

Chapter 13**West Virginia Flood Litigation:
Land-Use Companies Across the Nation
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§ 13.01. Introduction.

Rain gathered and tumbled down the hills and through the valleys of southern West Virginia throughout July 2001 and May 2002 in near-record proportions. On July 8, 2001, alone, some sources indicate that more than 6.77 inches of rain fell within a three- to six-hour period in parts of six major watersheds and 51 subwatersheds in a seven-county area. On May 2, 2002, southern West Virginia received up to five inches of rain within six hours. Accumulations of such vast quantities of water proved devastating for southern West Virginia communities where mountainous terrains served to funnel the falling waters through communities, destroying hundreds of homes, damaging thousands more, and claiming the lives of at least 13 residents. After the July 2001 floods, the federal government allocated more than \$143,000,000 in disaster assistance to southern West Virginia, and after the May 2002

floods, 6,142 more southern West Virginia residents registered for federal assistance—4,600 in McDowell County alone.¹

As the rains subsided and the water level dropped, despair turned to confusion as many southern West Virginians began seeking an explanation as to why the rainfall had delivered such a devastating blow to their communities. Some voices began to say, “Look to the hills!,” pointing to land-use activities within the mountains. Soon thereafter, 49 lawsuits were filed by southern West Virginia residents blaming various industries including mining, oil and gas, and timber companies operating in southern West Virginia for the damage caused by flooding. These lawsuits spanned eight counties, included over 3,000 named plaintiffs, and contained class action allegations. The West Virginia Supreme Court of Appeals consolidated all cases arising from the July, 2001 flooding before a three-judge Mass Litigation Panel (MLP), and because of the extraordinary nature of the rainfall and flooding and the uncertainty of the application of existing law to the extraordinary event, the MLP stayed all actions pending review of the legal theories relied upon by the plaintiffs. The Mass Litigation Panel sought to determine at an early stage whether the legal theories asserted in the various complaints stated a cause of action under West Virginia law. The Mass Litigation Panel, therefore, examined whether the legal theories and counts in the complaints could pass muster under the standard applicable to a motion for judgment on the pleadings pursuant to Rule 12(c) of the West Virginia Rules of Civil Procedure. Under this standard, the factual allegations set forth in the complaint are taken as true and the claim will be dismissed only if it appears that plaintiff can prove no set of facts that will support a claim for relief.

Given this standard, it was apparent that some of the plaintiffs’ claims such as negligence and unreasonable use of land causing diversion of surface water were recognized causes of action under West Virginia law. Several claims, however, asserted novel theories of liability not yet addressed in West Virginia, and certainly not in the context of a catastrophic natural disaster which on its face arose from forces of nature, not commercial land use activities. This chapter discusses the legal theories existing in West Virginia at the time the 2001 and 2002 floods occurred, the legal theories adopted and modified by the West Virginia Supreme Court of Appeals to fit this extraordinary situation, and the portability of those legal theories to other jurisdictions.

¹ <http://www.fema.gov/news>.