



*A History of*

# LAWSUIT REFORM IN TEXAS

**MAY 2008**

by Joseph M. Nixon

Texas Public Policy Foundation  
Center for Economic Freedom

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In America, we have developed a judicial system that strongly protects personal property rights and, for the most part, does a magnificent job of providing remedies to those who have been harmed. In essence, the American judicial system is the backbone of our economic system. Confidence in a legal system that fairly protects economic and personal rights is vital to healthy, free enterprise.

People who enter into contracts do so confident in their right to enforce that contract. Consumers have the right to believe that the product they purchased is made suitable for its intended purpose and meets its advertised and represented claims. Those unfortunately damaged by others' malice or negligence may justly be compensated for their injuries. Our laws fairly address the rights of those who have been wronged and protect the rights of those who have done no wrong.

Yet, no system set up by man is totally perfect, and the American legal system is in a constant state of change in an effort to seek fairness. The purpose of this paper is to address the development of those changes in Texas jurisprudence, the efforts to remedy legal inequities, and the recent legislative efforts to bring the scales of justice into balance.

## Historical Perspective

The history of common law in Texas differs from that of most states. After Mexico fought and obtained its independence from Spain in 1821, Mexico established a constitutional democracy in 1824, replicating the provisions of the United States Constitution. Texas was, of course, a province of the country of Mexico; Mexico had been a colony of Spain. Accordingly, the



original law of the land in Texas was the *Code de Seville*. When the first American immigrants settled in the Mexican province of Tejas, they subjected themselves to the *Code de Seville* and, subsequently, the Mexican Constitution of 1824. There was no English common law.<sup>1</sup>

In 1840, while Texas was its own nation, the Texas Legislature adopted by statute certain aspects of the English common law, though not all of it. Significantly, the legislation specifically reserved to the Legislature the right to change the common law it just adopted.<sup>2</sup>

During the same period of time, the citizens of Texas created a constitution, dividing power into executive, legislative, and judicial branches. There have been several constitutions, the last of which was written in 1876 (just after Reconstruction) and included the provision that the courts of the state "shall be open, and every person for an injury done him, in his lands, goods, person or reputation shall have remedy by due course of law."<sup>3</sup> This is an important provision, which guarantees access to the legal system for all Texas citizens and is known as the "open courts" provision.

<sup>1</sup> *Southern Pacific Co. v. Porter*, 160 Tex. 329, 331 S.W.2d 42 (Tex. 1960).

<sup>2</sup> The first law in Texas' statutes reads: "The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature." Tex. Civil Stat. Ann. Art. 1 (Vernon 1848). Article 1 was repealed in 1985 and replaced by Tex. Civ. Prac. & Rem. Code § 5.001, which reads: "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the Constitution or the laws of this state, the constitution of this state, and the laws of this state."

<sup>3</sup> Texas Constitution, Art. I, Sec. 13 (1876).

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One final historical point is that in 1876, when the last Texas Constitution was created, there did not exist in the English common law or in Texas jurisprudence the concept of non-economic damages. The Texas Supreme Court subsequently used the “open courts” provision to judicially create additional elements of damages. Non-economic damages a plaintiff can now recover (stated with the year the Texas Supreme Court authorized a jury award for that element of damage) include physical pain and mental anguish (1895), physical impairment (1901), disfigurement (1948), loss of spousal consortium (1978), parental loss of a child’s consortium (1983), and a child’s loss of parental consortium (1990). None of these elements of damages—created only by the courts after the constitution was adopted—were ever codified or ratified by the Legislature.

## Origins of Lawsuit Reform in Texas

The 1960s and 1970s saw an explosion in the development of tort

common law. From 1876 to the present, the courts of Texas, not the Legislature, developed the legal concepts of:

- Joint and several liability
- Class action lawsuits
- Expanded claims for non-economic damages
- Punitive damages
- Open venue rules
- Broader evidentiary rules for experts
- Strict liability for product manufacturers
- Contingency fee contracts for plaintiffs
- Expanded theories of professional liability

Additionally, the Texas Legislature created a wrongful death cause of action in 1895 and the Texas Deceptive Trade Practices Act (“DTPA”) in 1975.

The DTPA allowed any consumer of a good or service a cause of action against the seller for any alleged misrepresentation made during the sale. The DTPA also applied to sophisticated business transactions, launching this new cause of action to the forefront of business claims.

In this backdrop of an effort to provide plaintiffs remedies for their alleged injuries, Texans were being sued with greater frequency and ferocity.<sup>4</sup> As there is no point in prosecuting a claim against a defendant incapable of paying a judgment, doctors were an easy target because they either had insurance or assets necessary to satisfy a judgment. And, as suits against doctors became more prevalent as awards rose, doctors carried greater limits of liability that, in turn, increased their likelihood of being sued.

Before the litigation boom, many professionals did not carry malpractice insurance. Now, however, it is rare for an accountant, lawyer, engineer, architect, contractor, officer or director of a corporation, coun-

<sup>4</sup> The public policy debate should not include a criticism of lawyers. Lawyers have an ethical duty to aggressively pursue all legal rights and remedies on behalf of their clients, whether in prosecuting or defending civil claims. Certainly, there are instances in which criticisms of claims or defenses are valid. This debate is not about that. Rather, this discussion is whether the civil justice system is out of balance with regard to citizens’ other rights, i.e., the right to earn a livelihood, obtain medical care and participate in a civil society. The judicial system normally serves as the arbiter among all rights; but when the judicial system itself overwhelms citizens’ other rights, it is appropriate for legislators to examine and correct any imbalance. The civil justice reform discussion was formally begun in Texas by the Dean of the University of Texas School of Law, W. Page Keeton in 1975 at the request of the Governor, Lt. Governor, and House Speaker at the time and involved over the next 30 years such notable Texas office holders as John T. Monford, Will G. Barber, Teal Bivins, David Sibley, and Bill Ratcliff.

In the 1980s, the litigious nature of the state saw a reversal in societal behavior. People became less willing to serve on boards of directors. Recreational facilities closed. Diving boards were removed from swimming pools. All too often, the phrase, “We can’t do that; we might be sued,” was being heard.

selor, or consultant not to carry some type of errors and omission liability coverage. Texas, like most states, mandated that all drivers be insured for minimum limits. Homeowners now carry liability insurance in addition to peril insurance. While reducing the risk of an individual loss, the prevalence of insurance only exacerbated litigation exposure. Litigants now had an easy source of funds from which to collect a judgment.

Increased exposure to liability created by common law or statutes caused increased demands for insurance, coupled with contingent fee awards, created increased opportunities for litigants, which lead to increases in insurance premiums. This became an ever-upward spiral, the cost of which was borne by those buying insurance to protect against the cost of litigation and the exposure to judgments.

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there have been notable and laudable improvements in product safety, there has also been discouragement in product development and personal involvement. Business capital looked to other states, and businesses were reluctant to relocate or expand operations in Texas.

Even volunteers became targets. In Texas, where a doctor might stop and render aid in an emergency situation, the Legislature actually created a statute making a doctor liable for violation of the standard of medical care, even though the doctor was simply volunteering his services and trying to help save a life. The law immunized anyone untrained in medical arts but held those who had been trained, such as physicians and nurses, to a higher standard of care. This created the bizarre situation where a plumber who stopped to help someone injured in a car accident would be immune from suit, but a physician who rendered aid could be liable.

This law was created, in part, because the plumber had no malpractice insurance, and the physician did. Yet, the person in need of emergency care, if capable of answering the question, would tell you in every instance that they would rather

be treated by a physician. This is one example of poorly-developed public policy that, while beneficial to a plaintiff in a suit, was injurious to the health of the state’s citizenry.

Under this unbalanced judicial system, citizens began to respond and petition their government for change. One of the first groups created was the Texas Civil Justice League in 1986, followed by Citizens Against Lawsuit Abuse in 1990, and Texans for Lawsuit Reform in 1994.

