

Civil Justice Playbook

IDEAS, INITIATIVES, INFLUENCE

Delaware's Lawsuit Climate Gets Chillier

By David Hechler

What do you think of when someone says Delaware?

For many people, one word comes to mind: business. That's where numerous companies are incorporated. If they didn't already have "First State" on their license plate (Delaware was first to sign the U.S. Constitution), they could just print "The Business State" and people would know where they're from.

It's also known as a state where businesses can expect a fair shake if they're sued. And that's not just an anecdotal impression. For 16 years now the U.S. Chamber Institute for Legal Reform (ILR) has periodically published its "Lawsuit Climate Survey," which ranks the states based on the grades respondents give their liability systems. Delaware was ranked at the top every time. Until now.

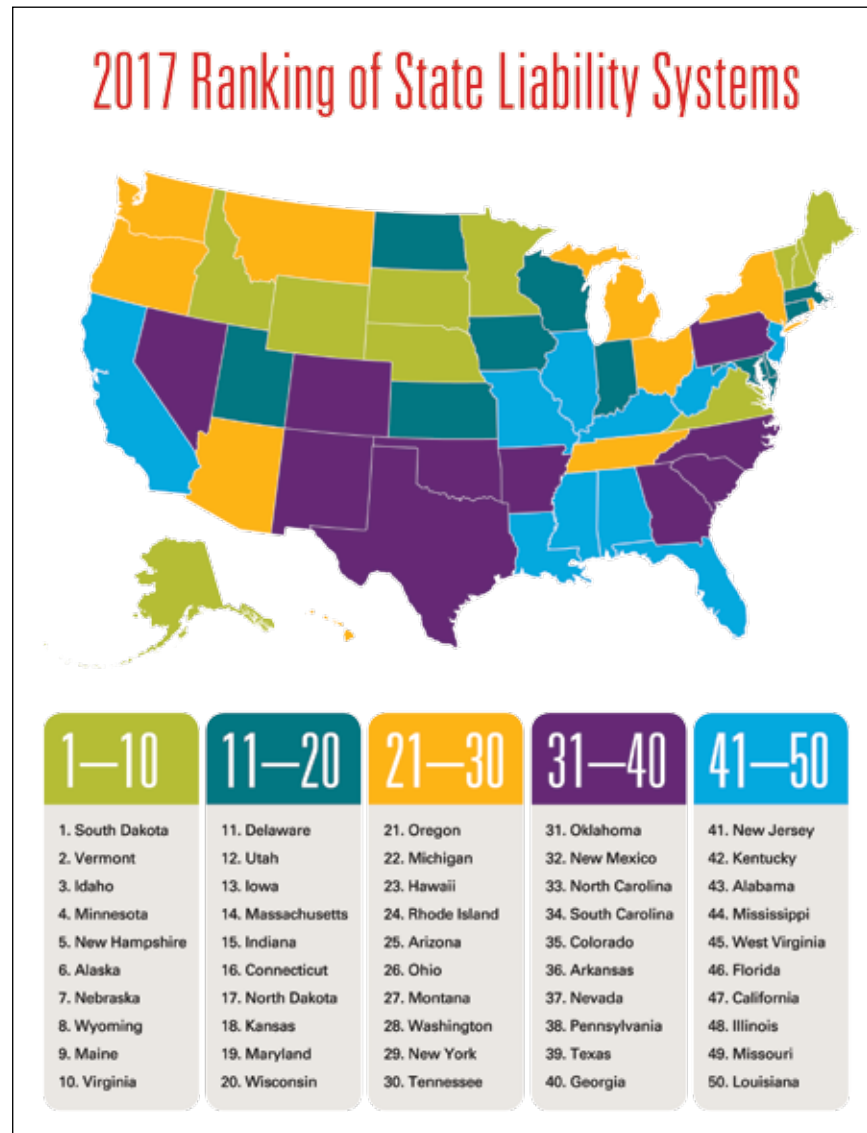
Yes, the First State was knocked from the top spot. And it didn't just slip to No. 2. It dropped all the way out of the top 10 to No. 11.

What happened since the last survey (in 2015)? There's actually some good news here. It's not that Delaware went to hell. Other states caught up. "As the competition between states to enact legal reforms gets tighter," ILR President Lisa Rickard said in a statement, "Delaware is losing ground."

"This is a wake-up call for Delaware," added Bryan Quigley, ILR's VP for strategic communications. "It's an opportunity for them to look at their courts and their laws," he told public radio station WHYY in Philadelphia, "and more importantly, who's competing with them, what the other states are that have passed them, because at the end of the day this is more about Delaware sticking in place while other states are passing them by."

Even so, the results were pretty tight. Delaware scored 72.8, which placed it three points from No. 1 (taken over by South Dakota) and one point from being tied for sixth (with Alaska).

The national survey conducted online and over the phone by the



Harris Poll reached more than 1,300 respondents from companies with at least \$100 million in annual revenues. Slightly more than half were general counsel, chief legal officers, litigation heads and other in-house lawyers. The rest were senior executives who were responsible for or directly knowledgeable about their companies' litigation. And all were familiar with or had litigated in the states they rated within the past five years – three-quarters of them within the past three years.

Respondents graded the states from A to F in 10 categories. Delaware continued to do very well in its trial

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judges' competence (2nd), its handling of scientific and technical evidence (5th) and its quality of appellate review (7th). Its poorest showings were in the treatment of class actions and mass consolidation suits (26th), proportional discovery (23rd) and juries' fairness (18th).

As much as dropping 10 slots may have bruised Delaware's collective ego, the two states that did the worst were Colorado, which dropped 19 slots, from 16 to 35, and North Carolina, which dropped a whopping 26 places, from 7 to 33. Both states were graded in the bottom half on treatment of contract and tort litigation;

treatment of class actions and mass consolidation suits; damages; scientific and technical evidence; trial judges' competence; juries' fairness; and quality of appellate review.

The most improved state was New Mexico, which moved from 45 to 32. Oregon moved from 32 to 21. In the top 10, top-ranked South Dakota moved up eight places and No. 4 Minnesota moved up nine. For a second consecutive survey, Vermont remained in second place.

The statistic that ILR emphasized most prominently did not involve the rankings. It was the answer to this question: "How likely would you say it is that the litigation environment in a state could affect an important business decision at your company, such as where to locate or do business?" The survey found that 42 percent said they were "very likely" and 43 percent "somewhat likely" to be influenced this way. The aggregate 85 percent far surpassed the 75 percent result in 2015 and the 70 percent finding in 2012.

Obviously, this is the factor that ILR hopes will motivate reform, and the organization also released a second report along with the survey. It's called "101 Ways to Improve State Legal Systems," and it contains detailed recommendations on balancing regulation and enforcement, safeguarding the integrity of the litigation process, promoting rational liability rules, improving product liability laws, and addressing runaway damages awards.

There was one prominent bright spot in the state survey that contrasted with the clouds and storms found elsewhere. Asked how they would describe "the fairness and reasonableness of state court liability systems in America," 63 percent called them "excellent" or "pretty good." This was far more favorable than the results in 2015 (50 percent) and 2012 (49 percent).

ILR President Rickard acknowledged that the results suggested overall improvement, but she also emphasized the context.

"There's been progress, but let's not kid ourselves," she said. "The 'sue 'em' culture in the U.S. is still the world's worst."