

Ten Years of Tort Reform: A Review

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Findings

- By the end of 2013, 10 years and three months after the effective date of HB 4, Texas will have almost DOUBLED the number of licensed physicians.
- Since the passage of lawsuit reforms, the increase in growth of the number of physicians in Texas is twice the population growth.
- After reform, Memorial Hermann Hospital System added in one year, 26 pediatric subspecialists; a normal year previously would have resulted in just one or two.
- Texans should stand our ground and rebuff efforts to undo our successful tort reforms.

Introduction

The relationship between efficient, fair courts and economic prosperity is stronger than most people realize. The simple fact is that free people using free markets need the rule of law enforced through a sound judicial system. The freedoms and rights enumerated in our Constitution are guaranteed in large part through the justice system. For instance, personal property rights need to be protected. Contracts need to be enforced. Citizens should be able to rely on product safeties and warranties.

Without an effective judicial system, our freedoms and our free enterprise system will decay: rights become uncertain; contracts are ambiguous; personal property loses value. Simply put, strong, fair courts produce certainty. Arbitrary justice results in economic inefficiency and comes with a huge cost to our economic system.

People's rights need to be protected through a well-balanced system. While those who have been harmed should receive a fair and adequate remedy, those who have done no wrong should be protected from those seeking unjust damages. The innocent have the right to keep their money in their pockets and to have their civil innocence adjudicated quickly.

A Judicial Hell Hole

Ten years ago, Texas was known as a "judicial hell hole." Our system of justice allowed for the state's laws to be arbitrarily applied. Enforcement of personal property rights and contracts varied greatly depending on which court had the case. Certain counties had bad reputations regardless of the court. Judicial outcomes were dependent upon which attorney was before which judge in which county. Citizens could not rely on equal enforcement of the state's laws.

The problem was not new to Texas in 2003. Thirty years before, the Governor, Lt. Governor, and the Speaker empowered Page Keeton, the well-respected Dean of the University of Texas Law School, to study the problem and offer legally sound solutions. In 1975, The Keeton Commission was the first to propose a cap on medical malpractice damages. In an effort to stem the adverse litigation effect on doctors, the Texas Legislature passed its first tort reform law in 1977, establishing a cap on all medical malpractice damages except medical expenses.

In 1988, however, the plaintiff, lawyer-backed Texas Supreme Court held that the cap violated the Texas Constitution's "open courts" provision and ruled the law unconstitutional. The state's constitutional provision only provides that the courts of the state shall be open to the public. The court's interpretation was a stretch, but the trial bar got what it wanted—the unlimited opportunity to sue physicians and hospitals.

As there is no reason to prosecute a claim against someone incapable of satisfying a judgment, doctors became easy targets because they had assets or insurance by which a judgment could be satisfied. As lawsuits became more prevalent, malpractice insurance rates climbed and doctors purchased more coverage. With more coverage came more lawsuits. The spiraling cost of medical malpractice insurance to physicians was having more than an economic effect—Texans were losing access to health care professionals.

The success of the plaintiffs' bar spilled over into many other businesses. Engineers were now being sued for "negligent design" with the same risk-insurance-increased risk-increased insur-

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ance spiral. The exact scenario played out again with bank officers, then corporate officers and all the way to board of directors of charities, and small business owners. The economic transfer from professionals and business owners to plaintiffs' lawyers with the imprimatur of Texas' courts was measurably pronounced.

In other words, the civilly innocent were being monetarily punished.

Here are a few indicators of the state of the Texas tort system in 2003:

- One out of four doctors in Texas was confronted with a malpractice claim each year.
- 85% of all medical malpractice claims failed but still cost more than \$50,000 to defend.
- The number of medical malpractice insurers in Texas dropped from 17 in 2000 to four in 2003. One of the four was the State of Texas as the insurer of last resort.
- Class action defendants almost always settled once the class was certified by the trial judge. Class certification, therefore, was seldom subject to appellate review, allowing the trial judge almost certain autonomy in deciding whether or not to certify a class. Because of the risk of disastrous results, defendants just settled once the class was certified.
- Plaintiffs were given too much latitude in deciding in which county to bring suit. Forum shopping was prevalent. Counties with no nexus to the parties or the case were chosen because of the judge or the jury pool.

- Thousands of non-impaired plaintiffs from all over the country were filing asbestosis and silicosis and even "industrial dust" cases in almost every Texas county. Most plaintiffs were not sick, many had no exposure, and some had never ever set foot in the state.
- Innocent property owners were held 100 percent responsible for the actions of trespassing criminals.

