

## The Honorable Dick Thornburgh The Honorable Scott Walker

### **The Issue:** **Civil Justice Reform in Wisconsin**

In this edition of Washington Legal Foundation's CONVERSATIONS WITH, Wisconsin Governor Scott Walker and former Pennsylvania Governor Dick Thornburgh discuss legal reform in Wisconsin and how it has impacted the state's business environment. After taking office in January 2011, Governor Walker made improving the legal system in his state one of his top priorities. He immediately called a special session of the legislature aimed at job creation with legal reform as its centerpiece. His thoughts on how he and his team built momentum for change, the specific reforms he pursued, and the benefits they brought to consumers, patients, and job creators are instructive for all who seek more balance in the legal system.

**Governor Thornburgh:** Upon taking office in January 2011, you immediately called a special session of the Wisconsin legislature focused on job creation. Why was reforming the state's civil justice system a key part of that special session?

**Governor Walker:** The people of Wisconsin elected me to focus on getting Wisconsin back to work. For too long, our leaders had ignored the path that our state was on towards fewer jobs and lower paying jobs. Part of the reason for the state's

decline was our poor legal climate. In fact, it was so bad that it earned Wisconsin the infamous moniker "Alabama of the North." Unfortunately, our legal climate had discouraged businesses from expanding in and coming to our state.

That's why the first thing I did upon taking office was call our legislature into special session to focus on jobs legislation, including tort reform.

Job creators need certainty and stability before committing resources to expand their operations and add new, higher-paying jobs. Our reforms focused on signaling to job creators that Wisconsin was going to remove the barriers and costs that impede job creation. The threat of litigation costs is one of the costs that impede job creation.

Our civil litigation reform measures will help lower these substantial costs on job creators. It will allow job creators to focus on what they do best, create jobs, and it gives them the certainty that they can take important steps to invest capital into job creation and not save it for potential litigation.

**Governor Thornburgh:** Were you inspired by the positive benefits of civil justice reform in other states? Did you draw any specific lessons from the work of other governors who pursued such reforms?



**Dick Thornburgh**  
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**Scott Walker**  
Governor of Wisconsin

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**Governor Walker:** Absolutely. We saw the successes of states like Texas and Florida that took on these important reforms in the 1990s and 2000s. Job creators there responded by leading the nation in job growth over the first decade of this century. Businesses in other states saw the direction that these states were going and moved jobs into those states. We wanted Wisconsin to create the same climate for job growth.

It was more than just creating jobs, too. On average, Texas households saw annual personal income grow by \$862 in part because of the civil litigation reforms. These were the types of results that Wisconsinites were looking for when they elected my fellow Republicans and me into office in 2010.

**Governor Thornburgh:** In some of those states, it took years to build up momentum for civil justice reforms. How were you able to marshal support for your plan in such a short period of time?

**Governor Walker:** Our voters sent a clear message that job creation was priority one for them. A new legislature was swept in by the voters to address the jobs issue. The leaders in the legislature and I took our mandate for job creation to put forward a number of free market job bills. We took a laser-like focus in the special session on what other states had done to successfully create jobs despite the national economy. The results from elsewhere in the country showed voters and their representatives in the legislature that civil litigation reform was an effective tool to limit the burdens and costs on job creators and

ultimately to spur job growth.

**Governor Thornburgh:** What voices were most engaged and most effective in advancing the proposals in the legislature?

**Governor Walker:** The majority’s leadership in the legislature made job creation a priority. They heard testimony from many groups, but most importantly job creators who said that potential litigation costs prevented them from investing in job creation in our state. Senator Rich Zipperer led the charge on civil litigation reform in the Senate and Representative Jim Ott ushered the bill through the Assembly. Thirty-one other legislators signed on as co-sponsors of the bill.

**Governor Thornburgh:** How well organized were the interests that opposed the bill? Did your approach of utilizing a special session impede their efforts?

