TEXAS WATCH FOUNDATION

Tort "Reform" in Texas

Implementing the Corporate Immunity Agenda

a report by the Texas Watch Foundation
www.TexasWatch.org

September 2011

Over the last decade, Governor Rick Perry has presided over a series of radical legislative proposals that, under the guise of so-called tort "reform," reward those who needlessly endanger our communities at the expense of families and small business owners. This report details the impact this corporate immunity agenda has had on Texans of all walks of life.

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> ***"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."***
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> *-- Seventh Amendment, Bill of Rights, United States Constitution*
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> ***"All courts 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."***
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> *-- Article I, Section 13, Bill of Rights, Texas Constitution*

Introduction

Texas has been the epicenter of so-called tort "reform" for decades, a land where an aggressive campaign on behalf of a corporate lobby bent on immunity from acts that cheat, maim, or kill has radically reshaped and deformed its civil justice system. The framers of the United States and Texas constitutions, who enshrined trial by jury as a fundamental right and believed in checks and balances, would not recognize the current Texas legal system, which perverts the rule of law into an instrument for the moneyed and powerful, as well as divorces it from any concept of justice.

Despite a professed desire to adhere to fundamental constitutional principles, Governor Rick Perry's tenure has been marked by radical changes that arbitrarily and dangerously restrict the legal and constitutional rights of Texans of all walks of life, including patients, families, workers, homeowners, senior citizens, policyholders, and small business owners.

Along with others in the state's political leadership, Governor Perry has presided over a series of draconian legislative reforms, particularly in 2003 and the sessions to follow, that effectively reward those who needlessly endanger our community, socializing risk and forcing victims, taxpayers, and responsible business owners to bear the costs of others' wrongdoing.

This report discusses the most notable of these statutory changes and details their devastating human cost, namely, how they have closed the courthouse door on many Texas families.

2003: Sweeping restrictions on rights, including damages caps

Riding an electoral wave that saw the election of Rick Perry to his first full term as governor,[1] a large class of impressionable freshman members in the House, and a hard-line speaker, Tom Craddick, the corporate immunity lobby tilled fertile ground during the 78th Legislature in 2003.[2] Emboldened after pushing through lawsuit restrictions in 1995[3] and 1997,[4] this lobby and their functionaries in the Legislature rammed through HB 4 in 2003,[5] an omnibus package of restrictions that were sweeping in scope and unprecedented in their destructive effect on the rights and lives of everyday Texans.

The merits of one's case are far outweighed by their socioeconomic status. Under Texas law, the value of one's life is essentially reduced to the value of their paycheck.

Totaling 133 pages in length, HB 4 was a sprawling piece of legislation that upended and undercut myriad aspects of the Texas civil justice system.[6] Among its most prominent provisions were the following:

Medical Malpractice

HB 4 restricts the rights of patients in numerous ways, including imposing a one-size-fits-all $250,000 cap on non-economic damages that effectively deprives many patients and their families of due process; [7] allowing emergency room doctors to escape accountability for substandard care; [8] requiring patients to give pre-suit notice of any health care liability claims and file a detailed expert report within an arbitrary 120-day deadline (with case-killing penalties if they fail to do so).[9]

The noneconomic damages cap, which is not indexed to inflation and thus worth less each year, hits those without wages and economic damages particularly hard, making even the most clear-cut malpractice cases on behalf of the elderly, the young, the disabled, and stay-at-home parents financially impossible to pursue for many given the high cost of retaining medical experts, which comprise the bulk of litigation expenses. The merits of one's case are far outweighed by their socioeconomic status. Under Texas law, the value of one's life is essentially reduced to the value of their paycheck. You are what you make. Life is cheapened and families are devalued. Instead of being a right possessed by all, what little justice remains becomes a privilege for the few.

As many as 98,000 Americans die each year from preventable medical errors in hospitals,[10] a staggering and senseless loss of life. A mere 5.9% of physicians are responsible for 57.8% of all malpractice

payments.[11] Despite the extent of medical errors, researchers have demonstrated that as few as one out of every twenty-five patients with a negligent or preventable injury goes to the length of bringing a medical malpractice claim.[12] In Texas, from 1990 to 2002, the number of smaller paid claims declined sharply, and adjusted for the number of physicians or growth in real health care spending, the total number of paid claims and the number of large paid claims declined.[13]

However, these facts did not get in the way of the so-called tort "reformers," who in their effort to carve up patient protections, cried that there was a "crisis" in medical malpractice *claims* as insurance premiums were ratcheted upward by carriers. Instead of improving the quality of medical care and investigating the accuracy of insurance premiums, safety was sacrificed and patients' rights were eviscerated.

Texas' medical crisis has only been exacerbated by a crisis in its judicial system, as many patients have access to neither a doctor in the event of illness nor a courtroom in the event of suffering a preventable medical error.