Doctors responded to the crisis by leaving the state, limiting their practice, or retiring early. Texas had one of the lowest doctor/citizen ratios in the country, and it was getting worse. The physician shortage was most pronounced in Texas' most litigious counties. For example, not a single neurosurgeon existed south of San Antonio. One hundred Texas counties did not have a pediatrician, and 154 did not have an obstetrician.

The unfair tort system was not just having an adverse impact on the state's economy; it was physically hurting and damaging those Texans who needed to see a doctor. Expectant mothers, children, those injured in accidents, the ill who needed specialists, and the families of all patients were paying a dear personal price for the lack of fairness in our court system.

The lawyers benefiting from the unbalanced court system were clever enough to invest in the political careers of legislators who would not adopt Dean Keeton's thoughtful proposals. From 1988 until 2003, legislation designed to balance our courts stayed bottled up or was defeated. The trial lawyers' lobby was one of the most powerful and effective in maintaining its objective.

House Bill 4

In 2003, the citizens sent to Austin the first majority of Republicans in the Texas House of Representatives since Reconstruction. With the Legislature no longer beholden to the plaintiffs' special interests, Governor Perry declared medical malpractice reform legislation to be an emergency issue. The Legislature then took on the effort of balancing the laws of the state to protect the rights of both those who had been wronged and those who had done no wrong.

The policy discussion of bringing efficiency, equity and balance to Texas' court system centered around House Bill 4 (HB 4), the omnibus tort reform bill which contained pro-

cedural, substantive, evidentiary, medical malpractice, and general civil reforms needed to extinguish the litigation crisis. Interestingly, nothing particularly new to American jurisprudence was written in HB 4. The reforms were modeled after laws adopted in other states or procedures used in the federal court system. The only unique aspect of HB 4 was that so many reforms were contained in one bill.

The common sense reforms written into HB 4 designed to end legal gamesmanship included:

- Juries should hear more evidence about who may really be a fault.
- Only those individuals who cause harm should pay and, then, only to the extent of their own fault.
- Damages should be limited to what the plaintiff paid or incurred, or what someone paid or incurred on their behalf, thereby eliminating “phantom damages.”
- In a malpractice case,
 - A medical report written by a physician in the same or similar field as the physician being sued should be submitted within 120 days of filing of the suit clearly identifying the standard of care in the case, how the standard of care was violated, and that damages resulted from the violation of the standard of care.
 - Non-economic damages should be capped at \$250,000 for any and all doctors sued with an additional cap of \$250,000 for each of up to two medical care institutions.
- Other procedural and substantive devices, such as forum shopping, used to tilt the scales of justice should be eliminated.

After extensive hearings before the House Committee on Civil Practices, HB 4, a 96-page bill, was presented for debate to the full House. The floor debate in the House went on for a remarkable eight days, often late into the night and early morning. To date, it is the longest debated bill in the history of the state. There were 375 floor amendments comprising over 650 pages of alterations designed to gut the reforms in the bill that were filed. At almost midnight on the

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eighth day of debate, 98 House members from both parties supported the strong lawsuit reforms and finally passed HB 4. The bill then went to the Senate where it invoked similarly exhaustive debate. Twenty-seven members of the Senate supported the substantive and procedural changes in HB 4 designed to bring about a fair court system, and the Governor signed the bill on June 11, 2003.

Shortly thereafter, *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 a number of commentators because it addressed so many procedural, substantive, common, and statutory law changes needed to bring the court system in Texas back into balance.

The Results of Reform

In the almost 10-year period since the reforms have been passed, it is now time to discern whether the reforms worked, if any reforms went too far in abridging the rights of plaintiffs, and if the stated goal of the medical malpractice reforms of increasing access to health care was achieved. Under almost all measurements, HB 4 has achieved its stated goals. Just four years after HB 4 passed, the *New York Times* observed:

Four 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.

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In May, 2005, the American Medical Association removed Texas from its lists of states in crisis. Texas is, so far, the only state to be removed from this list.

This is a strong admission that many past suits should never have been filed at all and that the reforms in HB 4 are working to discourage non-meritorious lawsuits.

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So, *The Wall Street Journal*, *New York Times*, the Texas Trial Lawyers Association, and The American Medical Association have all agreed that HB 4 worked to achieve its goals.

The most significant achievement has been the increased access to health care and its unanticipated huge positive economic impact on Texas' economy. By the end of 2013, ten years and three months after the effective date of HB 4, Texas will have almost DOUBLED the number of licensed physicians. It is anticipated that Texas will have somewhere close to 60,000 doctors to care for its citizens, almost twice as many as it had in 2003. The clear trend is that the growth in the number of physicians is now twice that of the population growth.

That is a surprisingly great statistic. What is even more surprising is how many physicians are moving here from other states. Rural communities are adding needed specialists, and our medical centers in Houston, Dallas, Fort Worth and San Antonio are expanding at unprecedented rates.

