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TRIAL LAWYERS INC. UPDATE

WEST VIRGINIA

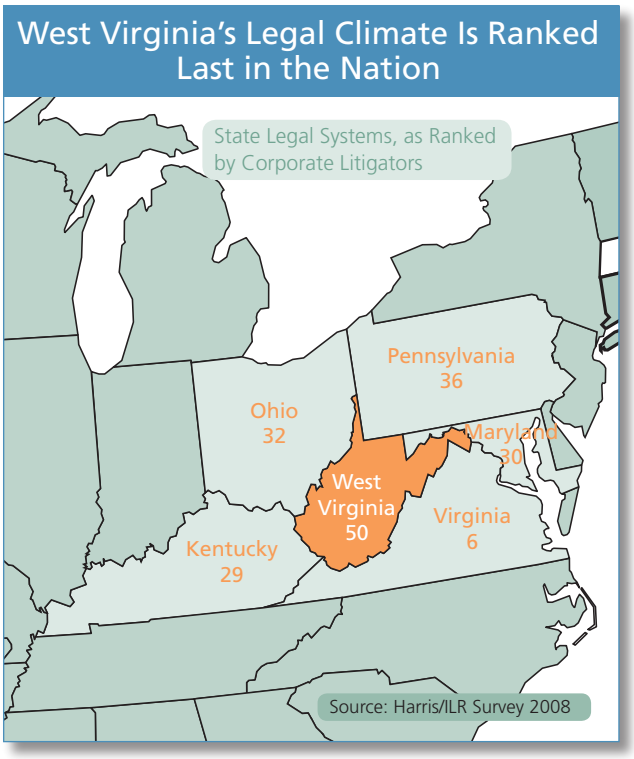
WATCHING WEST VIRGINIA

Businesses Look at Litigation Climate and Leave the Mountain State

In May, Chesapeake Energy Corporation shocked West Virginians when it canceled its plans to build a $35 million, futuristic headquarters in Charleston.[1] The company's decision, it said, was predicated upon the decision of the state supreme court of appeals not to review a $405 million verdict—including $270 million in punitive damages—that had been levied against the company by a Roane County jury.[2] A corporate spokesman called the court's decision "stunning" and noted that it "sends a profoundly negative message about the business climate in the state."[3]

Chesapeake Energy was not the first business to be scared off by the legal culture of the Mountain State. In a survey of national business leaders conducted by the Harris polling group for the U.S. Chamber of Commerce's Institute for Legal Reform, 64 percent said that a state's litigation climate would affect decisions on where to locate a business; in each of the last three years, the executives surveyed ranked West Virginia's litigation climate dead-last among the fifty states (see map graph).[4] West Virginia is also perennially featured in the American Tort Reform Association's annual *Judicial Hellholes* reports; the *Hellholes* reports look at a variety of problem regions, but they have spotlighted West Virginia, the only state singled out in its entirety.[5]

West Virginia can ill afford to drive away business, for even as Trial Lawyers, Inc. profits mightily from the state's legal system, the average West Virginian suffers. The state is the forty-ninth-poorest in the nation, and per-capita income in West Virginia is only two-thirds the national average.[6] Moreover, its economy has grown at a slower rate than that of the United States as a whole in each of the last four years (see graph on next page).[7] Cleaning up the



state's trial-lawyer-friendly litigation environment is not in itself sufficient to reverse these trends, but sending a strong message to businesses that West Virginia is no longer hostile to new investment would help.