In this brave new world, a tiny state agency, the Office of Patient Protection, was supposed to serve as a counterbalance for patients, but it was smothered in the cradle before it could even represent any aggrieved patients.[14] The Texas Medical Board, which nominally regulates physicians, does not have the will to consistently remove incompetent doctors from the practice, nor does it have a mechanism to compensate patients or adjust liability disputes between patients and doctors. Because of our broken legal and regulatory systems, Texas threatens to become a dumping ground for dangerous doctors.[15]

Restrictions on patients' rights were sold with lofty promises about access to care, such as Governor Perry's statement that HB 4 would "protect patient access to quality health care."[16] However, this rhetoric does not reflect reality. Texas ranks 1st in the percent of the population without health insurance, 42nd in the number of physicians per capita, and 44th in the number of registered nurses.[17]

Governor Perry's claims about Texas gaining doctors due to tort reform have been thoroughly investigated and determined to be outright false by the Pulitzer Prize-winning PolitiFact.[18] Rural communities are grossly understaffed, with 63 Texas counties having no hospital, 27 counties having no primary care physicians, and 16 counties having only one such doctor.[19] Roughly half of this 268,000 square mile state is covered by trauma centers in just two cities: El Paso and Lubbock.[20] In sum, "Texas was not losing physicians before HB 4 took effect," "the data do not yet support claims of dramatic improvements in patient access to physicians," and "tort reform had limited impact on the number

of DPC [direct patient care] physicians, including DPC specialists."[21]

Furthermore, health care costs for both families and taxpayers continue to rise. Health insurance premiums for Texas families have increased 51% and out-of-pocket costs as measured by deductibles are up 79%.[22] Meanwhile, per patient Medicare spending in Texas has risen at a rate that is nearly double the national average.[23]

Texas' medical crisis has only been exacerbated by a crisis in its judicial system, as many patients have access to neither a doctor in the event of illness nor a courtroom in the event of suffering a preventable injury. The biggest beneficiaries of this rigged system are the professional liability insurers who are able to routinely collect premiums for malpractice policies that they will rarely have to pay out on.

It should come as no surprise that given the ability to operate without any real accountability, nursing homes in Texas have cut corners and endangered patients.

Nursing Homes

Incredibly, nursing homes, which should exercise attentive care in allowing our most vulnerable citizens to live out their final years with dignity, were given the state's seal of approval to "go bare" and forgo liability insurance during the 2003 session.[24] This means that these facilities have been authorized to operate irresponsibly – with *de facto* immunity – as no victim's attorney will be able to incur the expense of prosecuting their negligence without the ability to recover from the wrongdoer. The Texas Legislature also wrote nursing homes into HB 4[25] and made it exceptionally difficult to admit records of their administrative violations and penalties into evidence during trial.[26] Couple this with an activist, corporatist Texas Supreme Court that has gone to the absurd lengths of interpreting spider bites[27] and sexual assaults[28] as "health care" claims, thereby shielding wrongdoers from responsibility, and you have a recipe for disaster.

It should come as no surprise, then, that given the ability to operate without any real accountability, nursing homes in Texas have cut corners and endangered patients, ranking second-to-last in the nation in terms of staffing.[29] In addition, a shocking 26% of Texas nursing homes have been given the worst rating on The Center for Medicare and Medicaid Services' comparative scale.[30] Through deliberate public policy choices such as these, the Texas political leadership has demonstrated their belief that life, in the end, means little.

Offer of Settlement

HB 4 also enabled defendants to trigger a special protocol for making settlement offers, which imposes high stakes on plaintiffs if they persist in exercising their constitutional right to a trial by jury and reject the offer. The rejecting party is liable for the other party's litigation costs,

including attorney's fees, if there is more than a 20% differential between the judgment and the offer.[31] This imposes severe risks on plaintiffs who seek a public accounting for defendants' wrongdoing. Justice is about more than money, but this provision crassly and coldly reduces cases solely to dollars and cents. For a wrongly-accused person seeking to clear their name through a libel suit or a grieving family wanting to discover, fully comprehend, and publicly expose corporate wrongdoing so that steps are taken to ensure others' loved ones will not be killed through malfeasance, this "offer of settlement" law can be used to intimidate them and forcibly purchase their silence.

This law is conceptually based on a so-called "model" law developed by the corporate-backed American Legislative Exchange Council in 1995.[32] As detailed later in this report, this law would also be at the center of the corporate immunity lobby's efforts in Texas during the 2011 legislative session.

At base, these reforms act to deprive state judges and juries of their ability to determine whether a product is unsafe, ceding this authority to unelected, unaccountable federal bureaucrats.

