



“Tort Reform and Texas”

Speech by Brooke L. Rollins to the CNP Action Conference

Speech delivered to the CNP Action Conference on October 4, 2009 at the Four Seasons Hotel in Austin, Texas by the Texas Public Policy Foundation’s president and CEO, Brooke L. Rollins.

Welcome to Austin, Texas. As you may know, we Texans often think we need no introduction, that surely everyone knows who we are and what we have accomplished. And while that might be a bit of an overstatement in many situations, I think it actually holds true when it comes to tort reform.

In fact, if you are paying much attention at all to the debate over ObamaCare, you’ve probably heard mention about Texas and the great success we have had with reforming medical malpractice and related tort laws. Unlike the pseudo-reforms we are hearing about out of Washington.

Back in the late 1980s, people throughout the country were joining *60 Minutes* and *Time Magazine* in asking, “Is justice for sale in Texas?”

About three years ago, the Foundation took part in a press conference with Gov. Rick Perry announcing that Texas had been named the best tort climate in the nation in a study by the Pacific Research Institute.

In our remarks that day, we said, “Our success is proven not just by the national recognition Texas is receiving today, but in communities across the state every day where patients have improved access to health care, workers have greater job security, and employers are free to grow with fewer fears of a frivolous lawsuit.”

That was a special day for those of us who can remember how far we had come in such a short period of time.

Back in the late 1980s, people throughout the country were joining *60 Minutes* and *Time Magazine* in asking, “Is justice for sale in Texas?”

But the question was a little late in coming. The truth of the matter is that it had already been bought and paid for as Texas had climbed to the top ranks of the “Judicial Hellholes” list.

Though the pace had certainly quickened in the 1970s and 80s, the truth is that judicial activists had been creating novel legal concepts and causes of action since Texas adopted its present constitution in 1876. Here are some of the common law concepts created over time by Texas courts—not the Texas Legislature:

- Joint and several liability
- Class action lawsuits

- Expanded claims for non-economic damages
- Punitive damages
- Open venue rules
- Strict liability
- Contingency fees

Texans first recognized our problems back in the 1970s when the Legislature passed a \$500,000 cap on all damages, economic and non-economic, in medical malpractice lawsuits. However, in 1988, the Texas Supreme Court creatively ruled that the medical malpractice cap violated the “open courts” provision of the Texas Constitution and was unconstitutional.

So when the Texas Public Policy Foundation opened its doors in 1989, doing something about the out-of-control civil justice system in Texas was at the top of our To Do list. But we discovered early on that quality research was only part of the solution to restoring balance to Texas courts. The other part was for Texans themselves to speak up through the political process.

That took place over time. A big part of making it happen was our good friend Dick Weekly and the folks at Texans for Lawsuit Reform, who joined us in the fray in 1994 to bring the voice of Texans into the legislative process. They did this by supporting with donations and endorsements those candidates who pledged or had a record of supporting common sense tort reforms.

All of this took time to produce results in the face of trial lawyer and partisan opposition.

While we did make some progress during those years, it was the elections of 2002—following legislative redistricting—that set the stage for our biggest reforms. Eighty-eight Republicans in a 150 member House brought an end to partisan gridlock, and we got down to business.

Medical malpractice reform was at the top of the list, because many willing plaintiffs were still taking advantage of the Supreme Court’s 1988 ruling on medical malpractice caps. Here is what the situation looked like in 2003:

- In doctor per citizen ratio, Texas was 49th worst out of 50 states;
- 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;
- The percent of a jury award attributable to a non-economic damage rose from 36 percent of the total award in 1989 to 66 percent in 1999;
- The number of medical malpractice insurance companies in Texas dropped from 17 in 2000 to 4 by 2003—one of those the insurer of last resort funded by the State of Texas; and
- Of Texas’ 254 counties, over 150 had no obstetrician and over 120 had no pediatrician.

Governor Perry declared medical malpractice reform an emergency issue, and the Texas Legislature went immediately to work on House Bill 4—authored by Rep. Joe Nixon, now a senior fellow with the Foundation— an omnibus 96 page bill that included significant medical malpractice reforms.

The floor debate in the House on HB 4 lasted for a remarkable two weeks, making it the longest debated bill in the history of the Texas Legislature. In an effort to weaken the bill, 375 floor amendments, comprising over 650 pages of alterations, were filed. Almost all amendments were defeated. At the conclusion of the process, 98 House members and 27 out of 31 senators supported HB 4, and Governor Perry signed the bill into law.

