

Ranking the States: LAWSUIT CLIMATE 2010



Conducted for the U.S. Chamber
Institute for Legal Reform by
Harris Interactive Inc.
www.jobsnotlawsuits.com

West Virginia: Survey Gives Lowest Ranking to State Liability System¹

Rank is 50 out of 50 states, but state leaders taking positive steps towards reform

There are a few bright spots in West Virginia's legal climate.

- The West Virginia legislature took a positive step forward by passing HB 4352, which authorizes the establishment of business courts in the most populous areas of the state. The legislation would simply allow circuit courts to create a business court division to hear technical commercial issues and disputes between businesses. It awaits the Governor's signature.
 - Fifteen states operate business courts. This legislation brings West Virginia in line with other key states and may help attract businesses to the state that may have chosen other states for significant business interests.
- On March 3, 2010, West Virginia Circuit Judge Ronald E. Wilson imposed important asbestos bankruptcy trust disclosure requirements on asbestos plaintiffs who bring tort claims in the state. This a solid step forward in the long term efforts to address the increasing role that asbestos bankruptcy trusts currently play in the tort system.

Here are some possible explanations for the state's low ranking:

Lack of mandatory appellate review is unique to West Virginia courts.

- West Virginia's legal environment is exacerbated by the inability of litigants to appeal adverse court decisions. West Virginia does not grant civil or criminal defendants an automatic right to an appeal.
- Governor Joe Manchin sought to correct this unfair process, and his Independent Commission on Judicial Reform strongly recommended establishment of an intermediate appellate court system and to provide parties with a right to appeal.² Despite consensus on the need for reform, legislation to create an intermediate appellate court failed in the Senate Finance Committee in February 2010.³

West Virginia's Attorney General works closely with the plaintiffs' bar.

- West Virginia Attorney General Darrell McGraw contributes to the state's poor litigation climate by pursuing shakedown lawsuits against private industry in which he hires private contingency fee lawyers, often campaign contributors, to sue on behalf of the state.
- Earlier this year, McGraw hired his brother's nephew to lead the state's antitrust lawsuit against Bank of America.⁴
- A federal appeals board recently ruled that West Virginia owed more than \$2.7 million to the federal government because of a settlement engineered by McGraw and his contingency fee counsel. Instead of distributing a \$10 million settlement to the three state agencies represented in the suit, he spread funds to pet projects, but only after paying the outside counsel that contributed to his campaigns one-third off the top of the settlement.⁵

West Virginia courts have deviated from established legal principles.

- Although a key West Virginia court has taken an important step to address asbestos litigation problems, the courts generally have been inhospitable to defendants.
- West Virginia law allows uninjured plaintiffs to sue for medical monitoring even when testing is not medically necessary or beneficial.⁶
- West Virginia is one of a handful of states that allows a controversial procedure in which a jury may consider whether to award punitive damages even before the jury determines whether or not the defendant is liable for the plaintiff's injury.⁷

- West Virginia's high court has declared the doctrine that allows courts to dismiss cases with little or no connection to the state to be "a drastic remedy."⁸ Not only has the state's high court taken a weak stance on forum shopping, in 2006, it invalidated the legislature's attempt to limit filings by nonresidents.⁹
- West Virginia has a reputation for allowing mass consolidation of claims without the safeguards of class action treatment that require similarity of the facts and law applicable to each claimant.¹⁰ This practice may force a defendant to settle without regard to the merits of the case.

West Virginia has a history of extraordinary awards.

- The problems of West Virginia's legal climate often translate into unprecedented awards. For example, over the past few years, West Virginia has been home to the largest civil awards in the nation,¹¹ and some of these awards, involving hundreds of millions of dollars, had no appellate review.
- For instance, in a case against two of the state's major natural gas suppliers – Chesapeake Energy and NiSource, Inc. – a trial court awarded \$405 million, including \$270 million in punitive damages, after finding the companies underpaid landowners under a royalties contract.¹²
- In another case, the state high court denied review of a \$100 million punitive damages award for a coal shipment dispute.¹³
- Unlike many other states, West Virginia has no statutory limit on the size of punitive damage awards and does not require a plaintiff to show "clear and convincing" evidence to receive such an award.