Responsible Third Party

A study in Orwellian doublespeak, the legal creation in HB 4 of "responsible third parties" are anything but, for they are neither proper "parties" to a suit nor are they held legally responsible.[33] However, they are extremely useful to defendants in that they allow them to reduce their own liability by pointing the finger at an empty chair, such as an unknown criminal, bankrupt company, or foreign entity, from whom the plaintiff cannot recover. The jury, not knowing the effect of their answers, may understandably think that they are helping a deserving plaintiff by apportioning liability to this "responsible third party"; but in our zero sum reality, every percentage point of fault that they assign to the "responsible third party" is a percentage point that is not assigned to a defendant, who is properly joined in the case and, therefore, subject to recovery. Stated bluntly, strategically scapegoating a "responsible third party" allows a defendant to fade the heat for its own wrongdoing.

Products Liability

Giving a whole new meaning to the phrase "Fed Up,"[34] HB 4 directed Texas courts to defer and look up to federal agencies in many state products liability actions. For actions alleging inadequate warnings regarding pharmaceuticals, a rebuttable presumption is created in favor of defendants if the warnings that accompanied the product were approved by the United States Food and Drug Administration (i.e., the "FDA defense").[35] And in other products liability actions concerning the formulation, labeling, or design of a product, a similar rebuttable presumption (i.e., a legal conclusion that is taken as true unless proven otherwise) is created for product manufacturers or

sellers who show that they complied with federal regulations.[36] At base, these reforms act to deprive state judges and juries of their ability to determine whether a product is unsafe, ceding this authority instead to unelected, unaccountable federal bureaucrats in agencies that have often been purposefully understaffed and underfunded, constrained in their authority, and are otherwise subject to influence by the industries that they are supposed to regulate.[37]

Residential Construction

The homebuilding industry, one of the wealthiest and most powerful constituencies within the corporate immunity lobby,[38] successfully created an entirely new state agency, the Texas Residential Construction Commission (TRCC), with the passage of HB 730 in 2003.[39]

At a time when state government faced a multi-billion dollar budget shortfall, and when the ruling majority professed allegiance to small government, questions arise: Why would an industry demand the creation of a state agency, and why would an anti-government legislature accede so readily to those demands? The answers lie in the structure of the agency and its authority. Dominated from within by industry representatives,[40] the TRCC was more about regulating homeowners' claims against builders than regulating the industry's building practices to ensure homes were constructed in a safe, sound, and habitable manner.

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Establishing weak building standards and warranties,[41] forcing homeowners into a lengthy administrative gauntlet under the auspices of a state-sponsored inspection and resolution process,[42] and making homeowners prove two cases in one if they somehow persevered and took their case to trial,[43] the TRCC immunized many builders from liability by exhausting already-distressed homeowners and giving the state's imprimatur to inadequate building practices.

This industry enjoyed not one but two layers of special protection, having already pushed through the "Residential Construction Liability Act" over a decade earlier, which limits homeowners' damages, requires them to give pre-suit notice and inspections of their property, as well as empowers shoddy builders to make offers that can carry consequences if the homeowner rejects.[44] This corner of the law exemplifies the power of special interests.

The Texas Legislature undertakes a periodic "Sunset" review of state agencies to determine whether they should continue (and in what form). Six years after it came into being, the much-maligned and fatally-flawed TRCC did not survive this process.[45] After homeowners

and their advocates fought to try to give the TRCC real teeth, the homebuilding lobby showed its true colors and decided it would rather have no agency than one that actually regulated the industry in a meaningful way.

Homebuilders and contractors were able to fall back to the aforementioned special protections already on the books.[46] Even in the one time it lost, the corporate immunity lobby in Texas still came out ahead.

2005: Limiting Access for Victims of Asbestos and Silica Poisoning

Although Texas ranks fifth in the nation in asbestos-related fatalities,[47] it was one of the first states[48] to pass a special law to shield those who exposed workers to this deadly substance from direct accountability by limiting access to our courts.[49] Passed in 2005, SB 15 requires plaintiffs to file, within 30 days of a defendant's answer or appearance in the case, an expert report from a board-certified physician detailing such information as their diagnosis, history, whether they meet stringent levels of impairment, and conclusions about causation.[50] If a plaintiff does not provide such a report in a timely and adequate manner, their case will be dismissed.[51] Demonstrating that their motives were driven by profit and not medicine or justice, the levels of impairment required by the corporate immunity lobby in the Texas law exceed those specified by medical authorities.[52]

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Rather than allowing a judge or jury to decide whether a person has been harmed, as well as the degree of that harm, the political leadership substituted their judgment, dictating that certain people, while injured through no fault of their own and unable to work, are not close enough to death's doorstep to bring a suit in their eyes.

