



The Honorable Dick Thornburgh The Honorable Haley Barbour The Honorable Joe Manchin Steve Hantler

The Issue: The Benefits of Legal Reform

This edition of Washington Legal Foundation's *Conversations With* examines legal reform in two key states – Mississippi and West Virginia – and the benefits that such reform has conferred upon consumers and the free enterprise climate. Former Attorney General of the United States and Pennsylvania Governor Dick Thornburgh leads an informative discussion with West Virginia Governor Joe Manchin, Mississippi Governor Haley Barbour, and American Justice Partnership Chairman Steve Hantler. The participants share their insights about what strategies have worked in these states; the types of reforms that West Virginia and Mississippi legislators have enacted; and how changes to the liability system have specifically improved the states' business climates.

Governor Thornburgh: Steve, you're here with two governors from — one Democrat and one Republican — talking about the benefits of lawsuit abuse reform. Historically, this has been viewed primarily as a Republican issue. Why is this changing?

Steve Hantler: At the American Justice Partnership (AJP), we believe winning and sustaining lawsuit reform

requires a bipartisan coalition. That's why AJP works with governors and legislators from both parties to enact reforms that fairly balance the needs of consumers and business. Leaders from both parties realize that if their states have an unfair legal climate that favors plaintiffs, business will slow down investments that create new jobs and expand operations. Leaders from both parties realize that when medical facilities close and doctors leave their states because of unfair medical liability laws, the quality of medical care declines and costs increase for everyone, families and employers alike. Proactive leaders from both parties, like Governor Manchin and Governor Barbour, realize that enacting legal reforms creates huge benefits for everyone — consumers, patients, business — and that's why far-seeing leaders from both parties support lawsuit abuse reforms.

Governor Thornburgh: Governor Manchin, as the very popular leader of West Virginia who has been energizing the state's economy, what legal reforms did you propose in West Virginia?

Governor Joe Manchin: In addition to the privatization of our Workers' Compensation system, significant tax reforms, and meaningful insurance reforms, our legal reforms have been a significant part of our broader effort to



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Haley Barbour
Governor of Mississippi



Joe Manchin
Governor of West Virginia



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make West Virginia a more attractive environment for businesses while simultaneously maintaining necessary protections for our citizens. Our legal reforms have included banning so-called "third-party bad faith" lawsuits brought by thirdparty claimants against insurance companies; reforming the common law standard of joint and several liability; and permitting certain businesses to address problems raised by consumers before lawsuits may be filed.

Additionally, recent years have witnessed significant improvements to the medical malpractice climate in West Virginia. Following comprehensive medical malpractice reforms in 2003 (that included caps on non-economic damages, pre-filing certificates), we have enjoyed a decline in the number of medical malpractice lawsuits and substantial reductions in malpractice premiums across the State. Since then, the Legislature has taken additional steps to improve West Virginians' access to healthcare. In 2005, the Legislature passed an "innocent prescriber" bill, which protects physicians and providers from product liability cases involving pharmaceutical drugs where the drug/medication was prescribed in accordance with FDA guidelines. In that same year, I signed into law HB 3174, which encourages doctors to offer expressions of apology or sympathy to their patients in the event of a negative medical outcome by making such expression inadmissible as evidence of liability.

Also, we have been able to set legislative parameters for pre- and post-judgment interest and establish a \$50 million cap on appeals bonds.

Governor Thornburgh: Governor Barbour, you made legal reform one of the top priorities after you took office. What did you propose?

Governor Haley Barbour: All were reforms most of us would view as just plain common sense — to allow affordable medical malpractice insurance for healthcare providers, to promote job creation, industry expansion and a business-friendly climate in Mississippi. Reforms included improving the areas of joinder and venue, placing caps on non-economic damages at \$1 million, and revising the punitive damages cap.

Governor Thornburgh: For both governors, what were the circumstances in your states that caused you to propose these reforms?

Governor Barbour: Mississippi was highly publicized for "Jackpot Justice." The state had long been regarded as a "judicial hellhole" where an unfair civil justice system had become a real threat to economic development and job creation. To add insult to injury, we were given a 50th ranking by the U.S. Chamber of Commerce for a fair legal climate three years in a row.

We had to change this reputation in order to achieve maximum success in job creation. Lawsuit abuse was draining Mississippi's economy and hampering job creation efforts, not to mention increasing the cost of, as well as threatening quality of and access to, healthcare. Unacceptably high liability insurance rates were forcing doctors to close their practices. Every small business seemed one lawsuit away from bankruptcy. Frivolous lawsuits

caused doctors to leave the state and hospitals to lose insurance. Obstetric wards were closing and neurosurgeons had stopped performing emergency surgery.