The state's legal climate adversely impacts its economy.

- West Virginia's legal climate parallels its economy, which traditionally ranks last or close to last among the states.¹⁴
- Fearing unfair trial court decisions, and frustrated without a guaranteed right to appeal those decisions, businesses and companies leave the state or choose to avoid it altogether in the first place.
- For instance, one week after the West Virginia high court denied review of the \$405 million award discussed above, Chesapeake Energy announced it was cancelling a \$35 million commitment to build a state-of-the-art regional headquarters in the state's capital, Charleston.¹⁵ Charleston will no longer serve as a regional, corporate headquarters, but instead will become a regional field office. As a result, last year, the company pulled all but 40 of its 255 employees from Charleston. Many of the jobs were relocated to Oklahoma.¹⁶

¹ Go to www.jobsnotslawsuits.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 West Virginia Independent Comm'n on Judicial Reform, Final Report, Nov. 19, 2009, at <http://www.judicialreform.wv.gov/reports/Documents/FinalReport.pdf>.

³ S.B. 589, Reg. Sess. (2010); see also Chris Dickerson, *Appellate Court Right of Appeal Bill Dies in Committee*, The Record (W. Va.), Mar. 4, 2010, at <http://www.wvrecord.com/news/225180-appellate-court-right-of-appeal-bill-dies-in-committee>.

⁴ John O'Brien, *McGraw's Bank of America Suit Transferred*, Legal Newsline.com, Feb. 9, 2010, at <http://www.legalnewsline.com/news/225477-mcgraws-bank-of-america-suit-transferred>.

⁵ John O'Brien, *McGraw's OxyContin Case Causes \$2.7M Medicaid Hole*, The Record (W. Va.), Nov. 18, 2009, at <http://www.wvrecord.com/news/223113-mcgraws-oxycontin-case-causes-2.7m-medicaid-hole>.

⁶ *Bower v. Westinghouse*, 522 S.E.2d 424 (W. Va. 1999).

⁷ *State ex. rel. Chemtall, Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), cert. denied, 128 S. Ct. 1748 (2008).

⁸ *Abbott v. Owens-Corning Fiberglas Corp.*, 44 S.E.2d 285, 292 (W. Va. 1994).

⁹ *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006), cert. denied, 127 S. Ct. 833 (2006).

¹⁰ See, e.g., *State ex. rel. Mobil Corp. v. Gaughan*, 211 W.Va. 106, 563 S.E.2d 419 (W.Va.), cert. denied, 537 U.S. 944 (2002).

¹¹ Verdict Search, *Top Verdicts of 2007*, at <http://www.verdictsearch.com/index.jsp?do=top100> (West Virginia had 3 of the 7 highest verdicts in the nation).

¹² David Ridenour, *The State Should Pursue Tort Reform*, Charleston Gaz. & Daily Mail, July 15, 2008, at 4A.

¹³ Ken Ward, *Gov. Defends Aid for DuPont*, Charleston Gaz. & Daily Mail, Aug. 23, 2008, at 1A.

¹⁴ U.S. Census Bureau, *State Rankings – Personal Income Per Capita in Current Dollars* (2007).

¹⁵ David Ridenour, *Bizarre Tort System Turning State into 'Almost Hell'*, The Record (W. Va.), July 16, 2008, at <http://www.wvrecord.com/arguments/213722-their-view-bizarre-tort-system-turning-state-into-almost-hell>.

¹⁶ Ann Ali, *Chesapeake Energy Eliminates 215 Jobs in Charleston*, State Journal, Mar. 6, 2009.