A Template for Reform

The Texas Tort Reform Story

By Richard W. Weekley and Hugh Rice Kelly

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TEXANS FOR LAWSUIT REFORM

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Abusive litigation has prevailed in this country so long that many in the business world have come to regard it as all but inevitable. In truth, by the 1980s lawsuit abuse had become inevitable because plaintiff trial lawyers across the country had successfully passed laws to expand legal liabilities and eviscerate defenses while the courts they controlled shredded hundreds of years of common law. This did not happen overnight, and it was not the result of an attack on any one business or industry. With momentum on the side of the plaintiff lawyers, business efforts to fight back were sporadic and generally ineffective across the country—except in one state: Texas.

Texas became the national leader in lawsuit reform, but that was not always the case. In the late 1980s, Texas had become a plaintiff lawyers' paradise, with a civil justice system many considered the worst in the country. But the Texas business community challenged the lawsuit industry and launched what has become a sustained reform effort that resulted in the enactment of over 80 separate statutory reforms that corrected every common type of litigation abuse. No other state has enacted more than a fraction of the statutory reforms enacted in Texas.

Texans for Lawsuit Reform (TLR) has led this battle for 25 years, and this paper is a summary of both the legislative and political strategies that have proved successful. While we are proud of what has been accomplished, the widespread defeat in 2018 of experienced judicial candidates who follow the law as written has put these reforms, and the strong pro-business climate that tort reform helped create in Texas, in peril. As a result, the next 25-year battle for civil justice has already begun.

I. PLAINTIFF LAWYERS: THE ARCHITECTS OF LITIGATION ABUSE

Plaintiff lawyers make their money at the courthouse, so the easier the rules make it to prevail in lawsuits and collect big damages, the more money they make. This guarantees that they will be a constant presence in elections, in front of the Legislature, and behind the scenes of every agency of government whose rulings can affect their industry.

To advocate before Congress and state legislatures, the lawsuit industry is primarily represented by the American Association for Justice (AAJ) and its state affiliates, locally the Texas Trial Lawyers Association (TTLA). When TLR set out to reform Texas tort law prior to the 1995 legislative session, one of its first discoveries was that the plaintiff lawyers were viewed as simply invincible in the Legislature. TLR's first task, therefore, was to understand how the TTLA had achieved practical control of the Texas Legislature on their issues, with enough votes in the Texas Senate to block any reform legislation, and how to break that control.

The answers were not hard to come by. Generally recognized in Texas as the most powerful special interest group in the state, the plaintiff lawyers excelled in every area of political action. Their strength was founded on focus, hard work, vast wealth and their willingness to spend it, and most importantly, ineffective business community opposition. Like AAJ at the national level, the plaintiff lawyers had long been able to defeat or disable fundamental reform in Texas. But they were not invulnerable, as events would later prove.

Inside the profession, the TTLA completely eclipsed its nominal opponent, the "defense bar." As used in Austin, the term "defense bar" refers mostly to insurance defense lawyers. Comparing this group of well (but relatively modestly) compensated defense lawyers to the opulently wealthy plaintiff's bar on its face suggested a mismatch. Early on we learned that some insurance defense lawyers actually *opposed* lawsuit reform and quietly lent support to the plaintiff's bar.[1] Eventually the plaintiff lawyer/insurance defense lawyer alliance became overt, with some defense lawyers openly conferring in the Capitol with TTLA strategists during legislative sessions. Similarly, but less understandably, business trial lawyers from the major law firms who represented corporate America demonstrated little interest in reform.[2]

Likewise, at the time of TLR's founding, business representatives in Austin posed no threat to the plaintiff lawyers for many reasons. But a simple comparison of focus tells enough: those representing business interests must disperse resources across the legislative spectrum from agriculture to zoning, while the lawsuit industry can zero in on only one point on the spectrum—lawsuits. In general, trade associations and businesses focus on their own industry interests.

It's important to note, however, that as time has passed, alliances have begun to shift and cooperation has increased, because the business representatives in Austin have learned that tort reform has had a meaningful impact on their sectors. Since inception, TLR has supported changes to laws that govern major business sectors, including manufacturing, construction, healthcare, and energy. In recent sessions, TLR has worked effectively and in close alliance with defense lawyers, business litigators, trade associations and other stakeholders to enact major legislation.

II. REFORM REQUIRES MASTERY OF POLITICAL FUNDAMENTALS

The first and final rule to remember is that legislators are the elected officials who introduce, deliberate, and vote on bills, and are responsible for legislative achievements. The lawmakers who reformed Texas litigation law over the past 25 years have demonstrated an extraordinary level of dedication to the public interest and a willingness to confront and resolve complex, challenging and controversial issues. But the legislative process is a multidimensional, fast-moving, contentious, sometimes emotional, and complicated activity under the best of circumstances. The most effective legislators want to know which issues are genuinely important to their constituents and what the real merits of

1 The defense bar's antagonism to litigation reform occasionally slips into print, as when a letter from an officer of the Texas Association of Defense Counsel, their lead bar group, referred to "the misperception that TADC was in favor of tort reform and the flattening of lawyer income in several areas of the state."

2 There have been notable exceptions, of course, among both law firm defense lawyers and corporate litigators. The most responsive segment of the Bar, however, has been in-house counsel. These lawyers, most notably the general counsels, must live with executive management and carry the often painful burden of explaining litigation issues and outcomes to them and to the board of directors. Most inside lawyers eventually come to see litigation from the same viewpoint as their clients, providing them a level of motivation rarely encountered among outside lawyers. For all of their professionalism, outside counsel do not personally suffer the burden of unjust and abusive litigation. Their careers and prosperity, in fact, depend on the legal status quo. Abusive lawsuits make money for the law firm's trial department, and a perilous litigation environment enhances the value of wise counsel and tightly drawn transactional instruments. Of course, good lawyers are against bad laws, but without specific fee-paying instructions from a client, most outside lawyers are content to leave reform work to others.

the issues are, but doing so in an area as difficult as litigation reform would be impossible without the efforts of advocacy groups. The importance of legislative advocacy has been recognized since the adoption of the First Amendment, which states the right "to petition the Government for a redress of grievances" in the same breath as it addresses freedom of speech and religion.