A POPULIST JUDICIARY REDISTRIBUTES WEALTH

At the root of lawsuit abuse in West Virginia is a populist, elected judiciary that looks to punish large businesses on behalf of local plaintiffs and plaintiffs' attorneys. Ten years ago, former supreme court of appeals justice Richard Neely admitted, "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so."[8] Little wonder that corporate executives rank West Virginia's judges the least impartial in the country.[9]

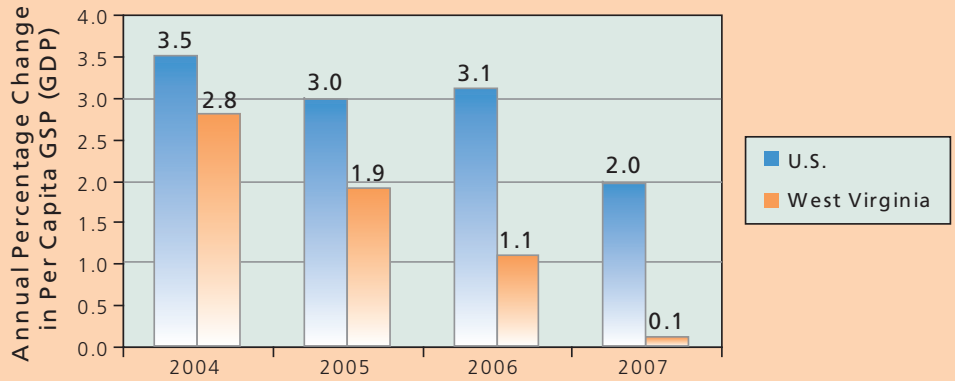
The amount of wealth redistributed by West Virginia's courts is staggering. In addition to Chesapeake Energy's mammoth adverse verdict in 2007, DuPont was on the losing end of the largest toxic tort judgment in the nation when a Harrison County jury slapped it with a $251 million verdict (see box, page 4).[10] Each of these verdicts was among the five largest in the country, according to *The National Law Journal*;[11] and these two verdicts alone are equivalent to over 1 percent of West Virginia's entire economic output.[12]

GIVE US YOUR TIRED, POOR, HUNGRY LAWYERS

To effect this wealth transfer, West Virginia's judges have repeatedly opened the state's courthouse doors to plaintiffs' lawyers from the nation at large. Their remarkably lax venue standards have made it especially easy for out-of-state plaintiffs and defendants to sue out-of-state corporations. Says circuit court judge Arthur Recht: "West Virginia was a 'field of dreams' for plaintiffs' lawyers. We built it and they came."[13]

In 2006, the West Virginia supreme court of appeals ruled that out-of-state plaintiffs could sue an out-of-state manufacturer for injuries sustained out of state that were attributable to one of its products, so long as a West Virginia company had sold or distributed it.[14] This decision was remarkable for the court's brazen refusal to apply the statute that the West Virginia legislature enacted to rein in the courts. It stated: "[A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."[15] The court implausibly contended that the statute violated the Privileges and Immunities Clause of the U.S. Constitution by discriminating against out-of-state plaintiffs,[16] yet failed to cite a decision of any other state appellate court that had reached a similar conclusion.[17] Unsurprisingly, the decision conflicted with

West Virginia's Economic Growth Has Significantly Trailed That of the U.S. As a Whole



Source: Bureau of Justice Statistics

clear U.S. Supreme Court precedent.[18] Also unsurprisingly, the same corporate executives who look askance at West Virginia's overall litigation climate and its judges rank the state fiftieth out of fifty in "having and enforcing meaningful venue requirements."[19]

AN ASBESTOS LITIGATION SCAM

Business leaders also rank West Virginia's courts dead-last in the nation for their fairness in handling class action and mass-consolidation suits.[20] For example, the state has been the locus of some of the worst abuses in asbestos litigation, the longest-running mass tort in U.S. history and arguably the most unjust.[21]

In 2002, the state supreme court of appeals allowed a Kanawha County judge to consolidate the claims of more than 8,000 asbestos plaintiffs into one legal action against more than 250 defendants.[22] While asbestos can indeed cause deadly injury, such mass consolidations are fundamentally unfair to defendants, since each plaintiff's exposure to asbestos and injury varies. Indeed, many asbestos plaintiffs—up to 90 percent[23]—are

Connor Studios/Michael Connor

West Virginia Dr. Ray Harron reviewed as many as 75,000 potential asbestos claimants nationwide.[24] According to CSX, he "identified asbestosis in approximately 97.5 percent of the X-rays he read for the Peirce firm since 2000."[25] Here, Dr. Harron is being sworn to testify before Congress on his role in asbestos screenings. He asserted there his right against self-incrimination.