Governor Manchin: Quite simply, our consumers were paying too much for insurance, and significantly more for home and automobile insurance than residents in our neighboring states. The industry had identified these potential reforms as the means to improve economic growth and provide much needed relief to our consumers. So we brought the big insurance companies to the table in order to make insurance more available and affordable for West Virginia consumers and put some much needed money, over \$70 million, back into their pockets

Governor Thornburgh: Steve made the point at the beginning of our discussion that a broad coalition is needed to pass any statewide legal reform. What did each of you do to build a coalition among legislators from both parties to help pass reform in your states?

Governor Manchin: Generally speaking, my approach is to bring key stakeholders on both sides of the issue together and work toward a consensus proposal that we can take to the people of West Virginia. In some instances, we weren't always able to obtain complete compromise on each and every detail of the reform proposals. In those instances, you simply have to do what's right. I felt so strongly about putting money back in our consumers' pockets that I knew the public — and the Legislature — would ultimately support the reforms.

Governor Barbour: There was strong support from the Lieutenant Governor and the majority of the Senate as well as 60 House members — all of whom sponsored the bill. After some initial hesitation at the behest of the trial lawyers' lobby, the majority of lawmakers embraced a comprehensive tort reform bill, which overwhelmingly passed both houses. Legal reform was also an issue on which I and other candidates campaigned in 2003, and we were eager and ready to make constructive changes.

Governor Thornburgh: Did you work with other legal reform supporters outside the Legislature to build public support?

Governor Barbour: I partnered with an aggressive coalition of doctors and other healthcare professionals, business leaders, lawmakers, community leaders, manufacturers, the financial services sector and groups like Stop Lawsuit Abuse and Mississippians for Economic Progress. We worked with Mississippians for Economic Progress to survey voters on the issue, and found that the public clearly realized our legal system needed reforms. Collectively these groups built a powerful case for civil justice reform. They pressed the legislature with phone calls, letters and gathered for numerous rallies to put an end to lawsuit abuse.

Governor Thornburgh: Was there a similar process in West Virginia, Governor Manchin?

Governor Manchin: We simply went directly to the people, laid out the problem and explained how the proposal would

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Barbour*

address the problem. Indeed, once we were able to demonstrate to the West Virginians that these reforms could bring immediate, tangible improvements — not to mention much needed premium reductions — public support quickly solidified.

Governor Thornburgh: Do you think you could have gained legislative approval without the support of the business community?

Governor Barbour: No, we could not have done this without the support of the business community, and I'm talking about businesspeople in companies of all sizes from across the spectrum. They all were absolutely key. They understood better than anyone that lawsuit abuse drove up the costs of doing business in Mississippi to intolerably high levels, and every small business understood that they were one lawsuit away from bankruptcy.

Governor Thornburgh: What role did the business community play in West Virginia and how important was this support to passage?

Governor Manchin: Obviously, the business community played an active and visible role in supporting these reforms efforts. Of particular note were the contributions of Steve Roberts and the West Virginia Chamber of Commerce. The support from Steve, the Chamber, and other business leaders was critical to the development and passage of the reforms.

Governor Thornburgh: Steve, you've spoken out about the need for CEOs to become engaged in lawsuit abuse reform campaigns. Why is it so important for

CEOs and their companies to be involved?

Mr. Hantler: First, legislators and governors want to know that proposed reforms are going to make a meaningful difference to the business community. Legislators are not going to support legal reforms — and thereby make themselves the targets of the trial bar in the next election — unless they hear directly from business leaders at the top that these reforms have the support of the business community.

Second, it is vital for CEOs and companies to stand up to the relentless efforts of the plaintiffs' bar to expand business liability in every way possible. The plaintiffs' bar contributes huge sums to elect candidates to state legislatures and judiciaries who will expand liability laws so that the plaintiffs' bar can siphon off more billions for their own pockets just as they did in the tobacco and asbestos litigations.

Unless more CEOs support legal reform campaigns financially, liability-related costs in literally tens of states will increase dramatically just as they did in Mississippi and West Virginia before Governor Manchin and Governor Barbour began to restore the rule of law.

Governor Thornburgh: As a former Governor myself, I know that the legislation you introduce often looks a lot different from the bill that actually passes. Were there any significant compromises you needed to make along the way that proved crucial to passage of your reforms and how long did this process take?

Governor Manchin: Like any legislative

initiative, the input of the elected members of the Legislature is a necessary and welcome part of the process. Although there was a good deal of give and take along the way, I was committed to keeping the reform proposals together in such a manner that would guarantee relief to our consumers.