2007: Restricting Venue under the Jones Act

In support of the maritime industry, the Legislature passed HB 1602 in 2007, [53] revising venue rules with respect to the Jones Act, a federal law that provides a cause of action for maritime workers who are injured or killed on the job. The Texas Legislature's law seriously restricts a maritime worker's right to bring suit in the county of their residence. This means that many of these workers, who have often suffered severe and debilitating injuries in the course of performing dangerous work, would be required to travel long distances to pursue their constitutional right to a trial by jury.

2011: Losers and Winners Pay, and Coastal Policyholders are Punished for the Sins of their Windstorm Insurance Company

More Sweeping Tort "Reform"

In the 2011 legislative session, the corporate immunity lobby pushed some of their most significant "reforms" to date in the form of HB 274.[54] Among its provisions, this legislation: strips plaintiffs of the ability to join someone as a proper party defendant if they are designated as a so-called "responsible third party" after the statute of limitations has run;[55] allows courts to dismiss suits pre-discovery – without the presentation of any evidence – and award costs and attorney's fees to the prevailing party;[56] and permits just one party to petition for an appeal of a controlling question of law in the middle of the litigation.[57]

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Politicians have been touting what they term a "loser pays" provision of the bill. But in the twisted reality of Texas jurisprudence, *winners* may actually be forced to pay under the arcane offer of settlement statute, which was bolstered in HB 274 to further tilt the scales against victims by potentially wiping out the entirety of a judgment awarded by a jury.[58] In other words, a plaintiff could bring a valid claim, have a jury rule in their favor and award damages – only to be forced to pay the wrongdoer's legal costs in the end, erasing their entire judgment in the process.[59]

This is a tilted, one-way process where the defendant has the sole option of triggering this provision.[60] It is intended to create even more risk for plaintiffs by forcing them to make a decision in the dark – before the extent of the defendant's wrongdoing has been uncovered, a jury has been impaneled, or evidence has been presented. This introduces the prospect of additional financial harm if they refuse to accept hush money from the defendant in the form of a settlement offer. As a result, wrongdoers are able to forcibly purchase the silence of their victims, defeating public accountability and endangering other families in the process.

This type of fee-shifting is anathema to the open courts envisioned originally by our Founders and violates some of the deepest traditions in American law. Since at least 1796, parties to lawsuits in this country have borne their own legal expenses and costs, unless specifically provided otherwise in a contract or a particular statute for public policy reasons.[61] Known as the "American Rule," this is one of the distinguishing features between our system of justice and that of other countries, such as Britain, which itself has begun to rethink the wisdom of its current fee-shifting scheme.[62]

Tried for a time in Florida and rejected due to its disastrous consequences, proponents of this type of provision are "diplomatically silent about Florida's unsuccessful experience. After five years, the state abolished its loser-pays system"[63] when "the same groups who had sought passage of the law returned to the Florida Legislature and successfully lobbied for its repeal."[64] Put more bluntly: "They tried it in Florida, and it was a disaster."[65] Only Alaska, among the 50 states, has a pure "loser pay" law for those who seek justice against large, powerful, and wealthy defendants, such as multinational corporations.[66]

With the passage of HB 274, Texas has "further stacked the legal deck in favor of big-money defendants"[67] and embraced fundamentally un-American legal concepts.

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Windstorm Insurance

Hurricane Ike pounded the Texas Coast in 2008, but the grief for policyholders was only compounded after the winds subsided and they faced a man-made catastrophe. Instead of paying claims fully, fairly, and timely, the Texas Windstorm Insurance Association (TWIA), which is the windstorm provider of last resort, allegedly engaged in a host of wrongdoing, from a pay-to-play culture, to the inadequate investigation of claims, to low-ball offers for those whose claims were not rejected outright.[68] These vulnerable policyholders are forced to buy windstorm insurance from this one provider, and when every layer of government failed them, they turned to the judicial system in an effort to recover their losses, return home, and reopen their businesses.

Citing legal expenses, which were caused by TWIA's aggressive legal tactics and refusal to take responsibility, the corporate immunity lobby pushed the Texas Legislature to restrict coastal policyholders' rights, and while it took a special session of the Legislature, lawmakers appeased them in the end, passing HB 3 in 2011.[69] This legislation removes vital consumer protections, such as meaningful penalties if the insurer knowingly harms them;[70] gives inordinate power to an unelected, unaccountable "expert" panel;[71] induces policyholders to give up their right to trial by jury through arbitration;[72] and forces policyholders into a claims process that can charitably be described as Byzantine.[73] Coastal policyholders have been relegated to second-class status, rendering "equal protection" a farce. The for-profit insurers, which refuse to write insurance along the coast directly and are in actuality the members of TWIA,[74] are the beneficiaries of these restrictions on policyholders' rights.