## Setting the Stage

In 1977, the Texas Legislature passed the first two significant tort reform laws. The first created a \$500,000 cap on all damages, economic and non-economic, in a medical malpractice lawsuit. It was apparent then that the prevalence of lawsuits against physicians in Texas was diminishing access to health care.

In 1988, however, in the case of *Lucas v. United States*,<sup>5</sup> the Texas Supreme Court ruled a medical malpractice cap of \$500,000 violated the “open courts” provision and was, therefore, unconstitutional. In support of its ruling, the Texas Supreme Court argued that only the courts

<sup>5</sup> *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988).

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had the authority to alter the common law in Texas, as common law was court “created and evolved.” It relied upon the “open courts” provision in the Texas Constitution to support its argument that the Legislature lacked the legal capacity to establish damage caps on common law causes of action. In ruling the damage cap “unreasonable and arbitrary,” the Texas Supreme Court completely forgot that the law of the land was the *Code de Seville*, until the Texas Legislature adopted certain aspects of the English common law by statute in 1848. Thus, in 1988, the “open courts” provision in the Texas Constitution of 1876 was given a meaning that legislative alterations of common law causes of action are an unconstitutional exercise of legislative authority.<sup>6</sup> This holding is a valid precedent today in Texas jurisprudence despite the fact that there would be no common law in Texas but for an act of the Legislature and that the statute that adopted the English common law specifically preserved for the Legislature the right to alter or

amend any aspect of the common law the Legislature chose.<sup>7</sup>

As a result of the court’s *Lucas* ruling in 1988, the medical malpractice reforms of 1977 had no effect. The pressure from citizens’ groups against what they perceived to be an overly litigious environment began to mount. Political pressure was created in legislative and judicial races regardless of party affiliation, and “tort reform” became a major political issue.

Equally important, the Texas Supreme Court held in *Lucas* that any legislative limitation of damages violated the state’s constitution. Any future enactment of a cap on damages needed to be accompanied by a constitutional amendment authorizing the cap. As Texas’ Constitution may only be amended by a two-thirds vote of each legislative body and affirmed by a majority vote of the citizenry, the Texas Supreme Court also created a very high political bar protecting judicial activism.

## The Campaign of 1994

Ann Richards had been serving as governor of Texas since 1990 and was seeking reelection for a second term. George W. Bush, in his campaign for governor, challenged her on four reform issues: welfare reform, education reform, juvenile justice reform, and tort reform. For the first time in Texas, lawsuit reform became a major campaign plank in a state-wide campaign, and many voters used tort reform as a litmus test in deciding which candidate to support in legislative races.

While the need for tort reform polled very high among voters, few people could identify with any specificity what needed to be done. “Lawsuit reform” was about as close a description as any voter could articulate. The law is a complicated morass of procedure, evidence, constitution, statutes, and common law that creates rights for citizens and opportunities for litigation. In 1994, Texans for Lawsuit Reform (TLR) reduced the complicated scheme into

<sup>6</sup> A discussion of lawsuit reform in Texas must recognize the political nature of the judicial system. Judges to all trial and appellate benches are selected in partisan elections in which judges campaign and receive campaign contributions. An important review of this system was examined by the CBS news show *60 Minutes* in a story entitled, “Is Justice For Sale?” The implication of the story was that the plaintiffs’ bar effectively caused pro-plaintiff oriented judges to be elected to the Texas Supreme Court. This news story aired about the same time as the *Lucas v. United States* decision was rendered.

<sup>7</sup> Amazingly, in the case of *Rose v. Doctors Hospital*, 801 S.W.2d 841 (Tex. 1990), the wrongful death cap was upheld by the Texas Supreme Court. In deciding *Rose*, the Texas Supreme Court recognized that the wrongful death cause of action did not exist in the English common law; it was created by the Legislature in 1895. The court went on to reason that, since the Legislature created the wrongful death cause of action, it had the authority to establish damage limits for that cause of action. Therefore, the damage cap on a wrongful death lawsuit did not violate the “open courts” provision of the Texas Constitution.

Texas had earned the moniker given it by different commentators and organizations as a “lawsuit mecca” and a “judicial hell hole.” Texas consistently ranked in the bottom of a handful of states on evaluations used by companies, medical providers, and insurers to decide in which states to do business.

11 subject matters for legislation: punitive damages, DTPA, joint and severable liability, medical malpractice, frivolous cases, junk science, streamlining, court rules, campaign finance reform, public servant liability, and contingent fees. The speaker of the Texas House, Pete Laney (D-Hale Center), created an additional committee to handle lawsuit reform bills. The House Committee on Civil Practices was first chaired in the 1995 legislative session by Representative Todd Hunter (D-Corpus Christi), who was known to be pro-tort reform. Interestingly, most of the lawsuit reform package was sent to the House Committee on State Affairs—not the Committee on Civil Practices—where its chairman was known to be a loyalist to the democrat speaker. Despite lengthy hearings in both House and Senate committees and the receipt of evidence supporting the need to curtail the abusive nature of the litigation system in Texas, the Legislature passed only a few aspects of the TLR tort reform package. The tort reform package that was allowed to pass did so with little or no debate, on voice vote, and without amendment. Members were informed by the Democrat leadership that, if amendments were offered, even the few bills allowed to be considered would be withdrawn, and no bill would be passed. In the end, three notable laws were enact-

ed: changes to the DTPA made it no longer a sophisticated business tool, reasonable punitive damage caps were enacted, and fixing the venue rule was attempted. Otherwise, pro-tort reform legislators watched agape at the passage of legislation having little effect on the tort litigation crisis in the state, because of a procedural play by those in partisan power in the Texas Legislature.

### Scope of the Problem in Texas in 2003

Texas had earned the moniker given it by different commentators and organizations as a “lawsuit mecca” and a “judicial hell hole.” Texas consistently ranked in the bottom of a handful of states on evaluations used by companies, medical providers, and insurers to decide in which states to do business. Further, the taxpayers of Texas paid for a court system that handled a tremendous amount of what was essentially national litigation. The problem areas that existed in 2003 are described in the following paragraphs.

#### *Medical Malpractice*

Governor Rick Perry declared medical malpractice a state-wide crisis. Doctors were caught between rising medical malpractice insurance costs and lower compensation from insurance-provided benefit contracts and low Medicare/Med-

icaid reimbursement levels. Combined with increasing hassles and demands to appear in court or in depositions, doctors were choosing to retire or leave Texas. In doctor-per-citizen ratio, Texas ranked 49th out of 50 states. Here are a few of the reasons why:

- One out of four doctors had a claim filed against them each year.
- Eighty-five percent of all medical malpractice claims brought to trial failed but cost an average of \$50,000 per defendant to defend.
- In 1989, the average non-economic award in a medical malpractice case was \$220,000; by 1999 the average non-economic award in a medical malpractice case was \$1.4 million.
- The percent of jury awards attributable to non-economic damages rose from 36 percent of the total award in 1989 to 66 percent of the total in 1999. This means that the economic damage award remained statistically the same but that portion of the award for mental anguish, pain and suffering, disfigurement, loss of consortium—all the court created elements—was responsible for the increase in the jury award.

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- The number of medical malpractice insurance companies in Texas dropped from 17 in 2000 to four by 2003. One of the remaining four was the insurer of last resort funded by the State of Texas.
- Texas has 254 counties. Over 150 counties in Texas had no obstetrician in 2003. Over 120 counties had no pediatrician. Many cities had no neurosurgeon and no orthopedic surgeon. Away from the large urban areas, people were literally dying because there were not enough emergency personnel to provide care in the critical hours immediately following an accident.

### *Class Action*

In a class-action case, certification of the class is generally the most significant event. In order for a class to be certified, the trial court must find that the plaintiff has a probable right of recovery. Accordingly, the determination by the trial court judge that the case will proceed as a class against the defendant essentially dictates the outcome of the case. Once a class is certified, as a practical matter, the defendants almost always settle, due to the high financial risk of going to trial.