AWARD WITHOUT INJURY

West Virginia is the only state in the nation in which plaintiffs who may have been exposed to dangerous substances can recover cash awards without showing that there was an actual injury. West Virginia's "medical monitoring" rule allows uninjured claimants to receive annual cash payments, supposedly to be spent on medical checkups, for as long as forty years, though plaintiffs who receive these payments are not required to spend them on medical tests. In effect, the medical monitoring rule significantly multiplies the value of the lawyers' claims.

West Virginia's medical monitoring rule figured prominently in last year's *Perrine v. DuPont*, a case in which a Harrison County jury considered damages alleged to have been caused by the defendant's zinc smelting plant.[26] No individual claimed to have suffered medical harms caused by any chemicals emitted by the plant; rather, the "damages" were the "remediation" expenses of a "cleanup" of nearby businesses, houses, and trailers.[27] The jury awarded compensatory damages of over $55 million for the cleanup and then slapped the company with punitive damages of over $196 million.[28] Those sums put the verdict among the top five in the nation for 2007, according to *The National Law Journal*.[29]

But the *Law Journal*'s rankings actually understate the verdict, since they omit the cost of the stipends to be paid to the 7,000 class members for medical monitoring—but not necessarily to be spent for that purpose.[30] According to the circuit court order implementing the monitoring plan, its cost will exceed $129 million.[31] For the case, six law firms were awarded a staggering $127,108,411 in legal fees.[32]

While the payoff to the litigation industry is obvious, the benefits to the class members—even if they should choose to be tested—are far from clear. In a brief submitted to the supreme court of appeals urging the court to review the verdict, the West Virginia State Medical Association argued that "this plan places the plaintiff class in unnecessary danger by approving biennial computed tomography ('CT') scans that will likely cause more cancer than they will ever find."[33]

actually uninjured, but corporate defendants inundated with thousands of claims find it "impossible . . . to investigate each claim on an individual basis."[34]

The CSX railroad corporation discovered what it claims to be multiple frauds visited upon it in its asbestos litigation in West Virginia, and the evidence CSX gathered, if proven, presents a sordid picture of the ability of the Mountain State's courts to handle these claims. CSX's case centers on an out-of-state law firm that the railroad alleges solicited clients from whom it encouraged testimony "without regard to the true state of the facts."[35] In another West Virginia state case, CSX contends that the doctor who had allegedly signed the diagnosis form of the plaintiff simply *did not* exist.[36]

MENDING MEDICAL MALPRACTICE

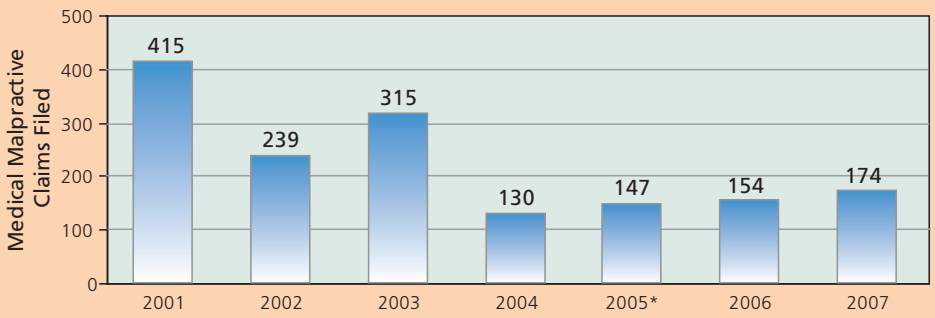
Notwithstanding the trial bar's successes in West Virginia, there have been notable improvements in one crucial area of litigation—medical malpractice. In 2001 and 2003, the legislature passed major reforms in this area that have led to declining insurance rates for doctors and encouraged them to practice in the state.