Conclusion

With ruthless efficiency, and demonstrating Machiavellian sophistication at pulling the levers of political power inside the halls of the Capitol, the corporate immunity lobby and its willing accomplices among the state's political leadership have succeeded in making our state more dangerous for Texas families. By restricting rights, they have removed the attendant responsibilities that corporations owe to us as members of our community.

Presenting a false choice between jobs and justice, this lobby and their politician allies have shaped and molded our civil justice system into something unrecognizable when held up next to our federal and state constitutions, minimizing their patrons' risk while forcing victims and society at large to bear the cost of corporate wrongdoing.

The corporate immunity agenda has been written into law in Texas. Our state is the poorer for it.

About Texas Watch Foundation

The Texas Watch Foundation is an Austin, Texas, based nonprofit 501(c)(3) research and education organization that is dedicated to educating the public about the need for responsible consumer protections, including fair markets and meaningful accountability for corporate wrongdoers. For more information about our research and education projects, as well as the advocacy efforts of our 501(c)(4) partner, Texas Watch, visit www.TexasWatch.org.

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[1] Perry was Lt. Governor when George W. Bush was elected president in 2000 and was elevated to the position of governor when Bush resigned the office.

[2] This lobby is comprised of a coterie of corporate interests, including insurance, oil and gas, pharmaceutical, medical, tobacco, liquor, chemical, nuclear waste, and construction industry lobbyists, and is led, primarily, by the self-styled group "Texans for Lawsuit Reform."

[3] *See* legislation from the 74th Regular Session: SB 25 (limiting punitive damages), http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=74R&Bill=SB25#; SB 28 (joint & several liability), http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=74R&Bill=SB28#; SB 32 (venue), http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=74R&Bill=SB32#; SB 31 (sanctions), http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=74R&Bill=SB31#; and SB 94 (judicial campaign finance), http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=74R&Bill=SB94#. Note: The "enrolled" version is the final version of each bill.

[4] *See* SB 220 (expanding *forum non conveniens* dismissal of out-of-state suits) [75th Regular Session], http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=75R&Bill=SB220; *also see* "Major Issues of the 75th Legislature Regular Session," House Research Organization, Texas House of Representatives, 7/11/97, at p. 17, http://www.hro.house.state.tx.us/pdf/focus/majiss.pdf.

[5] See HB 4 [78th Regular Session], http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4.

[6] For summaries of each of the bill's provisions, *see* "Enrolled Bill Summary," http://www.capitol.state.tx.us/BillLookup/BillSummary.aspx?LegSess=78R&Bill=HB4; *also see* "Major Issues of the 78th Legislature, Regular Session," House Research Organization, Texas House of Representatives, 8/6/03, at p. 7, http://www.hro.house.state.tx.us/pdf/focus/major78.pdf.