To successfully guide a reform program through the legislature, a reform group must be prepared to defeat the opposition on three main battlefields: electoral politics, legislative advocacy, and public relations.

1. Electoral Politics. The ability to wage hands-on ballot-box warfare, and to pursue it consistently over many years, is the key difference between TLR and all other tort reform organizations. From its inception in 1994, TLR's Political Action Committee (TLRPAC) has been one of the largest PACs in Texas. Its campaign finance capability gave TLR the ability to provide crucial support to legislative candidates likely to support tort reform. Of equal importance, it gave us the ability to oppose candidates supported by the plaintiff lawyers.

Without political strength, no amount of organization will be effective in the long run. Reform, after all, is an intensely political process. You will derive only limited political strength from the charm and connections of lobbyists and power brokers—the bedrock of political strength is the ballot box. Elected officials are driven by the concerns of their constituents, so a lawsuit reform group must be acutely aware of how abusive litigation is affecting their districts. And any serious reform group must know that elected officials face the reality of election cycles, so if a reform group cannot support candidates who believe in its issues and cannot credibly and effectively oppose those who fight reform, the plaintiff lawyers will win—because they never fail to show up with campaign contributions at election time.

Many state lawsuit reform groups emphasize advocacy, research and organizational activity but do little in the electoral arena. There are understandable reasons for this: (1) it is very expensive to participate in the electoral process, and (2) corporate money either cannot be used in elections, or, in states where it is allowed, the amounts allowed are so limited as to be of little significance. So even though a competent reform advocacy organization is often able to obtain adequate funding, its affiliated political action committee is not. In contrast, because many plaintiff lawyers measure their net worth in tens, even hundreds of millions of dollars, and because most practice law as individuals or in entities treated as partnerships, their law firm money is plentiful, available on short notice, and typically untouched by prohibitions applicable to corporations.[3] The plaintiff lawyers and their PACs are therefore free to make unlimited personal and

3 As a general rule, corporations cannot make political contributions in Texas. See TEX. ELEC. CODE § 253.094(a). A corporation can contribute to the establishment or administration of a general-purpose political action committee in Texas. Id. § 253.100(a). These corporate PAC contributions may be used to pay rent, utilities, legal and accounting fees, and similar expenses. *Id.*

PAC campaign contributions to support their candidates,[4] while pro-reform candidates typically have no comparable source of campaign financing. Where this imbalance remains uncorrected, few reformers are elected, and the zeal of those who are elected is frequently dampened in the process. Trumping the trial lawyers' campaign finance advantage, therefore, became one of TLR's first strategic goals.

In its first year of existence (1994), TLR went from a concept in January to a full-blown organization by Election Day in November. Most importantly, TLR's sister organization, TLRPAC, went from zero to one of the largest PACs in Texas in time to support a selective slate of reform candidates, including then-gubernatorial candidate George W. Bush and several candidates challenging state senators beholden to the trial lawyers. The victory of those candidates, and the broad recognition of TLRPAC as an effective force in electoral politics, set the stage for the first round of successful litigation reform in 1995. This experience demonstrated that successful participation in electoral politics is both essential and achievable.

By placing heavy emphasis on electoral politics, TLR set itself apart from the older Texas reform group, a business coalition having little visibility in elections. The activity of each group in a special election not long after the milestone 2003 legislative session is instructive. A surprise special election presented the plaintiff lawyers the unexpected prospect of gaining a crucial seat in the closely divided Senate. They moved quickly to put their money on one of their own, an attractive and well-known plaintiff lawyer, against a divided field of lesser-known conservative businessmen. Absent major funding for reform candidates, the limitless instant campaign funding machine of the plaintiff lawyers would have given them the power to walk away with this election. To counter the threat, in the seven-week period from the filing deadline through the runoff election, TLR's PAC raised and spent almost $1 million *before* the election to help defeat the plaintiff lawyer candidate and elect the reform candidate. The other Texas tort reform group, whose campaign resources were typical of state reform groups, contributed $1,000 to the winner ten days *after* the election.

TLR's PAC activities position the organization as an independent and potent political movement focused on the civil litigation system. Of course, TLR also built a sophisticated political and legislative advocacy organization—but having a campaign war chest large enough to balance the plaintiff lawyers at the ballot box made all the difference. TLR retained and reinforced this model, and in every year since 1994, TLRPAC has been the largest, or second largest, political action committee in the state and has served as a critical resource supporting the election of pro-reform candidates. Our electoral activity does not end with financial support. We work hand in hand with the candidates we support, to ensure access to the best data, effective deployment of all available resources, and ultimately their success at the ballot box.

4 The Texas Election Code limits contributions by individuals and PACs to judicial candidates. See TEX. ELEC. CODE §§ 253.155, 253.157. No Texas statute places similar limits on contributions by individuals and PACs to other candidates for state offices, and in the absence of such statutory limitations, individuals and PACs are allowed to make unlimited contributions to these candidates. Plaintiff lawyers at times have attempted to conceal their massive contributions by laundering them through a maze of innocuously named but heavily funded PACs. It is an old, familiar game.

