduction to Defendants' Preliminary Dispositive Motions in Coal Watershed Proceeding at 1-2); that the filing of amended complaints, which merely added parties

plaintiff and defendant to this morass, did nothing to remedy these legal insufficiencies; that Plaintiffs' Preliminary Unified Client-Defendant Disclosures identified what Plaintiff or group of Plaintiffs was making claims against what Defendant or group of Defendants but did not specify "the activities [in] which the defendant allegedly engaged that the plaintiffs claim related to that harm" (id. at 2, quoting the March 27, 2006 Order); and that the More Definite Statements filed by Plaintiffs on June 12, 2006 and June 30, 2006 added nothing (id.).

33. Plaintiffs filed responses to these various motions. Included among Plaintiffs' filings were two affidavits which were characterized as being submitted pursuant to West Virginia Rule of Civil Procedure 56(e), one by Stuart Calwell on behalf of the Calwell Plaintiffs and the McGraw Plaintiffs and the other by David Cecil on behalf of the Humphreys Plaintiffs. Both of those affidavits admit that the Plaintiffs are unable to provide any factual foundation to support the generic, fault-based allegations in their various complaints and amended complaints and state that they need discovery to try to find that information. In other words, at the time the lawsuits were filed and now some five years later (after having been required repeatedly by this Court and given full opportunity to provide this basic, core information),

Plaintiffs did not and do not have any factual predicate as to any Defendant for the fault-based causes of action they generally pled against all Defendants.

34. Plaintiffs suggest that the law and "notice" pleading permit them to file a lawsuit collectively against multiple defendants without a liability foundation as to any and that they may thereafter seek such foundation through discovery. Presumably, Plaintiffs will dismiss any Defendant about which they cannot discover any culpable conduct related to their alleged loss. This approach is not in accordance with our Rules and is unfair and prejudicial. 31.

35. On September 30, 2006, the Court held a hearing specifically relating to the various dispositive motions filed by Rowland Land Company, Penn Virginia Operating Company, LLC, Penn Virginia Coal Company, Penn Virginia Oil and Gas Company, Penn Virginia Resources, White Oak Land Company, Pardee Resources Group, Inc., and Massey Coal Services, during which this Court invited and entertained arguments from counsel upon the sufficiency of Plaintiffs' complaints, amended complaints, and disclosures/more definite statements under Rules 12(b)(6) and 12(c). The Court ruled on the record at that hearing that Plaintiffs had failed, as a matter of law, to state a claim upon which relief can be granted.

36. On November 22, 2006, Plaintiffs submitted their Motion of Plaintiffs to Set Aside Court Rulings Made on the Record at the September 30, 2006 Hearing, even though this Court had not yet issued an opinion or order relating to its oral ruling.

37. In correspondence dated December 4, 2006, the Court asked Defense Counsel to prepare proposed findings of fact and conclusions of law sustaining their various motions to dismiss pursuant to Rules 12(b) and 12(c). The Court further asked Defense Counsel to respond to the Motion of Plaintiffs to Set Aside Court Rulings Made on the Record at the September 30, 2006 Hearing.

38. On December 15, 2006, Defendants filed their Response to Motion of Plaintiffs to Set Aside Court Rulings Made on the Record at the September 30, 2006 Hearing and their proposed Findings of Fact and Conclusions of Law.

CONCLUSIONS OF LAW

1. This Court has evaluated the sufficiency of Plaintiffs' averments under Rules 12(b)(6) and 12(c) based upon Plaintiffs' complaints and amended complaints; Plaintiffs' Preliminary Unified Client-Defendant Disclosures provided on April 7, 2006; The McGraw Plaintiffs' More Definite Statement of Defendants [sic] Misconduct, Plaintiffs' Memorandum in Support of the Sufficiency of the Calwell

Plaintiffs' More Definitive Statements of the Defendants' Misconduct, and Plaintiffs' Unified More Definite Statement filed on June 12, 2006; and the Calwell and McGraw-Atkins Plaintiffs' Notice of Filing Revised Client-Defendant Lists/Supplemental Response to the Motion of Defendants for a More Definite Statement filed on June 30, 2006, all of which this Court FINDS as a matter of fact and law constitute efforts by Plaintiffs to comply with this Court's orders that they provide more definite statements of their allegations against each Defendant and are "pleadings" or supplements to pleadings within the meaning of Rule 12(c). For purposes of the rulings made herein, this Court did not consider any factual information outside of these materials and arguments made relating to them.

