The Rise and Fall (and Rise?) of Texas Trial Lawyers

Preface by Ralph Nader

Andrew Goldman
Stuart Speiser Memorial Fellow
June 2013

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TABLE OF CONTENTS

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This report on the fall and rise of the Texas Trial Lawyers by Andrew Goldman is a combination of reality and realistic hope. The reality is that for the past twenty years, the commercial closure movement on the civil justice systems has been incrementally and relentlessly successful against the efforts of trial lawyers and their coalition of nonprofit organizations representing the injured and sick. When the chance to attain some measure of civil justice in Texas state courts is stripped away by statute, constitutional revision and judicial elections, all driven by commercial interests greased with ample campaign cash, the proper word for this condition is "crisis."

What, how and why this degrading of the tools for civil justice occurred is the subject of Andrew Goldman's report. He concludes with numerous practical recommendations for a rollback of the "tort deforms," including repeal of Proposition 12 that took away a key protection of the venerable Texas state constitution for millions of Texans.

Andrew Goldman is the first recipient of the Stuart M. Speiser Memorial Summer Fellowship. Mr. Speiser was a pioneering practitioner of aviation safety litigation, the noted author of more than 50 books, including the eleven-volume, *The American Law of Torts* (with Charles F. Krause and Alfred W. Gans), which have been cited hundreds of times by the Supreme Court of the United States and other federal and state appellate courts. Mr. Speiser advanced the plaintiff's side of air crash litigation successfully representing victims of many of the major air disasters of the 20th century, among other celebrated cases.

Mr. Speiser's son, James Speiser was an early financial supporter of this Fellowship. Mr. Speiser's law firm, Speiser Krause and his partner, Charles F. Krause were contributors as well.

Attached as an appendix is an open letter which I sent to the trial lawyers of America in 2012 that provides a broader context for this report. What is being done in Texas by the Tortfeasors and insurance lobbies is occurring in many other states. Lessons from the Texas experience are duly applicable in one measure or another to other states afflicted by the same massive assaults on the American civil justice system, its budget and its procedural as well as substantive rights for wrongfully injured people.

Introduction

At the outset of this article it is important to point out that the author is not a Texan. The author has traveled to many parts of Texas, and has family in Frisco and in Austin. The author has a fondness for the state's lore—everything from the Wild West to Townes Van Zandt to BBQ. But the author is about as much a born-and-bred East Coaster as they come, a liberal attorney with a lifetime of living in the short corridor between Baltimore and New York City. In writing about Texas politics, this distanced relationship creates some obvious disadvantages—most significantly, an admitted lack of the kind of second-nature intrinsic home-turf knowledge of the way that things operate. But the distance creates some distinct advantages, as well. Not knowing a place like the back of your hand perhaps allows one's general curiosity to roam more freely.

Curiosity, or more accurately curiosity coupled with frustration, is the impetus behind this article. At its broadest, the primary question in mind was how Texas could so drastically shift from being a Democratic stronghold over almost the entirety of the twentieth century to being almost uniformly conservative? More specifically, what roles have the trial lawyers played in this drastic shift over the last two decades or so? We are now upon the tenth anniversary of 2003's Proposition 12 ("Prop 12") defeat—a loosely-worded "tort reform" ballot measure that allowed the legislature to cap non-economic damages in medical malpractice cases and "all other actions" beginning in 2005. The anniversary of this defeat affords an entry point into considering these questions. The Prop 12 fight was never going to be an easy one, but the loss was nonetheless unnecessary and unfortunate—baffling, even, when one considers tremendous recent successes in asbestos and tobacco litigation that left the Texas trial lawyers flush with money. The law was passed by a narrow 51-49% margin—a difference of only 33,000 votes—with a meager 13% turnout. In contrast to the simple, powerful, readily-understood message used by Prop 12 proponents—*the doctors will leave; trial lawyers are slimy*—the coalition fighting Prop 12 had a complex, unwieldy six-point message crafted by a Republican consultant and lacking a common theme or an identifiable antagonist in the insurance industry.

This article seeks to analyze the Prop 12 defeat and place it in context in an effort to push for the law's repeal and a restoration of the Texas State Constitution. Parts I, II, and IV of this article analyze the steady erosion of the justice system in Texas, including the gutting of workers' compensation, the corporatization of the Texas Supreme Court, and the "Loser Pays" statute. Part III analyzes the Prop 12 defeat with specific focus on the logistical challenges of that campaign, the lackluster

messaging, and questionable strategy. This section benefits from extensive firsthand recollections by many individuals who were actively involved in the Prop 12 campaign. In Part V, the article offers constructive recommendations for fighting "tort reform" efforts in Texas and around the country in the future. Obtaining a detailed understanding of the Texas campaign's failure to defeat Prop 12, and situating that fight and other losses post-2003 in a Texas-historical context will help to illuminate important solutions for fighting "tort reform" and engaging the trial lawyer community in Texas as well as the rest of the country. The hope is that stepping back and attempting to make sense of the losses of the last few decades will motivate lawyers, advocates and activists, and will spark discussion and continued analysis dedicated to the restoration of an accessible and adequate civil justice system for wrongful injuries.

I. GUTTING WORKERS' COMP

Of all the many affronts to the rights of wrongfully injured citizens in Texas over the last two decades, the ongoing erosion of the workers' compensation system has been among the most noticeable and most unconscionable defeats. The system—already born out of compromise with business and insurance industry interests—continues to be whittled away by these same interests and their allies in the legislature under the guise of "reform." Year after year the Texas legislature has trumpeted economic efficiency while restricting the rights of injured workers to recover, making it more difficult for trial lawyers to take workers comp cases, and establishing a system that, as the American Bar Association (ABA) has noted, has been criticized for becoming "so hostile, so skewed toward delay and denial that lawyers, physicians and even legitimate claimants have been driven away."[1]

The shift to a workers' compensation system was the necessary result of late-nineteenth and early-twentieth century laws failing to adequately address serious industrial accidents that caused one in fifty workers to be killed or seriously injured.[2] The common law was, at this time, still hanging onto the remnants of feudal traditions where servants were unable to sue their lords. In an influential 1907 German study cited for its statistical depth and detail by Larson's treatise on workers' compensation, employer-friendly legal defenses such as assumption of the risk, contributory negligence and the fellow-servant rule combined to produce an estimated 83 percent of cases where an injured employee would be completely without remedy, with many of the remaining cases still being susceptible to an assumption of the risk defense.[3] Fatality and compensation numbers from industrial accidents are equally staggering. In Illinois a commission found 614 deaths in 5,000 industrial accidents, with the families of the deceased receiving little or no compensation; in New York, a 1908 study found no compensation to the family in 43.2 percent of fatalities.[4] In the New York study, Larson points out that even for the families that did receive some compensation, after deducting attorneys' fees and funeral expenses, "it became clear enough that the precompensation loss-

[1]Terry Carter, "Insult to Injury: Texas Workers' Comp System Denies, Delays Medical Help," *ABA Journal*, October 2011, http://www.abajournal.com/magazine/article/insult_to_injury_texas_workers_comp_system_denies_delays_medical_help/.

[2] John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard University Press, 2004).
[3] 1-2 Larson's Workers' Compensation Law § 2.03.
[4] *Id*. at § 2.05.

adjustment system for industrial accidents was a complete failure and, in the most serious cases, left the worker's family destitute."[5]

As a result of the inadequate state of the law and the shocking effects on injured workers and their families, workers' compensation laws began to spread throughout the country in a compromise premised on efficiency, whereby the cost of injuries was shifted to the employer by trading the employee's right to go to court for work-related injuries in exchange for a no-fault system of compensation.[6] Texas passed its workers' compensation law in 1917, though it was (and remains) the only state to allow voluntary employer participation.[7] But by 1972 the workers' comp laws had already fallen short of their intended benefits to injured employees. A bipartisan commission appointed by the Nixon administration found existing workers' compensation programs "inadequate and inequitable," and cited the need for shoring up and expanding coverage and benefits.[8]

The report had the unintended consequence of provoking a nationwide backlash against workers' compensation orchestrated in large part by business and insurance industry interests.[9] In Texas, by the 1980s the backlash had grown powerful enough to prompt legislators to begin pushing for changes to the system in a purported effort to help bring costs down via a variety of measures making it increasingly difficult for lawyers to become involved. As Terry Carter has stated in the *ABA Journal*, these efforts have radically reduced the number workers' compensation attorneys from the hundreds to approximately thirty.[10] Carter cites attorney Rick Levy, a former legal director for the Texas AFL-CIO, on the injustice of how injured workers have been left behind to fend for themselves:

> The goal was to get lawyers out of the system and leave more money for helping injured workers, and they got it half right. …So for a long time it's been insurance companies and their lawyers going up against injured workers usually without lawyers. The unfairness of that is not difficult to discern.[11]

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[5] *Id.*
[6] Amy Widman, *Workers' Compensation: A Cautionary Tale* (New York, NY: Center for Justice and Democracy, 2006), [Page 4], http://centerjd.org/content/workers-compensation-cautionary-tale-national.
[7] "Workers' Compensation Insurance," Texas Department of Insurance, last modified February 2012, http://www.tdi.texas.gov/pubs/consumer/cb030.html.
[8] Report of the National Commission on State Workmen's Compensation Laws, Rep., at 151 (1972). http://workerscompresources.com/?page_id=28.
[9] Widman, *Workers' Compensation: A Cautionary Tale*, p.7.
[10] Carter, *Insult to Injury.*
[11] Carter, *Insult to Injury.*

In 1987 the Texas legislature appointed a Joint Select Committee to address the criticisms regarding the costs and benefits of the workers' compensation program, and their findings laid the groundwork for the first major attack.[12] The House Resolution creating the Committee was, unsurprisingly, laden with pro-industry wording concerned with increasing efficiency and decreasing operating costs and void of language regarding injuries or the effects of changes on workers.[13] The Committee's report, issued in January 1989, followed more or less accordingly, noting at the very outset that, "workers' compensation insurance rates had increased over 67% in 30 months," but burying and applying zero critical insight to the fact that higher costs may be due, to whatever degree, to the fact that Texas "is only one of three states in which coverage is not mandatory."[14] While the Committee did include among its recommendations that coverage should be mandatory, it also added a page of miscellaneous provisions that included capping attorney's fees in a variety of different manners.[15]

The legislature pounced on the industry-friendly report and pivoted to quickly pass one of the most significant assaults on a workers' compensation in Texas history, the Texas Workers' Compensation Act (S.B. 1, 1989, effective January 1, 1991). Observers say the AFL and the Texas trial lawyers put up a good fight in defeating the attack on workers compensation twice during the regular session and in two special sessions but ultimately were unable to hold back the powerful insurance-big business lobby. The rough and tough lobbying is well illustrated by a New York Times reprint of an AP story about a millionaire handing out $10,000 checks on the Texas State Senate floor. The story notes that "Lonnie (Bo) Pilgrim, an East Texas chicken processor, offered the personal checks, with the payee's name left blank, to nine of the Senate's 31 members Wednesday, two days before the

[12] "About Workers' Compensation," Texas Department of Insurance, last modified December 08, 2012, http://www.tdi.texas.gov/wc/dwc/index.html.
[13] H.R. Res. 27, 70th Leg. (Tex. 1987). http://www.lrl.state.tx.us/scanned/interim/70/2ndhcr27.pdf.
[14] Joint Select Committee on Workers' Compensation Insurance, 71 (Tex. 1988). http://www.lrl.state.tx.us/scanned/interim/70/w891.pdf.]
[15] *Id.* p.19.

Senate's vote on a House workers' compensation bill." Perhaps if the well-off trial lawyers had spent more money and had invested in building a significant base of citizen support for the workers compensation system, they could have ultimately prevailed. While the industry-friendly Texas Department of Insurance (TDI), which houses the Division of Workers' Compensation, touts the Act as "creating a more equitable environment for all participants," one of the primary methods by which it sought to reduce costs was to create a "multi-tiered dispute resolution system" – in other words, to remove attorneys from the equation by outlawing lump-sum settlements and forcing a prolonged administrative process.[16] In plain speak:

> Medical and compensatory claims are bifurcated: Whether or not the worker was actually injured on the job must be fought out, determining whether the claimant will get 70 percent of his salary while recuperating; also the necessity of medical treatment, as well as the extent to which any pre-existing conditions might partially offset covered treatments.[17]

As a result, where attorney representation of injured workers was formerly above 90 percent during prehearing conferences and 40-45 percent of all overall claims, by 1995, only 8.7 percent of claims were represented by an attorney.[18]

While TDI trumpets the effects of the Texas Workers' Compensation law keeping costs down, the consequence on workers has been to leave them to fight on their own in a complex process where much is at stake and the deck is stacked against them. As Professor Martha McCluskey has noted, "Taken cumulatively, changes involving administrative procedures favoring employers and insurers and reduced worker access to lawyers and doctors have probably increased workers' costs and suffering as much as or more than direct benefit decreases."[19] And the hits keep on coming. In 2001, Texas passed H.B. 2600, which required

[16] *Effects of Reforms on the Texas Workers' Compensation Insurance Market* (Austin, TX: Research and Oversight Council on Workers' Compensation, 1999), [Page 1], http://www.tdi.texas.gov/reports/wcreg/documents/insmarket.pdf.
[17] Carter, *Insult to Injury.*
[18] *Effects of Reforms,* p. 2.
[19] Martha T. McCluskey, "The Illusion of Efficiency in Workers' Compensation 'Reform'," 50 Rutgers L. Rev 657, 714 (1998).

that physicians wishing to treat injured workers register their names on an "approved doctor" list, and required insurance carrier preauthorization for spinal surgeries, thereby putting purported cost-cutting above medical advice and patient care.[20] In 2005, H.B. 7 abolished the Texas Workers' Compensation Commission (TWCC) and shifted its responsibilities to the Division of Workers' Compensation within TDI.[21] Where previously the TWCC had been run by six commissioners reflecting a balance of employer and labor interests, H.B. 7 replaced that administrative structure with a single commissioner to be appointed by the governor.[22]

Partisan politics—which has been synonymous with Republican politics in Texas for two decades—and pro-insurance ideology continue to triumph while workers continue to suffer. These changes to the workers' compensation system are not anomalies in the U.S., but they are among the worst. Florida, California, West Virginia and Missouri are among the states that have, as Amy Widman, a professor at Northern Illinois University, describes, "completely gutted their workers' compensation programs." Moreover, ongoing attempts to tilt the balance of power in favor of employers and insurance companies are underway in many other states.[23] But Texas's record for workplace safety continues to be objectively appalling, year after year producing obscenely high rates of workplace fatalities.[24] And while TDI numbers indicate a lower rate of nonfatal occupational injuries and illness than the nationwide average, these figures are underrepresentative and skewed by the so-called reform measures that have made it more difficult to prove injury and have placed more power in the hands of insurers to deny claims.[25] Attorneys have been relegated to onlooker status while those they are meant to protect are left defenseless and vulnerable.

[20] H.B. 2600 (2001).
[21] H.B. 7 … Texas Labor Code § 402 *et seq*.
[22] *Id.*
[23] Widman, *Workers' Compensation: A Cautionary Tale*, p.7.
[24] According to the 2011 AFL-CIO Death on the Job Report, statistics from 2009 showed Texas having among the highest number of overall workplace fatalities (480), the highest number of Hispanic worker fatalities (185), and highest number of foreign-born worker fatalities (124). The rate of fatalities per 100,000 workers at private sector jobs in 2009 was 4.4, as compared to 3.3 nationwide. *Death on the Job: The Toll of Neglect* (AFL-CIO, 2011), [Page 160], http://www.aflcio.org/Issues/Job-Safety/Death-on-the-Job-Report/Death-on-the-Job-Report-2011.
[25] "Nonfatal Occupational Injury and Illness Data, and Information," Texas Department of Insurance, last modified December 28, 2012, http://www.tdi.texas.gov/wc/safety/sis/nonfatalhomepag.html.