In the early part of the new century, insurance companies as well as doctors were fleeing West Virginia. Ohio-based PIE Mutual, which had had about one-third of the West Virginia medical-malpractice-insurance market, went bankrupt in 1998, and the St. Paul Companies, which became the state's largest insurer as a result, exited the market at the end of 2001.[37] Facing skyrocketing premiums, specialty physicians started leaving for other states, and maternity wards started shutting down.[38]

In reaction to the malpractice crisis, the West Virginia legislature in 2001 passed a law requiring plaintiffs' lawyers to obtain a "certificate of merit" from a qualified expert attesting to a claim's validity before a case could proceed.[39] In 2003, the legislature established a $500,000 cap on noneconomic damages, the difficult-to-review awards for unquantifiable harms like "pain and suffering," which are the main drivers of medical-malpractice costs.[40]

The effects of the legislature's reforms were rapid and striking. From a 2001 high, medical-malpractice claims fell almost 69 percent by 2004, the year following the enactment of the second round of malpractice liability reform (see graph), and claim volumes have remained at manageable levels since then.[41] Insurance companies began lowering their medical-malpractice premiums in 2005, and the West Virginia Mutual Insurance Company, now the state's largest medical-malpractice insurer, has reduced or held steady its malpractice insurance rates in each of the last three years.[42] The state supreme court of appeals has reviewed two different cases that applied the 2001 and 2003 reform laws and

After Reforms Were Enacted in 2001 and 2003, Med-Mal Claims in West Virginia Fell



*Excludes 126 Claims Against a Single Surgeon in Putnam County
Source: West Virginia Offices of the Insurance Commissioner

McGRAW'S LAW

Attorneys general are supposed to be states' chief law enforcement officers, but West Virginia's top prosecutor, Darrell McGraw, has instead used his powers to circumvent the legislature, attack corporations, and promote his own reelection. The result has been to enrich Trial Lawyers, Inc. First elected in 1992, McGraw soon followed other state attorneys general in contracting out his own state's civil enforcement duties to private lawyers in a lawsuit against the tobacco companies; the West Virginia portion of the settlement ultimately paid out $33.5 million to the attorneys McGraw selected.[43]

AP Photo/Bob Bird

Darrell McGraw

Even though McGraw drew criticism from a judge and the state auditor for the contracting out of state legal business in the tobacco litigation,[44] he used the same techniques in scores of other cases. Under McGraw's leadership, the attorney general's office has, in many respects, become a major division in Trial Lawyers, Inc.'s West Virginia operations: in the last three years alone, McGraw has hired private lawyers to act as "special assistant attorneys general" in more than twenty-five cases.[45] Unlike many other states, which limit the discretion of their attorneys general to hire outside counsel, West Virginia gave most of these lawyers no-bid contracts.[46]

McGraw's privately contracted litigation came under increased scrutiny as the result of the state's 2001 lawsuit against Purdue Pharma, the maker of Oxycontin.[47] The four private firms that McGraw's office hired to handle the case took in fees exceeding $3 million in a settlement for $10 million.[48] It was later reported that those same firms had given $47,500 to McGraw's reelection campaigns.

The aspect of the Oxycontin settlement that has sparked the harshest criticism, however, is McGraw's handling of the funds that were *not* paid out to the private firms. Rather than returning the monies to the legislature for appropriation, or to the state agencies that were the underlying plaintiffs in the case, McGraw decided to dole out the proceeds himself to various charities of his choosing.[49] In response, the U.S. Department of Health and Human Services last year withheld over $4 million in Medicaid funding, the portion of settlement proceeds to which it claimed it was entitled, though the amount will be reduced in accordance with an appeals-board ruling this summer.[50]

West Virginia's legislators should rein in these abuses of their attorney general by passing the Private Attorney Retention Sunshine Act, which would limit the attorney general's discretion to hire private outside counsel, expose any such deals to public scrutiny, and specify how settlement funds should be distributed.[51] The people of West Virginia could also send a message to McGraw by failing to return him to office; he's up for reelection this November.

did not declare either law unconstitutional.[52] For now, at least, the legislature's medical-malpractice reforms look like striking successes.

