

Ranking the States: LAWSUIT CLIMATE 2010



Conducted for the U.S. Chamber
Institute for Legal Reform by
Harris Interactive Inc.
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Arkansas: Survey Gives Bottom 10 Ranking to State Liability System¹ *Arkansas ranks number 44 out of 50 states in survey of corporate lawyers*

Here are some possible explanations:

The Arkansas Supreme Court is chipping away at the progress made toward a fair system.

- The Arkansas Supreme Court recently struck down several tort reform measures that were intended to reduce healthcare costs, fairly allocate damages, and weed-out meritless claims. For example, in 2009, the Arkansas Supreme Court struck down two provisions of the state's comprehensive Civil Justice Reform Act of 2003.²
 - First, the court invalidated a provision that would have allowed a jury to allocate fault among all of the individuals or entities that contributed to the plaintiff's injuries, whether or not they are parties in the lawsuit.
 - Second, the court invalidated a reform that would have precluded excessive awards for "phantom damages," sticker-price amounts for medical services that were not actually paid directly by the plaintiff or on the plaintiffs' behalf by a private insurer, Medicare, or Medicaid. Rather, the law ensured that the jury would hear accurate evidence of the amount of medical costs that were actually paid by or on behalf of the plaintiff. This reform would have significantly reduced healthcare costs.
 - The effect of these rulings is to declare that the state legislature is powerless to address unfair and unsound practices in civil litigation.
- An Arkansas trial court has declared the flexible limits on punitive damages contained in the 2003 reforms unconstitutional. Last year, the Arkansas Supreme Court dismissed the appeal on procedural grounds because the lower court did not finalize its decision on all the claims and defendants.³ Future challenges are expected.
- These decisions represent substantial steps backwards in reforming the state's civil justice system and present an obstacle to future legislative reform.
 - Arkansas' 2003 reforms are credited with curbing medical malpractice insurance rates and bringing new carriers to the state. Since August 2008 alone, four more insurance companies entered Arkansas to write medical liability insurance, bringing the total to 16 companies and helping stabilize rates. The medical community is concerned that the Arkansas judiciary's chipping away at the law places such progress in jeopardy.⁴

Arkansas eases the standards for filing class actions in the state.

- The Arkansas Supreme Court has shown a lenient attitude toward class certification, rejecting the widely-accepted requirement that courts conduct a choice-of-law analysis before certifying a class that consists of plaintiffs from around the country. Rather than conduct a

rigorous choice-of-law analysis, the court prescribed to the theory that “a class can always be decertified at a later date if necessary.”⁵

- Now, Arkansas courts provide an appealing forum for lawyers seeking to bring multi-state or national class actions.

Arkansas’ litigation climate may impact job creation.

- In the 2010 Harris survey, two-thirds (67%) of respondents report that the litigation environment in a state is likely to impact decisions at their company, such as where to locate or do business.
- With an unemployment rate of 7.6%, Arkansas should be concerned about creating new jobs and bringing new employers to the state.
- As Arkansas’ leaders work to recover from the current economic downturn, they need to think about whether the policies they are considering will help create jobs or create lawsuits and expand liability against local businesses.

¹ Go to www.jobsnotlawsuits.com for a copy of “Ranking the States: Lawsuit Climate 2010 State Liability Systems Survey” conducted for the U.S. Chamber Institute for Legal Reform by Harris Interactive Inc.

² *Johnson v. Rockwell Automation, Inc.*, No. 08-1009, 2009 WL 1218362 (Ark. Apr. 30, 2009).

³ *Beverly Enterprises Inc. v. Keaton*, No. 08-834 (Ark. Sept. 24, 2009).

⁴ Mark Friedman, *Tort Reform Rollbacks Worry Arkansas Medical Society*, Ark. Business, Oct. 12, 2009, at <http://www.arkansasbusiness.com/article.aspx?aID=117595&view=all>.

⁵ *General Motors Corp. v. Bryant*, 285 S.W.3d 634 (Ark. 2008).