II. THE CORPORATE SUPREME COURT OF TEXAS

The pro-corporate agenda in Texas has, during the Bush and Perry years, found a willing ally in the state Supreme Court. According to Texas Watch, 2000-2010 in particular saw a marked shift toward support of corporations, with an average of 74 percent of cases being found in favor of corporate defendants and only 22 percent of cases being won by plaintiffs.[26] The statistics tell the story of a state judiciary that has strayed far from its intended role as an independent and impartial check on the executive and legislative branches, vital to a functioning civic system. And the cases show an activist Court prone to disregarding precedent, to overreaching and contortion in its interpretation of the law in accordance with ideology, and to overturning jury verdicts at an unusually high rate. The reversal of jury verdicts in and of itself illustrates an assault on citizens' Constitutionally-afforded Seventh Amendment right to a trial by jury.[27] Juries have long been considered the backbone of the American civil justice system, with courts attaching "singular importance to enforcing the Seventh Amendment."[28] As Professor Eric Schnapper has pointed out, in 1830 United States Supreme Court Justice Joseph Story emphasized the second clause of the Seventh Amendment as being a substantial and independent idea preserving the power of the jury: "No fact tried by a jury shall be otherwise re-examinable, in any court of the United States, than according to the rules of the common law."[29]

The Texas Constitution enshrines this principle in Art. V, § 6, prohibiting Courts of Appeals from weighing disputed evidence and limiting the Court's authority to questions of law, a provision that Professor David Anderson says had been until recently "understood to deny the Texas Supreme Court jurisdiction over such questions."[30] Yet between 2004 and 2010, Texas Watch found that the average rate of the Texas Supreme Court's reversal of jury verdicts has been an astounding 74 percent, dipping below 70 percent only once (2007-2008).[31]

Anderson found that an "unprecedented" number of these reversals have come through the Texas Supreme Court's use of factual analysis rather than legal analysis:

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[26] *Thumbs on the Scale: A Retrospective of the Texas Supreme Court* (Texas Watch Foundation, 2012), [Page 3], http://www.texaswatch.org/wordpress/wp-content/uploads/2012/01/Thumbs-on-the-Scale_CtWatch_Jan2012_Final.pdf.

[27] U.S. Const. amend. VII.; the Texas State Constitution also holds the right to a jury trial "inviolate." See Texas. Const. of 1876, art. I, § 15.

[28] Eric Schnapper "Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts" U. Wisc. L. Rev. 237, 238 (1989).

[29] *Parsons v. Bedford*, 28 U.S. [433, 447] (1830).

[30] Texas Const. art V, § 6; *See* Anderson, David A., "Judicial Tort Reform in Texas" Review of Litigation, 2007; U of Texas Law, Public Law Research Paper No. 116. Available at SSRN: http://ssrn.com/abstract=976114

[31] *Thumbs on the Scale*, p. 6.

> The most controversial method of producing defendant victories is by holding that there is no evidence to support a plaintiff's verdict. The Texas Supreme Court is doing this far more frequently now than in the past, particularly in tort cases… The extent of the present court's use of no-evidence determinations appears to be unprecedented.[32]

In *Volkswagen of America, Inc. v. Ramirez*, for example, the Texas Supreme Court overturned a jury verdict in favor of a plaintiff suing Volkswagen for a product defect that led to a fatality by finding that there was no evidence to support causation of the accident.[33] The Supreme Court analyzed the experts' testimony under Texas Rule of Evidence 702, which, as interpreted through a series of earlier cases, gave the Court ample opportunity to question and overrule expert testimony.[34] And in spite of detailed testimony as to a faulty wheel-bearing assembly, microscopic tearing at the base of a necessary adjustment nut, and other highly technical defects that described as cumulatively causing the accident, the Court reversed the jury's determination (as well as the affirmation by the appellate court) and found the expert testimony an unsupported conclusion, and therefore not evidence in the eyes of the Court.[35] Chief Justice Jefferson argued in dissent that the jury had been entitled to draw the inferences that it had, and that the Court had wrongly taken the verdict away from the plaintiff, stating that, "this Court lacks constitutional authority to weigh conflicting evidence."[36] Calling the decision a "dangerous precedent that threatens to fundamentally alter the nature of no-evidence review," Chief Justice Jefferson illustrates the problem in an amusing but poignant footnote addressed to Justice Hecht's concurrence:

> Volkswagen has not challenged in this Court the methodology employed by Cox or the extent to which his conclusions are supported by testing. . . Cox does not say "the moon is made of green cheese," or "the Earth is the center of the solar system," but rather that objective evidence supports his conclusion that the bearing failure occurred before the Passat left the eastbound lane and caused the accident. . . . A court may

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[32] *Thumbs on the Scale*, p. 21.
[33] *Volkswagen of America, Inc. v. Ramirez*, 159 S.W.3d 897, 903 (Tex. 2004).
[34] *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001) (expert testimony requires not only that the expert be qualified, but that his proposed testimony must be relevant and reliable); *see also E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995) (expert testimony is unreliable if it is not grounded "in the methods and procedures of science" and is no more than "subjective belief or unsupported speculation") (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993)).
[35] *Volkswagen*, p. 912.
[36] *Id.*, p. 914 (Jefferson, C.J. dissenting).

> decide as a matter of law that the former examples are "no evidence," but when more than a scintilla of objective evidence supports an expert's conclusions in a technical area in which judges have no particular expertise, and when that expert's methodology is not challenged on appeal, the question becomes one of factual, and not legal, sufficiency.[37]

The *Volkswagen* case is illustrative but hardly an isolated example of the Texas Supreme Court overreaching to tilt the balance of power toward corporations. As Texas Watch has argued, the Court is an exemplar of judicial activism at its worst, "interpreting statutes broadly or narrowly, as the circumstances warrant, to reach a result that favors the powerful."[38] In *Severance v. Patterson*, for example, the Court recently sided with private landowners in a decision that turned its back on the Open Beaches Act, a law that had for fifty years stood for the proposition that the public should have access to public beaches as well as private beaches to which the public had acquired an easement permitting use.[39] The Open Beaches Act had previously been interpreted to allow for "rolling easements," where gradual shifts in the land due to erosion would not interfere with the public's access to the beach.[40] Yet the Court found that "the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land to which the easement was originally attached is violently washed away," and held that Texas does not recognize rolling easements.[41] The immediately unpopular decision prompted even Republican Attorney General Greg Abbott to deride the Court's opinion as grounded in "nothing."[42]

Texas Watch highlights two other cases as examples of the Texas Supreme Court's activist inclinations and total disregard for legislative intent, with both cases making the advocacy group's "dirty dozen" list of the twelve most anti-consumer decisions delivered by the Court between 2000-2010. In *PPG Industries, Inc. v JMB*, the Court ruled that claims under the Texas Deceptive Trade Practices Act (TDPA)—a law explicitly intended to be liberally construed for the protection of consumers—could

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[37] *Id.* n. 3.
[38] *Thumbs on the Scale*, p. 7.
[39] *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2011).
[40] *See Feinman v. State*, 717 S.W.2d 106 (Tex.App. Houston 1st Dist. 1986) (upholding public easement for beach access following destructive hurricane); see also *Arrington v. Tex. Gen. Land Office*, 38 S.W.3d 764, 766 (Tex.App. Houston 14th Dist. 2001) (citing *Feinman* for the proposition that a rolling easement is "implicit" in the OBA, and *Matcha v. Mattox*, 711 S.W.2d 95, 100 (Tex.App. Austin 1986) for the proposition that established beach easements may "shift with the natural movements of the beach").
[41] *Severance*, p. 724, 725.
[42] Harvey Rice, "Open Beaches an Issue in Texas Supreme Court Race, "*Houston Chronicle*, June 19, 2012, http://www.chron.com/news/houston-texas/article/Open-beaches-an-issue-in-Texas-Supreme-Court-race-3646596.php.

not be assigned to third parties.[43] Justice Harriet O'Neill's dissenting opinion, joined by Justices Michael H. Schneider and Steve Smith (with Justice Wallace Jefferson not participating), criticized the majority opinion for incorrectly assessing the legislative intent and overstating key holdings in earlier relevant decisions, but illustrated via succinct hypothetical the problem that the decision creates for consumers:

> S, a car dealer, turns the odometer back on a vehicle that it sells to B, clearly a false and deceptive trade practice that the DTPA was designed to remedy. Unaware that the odometer has been tampered with, B sells the car to C a week later and assigns all warranties associated with it. The car immediately breaks down, and C discovers that the vehicle has 100,000 more miles on it than the odometer represents. *After today, C has no remedy against S for deceptive trade practices because the Court indiscriminately outlaws the assignment of all DTPA claims, even those that do not raise the policy concerns the Court fears*.[44] [Emphasis added.]

The second of the two cases, *Entergy Gulf States, Inc. v. Summers*, is equally suspect from a jurisprudential perspective, but perhaps even more noteworthy for the criticisms it provoked.[45] As Texas Watch points out, where lobbyists for business interests had tried unsuccessfully for years to "lasso laborers who are not employed by a premises owner but are hurt on the job into the workers' compensation system," the Court went "to exceptional lengths to reward negligent premises owners who purport to act as their own general contractor."[46] In spite of overtures toward judicial restraint and "giving wide berth to legislative judgment" as required by principles of statutory construction, the Court contorts to find, in a 1989 recodification of the Workers' Compensation Act, a new intent to allow general contractors the exclusive remedy defense of removing tort liability for injured workers.[47] The initial decision, handed down in August 2007, led to the filing of numerous *amici* briefs pointing out the error in the Court's holding and calling for a rehearing.[48] One such brief, filed by two Democratic and two Republican state legislators, charges the Court with having "violated the separation of powers clause of the Texas Constitution, and impermissibly encroach[ing] on the powers and

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[43] *PPG Indus. v. JMB/Houston Ctrs. Ltd. P'ship*, 146 S.W.3d 79 (Tex. 2002).
[44] *Id.* p. 66 (O'Neill, J. dissenting).
[45] *Entergy Gulf States v. Summers*, 282 S.W.3d 433 (Tex. 2009).
[46] *Thumbs on the Scale*, p. 7
[47] *Entergy*, p. 481.
[48] E. Lee Parsley, "Supreme Court Under Fire?," *The Appellate Advocate: State Bar of Texas Appellate Section Report* 21, no. 4 (Summer 2009): [Page 259, 264].

functions expressly reserved to the Legislature."[49] The brief explains the 1989 changes to the law as deliberately excluding premises owners from those granted tort immunity as owners or general contractors:

> In 1989, we overhauled the worker's compensation system. In the draft bill during the regular session, immunity was extended to owners, as well as general contractors. However, in the subsequent special session we removed premises owners from the list of actors granted immunity. The deletion of a provision in a pending bill discloses a legislative intent to reject the proposal. Just as a court assumes that every word in a statute has been used for a purpose, the court presumes that every word excluded was excluded for a purpose. We excluded the word "owner" because we did not want to extend immunity to non-employer premises owners.[50]

The Court ultimately did grant a rehearing, but not only remained unpersuaded by the briefs but dismissed the legislators' criticisms as merely "post-hoc statements as to what a statute means."[51]

The Texas Supreme Court's drift from jurisprudential ideals into the arms of corporate ideology begins with the fact that Justices in Texas are elected rather than appointed, and concludes, as with many things in politics, at the end of the money trail. A 2008 report by Texans for Public Justice tracked the influx of cash into the reelection campaigns of three incumbent GOP justices and found that they raised $2.8 million during the fundraising cycle as compared with $1.2 million for their Democratic challengers, with 56 percent of the money for incumbents coming from PACs and businesses.[52] Fifty-two percent of the money came from lobbyists and lawyers (typically large corporate defense firms), 12 percent from energy and natural resources interests, and 7 percent from conservative and "tort reform" ideological and single-issue interest groups such as Texans for Lawsuit Reform, the Texas Civil Justice League, and the Republican Party of Texas.[53] By contrast, the list of the top thirty-three donors to the three justices does not show any progressive groups.[54] And while many successful plaintiff firms gave substantially to the

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[49] Brief for Sens. Rodney Ellis/Jeff Wentworth and Reps. Craig Eiland and Bryan Hughes as Amici Curiae Supporting *Entergy Gulf States v. Summers, 282 S.W.3d 433* (Tex. 2009). p.1 http://www.supreme.courts.state.tx.us/ebriefs/05/05027212.pdf.
[50] *Id.* p. 2.
[51] *Entergy*, p. 444.
[52] *Interested Parties: Who Bankrolled Texas' High-Court Justices in 2008?* Texans for Public Justice, October 2009. [1]. http://info.tpj.org/reports/supremes08/InterestedParties.oct09.pdf.
[53] *Id.* p.3.
[54] *Id.* p.4.

Democratic challengers, their donations have been unable to compete with the amount of corporate-friendly money flooding toward incumbents.[55] This imbalance reflects the norm in Texas nearly two decades; where trial lawyers were once powerful players in Texas electoral politics, but the late 1980s and 1990s saw them replaced by an assortment of business interests.[56] During that same time period, the Texas Supreme Court shifted from being historically controlled by Democrats to being uniformly dominated by Republicans.[57]

These changes, when considered together with the unsparingly anti-consumer, anti-labor, anti-victim decisions handed down by the Court, should, as *The Atlantic* has said, "…chill the blood of every citizen who believes in an independent judiciary and the critical role judges play in leveling the playing field for all litigants."[58] Alexander Hamilton famously declared the judicial independence as "requisite to guard the Constitution and the rights of individuals."[59] Recently retired Supreme Court Justice Sandra Day O'Connor has called for removing the judiciary from the world of electoral politics, and has written that, "In our system, the judiciary, unlike the legislative and the executive branches, is supposed to answer only to the law and the Constitution. Courts are supposed to be the one safe place where every citizen can receive a fair hearing."[60] But the Texas Supreme Court, now deeply entrenched in corporate ideology and corporate money, has, for two decades, presided over a broken system of justice where the powerful win, victims have no remedy, and trial lawyers cannot protect those who remain vulnerable.

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[55] The top donor for each of the challengers was a plaintiff firm. Linda Yanez: Feazell Rosenthal & Watson ($25,000); Sam Houston: Cruse Scott Henderson & Allen ($37,500); Jim Jordan: Williams Bailey ($10,000). See *Courtroom Contributions Stain Supreme Court Campaigns,* Texans for Public Justice, October 2008. http://info.tpj.org/reports/courtroomcontributions/challengers.html.

[56] "Judicial Campaigns and Elections: Texas," American Judicature Society, http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=TX.

[57] The Texas Supreme Court bench was uniformly Democrat all the way until 1978, when Republican William Lockhart Garwood was appointed to replace Justice Samuel D. Johnson, Jr., who had been appointed by President Jimmy Carter to a federal judgeship. Garwood was voted off of the bench one year later, and the next Republican Justice(s) did not reach the bench until 1988. See http://en.wikipedia.org/wiki/Supreme_Court_of_Texas.

[58] Andrew Cohen, "State Court Justice, for Sale or Rent," *The Atlantic*, October 10, 2012, http://www.theatlantic.com/national/archive/2012/10/state-court-justice-for-sale-or-rent/262791.

[59] Alexander Hamilton, "Federalist, No 78." Independent Journal. 14 June 1788. http://www.constitution.org/fed/federa78.htm.

[60] Sandra Day O'Connor, "Take Justice Off the Ballot," *New York Times*, May 22, 2010, http://www.nytimes.com/2010/05/23/opinion/23oconnor.html.

