

# Bailey Glasser Secures Appellate Victory Over Dow Chemical Company: West Virginia State University's Contamination Suit Will Proceed in State Court

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Bailey Glasser won an appellate victory on behalf of its client West Virginia State University (WVSU), the largest historically Black university in the state. The success on appeal will require Dow Chemical and other chemical manufacturers to face the University's contamination lawsuit where it was filed—in West Virginia state court. WVSU's campus is adjacent to Dow's 433-acre chemical manufacturing plant and wastewater treatment facility. WVSU sued the chemical giant, alleging contamination of the University's groundwater.

By a unanimous decision, the U.S. Court of Appeals for the Fourth Circuit rejected Dow's bid to remove the case to federal court, holding that Dow was not "acting under" a federal officer and that the University's state-law claims belong in state court. This is a particularly significant victory that will limit other corporate defendants—who also operate under complex regulations—from claiming to act under the guidance and control of a federal officer so they can choose their judicial forum and delay litigation.

In 2017, WVSU filed a lawsuit in West Virginia state court asserting claims under state law due to contaminated groundwater on WVSU's property. The Defendants removed the lawsuit to federal court because they claimed to be acting under a federal officer. District Court Judge John T. Copenhaver rejected that argument and remanded the case back to state court, explaining that simply complying with complex regulations does not mean that the Defendants were acting under a federal officer and could not satisfy the jurisdictional requirements to be in federal court.

Dow then appealed to the Court of Appeals for the Fourth Circuit. Chief Judge Gregory, writing for a unanimous panel, rejected the Defendants' arguments on appeal and affirmed the district court with a 43-page published opinion. Particularly significant, the panel clarified the limited scope of

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federal officer jurisdiction, explaining that merely complying with federal law does not amount to “acting under a federal officer” and holding that “Defendants’ conduct has been limited to strict compliance with the RCRA regulations.” Thus, the appellate court reasoned, the matter should remain in state court.

Bailey Glasser attorney Benjamin Hogan successfully argued the case before the Fourth Circuit, which will now move forward in the Circuit Court of Kanawha County, WV. Bailey Glasser partners Brian Glasser and Samuel Hrko, and of counsel Victor Woods, are also representing WVVSU.

“This is an important win for our client and will allow us to resume seeking environmental justice for West Virginia State University. The Court’s clear rebuke of the Defendants’ expansive view of ‘acting under a federal officer’ is particularly significant in light of the Supreme Court’s recent decision in *BP P.L.C. v. Baltimore*, which expanded the scope of appellate jurisdiction where a party premises removal to federal court at least in part on acting under a federal officer. The Court’s opinion clarifies and limits what it means to be acting under a federal officer. Merely complying with complex regulations doesn’t cut it. Hopefully this will curb industry actors from broadly asserting that they’re acting under the federal government when they’re merely complying with the law while conducting for-profit business. These tactics can drag out litigation and allow parties to backdoor appellate review of normally unappealable remand orders,” said Benjamin Hogan.

“We are pleased the Fourth Circuit has affirmed the decision of the U.S. District Court for Southern District and allowed the lawsuit to move forward,” said firm co-founder Brian Glasser. “West Virginia State University deserves its day in court and our team looks forward to representing the institution as it seeks justice for the harm caused by environmental contamination.”

### **About Bailey Glasser LLP**

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We bring a trial-focused approach to litigation for plaintiffs and defendants that vigorously protects the interests of our clients – businesses in many industries and of all sizes (from Fortune 500 companies to family offices), individuals, governmental entities and government servants, and even law firms that call upon us to help them in matters because of our unique blend of resources and trial experience. Some of our areas of particular litigation focus include complex commercial

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### **Practice Areas**

Appellate and Supreme Court Practice

Environmental