Prior to 2003, the Texas Rules of Civil Procedure allowed the trial court to certify the case as a class action, try the case, and, if the defendant chose to appeal, the case could be appealed to the court of appeals on the issue of class certification. The Supreme Court only received the case after the initial appeal if one of the parties petitioned the court to accept it and the court chose to hear the case. Accordingly, there were very few Supreme Court cases detailing the legal requirement of class certification. Trial courts had little guidance in class certification.

Not surprisingly, some class-action cases were used to capture large attorneys' fees. Many times, individual class members were compensated with very little money or a coupon discounting the next purchase of the very product they bought from the defendant and complained about in the suit. The lawyers were always paid in cash.

Finally, the certification and settlement of some cases were combined. If liability was a possibility, the defendant agreed to have the class certified quickly in an effort to extinguish larger claims of damages and minimize its financial exposure. In valid cases, this is unfair to class plaintiffs. Yet, these types of cases were settled for large attorneys'

fees, with very little money going to the nominative plaintiff or coupons being mailed to the class, and no alternation in the product. This is an easy way out for defendants and a financial boon for attorneys; the only ones left out are consumers.

### *Pre-Trial Settlement*

America's open, accessible legal system works well for our society. Having access to an impartial body of law, an impartial judge, and an impartial jury is very important to a free society and sustained economic growth. But, as an adversarial system, it can become imbalanced by allowing time-consuming and expensive litigation to proceed rather than promoting the resolution of disputes in the least expensive manner possible. The procedures in Texas did not allow for or encourage a resolution of disputes where the allegations made by a plaintiff were based on inadequate or no evidence. Many defendants unnecessarily endured lengthy discovery and pre-trial maneuvering because either they or the plaintiffs failed to realistically evaluate the merit of the lawsuit early in the litigation process to determine whether it should be settled. Some parties used the expensive and time-consuming nature of litigation as leverage to extract concessions or a settlement from the opponent. In Texas, the





civil justice system failed to provide appropriate incentives to litigants in order to avoid unnecessary expense and to shorten the time a lawsuit stayed alive in the legal system.

For example, many cases are settled on what is called “nuisance value.” A nuisance value settlement is what a defendant is willing to pay a plaintiff just to go away and stop being a costly nuisance. The settlement is valued as the cost of defense of the lawsuit and has no relation to plaintiff’s asserted injury. As many of these cases are filed by plaintiffs who have agreed to pay their attorney a contingency fee, the lawyer receives a contracted percentage of the nuisance value. Hence, the lawyer has an incentive to manipulate the process in order to increase the value of a nuisance. The Texas Rules of Civil Procedure allowed for significant manipulation of frivolous lawsuits into big nuisances. Finding a solution to this problem would mean fewer lawsuits, less expense to Texas citizens, fewer cases, and less burden on citizens who serve on civil juries.

### *Venue*

The choice of a friendly forum for a lawsuit often predetermines the outcome. But allowing a plaintiff to shop for venues violates a basic legal tenet that a case should be tried where the injury occurred,

where the plaintiff lives, or where the defendant lives. In Texas, multiple plaintiffs could join a suit by filing suit with a plaintiff who lived in the county. For years, many people who had never set foot in Texas became plaintiffs in Texas lawsuits. In 1995, the Legislature attempted to address courthouse forum shopping, passing a bill requiring that each plaintiff independently establish venue in the court where the lawsuit was filed. This requirement was intended to address the problem of Texas serving as host to the claims of plaintiffs from all across the country without any connection to Texas simply because one of the plaintiffs lived in a Texas county considered to be a plaintiff-friendly forum. The 1995 venue reform statute provided that, if each plaintiff in a multiple plaintiff lawsuit cannot independently establish venue, the out-of-state plaintiff must satisfy other factors regarding fairness in order to join as a plaintiff.

A few Texas trial judges used a couple of procedural paths to circumvent the intent of the 1995 legislation and routinely allowed out-of-state litigants to join as plaintiffs. This hole in the procedure did little to end the abuse of bringing a lawsuit in a plaintiff-friendly county where neither the plaintiff nor defendant resided, nor where the cause of action occurred.

### *Multi-District Litigation*

The United States Congress recognized years ago that the inefficiencies of having factually-similar litigation pending in multiple locations around the country was a significant problem. Cases involving the same product being brought in multiple courts across the United States created inequities in awards and inconsistencies in rulings. To solve the problem, Congress created the multi-district litigation panel and empowered the panel to transfer factually-related cases pending in the federal court system to a single-district court for consolidated pre-trial proceedings. The federal district court that is designated as the multi-district litigation (MDL) court for that particular issue is then able to issue consistent pre-trial rulings, coordinate pre-trial matters, including discovery and motions, so as to make the litigation process more cost effective, efficient, and consistent. This is fair to plaintiffs and defendants.

Texas lacked a similar procedure for handling factually-similar cases. It was not uncommon, specifically in toxic tort or mass product cases, to have thousands of identical cases filed in various counties all over the state, with inconsistent pre-trial rulings and evidentiary decisions. The outcome of the case depended more on where it was filed than the



application of the rules of evidence or procedure.

This inequity created enormous burdens on the civil justice system. Defendants and plaintiffs incurred unnecessary pre-trial costs and the case outcome was truly uncertain. Recent examples of the need for multiple district litigation are cases involving breast implants, vanishing premium life insurance contracts, asbestos, tire, mold, silica, and pharmaceutical products.

### *Proportional Responsibility*

Even in 2003, jurors in Texas were prohibited from assigning fault to a party who could not legally join a lawsuit. This anomaly began nearly 100 years ago when the Texas Supreme Court first adopted the concept of joint and several liability. Joint and severable liability arose from a legal theory that fault could not be proportioned in a suit, so that any defendant found to be even a little at fault was liable for the entire judgment. Over the years, the law in Texas evolved to allow jurors to apportion fault; however, courts instructed juries that they must assign fault to only those parties listed in the lawsuit, regardless of the evidence.

The problem was that not all the parties responsible for the damaging acts could be included in a law-

suit. For example, debtors in bankruptcy cannot be joined in a suit for a debt because they are protected by the bankruptcy laws from further litigation, even if the debtors were most at fault for a plaintiff's loss. Other people who could not be joined were an employer, an unknown party, or a person outside the reach of service of process. Many property owners sued by tenants for acts committed by a criminal could not join the criminal who was responsible for the injury suffered by the plaintiff. Hit-and-run drivers who were unknown, yet who caused an accident, could not be assigned fault because they were not sued. An employer who carried worker's compensation insurance could not be apportioned fault even if it or a co-worker was the party most responsible for a workplace injury. As a result, in many instances, jurors could not assign fault to those who actually caused the injury because Texas law simply did not allow juries to consider evidence that certain people may have been at fault for a particular event. That law frustrated juries and often placed a greater percentage of financial responsibility on the wrong defendants.

### *Product Liability*

In Texas, as in many other states, an anomaly existed in product liability law. A seller of a product that turned out to be defective could be sued

and held accountable for the product defect even if the seller did not make or package the product. This was most prevalent in cases involving big retailers such as Sears and Wal-Mart, who were held liable for the defects of products they acquired as wholesalers to re-sell. The law favored an innocent purchaser over an innocent retailer. The thinking was that an innocent retailer is in a better position to discover a product defect and not sell the product. While this sounds fair, the law caused many small, family-run businesses to be litigated into extinction. The pharmaceutical arena is a case in point. Together with the inappropriate venue statutes, a small, local, and independently-owned pharmacist could be sued for the delivery of a drug manufactured by a large pharmaceutical company and prescribed by a doctor, even though the plaintiffs knew that a mom-and-pop drugstore in a small town did not have the resources to pay a multi-million dollar judgment and had no involvement in the development of the drug.

The pharmacy and the pharmacist were often brought into the lawsuit simply to obtain venue in a plaintiff-friendly location. Small businesses all over Texas have been forced to expend thousands of dollars per lawsuit defending themselves in actions based upon alleged product

It violates common sense to require manufacturers to comply with government mandated safety standards and then allow those manufacturers to be sued when the standards are either insufficient or misguided, or when the product is designed and manufactured to higher standards.

defects, even though the local business owner had no responsibility for the product defect, did not write the warnings or instructions that accompanied the product, and made no representations about the product.

