

BACKGROUND

No. 2830 | JULY 26, 2013

Ten Years of Tort Reform in Texas: A Review

Joseph Nixon

PRODUCED WITH THE
TEXAS PUBLIC POLICY FOUNDATION

Abstract

Ten years of tort reform have provided greater access to health care and helped make Texas the nation's leading job producer. Indeed, by recognizing the causal connection between economic prosperity and efficient, fair courts, the Texas legislature passed and Governor Rick Perry signed House Bill 4 (HB4)—powerful tort reform legislation that is the foundation of the Texas economic miracle. Yet, despite the awesome economic growth and increased access to health care triggered by HB4, members of the trial bar are still working to overturn this reform. While Texans should stand their ground and rebuff efforts to undo HB4's successful tort reforms, all Americans should take notice of Texas's remarkable transformation and look to enact similar reforms in their own states.

The causal connection between economic prosperity and efficient, fair courts is stronger than most people realize. The simple fact is that free people using free markets need a strong judicial system: Fair markets require fair courts. The freedoms and rights enumerated in the U.S. Constitution can be guaranteed only through the justice system. For instance, personal property rights need to be protected. Contracts need to be enforced or damages paid. People need to be able to rely on product safeties and warranties.

Without an effective judicial system, our freedoms and our free enterprise system decay: Rights become uncertain, contracts are ambiguous, and personal property loses value. Simply put, strong, fair courts equal certainty. Arbitrary justice equals economic

KEY POINTS

- By the end of 2013, 10 years and three months after the effective date of HB4, the number of licensed physicians in Texas will almost have doubled.
- 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 the addition of just one or two.
- Texans should stand their ground and rebuff efforts to undo HB4's successful tort reforms, and other states should look to Texas's 10-year successful reform as an example to follow.

This paper, in its entirety, can be found at <http://report.heritage.org/bg2830>

Produced by the Edwin Meese III Center for Legal and Judicial Studies
and the Texas Public Policy Foundation

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

inefficiency and comes with a huge cost to America's economic system.

Americans' rights need to be protected through a well-balanced system. While those who have been harmed need a fair and adequate remedy, individuals who have done no wrong need to be protected from those seeking unjust damages. And those who have done nothing wrong have the right to keep their money and to have their lack of responsibility for any alleged injury suffered by a plaintiff adjudicated quickly.

A Judicial Hellhole

Ten years ago, Texas was known as one of the nation's "judicial hellholes."¹ The state's system of justice allowed for laws to be applied arbitrarily. Enforcement of personal property rights and contracts varied depending on which local court had the case. Furthermore, certain counties had bad reputations regardless of the court. Judicial outcomes often depended on which attorney was before which judge in which county. Equal enforcement of the state's laws was simply not a certainty upon which a citizen could rely.

Ten years ago, Texas was known as one of the nation's "judicial hellholes." Equal enforcement of the state's laws was simply not a certainty upon which a citizen could rely.

This problem was not new to Texas. Thirty years before Texas was proclaimed a judicial hellhole, the governor, lieutenant governor, and 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 proposed the state's first cap on medical malpractice damages.² In order to stem the adverse effects of litigation on doctors, the Texas legislature passed its first tort reform law in 1977,

establishing a cap on all medical malpractice damages except medical expenses.³

In 1988, however, the plaintiffs' lawyer-backed Texas Supreme Court held that the cap violated the Texas Constitution's "open courts" provision and ruled the law unconstitutional.⁴ The state's constitutional provision provides only 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 opportunity to sue physicians and hospitals for unlimited damages.

As there is no reason to pursue a claim against someone who is incapable of satisfying a judgment, doctors became easy targets because they had assets or insurance with which a judgment could be satisfied. Consequently, the number of lawsuits against medical professionals jumped, malpractice insurance rates climbed, and doctors were forced to purchase more coverage. And with more coverage came even more lawsuits. The spiraling cost of medical malpractice insurance premiums to physicians was having more than an economic effect: Texans were losing access to health care professionals as doctors left the profession or fled the state.

The success of the plaintiffs' bar spilled over into many other businesses. For example, engineers were now being sued for "negligent design," which resulted in a similar insurance premium spiral. This scenario played out yet again with bank officers, then corporate officers, and on and on all the way to the boards of directors of charities and small-business owners. The economic transfer of wealth from professionals and business owners to plaintiffs' lawyers with the imprimatur of Texas's courts was pronounced.

In other words, those who had done nothing wrong and who did not deserve to be held civilly liable were not keeping their hard-earned money in their pockets or investing it in expanding their businesses. By 2003, the Texas tort system was a mess. For example:

- One out of every four doctors in Texas had a malpractice claim filed against him or her each year.