Working with the Legislature, we were able to accomplish many of these initiatives in just a few short months. However, like any serious reform, these steps must necessarily remain part of an ongoing process.

Governor Thornburgh: Were there similar steps that had to be taken to build a political consensus for legal reform in Mississippi, Governor Barbour?

Governor Barbour: The Speaker of the House and the chairman of the House Judiciary Committee bottled up the bill and the Legislature did not pass the measure during the Regular Session. I called a Special Session to deal solely with tort reform. At that point, even lawmakers who were not originally supporters were willing to get on board.

Governor Thornburgh: And how did it take to actually get a bill on your desk?

Governor Barbour: More than three years; the process actually started before I took office and some weaker reforms were passed. In January 2004 I was sworn in as Governor and we really got down to business.

Governor Thornburgh: Steve, both governors have said the business community plays a critical role in enacting legal

reform at the state level. From a business perspective, what impact does lawsuit abuse have on the investment in job creation and economic development?

Mr. Hantler: One of America's most successful entrepreneurs — Bernie Marcus, the co-founder of Home Depot — has said that the trial bar is Corporate America's biggest competitor for capital. Litigation-related expenses drain away billions of dollars that could otherwise be invested in new plants, new jobs, expanded facilities and new products.

In states with unfair liability laws, plaintiffs' lawyers also try to extort unwarranted settlements by using the media to attack a company's products and its reputation. These attacks drive down stock prices and cost shareholders billions of dollars. In fact, a new study by the economists at Pacific Research Institute (PRI) estimates that shareholders lose about \$684 billion every year because of lawsuit abuses. "Jackpot Justice," available at http://special.pacificresearch.org/pub/sab/entrep/2007/Jackpot_Justice/index.html. And don't think that's just hitting the wealthy — this is reducing the retirement assets of everyone with a 401(k) or ESOP.

Business leaders simply will not invest in jobs and facilities in states that do not have a fair and predictable legal climate. When a company has funds to invest, its management identifies the best states in which to invest and shuns states that are unfairly pro-plaintiff. This is why states like Texas, Georgia, Mississippi and other legal reform leaders have faster growing economies now compared with states where business is cutting back on new investments because of onerous liability

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Governor Thornburgh: What benefits did you originally envision coming from legal reform in West Virginia and in what ways have those benefits been realized?

Governor Manchin: The benefits were tangible — business and industry, particularly the insurance industry, had identified these issues as the cause of skyrocketing insurance rates and as impediments to the insurance market in West Virginia. Since they were asking for a commitment from the State, it seemed only natural that they make a similar commitment to our citizens. If these issues truly were obstacles to improving and expanding the market in West Virginia, then I thought the industry would be more than happy to commit to rate reductions and expanding into other lines of coverage if we could address these problems. So, I made it clear that if we were to work with the Legislature to enact these reforms, money must be put back into people's pockets in the form of lower premiums. That is exactly what I expected to happen.

Since enactment of these reforms, over \$70 million in rate relief has been realized by West Virginia consumers. On average, insurance premiums were reduced by 7.2% in 2005, and an additional 1.8% last year.

Just as important, the reforms led to the return of a major insurance company into West Virginia. Because of the insurance climate, State Farm had stopped writing new business in auto insurance in West Virginia in 2003. Following passage of these reforms, State Farm resumed writing of new auto insurance policies.

Obviously, the return of one of the largest players in the market has increased availability to consumers and increased price competition among remaining carriers, which will ultimately benefit West Virginia consumers.

Additionally, State Farm also returned to the homeowners and business insurance markets in West Virginia after nearly a two-year absence. After incurring nearly \$200 million in homeowners and business insurance underwriting losses in West Virginia from 1993 through 2003, State Farm decided to leave these markets. Citing the recent legal and insurance reforms, State Farm indicated that the increased market stability achieved by these reforms permitted them to begin accepting new homeowners and business insurance customers again in West Virginia.

Governor Thornburgh: Governor Barbour, you've also won a lot of praise for the Tort Reform Act of 2004. What benefits have Mississippi residents seen from this legislation?

Governor Barbour: In October 2004, I was proud to accept the State Legislative Award from the U.S. Chamber of Commerce Institute for Legal Reform on behalf of those who worked so hard on the passage of meaningful tort reform.

The *Wall Street Journal* called the reform "one of the most comprehensive legal reforms in the nation."

And, as I travel around Mississippi I see that our medical system is intact again. Doctors are practicing medicine, not having to defend frivolous lawsuits; in fact,

medical liability cases have dropped by 90 percent since reforms went into effect, and patients are getting better care.