A second problem was that Texas' product liability law discouraged manufacturers from using safer product design. A product defect case may be proven at trial when the evidence shows that the manufacturer knew or should have known of a safer alternative design for the defective product but failed to employ the safer design. Traditionally, plaintiffs prove this fact by showing that the manufacturer had knowledge of a safer design of the product based upon the manufacturers' research and development. Allowing this kind of proof actually discouraged manufacturers from spending capital to design and research safer products.

Finally, Texas manufacturers could be strictly liable even when they followed all state and federal safety standards in manufacturing their products. Evidence that a manufacturer was required to produce a product to specific federal standards was no legal defense. Yet, deviation from federal standards was, in itself, cause for strict liability. If the standard was insufficient, the manufacturer was still strictly

liable. It violates common sense to require manufacturers to comply with government-mandated safety standards and then allow those manufacturers to be sued when the standards are either insufficient or misguided, or when the product is designed and manufactured to higher standards.

#### *Pre- and Post-Judgment Interest*

For many years, Texas did not allow interest on the award of judgments. This inappropriate position encouraged defendants to slow discovery, delay trials, and file frivolous and unnecessary appeals. Liable defendants kept the time value of a judgment for as long as they could legally withhold or forbear execution on the judgment.

Appropriately, the Texas Supreme Court, followed by the Texas Legislature, altered this inequitable rule to allow interest on judgments. At the time the statute was adopted, interest rates in the United States were very high. Accordingly, the Legislature set a post-judgment interest floor of 10 percent and ceiling of 20 percent. It also set a pre-judgment interest rate of 10 percent. (In some contract cases, it was less.) When the interest rates returned to historically normal levels, suddenly one of the best investments was to own a cause of action or a judgment in Texas against a solvent or insured

defendant. With a pre-judgment interest rate at 10 percent, plaintiffs had little incentive to push valid cases to trial at the earliest possible time. High pre- and post-judgment interest rates also discouraged reasonable settlements. Rather than compensating a judgment creditor for the actual current value of the money owed as a result of the judgment, the statutory pre- and post-judgment rates were out of step with current economic trends.

#### *Supersedeas Bonds*

In Texas, every litigant has an automatic right of appeal to a court of appeals. In order to effect the appeal, the appellant must file an appeal bond. This is a small-cost bond and does nothing to prevent a plaintiff from executing on a judgment. In order to preclude the plaintiff's execution on a judgment, a defendant who chooses to appeal must file a supersedeas bond, which has the effect of superseding execution on the judgment. In 2003, a supersedeas bond was required to equal the amount of the judgment, no matter how large, and to include interest. If the appeal took a matter of years, interest of 10 percent was required to be added to the bond each year. If a supersedeas bond was not in place, the plaintiff could execute on the judgment and seize assets of the defendant.

In mass-tort litigation, often the company responsible for the manufacturing of the offending product is out of business or bankrupt. Accordingly, plaintiffs, through their attorneys, look to find companies that have done business with the bankrupt manufacturers or had owned subsequently-acquired assets of the bankrupt company, in an effort to hold the successor of the asset or business liable.

This system in Texas existed essentially since the adoption of the Constitution of 1876 and was designed to protect judgment creditors from deadbeats who might hide their assets in response to an adverse judgment while prosecuting a frivolous appeal.<sup>8</sup>

The problem was particularly acute in those Texas counties known as judicial hell holes. The plaintiff may have obtained a large judgment based on inappropriately-admitted evidence or an incorrect trial court ruling, but the defendant was precluded from effectuating an appeal because they could not risk the loss of operating capital by posting a huge supersedeas bond.

### *Successor Liability*

A vibrant economy requires the free flow of goods and services and open markets for assets. Sometimes, open markets for assets include the acquisition or merger of businesses. In those situations, the acquiring company, under Texas law, often acquires the liability along with the assets so that a successor of a company with liabilities becomes responsible for those liabilities, whether they be debts or claims against the company. This is known as successor liability.

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One horrific example of successor liability involved Crown Cork & Seal Co. Inc., which manufactured soft drink bottle tops. In 1963, Crown Cork & Seal acquired—for \$7 million—stock of a company that had a division that previously manufactured an insulation product that included some asbestos (but not during the time Crown Cork & Seal owned it). Three months after the stock acquisition, the acquired company sold the division, not because it knew or had any knowledge of anything wrong with the insulation product, but because the division was not part of the business model of Crown Cork & Seal. Today, Crown Cork & Seal has numerous manufacturing facilities world-wide, employing over 20,000 people, including 6,000 people in the United States.

In its entire history, Crown Cork & Seal has never manufactured a product that included asbestos, but because it once owned—for three months some 45 years ago—a division of a company that manufactured an asbestos-containing insulation product prior to acquisition, it has been sued repeatedly throughout the United States, and especially in Texas.

Crown Cork & Seal has been forced to pay out over \$600 million to asbestos plaintiffs for alleged defects of a product Crown never made. If the law is about justice and holding accountable parties responsible, under no fathomable theory of justice can it be reasonably argued that Crown Cork & Seal was a responsible party for the manufacture of a defective product that included friable asbestos. Because the laws of Texas and many other states allowed for the successor of a liable company to be liable—as if it were the manufacturer—companies such as Crown Cork & Seal throughout America were being sued in Texas' courts, as if they were the manufacturer of a defective product.

<sup>8</sup> This system also had the effect of precluding defendants suffering large judgments to effectively prosecute an appeal. In the case of *Pennzoil v. Texaco*, in which Pennzoil obtained a \$3 billion dollar judgment, Texaco could not put up a \$3 billion dollar supersedeas bond. The entire company was exposed to seizure during appeal.



### *Asbestos*

Asbestos is a naturally-occurring mineral widely used during and after World War II<sup>9</sup> in a variety of industrial, commercial, and household products. It is an excellent insulator, does not burn, resists corrosion, and is virtually indestructible. It can even be spun into threads, making the product useful for a wide variety of commercial applications.

In 1973, a landmark product liability case created a litigation onslaught against asbestos manufacturers. Texas became one of the nation's leading states for attracting claims, because of its easy venue rules and plaintiff-friendly counties. Plaintiffs who never worked or lived in Texas sued, in Texas, companies domiciled in other states. What began as complex cases seeking compensation for workers truly injured by asbestos degenerated into hundreds of thousands of claims being filed against tens of thousands of companies. Remember, strict liability in product liability law made it easy for plaintiffs to recover from defendants who never manufactured, altered, or made any warranties regarding the product. Lawyers advertising for plaintiffs and warning people about possible exposure helped to fuel the litigation.

Truck-towed trailers that carried an x-ray machine, medical forms, and lawyer referrals were parked outside of manufacturing plant facilities and in store parking lots. Radio and newspaper advertisements encouraged workers to receive a quick x-ray, a diagnosis of asbestosis, and referral to a lawyer. Lawyers contracted with diagnosing companies to examine and refer as many plaintiffs as possible.

The problem with this system is that the medical diagnosis of asbestosis is very subjective. Many people who suffer no impairment may be diagnosed with asbestosis, even though that individual is still capable of running a marathon and will have no reduced lifespan or diminished quality of life. Only a small percentage (5-10 percent) of those who are correctly diagnosed with asbestosis will ever develop impairment or a more serious illness.

The cases were filed so that two or three people who were very ill with mesothelioma, a debilitating and fatal disease, were included with hundreds of plaintiffs allegedly suffering from asbestosis, most of whom had absolutely no impairment whatsoever. This large group of plaintiffs

then sued an even larger group of defendants. Because none of the asbestos fibers in the lungs could be traced back to any particular product, plaintiffs sought to hold all defendants equally accountable. Added to this difficult situation was a change in the joint and several liability law stating that, in toxic tort cases involving such products as asbestos or silica, any defendant who was found to be 15 percent liable was responsible for 100 percent of the damages. Instead of having only one deep pocket to pursue, plaintiffs in Texas asbestos cases had up to six.

