

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of May, 2008, the following order was made and entered:

IN RE: Request for Comments on Proposed Amendments to The West Virginia Trial Court Rules, Rule 26. Mass Litigation.

On a former day came the Mass Litigation Panel and presented to the Court proposed amendments to Rule 26 of the West Virginia Trial Court Rules, Mass Litigation.

Upon consideration whereof, the Court is of opinion to and does hereby approve a period of public comment on the proposed amendments to the Rule, to conclude on July 7, 2008, with comments to be filed with the Clerk of this Court. Insertions are indicated by underscoring, deletions by strikethrough, to read as follows:

“WEST VIRGINIA TRIAL COURT RULES

26.01. Mass Litigation.

There is hereby established a Mass Litigation Panel.

26.0102. Mass Litigation Panel and Procedure Appointments.

(a) The Mass Litigation Panel shall consist of six (6) active or senior status circuit judges who shall be appointed by the Chief Justice, with the approval of the full Court. Each shall serve on the Panel for a term of three (3) years, two (2) to be appointed each year. There shall be no prohibition against serving successive terms. The Chief Justice shall annually designate ~~one of the a panel members of the Panel~~ a panel member to serve as its chairman to preside over the activities of the Panel and to report to the Supreme Court of Appeals.

26.03. Application Generally.

These rules apply to and govern all cases in the circuit courts referred to the Mass Litigation Panel. These rules shall not be construed to limit the jurisdiction of the circuit courts as established by law.

26.04 Definitions.

For purposes of this Rule, the following definitions shall apply:

(a) "Mass litigation" shall be defined as two (2) or more civil actions pending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.

(b) "Liaison Counsel" shall be defined as attorneys designated by the presiding judge to act on behalf of other counsel and parties in addition to their own clients and charged with essentially administrative matters, including communications between the court and other counsel, receiving and distributing notices, orders, motions, and briefs on behalf of the group, convening meetings of counsel, advising parties of developments, and otherwise assisting in the coordination of activities and positions. In the absence of an agreement of the parties, the presiding judge is authorized and may appoint liaison counsel. The presiding judge has authority, after consultation with all counsel, to determine the method and manner of compensation for liaison counsel.

(c) "Lead Counsel" shall be defined as attorneys designated by the presiding judge and charged with formulating and presenting positions on substantive and procedural issues during the litigation by initiating and organizing discovery requests and responses, conducting the principal examination of deponents, employing experts, arranging for support services, serving as the principal attorneys at trial for their respective plaintiff or defense group and organizing and coordinating the work of the other attorneys on their respective plaintiff or defense trial team. In the absence of an agreement of the parties, the presiding judge is authorized and may appoint lead counsel. The presiding judge has authority, after consultation with all counsel, to determine the method and manner of compensation for lead counsel.

(d) "Certificate of Service" shall be defined as the document prepared by liaison counsel from the Notices of Appearance and certified by the presiding judge as the official certificate of service for the case.

(e) "Notice of Appearance" shall be defined as the document prepared by counsel for each party containing the name of the party or parties each counsel represents, the name of the attorney, name of firm, mailing address, telephone number, fax number, and electronic mail address. All counsel shall file and serve a Notice of Appearance on all parties.

(f) "Notice of Withdrawal" shall be defined as the document prepared by counsel who no longer represents a party or parties for whom a Notice of Appearance has been filed in

a civil action referred to the Mass Litigation Panel. All counsel shall file and serve a Notice of Withdrawal on all parties if counsel no longer represents a party or parties in a civil action referred to the Mass Litigation Panel.

26.05. Powers Generally.

(a) All civil actions transferred pursuant to this rule shall be conducted by a Panel member or members or by a circuit or senior status judge or judges who are recommended by the Panel to assist in activities necessary to resolve actions or issues and assigned by the Chief Justice. Any Panel member or any judge to whom actions are assigned shall be authorized to exercise the powers of a circuit judge in any circuit in which actions are pending or have been transferred for the purpose of conducting proceedings consistent with the Panel's case management and trial methodologies.

(b) With majority agreement of the Panel, the Panel member or judge assigned to preside over the case may transfer actions or parts thereof from one circuit to another in order to facilitate case management or trial methodologies.