1. See, e.g., AMERICAN TORT REFORM ASSOCIATION, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2002), available at <http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2002.pdf>.
2. TEXAS MEDICAL PROFESSIONAL LIABILITY STUDY COMMISSION, REPORT TO THE 65TH LEGISLATURE (Dec. 22, 1976).
3. 1979 Tex. Gen. Laws 2039, amended by Act of May 18, 1979.
4. Lucas v. United States, 757 S.W.2d 687, 692 (1988).

- 85 percent 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 only 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 was seldom subject to appellate review, thereby allowing the trial judge almost exclusive autonomy in deciding whether to certify a class. Because of the risk of disastrous results and the costs involved in defending against a class action lawsuit, defendants just settled once the class was certified.
- Plaintiffs were given too much latitude in choosing in which county to bring suit. Forum shopping was prevalent. Counties with no nexus to the parties or the case were chosen because plaintiffs' lawyers thought the judge or the jury pool in that county were likely to favor them.
- Thousands of non-impaired plaintiffs from all over the country were filing asbestosis and silicosis and even "industrial dust" cases in a few Texas counties. All but a few of the plaintiffs were healthy. Many had no exposure, and some had never even 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-to-citizen ratios in the country,⁵ and it was getting worse. The physician shortage—particularly of specialists, who are most often the target of malpractice claims—was most pronounced in the state's most litigious counties. For example, there was not a single neurosurgeon south of San Antonio. Furthermore, one hundred Texas counties did not have a pediatrician, and 154 did not have an obstetrician.

The unfair tort system was not just hurting the state's economy; it was posing a severe risk to those Texans who most needed to see a doctor. Expectant mothers, children, those who were injured in accidents, those who needed specialists, and the families of patients were all paying a personal price for the lack of fairness in the Texas 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 the Texas state courts stayed bottled up in committee or was defeated on the floor of the legislature. The trial lawyers' lobby was one of the most powerful and effective in maintaining its hold on the state's court system.

Legislation designed to balance the Texas state courts stayed bottled up in committee or was defeated on the floor of the legislature. The trial lawyers' lobby was one of the most powerful and effective in maintaining its hold on the state's court system.

House Bill 4

In 2003, for the first time since Reconstruction, the citizens of Texas elected a Republican majority to the Texas House of Representatives—a great number of whom were interested in reforming the state's tort system. With the legislature no longer beholden to the special interests of the trial bar, Governor Rick Perry (R) declared medical malpractice reform legislation to be an emergency issue. The legislature took on the task 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 the Texas court system centered around House Bill 4 (HB4), the omnibus tort reform bill. This bill contained procedural, substantive, evidentiary, medical malpractice, and

5. In 2003, Texas fell to 41st nationally in patient care physicians per capita. Texas Medical Association, *Proposition 12 Produces Healthy Benefits*, www.texmed.org/template.aspx?id=5238.

general civil reforms needed to extinguish the litigation crisis. Interestingly, HB4 contained nothing particularly new or innovative to American jurisprudence. Instead, the reforms were modeled after laws adopted in other states or procedures used in the federal court system. The only unique thing about HB4 was that so many reforms were contained in one bill.

The common-sense reforms written into HB4, which were designed to end legal gamesmanship, included:

- Juries should hear more evidence about who may really be at 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.”⁶
- In a malpractice case:
 1. 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 the filing of a lawsuit, clearly identifying the appropriate standard of care, how the standard of care was violated, and the damages that resulted from the violation of the standard of care.
 2. 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 would be eliminated.

After extensive hearings before the House Committee on Civil Practices, HB4, 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 most extensively debated bill in the history of the State of Texas. Three hundred and seventy-five floor amendments comprising over 650 pages designed to gut the reforms in the bill were filed.

At almost midnight on the eighth day of debate, 98 House Members from both parties supported the strong lawsuit reforms and finally passed HB4. The bill then went to the Senate, where the debate was similarly exhaustive. Twenty-seven Members of the Senate supported the substantive and procedural changes in HB4 designed to bring about a fair court system, and on June 11, 2003, the governor signed the bill into law.⁷

HB4 has been referred to as a model bill by a number of commentators because it addressed so many procedural, substantive, common law, and statutory law changes needed to bring the court system in Texas back into balance.