2. "The purpose of a motion under [Rule 12(b)(6)] is to test the formal sufficiency of the complaint." John W. Lodge Distributing Co. v. Texaco, Inc., 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). Further, the Supreme Court has held that "[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 2, McCormick v. Walmart, 215 W. Va. 679, 600 S.E.2d 576 (2004)

quoting Conley v. Gibson, 355 U.S. 41, 45- 46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). However, it is also well-settled that conclusory allegations without factual foundation will not survive a motion to dismiss under Rule 12(b)(6). *NOT ON*

3. A motion for judgment on the pleadings under Rule 12(c) "is essentially a delayed demurrer or a motion to dismiss," and the rules approach such a motion "as a motion to dismiss for failure to state a claim." Copley v. Mingo Co. Bd. of Ed., 195 W. Va. 480, 484, 466 S.E.2d 139, 143 (1995). The standard under Rule 12(c) "virtually is identical to a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure." Kopelman and Associates, L.C. v. Collins, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996). Under Rule 12(c), the pleadings should be read liberally and the well-pleaded allegations of the pleadings should be accepted as true. Id. (citing State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995)). "Conversely, although the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted." Id. (citing Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59, 65 (1984) (emphasis added)).

4. The Supreme Court has stated that "despite the allowance in Rule 8(a) that the plaintiff's statement of the claim be 'short and plain,' a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint' A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." Williamson v. Harden, 214 W. Va. 77, 79-80, 585 S.E.2d 369, 371-72 (2003) (internal quotation omitted) quoting State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995); Harrison v. Davis, 197 W. Va. 651, 657-58 n.17, 478 S.E.2d 104, 110-11 n.17 (1996).

5. It is the law of West Virginia that allegations in a complaint must be supported by essential factual statements. General allegations that are mere sketchy generalizations of a conclusive nature unsupported by operative facts will not withstand a motion to dismiss pursuant to Rules 12(b)(6) and Rule 12(c). Fass v. Nowsco Well Service, LTD, 177 W. Va. 50, 350 S.E.2d 562 (1986).

6. Where strict liability does not apply, there must be an allegation of some liability-producing act or omission related to the harm alleged on the part of each party against which recovery is sought. General allegations that all defendants engaged in the normal activities associated

with the conduct of their lawful businesses without any specific information as to each defendant to indicate that such activities were conducted improperly or unreasonably are insufficient.

7. When a claim is made outside the realm of strict liability, each plaintiff should investigate before filing suit and allege with an adequate level of specificity the liability-producing acts or omissions of each defendant against whom a claim is asserted.

8. The various complaints and amended complaints do not properly join the claims of multiple plaintiffs against multiple defendants under Rule 20 of the West Virginia Rules of Civil Procedure.

9. Our rules of procedure require, at a minimum:

a. that each plaintiff provide "a short and plain statement of the claim" that discloses why that plaintiff "is entitled to relief," and "a demand for judgment for the relief the pleader seeks." W. Va. R. Civ. P. 8(a);

b. that "averments of time and place are material and shall be considered like all other averments of material matter." W. Va. R. Civ. P. 9(f); and

c. that "each claim founded upon a separate transaction or occurrence . . . shall be stated in a separate count" W. Va. R. Civ. P. 10(b).

These requirements apply to each plaintiff's claims against each defendant.