III. PROP 12

As *Bloomberg Businessweek* has stated, the assault on Texas's civil justice system "came not all at once but in waves … crescendoing in 2003."[61] That year saw the introduction and passage of House Joint Resolution 3 in the Texas legislature, a radical proposal for an amendment to the Texas State Constitution allowing the legislature to statutorily limit non-economic damages in medical malpractice cases, as well as the loosely-worded authority to limit damages on "all other actions" beginning in January 2005.[62] Once passed, this resolution set up a heated four-month fight over the proposed amendment—Proposition 12 (Prop 12). The ensuing campaign was a steep uphill battle pitting a coalition led by the Texas trial lawyers and leading advocacy groups against a powerful alliance of the insurance industry, Republican politicians, and the Texas Medical Association.[63] Initial polling done by the trial lawyers in June 2003 showed 62 percent of the population in favor of the amendment, and 28 percent against.[64] The ultimate loss in September was by a far narrower 51-49 percent margin and a thin vote differential of approximately 33,000 votes, evidence of a campaign that, in spite of being shockingly close to victory, was nonetheless marked by critical missteps in messaging, strategy and participation. The proverbial day late and dollar short approach produced a devastating, unnecessary loss.

Hindsight is 20/20. But a review of the tactics and operation of the fight against Prop 12, with reflection by those who were directly involved, provides critical insights for future campaigns in Texas and elsewhere around the country with regard to how much quicker and tougher trial lawyers and grassroots organizations need to be in order to stem and reverse the tide.

Slow Out Of the Gate

Texans for Lawsuit Reform (TLR), a lobbying group that advocates for "tort reform" and limiting lawsuits, had been building their operation for years, and had raised sufficient funds to create the biggest political action committee in Texas. According to Craig McDonald, Director of Texans for Public Justice, "This was a long

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[61] "How Business Trounced The Trial Lawyers," *Bloomberg Businessweek Magazine*, January 7, 2007, http://www.businessweek.com/stories/2007-01-07/how-business-trounced-the-trial-lawyers.

[62] H.R.J. Res. 3, 78th Leg. (Tex. 2003). http://www.legis.state.tx.us/tlodocs/78R/billtext/pdf/HJ00003I.pdf#navpanes=0.

[63] From Tex Med Assoc.: "The 'Yes on 12' campaign is off to a rousing start. Gov. Rick Perry, Lt. Gov. David Dewhurst, and Speaker Tom Craddick all worked hard to bring Resolution 12 to the voters. Most leading Texas health care and business organizations are raising funds for the effort and rallying their members behind it. The Texas Medical Association and the state's county medical societies and specialty societies are all playing a key role." "Texans Vote 'Yes on 12,'" Texas Medical Association, http://www.texmed.org/template.aspx?id=2819.

[64] Unpublished Composition of Materials Regarding the Proposition 12 Fight in 2003.

process, not just this one election. It started with the defeat of Ann Richards. Karl Rove saw "tort reform" as not only a wedge issue but as a money machine. They made this a do-or-die issue."[65] In spite of the fully public and predictable intentions of TLR and its allies, the passage of the resolution that set up Prop 12 caught Texas trial lawyers flat-footed, and their slow start in developing a cohesive approach may have ultimately cost them the victory. One former Texas Trial Lawyers Association (TTLA) President said:

> We've lived in an apocalyptic environment for so long… 'this is it! This is the end!' Eventually your adrenal glands give out and you stop having the panic response. We had just lost Chapter 74 and a brutal election. I think there was a sense that maybe this was just medical mal—which it wasn't—and a little bit of a sense that this was so ludicrous that it could never pass. And part of the reason Chapter 74 passed was because we had the Governor, Lt. Governor, and Speaker as all knee-jerk "tort reformers." There was never any kind of conversation. And the Amendment was pushed out of people's minds a bit during the session, but it got slammed right on through. People were a little dumbfounded by that, which may go to why the reaction was a little slow. And I think people assumed that Chapter 74 would be found unconstitutional.[66]

Another unnamed attorney (known hereinafter as "Houston Attorney") involved with TTLA at the time was similarly forthcoming about the organization being unprepared for the passage of the resolution and the subsequent Prop 12 fight:

> The legislature was meeting in 2003 for 120 days mid-Jan to late May. So I moved to Austin for five months to help fight "tort reform". In the 2002 election there had been a huge Republican sweep. The legislature was full of "tort reformers"; TLR made a brash statement about wanting to get a constitutional amendment. To get a Constitutional Amendment passed, they needed a supermajority. I laughed at them, thought it was a braggadocious claim thinking they could get that on the ballot. When it actually got on, we were sitting around in May depressed. … I said "we have to fight this."[67]

[65] Interview with Craig McDonald, on file with CSRL.
[66] Interview with unnamed former TTLA Prez., on file.
[67] Interview with Houston attorney, on file.

In spite of the shock, the TTLA did quickly mobilize to raise almost $2 million in June, outdoing the nascent "Yes on 12" campaign in that time period by a factor of ten.[68] But numerous advocates and lawyers interviewed stated that, in terms of outreach and messaging (discussed below), at the finish line "…we were in the process of winning, we just needed a little more time."[69]

September Election Presented a Compressed Timeframe

The challenge of developing a successful campaign was compounded by the fact that Governor Rick Perry's office set the election for this Constitutional Amendment on a Saturday in September, creating what Luke Metzger, formerly of Texas PIRG, called "the big problem from the get-go."[70] Setting an early election date was, according to Cary Roberts, former Communications Director at the Texas Civil Justice League "tort reform" PAC, likely a calculated decision by Perry's office designed to keep the opponents of Prop 12 off balance.[71] The September date presented TTLA with a twofold quandary: 1) a compressed period of time in which to develop and implement a winning strategy; and 2) Constitutional Amendment elections in Texas typically attract only a fraction of the voter turnout that general elections typically see. During the previous special Constitutional Amendment election in September 2001, only 6.91 percent of registered voters voted; in 1999 the turnout was 8.38 percent.[72] By contrast, the November 2002 Texas gubernatorial election saw a 36.24 percent registered voter turnout; the 2000 General election had a 51.81 percent registered voter rate.[73] While trial lawyers and advocates were not certain of the exact data on the political profiles of the likely Constitutional Amendment voter, Willie Chapman, the Senior Director of Communications at TTLA, explains that there was confidence that the likely voter for this election would be overwhelmingly conservative:

> The position we were in was that most Texas Constitutional amendments are generally in November, a normal election date. When this one came through, they put it on a Saturday in September. The original bill would have been in November, the same date as the Mayor's election in Houston, where they had an African-American candidate that would have likely

[68] Janet Elliot, "Lopsided Fundraising Reported in Campaign Over Lawsuit Limits," *Houston Chronicle*, July 16, 2003.
[69] Interview with Paula Sweeney, on file.
[70] Interview with Luke Metzger, on file.
[71] Interview with Cary Roberts, on file.
[72] "Turnout and Voter Registration Figures (1970-current)," Texas Secretary of State, http://www.sos.state.tx.us/elections/historical/70-92.shtml.
[73] *Id.*

> aided our turnout. So we were looking at having an overwhelmingly Republican and conservative turnout. Historically you can look at the number of people who turn out in Constitutional Amendment elections, and we all felt confident that the profile for those are overwhelmingly Conservative in the state of Texas. There is no voter culture here used to turning out and voting for Constitutional Amendments; not like ballot initiatives where people are used to voting in conjunction with a general election.[74]

Rob Allyn and the Centrist Approach

This assessment of the likely voter and overall political climate in Texas led the TTLA to choose Allyn & Co., a PR and political media firm headed by Republican consultant Rob Allyn, as their primary consultant and strategist for the fight against Prop 12. As Willie Chapman explains, "Rob Allyn is a Republican. [His firm] had worked almost exclusively for Republican candidates or nonpartisan elections. They were a firm well experienced in communicating with a Conservative electorate. That was a choice."[75] Houston Attorney concurs, "Rob had been a consultant for us. Texas was a very Republican leaning state, and all of our messages were falling flat. We thought Rob was the best to speak to people who were likely voters. I thought he did a fantastic job."[76]

But the choice of Allyn had consequences in the formation of the messaging and strategy that may have ultimately been the difference between victory and defeat. Allyn helped to craft the messaging for the campaign, settling on a barrage of six mini-messages rather than one single unifying theme. The proponents of Prop 12 essentially had one easily understandable message that leaned heavily on the high favorability ratings of doctors—*if Prop 12 is not passed, the doctors will not be able to afford to practice in your community*. As Willie Chapman said, "[The] other side's messaging [was] very powerful. [It] scares people. They'd show people the pregnant woman going to the doctor and seeing the 'closed' sign."[77] Allyn and TTLA, by contrast, developed a message full of important but complex concepts, based on polling of constitutional amendment election voters, only 23 percent of whom had voted in Democratic primaries:

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[74] Interview with Willie Chapman, on file.
[75] *Id.*
[76] Interview with Houston Attorney, on file.
[77] Chapman interview, on file.

- The best "tort reform" would change Texas laws to force HMOs, hospitals, health care providers and insurance companies to be more accountable for their actions.

- The Texas Constitution's Bill of Rights guarantees each citizen access to our courts. Politicians and lobbyists for HMO's and insurance companies shouldn't interfere with that.

- We've seen this same type of crisis with homeowners and car insurance. The medical malpractice issue is just another example of insurance companies jacking up their rates to protect their profits.

- Doctors, hospitals and HMOs need to take responsibility for their mistakes just like everyone else, not matter how much it costs them.

- Texas lawmakers should stand up for Texas families, not the HMOs, health care providers, hospital corporations or insurance companies who ask for protection for lawsuits when they have carelessly injured or killed people.

- The best solution to the crisis is a cap on the outrageous amount of money HMOs and insurance companies can charge doctors for medical malpractice insurance.[78]

From a rhetorical perspective, it is remarkable that the end result was so close given how unfocused this messaging was. In practice, this fragmented messaging often manifested itself in a variety of wordy mailers that may have connected with people who have some advanced familiarity with the legal system and politics in general, but which lacked cohesion and an emotional hook. As lobbyist Cary Roberts recalls:

> For my viewpoint, I thought the trial lawyer groups were throwing everything against the wall to see what sticks, in terms of messaging. I don't know if it was lack of coordination

[78] Unpublished Composition of Materials Regarding the Proposition 12 Fight in 2003., p.18.

> among the opposition groups, or an attempt to segment the message among different populations, but my sense was that there was not one single rallying cry.[79]

Yes on 12, the main super PAC (SPAC) for the proponents of Prop 12, sent out visually striking direct mailers that juxtaposed a smiling doctor with a stethoscope against a stereotypical cigar-smoking fatcat (presumably a trial lawyer) overlaid with the provocative question "Whom Would You Trust…";[80] mailers featuring cute babies and mothers, asking "Who Will Deliver Your Baby?";[81] and mailers showing smiling children visiting their family doctor, with the tagline of "Save Your Family Doctor, Vote 'Yes' on 12."[82] (See Appendix II for mailer images.)

Save Texas Courts, on the other hand, sent out mailers with a picture of what appears to be the Constitution—quill pen, cursive, parchment, candle and stamp—offset by a quote from the Dallas Morning News stating that "The truly conservative position in this matter is to oppose Proposition 12" and a tagline at the bottom that read "Trust our courts, not the Legislature."[83] On the reverse side of the mailer there are a series of quotes in smaller font from individuals and groups fighting against Prop 12, but one must look very closely to even see the simple but essential statement: "Vote No on Proposition 12." Many other mailers from Save Texas Courts are similarly wordy and emotionally flat, if somewhat more clear about voting against the proposition. Most are exactly the sort of thing one might spend half a second looking at before tossing it in the recycling bin. (See Appendix II for mailer images.)

To be fair, the messaging was not an unmitigated failure. As part of the centrist positioning, Deborah Hankinson, a then-recently retired Texas Supreme Court Justice, was brought on board to help with conveying the message that Prop 12 would be a devastating assault on the Texas State Constitution and the right of access to the courts, was considered by some to be among the successes. According to former TTLA President Paula Sweeney, "She was an accomplished

[79] Interview with Cary Roberts, on file.
[80] See appendix #, p.2.
[81] I*d.* p. 3-5.
[82] *Id.* p.7.
[83] Unpublished Composition of Materials Regarding the Proposition 12 Fight in 2003, p. 43.

centrist who had succeeded in building a centrist coalition on the court for several years. She came in to help and to spearhead the anti-Prop 12 forces. Had she gotten in a little earlier, even a few weeks earlier, it might have made the difference. She came on board within about 6 weeks of the end."[84] Numerous publications ran favorable editorials on her message and Republican-friendly slant, including the *Dallas Morning News*:

> Don't mistake Deborah Hankinson for a fire-breathing trial lawyer. She's a former Texas Supreme Court Justice. She carries credentials as a moderate appointed to the court by then-Gov. George W. Bush. She also has an abiding respect for the Texas Constitution and for legal procedure. So when she says Proposition 12, a constitutional amendment billed as medical malpractice insurance relief for doctors, would deprive thousands of Texans of their day in court, all of us should listen. We have, and we agree.[85]

Yet, however accurate the mailers and messages were on this sub-issue, and for all the op-eds in opposition to Prop 12, there was overall a marked absence of the kind of cohesion in messaging that Yes on 12 had. Moreover the anti-Prop 12 messaging they lacked any clear reminder to voters that fundamentally this issue is about *victims*. As Alex Winslow, Executive Director of Texas Watch, stated, "In the abstract when you talk about medical errors, etc., it's easy for the average person or voter to think, well, that's not going to happen to me. But as a parent or human being you can relate to victims as people at a much deeper level than on the intellectual policy level."[86] John Eddie Williams, at that time the president-elect of TTLA, remembers the omission of a victim narrative being a deliberate choice by Allyn in his attempt to target what he believed would be likely constitutional amendment voters, saying, "Rob kept arguing to us that you can't tug at the heartstrings of Republicans, and you can't have some sort of sappy message. 'You have to try to affect their pocketbook,' or something like that. He thought testimonials would not work. We went with that."[87] Later in the campaign, when Save Texas Courts eventually did produce a television advertisement with a very prominent human component, Allyn and the TTLA were shocked at how well it connected with people. Williams continued:

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[84] Sweeney interview, on file.
[85] "A Day in Court—Proposition 12 would deny Texans that right," *Dallas Morning News*, August 23, 2009.
[86] Interview with Alex Winslow, on file.
[87] Interview with John Eddie Williams, on file.

> Then we had an ad about a cheerleader who lost her legs; a very tearjerking ad and it made you understand that the value of such things shouldn't be left in the hands of politicians in Austin. Rob saw the ad and called and said, "I'm wrong. I think we've made a mistake." Maybe it was 3-4 weeks before the election, possibly two.[88]

Willie Chapman agreed that the ad "was probably the most powerful ad we had" and stated his belief that "[i]f there was one thing to do over it would be to have more ads like [it]…It might have helped with the turnout and brought out some more traditional voters."[89] Yet Chapman simultaneously holds tight to the company line on the messaging as a whole, stating that "I don't think our messaging was wrong; I think it was working by and large with the electorate we had to work with."[90] But failing to personalize this issue sooner in the campaign ceded the Prop 12 opponents' ability to craft a winning narrative and prevented them from successfully avoiding being cornered into the doctors-versus-lawyers story that they sought to avoid. As Alex Winslow states:

> We didn't quickly enough establish a narrative about safety, about who would lose. We have to move away from the traditional frame and make this about insurance companies and patients. The doctors became the front for the insurance industry, where really this was about the insurance companies. The real beneficiaries and drivers of the discussion were the insurance companies.[91]

Successful Fundraising but an Underfunded Grassroots Effort

Purely by the numbers, one of the most successful aspects of this campaign was TTLA's vigorous fundraising effort, spearheaded by John Eddie Williams and fellow Houston attorney Richard Mithoff. Save Texas Courts raised approximately $7.18 million during the period of June 9-September 03, 2003, or nearly $1.4 million more than Yes on 12.[92] According to Williams, "There was probably ten of us or more that put in $250,000 each. Joe Jamail was very helpful with getting the huge donors. Richard Mithoff helped me on this every day. We went all around the state and asked every trial lawyer we could to donate whatever they could."[93] Williams and

[88] Williams interview, on file.
[89] Chapman interview, on file.
[90] *Id.*
[91] Winslow interview, on file.
[92] Information drawn from: Texas Ethics Commission. http://www.ethics.state.tx.us/.
[93] Williams interview, on file.