So, when the long-time Texas House Speaker, a fierce trial lawyer ally, was defeated in 2003 because of a seismic change in the composition of the Texas House (due in meaningful part to TLRPAC's activity), the plaintiff bar's ability to block civil justice reform in the House ended. Unprecedented reforms followed. The formula is simple to describe but hard to deliver: when reform-minded legislators are elected, reform bills pass, and getting legislative support starts at the ballot box.[5]

2. Legislative Advocacy. Credibility earned in the electoral process must be translated into effective legislative advocacy that can operate in all channels of communication and persuasion. The reform group must be able to conduct legal, economic, and issue research; hire and direct lawyers and lobby teams; organize and deploy grassroots support; build alliances with like-minded groups; and work effectively with the media and other communication channels. It must bring all of these activities together to demonstrate to lawmakers that the proposed reforms will improve the civil justice system, since they will be held accountable for the changes to the law. Unsatisfied with the existing models it saw in the tort reform movement, TLR decided to draw up its own blueprint.

In the early 1990s, Texas occupied a seemingly permanent place in the bottom rank of every published civil justice evaluation. The plaintiff lawyers controlled the Legislature and many of the courts, and the Austin mandarins dismissed attempts at meaningful reform as wishful thinking. The incumbent civil justice reform organization was limited by its lack of political strength, its dependence on a narrow support base, and an "insider" orientation that structurally compromised its ability to achieve bold reform legislation.

An informal group of concerned citizens began to meet in 1993 and eventually decided to do something to change things, leading to the founding of TLR the following year. TLR's organizers had some experience in public affairs, but for the most part they were not sophisticated public policy advocates. They entered the public policy arena unencumbered by defeatist conventional wisdom, which they concluded had largely immobilized and demoralized existing reform efforts. Notwithstanding these inauspicious beginnings, within its first 18 months TLR was able to pass eight major reform bills and achieve its first installment of broad-scale reforms. In the process, the volunteers gained experience relevant to both tort reform and other public policy initiatives.

It is interesting to note that when TLR began to stir the pot in 1994, we received increasingly severe messages from legislative leadership, particularly from the Lieutenant Governor. In speeches before groups that included significant TLR supporters, the

5 We do not suggest that ours is the only path to effective participation in electoral politics. In some states, for example, reformers have achieved this end by forging alliances with the political campaign of a candidate for governor. This factor was a major element in TLR's support of the successful gubernatorial campaign of George W. Bush in 1994, which set the stage for TLR's reform successes in the 1995 session. The same was true in a number of other states, for example the major litigation reforms enacted in 2004 in Mississippi following the election of Governor Haley Barbour. Other types of reform groups, for example mass movements such as high-profile educational or social reform groups, can deliver campaign workers rather than campaign finance, to good effect. Whether alone or in tandem with candidates or other groups, however, strength in the electoral process means greatly enhanced prospects for success in legislation.

Lieutenant Governor pointedly opined that only glacial gradualism would work in litigation reform—perhaps one modest reform issue per session—meaning once every two years (the Texas Legislature meets in regular session from January through May in odd-numbered years). This message was tantamount to saying that no real progress would ever be made. At the same time, word of a sustained whisper campaign came back to us, suggesting that we would do better to stay home and tend to our own business; that Austin insiders knew the score and could handle things, while we were clueless; and that TLR's leadership consisted of naïve and unruly amateurs who would get nowhere. At first, the political naïveté reports were not entirely incorrect, but we learned fast. For the most part, this campaign increased our determination to push aggressively for reform. (It is worth noting that the Lieutenant Governor who preached slow-motion reform in 1994 ultimately helped pass TLR's aggressive agenda in the 1995 legislative session.)

3. Public Relations. A lawsuit reform group must assemble as many examples of abuse as it can to illustrate the injustice of the law it seeks to change. These stories must be detailed and verifiable because your opponents will do everything they can to undermine your credibility. The reform group must prepare for the worst because most who work in the media have a strong bias against business and never tire of painting plaintiff lawyers as knights in shining armor. The reform organization's press relations manager has a tough job that calls for a lot of patience and persistence.

III. A NOTE ABOUT THE JUDICIARY

Reform must encompass the state judiciary, which holds the power to compromise reform statutes through hostile application or by striking down tort reform laws as unconstitutional. In Texas, all judges are subject to elections, although many are initially appointed to vacant positions by the Governor. By 1988, reform forces had already begun to improve the quality of the Texas Supreme Court, with the result that as of 2018, the Texas Supreme Court had become one of the most respected high courts in the country. TLR has always worked with the Governor's office to advocate the appointment of highly qualified Supreme Court judges as well as judges of lower courts when vacancies occur. TLR's political action committee activities in every election cycle have included significant campaign finance support for candidates for the Supreme Court, which has successfully thwarted several attempted trial lawyer takeovers.

In a perilous development, however, the 2018 elections resulted in a total sweep of competent, experienced judges off the bench at the trial and intermediate appellate court levels in all but one of our state's major metropolitan areas. If history and data are any guide, some of the newly elected judges will avoid application of the law and instead attempt to evade reform statutes and precedents, circumventing the rule of law and removing certainty from the civil justice system.

The bright spot in the picture is the Texas Supreme Court, which remains an experienced, conservative court, with judges who adhere to the rule of law. However, the court is capable of handling only a limited number of appeals, thereby limiting its ability to counter wrongly decided lower court decisions. Nevertheless, trial lawyer domination over the state supreme court would be a serious setback to tort reform because a liberal court would be positioned to throw out some tort reform measures as being violative of the state constitution—as has occurred in two dozen states, particularly in medical malpractice cases.

In the 2019 legislative session, Texas Governor Greg Abbott appointed a bipartisan committee to study judicial selection systems, including appointive judicial selection plans. The adoption of an appointive plan would require passage of a constitutional amendment.