Fraudulent cases are being thrown out of court and prosecutors are finally pursuing plaintiffs who collect money based on fraudulent claims. "Jackpot Justice" doesn't have a home in Mississippi anymore.

Before tort reform, the Toyota Motor Company said Mississippi's legal climate was one of the reasons the automotive manufacturer decided not to locate an assembly plant in Mississippi. But earlier this year Toyota announced its selection of a 1,700-acre site in north Mississippi to build its eighth North American vehicle assembly plant. That plant is now under construction and it would not have happened without real tort reform. We changed the judicial landscape to the point where it is a help not a hindrance. A state's legal environment is directly related to job creation. I am happy to report that the Toyota plant will employ 2,000 and start production of its Highlander model in 2010.

Governor Thornburgh: Governor Barbour, what benefits from legal reform in Mississippi have been experienced by small business?

Governor Barbour: The U.S. Chamber of Commerce and associated pro-business groups are now acknowledging that our new law is changing not only the poor rankings and reputation, but also the very climate for job growth and business expansion. Small business owners constantly tell me they have a better handle on costs because they have less fear of frivolous lawsuits. That's huge, no

matter what product or service your company offers.

Governor Thornburgh: Which lawsuit reforms are most important to small businesses?

Mr. Hantler: The most important reforms would be to limit non-economic and punitive damages and impose sanctions for frivolous cases so small businesses are better protected from litigation abuse. Even when a small company is successful in defending itself against frivolous lawsuits, it can spend two or three years' profits doing so. This is a huge cost to our entrepreneurial system.

AJP surveys of small business leaders we conducted in conjunction with our state partners show that in many states, liability laws are so onerous that business managers and owners now spend less time on product development and marketing plans than they do on figuring out ways to avoid lawsuits. This dangerous trend suggests that America will fall behind in the competition in the global marketplace because our companies are avoiding lawsuits instead of growing.

Small business owners also have a direct stake in how the state's legal climate treats larger companies. When trial lawyers target a state's core industries, this can damage the overall health of the states' economy. If an anchor business has to spend millions defending against frivolous cases, it has less money for payroll-and all the multiplier effects on suppliers and local businesses. Also, the abuse of joint-and-several liability-where trial lawyers can use one company to get at another-can destroy a successful small business

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through extraordinary costs that can never be recouped and often result in bankruptcy.

Governor Thornburgh: What benefits have Mississippi consumers seen due to legal reform legislation?

Governor Barbour: The day I signed the tort reform into law, MassMutual Financial Group, a nationwide life insurance company, announced it was re-entering the Mississippi market due to the passage of this legislation. Examples like that speak for themselves.

A year after this legislation was passed and before Hurricane Katrina devastated our coast and reversed this trend, we saw decreases in general liability rates, homeowner's insurance rates, automobile insurance rates, and property insurance rates.

On the medical liability front, there have been three reductions in medical liability insurance rates by the largest insurer of doctors in Mississippi, concrete evidence that tort reform is working. Rates were reduced across the board by 10 percent for 2007, which came after a reduction in renewal rates for 2006 by 5 percent, and a retroactive refund of up to 15 percent on 2005 premiums.

Governor Thornburgh: Steve, Governor Barbour makes the point that access to medical care improves when medical liability laws fairly balance the interests of the medical community and patients. Everyone, including employers, have an interest in lower medical costs and higher quality care. What reforms are the most important to patients and where have patients benefited from the enactment of state-level medical liability reform?

Mr. Hantler: The most critical reforms for patients are reasonable limits on non-economic damages and limits on attorney contingency fees.

The experience in Texas is a good case study. Before 2003, medical care in Texas was deteriorating rapidly. Why? In just four years, doctors saw insurance premiums skyrocket as much as 128 percent. Two-thirds of all Texas doctors said they had to take out bank loans, draw down on their retirement savings, or take salary cuts to keep their practices going — 6,500 doctors couldn't afford liability at all, so they were forced to practice without coverage. See "Jackpot Justice," *supra*.

Of course, lawsuits were driving these costs. By 2002, one out of three doctors could expect to be sued in any given year. Thirteen out of 17 liability carriers went out of business, left the state, or began withdrawing their business from Texas. See "Jackpot Justice," *supra*.

In 2003, Texas voters passed Proposition 12, a constitutional amendment that placed reasonable limits on "non-economic" damages. In the years since Proposition 12 passed, every major carrier in Texas has cut its rates, most by double digits. See "Jackpot Justice," *supra*. As a result, Texas has added 7,000 physicians and the numbers of specialists are starting to increase. See "Jackpot Justice," *supra*.