10. So-called "mass litigation" filings require greater rather than lesser vigilance regarding the sufficiency of pleading. Such filings must meet the requirements of Rule 20 where multiple plaintiffs attempt to join their claims against multiple defendants. The requirement that a plaintiff have basic, core information as to each claim he or she asserts against each individual defendant may not be sidestepped or avoided by unilateral "mass" filings.

11. Without a specific allegation of culpable conduct tied to a particular location or operation, a Defendant that may have owned or operated far and wide for many years has no true notice of the claims asserted against it.

12. Specificity is also required in "mass" filings such as this if courts are to be able to organize claims for disposition.

13. The situation before this Court, at its essence, presents the following fundamental questions: May Plaintiffs, under the guise of so-called "mass litigation," file

complaints in which scores or hundreds or thousands of plaintiffs collectively sue scores or hundreds of defendants collectively and indiscriminately upon the same generic factual allegations without having any specific factual basis indicating actionable conduct on the part of any defendant with respect to any plaintiff? If they have filed such complaints without factual bases, may they survive a motion to dismiss for failure to state a claim or for judgment on the pleadings by arguing that they may find such factual bases later through discovery? This Court is of the opinion that our system of justice does not contemplate or permit plaintiffs to bring suits implicating scores or hundreds of defendants without a factual basis as to any of them and then attempt through discovery to identify such bases, and accordingly answers these questions "no."

14. In the interest of economy and fundamental fairness to the litigants, this Court has a duty to ascertain as to each Plaintiff and Defendant whether the Plaintiffs have stated any basis for filing suit other than strict liability for extracting natural resources.

15. It is within the discretion of the Panel Judges and this Court to order that more definite statements be filed in this action. This case was pled as a class action, and the request for class certification was later withdrawn. At the

time of the initial pleading, a cause of action for strict liability was pled. While the complaints and amended complaints could arguably survive a motion to dismiss under a strict liability theory, it was determined in In Re Flood Litigation that strict liability does not apply. In the complaints and amended complaints, thousands of plaintiffs made vague and conclusory allegations against more than two hundred defendants. [The complaints and amended complaints did not specify which plaintiffs were suing which defendants, which defendants' operations were at issue,] or what was alleged to be improper with regard to any specific defendant operation. The three-part inquiry and the requests for more definite statements were designed to test the formal sufficiency of the various complaints and amended complaints. See John W. Lodge Distributing Co. v. Texaco, Inc., 161 W. Va. 603, 604-05, 245 S.E.2d 157, 158 (1978).

16. Based upon the filings and hearings leading up to the September 30, 2006 hearing, based upon the arguments of counsel during that hearing, and after review of the pleadings and motions filed in this case, the Court **FINDS** that Plaintiffs' complaints and amended complaints are deficient. The Court further **FINDS** that the Court provided Plaintiffs at least two opportunities to possibly breathe some oxygen into their otherwise deficient complaints and amended complaints by

requiring Plaintiffs to make disclosures in response to the three-part inquiry first set out in this Court's March 27, 2006 Order, and that each and every one of those efforts is also deficient.

17. Plaintiffs' complaints and amended complaints do not state a claim upon which relief can be granted, and the Plaintiffs have not availed themselves of opportunities presented by the Court, in light of the generic manner in which these cases were pled and repled by Plaintiffs, for them to make a more definite statement of their claims.

18. Plaintiffs do not have specific information relative to any Defendant other than some relationship with the ownership and/or operation of extracting and removing natural resources and a contention that these activities exacerbate naturally-occurring flooding. The complaints and amended complaints lack sufficient specificity to state a claim against any Defendant other than upon a theory of strict liability, and strict liability was rejected by our Supreme Court in In Re Flood Litigation.

19. Although the information necessary to answer the three-part inquiry posed by the Court in its March 27, 2006 Order is the type of information that must be known prior to filing suit, the Court **FINDS** that Plaintiffs did not provide the required information at any time. Plaintiffs have never

provided the basic, core information that must be included in all complaints. This information was not provided in the Plaintiffs' complaints, in the Plaintiffs' amended complaints, in Plaintiffs' Preliminary Unified Client-Defendant Disclosures provided on April 7, 2006, or in the supplemental more definite statements provided on June 12, 2006 and June 30, 2006.