Mithoff additionally wrote impassioned letters to trial lawyers throughout Texas expressing the urgency of the situation, calling for lawyers to give time and money while acknowledging that many of them had already recently given of themselves during the bitter legislative session.[94] By the end of June, Save Texas Courts had raised $1.9 million to Yes on 12's $205,000;[95] by mid-August, Save Texas Courts had raised $4.3 million to Yes on 12's $2 million.[96] In addition to the ten firms that donated upwards of $250,000, there was as broad a base of support as one might expect from the richest trial lawyers bar in the country, with over one hundred donations of $10,000, and many upwards of $25,000.[97] Yet in spite of what should have been considered a fundraising win, that money was not enough to buy more ads like one featuring an injured cheerleader, and many people involved in the campaign articulated the belief that, as one anonymous TTLA member stated, "Had there been another two million [dollars] we could have had some more ads the week before [the election] and possibly won."[98] To put that sum into context, one advocate working in Texas ("Texas Advocate") argues, "The difference of two or three million dollars is roughly what a verdict might generate for one trial lawyer [in a medical malpractice case]."[99]

Perhaps more importantly, the funds did not find their way to a grassroots campaign that, in spite of the best efforts of dedicated advocates, was woefully underfunded to the paltry sum of $200,000.[100] According to Willie Chapman, "TTLA was certainly involved in the funding of the grassroots campaign but it was the coalition's job to work on 'earned media,' holding press conferences, getting media coverage. Trial lawyers were involved on election day for phone banks, and provided the campaign with client lists."[101] In practice, however, what this low, grassroots budget meant was insufficient funds to reach out to potential voters who might have made the difference in Election Day turnout. Texans for Public Justice Executive Director Craig McDonald helped lead Texans Against Prop 12 (TAP 12)—the main SPAC established by consumer groups to do grassroots outreach in this campaign—and recalls some of the negative consequences of an underfunded grassroots effort:

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[94] Unpublished Composition of Materials Regarding the Proposition 12 Fight in 2003. p.28.
[95] Janet Elliot, "Lopsided Fundraising Reported in Campaign Over Lawsuit Limits," *Houston Chronicle,* July 16, 2003.
[96] Terry Maxon, "Lawyers Top Doctors in Fund Raising For Prop 12," *Dallas Morning News*, August 20, 2003.
[97] TX Ethics Commission.
[98] Interview with anonymous TTLA member, on file.
[99] Interview with Texas Advocate, on file.
[100] Figure according to Craig McDonald interview, on file.
[101] Willie Chapman interview, on file.

> We had three or four regional field organizers. We had a list of 40 or 50 organizations [who] opposed this. We'd do small town tours. We'd have press conferences. One thing we didn't have the budget to do was do mass mailings until the last week or so, when we reached out the county democratic clubs. No one had reached out to these people. But had we done that for three months prior, thought a little broader from the start, and had more money to mobilize from the start, we would have had it.[102]

Jason Kafoury, an attorney now living and working in Oregon, was previously an organizer with experience working in numerous political campaigns around the country and was brought in to help with organizing for TAP 12 with less than six weeks to spare before the election. Upon his arrival in Texas, he recalls that the campaign was still down 20 points in polling on Prop 12 and perplexingly still had no full-time volunteer coordinator.[103] Kafoury's recollection of the campaign echoes McDonald's sentiments regarding lack of necessary funding from the trial lawyers:

> I thought they should have committed way more money to the grassroots—A) a lot earlier, and B) a lot more—for paid organizers, getting materials up all over… With low [anticipated] turnout, it is all about turning out the base. With more time and more money, I feel we could have done a better job.[104]

A post-election reflective analysis by Kafoury refers to his belief at the time that in addition to a variety of problems specific to Texas politics—a "hemorrhaging" Democratic Party that had lost twenty county chairs in the previous weeks, no Green [Party] leaders willing to organize the party—TAP 12 lacked the resources to accomplish all of the tasks that could have and should have been done. These tasks included follow-up outreach close to the election with Texas Greens, establishing and utilizing point people for untapped volunteer networks, and creating workarounds to avoid the "problem of people wanting to get paid in Texas for working," something that Kafoury believes was a "legacy of high-priced past campaigns."[105]

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[102] Craig McDonald interview, on file.
[103] Interview with Jason Kafoury, on file.
[104] *Id.*
[105] Kafoury interview, on file.

TAP 12's organizers were still able to accomplish a tremendous amount with exceedingly low resources, including setting up op-eds throughout the state, doing press events in East Texas, creating briefing packages for press and media, sending mailings to members of civic groups, and organizing debates in various locations around the state.[106] Tom "Smitty" Smith of Public Citizen recalls traveling out to East Texas and how organizing efforts there helped make the Southeast region of the state an area where the votes "against" Prop 12 won, since "very few people take the time to go to the small towns [like] Tyler, Nagodoches, etc. So when that does happen, it's a big damn deal. So that was successful."[107] Even so, some organizing ideas were thwarted for the simple reason that the intended audience was not in line with Allyn's strategy. Luke Metzger, formerly of Texas PIRG, recalls "wanting to do more earned media events, and getting some pushback on that. There was something in the news about a man's penis being wrongly amputated, [and] we thought that might have been a good story to go around on college campuses."[108] College students, often known for both their dark senses of humor and their deep fascination with the human body, may have well been a receptive audience, but according to Metzger that idea was nixed for the simple reason that Allyn did not believe that college students were the target voters for this constitutional amendment.

Metzger's recollection illustrates a critical point about the campaign that Allyn and TTLA were waging: the only voters that effectively "counted" in their eyes were the conservative ones that Allyn & Co. said counted. Or, as Willie Chapman put it, "We felt that if we made it a traditional campaign that looked like it came from the left, we'd be sunk. We had to deal effectively with the electorate we were faced with."[109] Potential counterbalancing liberal voices were sidelined when it came to strategy. The Texas Advocate referred to earlier recalls not being privy to the strategy because of not ideologically aligning with Allyn and the TTLA:

> I was only marginally involved in the Prop 12 debate and then the opposition work. Because of some intemperate remarks that Ralph Nader and I made 10 or 15 years ago, I was not on the trial lawyers' short list. [It was] "Don't ask him for advice or help, don't invite him to the Christmas parties." We had

[106] Interview with Tom "Smitty" Smith, on file.
[107] *Id.*
[108] Luke Metzger interview, on file.
[109] Chapman interview, on file.

> criticized them for selling out. I generally believe that critique was right. So I wasn't privy to the strategy.[110]

In rejecting alternative perspectives, the TTLA allowed Allyn to write off a multifaceted approach designed to target *both* the conservative constitutional amendment voters as well as more traditional Democratic and Green Party voters who might likely be responsive to this issue. This failure to reach out to the traditional "base" may have been the biggest mistake of the campaign.

The most practical application of this shortsightedness was the failure to engage the deeply Democratic Texas counties along the border of Mexico. As opposed to East Texas, where the outreach efforts resulted in votes, the lack of an outreach strategy in the border counties, coupled with heavy targeting by the Yes on 12 side, ceded votes that may have otherwise been receptive to an anti-insurance industry, big business versus individual patients narrative. In the 2002 Texas gubernatorial election, for example, Rick Perry won handily both in terms of the actual vote (57.8 percent, or nearly 800,000 votes more than the Democratic challenger Tony Sanchez) and in the county by county race; 218 counties went for Perry and only 34 for Sanchez.[111] The Texas map of that election is almost a complete wash of Republican red, with the notable exception of the string of counties along the border of Mexico that are, except for Brewster, Jeff Davis, and Kinney counties, uniformly Democratic from El Paso all the way down to Cameron county.[112] Even in the 2000 general election in which Texas sent its own George W. Bush into the White House, Al Gore still won most of the border counties by sizable margins, including El Paso (57.8 percent), Presidio (60.6 percent), Maverick (65 percent), and won with over 70 percent of the vote in Zavala, Dimmit, Duval, Brooks, Jim Hogg, and Starr counties.[113] One need not be a political scientist to recognize that the total number of Democratic voters in these counties would have more than made up the difference in the Prop 12 fight, had a serious effort been made to reach them. Yet Allyn and the TTLA failed to do so.

This failure to engage with the border counties was the result of working with a Republican strategist with limited or knowledge of how to work with non-Republican voters, and some crossed wires within the trial lawyer community. As the anonymous TTLA member said:

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[110] Interview with Texas Advocate, on file

[111] Texas Almanac. http://www.texasalmanac.com/sites/default/files/images/uploads/gov1845-2010table.pdf.

[112] CNN. "SpatiaLogic Map: Texas Governor."
http://www.cnn.com/ELECTION/2002/pages/states/TX/G/00/map.html.

[113] US Election Atlas. http://uselectionatlas.org/RESULTS/state.php?f=0&year=2000&fips=48; citing Texas Office of the Secretary of State, http://elections.sos.state.tx.us/elchist.exe.

> Logistically, the huge screw-up was ignoring the Democratic base in South Texas and just doing Republican-oriented messaging. …We mainly won in a lot of Democratic areas, some Republican areas. But the major exception was a failure to communicate with the Hispanic and border counties. We ended up getting our ass kicked in those counties. Our leadership heard from down South to let them do it, but they didn't have any air cover message on top of that because our leadership essentially lopped them off. So there was no TV messaging. We didn't have a Democratic consultant involved sufficient to cover all of the Democratic messaging. Allyn & Co. said 'There's not enough votes down there to matter.' We lost those counties by 30,000 votes. The voters in those areas weren't even on Allyn's list because they are Republican and they focus on Republican voters.[114]

These are the same areas where, according to former Texas Watch Executive Dan Lambe, the "lawsuit abuse" groups were incredibly active. "…Those areas were probably the most vocal from a pro-reform perspective. The big outcry was that there was a lack of doctors going to those areas, so there was a lot of scare tactics—[suggesting that] doctors won't go there because of the fear of lawsuits. Houston Attorney also remembers that TTLA was told by lawyers in the border region to stay out of their way because of the inherent cultural differences, saying "The [Rio Grande] valley in Texas is a very different region, different culture than either Houston or Dallas. The lawyers in the valley said 'We know how to do this, let us handle it our way.' That was a huge mistake. We let them handle it because they told us they would do it."[115] Whatever operational failures were the immediate fault of trial lawyers in the border counties, the TTLA, relying on Allyn's strategy to carry conservative voters, clearly did not respond sufficiently to what at the very least was an internal breakdown in communication. No one interviewed described any corrective measures taken to rectify the outreach void.

The results were fatal to the effort to stop Proposition 12, both in losing the actual vote in the border counties, and, more importantly, losing the votes that could have been. In the border counties listed below, 40,347 votes were cast for the Proposition, and 32,452 against, or 55-45 percent -- a statistically worse percentage than the overall statewide election results in spite of the higher density of Democratic voters.

[114] Anonymous TTLA member interview, on file.
[115] Houston Attorney interview, on file.

County	"For"	"Against"	Total Possible Voters	% Turnout
El Paso	17,295	11,652	347,005	8.34%
Jeff Davis	122	106	1,744	13.07%
Presidio	110	141	4,871	5.15%
Brewster	420	403	5,621	14.64%
Terrell	60	50	782	14.06%
Val Verde	546	519	25,058	4.25%
Kinney	193	111	2,422	12.55%
Maverick	297	676	24,133	4.03%
Zavala	117	242	8,099	4.43%
Dimmit	166	242	7,629	5.34%
Duval	163	485	9,856	6.57%
Brooks	175	278	6,771	6.69%
Webb	2,128	2,500	91,850	5.03%
Zapata	111	212	6,601	6.40%
Jim Hogg	86	162	4,098	6.05%
Starr	357	493	26,670	3.18%
Hidalgo	9,416	9,479	252,611	7.47%
Cameron	8,675	4,701	151,492	8.82%
TOTAL	**40,437**	**32,452**	**977,313**	**7.46%**

Source: Office of the Secretary of State[116]

[116] "About the Elections Division," Texas Office of the Secretary of State, http://www.sos.state.tx.us/elections/index.shtml.

Some of these counties are so small as to perhaps not warrant a great deal of attention, but any combination of counties could have potentially produced the requisite number of votes needed to stop Prop 12. In some counties, such as Hidalgo, the votes against Prop 12 even outnumbered the votes in favor, and there were still over 200,000 voters who did not vote.

Close But No Cigar

All told, the results were far closer than even the Yes on 12 proponents would have expected. Lobbyist Cary Roberts called the factors leading up to Prop 12 "the perfect storm" and the logical extension of years of buildup, and expressed shock at how tight the vote ended up:

> What was interesting about Prop 12 is that the poll numbers really tightened. I think the expectation from a lot of people was that it would be a blowout. But it ended up being extremely close. It was probably part and parcel of the whole movement in Texas in the 90s in terms of legal reform, culminating with Prop 12 in 2003.[117]

Some of those who fought against Prop 12 echoed this surprise in how close the outcome was. As Craig McDonald said, "Nobody on our side ever thought we would win. But we came very close. They had God and Doctors on their side."[118] And the results, as John Eddie Williams pointed out, were close enough to keep the legislature from following through on the broad authority granted to it within Prop 12 to limit damages in "all other actions."[119]

These are perhaps the two most positive takeaways that opponents of "tort reform" can point to—the final vote was closer than anticipated, and close enough to prevent the extension of Prop 12 to "other actions." Furthermore, the rapid response by John Eddie Williams and Richard Mithoff with regard to fundraising and participation within the trial lawyer community deserves kudos. One might say that if nobody ever believed that the opponents had a chance at winning the campaign against Prop 12, that there is an embedded presumption that competing with the insurance industry on campaign budgeting is a near impossibility; yet the TTLA managed not only to compete but to raise more funds than Yes on 12.

[117] Roberts interview, on file.
[118] McDonald interview, on file.
[119] Williams interview, on file.

But if trial lawyers in Texas and elsewhere around the country want to successfully stop the erosion of the civil justice system via "tort reform" and related measures, self-congratulation must not obscure the failures of the past. For all that TTLA did right in the Prop 12 fight, the strategic missteps were noteworthy and costly. The trial lawyers failed to identify and, in some instances, continue to stand behind the selection of a Republican consultant who opted to target likely conservative voters instead of creating a two-pronged strategy meant to simultaneously increase turnout of more traditional Democratic and progressive voters. The trial lawyers failed to engage a specific geographic location where extra votes could have been targeted, had the controls not been turned over to a consultant who failed to understand or otherwise ignored the imperative to reach out to those base voters. The trial lawyers, in following the advice of this same consultant, failed to shape a message that was unified and that cut through insurance industry spin to reveal a human, emotional component that would attract voters. And the trial lawyers failed to ensure that the funds found their way to a ready and willing grassroots outreach to complement the paid media campaign. These are mistakes that had devastating consequences on the shape of the civil justice system in Texas, and they should not be made again.