But unfortunately, many states—including Florida and Pennsylvania—haven't learned the lesson that medical liability laws that favor the plaintiff's bar over doctors will reduce access to life-saving medical care. When you think about it, it is extraordinary that there are governors and legislators in these states and others who are

putting the financial goals of plaintiff's lawyers ahead of the well being of tens of thousands of vulnerable medical patients.

Governor Thornburgh: Governor Manchin and Governor Barbour, now that the reforms have been in place for several years, as you look back at the process you directed to achieve these reforms, what lessons have you learned that might be useful for other government leaders who may be considering similar reforms?

Governor Manchin: First and foremost, I am pleased that West Virginia was able to achieve comprehensive insurance and civil justice reform without sacrificing necessary safeguards for our consumers. Additionally, I think we found a new approach to handling some of these types of issues. We were being told by business and industry that two or three certain legal changes could improve the market, grow the economy, and benefit consumers. I was prepared to take them at their word — if they were prepared to speak in dollars and cents. And they stepped up and publicly committed to reduce rates, return to West Virginia in other markets, and ultimately improve the climate for our consumers.

Governor Thornburgh: Governor Barbour?

Governor Barbour: It took an army of aggressive supporters to push this legislation through. My main message would be to develop a plan, engage all partners, build public support and follow through, no matter what. States beginning to look at tort reform will face a rich, loud, bullying lobby in trial lawyers, but you can be confident that, with a lot of work, common sense and the common good can triumph over selfish special interests. A fair legal climate is one of the vital fundamentals for job creation.

In Mississippi the early returns are good and I expect them to get better.

Governor Thornburgh: Steve, there is ample evidence that lawsuit abuse reforms are creating concrete benefits for consumers, patients and business in many states. Yet, officials in many states are resisting these reforms. What's your assessment of the situation and what we should be doing?

Mr. Hantler: There is no question that lawsuit abuse reform is in the public interest as Governor Manchin and Governor Barbour have described here today. However, we have to be alert to the nature of the plaintiffs' bar. This is an industry of wildcatters who collectively rake in more than \$40 billion a year. In the tobacco settlement from the mid-90s, they gained \$268 billion in fees — that's billion with a "B". These very street-smart entities, who unlike corporate associations can make decisions on a dime, have used their vast financial resources to become tremendously powerful in supporting candidates for governor, legislature and Supreme Court. In some states, they are the most powerful deep pockets supporters of activist candidates, spending more than any other interest group. They are now even supporting conservative candidates who will favor plaintiffs' interests.

The plaintiffs' bar is very astute in using its campaign finances and PR machine to reward candidates and office holders who vote against legal reform. Likewise, when sitting legislative leaders propose reforms, these leaders nearly always face political opponents in the next election who are heavily funded by the plaintiffs' bar, perhaps to a greater degree than the leaders can gain from his or her own funders.

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When state leaders support the type of legal reforms we have discussed today, the business community needs to be prepared to support these leaders in legally permissible ways in the next election. If the business community does not support these leaders, it will be the equivalent of letting the plaintiff's bar win without a fight.

We in the business community need to demonstrate increased support for legal reform and for the state leaders who are the front lines in this battle with the trial bar. We can do this most effectively, as the American Justice Partnership does, by rallying behind in-state advocacy organizations and providing them with adequate strategic and financial support to educate the public as to what they have at stake and persuade legislators to do what is in the public interest.

Governor Thornburgh: Thank you, gentlemen.

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BIOGRAPHIES

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 Counsel to the law firm Kirkpatrick & Lockhart Preston Gates & Ellis LLP, and Chairman of Washington Legal Foundation's Legal Policy Advisory Board.

The Honorable Haley Barbour is the Governor of Mississippi. He was elected on November 4, 2003 in the largest turnout in a gubernatorial election in state history, and was inaugurated on January 13, 2004. He is a native of Yazoo City, and received his law degree from Ole Miss in 1973. In the mid-1980s, Governor Barbour served as an advisor to President Ronald Reagan for two years as Director of the White House Office of Political Affairs. From 1993 to January 1997, he served two terms as Chairman of the Republican National Committee.

The Honorable Joe Manchin was elected West Virginia's 34th governor in 2004. He previously served in the state legislature from 1982-1996, and was also Secretary of State from 2000-2004. He is Vice-Chair and Chair-Elect of the Southern Governors' Association, and is Chair-Elect for 2008 for the Democratic Governors' Association.

Steven B. Hantler is Chairman of the American Justice Partnership, a partnership of over 70 state and national organizations working for state liability reform. He is a member of the Washington Legal Foundation's Legal Policy Advisory Board.