The asbestos lawsuits problem became a game of numbers and not of justice. Remember the nuisance value of settlement discussion earlier? Plaintiffs would offer defendants an opportunity to settle for amounts as small as \$500 to \$2,500. A plaintiff sought nuisance value settlements from as many defendants as possible. Because paperwork and expert fees associated with these cases were expensive, after deduction of the costs and attorneys fees paid to the plaintiff's attorney, typically only about one-third of the settlement value reached any plaintiff.

<sup>9</sup> Many have argued that the success of the U.S. Navy in World War II was due, in part, to the fact that the U.S. ships containing asbestos did not burn uncontrollably, thereby saving the lives of many sailors.

In an effort to replicate the success of the asbestos litigation, plaintiffs' attorneys similarly advertised for silica plaintiffs, as a means of generating the same numbers game and easy money. Amazingly, many of the asbestos plaintiffs who settled nuisance value asbestosis claims, 10 or 15 years later claimed to have exposure to silica.

### *Silica*

Silica is a naturally-occurring mineral used in the manufacture of glass, pottery, a variety of household goods, sand blasting, and computer chips. It can be airborne in fine dust, and those working around it are required to use respirators. Silicosis is caused by the inhalation of silica and may lead to very serious lung disorders and death. The illnesses associated with silica inhalation are considerably faster moving and more degenerative than asbestos.

In an effort to replicate the success of the asbestos litigation, plaintiffs' attorneys similarly advertised for silica plaintiffs, as a means of generating the same numbers game and easy money. Amazingly, many of the asbestos plaintiffs who settled nuisance value asbestosis claims, 10 or 15 years later claimed to have exposure to silica. In many Texas cases, the exact same physician reading the exact same 10-year-old x-ray would decide that the plaintiff did not have—and never had—asbestosis. Now they had silicosis. These experts were paid \$500 to \$1,000

per x-ray “reading” by plaintiffs' lawyers. The same type of multiple-plaintiffs' scheme suing multiple defendants resulted in the same nuisance value settlements. In addition to this fraud, those plaintiffs who suffered real debilitating injuries were being lost in the morass of filings. And, once again, Texas was being used as a popular national venue for filing silica claims.

### *Dredging*

Texas is blessed with multiple river systems feeding into natural bays. Barrier islands caused by Gulf of Mexico currents create several natural shallow water harbors. Dredging allows navigation by large, ocean-going vessels of major inland ports in Orange, Beaumont, Houston, Corpus Christi, and Brownsville. The state is very dependent upon commerce imported and exported from Texas' ports. So, dredging is vital to the state's economy.

A quirk in the venue law allowed those injured on dredging vessels to sue in the county in which they resided at the time of suit. Not sur-

prisingly, injured seamen most often claimed residence in a couple of counties notorious for plaintiff verdicts. One plaintiff's lawyer bragged at a legal conference at which he was a featured speaker:

*“Obviously, there is great influence on a case if we file in the Valley versus, say, Houston. As a plaintiff's lawyer, I'm going to get a case probably worth at least 60-70 percent more if it is filed in the Valley. Cases filed in Starr County, which is traditionally the best venue in the State of Texas ... probably adds about 75 percent to the value of the case.”<sup>10</sup>*

Venue shopping in dredging cases increased the expense of keeping certain ports open and navigable and resulted in unjust verdicts.

## **The Reforms of 2003: House Bill 4**

The election of 2002 was predicated by a significant and historic redistricting process at the conclusion of the 2000 census.<sup>11</sup>

<sup>10</sup> Presentation by Anthony Buzbee at the annual Marine and Energy Seminar, Las Vegas, Nevada, May 2006.

<sup>11</sup> By 2000, Texas had a Republican governor, a Republican-controlled Senate, a Republican Lieutenant Governor, a Democrat-controlled House and a Democrat Speaker of the House. While this scheme worked well to insure that bi-partisan bills were passed, it created an impassable dam for any legislation highly prized by one party. The most partisan of all bills, a required decennial bill to redraw the lines for new districts from which representatives and senators would be elected, could not be passed. Accordingly, the redistricting was left, pursuant to the state constitution, to a legislative redistricting board which was comprised of four statewide elected offices, all held by Republicans, and the Democratic Speaker of the House. Not surprisingly, this board redrew lines in a manner which favored the election of Republicans. It is a generally, but not always, true statement that Republicans favored lawsuit reform legislation. Certainly, the House Speaker did not favor any reforms beyond those enacted in 1995.

In January 2003, when the new Legislature was sworn in, Governor Rick Perry declared medical malpractice lawsuits an emergency issue and asked the Legislature to address that issue as one of its first items.

When the Republican-dominated legislative redistricting board redistricted House and Senate districts, new opportunities awaited Republicans in the general election of 2002. On election day, the majority control of the Texas House switched—for the first time in 130 years—from a Democrat-controlled body to a Republican-controlled body, and, with that change, its first Republican speaker since Reconstruction. Eighty-eight Republicans out of 150 House members were elected to serve in the House beginning January 2003. In the Senate, 19 of 31 senators were Republicans. This gave those who supported lawsuit reform a new opportunity. No longer was the lawsuit reform legislative package blocked in the Texas House by the speaker. The legislative dam was broken.

In January 2003, when the new Legislature was sworn in, Governor Rick Perry declared medical malpractice lawsuits an emergency issue and asked the Legislature to address that issue as one of its first items.

The Legislature began the discussion regarding lawsuit reform in a bill numbered House Bill 4 (HB 4). HB 4 included procedural, substantive, evidentiary, medical malpractice, and general reforms. After extensive hearings before the House Committee on Civil Practices, HB 4, a 96-page bill, was presented for debate to the full House. Once it began, the floor debate in the House wore on for a remarkable two weeks. To date, it is the longest debated bill in the history of the state. Three hundred seventy-five floor amendments comprising over 650 pages of alterations were filed in an effort to weaken the bill. Almost all amendments were defeated. At the conclusion of the debate, 98 House members from both parties supported the strong reforms and passed HB 4. HB 4 then went to the Senate, where it had similarly exhaustive hearings. Twenty-seven members of the Senate supported the substantive and procedural changes in HB 4, and Governor Perry signed the bill on June 11, 2003.

*The Wall Street Journal* called the changes adopted in HB 4 “Ten Gallon Tort Reform.” It has been referred to as a model bill by numerous commentators because it addressed so many procedural and substantive, common, and statutory law changes needed to extinguish the litigation crisis. It evidenced the political will of Texas citizens to put the scales of justice into balance.<sup>12</sup> What follows is a description of what HB 4 changed.

### *Medical Malpractice*

By far, the most controversial provision in HB 4 is the medical malpractice non-economic damage cap. The cap was established for \$250,000 for all doctors, no matter how many were sued in a case, and \$250,000 per health care institutions up to two institutions. The critical point is that the cap only covers non-economic damages: pain and suffering, loss of consortium, disfigurement, and other extremely subjective damages that seek to compensate injuries with money. All actual medical expenses, lost past and future

<sup>12</sup> While HB 4 has been widely praised and loudly criticized, one of its most amazing characteristics is that it contained no original legal theories. Each aspect was borrowed from other jurisdictions. Procedural and venue provisions were taken from current federal law and procedure. Its medical malpractice reforms were copied from California’s MICRA legislation of 1975. Offer of settlement: Alaska; product liability: Kansas; successor liability: Pennsylvania. The bill was only unique in that so much reform was written into one bill. Even the asbestos/silica reform bill in 2005, SB 15, was copied from the American Bar Association proposed model legislation which was enacted in Mississippi in 2003.



income, and any expense that can be translated into dollars, such as a driving service or maid service, are still recoverable.