**Governor Walker:** I think our special session put the goal of job creation front and center for everybody. We had an open debate, and we heard testimony from both sides before the legislation passed. There were some groups that spoke out against our reforms, in particular the Wisconsin Association for Justice and Wisconsin State AFL-CIO. But both sides of the political aisle focused on the issue of how civil litigation reform affected the creation of jobs, and the legislature weighed those views and ultimately decided that the reforms were needed.

**Governor Thornburgh:** Please give us a brief overview of the reforms and then we can talk about them individually.

**Governor Walker:** We limited non-economic damages awarded in actions against long-term care providers and provided a three-year statute of limitations on those and other medical malpractice claims.

In response to activist judicial rulings, we limited the potential liability for manufacturers, distributors, sellers, and promoters of products to the harm their products actually cause.

We also ensured the confidentiality of health care services reviews, so our health care providers can focus on improving services and solicit candid assessments of their efforts.

Expert testimony and the testimony allowed by lay witnesses were also clarified. We also prohibited contingency agreements with expert witnesses.

We sought to prevent lawsuit abuse by putting in place mandatory penalties for using frivolous claims to harass another party.

**Governor Thornburgh:** Let's take a look at the product liability provisions first. Why were liability limitations for product sellers a high priority for you?

**Governor Walker:** When four justices on the Wisconsin Supreme Court used a theory of "risk contribution" to hold a manufacturer of white lead carbonate liable for the harm potentially caused by the ingestion of a product like theirs in

lead paint, job creators were faced with an enormous amount of uncertainty about their litigation risks going forward. This was the first court in the country that said that manufacturers could be liable for contributing to the risk that somebody, somewhere, *might* be affected by somebody else's end product. So, it was a very high priority for us to put Wisconsin back into line with the rest of the country.

**Governor Thornburgh:** How does the legal reform law address that ruling?

**Governor Walker:** The legislature clarified the law to overturn the effect of that ruling. Our reforms require that a plaintiff prove that their injury was caused by a product manufactured, distributed, sold, or promoted by the defendant. In some instances, the plaintiff may seek damages if they name as defendants those manufacturers who collectively manufactured at least 80 percent of all products sold in Wisconsin that are chemically identical to the specific product that caused the injury. Job creators need certainty that they will not be dragged into court and made to pay for harm they did not cause. If the *Thomas v. Mallet* precedent was to stand, job creators in this state would not be able to invest in expanding their business because they would need to save for unforeseen litigation. That kind of business climate is not stable or certain and is unhealthy for job creation.

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**Governor Thornburgh:** The product liability sections are very detailed and specific, especially on matters such as joint and several liability and the foreseeability of harm. How will such clarity benefit all parties involved in product litigation?

**Governor Walker:** When a company produces a product that actually injures a consumer, that consumer should be able to seek redress from that specific company, not the most convenient, deep-pocketed defendant they can find in the industry. So, we set out very specific guidelines to govern how liability should be attributed and when a party is liable. This prevents businesses that may have a small role in a defective product from assuming all of the liability. We also implemented certain defenses to liability if the product met industry standards or the defect was a reasonably recognizable inherent characteristic of the product. This provides certainty for all parties. Some products are inherently dangerous and the user assumes some risk in using the product. The free market will often eradicate products that are too dangerous compared to their productive utility. Litigation costs on businesses that manufacture, sell, and promote these products are counter-productive to a growing economy. Our reforms removed the impetus for this litigation and limited liability to the harm actually caused by the contributions of a particular defendant.

**Governor Thornburgh:** The provision limiting punitive damages seemed to receive greater attention than other parts of the law. Why was that the case, and how did you respond to those who argued that such limits restrict plaintiffs’

access to justice?

**Governor Walker:** Punitive damages are intended to punish persons for acting wrongly. Our reforms ensure that punitive damages are only used against those defendants that intend harm or are almost certain an action will cause an injury. The role of these lawsuits is to make the injured party whole again; punitive damages go beyond that and should only be utilized in the most egregious cases and not just to bolster an award for a trial attorney working on a contingency fee agreement. Our reforms ensure that this is the case in Wisconsin. They still give injured parties the opportunity to become whole.