HOPE FOR THE FUTURE

The West Virginia legislature has not limited itself to medical-malpractice liability reform. Now, under the state's "joint-and-several liability" rules, the deep pockets of a defendant that a jury determines to be only slightly responsible for a given injury do not by themselves put the defendant on the hook for the entire damage award.[53] The elected representatives' willingness to pass laws addressing the state's lawsuit abuse ultimately is due to the citizenry's change of heart: in a 2005 survey conducted by Public Opinion Strategies, almost eight in ten West Virginians thought that the "number of lawsuits in West Virginia courts" was a "serious problem,"[54] and

three-quarters thought that lawyers, rather than consumers or victims, benefited most from the system.[55]

In 2004, the voters threw out state supreme court of appeals justice Warren McGraw despite (or perhaps in part because of) his having amassed an eye-popping $2.5 million in campaign donations from plaintiffs' attorneys.[56] With a dash of panache, the ousted justice filed a lawsuit against a television station that had aired negative advertisements about him and another lawsuit, for $1.45 million, against a truck driver who had allegedly rear-ended him; McGraw claimed that pain from the injury had caused him to grimace during a televised campaign debate, to which the former justice attributed his defeat.[57]

Notwithstanding these positive trends, West Virginians continue to have cause for concern. As the result of an extraordinary decision of the state supreme court of appeals last year, West Virginia is the *only* state in the union where the "learned intermediary" doctrine for pharmaceutical companies, under which warnings that drug companies convey to the very physicians who prescribe a given medication exempt the companies from liability for the side effects warned about, does not apply.[58] Whether the state's highest court will continue to make such outlandish rulings depends on whom voters select in the upcoming election to fill the two vacant seats on the state's highest court.

Even though the governor and the legislature have been supportive of liability reform efforts, Attorney General Darrell McGraw—who is Warren's brother and himself a former state supreme court of appeals justice—has had an all too close relationship with plaintiffs' lawyers and has regularly adopted policies that promote the trial bar's interests (see box). Attorney General McGraw is up for reelection this year and is currently ahead of his opponent, Dan Greear, in the polls, although Greear appears to be closing in.[59] Greear has promised a regime of transparency in the AG's office and has promised to open up all contracts between the office and private attorneys to competitive bidding.

In any event, West Virginians now seem to understand that what Justice Neely called "redistribut[ing] wealth from out-of-state companies to in-state plaintiffs" ultimately hurts themselves. For this economically struggling state, the rejection of that idea by all three branches of government is key to attracting businesses other than Trial Lawyers, Inc.