IV. THE ORGANIZATIONAL TEMPLATE

1. Volunteer Leadership. The keystone of TLR's entire effort has been its dedicated volunteer leadership. To have the best chance for success, major public policy initiatives should be led by volunteer principals who are intensely focused on successfully adopting and implementing the proposed reforms. The leaders cannot be subject to cross-issues that could compromise their position. To lessen the professional leverage of their opponents, it would be helpful for them to have a certain degree of personal financial independence, and it would likewise be advantageous for the leaders not to rely on an income stream from the organization for their livelihood. Volunteer leadership is a necessary ingredient because it means the leaders are rooted in business and the professions, not the inside world of lobby politics, and are unlikely to become trapped within the narrow confines of what the insiders consider possible. Volunteers don't lose their jobs because some position or strategy they held out for failed. The employee may be less confident. Volunteer principals are much more likely to hold firm to an important point and suffer defeat, while the employee is more likely to salvage some remnant of a defeated initiative that complicates subsequent reform legislation.

2. Philosophy and Strategy. TLR's leadership has no interest in gradualism or halfway measures. When it doesn't have enough legislative support, TLR's principal response has been to redouble its legislative advocacy rather than to begin deciding how to water down its bills. We believe a reform group cannot afford to become part of the woodwork in the statehouse. If you intend to make legislative omelets, you had better be prepared to break some eggs.

a. Emphasize Strategy. Developing a clear and cogent strategy is indispensable to the success of a public policy reform effort. Taking care on this point pays rich dividends across the entire organization and its operations, including such key activities as development of reform agendas and tactical planning.

b. Don't Settle for Inadequate Resources. TLR adopted the assumption that we had unlimited time and unlimited money so as not to constrain our strategic and tactical planning. We then adjusted to reality rather than letting reality

dictate our strategy. The process forced us to think big, to shape our own independent organization, and to adopt ambitious but necessary fundraising goals.

*c. **Plan on a Multi-Year Campaign With No End Point.*** We recognized that major reforms would be difficult to achieve in a single legislative session, so we initially committed to three legislative sessions, a six-year organizational timeline. It eventually took us 10 years to pass the most urgently needed reforms and 15 years thereafter to enact additional critical reforms. At the same time, we were busy protecting the earlier reforms and defeating numerous bills intended to create new causes of action. In the process, we were eventually forced to recognize that shutting down the organization after a fixed term was not possible. That would simply clear the way for opponents to undo these hard-earned reforms in a few short years.

*d. **Persistence Pays.*** During the lean years of the 1997 and 2001 legislative sessions when the House Speaker killed most of the significant tort reform legislation, TLR continued to build its base of strength. This is the kind of dry spell a reform organization must endure if it is to be taken seriously. When you are trying to educate elected officials as to how abusive lawsuits are affecting their constituents, their perceptions of the organization are important. At election time, you must be there to support those officeholders and candidates who are philosophically aligned with you and oppose those who work against reform.

3. Financial Commitment. Without major campaign finance and organizational funding, the wheels of advocacy will not turn. Though it is burdensome and frequently discouraging, fundraising is crucial.

*a. **Fundraising Cannot Be Delegated***. TLR's experience suggests that someone (or several) in the volunteer leadership group must take the lead in fundraising. They should have the prominence to open doors and get phone calls returned, but they must also have the time and dedication to devote to the task. Donors typically match stripes with their peers, so a successful entrepreneur will more easily open the doors and the checkbooks of other entrepreneurs. Similarly, typically CEOs have access to and influence over other CEOs. While primary fundraising duties cannot be effectively delegated, a professional fundraiser can add value, particularly when the reform group has aggressive fundraising goals.

*b. **The Fundraiser Must Convey the Vision of Reform.*** The lead volunteer fundraisers and professionals must also be capable of inspiring potential supporters by communicating the group's policy vision and passion for reform.

*c. **Support Must Be Broad-Based.*** Do not yield to an early tendency toward funding the effort from within the circle of the founding members. This is hardly an appealing prospect for a program of broad public benefit, and the members will eventually tire of carrying a burden that should be shared by many. It is time

consuming and frustrating to discover that responsible companies and individuals are willing to take a free ride and benefit from a reform program. Count on fundraising to be the biggest potential Achilles' heel of any reform effort.

4. Intellectual Resources. You may know your issue and what reforms should be implemented, but persuading legislators, the media and the public requires substantial investment in intellectual resources.

*a. **Issue Research.*** Successful public policy initiatives must be founded on accurate, thorough, and comprehensive research. When you are asking business men and women to consider your recommendations and make them a top priority, your academic, economic, and legal research must be unimpeachable. TLR's legal research is generally done for internal consumption, but we also routinely publish white papers explaining proposed legislation in detail. Economic research that quantifies the cost of abusive litigation practices is also done in support of legislation. We retain qualified attorneys and university economists to perform this necessary research.[6]

*b. **Public Opinion Research.*** Once the major outlines of the academic and legal research are known, you must do market research to understand how the public is likely to react to your issues. The results tell you how best to communicate your message and which of your opponent's arguments are going to carry the most weight. This is as much science as art, and the message should not be guided by "gut instincts."