With bipartisan support, the legislature also passed Texas Constitutional Amendment Proposition 12.⁸ This proposal asked the voters to amend the state constitution to give HB4 full

6. Phantom damages are damages awarded for medical bills not actually incurred. It is the difference between the amount a medical provider would charge a fee-for-service patient and the amount the plaintiff’s insurance provider contracted to pay the medical provider. For example, an accident patient’s medical expenses may be covered by workers’ compensation or another medical insurer who pays the hospital bill. The amount actually paid is the amount of actual medical damages. Hospitals were submitting invoices to lawyers for the larger amounts not actually due them. The lawyers would submit the larger amount into evidence as “reasonable and necessary” rather than the actual medical charges paid by the insurer. Juries would then award damages based on these phantom medical invoices. This practice has been eliminated.

7. Medical Malpractice and Tort Reform Act of 2003, 2003 Tex. Gen. Laws 897-99.

8. Tex. H.J.R.3, 78th Leg. R.S. (2003).

effect and overturn the 1988 Texas Supreme Court decision against caps on non-economic damages. The citizens voted to adopt Proposition 12, and in September 2003, HB4 became the law in Texas.⁹

Shortly thereafter, *The Wall Street Journal* heralded the changes adopted in HB4 as “Ten Gallon Tort Reform.”¹⁰ HB4 has been referred to as a model bill by a number of commentators because it addressed so many procedural, substantive, common law, 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 were passed, it is possible to discern whether the reforms worked, whether any of the reforms went too far in abridging the rights of plaintiffs, and whether the stated goal of increasing access to health care was achieved. By any measure, HB4 has achieved its stated goals. Just four years after HB4 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.¹¹

Indeed, a former president of the Texas Trial Lawyers Association stated that it is unlikely that the volume of tort lawsuits will ever exceed one-half to two-thirds of pre-reform levels. This is a strong admission that many past suits should never have been filed at all and that the reforms in HB4 are working to discourage the filing of non-meritorious lawsuits.

In May 2005, the American Medical Association removed Texas from its list of states in crisis.¹² Texas is so far the only state to be removed from this list.

So *The Wall Street Journal*, *The New York Times*, the Texas Trial Lawyers Association, and the American Medical Association have all agreed that HB4 worked to achieve its goals.

The reform bill’s most significant achievements have been increased access to health care and an unanticipated positive economic impact on the Texas economy. By the end of 2013, 10 years and three months after the effective date of HB4, the number of licensed physicians in the state will almost have doubled.¹³ 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 number of physicians in Texas is now growing at twice the rate of the state’s population—a statistic that helps prove the success of HB4’s reforms in increasing access to health care.

HB4’s most significant achievements have been increased access to health care and an unanticipated positive economic impact on the Texas economy.

What is even more impressive, however, is how many physicians are moving to Texas from other states. Rural communities are adding needed specialists, and medical centers in Houston, Dallas, Fort Worth, and San Antonio are expanding at unprecedented rates.¹⁴ For example, 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 since 2003.¹⁵ Additionally, Memorial Hermann Hospital System added—in just one year—26 pediatric subspecialists; a normal year

9. Janet Elliott, *Texas Pass Prop. 12 in Statewide Election*, HOUSTON CHRONICLE (Sept 9, 2003); Office of Secretary of State, *Race Summary Report, 2003 Constitutional Amendments Election* (Sept. 13, 2003), <http://www.sos.state.tx.us/elections/forms/enrpts/2003sep.pdf>.

10. Editorial, *Ten Gallon Tort Reform*, WALL ST. J., June 6, 2003, at A10.

11. Ralph Blumenthal, *More Doctors in Texas After Malpractice COPS*, N.Y. TIMES, Oct. 4, 2007.

12. The AMA no longer keeps the list. As of May 16, 2005, Texas was the first and only state to be removed from the list.

13. Texas Medical Board, *Statistics, Fiscal Years 2003–2012* (Dec. 2012), <http://www.tmb.state.tx.us/TMBstats-FY03-12.pdf>.

14. Texas Medical Board, *Physicians In and Out of State* (March 7, 2013), <http://www.tmb.state.tx.us/agency/statistics/demo/docs/d2013/0113/inout.php>.

15. *Id.*

before enactment of HB4 would have resulted in just one or two new subspecialists.