[7] *See* HB 4 at ARTICLE 10, adding TEX. CIV. PRAC. & REM. CODE § 74.301, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4. Note: All Texas statutes may be viewed at the Texas Legislature Online: http://www.statutes.legis.state.tx.us/.
[8] *Id.* at ARTICLE 10, adding TEX. CIV. PRAC. & REM. CODE §§ 74.153, 74.154 (establishing a "willful and wanton" standard and pointedly instructing the jury).
[9] *Id.* at ARTICLE 10, adding TEX. CIV. PRAC. & REM. CODE §§ 74.051, 74.351.
[10] *See* "To Err Is Human: Building a Safer Health System," Linda T. Kohn, Janet M. Corrigan, and Molla S. Donaldson, Institute of Medicine, 2000, at pp. 1 & 26, http://www.nap.edu/catalog.php?record_id=9728#description.
[11] *See* "The Great Medical Malpractice Hoax: NPDB Data Continue to Show Medical Liability System Produces Rational Outcomes," Public Citizen, 1/07, at p. 12, http://www.citizen.org/documents/NPDB%20Report_Final.pdf.
[12] *See* "The Medical Malpractice Myth," Tom Baker, The University of Chicago Press, 2005, at pp. 37 & 69.
[13] *See* "Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002," Bernard S. Black, Charles M. Silver, David A. Hyman and William M. Sage, Journal of Empirical Legal Studies, Vol. 2, at pp. 207-209, 2005; Columbia Law and Economics Working Paper No. 287; U Illinois Law & Economics Research Paper No. LE05-002; U of Texas Law, Law and Econ Research Paper No. 030; available at SSRN: http://ssrn.com/abstract=770844.
[14] This agency was established in 2003; *see* HB 2985 [78th Regular Session], http://www.legis.state.tx.us/BillLookup/history.aspx?LegSess=78R&Bill=HB2985). It was defunded in 2005 during the following legislative session; *see* "Office Created Two Years Ago to Represent Patients is Closed," Mary Ann Roser, Austin American-Statesman, 10/13/05; *also see* "Senate Budget Writers Adopt Plan to Kill Office of Patient Protection," Texas Watch, 3/7/05, http://www.texaswatch.org/2005/03/senate-budget-writers-adopt-plan-to-kill-office-of-patient-protection/.
[15] For reporting on two representative cases, search "Pamela Johnson" and "Stefan Konasiewicz" on the Texas Watch website: http://www.TexasWatch.org.
[16] "Gov. Perry Speaks at Med Mal Bill Signing," Office of the Governor Rick Perry, 7/11/03, http://governor.state.tx.us/news/speech/10637/.
[17] *See* source notes at "Texas on the Brink, How Texas Ranks Among the 50 States, Fifth Edition" Legislative Study Group, 2/15/11, at p. 4, http://texaslsg.org/texasonthebrink/texasonthebrink.pdf.
[18] *See* "Rick Perry Says Texas Added 21,000 Doctors Due to Tort Reform," Jon Greenberg, PolitiFact, 8/25/11, http://www.politifact.com/truth-o-meter/statements/2011/aug/25/rick-perry/rick-perry-says-texas-added-21000-doctors-because-/. For another debunking of Perry's claims, *see* author/activist Wendell Potter's analysis entitled "The Mythical Benefits of Tort Reform in Texas," The Center for Public Integrity, 9/1/11, http://www.iwatchnews.org/2011/09/01/6097/analysis-mythical-benefits-tort-reform-texas.
[19] *See* "Health Care Sparse in Rural Texas," Emily Ramshaw, The Texas Tribune, 1/4/10, http://www.texastribune.org/texas-health-resources/health-reform-and-texas/health-care-sparse-in-rural-texas/.
[20] *See* "Little Trauma Care in Rural Texas," Emily Ramshaw, The Texas Tribune, 1/5/10, http://www.texastribune.org/texas-state-agencies/health-and-human-services-commission/little-trauma-care-in-rural-texas/.
[21] *See* "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," Charles Silver, David A. Hyman and Bernard S. Black, Texas Advocate, Fall 2008, at pp. 25, 27, & 29; U of Texas Law, Law and Econ Research Paper No. 134; U of Illinois, Law and Econ Research Paper No. 08-028; available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1139190.
[22] *See* "Patients' Premiums Climb," Collin Eaton and Kyle Alcott, The Dallas Morning News, 7/25/11.
[23] *See* "Liability Limits in Texas Fail to Curb Medical Costs," Public Citizen, 12/09, at p. 2, http://www.citizen.org/documents/Texas_Liability_Limits.pdf.

[24] *See* HB 2292 [78th Regular Session] at ARTICLE 2.156, repealing TEX. HEALTH & SAFETY CODE § 242.0372, which required mandatory liability insurance as a condition of operating such facilities, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB2292. For more on the section that was repealed, see the enacting legislation, SB 1839 [77th Regular Session] at SECTION 6.01, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=77R&Bill=SB1839.
[25] *See* HB 4 [78th Regular Session] at ARTICLE 10, adding TEX. CIV. PRAC. & REM. CODE §§ 74.001 (a)(11)(J), 74.001 (a)(21), http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4.
[26] *Id*. at ARTICLE 16, adding TEX. HUM. RES. CODE § 32.060 and TEX. HEALTH & SAFETY CODE § 242.017.
[27] *See Omaha Healthcare Center, LLC v. Wilma Johnson, On Behalf of the Estate of Classie Mae Reed, Deceased*, Case No. 08-0231, Texas Supreme Court, 7/1/11, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=29213; *also see* "Is a Spider Bite Like a Rickety Staircase or a Botched Surgery?" Linda P. Campbell, Fort Worth Star-Telegram, 7/27/11, http://www.star-telegram.com/2011/07/27/3251137/is-a-spider-bite-like-a-rickety.html.
[28] *See Diversicare General Partner, Inc., et al. v. Maria G. Rubio and Mary Holcomb as Next Friend of Maria G. Rubio*, Case No. 02-0849, Texas Supreme Court, 10/14/05, http://www.supreme.courts.state.tx.us/opinions/case.asp?FilingID=17053.
[29] *See* "Texas Nursing Homes Rank Near Bottom for Staffing," Jeremy Rogalski, KHOU 11, updated 8/26/11, http://www.khou.com/news/local/ITeamNursingHome-128406908.html.
[30] *Id.*
[31] *See* HB 4 at ARTICLE 2, adding TEX. CIV. PRAC. & REM. CODE § 42.004, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4; *also see* & TEX. R. CIV. P. 167 at http://www.supreme.courts.state.tx.us/rules/trcp/trcp_part_2.pdf. For example, if a plaintiff rejects a $100,000 offer, continues to prosecute their case, and later wins $79,000 at trial, they would be responsible for paying litigation costs to the other side. Even though a plaintiff wins, they ultimately lose.
[32] *See* "Offer of Settlement Act," ALEC Exposed, The Center for Media and Democracy, http://www.alecexposed.org/w/images/6/68/0H2-Offer_of_Settlement_Act_Exposed.pdf
[33] *See* HB 4 at ARTICLE 4, amending TEX. CIV. PRAC. & REM. Code § 33.004, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4.
[34] Governor Rick Perry has penned a book by the same name that argues in favor of states' rights and against federal overreach.
[35] *See* HB 4 at ARTICLE 5, adding TEX. CIV. PRAC. & REM. CODE § 82.007, http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB4.
[36] *Id.* at ARTICLE 5, adding TEX. CIV. PRAC. & REM. CODE § 82.008.
[37] The latter refers to the economic concept of "regulatory capture." For an insightful essay on the topic, *see* "Obama and 'Regulatory Capture': It's Time to Take the Quality of our Watchdogs Seriously," Thomas Frank, Wall Street Journal, 6/24/09, http://online.wsj.com/article/SB124580461065744913.html.
[38] Texas homebuilder Bob Perry (of no known biological relation to Rick Perry) is one of the most prolific contributors in all of American politics. For more, *see* the archives of Texans for Public Justice at http://www.tpj.org/search/label/Bob%20Perry. Homebuilder Dick Weekley is Co-Founder, Chairman, and CEO of Texans for Lawsuit Reform (TLR); *see* http://www.dickweekley.com/weekley/index.html. For more on TLR's political contributions, *see* the archives of Texans for Public Justice at http://www.tpj.org/search/label/Texans%20for%20Lawsuit%20Reform; *also see* "On the Records: 2011's Top Political Donors," Ryan Murphy, The Texas Tribune, 8/10/11, http://www.texastribune.org/texas-politics/campaign-finance/top-early-2011-texas-political-donors/.
[39] The full list of witnesses supporting HB 730 [78th Regular Session] can be viewed here: http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB730.