IV. THE STEADY UNRAVELING – LOSER PAYS STATUTE (2011)

In the ten years since the Prop 12 fight, the corporate "tort reform" assault in Texas has continued unabated. In 2011, the state legislature passed H.B. 274, the "loser pays" law touted as an emergency by Governor Rick Perry, in another purported attempt to "streamline" litigation—at the expense of the ability of injured parties to bring suit.[120] The legislation was lobbied for by the usual corporate interests—defense law firms, Texans for Lawsuit Reform, Greater Houston Partnership (which has roots in Houston's Chamber of Commerce)—and was applauded as a "home run" by Tiger Joyce, the President of the American Tort Reform Association.[121] *The National Review* brashly proclaimed that, "The Lone Star State is open for business," parroting rote corporate tropes implying that business must play a zero-sum game with the civil justice system.[122] And during a Republican presidential debate in September 2011, as the candidates were falling over themselves to prove each more unabashedly corporate and more hostile to the civil justice system than the next, Governor Rick Perry bombastically proclaimed the law a model for the rest of the country to "tell the trial lawyers to get out of your state."[123]

The theoretical benefits of H.B. 274 to business are largely based upon the shifting of burdens onto plaintiffs who would file lawsuits, thereby creating strong disincentives for bringing a grievance to court. The law amended Chapter 42 of the Civil Practice and Remedies Code to add deposition costs to the list of reasonably recoverable litigation costs (§ 42.001), and to provide that if a party rejects a settlement offer and goes on to receive a judgment of less than 80 percent of the offer, the offering party may recover litigation costs. Most notably, § 1.02 amends Chapter 30 § 30.021 of the Civil Practice and Remedies Code to provide that attorneys' fees be awarded to prevailing parties—whether plaintiff or defendant—on motions to dismiss causes of action under $100,000 that have no basis in law or fact. These changes effectively turned Texas's back on a two-hundred-year-old principle known as the American Rule – where each party covers its own litigation costs – opting instead for a "loser pays" principle.

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[120] H.R. 274, 82d Leg. (Tex.).

http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00274F.pdf#navpanes=0.

[121] Tiger Joyce, "A Banner Year for State Tort Reforms," *Metropolitan Corporate Counsel* 19, no. 8 (August 2011): [Page 37], http://www.metrocorpcounsel.com/pdf/2011/August/37.pdf.

[122] Stephen DeMaura, "'Loser Pays,' Texas Small Business Wins," *National Review Online*, May 31, 2011, http://www.nationalreview.com/corner/268436/loser-pays-texas-small-business-wins-stephen-demaura.

[123] Moira Herbst, "'Loser pays' is misnomer for Texas law," *Thomson Reuters*, September 28, 2011, http://newsandinsight.thomsonreuters.com/Legal/News/2011/09_-_September/_Loser_pays__is_misnomer_for_Texas_law/.

Texas trial lawyers, along with the AFL-CIO and advocacy groups such as Texas Watch, worked against passage of the bill. But when the dust settled, plaintiffs' attorneys seemed to have adopted the perplexing, defeatist attitude that bad is better than worse. John Langdoc, of Texas asbestos/mesothelioma firm Baron and Budd, acknowledged that the law helps "deep-pocketed" defendants, but went on to downplay the impact as "not even mini-'loser pays'; it's micro."[124] The sentiment was echoed by Bradley Parker, a Fort Worth plaintiffs' attorney and vice president of legislative affairs at TTLA, who claimed that, "To call [H.B. 274] 'loser pays' is a misnomer…[it] doesn't do violence to the civil justice system."[125] It is difficult to not interpret these comments as hinting that the changes to the law are "micro" because they only affect cases under $100,000—small potatoes, if one can make such a ridiculous statement, when compared with the multi-million-dollar world of class action litigation. At the very least the comments suggest that some Texas trial lawyers seem to think that "violence" to the civil justice system must come all at once, or with much smoke and flash; there is no sense of an awareness that the damage has been drawn out over two decades, sometimes with greater visibility and sometimes less so.

Furthermore, trial lawyers, perhaps in an attempt to seem willing to compromise, essentially endorsed the "tort reformist" position that this law was about trying to prevent frivolous lawsuits. Former TTLA president Mike Gallagher, who helped to negotiate the version of the bill that passed the state Senate (Committee Substitute House Bill 274), was quoted by *Texas Lawyer* saying, "If you bring a lawsuit that has no basis in law or fact, that is a definition of a frivolous lawsuit, and you ought to be liable."[126] Whether spinning for the sake of saving face after another embarrassing loss or just willfully oblivious, frivolous lawsuits were never *really* the point. As Professor Lonny Hoffman has written in the *Houston Law Review*, "the claim that the federal courts are inundated with 'frivolous' lawsuits is

[124] Herbst, "Loser Pays is a misnomer for Texas law".
[125] *Id.*
[126] Angela Morris, "UPDATE: Senate Passes New Version of Loser Pays," *Texas Lawyer*, May 24, 2011, http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202522147627&UPDATE_Senate_Passes_New_Version_of_Loser_Pays&slreturn=20130119113733.

unsubstantiated by the available empirical evidence."[127] This oft-repeated myth of frivolous lawsuits has been repeatedly exposed as little more than thinly veiled hostility toward the civil justice system, with only 3 percent of federal district judges believing "groundless litigation" to be a "large or very large problem."[128]

Rather, the true significance of the law is in the barriers that it creates to access to the civil justice system by shifting burdens onto middle class individuals and families and small businesses. As Texas Watch has stated:

> The bottom line is that [H.B. 274 is] designed to intimidate families and small business owners into foregoing the legal accountability process, immunizing polluters, insurance companies, and other big corporate defendants from responsibility. These schemes most acutely impact middle class families who could be financially devastated not only if they lose a valid lawsuit, but even if they just don't win big enough.[129]

In Texas, where the judiciary is predisposed to side with defendants, it is easy enough to envision plaintiffs with legitimate claims finding themselves not only with cases dismissed but also with the added insult of having to foot the defendant's attorneys' fees. Or, more likely, plaintiffs will simply think twice about bringing a lawsuit at all.

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[127] Lonny Hoffman, "The Case Against the Lawsuit Abuse Reduction Act of 2011" 48 Houst. L. Rev. 545 (Fall 2011).
[128] *Id.* at 572 (David Rauma and Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure* (n.p.: Federal Judicial Center, 2005), [Page 14], http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/$File/Rule1105.pdf).
[129] '*Loser Pays' Means Families Pay* (Texas Watch Foundation, 2011), http://www.texaswatch.org/2011/05/loser-pays-means-families-pay/.

V. RECOMMENDATIONS

The first step toward getting oneself out of a hole is to stop digging. What follows are several common sense but non-exclusive recommendations for how to begin to turn things around in Texas (and elsewhere), with particular focus on what the legal profession can do. These recommendations generally might fall into the categories of (a) image polishing and (b) spine-stiffening. More specifically:

- Greater scrutiny of and sanctions for misuse of attorney advertising
- Mandatory pro bono requirement
- Implement a merit-based system to appoint justices
- Multifaceted strategies for policy campaigns

1) Improve the Public Image of Lawyers – Advertising and Pro Bono

If the entire justification for obscuring the role of the trial lawyers in the Prop 12 fight was the public's overwhelmingly unfavorable perception of trial lawyers, it stands to reason that one part of the larger solution should necessarily be the rehabilitation of the trial lawyer image. Addressing this image problem would have the practical benefit of allowing for more head-on involvement by lawyers in important matters of policy and justice. Instead of being forced to contort themselves and their arguments so as to avoid detection in public debates, lawyers could stand proud and more openly participate in matters that fundamentally involve justice, and that align with the ideals that underpin the entire profession.

Rather than conjuring up stalwart crusaders for justice, great orators, defenders of the people, sentinels for safety, the moniker of "lawyer" has come to be inextricably associated with greed, arrogance, a lack of scruples, or worse.[130] Allyn's polls showing insurmountable public antipathy for lawyers reflect the norm, not the exception; there is such a deeply engrained negative impression of lawyers in our culture as to be reflexive. This negative association is projected outward by the general population and returned back in the form of reprehensible, exaggerated pop culture characters like Saul Goodman, the semi-comical lawbreaking consigliere to the drug-kingpin main character on AMC's *Breaking Bad*.[131] In turn, the negative association is reinforced in a self-perpetuating feedback loop. The result, as Justice

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[130] *See, e.g.*, Tim A. Baker, *Survey: Professionalism and Civility: A Survey of Professionalism and Civility*, 38 Ind. L. Rev. 1305, 1307 (2005). Baker cites a 2004 survey by the Indianapolis Bar Association on the image of attorneys and the legal profession that found only 22.6% of respondents held a positive image of attorneys. Of those who had a negative impression, the series of unflattering terms used to describe lawyers included "not trustworthy; greedy; arrogant; unethical; expensive; thieves; cold-hearted; money-grubbers; and shysters."

[131] *See* http://breakingbad.wikia.com/wiki/Saul_Goodman.

O'Connor has lamented, is that "Few Americans can even recall that our society once sincerely trusted and respected its lawyers."[132]

This negative image is not entirely created by lawyers; there are many points along the feedback loop where the damage is done. Some of the harm, as U.S. Magistrate Judge Tim Baker points out, is due to misrepresentations of jury verdicts by the news media. Baker cites, for example, reports of a $4.6 million jury verdict for an employment workplace discrimination case brought under the Americans with Disabilities Act, where the news failed to mention statutory caps on damages that reduced the *actual* amount to $300,000.[133] The effect was that "the media's coverage of this court proceeding would lead the public to conclude that a plaintiff in a fairly routine employment discrimination case recovered an excessive multi-million dollar verdict."

But to whatever extent the news media or other pop culture creations are involved in exacerbating the image problem, the legal profession must accept its own complicity in creating the situation in the first place. In spite of limitations on solicitation and advertising, governed by each state's own rules of professional conduct, there are still far too many advertisements on TV and radio that range from the completely undignified to the egregiously tasteless, doing untold damage to the image of the profession as a whole. The internet has made it easy to find examples, as numerous websites looking for pageviews have taken to compiling YouTube clips of some of the worst advertisements.[134] One such compilation includes an ad promising to "change your pain into rain," featuring background images of floating dollar bills—and, in one segment, actual dollar bills being dumped all over a woman. Another ad strikes approximately the same tone as an invitation to a monster truck rally, with an attorney who nicknames himself "The Hammer" yelling into the camera that "size does matter" while images of explosions run in the background—thus turning a tasteless assertion about working to obtain larger jury verdicts and settlement into an even more tasteless sexual innuendo.

Texas, in spite of the state bar association's requirement that certain types of advertisements be submitted to the Advertising Review Committee,[135] is home to one of the most outrageous big-personality attorney advertisers in the country. Adam Reposa, a criminal defense lawyer based in Austin, created a stir when he

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[132] Sandra Day O'Connor, *Professionalism,* 78 Or. L. Rev. 385 (1999).
[133] Baker, p. 1310.
[134] For twelve examples of the lows of lawyer advertising, see:
Alex Mikoulianitch and William Wei, "From Machetes To Tanks, 12 Lawyer Ads That Are Just Outrageous," *Business Insider*, June 3, 2012, http://www.businessinsider.com/some-of-these-lawyer-ads-are-just-outrageous-2012-5?op=1.
[135] Texas Disciplinary Rules of Professional Conduct § 7.07.

created a thoroughly bizarre, abrasive and even nonsensical advertisement, which was later posted on YouTube.[136] The ad features Reposa driving a large truck straight into the back of another car, at which point he gets out of the truck and starts to kick the car, eventually smashing a window. All the while, Reposa, edited to the point where sentences are mangled into incomprehensibility, screams, "Why don't are you you [sic] get in my in my [sic] way! I AM A LAWYER!" The ad is strange enough to have "gone viral"; as of this writing, the ad has been viewed over 200,000 times and has been the subject of profiles by *AdWeek*, *Vice Magazine*, *Above the Law*, and others.[137] According to *AdWeek*, the ad was actually rejected for by the Texas State Bar.[138] But in spite of the fact that the Bar declared that the ad could not air because of "behavior unfitting a lawyer," the ad found its way onto YouTube, and remains there.

Astoundingly, perhaps because the ad appears to have been posted by the director of the video rather than Reposa himself, there is no record of any reprimand for the ad remaining viewable, though Reposa is currently serving a three-year fully probated suspension of license for completely separate incidents, including an attempt to disrupt proceedings in a courtroom by making an obscene gesture in a courtroom.[139]

While resuscitating the image of the legal profession is a steep uphill battle, engaging in a more serious policing of such tasteless advertisements would be a large step in the right direction. Reposa's ad may, admittedly may have a John Waters-esque trashy allure, depending on one's sensibilities, and there may even be

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136 "ADAM REPOSA: Lawyer, Patriot, Champion," YouTube, video file, posted May 21, 2012, http://www.youtube.com/watch?v=tBLTW-KLdHA.

137 Rebecca Cullers, "Meet Adam Reposa: Lawyer, Patriot, Champion, Maker of Insane Ads - Do not get in the way of his truck," *AdWeek*, September 7, 2012, http://www.adweek.com/adfreak/meet-adam-reposa-lawyer-patriot-champion-maker-insane-ads-143459.

138 *Id.*

139 "Disciplinary Actions: Suspension," *Texas Bar Journal* 73, no. 5 (May 2010): [Page 418], http://www.law.uh.edu/libraries/ethics/attydiscipline/2010/May2010.pdf.

an argument that the irony of the ad helps undo the stereotype of lawyers as buttoned-up and overly serious. But whatever its value as a joke or as performance art, the irony cannot be uncoupled from the fact that the ad and those like it further the caricature of lawyer as untrustworthy, ignoble, and egotistical. In 1977, when the Supreme Court opened the floodgates by removing the ban on attorney advertising, the Court specifically reserved the right for state bar associations to regulate such advertising.[140] The extent to which regulations are constitutionally permissible has been delineated by a variety of cases since then, but the burden still falls to the state bar associations and to lawyers themselves to police attorney advertising.[141] Balancing free speech issues is hardly a simple task, but one must hope that state bar associations can more successfully navigate the constitutional terrain while raising standards for the entire profession.

2) Pro Bono Requirement

There are many other ways that state bars could work to improve the image of lawyers, but one of the easiest ways to destroy the notion that lawyers are greedy and egotistical would be to implement a mandatory pro bono requirement. Currently, most states have either no pro bono requirement at all, or merely have an "aspirational" goal.[142] Oregon has the highest aspirational pro bono goal in the country, with a recommended eighty hours of service, while most states tend to suggest fifty hours or below.[143] Put into context, fifty hours spread out over the year is less than one hour per week to be set aside to help those who cannot afford the hourly rates of most lawyers. While the merits of a mandatory pro bono requirement have long been the subject of countless law review articles, there has generally been little movement by the state bars toward such an approach.[144]

In 2012, New York made headlines by becoming the first state in the country to impose a fifty-hour pro bono requirement to be fulfilled prior to admission to the state bar.[145] The rule was met with mixed reaction, with some supporters applauding the move as a step toward solving a crisis of underrepresentation in impoverished communities, while others decrying the rule as placing an unfair burden on law school attendees already grappling with student tuition and debt, not

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[140] *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).
[141] For a full discussion of caselaw on attorney advertising since *Bates*, see *Lawyer Advertising at the Crossroads: Professional Policy Considerations* (American Bar Association, 1995).
[142] For a matrix of state pro bono rules, see http://www.americanbar.org/groups/probono_public_service/policy/state_ethics_rules.html.
[143] Oregon State Bar Bylaws § 13.1.
[144] See, e.g., Leslie Boyle, *Current Development 2006-2007: Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 Geo. J. Legal Ethics 415 (2007) (arguing in favor of a mandatory pro bono requirement);
[145] 22 NY CRR 520.16 (amended, effective January 1, 2013).

to mention increasingly dubious job prospects.[146] Truth be told, fifty hours of pro bono work spread over what is typically at least three years from the start of law school to the date of admission is only one-third as burdensome as the already negligible fifty-hour annual aspirational goals. Furthermore, given the current depressed legal economy, most students would likely leap at the opportunity to gain additional real-world experience to add their resumes while doing valuable work for those who need it. The rule allows for a large variety of ways in which the fifty-hour requirement can be met, including, among other possibilities, law school clinics, externships, and law-related work for nonprofit groups.[147] It might thus be said that the primary limitation is the student's own inherent creativity or lack thereof in finding qualifying work that is interesting to them.