Indeed, evidence of HB4's success is everywhere. For instance:

- 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 starting in 2004. Total cost-basis charity care in Texas was \$594 million greater in 2006 than it was in 2003.¹⁶ Sister Michele O'Brien of CHRISTUS stated that the expanded charity care is a direct result of the lawsuit reforms.¹⁷
- Texas Children's Hospital is completing a multibillion-dollar expansion that it could not have undertaken without the lawsuit reforms in HB4.¹⁸ This expansion is just in health care facilities and does not include the increased 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 HB4 exceeds \$10 billion.¹⁹ While the numbers have been impressive, even more impressive is the impact this has had on patients.
- Individuals have seen their lives improve as well. Consider the case of George Rodriguez, a man who lives in Corpus Christi, a city that did not have a neurosurgeon before HB4. One day, suffering from back pain, Mr. Rodriguez went to the emergency room and was seen by Dr. Matthew Alexander,²⁰ a neurosurgeon who had moved to Corpus Christi from out of state and had opened his practice one week beforehand specifically because of HB4. 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 Christi, a patient needing a neurosurgeon would be stabilized as best as possible and flown to Houston. The flight itself is about 45 minutes. In George Rodriguez's case, there was no stabilizing option: He would have died or been permanently crippled unless he received immediate treatment. Fortunately, Dr. Alexander was there to operate on Mr. Rodriguez, thereby saving his life. Though Mr. Rodriguez still has a limp, he is, like many other patients in Texas, a big supporter of HB4.

These examples are not unique. The saving and improving of lives is a direct result of increased access to health care, which in turn is the direct result of the positive effect that HB4's reforms have had on medical malpractice insurance rates.

A Tale of Two States

In 2003, Texas physicians were paying about the same malpractice rates as were doctors in New York. Physicians were struggling to pay their 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 more than 60 percent on average. Consequently, most Texas doctors are paying less than half of what they were paying 10 years ago.²¹

In contrast, malpractice premiums in New York have increased by 60 percent. As a result, almost 2,000 physicians have moved their practices from New York to Texas. To stem the loss of New York doctors moving to other jurisdictions, New York enacted legislation requiring the State of New York to subsidize the malpractice insurance costs of doctors, ignoring the problems in the state's legal system that generated the high premium rates.²² This

16. *Hearing Before the Senate Comm. on State Affairs, Interim Charge No. 6: Study the Economic Impact of Recent Civil Justice Reform Legislation* (April 18, 2008) (statement of Sr. Michele O'Brien, CHRISTUS Health).

17. *Id.*

18. Joseph Nixon, *Proposition 12 a Winner Five Years Later*, FORT WORTH STAR TELEGRAM, Oct. 1, 2008, <http://www.bmplp.com/publications/115-proposition-winner-five-years-later>.

19. Texas Medical Association, *supra* note 5.

20. Jason Roberson, *The Grateful Patient*, DALLAS MORNING NEWS, June 17, 2007.

21. Press Release, Texas Medical Liability Trust, Four Percent Rate Reduction to Save Policyholders Approximately \$5.5 million (Aug. 15, 2012).

22. REPORT ON THE HOSPITAL EXCESS LIABILITY POOL TO THE GOVERNOR AND LEGISLATURE OF NEW YORK (Dec. 2012), available at http://www.health.ny.gov/press/reports/docs/2012-12_hospital_excess_liability_pool_report.pdf.

means 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; it is encouraging them.

The contrast between the effective and common-sense reforms adopted by Texas and New York's nonsensical backdoor payments to trial lawyers is a perfect example of why Texas is the nation's leading job producer. Dr. Ray Perryman reports that almost 10 percent of Texas's economic growth is directly attributable to tort reform legislation.²³ Combined with a low tax climate, Texas's stable court system has led to the state's becoming home to more *Fortune* 500 companies than any other state except California. Governor Perry has publicly stated that this economic growth could not have been accomplished without HB4.

Preserving the Texas Miracle

While the past 10 years have shown a causal connection between economic success and fair courts in

a free enterprise system, the trial bar is still working to unravel the reforms in HB4. Some want to eliminate the pre-trial report; others seek the re-establishment of phantom damages; plaintiffs' lawyers want unlimited non-economic damages.

However, these are not the kind of changes that 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, and provided remedies to those who have been wronged as well as protected the rights of the innocent. Texas should stand its ground and rebuff efforts to undo one of the foundations of the Texas economic miracle, and other states should look to Texas's 10-year successful reform as an example to follow.

—*Joseph Nixon is a partner at Beirne Maynard & Parsons, LLP. In 2003, he was in the Texas State Legislature and Chairman of the House Committee on Civil Practices. He authored HB4 and the constitutional amendment, Proposition 12, which authorized the cap on non-economic damages.*

23. The Perryman Group, *A Texas Turnaround: The Impact of Lawsuit Reform on Business Activity in the Lone Star State* (April 2008), available at http://tlrfoundation.com/beta/files/Texas_Tort_Reform_Report_2008.pdf.