[40] *See* "'Crony Capitalism' Draws Attention in GOP Race," Patricia Kilday Hart, Houston Chronicle, 9/11/11, http://www.chron.com/default/article/Crony-capitalism-draws-attention-in-GOP-race-2164766.php; *also see* "Texas Government's Potemkin Village," Dave Mann and A.J. Bauer, The Texas Observer, 5/17/07, http://www.texasobserver.org/tribute.php?aid=2501.
[41] *See* HB 730 at ARTICLE 1, adding TEX. PROP. CODE § 430.001, et seq., http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=78R&Bill=HB730.
[42] *Id.* at ARTICLE 1, adding TEX. PROP. CODE § 426.001, et seq.
[43] That is to say, (1) the builder was wrong in its construction; and (2) the agency was wrong in its assessment of the construction. *See* the "rebuttable presumption" in the law; *Id.* at ARTICLE 1, adding TEX. PROP. CODE § 426.008.
[44] *See* TEX. PROP. CODE § 27.001, et seq.
[45] *See* "Major Issues of the 81st Legislature, Regular Session and First Called Session," House Research Organization, Texas House of Representatives, 9/30/09, at p. 10, http://www.hro.house.state.tx.us/focus/major81.pdf.
[46] *See* TEX. PROP. CODE § 27.001, et seq.
[47] "Government Statistics on Death Due to Asbestos Related Diseases," Environmental Working Group, http://www.ewg.org/sites/asbestos/tables/deathdetails_state.php.
[48] Only Ohio, Georgia, and Florida preceded Texas in passing such laws.
[49] *See* SB 15 [79th Regular Session], http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=79R&Bill=SB15.
[50] *Id.* at SECTION 2, adding TEX. CIV. PRAC. & REM. CODE §§ 90.003, 90.004, 90.006.
[51] *Id.* at SECTION 2, adding TEX. CIV. PRAC. & REM. CODE § 90.007(c).
[52] Compare the "1/1" profusion grading standard set forth in TEX. CIV. PRAC. & REM. CODE § 90.003 (a)(2)(C)(i)(a) to the American Thoracic Society's official statement, which states that a lower grade of "1/0" is "presumptively diagnostic" and is "used as the boundary between normal and abnormal in the evaluation of the film"; *see* "Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos," American Thoracic Society, adopted 12/12/03, published in the American Journal of Respiratory and Critical Care Medicine, Vol. 170, 2004, at pp. 696 & 700, http://www.thoracic.org/statements/resources/eoh/asbestos.pdf. Profusion grading measures the intensity or concentration of scarring in the lung tissue (i.e., the "visual snowstorm" that is identified in an affected person's chest x-ray). For more, *see* "Diagram Teaching Files: Asbestos Disease," Daniel Powers, M.D., Discovery Diagnostics, http://www.breader.com/diagram-teaching-files/index.html.
[53] HB 1602 [80th Regular Session], http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB1602.
[54] HB 274 [82nd Regular Session], http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=HB274.
[55] *Id.* at ARTICLE 5, repealing TEX. CIV. PRAC. & REM. CODE § 33.004(e). *See* the earlier discussion in this report about the destructive gamesmanship defendants can play in pointing the finger at empty chair "responsible third parties."
[56] *Id.* at ARTICLE 1, adding TEX. GOV'T CODE § 22.004 and TEX. CIV. PRAC. & REM. CODE § 30.021. Texas already has a "No-Evidence Motion for Summary Judgment" practice, which allows the parties adequate time for discovery before the court may make a determination. *See* TEX. R. CIV. P. 166a(i), http://www.supreme.courts.state.tx.us/rules/trcp/rcp_all.pdf. The distinguishing factor with the "Motion to Dismiss" practice adopted by HB 274 appears to be the ability to kill cases before discovery has been conducted, meaning unsuccessful plaintiffs – and the public, by extension – will not know the extent of a defendant's knowledge or the full scope of their wrongdoing.
[57] *Id.* at ARTICLE 3, amending TEX. CIV. PRAC. & REM. CODE § 51.014.
[58] *Id.* at ARTICLE 4, amending TEX. CIV. PRAC. & REM. CODE § 42.004(d).
[59] *Id.* The previous version of the offer-of-settlement law allowed the claimant to retain 50% of their economic damages. HB 274 eliminates this floor on economic damages, meaning all of a claimant's judgment may be used to pay the losing side's litigation costs.