New York's new rule is movement toward a stronger pro bono standard, but it leaves much room for improvement. Pushing for mandatory pro bono hours for attorneys who are *already* admitted, rather than simply carving out one three-year period for those yet to be admitted, would make a much more significant impact in terms of either the sheer legal manpower or the dollars to be donated, or some combination of both. Some states' aspirational pro bono rules already allow attorneys to choose either hours or a money payout in lieu of hours, and there is no reason a mandatory requirement could not be similarly flexible so as not to unfairly presume that all attorneys have equivalent financial or time commitments. The mechanics of a mandatory requirement need not be rocket science; criticisms of mandatory pro bono that hew to an argument of impracticality or lack of resources ring hollow. Where voluntary pro bono goals have fallen short, lawyers could do a tremendous amount of good and simultaneously significantly elevate the status of the profession by coming together behind a mandatory pro bono requirement. This would be a development befitting the fact that lawyers are, after all, "officers of the court"—a quasi-official status born of their legal monopoly.

3) Preserve the Integrity of the Judiciary by Ending the Political Election of Judges

The sharply pro-corporate tack of the Texas Supreme Court over the last several decades aligns closely with the general shift toward Republican pro-corporate political ideology that swept across the country during the Reagan era and was

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[146] See: Joan C. Rogers, "Pro Bono Mandate for N.Y. Bar Admission Brings Mixed Reactions, Lots of Questions," *Bloomberg BNA*, May 23, 2012, http://www.bna.com/pro-bono-mandate-n12884909631/; Ben Trachtenberg, "Rethinking Pro Bono," *New York Times*, May 14, 2012, http://www.nytimes.com/2012/05/14/opinion/a-better-pro-bono-plan.html.

[147] See the FAQ regarding the type of work that satisfies the new law, available at http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf.

cemented with the governorships of George W. Bush and Rick Perry. This mimicry of the shifting political winds is the antithesis of the ideal of an independent judiciary and makes a mockery of the notion of checks and balances. A child in her first civics lesson might tell you as much.

The problem is, of course, how to untangle this mess when seemingly all options are closed off. Campaign finance reform to end the flow of corporate cash to successive waves of justices? After *Citizens United vs. FEC* the prospects for campaign finance reform moving on a national level anytime soon are slim. Passing a state law to modify Texas's state campaign finance laws? With Republicans controlling the state house and the legislature, this again is not likely to be seen in the near future. Place the responsibility on the State Bar to crack down on political overtures made during judicial elections? The U.S. Supreme Court deemed as much unconstitutional on free speech grounds in *The Republican Party of Minnesota v. White*.[148]

In an ideal situation, Texas's legislature would pass an amendment to Art. 5 §2(c) of the state Constitution to strike the provision allowing for election of the Supreme Court justices. In place of the current system, a system of merit selection would be created for the appointment of justices based upon the recommendation of a non-partisan commission comprised of a mixture of lawyers and non-lawyers. This plan was first adopted by Missouri in 1940 (and is thus often referred to as the "Missouri Plan") and has since been adopted either in whole or with some modification.[149] The length of the appointments is a matter for debate; having terms slightly longer than the current six-year term may be beneficial in encouraging separation from political changeovers in the State House. Some states do have terms of appointment of only six years; most terms are longer. Regardless, while merit-based systems are not immune from criticism on grounds of being undemocratic, the Missouri Plan represents a path toward disrupting the unstoppable flow of corporate cash that has distorted and corrupted the judicial process. After leaving the bench, former Texas Supreme Court Justice John Hill went on to actively advocate for reform of the Texas judicial system and the adoption of the Missouri Plan, calling it "the correct and best solution for the problem" precisely because "it takes away the influence of excessive money."[150]

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[148] 247 F.3d 854 (2002) (holding that a Minnesota judicial ethics rule prohibiting a candidate for judicial office from announcing his or her views on disputed legal or political issues violated the First Amendment).

[149] See http://www.judicialselection.us/.

[150] John Hill, interview, *Frontline*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/hill.html.

The practical problem remains, though, of how to implement this kind of reform in an overwhelmingly Republican state. The short answer is that there is not going to be an easy solution. Change will require exactly the kind of hard work and grassroots organizing that the Republicans used to gain entry into the Texas Supreme Court in the late 1980s. As former American Medical Association lobbyist Kim Ross described to PBS Frontline:

> [The AMA] aggressively organized physicians and physician allies across the state to challenge the members of the court that we thought best represented the judicial activism and that sort of a legislative agenda… That was the beginning of …what became a very aggressive grass roots campaign called 'Clean Slate '88.' And in that series of races we won five out of six seats. … In every election since then we've had either 100% or two out of three…[151]

While the tables have turned, and the coalitions and players are necessarily different, the strategy must remain the same. Aggressive grassroots organizing is the only option. In practical terms, what that could mean at a bare minimum would be an increase in donations to existing nonprofit advocacy groups like Texas Watch and Texans for Public Justice, so that they can increase the number of relevant Supreme Court projects that they do per year and help to raise the profile of the issue and bang the drums for change. Organizing may also require the creation of new nonprofit groups and/or partnering with existing groups in coalition so as to drum up broad support from all regions of the state. A steep uphill battle, to be sure, but accepting the status quo is something the civil justice system cannot afford.

4) Develop Multifaceted Campaign Strategies

Prop 12 was unique in several important aspects, most significantly the timing of the election. But perhaps the most crucial lesson that must be drawn from such an excruciatingly close defeat is the need to create more effective multifaceted strategies. The fact that most of the state has become Republican should not mean abandoning or underplaying efforts to reach out to progressives in all parts of the state, as it did during the Prop 12 campaign. Such a strategy is a recipe for perpetual defeat. Even a victory under this strategy is a loss in the long-term, as it means neglecting to shore up an organizational infrastructure that can more consistently produce defeats of obstructing Texans' full day in court year after year, bill after bill.

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[151] Kim Ross, interview, *Frontline*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/ross.html.

The suggestion here is straightforward, at least in theory: lose the defensive posture, and instead be on the offensive creating effective multifaceted campaign strategies that simultaneously attempt to peel off some Republican voters while making an aggressive grassroots push to mobilize progressives of all stripes throughout the state. Along with the greater financial support by trial lawyers for advocacy groups and building stronger coalitions, this approach demands more continuing/ongoing outreach to even the furthest reaches of the state, especially to those counties that remain stubbornly Democratic in the Presidential and gubernatorial elections. If, as Jason Kafoury explained earlier, campaigns have trouble working with older, less motivated ground organizers in some of these areas, then it is time to find new, younger, more enthusiastic organizers who don't have decades of defeat burdening them. Especially in the current economy, where so many young people are desperate to find opportunities to do good work, there is no reason why the trial lawyers, working together with advocacy groups and political parties, cannot better harness their exuberance and optimism to help find the votes that could mean the difference between continued defeat and a renewed system of justice.

Suggestions for the Rise of the Texas Trial Lawyers

As a famous Frenchman Jean Monnet once said, "nothing is possible without men, but nothing is lasting without institutions." Texas trial lawyers should connect the older generation with the up and coming generation of trial lawyers at a weekend retreat to plan for the great restoration and preservation of tort law and the civil justice system. This grand comeback against the tortfeasors/corporate lobby aligns with the traditions of our founders, the U.S. Constitution and endless human interest content in the great victories for the underdogs against the abusers who want to escape responsibility by rigging the law in their favor and closing the courtroom door to the wrongfully aggrieved.

Texans Against Lawsuit Abuse and its allies must be countered by pro-justice chapters around Texas with an adequately-funded Austin-based group, such as Texans for Public Justice, that already, at its small budget, has proved its mettle, its media-savvy, and worth with its accurate and plainly written reports and tenacious advocacy. The first order of business is a victory that will reverse defeatism and low morale and elevate the protective mantles of civil justice before judge and jury in Texas. That victory must be the repeal of Prop 12 and the restoration of the fundamental respectful language of the Texas Constitution for the right of trial by jury in Texas courts. This is an eminently winnable battle, both for intrinsic reasons of morality and justice, and for how cruel the aftermath of Prop 12 and its specious claims have turned out to be in retrospect. This victory will reverse the momentum in the state legislatures of those who, step by step, expand the escape from accountability by corporate and other commercial interests, including the always unpopular insurance industry.

The funds needed for implementing this constitutional restoration and the suggestions which follow, year by year, are miniscule compared to the GDP of Texas trial lawyers. These actions will legitimately increase the supplies of justice for the innocent and defenseless injured, sickened or property-devalued Texans. There will also be the deterrence of future recklessness or crimes. Texas trial lawyers know this capability of theirs to be a fact and also know that they are central to the resurgence of a major coalition of many nonprofit citizen groups representing day laborers, children, the elderly, women's rights, the opponents of poisonous environments (air, water, food and soil). Even those conservatives, reflecting their revered thinkers who fostered the Seventh Amendment to our Constitution, would welcome the return of some law and order for those chronic violations of conservative, in contrast to corporatist, values. What follows are some initiatives

known to most but not yet fused into effective operational movements:

1. Sponsor reports/studies to help educate the public about the importance of Tort Law. The Texas trial lawyers should take on a leading role in sponsoring the type of important research and analysis as well as creative efforts embracing real life stories to help educate the public, the press, and lawmakers on the importance of Tort Law. Some possible reports and studies might include topics such as the development of the new frontiers of tort law; an annual rundown of the benefits to people and their children of tort law and needed changes in Texas; approaches to reducing the harm to people caused by negligent or chronically incompetent physicians; and the cost to taxpayers of defective products, including medical devices.

2. Sponsor fellowships/grants to allow aspiring documentary filmmakers and photographers to create vital works on tort issues. In addition to reports and studies, the trial lawyers could augment these reports through the creation of annual fellowships and/or grants designed to fund creative but informative documentaries on tort issues, sand photography. These fellowships would give young, aspiring filmmakers and photographers an opportunity to make an impact through work that might not otherwise be funded. Much in the way that documentaries such as "Hot Coffee" changed the way people understood the notorious McDonald's coffee burn, or in the way that "Fast Food Nation" changed the way many people understood the nutritional void of fast food, artistic works in Texas could have an important informative and even galvanizing effect on the populace.

3. Sponsor and organize public events to facilitate further education on the issues and to encourage deeper civic engagement. The trial lawyers should work with advocacy groups to implement regular conferences and symposiums throughout the state designed to supplement public education efforts of the type described above. Some possible conferences could include an annual "People's Law School," wherein lawyers would work together with advocates in explaining the law—especially torts—to citizens in readily-understood ways. The emphasis could be on connecting the law to the corporate abuses people witness on a daily basis, on the rights and remedies for wrongfully injured people, and on a frank discussion of the direction of tort law and the civil justice system in Texas and elsewhere. The conference could also break out into a discussion of developing strategies and practical courses of action, and get conference attendees to sign up for an email list

to help in the fight. And presentations by lawyers at school assemblies could counteract the corporate propagandists who speak to these gatherings.

4. Develop and implement strategic infrastructure throughout the state to aggressively combat the tortfeasors/corporate lobby. As described earlier, Texas trial lawyers must take the lead in coordinating with nonprofit groups throughout the state to build out a statewide political infrastructure, and in supporting that infrastructure with generous, valuable contributions of money and resources. Building out this infrastructure should be done with an eye on getting the truth to the people and in being able to mobilize ready and able citizen support groups in aggressive political campaigns designed to defend against harmful political initiatives, to roll back bad legislation, and to champion new, forward-thinking initiatives that would make gains for the civil justice system.

5. Organize a broad-based campaign to repeal Prop 12. Such an effort would send a message to the tort "deform" lobby that the civil justice system is a pillar of our democracy and that unpatriotic efforts to undermine unencumbered access to the peoples' day in court will not be tolerated.

Photos and Illustrations

Justice Scale Cover Page, title page
August 2011, Toby Hudson
http://commons.wikimedia.org/wiki/File:Brass_scales_with_cupped_trays.png

Austin State Capitol Picture, page3
1906, University of Texas Library
http://commons.wikimedia.org/wiki/File:State_Capitol,_Austin,_Texas.jpg

Texas State Senate Seal, page 6
May 2011, Wikimedia Commons
http://commons.wikimedia.org/wiki/File:Seal_of_State_Senate_of_Texas.svg

Texas State House of Representatives, page 7
June 2011, Wikimedia Commons
http://commons.wikimedia.org/wiki/File:Seal_of_Texas_House_of_Representatives.svg

Texas Supreme Court Seal, page 20
Supreme Court website
http://www.supreme.courts.state.tx.us/

Texas Trial Lawyers Association, page 33
http://www.ttla.com/index.cfm

Adam Reposa YouTube Clip, page 37
http://www.youtube.com/watch?v=tBLTW-KLdHA

Useful Links

- Center for Justice & Democracy - http://www.centerjd.org
- Public Citizen - http://www.citizen.org
- Texans for Public Justice - http://www.tpj.org/
- Center for Study of Responsive Law - http://csrl.org/

About the Author

Andrew S. Goldman is an attorney licensed to practice law in the state of New York. He graduated with a B.A. in Politics from Princeton University, received a M.A. in American Studies from Columbia University, and a J.D. from University of Maryland Francis King Carey School of Law. He worked at the Center for Study of Responsive Law in 2012 as the inaugural Stuart Speiser Memorial Fellow.

The author would like to thank Professor Joe Page and Katherine Raymond for their contributions to the content and creation of this report.

Appendix I

Open Letter to Plaintiff Trial Lawyers

August 2012

Dear Plaintiff Trial Lawyers of America:

The common law of torts, which came from England to the Thirteen Colonies, has been elaborated in tens of thousands of judicial decisions with one basic message – if a person suffers a wrongful injury or harm, he or she can seek redress in court with a trial by jury. This is the civil justice system working through the evolving law of torts. It is this body of law that especially focuses on protecting the physical integrity of human beings, their reputations and their property.

The two initiators of the common law are the plaintiff and the attorney. Over the years these two movers have challenged and prodded the courts into building the greatest civil justice system in the world – one that, despite its insufficient usage, strives to keep up with community values and the risks of existing and new technologies.

The civil justice system, when not straitjacketed, works to compensate victims for various losses, punish the perpetrators in the more heinous cases and deter future injudicious or reckless behavior. The courtroom door is more open to claimants due, in substantial part, to the contingent fee. The injured, poor or not, only pay their attorneys in cases where they prevail.

As a judicial system of public decision-making, it has to conform to a range of refereeing far beyond what is in place for decisions by legislatures, executive agencies and global corporations. Disputes are first refereed by the very nature of the adversary system and its rules of evidence and cross-examination. The judge referees the interpretation of the law and the jury referees the facts. Then the judge referees the jury's decision followed by the appeals courts. The entire process is open.

Trial counsel expanded the embrace of tort law with a refereed steadiness, expressed so concisely by the former Dean of the Harvard Law School, the celebrated Roscoe Pound, who wrote: "The common law must be stable but it cannot stand still."

Unfortunately, even before the massive assault on the tort system by the corporatists and their ideological allies, the civil justice courts did not serve enough of the millions of people suffering injury or illness caused by negligent or intentional behavior. The costs of specific litigation, such as medical malpractice or complex corporate torts, removed all but the cases with the most accessible evidence and greatest damages from the calculus of the trial attorney. By comparison with other countries, however, the American law of torts, with all its limitations – textually and operationally – remained far superior and continued to evolve, though haltingly, through the decisions of some of the finest judicial

minds in our country. Until, that is, the 1980s, when the backlash by the wrongdoers' lobby and their ever profitable insurance company bell-ringers intensified their attacks.

Until that decade, the common law had expanded to include damages for pain and suffering, the infrequent but necessary punitive damages, loss of consortium, joint and several liability, comparative negligence, and other doctrines. Again and again, plaintiff attorneys could take credit for bringing cases, having little chance of success, but nonetheless enlarging the core of more humane legal arguments presented in open court. Sometimes pioneering trial lawyers prevailed against powerful defendants, with far greater resources, such as the asbestos and tobacco industries. This benefitted their clients and our society as well.