5. Operations

*a. **The Legal Team.*** You must retain legal experts skilled in the substantive law in question so that your proposed statutes are clear and resistant to being misconstrued or challenged in court. Because our subject is litigation, we retain outstanding business trial and appellate lawyers who are philosophically attuned to our position.[7]

Having real trial veterans on the legal team helps trump the opponents of tort reform, who have always been adept at proposing innocuous-sounding amendments that will actually gut the proposed reforms. Your legal team must also be vigilant up until the very point that the bill is signed into law so that "minor"

6 Existing state and national research sources have proven invaluable to the reform effort in Texas. Numerous national groups have published valuable research, including The Manhattan Institute; the RAND Institute for Civil Justice; the U.S. Chamber of Commerce Institute for Legal Reform; the AEI-Brookings Joint Center; the American Tort Reform Association; and the Federalist Society. The Texas Public Policy Foundation at the state level likewise performed key studies that materially aided the reform effort. The American Legislative Exchange Council has maintained a valuable resource in its exceptionally well crafted and practical civil justice model acts.

7 TLR found that many lawyers, including many conservative practitioners who favor reform, are simply uninterested in expending the time and energy to change the system. So, you need to pick a lawyer who really believes in your issues to be able to tap into the legal creativity that is needed to structure truly effective reform legislation.

and "housekeeping" changes don't slip in at the last minute to eviscerate your bill. Don't think this doesn't happen—it does.

b. The Lobby Team. Even though the effort is best directed by volunteers, a highly motivated and skilled professional lobby team is essential to the success of your public policy initiative. They must advise you on such crucial decisions as picking the right sponsor and co-sponsor in each legislative chamber, on how your bill can be assigned to a committee whose chairman and members are open-minded about your issue, and on a myriad of other strategic and tactical decisions along the way to passage. Your lobby team will guide your overall legislative strategy—but the volunteer leadership must ultimately make the crucial decisions.

When picking outside professionals, it is critical that you choose those who share your commitment to reform. Many professionals who are outstanding in their fields won't fit this description, so special care in selection is important. You will find that many potential lobbyists and political consultants, for example, are too closely tied to certain legislative leaders or to other clients, or are too cynical to be of real help to you. But if your professionals are true believers in your cause, their contributions will be invaluable.

c. The Media and Communications Team. The media is an integral part of your strategic plan. During legislative wars, battles are usually underway on two fronts. The first is the obvious legislative battle, where your bill is being fought in committee and on the House and Senate floors. But there is also the media battle, where your opponents are trying to turn public opinion against important proposed reforms or are trying to put out misinformation that labels your proposed reforms as bad for consumers, bad for children, or bad for anything they can dream up to obscure the true merits of the reforms. The ingenuity—and disingenuousness—of the plaintiff's bar in conjuring up the supposed evils of litigation reform is always a wonder to behold.

A gutter-level example appeared during the plaintiff lawyer–funded publicity blitz opposing the 2003 medical malpractice reform bill, which included caps on non-economic damages in healthcare cases. To bolster their appeal to conservative right-to-life legislators, the plaintiff lawyers deceptively deployed "pro-life" spokesmen equipped with "statistics" purporting to prove that medical malpractice caps would lead to an *increase* in abortions. Their ominous message claimed that California's adoption of medical malpractice caps in 1975 produced an increase in abortions—conveniently failing to mention that abortion had been legalized in *Roe v. Wade* only two years earlier.

Trying to inject an emotionally charged and irrelevant social issue into the debate backfired badly on the plaintiff lawyers because it was not hard to show that the abortion rate increased everywhere in the country in the 1970s, especially following *Roe v. Wade*.[8] But the magnitude of the plaintiff lawyers' foray into statistical fakery became transparent when research disclosed that abortions in Texas increased at twice the California rate in the same period, even though Texas had not enacted any version of the supposedly sinister damage caps the plaintiff lawyers were desperately trying to defeat.[9]

Finally, it is important that the reform group's communications be accurate and consistent across all of the group's various constituencies, including individual and organizational supporters, the media, elected officials, and opinion leaders. Key communicators should be press professionals or knowledgeable, well-prepared volunteers who can get your message understood by the media. Media advocacy must be unrelenting and persuasive, leaving no specious claim unanswered. Positive media coverage on both the news and the editorial pages, not to mention the burgeoning electronic and social media, as well as effective grassroots strategies not only help win campaigns but also maintain legislative gains, which inevitably come under attack in subsequent years.[10]

d. The Grassroots Team. Direct communications (office visits, letters, phone calls, emails) from constituents are often important to legislative success, if used well. Business support is always important, but to a rural or small-town legislator, his hometown automobile dealers or other respected local business men and women are more significant influences than the head of a major corporation or lobby group. It is hard and time-consuming work to organize a true grassroots network that will communicate with legislators on your issue.

TLR volunteers have been making speeches across Texas for the past 25 years. This has generated a significant organization of solid grassroots supporters in every part of the state. TLR tried the popular method of hiring a public relations firm to generate grassroots advocacy, but this generally did not prove successful. Once recruited, grassroots supporters must be kept informed on a regular basis, must be motivated to act, and must be invested in the work of the organization. For this reason, many of TLR's "grassroots" might be better referred to as "grass tops"—entrepreneurs, senior business leaders and other men and women who understand how public policies impact the economy and are active in their communities.

8 The U.S. Center for Disease Control and Prevention's Guttmacher Institute publishes abortion rates in the United States based on the number of abortions and births per 1,000 women age 15-44. The agency's trend and year-over-year data can be found at www.cdc.gov.

9 This same strategy appeared in 2018 in Arkansas, in which a Christian group had begun rallying churches and abortion opponents against a proposed tort reform measure, saying that limiting damage awards in lawsuits sets an arbitrary value on human life, contrary to anti-abortion beliefs, and conflicts with biblical principles of justice and helping the poor. A large cash donation by a plaintiff trial lawyer to an influential church group is said to have initiated the campaign.