Endnotes

[1] George Hohmann, *Chesapeake Nixes New Building*, Charleston Daily Mail, 1A, May 29, 2008.
[2] *See* Estate of Tawney v. Columbia Natural Resources LLC, 633 S.E.2d 22 (W. Va. 2006).
[3] Hohmann, *supra* note 1.
[4] *See* U.S. Chamber of Commerce, Institute for Legal Reform, *Lawsuit Climate 2008, available at* http://www.instituteforlegalreform.com/states/lawsuitclimate2008/pdf/LawsuitClimateReport.pdf.
[5] *See* American Tort Reform Foundation, Judicial Hellholes 2007, *available at* http://www.atra.org/reports/hellholes/.
[6] *See* Bureau of Economic Analysis, Regional Economic Accounts, *available at* http://www.bea.gov/regional/gsp/.
[7] *See id*.
[8] Richard Neely, The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts 4 (1998) (arguing that until product liability law becomes federalized, which he calls for, judges can be expected to act in their states' respective interests).
[9] *See* U.S. Chamber of Commerce, *supra* note 4.
[10] See Perrine v. E.I. DuPont De Nemours & Co., No. 04-C-296-2 (W.Va. Cir. Ct., Harrison Co., 2007).
[11] *See* Top 100 Verdicts of 2007, *available at* http://www.verdictsearch.com/index.jsp?do=top100.
[12] *See* Bureau of Economic Analysis, *supra* note 6.
[13] AEI-Brookings Joint Center for Regulatory Studies, Judicial Education Program: Critical Issues In Toxic Tort Litigation, Washington, D.C., April 28-29, 2004.
[14] *See* Morris v. Crown Equipment Corp., 633 S.E.2d 292 (W. Va. 2006).
[15] W.Va. Code, 56-1-1(c) (2003).
[16] *See* Morris, 633 S.E.2d at 300.
[17] *See id.* at 297-301.
[18] *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 4 (1950) (quoting *Douglas v. New York*, N.H. & H. R.R., 279 U.S. 377, 387 (1929) ("[I]f a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control.")).
[19] *See* U.S. Chamber of Commerce, *supra* note 4.
[20] *See id.*
[21] *See* Manhattan Institute Center for Legal Policy, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America*, 2003 10, *available at* http://www.triallawyersinc.com/html/part05.html.
[22] *See* State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793 (W. Va. 2002).
[23] *See* Lester Brickman, *Disparities between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 Cardozo L.

Rev. 513 (2007).

[24] *See* Jonathan D. Glater, *Reading X-Rays in Asbestos Suits Enriched Doctor*, N.Y. Times, Nov. 29, 2005, at A1.

[25] CSX Transportation v. Gilkison, No. 05-cv-202 (N.D. W. Va. July 5, 2007) (Am. Compl. ¶ 36).

[26] *See* Perrine, *supra* note 10.

[27] *See* Thom Weidlich, *DuPont Must Pay $55 Million for Cleanup of Structures*, Bloomberg.com, Oct. 15, 2007.

[28] *See* Cara Bailey, *Jury Orders DuPont to Pay Nearly $200 Million in Punitive Damages*, W. Va. Record, Oct. 24, 2007.

[29] *See* Top 100 Verdicts of 2007, *supra* note 11.

[30] *See* Perrine v. E.I. DuPont De Nemours & Co., No. 04-C-296-2 (W.Va. Cir. Ct., Harrison Co., Feb. 25, 2008) (order regarding medical monitoring plan).

[31] *See id. at 15*.

[32] *See* Perrine v. E.I. DuPont De Nemours & Co., No. 04-C-296-2 (W.Va. Cir. Ct., Harrison Co., Feb. 25, 2008) (order regarding plaintiffs' counsel's fees and litigation expenses).

[33] Brief of *Amicus Curae* West Virginia State Medical Association at 1, Perrine v. E.I. DuPont De Nemours & Co. (W. Va. 2008) (No. 04-C-296-2) (filed June 24, 2008).

[34] Gilkison, *supra* note 25 (Am. Compl. ¶¶ 169-70).

[35] *Id*. at ¶ 66.

[36] In Re: FELA Asbestosis cases, No. 02-C-9500 (Cir. Ct. W. Va.) (Mot. to Dismiss Plaintiff Rodney Chambers ¶¶ 15-18).

[37] Although St. Paul's announced its withdrawal from the market in December 2001, the process was not completed until March 2003. *See* State of West Virginia, Medical Malpractice: Report on Insurers with over 5 Percent Market Share 26 (2004), *available at* http://wvinsurance.gov/reports/pdf/insurers_over_5_percent_market_2004.pdf.