Twenty states now have similar caps on non-economic damages, and a \$250,000 cap, regardless of the type or number of defendants, has been in place in California since 1975. The main criticism of the cap on non-economic damages is that access to the courthouse is extinguished because the cap is arbitrary. This is not true. No one is precluded from filing a lawsuit. The courts of the state are still open. Access to the courts, however, cannot be equated with unlimited damages for pain and suffering. Non-economic damages are highly subjective and difficult to predict, and no two juries will award the same amount of non-economic damages. Any award for non-economic damage is essentially arbitrary. Asking a jury to quantify pain and suffering in arbitrary dollar terms with no limit is quite different than asking them to make a “yes” or “no” factual determination. Even in criminal law, juries determine guilt, then punishment is set in allowable guidelines. When consumer prod-

ucts are at issue, high-dollar awards are simply passed on to consumers as future price increases.<sup>13</sup> In the medical malpractice arena, those open-ended jury awards for pain and suffering are paid by other consumers of health care. Either the doctor bill goes up or the doctor is forced out of business. In either instance, access to health care is diminished or denied, which is just as arbitrary to the people in need of medical care. It is the Legislature’s governmental role to balance competing societal interests and establish policy that is best for the whole.

While most opponents of HB 4 focused on the non-economic damage cap, the Legislature placed into the law numerous reasonable controls against frivolous medical malpractice suits. Not only did the Legislature cap non-economic damages from getting out of control, but it put a high hurdle in the beginning of the lawsuits. An expert report must be filed within 120 days of filing a medical malpractice suit clearly stating that the doctor or hospital violated the standard of care or the case is to be dismissed with prejudice. In defining an ex-

pert, the Legislature made it clear that the expert must be a practicing physician in the same or similar field as the one being sued. The suit is stayed, except for ascertainment of medical documents and one deposition to clarify any medical records, until the expert report is filed and approved by the court.

In emergency room care, the burden of proof is no longer simple negligence, but “willful and wanton neglect.” The reason the Legislature imposed a higher burden of proof is because those operating in life and death situations are not given the luxury of obtaining extended medical histories, and they are often under extreme pressure to make crucial decisions. In order to encourage people to work in emergency care, the Legislature chose to create a higher level of proof of negligence.

Doctors in clinics who donate time to charity care are now immune from any kind of suit as long as the patient is aware of and acknowledges that they are receiving free health care. This is designed to encourage doctors to donate their time and increase access to health care. Previ-

<sup>13</sup> All consumers bear the cost of jury verdicts. The manufacturers of any product calculate the cost of future litigation into the price of their product. An adverse judgment is not borne solely by one company. Each competing company adjusts its product pricing to reflect actual costs, including an increase in insurance premiums, or perceived costs in reasonable anticipation of litigation. An insured judgment is borne by all those with similar policies and is reflected in increased insurance premiums, resulting in higher costs for the product paid by consumers. Thus, injuries caused by product use are essentially paid for by consumers of the product.



Doctors in clinics who donate time to charity care are now immune from any kind of suit as long as the patient is aware of and acknowledges that they are receiving free health care. This is designed to encourage doctors to donate their time and increase access to health care.

ously, doctors who were retired and who would have liked to spend one day a week caring for poor patients could not do so because of the cost of malpractice insurance. Now, these doctors are immune from suit and do not need malpractice insurance.<sup>14</sup> This is an important aspect to make sure that people in emergencies are able to receive care. And, those doctors who stop and render aid to accident victims may not be sued.

As it relates to the non-economic damage cap of \$250,000, a health care institution is broadly defined to include everyone working for the hospital. Hospital systems and sister hospitals, including executives, boards of directors, business office employees, and anyone else that the lawyers can think to sue to get around the imposition of a cap. Now, plaintiffs cannot sue a bookkeeper for negligent record-keeping, in an effort to not have the \$250,000 cap imposed. In short, the Legislature meant business regarding keeping doctors, hospitals, and nursing homes in business in Texas.

### *Class Action*

The first section of HB 4 dealt with solving the problem of not allowing interlocutory appeals of class

certification decisions prior to trial. Now, in Texas, the issue of whether a class was correctly certified by the trial court is immediately appealed both to the Court of Appeals and then to the Texas Supreme Court. The proceedings in the trial court are stayed pending the resolution of the appeal on class certification. Additionally, the trial court must dismiss without prejudice a class-action case if (1) a state agency has exclusive jurisdiction to determine an issue in dispute or grant an administrative remedy before the claimant can seek a legal remedy and, (2) one or more class representatives have failed to seek the administrative remedy. If the agency still has jurisdiction to resolve the dispute, that agency must make findings of fact and conclusions of law to aid the trial court before a case may be certified.

The most applauded change to class action law in Texas is the award of attorney fees. Now, attorney fees must be determined by what is commonly referred to as the "Lodestar Method." This is very similar to the process used in federal court. The base fee is determined by multiplying the number of hours worked by an hourly fee that the court determines is no greater than

the fee customarily charged in the locality of the case for similar legal services. That fee may be increased or decreased by the court based on five specific factors, but in no case may the fee exceed 25 percent of the amounts collected by the class members out of the common fund. Just as importantly, if the settlement of a class action case involves the award of coupons, and not cash for the class, the attorney must be paid in the same coupons he obtained for the class members. No longer will the lawyers be the main beneficiaries of a class-action lawsuit. And, no longer will class-action cases be used to extort legal fees where there is little or no merit for class claims.

### *Pre-Trial Settlement*

In an effort to reduce either frivolous cases or prevent unnecessary trials where a party is clearly at fault, the Legislature created a system whereby a defendant may offer to make the plaintiff whole early in a case. The failure to accept the offer subjects the plaintiff to having to pay the defendant's attorneys' fees if the offer is greater than what the plaintiff receives in a trial. The statutory scheme to resolve cases early allows the defendant to recover litigation costs, including attorneys'

<sup>14</sup> All of the doctors and para-medical personnel who donated their time to the victims of Hurricane Katrina and Rita did so confident in the knowledge that they could not be sued.

In an effort to reduce either frivolous cases or prevent unnecessary trials where a party is clearly at fault, the Legislature created a system by which a defendant may offer to make the plaintiff whole early in a case.

fees, from the date the plaintiff rejects a settlement offer that is more favorable to them than the judgment the plaintiff ultimately recovers. This procedure is particularly useful in cases in which a defendant admits liability, economic damages are fairly certain, and the plaintiff is simply attempting to use the claim for an opportunity to seek a large jury award. Now, the plaintiff has an incentive to accept a responsible settlement offer that would make them whole. The failure to accept that offer could subject the plaintiff to paying the litigation costs of the defendant for trying a case that should have never gone to trial.

### *Venue*

In HB 4, the Legislature eliminated the procedural loophole that allowed improperly-joined plaintiffs to maintain suit in a county that did not comply with the general venue requirements. To drive the point home that venue shopping was not permissible, the Legislature also allowed for an immediate appeal on the issue of venue, regardless of the procedural reason a trial court might have permitted a case to be prosecuted in its county. Now, each plaintiff in a suit must establish proper venue.

### *Multi-District Litigation*

Modeled after the federal legislation, HB 4 created a Texas multi-district litigation panel made up of judges se-

lected by the Texas Supreme Court and empowered the panel to transfer factually-related cases to a single district court for consolidated pre-trial proceedings. The multi-district litigation court is charged with the responsibility of coordinating discovery, making consistent rulings on pre-trial motions and other pre-trial matters that are raised by parties in factually-similar cases. To date, there are six multi-district litigation cases pending in Texas: a type of automobile, tires, asbestos, silica, Vioxx, and a nursing home bus fire.

In the asbestos MDL, over 65,000 cases were transferred from throughout the state to one court. In a recent hearing before the House Committee on Civil Practices, the asbestos MDL judge was highly praised by both the plaintiff's and defendant's counsel for making consistent, fair, expedient rulings that allowed individuals actually suffering a recognizable illness to proceed to trial to seek fair compensation. Those claimants who had no recognizable impairment have their rights preserved.