10 A 2002 Scripps Howard "Texas Poll" designed by a skeptical reporter asked the question, "Is tort reform personally important to you and your family?" Seventy-eight percent of the 1,000 Texas respondents answered "Yes," no doubt startling the reporter.

e. Allied Groups. It is important to rally various trade associations and other business and citizen groups to support your effort. You cannot expect, however, that most groups will be in a position to dedicate significant resources to your reform program, since each of these groups is understandably focused on its own industry-specific issues. Nevertheless, if your effort is important to the state and has important implications for its economic vitality, you should be able to count on support from many of these organizations. Having their endorsement and assistance is definitely worth the effort, particularly for the credibility and momentum they add to your program.

6. Administration. Three separate types of organizations can be established to help implement public policy initiatives: (1) a Section 501(c)(6) or (c)(4) corporation to serve as the advocacy arm and operating entity of the reform effort, (2) a Political Action Committee to help elect reform candidates, and (3) a tax-exempt Section 501(c)(3) foundation for independent research and education. The foundation is optional depending upon the initiative. The operations and record keeping of these entities must scrupulously adhere to the law because your opponents are constantly looking for mistakes to exploit in order to undermine your credibility. TLR has created all three entities to achieve its reform objectives.

V. CAUTIONARY TALES AND MYTHS

1. Trial Lawyers Do Not Give Up. TLR has always been conscious that abusive litigation does societal harm by wasting judicial resources and undermining respect for the law, and that the cost of unnecessary and abusive litigation is ultimately borne by consumers. The plaintiff's bar continues to be a major political force nationally and remains a dangerous threat in Texas. They can be counted on to continue funding their "justice," "consumer," and "watchdog" organizations to make sure their industry remains a force in electoral campaigns and among federal and state lawmakers and judges. Their political commitment must be recognized as a perpetual force that continuously innovates in an effort to achieve success in the courthouse.

2. The Battle Never Ends. After 25 years of work, and enactment of over 80 legislative reform statutes that have aided every business sector in the state, the battle continues. In Texas, TLR has made a heavy commitment to the business community to create and maintain a competitive environment that allows CEOs and general cousels from all sectors to have a degree of confidence knowing that there is a statewide organization committed to defeating abusive litigation. But, in order to keep that commitment, TLR and its supporters must never relent.

Each election cycle, candidates backed by certain trial lawyers seek elected office with an eye toward eroding the reforms that have been put in place and creating new causes of action that would bring businesses of all sizes into court. Likewise, in each

legislative session there are efforts to pass new laws or amend existing statutes to create ambiguities or new causes of action, and ultimately to increase the ability to pursue abusive litigation. As an organization dedicated to preventing abusive lawsuits, it would be convenient to declare that tort reform was "done" in Texas. But that simply would not be true. Worse, this would create an opportunity for members of the litigation industry to "turn back the clock" and disrupt, if not destroy, the competitive business environment in Texas.

3. Competing Priorities Can Depress Corporate Engagement. One would think that 50 years of drubbing in the courts would be sufficient to mobilize corporate America to declare war on lawsuit abuse. Yet even today, many corporations have put litigation reform near the bottom of their priority list. There are some significant exceptions where insightful, forward-thinking CEOs understand that a stable legal environment, free from extortionate lawsuits and massive legal exposure, is critical for the health of their companies.

It is undeniable that corporations have many wolves to fear in Congress, state legislatures, and regulatory agencies—not to mention the press. Businesses must protect their many flanks and are never free of anti-business smears in the media and the demagoguery of publicity-driven legislative committees, regulators, and governmental officials—and many companies have the scars to prove it.

It is still depressing to learn that many corporations categorize contributions to litigation reform groups into the same budgetary category—and management mindset—as the United Way and the March of Dimes. It is unclear why this is the case. Abusive litigation is often systemic, and importantly, it has the potential to bankrupt companies and change the landscape in many business sectors. Can anyone say this is true for Corporate Social Responsibility efforts or contributions to nonprofits? But even now, when litigation routinely intrudes into the boardroom, corporate investment in lawsuit reform, for the most part, remains stuck at trivial levels compared to their financial losses sustained in litigation.

More CEOs should consider the benefit of investing in civil justice reform in comparison to the cost of annual litigation expense. The last survey of the cost per company found that the average Fortune 200 company would spend at least $115 million a year on litigation. Even a $500,000 investment to prevent abusive lawsuits would amount to a meager one half of one percent of annual litigation expense.[11]

11 U.S. Chamber Institute for Legal Reform, *Costs and Compensation of the U.S. Tort System* (2018), https://www.instituteforlegalreform.com/uploads/sites/1/Tort_costs_paper_ FINAL_WEB.pdf (accessed Sept. 9, 2019). Also see Lawyers for Civil Justice, et al., *Litigation Cost Survey of Major Companies* (2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf (accessed Sept. 9, 2019).

4. Major Reforms Need Major Political Support. As previously mentioned, there are exceptional CEOs who support and help fund TLR's 501(c)(6) business organization. But the political dollars (TLRPAC) are typically contributed by civic-minded entrepreneurs and owners of privately held companies who have spent their lives building, rebuilding, and defending their own companies.

When one of these individuals is compelled to yield to an extortionate settlement and write out a settlement check for millions of dollars, the injustice of the system needs no explaining. *They get it*. These entrepreneurs are quick to grasp the importance of reform issues and are usually the strongest supporters one can find for any well-planned, effective reform program.

5. Stay Mission-Focused. TLR was established in 1994 with a monumental but clear goal in mind: to end the abusive litigation that was suffocating the economy and degrading the quality of life in Texas. Since then, and with support from a significant number of people across the state, TLR has been able to help institute the type of changes in Texas that have spurred economic growth and benefited every Texan, every day. However, as an organization dedicated to reform and creating certainty in the state civil justice system, it's not always a simple decision to stay the course. For TLR, success over time is due in large part to one thing: a disciplined approach. And after 25 years, over 80 statutory changes, and extensive political engagement, the goal of achieving and maintaining a fair and predictable civil justice system is, unfortunately, every bit as compelling today as it was in the beginning.