20. The West Virginia Rules of Civil Procedure are not intended to and do not allow Plaintiffs to file unfounded lawsuits for the purpose of engaging in "fishing expeditions" to determine whether their broad allegations may be supported by facts unknown to the pleader at the time the pleading is filed. See W. Va. R. Civ. P. 11.

21. Complaints may not be filed where plaintiffs intend to find out in discovery whether or not, and against whom, they may have a cause of action. [Plaintiffs' counsel may not bring suit until sufficient information is obtained and plaintiffs' counsel believes in good faith that each plaintiff has an appropriate cause of action to assert against a defendant or defendants in the jurisdiction where the complaint is to be filed.] See Harold's Auto Parts, Inc. v. Mangialardi, 889 So.2d 493 (Miss. 2004). A clients's mere suspicions do not create a sufficient factual basis for filing

a lawsuit. Bredehoft v. Alexander, 686 A.2d 586 (D.C. Ct. App. 1996).

22. Plaintiffs admit, both directly and indirectly, that any "knowledge, information, and belief" they may hold regarding any Defendant's liability to them was not formed after an inquiry reasonable under the circumstances.

23. Federal courts have agreed that notice pleading requirements should not be construed to allow plaintiffs to engage in "fishing expeditions" when they cannot point to facts sufficient to support the allegations set forth in the complaint. See, e.g., DM Research, Inc. v. College of American Pathologists, 170 F.3d 53, 55 (1st Cir. 1999); Pickern v. Pier 1 Imports (U.S.), Inc., 339 F.Supp.2d 1081 (E.D. Cal. 2004); Town of Norwood, Mass. v. New England Power Company, 202 F.3d 408 (1st Cir. 2000).

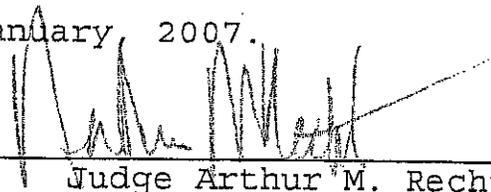
24. Moreover, this Court **FINDS** that the allegations set forth in "Plaintiffs More Definite Statement of Defendants [sic] Misconduct" submitted by the McGraw Law Offices on June 12, 2006; in "Plaintiffs' Unified More Definite Statement," submitted by James F. Humphreys & Associates, L.C.; and in "The Calwell Plaintiffs' More Definitive Statement of Defendants' Misconduct," filed on June 12, 2006, were conclusory in nature and that no factual foundation was provided to support any of the Plaintiffs' bald assertions.

25. Upon reviewing the complaints, amended complaints, the more definite statements provided to the Court on April 7, 2006, and the supplemental more definite statements provided on June 12, 2006 and June 30, 2006, the Court hereby **CONCLUDES** that the Plaintiffs' complaints, amended complaints, and more definite statements fail to state a claim upon which relief can be granted under Rules 12(b)(6) and 12(c).

26. Accordingly, pursuant to Rule 12(b)(6) and 12(c) of the West Virginia Rules of Civil Procedure, this Court hereby **DISMISSES WITH PREJUDICE** each and every claim relating to the July 8, 2001 flooding asserted by each and every Plaintiff within the Coal River watershed.

27. The Court **FINDS** that it need not at this time reach any of the more specific motions submitted by Defendants because this ruling is dispositive as to the claims asserted against each of them.

ENTER this 18th day of January, 2007.



Judge Arthur M. Recht

The Clerk is directed to send an attested copy of this Order to all counsel of record.

This is a true copy of an order entered in this office on the 18th day of January, 2007
of JAM
JANICE D. DAVIS, Circuit Clerk of
Raleigh County, West Virginia
By: OB
Deputy