26.06. Duties Generally.

~~(b) The Mass Litigation Panel shall have the following responsibilities:~~

~~1. To develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which may be referred to it by the Chief Justice;~~

~~2. To preside over actions referred to it by the Chief Justice and to provide assistance and guidance to any other circuit judge within the State upon assignment assigned by the Chief Justice;~~

~~3. To make recommendations to the Chief Justice on the transfer of actions from one circuit to another in order to facilitate any case management or trial methodologies developed by the Panel, and to request the assignment of additional circuit or senior status judges to assist in any activities that may be necessary to resolve actions or issues in actions that may be referred to the Panel;~~

~~4. To recommend rules for adoption by the Supreme Court of Appeals for the conduct of the business of the panel Panel;~~

~~5. To report periodically to the Chief Justice concerning its activities; and~~

~~6. To take such action as is reasonably necessary and incidental to the powers and responsibilities expressly conferred by this rule or by the specific directive of the Chief Justice;~~

develop and implement plans for central organization, including, but not limited to staffing, record keeping, and other assistance; for the management of mass litigation cases; for the transfer and storage of all mass litigation case files; to implement appropriate technology and to adopt necessary rules and procedures.

~~(c) "Mass litigation" shall be defined as two (2) or more civil actions pending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common~~

~~questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.~~

~~(d) Any coordinated or consolidated actions transferred pursuant to this rule shall be conducted by a member or members of the Panel and/or judge to whom the actions are assigned by the Chief Justice. Any member of the Panel or any circuit judge to whom actions are assigned under this rule shall be authorized to exercise the powers of a circuit judge in any circuit in which actions are pending or have been transferred for the purpose of conducting any proceedings consistent with the Panel's case management and trial methodologies.~~

26.07. Motion to Transfer Refer Actions.

~~(e)~~(a) Any party, judge, or the Administrative Director of the Courts may seek a referral ~~to the Panel for transfer of actions to the Panel~~ by filing a Motion to Refer Civil Action to the Mass Litigation Panel, accompanied by a completed Docketing Statement in the form contained at Appendix A to these Rules, in any circuit court in which a qualified case is pending. The motion shall identify the nature of the actions sought to be referred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular cases in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future.

Said motion may be filed within six (6) months after the filing date of the case in which the motion is being filed; provided, however, that a judge or the Administrative Director may file said motion at any time, if it is determined that litigation qualifies as mass litigation and that the litigation may be resolved more expeditiously by reference referral to the Panel.

The motion and docketing statement shall be served on all the parties, including those parties not represented by counsel, all judges in actions which are the subject of the motion, and the Administrative Director. Any party shall have twenty (20) days after the motion is filed to file a reply memorandum stating its position and opposition, if any. Any affected judge may file a reply memorandum within ~~ten (10)~~ twenty (20) days thereafter.

The filing of a motion to refer shall not operate as a stay of the civil action(s).

(b) After the response periods have expired, the judge of the court shall direct the circuit clerk of the court in which the motion was filed shall to forward to the Office of the Clerk of the West Virginia Supreme Court of Appeals and the Chief Justice a copy of the motion and all reply memoranda filed in the case. Upon review of the motion and reply memoranda, the Chief Justice may act directly upon the motion or may direct the Panel to conduct a hearing and make recommendations concerning coordinated or consolidated proceedings under this rule. The Chief Justice shall act upon the motion ~~within ten (10)~~ days.

~~If the Chief Justice so directs, motion is referred to the Panel, the Panel or a designated member of the a Panel member or members shall hold a hearing to receive evidence and entertain arguments by the parties or any judge, and shall submit findings of fact and a recommendation to the Chief Justice. Said recommendation shall be provided to the Chief Justice within twenty (20) days from the date the matter was referred to the Panel.~~

The Chief Justice, whether acting directly upon the motion or upon the recommendation of the Panel, shall enter an order either granting or denying the motion, or by providing modified relief consistent with this rule ~~within ten (10) days.~~ A copy of the order shall be filed with the Office of the Clerk of the West Virginia Supreme Court of Appeals.

~~(f) The filing of a motion under subsection c of this rule shall not operate to stay discovery in any affected case in any instance or to delay a scheduled trial unless a stay of a trial is ordered by the Chief Justice.~~

~~(g) Nothing contained in this rule shall be deemed to affect the authority of a circuit judge to act independently under the provisions of W. Va. R.Civ.P. 42.~~

26.08 Transfer of Actions.

If granted, the Office of the Clerk of the West Virginia Supreme Court of Appeals shall send a copy of the order granting the referral to the circuit court(s) where the action is filed, the chair of the Mass Litigation Panel and all parties. Upon receipt of order granting the referral, the circuit court clerk(s) shall forward the entire case file(s) to the Office of the Clerk of the West Virginia Supreme Court of Appeals. Once assigned to the Mass Litigation Panel, all documents to be filed in the case shall be filed with the Office of the Clerk of the West Virginia Supreme Court of Appeals, clearly identifying the Mass Litigation Panel number assigned to the case. The Clerk shall designate staff to function as a deputy clerk for the county where the case was filed and assist the Panel. A Mass Litigation Manager may be employed by the Court to work in close coordination with the Panel to manage cases under the direct supervision of the Clerk of the Supreme Court of Appeals.