VI. CONCLUSION

When viewed in retrospect, TLR's 25-year fight for civil justice reform in Texas has proven to be much more daunting than it seemed when we started. For example, we thought at the outset that the corporate community across Texas would aggressively embrace and support our effort to change the civil justice system. We learned, however, that the press of other priorities and internal protocols sidelined many corporate interests, even when the companies recognized the need for our reform agenda.

We were successful in part because our initial optimism was buoyed by the prevalent sense in Texas that our justice system was out of control and was seriously damaging our economy and society. After setting our goals, we did not relent. And while it certainly was not easy, after 25 years, we take some satisfaction in knowing that our original agenda has been enacted, and that many new issues, equally important to the civil justice system and the economy in Texas, have also been successfully addressed. These litigation reforms are one of the drivers that propelled the rise of Texas to the top rank of of places to do business in the country—a part of what some call the Texas economic miracle.

Nonetheless, the strength of statutory reform can still be weakened by frailty in the institutions that apply and enforce them: juries, the judiciary, and the legal profession. Although most of the principal statutory elements of tort reform have now been enacted into Texas law, plaintiff lawyers are constantly exploiting the political process to improve their fortunes. As this is being written, more plaintiff-minded lower state and federal court trial judges are on the bench than there were 15 years ago, giving rise to more headline judgments than we have seen in many years. *So, our work must continue.*

While this template has necessarily focused on TLR's role in the reform process, fairness dictates that we recognize the many individuals and allied groups whose efforts are contributing to the reform effort in Texas. TLR and its statewide volunteers provide leadership, resources and focus, but passing laws requires the courageous and visionary leadership of public officials in all three branches of government. The reform advocacy effort requires financial support from individuals, entrepreneurs and corporations; research and recommendations from lawyers and academics; competent execution by lobbyists, political professionals, and communications experts; and coordinated activities with trade associations, other litigation reform groups, business groups, and corporate government relations officers. Like any successful major public policy initiative, tort reform in Texas has been, and continues to be, a broad-based team effort.

VII. EPILOGUE

Outside the litigation reform arena, it seems unlikely that the opposition to many reform programs will be as well-funded, organized, creative, and tenacious as the plaintiff trial lawyers, so not all parts of this template may fit other situations. But every reform effort attracts opponents. Reformers must conquer apathy, inertia, misinformation, anonymous social media smears, "fake news," entrenched bureaucracies, *ad hominem* attacks, partisanship, and media misperceptions, much of it actively promoted by the opposition. Every reformer will be told that the status quo will prevail forever and that those who seek change are misguided and naïve. The insiders always say these things because change is a threat. Have confidence in your mission and stay on target. Finally, when along the way you feel isolated, underfunded, and outnumbered, recall this insight of the anthropologist Margaret Mead:

Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.

APPENDIX

REFORM LEGISLATION IN TEXAS 1995-2019

(BY AREA OF REFORM)

TEXANS FOR LAWSUIT REFORM

REFORM LEGISLATION IN TEXAS 1995-2019
(BY AREA OF REFORM)

I. BROADLY APPLICABLE REFORM LEGISLATION

1. **Class Actions (2003).** Originally conceived as a way of litigating numerous identical lawsuits in one court proceeding, class action lawsuits morphed into a weapon of mass destruction in the hands of plaintiff lawyers, who were routinely awarded immense fees for representing the class. Aided by friendly judges who exercised almost unlimited power to "certify" a class action, this kind of litigation poses the risk of such huge damages that defendants almost always settled class actions rather than risk a trial. To stem class action abuse across the state, the Legislature

   - granted the Texas Supreme Court jurisdiction to hear appeals from a trial court class action certification order;
   - required issues within the primary jurisdiction of a state agency to be addressed by that agency before the plaintiff may proceed to court to pursue a class action;
   - abolished percentage-based contingency fees in class actions in favor of hourly based fees with the opportunity to have the fee multiplied in cases of exceptional performance by the plaintiff lawyer; and
   - set a new precedent requiring the plaintiff lawyer to be paid in coupons versus cash when a class action is settled using coupons to compensate the class members.

2. **Punitive Damages (1995 & 2003)**. Historically, few guidelines were in place governing the award of punitive damages, which often resulted in wildly excessive awards. The Legislature addressed punitive damages as follows:

   - The 1995 reforms limited punitive damages to the greater of: (i) $200,000 or (ii) two times economic damages plus an amount equal to the amount awarded for non-economic damages up to $750,000.
   - The 1995 reforms also enhanced the burden of proof, permitting an award of punitive damages only upon a showing of "clear and convincing evidence" rather than a mere "preponderance of the evidence."
   - The 2003 reforms required a unanimous 12-0 jury verdict for the award of punitive damages rather than the 10-2 verdict allowed for an award of actual damages.