The law of torts cannot stand still because evolving expectations by society toward greater care, caution and anticipation atrophy or are repressed if they are not regularly transformed into prudent legal rights and responsibilities.

It cannot stand still because the evidence acquired in the course of litigation pierces the veil of corporate and professional secrecy and allows the use of newly discovered information in the preventative process of health and safety regulation. For example, evidence acquired in tire products liability cases led to the federal tire safety law of 1966.

Having initiated and materially gained from their overdue and proper expansion of the common law of torts, plaintiff lawyers should more vigorously embrace a presumed trusteeship to defend what they helped bring about. Such a trusteeship could be invaluable in confronting the tidal wave of what grotesquely became known as "tort reform." This corporate lobbying drive first focused on state legislatures. This assault was amply greased by falsehoods and campaign cash and ultimately shaped the elected judiciary in many states. Blatant insurance industry propaganda, along with occasional insurance or reinsurance company strikes, or tactical refusals-to-sell insurance coverage, got headlines.

The "tort deform" juggernaut gathered steam in the 1980s as a peculiar phenomenon began to emerge. At the same time that some trial lawyers achieved very considerable wealth from their breakthrough litigation successes, their resistance, once muscularly organized, began to flag before the gathering storms. This anomaly only worsened in the 1990s and in the first decade of the 21st century. Although riches were amassed by the creative litigators involved in asbestos, tobacco and other mass tort victories for workers, patients and public health policies, inadequate resources were directed toward countering the commercialist movement that infected elections, legislatures and the judicial confirmation process to shred tort law.

The recent history in Texas illustrates this point only too well. Commencing in 1991, the wealthiest trial bar in the country lost legislative battle after legislative battle designed to destroy the wrongful injury remedies of injured Texans. It started with the weakening of

the workers compensation law by an increasingly antagonistic legislature. In drumbeat succession, lawyers for people harmed by negligent or chronically incompetent physicians and manufacturers of defective products were rendered less and less able to pursue the legitimate rights of their clients in the courts.

"Tort deform" laws tied the hands of judge and jury – the only people who see, hear and evaluate the evidence before them in open court. Both absentee state legislators and judicial candidates who show their responsiveness to the legislating of judicial outcomes that were uniquely anti-plaintiff in tort cases were flooded with campaign money. From corporate interest, money talked loudly. Now the judiciary, especially the Texas Supreme Court, and the indentured Texas legislature and governor, have cruelly turned against these innocent victims and their attorneys, restricting their meaningful access to the courthouse.

The venerable Texas Constitution of 1935 said, "The right of trial by jury shall remain inviolate." In 2003, the ravenous corporatists, including of course the insurance industry, decided to take on an important section of the Texas Constitution and of Texas democracy. Their millions of dollars placed a provision on a statewide ballot initiative. The proposed constitutional amendment "Prop 12" would, in the words of Craig McDonald, director of Texans for Public Justice, "take power away from communities, judges and juries and give the Texas Legislature the absolute unfettered power to grant special interest groups special protections from the harm they might cause in the future and dismantle the checks and balances system that's been the backbone of our government." Passing the amendment was considered an uphill struggle in the opinion of some observers who overestimated the resolve and smarts of the trial lawyers. Corporate cash, that could easily have been matched but wasn't, and deceptive television ads won the vote for Mammon, Greed and Cruelty by a margin of 51 to 48 percent of those who chose to vote. The predictable further weakening of Texas tort law followed. The resolve of the trial bar in protecting the law of torts was inadequate or inept.

Why have the Texas trial lawyers – no shrinking violets to past contests of power – lost again and again? Needless to say they had the arguments, the evidence, the heart-rending cases of avoidable deaths, injuries, illnesses and family anguish. They had the contrast of corporate bosses, with rubber-stamping boards of directors, paying executives huge compensation and bonuses even while these bosses were taking down their own companies, workers and shareholders. Remember Enron. After all, these years of "tort deform" paralleled the greatest corporate crime wave in American history. Weren't there several dozen trial lawyers each worth hundreds of millions of dollars and even a billion or two who could contribute the money and talent needed to get the truth to the people and mobilize ready and able citizen and labor groups to build the voting power needed to preserve tort law in Texas? It seemed that the very traits of individualism and self-regard that drove them to their courtroom victories – cases involving asbestos, tobacco, medical devices and toxic release – hindered the kind of sustained, collective organization that so many advocates pleaded with them to support.

The sterling, publicized work of Texans for Public Justice led by Craig McDonald and Andrew Wheat (www.tpj.org) with its tiny budget was an operating example of what an expanded public investment would have accomplished. By contrast the "tort deform" lobby spawned many well-funded state-based astro-turf groups against so-called "lawsuit abuse," and several national groups as well.

The loss of the constitutional referendum in Texas was the result of poor strategy, a low advocacy budget, compared to the corporation's expenditures, excessive delegation by leading trial lawyers to their unimaginative professional association in Austin and especially the exclusion of ideas and participants by their misguided consulting firms.

Loss after loss in state after state – severe limits on damages, abolition of joint and several liability and the collateral damage rule, restrictions on expert witnesses and jury autonomy – revealed another vulnerability of the trial lawyers that did not go unnoticed by their adversaries. The trial lawyers had no second strike capability to roll back bad legislation once enacted. Moreover, they had no power, or chose not to exercise it, to improve tort law that had fallen behind the times. They signaled to the corporate insurance lobby that they could be steamrolled again and again, unlike groups who regroup and become stronger after suffering a defeat. They relied on campaign contributions instead of full-bodied grassroots campaigns. Their presumed trusteeship had little energy or capacity for self-renewal.

All the missteps of the trial lawyers did not keep their corporate opponents from constantly magnifying the power of the trial bar so as to raise more money and give the impression that they were fighting Goliath when in reality *they* were the giants, from the U.S. Chamber of Commerce on down. The trial lawyers were like Davids with broken slingshots.

To be sure, the trial lawyers and their civic allies are not without their history of victories in New York, Florida, Ohio, Illinois and other states during this period. But they have been smaller and less frequent in the past twenty years. The biggest victories are defensive – holding the shrinking fort – with truly offensive turnarounds going the way of the Mauritius Dodo bird. The "mighty" trial lawyers of California cannot even mount an inflation-adjusted campaign to bring the 1976 cap on pain and suffering – a stagnant $250,000 lifetime cap – up to 2012 dollars or about $1 million. This is the case even though the then and current Governor Jerry Brown in his 1992 statement expressed his regret for supporting such a draconian limit that has caused so much deprivation, cruel mimicry in other states and a required reduction in adjudicated jury verdicts above that limit for horrendous injuries from medical malpractice.

To be sure, plaintiff lawyers have developed some sterling ways to teach the public about their legal rights – such as the Peoples Law School seminars. They collaborated in the late '80s with the Johns Hopkins School of Public Health to publicize consumer product defects and other harmful conditions based on their proven case files. But these good efforts are not diffused throughout the country and often fade away. Seventy thousand

fulltime plaintiff trial lawyers can do much, much better for the lives, the health and safety of the American people for whom they are the first responders.

Their potential is seen in the adoption of a proposal I made more than thirty years ago for them to start a public interest law firm that they called Trial Lawyers for Public Justice (now called Public Justice) – a nonprofit organization to take important cases that commercial law practices would not undertake. The success of Public Justice (www.publicjustice.net), led by the resourceful Arthur Bryant, is convincing evidence of how much more could have been done in state after state with modest draws on the trial bar's discretionary income.

As detailed in the work of Joanne Doroshow's Center for Justice and Democracy (www.centerjd.org), studies have shown that civil litigation by the injured is in decline by several measures. Far fewer than 10 percent of actionable tortious acts ever move to the stage of a legal complaint. It is harder and harder for these Americans to have their day in court. People slated for jury pools are constantly misled and lied to by the barrage of propaganda in print, TV and radio about the civil justice system (again, see www.centerjd.org). Actual trials are declining in number and court budgets are being radically cut in some states.

I was introduced to the law of torts at Harvard Law School in 1955 by the legendary Warren Seavey's case book and in 1956-1957 by the writings of Professor Thomas F. Lambert, Jr., the director of the first trial association known as NACCA (The National Association of Claimants' Compensation Attorneys). The *Nader v. General Motors Corp.* case[152] brought by leading trial attorney and author of the treatise *The American Law of Torts*, Stuart Speiser, helped advance the right of privacy and is often included in legal casebooks.

For decades I have testified, written and fought for the legal rights and remedies of wrongfully injured children, women and men in the workplace, marketplace, home and environment. Illustratively, in 1986 I traveled to more than forty states to help stem the massive assault on the tort system fronted by the insurance lobbies, often with the formidable J. Robert Hunter whose expert testimony as a leading property-casualty insurance actuary impressed many a state legislator in that critical year.

In almost every state, there were a few trial lawyers who stood very tall on the trial lawyer association ramparts against the tortfeasors' lobbies. The vast majority paid their modest annual dues and practiced law. Year after year the ramparts weakened. Our country's tort law can be considered mortally wounded in many states with the congressional minions of the wrongdoers' battalions thirsting to federalize and codify downward the entire common law of the fifty states – for a "mess of pottage."

It is time to call for a grand, multifaceted mobilization of the American people who believe in their constitutional right of trial by jury and their full day in court based on the principle and affordable practice that every wrongful injury requires a righteous remedy

[152] Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970).

and fair compensation paid by the perpetrators of those harms. This should be a movement for responsibility and accountability for those wrongdoers. Plaintiff trial lawyers should come out of their cloistered and defeatist corners to lead this community-based restoration and expansion of refereed civil justice and deterrence under law.

If you and other colleagues are interested in this call to action and what it will take to effectuate, please call or write to me ASAP for further elaboration and a mutual exchange of suggestions.

Sincerely yours,

Ralph Nader

Washington, DC

Appendix II

...If your life was on the line?

For you, the choice is clear.

But right now, your doctors and hospitals don't have a choice. And you won't like what's happening. The personal injury trial lawyers are filing so many junk lawsuits, that your doctors' and hospitals' liability insurance costs are going through the roof.

Many Texas doctors are retiring early, being forced out of their practices, or leaving the state.

Voting YES on Proposition 12 is about one thing: allowing doctors to do what they do best — care for their patients.

We can put an end to the medical liability crisis caused by personal injury trial lawyers by voting YES on Proposition 12 on September 13. Proposition 12 will cap non-economic damages in medical liability cases to $750,000, with no limit on economic damages including past and future-lost wages and medical bills.

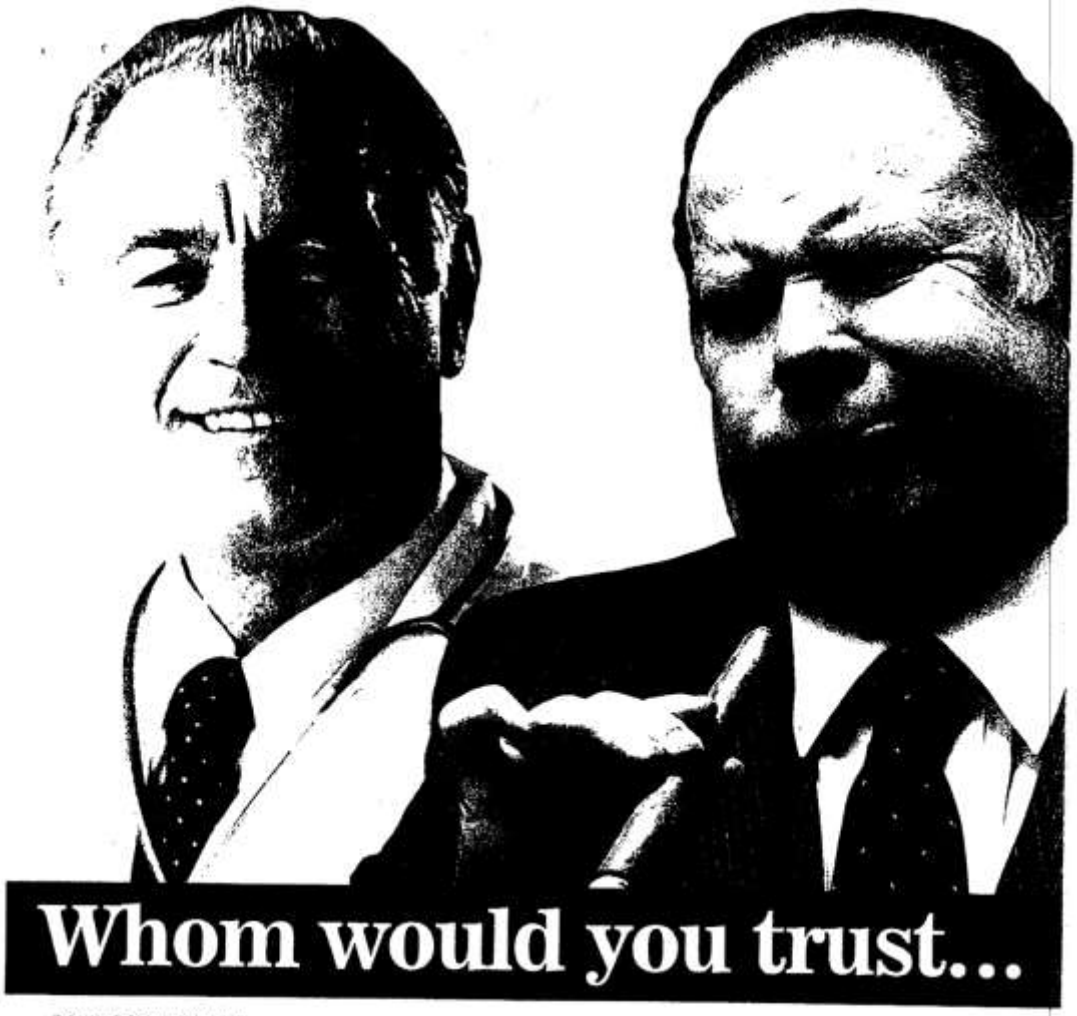
Your YES vote on Proposition 12 means:

- Lower costs and more security in our health care system, because more doctors and hospitals can afford to practice.
- Greater access to high quality health care professionals, including important specialty doctors like cardiologists and neurologists.
- Hospitals and doctors can focus on what they do best — treating patients.

Texas seniors deserve the confidence and security that our health care system is sound, with access to family physicians and the best specialists in the country.

Don't let the personal injury lawyers scare you. Proposition 12 means those who have legitimate legal claims will continue to have full access to the courts, while more health care providers will be able to do what they do best – serve patients in their communities.

SUPPORT PROP. 12



Whom would you trust...