### *Proportionate Responsibility*

In ending the court-created concept of joint and several liability for all defendants, HB 4 created a scheme for appropriately allocating fault. HB 4 clarifies that payments by settling parties should be credited to non-

settling parties on the basis of the parties' allocated fault or a dollar-for-dollar credit. More importantly, HB 4 now allows the trier of fact to consider all persons who caused or contributed to the harm for which the plaintiffs seek damages, without regard to whether those responsible are parties to the litigation.

HB 4 requires that criminals, whether known or not, bankrupt parties, settling defendants, employers and co-defendants, and other persons who may not legally be responsible for damages but who contributed to the injury, be included as responsible third parties. This ensures that those people at fault pay their portion of fault and no more.

### *Product Liability*

In HB 4, the Legislature made it clear that an innocent seller is not liable for harm caused by a product defect unless the seller also modified the product, exercised a substantial control over the content of the warning or instruction that accompanied the product, made an express representation about the aspect of the product that caused harm, or actually knew of the defect that caused harm. Additionally, evidence of a subsequent improvement to a product is not admissible to show that the improvement, if previously made, would have made the alleged injury less likely.

In HB 4, the Legislature made it clear that an innocent seller is not liable for harm caused by a product defect unless the seller also modified the product, exercised a substantial control over the content of the warning or instruction that accompanied the product, made an express representation about the aspect of the product that caused harm, or actually knew of the defect that caused harm.

As it relates to government-imposed standards, if a manufacturer complies with those standards in creating its product, the manufacturer cannot be held liable for a defect in that product unless the manufacturer misled or withheld information from the governmental agency that regulated the product, the manufacturer knew that the misrepresented or withheld information could result in a product defect, and the plaintiff's injury resulted from the anticipated defect. Accordingly, if a manufacturer meets the government-required standards, a plaintiff cannot complain that meeting those standards are somehow defective unless the government was misled by the defendant in creating the standards. This ended the horrible anomaly of building a product as required by the government and yet being held liable for having done so.

Finally, the Texas Legislature imposed a 15-year statute of repose on products, meaning that a plaintiff has to commence suit against the product manufacturer within 15 years from the date of the sale of the product, regardless of when a defect is found. Previously, product defects could be found many years after the product had been in use and long after the statute of limitations had run, claiming the defect was just now "discovered."

#### *Pre- and Post-Judgment Interest*

HB 4 also altered the floor and ceiling of post-judgment interest from 10 and 20 percent to 5 and 15 percent and tied the actual interest rate to the current federal funds interest rate. No longer is investing in lawsuits one of the best ways to make a high return on legal capital. A judgment debtor should be charged the time value of the money but not at an exorbitant rate.

There had also been an unfair award of pre-judgment interest on future damages. In addition to creating a floating interest rate, HB 4 ended the assessment of interest on damages not yet due.

#### *Supersedeas Bonds*

Rather than requiring a defendant to supersede execution on a judgment by filing a bond equal to the amount of all of the damages plus interest owed on a judgment, an appeal bond is now limited to the lesser of \$25 million or 50 percent of the defendant's net worth. This addresses the injustice to less wealthy defendants who may not have the means to post a bond for the full amount of the judgment and protects the rights of judgments' debtors to prosecute an appeal. Additionally, if placing 50 percent of the defendant's net worth would cause substantial harm, the defendant may ask the court to require a lower

bond. In a recent judgment against the pharmaceutical manufacturer Wyeth, a jury awarded \$1.1 billion in damages. Under the old supersedeas bond scheme, Wyeth would have had to place \$1.1 billion plus interest of cash in the registry of the court to supersede execution. Without HB 4, Wyeth surely would have curtailed many jobs and eliminated many research and development opportunities just to stay execution during appeal. Because of the reforms in HB 4, Wyeth is now only required to file a \$25 million bond to safely prosecute an appeal. Its position and legal rights on appeal are not leveraged by a remarkably large judgment.

#### *Successor Liability*

Texas now limits the liability exposure of a successor entity of asbestos-related liabilities to the fair market value of the assets of the acquired company of the time of the merger. Now, if a company like Crown Cork & Seal acquired a company for \$7 million in 1963, it would be limited in liability exposure to \$7 million, plus interest, for asbestos-related claims. Mississippi, Georgia, Florida, South Carolina, Ohio, and Pennsylvania have all passed similar statutes. Limited successor-liability legislation is pending in Delaware, Michigan, Missouri, Oklahoma, New York, and Washington.

HB 4 now allows the jury to know whether or not a plaintiff who is suing because of the injuries sustained in an automobile accident was wearing a seat belt at the time of the accident.

### *Forum Non Conveniens*

Forum non conveniens is a Latin term that means it is not convenient and does not make sense to try a case in a specific venue. It is a concept that allows for the transfer of a case to another jurisdiction based upon the overall convenience and rights of the parties. HB 4 modified Texas' forum non conveniens rule so that trial judges are given broad discretion to dismiss cases that should be tried in another state or country. It was the intent of the Legislature to draft a procedure that was consistent with the federal forum non-conveniens practice. This is done, along with the venue reforms, to keep Texas from being host to national litigation and in an effort to dry up the judicial hell holes.

### *Seat Belts*

HB 4 now allows the jury to know whether or not a plaintiff who is suing because of the injuries sustained in an automobile accident was wearing a seat belt at the time of the accident. Unbelievably, prior to 2003, Texas law prohibited admission of evidence that the plaintiff was partially at fault for his own damages for failure to wear his seat belt, despite the fact that state law required every passenger to wear a seat belt. Now, common sense prevails, and the jury is given additional information on which to base its allocation of fault.

### *Wrongful Death*

The wrongful death cap first established in 1977, grows annually by an inflation adjuster. The cap is now over \$1.5 million. HB 4 clarified that the cap included punitive damages, as was intended when the Legislature first established the wrongful death cap.

### *Volunteer Immunity*

After HB 4, volunteers of charitable organizations, volunteer firefighters, and teachers were given immunity from suit while working in the course and scope of their employment. No longer may a student sue a teacher based upon negligent teaching, or a homeowner sue a volunteer firefighter for negligence in the way a fire was extinguished. The Legislature, through this provision in HB 4, sought to encourage people to return community service and to support public service.

### *Attorney General Contingency Fee Contracts*

In 1999, in response to excessive legal fees paid in the Texas tobacco litigation, the Legislature put limits on contingency fee contracts. Specifically proscribed is the award of a pure percentage contingency fee for representing the state. Now, only hourly fees are permitted, which may include a multiple of up to four times a reasonable hourly rate, if a contingency is required. Additionally, the

Attorney General may not independently award an hourly-basis contingency fee contract without the agreement of either the Legislature or a special committee comprised of the Lieutenant Governor and the Speaker, when the Legislature is not in session. Unlike the tobacco litigation, the attorney general may not award a contingency fee contract to lawyers without public scrutiny.

It is recognized that, from time to time, special legal skills may be needed to fully prosecute cases upon behalf of the state. It is also recognized that an award for exceptional legal talent—or results—may be necessitated based on the skills or the particularities of a specific case. However, reasonable limits—based upon the work and not a percentage of the recovery—are now mandated.

### *Air Migration Trespass Limitations*

Plaintiffs' lawyers sought to create a loophole in the environmental and toxic tort cases, which would have allowed for suit in instances where a defendant's molecules were alleged to have trespassed onto another's property and create strict liability for an environmental case. HB 4 limited actions for trespass for migration or transport of an air contaminant to those cases where evidence supports an actual and substantial damage to the plaintiff.



### *Asbestos and Silica Reforms of 2005*

In 2005, the Legislature addressed specific problems with regard to diagnosis of asbestosis and silicosis in the flood of claims of persons not actually impaired by either of those diseases. Now, each person seeking to proceed to trial must provide the court a written opinion by a treating physician stating the person has more than the lowest indication of asbestos or silica in his lungs and has incurred an objective determination of lung impairment.