26.09 Assignment of Transferred Actions.

An order granting a motion to refer shall act as a transfer of the civil action(s) to the Mass Litigation Panel. Upon receipt of the referral order, the Panel chair shall, with the advice and consent of the Panel, select and assign one or more Panel judges to preside. When a case is assigned to more than one member of the Panel, to the extent possible, appropriate measures shall be adopted to insure uniformity of decisions, including the requirement that all pre-trial dispositive motions be decided by a majority of the judges assigned to preside over the case. If the Panel requests the assignment of additional circuit or senior status judge(s) for assistance, the request and recommendation shall be filed with the Clerk of the Supreme Court of Appeals and sent to the Chief Justice for the assignment. The assignment shall be sent by the Clerk to all parties.

The chair may act on any properly filed motions until the case is assigned.

26.10 Motions to Join in Transferred Cases.

Any case to be transferred and joined with an existing mass litigation case shall be accompanied by a Motion to Join and filed in the office of the circuit clerk where the case

is pending and the Office of the Clerk of West Virginia Supreme Court of Appeals. The motion shall set forth the identity and nature of the actions sought to be transferred, the number of plaintiffs, the number of defendants, the number of actions pending, the basis for the request, a listing of the particular cases in all the circuits for which a referral is being requested, and, if known, whether additional related actions may be filed in the future. The presiding judge assigned to the mass litigation case shall grant or refuse the motion by written order. The order granting or refusing the motion shall be sent by the Clerk to all parties, the circuit court where the action is pending, and the Panel chair of the Mass Litigation Panel.

If the initial order of referral does not provide the authority for the Panel to transfer subsequently filed cases, the procedure under Rule 26.07 must be followed.

26.11. Class Actions.

If any case transferred to the Panel becomes certified as a class action by any court pursuant to Rule 23, R.C.P., the Panel may request the Chief Justice remove the case from the Panel.

26.12. Official Reporter.

In each case, the presiding judge shall determine and designate the official court reporter who shall transcribe the proceedings and no other transcriber or transcription will be permitted without consent of the presiding judge.

26.13. Pro Hac Vice Counsel.

With the consent of court, pro hac vice counsel may appear and participate in depositions or other proceedings without the presence of local counsel.

26.14

If these Rules conflict with other rules or statutes, these rules shall apply; otherwise all applicable Rules apply.”

A True Copy

Attest: _____
Deputy Clerk, Supreme Court of Appeals

MASS LITIGATION PANEL DOCKETING STATEMENT

In the Circuit Court of _____ County

Style of case:

Civil Action No.:

Circuit Court Judge:

Date of Filing:

v.

CASE INFORMATION

State briefly the nature of the case and the relief sought. (Attach an additional sheet if necessary).

State the name and address of each party. (Attach an additional sheet if necessary).

CASE MANAGEMENT INFORMATION

Name of the party or parties filing this civil action:

List counsel for each party represented in this civil action. Provide each counsel's name, WV State Bar Number, firm name, address, electronic mail address, facsimile number and telephone number. (Attach an additional sheet if necessary).

If a party is not represented by counsel, provide the following requested information for that party: name, address, electronic mail address, telephone number and facsimile number. (Attach an additional sheet if necessary).

Name of attorney or individual filing this Docketing Statement:

Attorney _____ Non-Attorney
(self represented)

Will you be handling the trial?

Yes _____ No _____

If yes, provide name, firm name, address, electronic mail address, facsimile number and telephone number. (Attach an additional sheet if necessary).

Signature: _____

WV Bar Number: _____

Date: _____

Instructions for preparation of Mass Litigation Panel Docketing Statement

1. Pursuant to Trial Court Rule 26.07(a), a docketing statement must accompany every case in which a Motion to Refer Civil Action to the Mass Litigation Panel is filed.
2. Remember to attach additional pages to the docketing statement containing any extended answers to questions on the docketing statement.
3. Pursuant to Trial Court Rule 26.07(a), the completed docketing statement must be filed with the motion and served on all the parties, including those parties not represented by counsel, all judges in actions which are the subject of the motion, and the Administrative Director. The docketing statement must be in the form contained at Appendix A to the Trial Court Rules or in a substantially similar format. A certificate of service, verifying service of the docketing statement on all of the parties to the proceeding must also be attached to the motion to refer.
4. Only one docketing statement shall be filed. The parties should confer and decide who will file the docketing statement.
5. The docketing statement should briefly address the nature of the action. However, the docketing statement is not the appropriate document for making arguments or motions. While every effort should be made to include in the docketing statement all issues to be presented in the circuit court, the omission of an issue from the docketing statement will not affect the jurisdiction of the circuit court to consider all issues presented by the complaint.
6. If another party to the proceeding believes that the docketing statement is inaccurate or incomplete, that issue should be addressed at the initial scheduling conference.