[60] *See* TEX. CIV. PRAC. & REM. CODE § 42.002(c).
[61] *See Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796), http://supreme.justia.com/us/3/306/case.html; *also see Alyseka Pipeline Svc. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), http://supreme.justia.com/us/421/240/case.html.
[62] *See* "Seven Dogged Myths Concerning Contingency Fees," Herbert M. Kritzer, Washington University Law Quarterly, Vol. 80, at pp. 739-794; available at SSRN: http://ssrn.com/abstract=907863; *also see* "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales: Implementation of Lord Justice Jackson's Recommendations," Ministry of Justice, 11/10, http://www.justice.gov.uk/consultations/docs/jackson-consultation-paper.pdf.
[63] *See* "Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution," Deborah L. Rhode, Duke Law Journal, 11/1/04.
[64] *See* "In Defense of the Tort System," Michael Foster, Tampa Tribune, 3/13/95.
[65] *See* "Litigation in Turmoil: Where Is It Going?" Michael A. Pope, Illinois Legal Times, 10/95.
[66] However, Alaska, unlike Texas, grants judges discretion when making such an award of attorney's fees. *See* Alaska Rule of Civil Procedure 82(b)(3), http://www.courts.alaska.gov/civ2.htm#82.
[67] *See* "Tort Deform: House Bill 274 Further Stacks the Legal Deck in Favor of Big-Money Defendants," Editorial Board, Houston Chronicle, 5/14/11, http://www.chron.com/opinion/editorials/article/Tort-deform-House-Bill-274-further-stacks-the-1380239.php.
[68] For a detailed look at TWIA's alleged wrongdoing, see "Plaintiff's Sixth Amended Petition" in *Bakht Khattak v. Texas Windstorm Insurance Association, Pacesetter Claims Service, Inc. and Blane E. Bergan*, Cause No. 09-CV-0147, in the 56th Judicial District Court of Galveston County, Texas, http://www.scribd.com/doc/24087153/TWIA-lawsuit-6th-Amended-Petition; also see "New Round of Criticism Hits Windstorm Insurer," Purva Patel, Houston Chronicle, 12/2/09, http://www.chron.com/default/article/New-round-of-criticism-hits-windstorm-insurer-1729806.php.
[69] HB 3 [82nd Legislature, 1st Called Session], http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=821&Bill=HB3.
[70] *See, e.g.*, *Id.* at SECTION 2, amending TEX. INS. CODE § 541.152, and SECTION 5, adding TEX. INS. CODE § 2210.014.
[71] *Id.* at SECTION 41, adding TEX. INS. CODE § 2210.578.
[72] *Id.* at SECTION 34, adding Tex. Ins. Code § 2210.363, and SECTION 40, adding TEX. INS. CODE § 2210.554.
[73] *See* "31 Days, 31 Ways: TWIA's Claims Process Gets a Makeover," Ben Hasson and Becca Aaronson, The Texas Tribune, 8/17/11, http://www.texastribune.org/library/data/texas-windstorm-insurance-claims-process/.
[74] TEX. INS. CODE §§ 2210.051-2210.052.