Pending cases for which there is no objective evidence of impairment must transfer to the MDL court and are not allowed to proceed to trial unless and until such time that the objective medical criteria in the legislation is met. Any future claim filed without the objective medical criteria will be dismissed without prejudice until there is evidence of impairment.

If a plaintiff files a report indicating he has sustained an injury and meets the medical criteria, the case is put on the fast track to trial. The MDL judge has put those cases to trial within four to six months from the filing of a report.

No longer are hundreds of cases allowed to be bundled together in an effort to exacerbate the damages claimed by the non-impaired plaintiff. Instead, each case must proceed to trial independently. The MDL judge, who has made all of the pre-trial rulings, returns the case for trial to the county of the original suit.

Because very few cases of people diagnosed with asbestosis will degenerate to a serious condition, the parties responsible for having produced the asbestos will not be paying millions of dollars to unimpaired plaintiffs for nuisance value settlements. Instead, settlement funds should be available for those people who have seriously suffered illnesses. In light of the fact that there have been over 70 bankruptcies of companies in the United States as a result of the asbestos litigation, it is important to maintain assets so that those who have been truly injured may be fairly compensated.

### *Dredging Venue*

Lawsuits involving injured seamen are mostly made pursuant to the *Jones Act*<sup>15</sup> but may be brought in state court. The old venue rules for *Jones Act* cases were simplified in 2007 to require a lawsuit involving an injury in Texas' navigable waters

to be brought in the county in which the injury occurred or the county of the defendant's principal office.

## Proposition 12

In order to respond to the poorly-reasoned case of *Lucas v. United States*, the Texas Legislature asked the people of Texas to alter the constitution to give the Legislature the authority to place a cap on non-economic damages and affirm the enacted reforms of medical malpractice claims in HB 4. This constitutional amendment, known as Proposition 12, became a source of a bitter debate between the plaintiffs' bar and those in favor of increasing access to health care. A multi-million dollar political campaign ensued in what was, for the plaintiffs' bar, a last-ditch effort to protect its economic mainstay. In the end, Texans from all backgrounds, particularly in those areas underserved by physicians, voted to increase their access to health care and passed Proposition 12. Once the reforms in HB 4 were immediately ratified by the voters, the argument that the people of the state, acting through their Legislature, should slow down judicial activism, prevailed. In choosing between lawyers and access to health care, the people chose the latter.

<sup>15</sup> 46 U.S.C. 688 et seq.

Four years have passed since Texans endorsed Proposition 12, and the results are remarkably positive. All across Texas, there are undeniable signs that the passage of Proposition 12 and HB 4 is fulfilling the promise of healing our health care delivery system and quieting an inflamed legal system.

## Results: Four Years Later

Four years have passed since Texans endorsed Proposition 12, and the results are remarkably positive. All across Texas, there are undeniable signs that Proposition 12 and HB 4 are fulfilling the promise of healing our health care delivery system and quieting an inflamed legal system. One shining star, Christus Health, a not-for-profit Catholic health system of hospitals throughout Texas, saved \$25 million in liability costs in the first year and at least \$50 million this most recent year. Christus has used those savings for patient services and has since expanded its already high level of charity care. Christus officials say the liability savings are a direct result of Proposition 12.

Two doctors in the rural town of Fredericksburg recently announced they would again deliver babies, after stopping the obstetrical portion of their practice due to an inability to pay the malpractice premiums for that medical service. Expectant mothers in that area of Texas will no longer have to travel an hour-and-a-half to San Antonio for prenatal care and delivery.

After announcing their departure, the only two neurosurgeons in Brazos County will continue their practice. Because of the relief in premium expense, they chose to stay.

Four new anesthesiologists have agreed to move to Beaumont. Four nursing homes, two in Austin and two in San Antonio, are able to continue to provide a home and health care to 600 elderly Texans. In fact, it is widely regarded that the enactment of HB 4 kept open approximately 30,000 nursing home beds in Texas, providing comfort and care to the elderly.

In addition to doctors in Texas expanding their practices, more than 7,000 doctors have *moved* their practices to Texas since the passage of Proposition 12. Many of those doctors have moved to rural Texas or those areas previously underserved in the health care community. San Antonio has experienced a 52 percent growth rate in the number of new physicians. Valley doctors have increased by 12 percent. In Houston, the number of new doctors has increased by 47 percent.

Specialists in the high-risk areas of orthopedic surgery, emergency medicine, pulmonology, oncology, anesthesiology, neurology, neonatology, and pediatric cardiology have chosen to locate their practices in the state. This year, 26 pediatric sub-specialists have agreed to come to work for Memorial Hermann Health Care pediatric system. Before the reforms were enacted, a normal year would have yielded two such skilled doctors.

The Texas Medical Board has licensed a new record number of doctors since the passage of Proposition 12, and the applicants keep arriving in record numbers. In fact, the State Board of Medical Examiners is experiencing such a large backlog—and unplanned delays in processing applications caused solely by the increased demand of doctors to relocate their practices in Texas—that the Legislature was required to make an emergency appropriation to the medical board to accelerate the application process. Because it now has over 3,000 pending applications, the medical board anticipates licensing more than 5,000 new doctors over the next 15 months. Texas, once listed as 47th worst state in the ratio of doctors per citizen, will soon be in the lower 30s and improving.

Just as importantly, over 30 insurers are vying for the medical malpractice insurance business from Texas doctors. This is a remarkable change in just four years. The state's largest medical malpractice indemnitor, Texas Medical Liability Trust (TMLT), has continued to cut premium rates and pay premium refunds. To date, the physicians insured by TMLT have saved over \$217 million in reduced malpractice insurance. Another rate cut was announced this fall, aggregating the four-year rate cuts to over 35 percent.

The success of the civil justice reform movement and, specifically, HB 4, has even been acknowledged today by some of its most ardent opponents. Even *The New York Times* tipped its hat to the legislation.

The success of the civil justice reform movement and, specifically, HB 4, has even been acknowledged today by some of its most ardent opponents. Even *The New York Times* tipped its hat to the legislation when it wrote:

*“Fours years after Texas voters approved a constitutional amendment limiting awards in medical malpractice lawsuits, doctors are responding as supporters predicted, arriving from all parts of the country to swell the ranks of specialists at Texas hospitals and bring professional health care to some long-underserved rural areas.”<sup>16</sup>*

## Conclusion

When Texas declared its independence from Mexico, it was blessed with leaders of courage and vision. Those citizens who sought to restore litigation to its proper role in society and bring the scales of justice into balance followed the example of the state’s first leaders. People working in grass-roots development, political activism, fundraising, legislative lobbying, and those serving as elected officials labored together to provide sensible, responsible, thoughtful, meaningful, and effective reforms to a system edged slowly out of balance. These

changes were difficult to accept for many attorneys who practice in the courts. Even many defense attorneys opposed reforms because of the diminution of their practice. Since deciding what is fair in our legal system is often a matter of perspective, maintaining a balance will be difficult, and the debate will continue. Yet, Texans should always be proud of its leaders who seek justice for those who have been wronged, as well as for those who have done no wrong. ★

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<sup>16</sup> Ralph Blumenthal, *The New York Times* (5 Oct. 2007).

## About the Author

The Honorable Joseph M. Nixon joined the Texas Public Policy Foundation as a Senior Fellow in its Center for Economic Freedom in January 2008.

Nixon represented Houston's District 133 for six terms in the Texas House. During his last two terms, Nixon chaired the House Civil Practices Committee. In 2003, Nixon authored a comprehensive tort reform bill (HB 4) and its companion constitutional amendment (HJR 3 a/k/a Proposition 12). That legislation has reduced medical liability premiums in Texas by almost 40 percent and increased the number of physicians practicing in Texas by nearly 6,000.

Nixon holds a bachelor's degree in economics from Texas A&M University. He attended law school at St. Mary's University in San Antonio. Nixon has been Board Certified in Civil Trial Law since 1991, and is admitted to practice before the U.S. Supreme Court, the U.S. Fifth Circuit Court of Appeals, all four Texas districts of the U.S. District Court system, and the Texas Supreme Court.

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