**Governor Thornburgh:** With relation to the admissibility of expert testimony, where did Wisconsin stand on the test for admitting scientific evidence compared to other states before the new law, and where does it stand now?

**Governor Walker:** Our reforms brought Wisconsin’s standards for expert testimony into line with federal law and the law in many other states.

**Governor Thornburgh:** One part of the law I’m surprised has received hardly any attention is Section 28, which relates to litigating in bad faith. Could you describe this section and why it was part of the final law?

**Governor Walker:** This section was important to prevent lawsuit abuse. Sanctioning litigants for these abuses should not be discretionary. That allows parties to intentionally abuse the legal process. So, we made it a mandatory

penalty. A party who abuses our legal system now must pay the costs and attorney's fees associated with defending against these frivolous claims.

**Governor Thornburgh:** Past Wisconsin legal reforms have been subject to constitutional challenges, as have many other states' reforms. Did you draft the bill with this in mind, and do you anticipate that any of the provisions will be challenged?

**Governor Walker:** We took great care to ensure that our reforms were constitutional. Some of them may be challenged because the people affected most by these changes are not injured parties, but the plaintiffs' attorneys. They are accustomed to fighting their battles in courts, so it is likely that challenges will come. I believe we have taken the necessary caution to ensure that our reforms will be upheld by the courts.

**Governor Thornburgh:** What did you expect the national reaction to be to your success in Wisconsin?

**Governor Walker:** As the effects of our reforms take hold, more people will see the positive outcomes of what we did. Job creators will see a certainty that will allow them to grow or relocate into Wisconsin. Medical professionals will see that they are not subject to the potential for extraordinary damage claims against them, and they will come into our state like they have to states that have instituted these reforms before us. I think the national reaction will be positive.

**Governor Thornburgh:** What have you been doing to "sell" the civil justice

reforms outside the state, and what have you heard from business leaders considering Wisconsin as a place to locate plants or conduct other activities?

**Governor Walker:** A number of the reforms we passed, including civil litigation reform, signaled to businesses in and out of the state that Wisconsin was moving in the right direction. Eighty-eight % of Wisconsin business leaders agreed that the state was headed in the right direction after our reforms; that was up from only 10% believing the state was headed in the right direction a year ago. In a survey of CEOs, Wisconsin moved up a record 17 spots, from 41st to 24th, in rankings of best state to do business in. Businesses have taken notice of our aggressive, pro-jobs agenda.

**Governor Thornburgh:** Governor Walker, thank you for your participation.

**Governor Walker:** Thank you.

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**The Honorable Dick Thornburgh** is a former Attorney General of the United States, Governor of Pennsylvania, and Under-Secretary-General of the United Nations. He is currently Of Counsel to the international law firm K & L Gates LLP, and Chairman of Washington Legal Foundation's Legal Policy Advisory Board. Governor Thornburgh began his public service career as a United States Attorney in Pittsburgh and an Assistant Attorney General in charge of the Criminal Division. As a private attorney, he was appointed in 2002 as Examiner in the WorldCom bankruptcy proceedings, the largest ever filed, to report on wrongdoing and malfeasance that led to the company's downfall. Governor Thornburgh was also chosen by CBS to conduct an investigation into the *60 Minutes Wednesday* segment on President George W. Bush's service in the Texas Air National Guard.

**The Honorable Scott Walker** was inaugurated on January 3, 2011 as the State of Wisconsin's 45th governor. Governor Walker served in the Wisconsin State Assembly from 1993 to 2002. In 2002, he was elected to be Milwaukee County Executive, a position in which he served for eight years. While serving as County Executive, the county's debt fell by 30% and the size of the county's workforce was reduced by more than 25%. Then-County Executive Walker authored nine consecutive budgets without increasing the property tax levy from the previous year. Despite failing national and state economies, Milwaukee County recorded a budget surplus. In his first year in office as Governor, Wisconsin balanced a \$3.6 billion budget deficit.