The border community of El Paso has added more than 200 physicians, including orthopedic surgeons, emergency care specialists, pulmonologists, pediatricians, internists, anesthesiologists, family practice doctors, oncologists, and pediatric cardiologists.

Memorial Hermann Hospital System added, in just one year, 26 pediatric subspecialists, where a normal year prior to HB 4 would have resulted in just one or two.

CHRISTUS Health, a not-for-profit Catholic health system with hospitals throughout Texas, saved so much on its liability costs that it expanded its charity care by \$100 million per year. Charity care in Texas has expanded altogether by almost \$1 billion. Sister Michele O'Brien of CHRISTUS stated that the expanded charity care is a direct result of the lawsuit reforms.

Texas Children's Hospital is completing a multi-billion dollar expansion it could not have undertaken but for the lawsuit reforms in HB 4. That expansion is just in health care facilities. It doesn't include the number of physicians, nurses, and support staff that accompany such a huge hardscape build out. In fact, the total health care facilities expansion in the state attributable to HB 4 exceeds \$10 billion. While the numbers have been impressive, even more impressive is the impact this has had on patients.

George Rodriguez is one of many examples. He lives in Corpus Christi, a city which did not have a neurosurgeon before HB 4. One day while suffering back pain, he was sent to see Dr. Matthew Alexander. Dr. Alexander, a neurosurgeon, had moved to Corpus Christi from out of state specifically because of HB 4 and had opened his practice exactly one week before he saw George Rodriguez. It turns out that Mr. Rodriguez had a spinal abscess, a life-threatening condition if not treated within the hour. Before Dr. Alexander opened his practice in Corpus, a patient needing a neurosurgeon would be stabilized and flown to Houston. The flight itself is about 45 minutes. In George Rodriguez' case, stabilizing would not have been an option. He would have been permanently crippled or dead. Instead, Dr. Alexander immediately operated on Mr. Rodriguez and saved his life. Though Mr. Rodriguez still has a limp, like many other patients in Texas he is a big supporter of HB 4.

This story is not unique. Saving and improving lives is a direct result of increased access to health care. Increased access to health care was the stated goal of lawsuit reformers and the bill's authors. Here is what happened.

In 2003, Texas' physicians were paying about the same malpractice rates as were the doctors in New York. Both were struggling to pay the malpractice premiums and keep their practices open. A crisis in access to health care was facing both states.

Texas chose to adopt reasonable, common sense lawsuit reforms. As a result, the malpractice insurance premiums paid by Texas doctors have fallen by greater than 60 percent on average. This means that most Texas doctors are paying less than half of what they were paying 10 years ago.

In contrast, malpractice premiums in New York have increased by 60 percent. As a result, almost 2000 physicians have moved their practices from New York to Texas. To stem the loss of New York doctors to other jurisdictions, New York responded with legislation requiring the state of New York subsidize the malpractice insurance costs of doctors. What this means is that taxpayers in New York are paying New York trial lawyers through the conduit of frivolous medical malpractice lawsuits. The state of New York is not working to eliminate frivolous suits; instead, it is actually encouraging them.

The contrast between common sense reforms of Texas and New York's nonsensical back door payments to trial lawyers is a perfect example of why Texas' economy has benefited from tort reform and why Texas is the nation's leading job producer. Dr. Ray Perryman reports that almost 10 percent of Texas economic growth is directly attributable to tort reform legislation. Combined with a low tax climate, Texas' stable courts system has led Texas to becoming home to more Fortune 500 companies than any other state except California. Governor Perry has publicly stated this economic growth could not have been accomplished without HB 4.

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These facts have been reported on in *The Economist*, *Forbes Magazine*, and *The Wall Street Journal*, and documented by the Pacific Research Institute and the U.S. Chamber of Commerce.

Conclusion

While the last 10 years have shown a causal connection between fair courts and economic success in a free enterprise system, the trial bar is still working to unravel the reforms in HB 4. Some want to eliminate the pre-trial report; others seek the re-establishment of phantom damages; most plaintiff lawyers want unlimited non-economic damages.

However, these are not what most Texans are seeking. Instead, they want jobs, access to health care, and opportunity.

Texas has balanced its courts, improved its economy, increased access to health care, provided remedies to those who have been wronged, and protected the rights of those who have done no wrong. It is time to stand our ground and rebuff efforts to undue one of the foundations of the Texas economic miracle. ★

About the Author



The Honorable Joe Nixon is a Senior Fellow in the Texas Public Policy Foundation's Center for Economic Freedom.

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, where he was a student of the Foundation's present chairman, Dr. Wendy Lee Gramm. Nixon attended law school at St. Mary's University in San Antonio. He 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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