The next step was for the voters to approve Proposition 12, the companion constitutional amendment passed by the Legislature to overcome the Supreme Court's 1988 decision on medical malpractice caps. A multi-million campaign ensued as the trial lawyers took one last shot at protecting their turf. The vote was close, but in the end, 51 percent of Texas voters approved the measure.

House Bill 4 was landmark legislation, and has been called a model for all states to adopt. It included medical malpractice caps and many other reforms. A full account of the 2003 reforms plus more recent ones can be found in Joe Nixon's paper for the Foundation, *The History of Lawsuit Reform in Texas*. I've brought copies with me for anyone who would like to know more.

We've seen dramatic results in Texas from our reforms.

For one thing, 15,000 new physicians have moved to Texas and other doctors are returning to practice, taking us from near the bottom to the middle of the states in number of physicians per resident.

There has also been an increase in charity care of more than \$600 million per year. Hospitals have invested over \$3 billion in new medical infrastructure. As a direct result of medical malpractice reform, more than 430,000 Texans have health insurance coverage. Our economic output has increased by \$51.2 billion and 499,000 permanent jobs have been created.

This is happening in large part because medical malpractice lawsuits—along with medical malpractice insurance premiums—have plummeted since the reforms. For instance, 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 in 2007.

This is just a part of what we like to call our little economic miracle in the Lone Star State. For instance, Texas added more jobs in 2008 than the other 49 states combined.

Texas has also ranked at or near the top of states for the last five years when it comes to attracting new and expanded facilities, according to *Site Selection* magazine. And Texas is now the home to more Fortune 500 companies than any other state with 64, compared to New York's 56 and California's 51.

However, tort reform is not the only reason we are doing so well in Texas.

Our good friend, senior Foundation fellow, and renowned economist Dr. Art Laffer has done a lot of work showing why some states outperform others from year to year. In ranking Texas first, he pointed out as reasons for success not only our tort climate, but also our tax burden, regulatory burden, and the right-to-work.

While this may not come as a surprise to you, there are apparently those around the country who still don't get it.

For instance, back in 2002, California led the nation in Fortune 500 companies with Texas coming in third. Since then, however, there has been a net swing of 23 companies between the two states.

Dr. Laffer's study, *Competitive States: Texas v. California*, details why this is the case. But instead of boring you with even more economic statistics, I'll just relate to you one simple comparison that Dr. Laffer came up with that tells the whole story.

To rent a 17 foot U-Haul truck one-way to move from San Francisco to Austin, it will cost you \$1,489. To go from Austin back to San Francisco? Only \$639. Nobody wants to move to California, but everybody wants to move to Texas.

I heard one person try to explain this by saying it isn't that government is better in Texas than in California, but that there are simply more jobs in Texas!

That is the mindset that has gotten California in so much trouble, and why they have fallen from the top in only a few years. In stark contrast to Texas' recent rise out of its 1980's doldrums.

So let me conclude by calling on all of us to put the focus on real tort reform as the term is bandied in the current health care debate. When politicians pay lip service to reforms, here are a few key points we can make that will help keep folks accountable and the debate heading in the right direction. Real medical tort reform means:

- Enacting caps on non-economic damages in medical malpractice cases. In Texas, the limit is \$250,000 per provider, with a total cap of \$750,000;
- Requiring an expert report from a doctor practicing in a similar field when a malpractice lawsuit is filed;
- Allowing plaintiffs to recover only those expenses that were actually paid or incurred, not the phantom charges that show up on the first bill from a provider and that are always marked down; and
- Allowing doctors who donate their services to charity care to receive immunity from lawsuits.

This policy battle is far from over. For the time being, though, we're ahead of the pack here in Texas. And I believe the tide may be turning in our direction nationally as well. Americans think more money is being wasted by Washington today than when Ronald Reagan was first elected. And about twice as many Americans believe that there is "too much government regulation of business and industry" as believe there is "too little."

The public may be almost ready to shed the yoke of big government for a while, as we did nationally in 1980 and 1994, and in Texas in 1994 and 2002. Runaway lawsuits are just as unappealing to most voters as runaway spending, so tort reformers should be ready to take advantage of this shift. In fact, we ought to be out in front leading the way. ★