[38] Office of the Asst. Secy. for Planning & Evaluation, U.S. Dept. of Health & Human Servs., Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System 3 (July 24, 2002); New Jersey Hospital Association, Medical Malpractice: The Crisis Deepens, Vol. 11, No. 2, *Leading Opinion* 1, May 2002.

[39] *See* H.B. 601 (2001).

[40] *See* H.B. 2122 (2003).

[41] *See* State of West Virginia, Medical Malpractice: Report on Insurers with over 5 Percent Market Share 77 (2007), *available at* http://wvinsurance.gov/reports/pdf/insurers_over_5_percent_market_2007.pdf; State of West Virginia, Medical Malpractice: Report on Insurers with over 5 Percent Market Share I-C (2002), *available at* http://wvinsurance.gov/reports/pdf/insurers_over_5_percent_market.pdf; *Medical Malpractice Suits on Rise in W.Va.*, Charleston Daily Mail, Aug. 25, 2008.

[42] *See* State of West Virginia (2007), *supra* note 41, at 89.

[43] *See* West Virginia Citizens Against Lawsuit Abuse, *Special Report: Flaunting [sic] Laws You Are Charged to Protect – A Critical Look at Fourteen Years in the Office of Attorney General Darrell McGraw* 6 (June 2007) [hereinafter "CALA Report"]; *Lawyer Receives $3.85 Million; Attorney Was Only Briefly Involved in Tobacco Lawsuit*, Charleston Daily Mail, June 27, 2002.

[44] *See* McGraw v. American Tobacco Co., No. 94-C-1707 (W. Va. Cir. Ct. Nov. 29, 1995) (holding that a contingency fee arrangement is an unlawful appropriation of state funds and that the attorney general has neither statutory or constitutional authority to retain such counsel); Phil Kabler, *Legislative Audit Questions Attorney General's Authority*, Charleston Gazette, January 8, 2002, at 5A (citing "constitutional requirement that the Legislature appropriate state funds").

[45] *AG's Practices Questioned by House Committee*, W. Va. Rec., Feb. 2, 2007.

[46] *See* CALA Report, *supra* note 43, at 7.

[47] *See id.* at 1.

[48] *See id.* at 2.

[49] *See* John O'Brien, *More OxyContin Money Dished Out by AG McGraw*, LegalNewsline.com., Aug. 6, 2007, *at* http://www.legalnewsline.com/news/198887-more-oxycontin-money-dished-out-by-ag-mcgraw.

[50] *See* Scott Sabatini, *Oxycontin Case Divides Mcgraw's Fans, Foes*, LegalNewsline.com., Aug. 8, 2008, *at* http://www.legalnewsline.com/spotlight/214766-oxycontin-case-divides-mcgraws-fans-foes.

[51] *See* H.B. 4767 (2006).

[52] *See* Riggs v. W. Va. Univ. Hosp., Inc., 656 S.E.2d 91 (W. Va. 2007); Westmoreland v. Vaidya, 664 S.E.2d 90 (2008).

[53] *See* S.B. 421 (2005).

[54] Public Opinion Strategies, Attitudes Toward Civil Justice Reform In West Virginia (2005) (commissioned by the U.S. Chamber of Commerce's Institute for Legal Reform).

[55] *See id*.

[56] *See* Bill Bissett, *Plaintiffs' Lawyers Were Spending, Too; They Put More Than $2.5 Million in Court Contest*, Charleston Daily Mail, Dec. 29, 2004, at 4A.

[57] *See* McGraw v. Blankenship, No. 04-C-317 (W. Va., Wyoming Cty. Cir. Ct.); McGraw v. Tugman, No. 06-C-91 (W. Va., Greenbrier Cty. Cir. Ct.); *see also* Editorial, *Frivolous Suits; Former Supreme Court Justice McGraw Joins the Crowd*, Register-Herald, May 8, 2006.

[58] *See* Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 914 (W. Va. 2007).

[59] See poll data at http://www.wsaz.com/political/headlines/28188244.html.

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