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Specific Purpose Committee
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Austin, TX 78768-2013

www.yeson12.org

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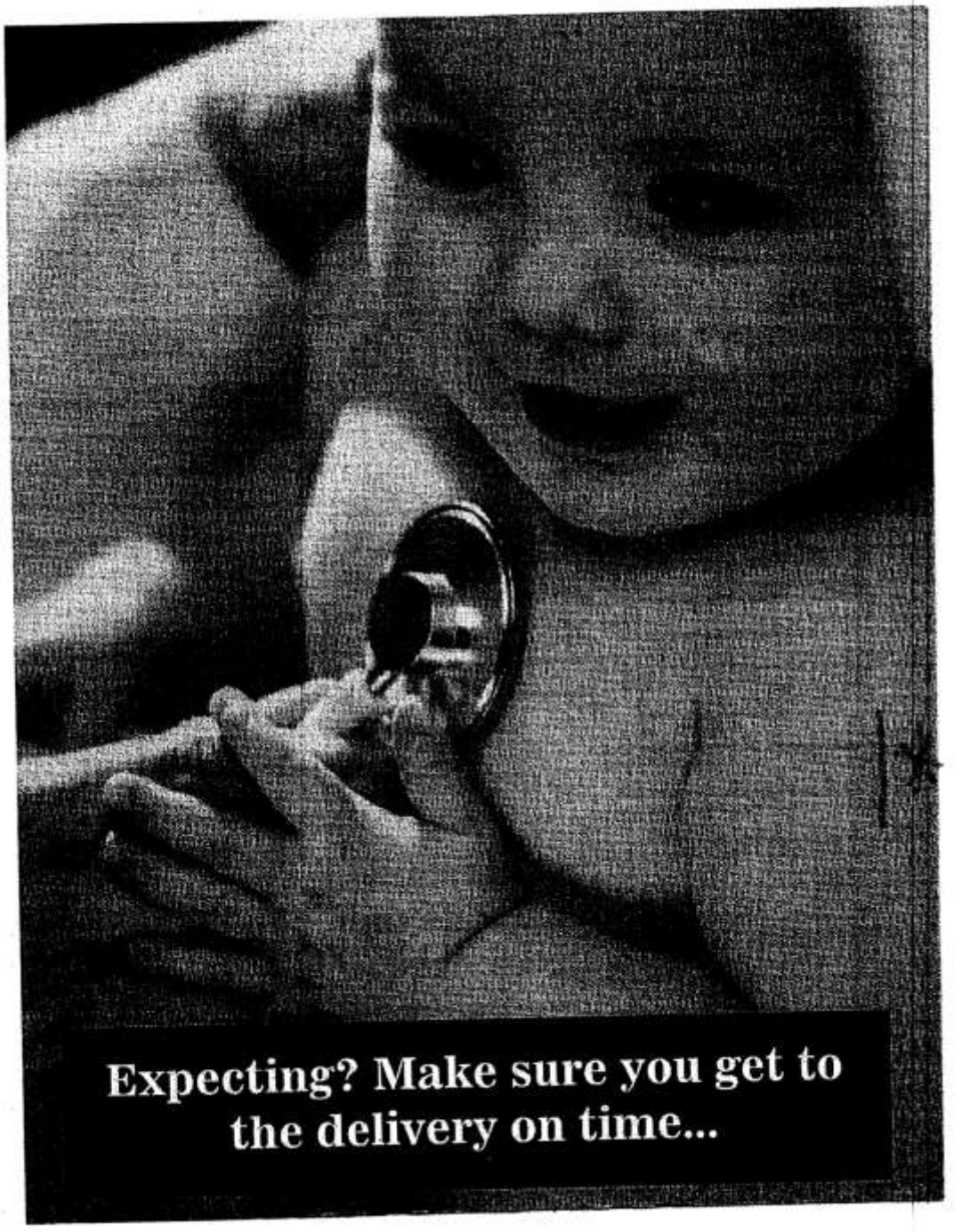

Expecting? Make sure you get to
the delivery on time...

...BECAUSE the trip may

A new survey shows 39% of OB/GYNs nationwide have quit delivering babies, rather than pay astronomical premiums. In South Texas, malpractice rates have driven away so many O.B.s, expectant mothers must travel 100 miles or more for prenatal care. (WFAA-TV, 2-21-03)

We take it for granted, a doctor nearby to help deliver a baby. But, increasingly, when expectant mothers go into labor -- the trip is much longer than they ever imagined -- sometimes as much as hundreds of miles.

And it isn't just a problem with obstetricians, all physicians are feeling the pinch from liability rates that have doubled, or more, in just three years. Increasingly, doctors who want to serve their communities can't afford to.

The problem is lawsuits and personal injury trial lawyers who file thousands of junk cases. More than 85% of medical liability claims are found to be without merit. The solution? Voting in support of Proposition 12.

* Proposition 12 will help reduce frivolous lawsuits and health care costs by authorizing caps on arbitrary non-economic damage awards in medical liability cases to $750,000. Economic damages, such as medical expenses and lost wages, will continue to be awarded without limits.

That means more doctors and providers will stay and serve in their communities.

Support Proposition 12

Vote early through Sept. 9th. Election day is Sept. 13th.

Medical Malpractice insurance rates' effect on OB-GYNs

WFAA-TV/Channel 8, Dallas
February 21, 2003

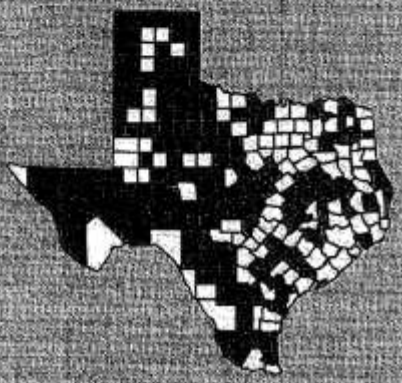
"First, it's one doctor, then a second, and a third.

"Surgeons, obstetricians, and family care physicians, closing up shop and leaving patients with fewer options for medical care. It's an upheaval that may put your health at serious risk . . . because high medical malpractice premiums have driven needed doctors away . . . affecting doctors and patients in a very real, life-and-death way.

"In 15 years as an OB, Grapevine doctor Angelo Mendez has never had an obstetric lawsuit filed against him. But he's paying for the possibilities in higher medical malpractice insurance."

be longer than you think.

Who will deliver your baby?



Denotes counties in Texas which DO NOT have practicing obstetricians (OBs). Due to the high cost of medical malpractice insurance, 9 out of 10 counties in Texas do not have OBs, who are the doctors who specialize in pregnancy and child birthing.

The official report of the Texas Senate identifies a dangerous trend in medicine, as fewer doctors serve because of the avalanche of lawsuits.

"The state's physician shortage is most glaring in rural areas where patients requiring any level of healthcare services are required to travel significant distances due to a complete lack of providers. For example, in Hemphill, the town's two family physicians have recently stopped providing obstetrical care because of rising insurance rates. Patients now must travel 45 minutes to Woodville to receive care."

(2002 Senate Interim Report on Medical Liability and Medicaid Systems)

President Bush Backs Medical Lawsuit Relief

"We understand a person who has been harmed by a bad doctor deserves his or her day in court. Yet, the system should not reward lawyers who are fishing for rich settlements. Because frivolous lawsuits drive up the cost of health care...medical liability reform is a national issue."

– President Bush
Houston, Texas
July 19, 2003

San Antonio Express-News

August 24th, 2003

EDITORIAL

Proposition 12 merits approval

Malpractice insurance costs have created a crisis for doctors that is beginning to limit access to medical care in some parts of the state.

A U.S. General Accounting Office study, which was released in June, focused on Texas and six other states and found that "increased losses on claims are the primary contributor to higher medical malpractice premium rates."

Even with noneconomic damages capped, economic damages and punitive damages would not be affected by the amendment.

Patients who believe they have been victims of malpractice will still be able to go to court and seek damages. Lawmakers have set limits on other types of damages, and courts have found those caps constitutional. As a result, we believe this amendment does not upset the balance of power as dramatically as foes fear. . .

Voters can do their part by supporting Proposition 12. Early voting begins Thursday, and the official election day is Sept. 13.

El Paso Times

Sunday, August 10th, 2003

Our Views: Approve amendment limits on certain damages

Vote YES on Proposition 12.

Allowing the Legislature to cap non-economic damages in a lawsuit makes sense. "Non-economic" refers to damages for pain and suffering, always an emotional issue that can be blown way out of proportion. Too often, speculative plaintiffs and their lawyers have visions of dollar signs cascading from a judgment.

And when physicians have to pay out astronomical pain-and-suffering judgments, and their liability-insurance costs climb, it may cause a doctor to move out of the profession or to a state where liability-insurance premiums aren't so high.

That's of particular concern here, because, according to the Texas Higher Education Coordinating Board, the El Paso area has the fewest doctors per capita of any region in Texas, and Texas lags behind the national average.

We need to attract and keep doctors, not drive them away.

And, according to information from the League of Women Voters of Texas, 11 insurance carriers have said goodbye to the Texas market. We need more insurers, not fewer.

This measure wouldn't limit economic damages, or actual medical bills, medical care during recuperation and loss of income. That should be seen as a practical impossibility, given the unpredictable nature of medical problems.

Don't forget to early vote for Proposition 12 through September 9th

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Yes on 12

*** | Texans Need Affordable Healthcare Now!!**

Save Your Family Doctor, Vote "Yes" on 12

Our health care system is in crisis: personal injury lawyers making millions while good doctors battle skyrocketing insurance premiums that threaten their ability to serve patients. And the problem keeps getting worse.

It's time to protect patients. It's time to support your family doctor and end the avalanche of health care lawsuits, 90% of which are without merit.

By supporting Proposition 12, you can end medical lawsuit abuse and restore balance to our courts.

Proposition 12 limits non-economic damages in medical liability lawsuits to $250,000 for each doctor, with no limit of what a Texan may receive in lost wages and other economic damages. Led by Governor Perry, Republican and Democrat lawmakers worked together to overwhelmingly place Proposition 12 before voters. Now, these lawmakers have joined with local doctors, hospitals and business leaders to pass this critical reform.

Prop. 12 means more doctors and providers will stay and serve their communities. More patients and employers will be able to afford health insurance. 1*

On September 13, cast a vote for a stronger Texas. End the medical liability crisis and vote for Prop. 12.

contact e-mail

Mailing address:

Yes On 12
PMB 304, P.O. Box 2013
Austin, Texas 78768

512-457-1212 (p)
512-322-0015 (f)

Make sure you are registered to vote. Registration ends August 14th. To register please visit the Secretary of State website

Pol. adv. paid for by Yes on 12-specific purpose committee, PMB 304, P.O. Box 2013, Austin, TX 78768.

Your "YES" vote on Proposition 12 will:

✓ **Make medical care affordable.**
Patients and employers spend less on medical care when doctors and hospitals spend less on liability insurance and defensive medicine.

✓ **Restore confidence in and improve accessibility to our health care system.** Medical lawsuit reform enables more doctors and hospitals to stay in business, protecting trauma and emergency care where the lawsuit crisis is most severe.

✓ **Cap arbitrary non-economic damages in medical liability lawsuits at $750,000.** Actual economic damages, such as lost wages and medical expenses, will continue to be awarded without limit.

✓ **Hold down liability insurance costs.**
By limiting frivolous multi-million dollar lawsuits, more small businesses can provide health insurance to their employees.

WARNING:

Don't believe the negative attacks by personal injury trial lawyers!

Proposition 12

preserves our jury system and improves our Texas Constitution. It provides access to the courthouse for those who truly need it and makes health care more affordable and available for all Texans.

Austin American-Statesman

Sunday, July 20, 2003

Cap on damages from malpractice suits is a necessity

"... We think the medical care situation is serious enough to tip our support toward the amendment..."

On September 13, Texans have the chance to go to the polls and cast a critical vote for health care by voting YES on **Proposition 12**.

Don't forget to vote early between 8/27 - 9/9!

Affordable Health Care. Expanded Access. Fewer Junk Lawsuits.

Prescription for a Stronger Texas

(1) Support accessible and affordable health care.

(2) Stop personal injury trial lawyers who drive up costs.

(3) Vote "Yes on 12!"

(4) Vote early with your family and friends 8/27 - 9/9.

Yes on 12

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RICK PERRY

GOVERNOR OF TEXAS

My Fellow Texan:

On Saturday, September 13th, Texans can help make health care **more affordable and accessible** for Texas families and employers and encourage health care professionals across Texas to remain in practice. **Your vote can make the difference.**

Your support is critical to overcoming the well-financed opposition of **personal injury trial lawyers who are mounting an unprecedented, multi-million dollar campaign to defeat our efforts.**

Too often the focal point of today's hospitals and doctors is defending against junk lawsuits filed by wealthy trial lawyers instead of treating patients.

Pregnant women often struggle to find an obstetrician to deliver their babies. Trauma patients are losing access to surgical specialists who have been forced out of practice. Neurosurgeons can't take the most difficult cases because they can't afford the medical liability coverage.

Patients pay the price when frivolous lawsuits escalate medical liability premiums, forcing doctors out of medicine. Proposition 12 will hold down the cost of liability insurance, meaning more doctors will remain in practice.

Injured Texans will continue to have access to fair compensation under this new law, including unlimited economic damages for lost wages and medical expenses. Proposition 12 will reduce junk lawsuits and improve access to the courts and juries for those who need it.

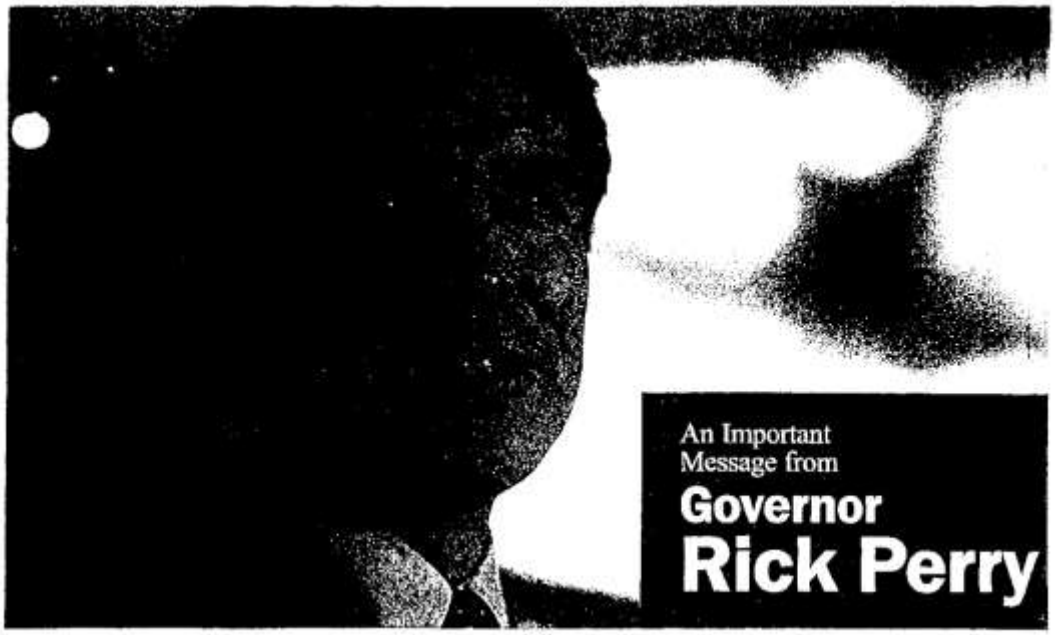
The only way to truly protect Texas patients, and ensure access to affordable health care, is to vote "YES" on Proposition 12. I hope I can count on your vote.

Sincerely,

Rick Perry

Rick Perry

P.S. Our opponents, funded by personal injury trial lawyers, have raised over $4 million dollars for their effort. I know what it is like to be outspent in a campaign. **The power of a strong grassroots organization can overcome even the most well-financed opponent.** Please make time to vote YES on Proposition 12 starting August 28th.



On September 13th, you have the opportunity to secure more accessible and affordable health care for every Texan. I hope you'll join me in voting for Proposition 12 because it's important to the future of Texas.

Early Voting begins on August 28th, so please take time to vote and take your family and friends to the polls.

To learn more about where to vote for Proposition 12, please call your local county clerk's office for early voting locations and times.

Pol. Adv. Paid for by Yes on 12
Specific Purpose Committee
PMB 304, P.O. Box 2013
Austin, TX 78768-2013
www.yeson12.org

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The Center for Study of Responsive Law

The Center for Study of Responsive Law is a nonprofit Ralph Nader organization that supports and conducts a wide variety of research and educational projects to encourage the political, economic and social institutions of this country to be more aware of the needs of the citizen-consumer. The Center publishes a variety of reports on a number of public interest issues.

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THE CENTER FOR STUDY OF RESPONSIVE LAW

The Rise and Fall (and Rise?) of Texas Trial Lawyers

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