3. **Proportionate Responsibility (1995 & 2003).** In a civil lawsuit, the jury must determine which of the potential parties caused the plaintiff's injury and then assign a percentage of fault accordingly. The jury also must determine the amount of money the plaintiff is awarded to compensate for her injury. Due to reforms to the proportionate responsibility statutes, the following apply:
   - Texas law now provides that a defendant is liable only for its own percentage of fault unless his fault exceeds 50 percent, in which case the defendant can be required to pay for all damages. Previously, a defendant that was more than 20 percent at fault in an ordinary negligence case could be required to pay all damages.
   - A plaintiff found more than 50 percent responsible is barred from any recovery.
   - The concept of proportionate responsibility applies to all cases, including economic and business torts, in addition to personal injury, death, and other personal tort claims.
   - All persons, including co-defendants who have already settled, bankruptcy petitioners, fugitive criminals, governmental entities entitled to immunity, employers covered by workers' compensation laws, and persons beyond the court's jurisdiction may be assigned a percentage of fault by the jury.
4. **Forum Shopping (1995 & 2003).**
   - The 1995 reforms abolished highly permissive venue rules for corporations that fostered abusive efforts to find a "favorable court" in certain parts of Texas.
   - The 2003 reforms fixed an ambiguity in the 1995 statute, which was originally enacted to require all plaintiffs to independently establish venue by allowing an immediate appeal of a trial court's decision to allow multiple plaintiffs to join a case.
   - To discourage out-of-state and foreign forum shopping into Texas, state forum non conveniens rules were modified to give Texas trial judges broad discretion to dismiss cases that should be pursued in another state or country. (Texas rules became aligned with federal forum non conveniens practice.)
5. **Offer of Settlement (2003 & 2011).** The offer of settlement statute encourages early resolution of legitimate civil cases. The concept is simple: defendants should be encouraged to make a sincere offer at an early stage of the case, and plaintiffs should be encouraged to accept a reasonable offer rather than seeking a "windfall" through prolonged litigation.
   - Parties who make reasonable pretrial settlement offers may be entitled to recover their attorneys' fees and other litigation-related costs when the opponent refuses the offer and then recovers significantly less in the trial than the initial offer.
   - Only defendants can initiate a settlement offer to prevent the creation of a "defendant pay" rule.

   - This offer of settlement procedure was modeled on similar provisions that were added to the Deceptive Trade Practices Act and the Insurance Code's Unfair Claim Settlement Practices Act at TLR's behest in 1995.
6. **Product Liability (2003).** Texas law has long recognized the right of a person to sue a manufacturer for an injury caused by (1) a defective or dangerous product, or (2) insufficient warning labels related to potential dangers arising from the product's use. These cases, however, must have guideposts to prevent meritless lawsuits against safe and beneficial products. In 2003, the Legislature adopted the following reforms:
   - In pharmaceutical cases, Texas law provides a rebuttable presumption in favor of manufacturers, distributors, or prescribers of pharmaceutical products in cases alleging failure to provide adequate warning about the product's risk, *if* the defendant (1) provided the government-approved warnings with the product and (2) did not mislead the government to obtain approval of the product.
   - In other product liability cases, a rebuttable presumption was established in favor of manufacturers who comply with federal standards or regulatory requirements applicable to a product *if* the government standard was (1) mandatory, (2) applicable to the aspect of the product that allegedly caused the harm, and (3) adequate to protect the public from the risk.
   - Sellers of products are not liable for a product defect *if* (1) the seller simply acquires the product from the manufacturer and sells it to the consumer and (2) the manufacturer is a domestic company.
7. **Frivolous Lawsuits (1995, 2011 & 2019).** Civil procedures were amended to discourage and penalize frivolous lawsuits.
   - A 1995 reform provides that
     - by signing a pleading, a lawyer warrants that the pleading (1) is not being presented for any improper purpose, including to harass or cause unnecessary delay, (2) will not needlessly increase in the cost of litigation for the opposing party, and (3) is supported by facts; and
     - if a lawyer signs a pleading that does not fulfill these warranties, he or she may be forced to pay the opposing party's attorney fees or suffer another similar punishment.
   - In 2011, the Legislature asked the Texas Supreme Court to create a rule to quickly dismiss cases that have "no basis in law or fact." The Legislature required that when one of these motions is filed, the party who prevails must be awarded attorney fees.
   - Some courts are reluctant to impose attorney fees on a plaintiff whose case is being dismissed. Consequently, the 2011 statute was amended in 2019 to

provide that the award of attorney fees is discretionary rather than mandatory, which should encourage the granting of these motions in appropriate cases.

8. **Actual Damages (2003).** A plaintiff who prevails in a lawsuit is typically entitled to recover his or her "actual damages"—the amount of money necessary to make the plaintiff whole for things like lost wages and medical bills that have been paid or are owed. Laws passed in 2003 in pursuit of that goal accomplished the following:
   - Limited the recovery of healthcare expenses to the amounts actually paid by the plaintiff or someone on the plaintiff's behalf, rather than allowing recovery of "retail" prices that were not actually paid.
   - Allowed the jury to consider a plaintiff's income taxes when awarding lost future income because personal injury awards are not subject to federal income taxes.
   - Prohibited the assessment of prejudgment interest on an award of future damages or punitive damages, correcting a perverse feature of prior law.
   - Lowered prejudgment and post-judgment interest rates to a market-based rate, but with a floor of five percent and a ceiling of 15 percent. Before 2003, the pre- and post-judgment interest rate was set at 10 percent.
9. **Consumer Protection Act (1995).** The Texas Deceptive Trade Practices–Consumer Protection Act (DTPA) was supposed to be a consumer protection statute when enacted in the mid-1970s. A key provision allowed a consumer to recover up to three times her actual damages and attorney's fees to help consumers pursue small cases that otherwise could not be pursued. However, because of the broad statutory language and liberal court interpretations, DTPA claims were pervasive and the initial intent was lost.
   - In 1995, the DTPA was amended to eliminate claims involving matters with a total value of more than $500,000, or more than $100,000 for claims based on a written contract when plaintiff received independent legal advice prior to signing the contract.
   - The DTPA was also amended in 1995 to create a high standard for awarding triple damages. (In most cases, the defendant must have acted "knowingly" or "intentionally" for the plaintiff to recover these enhanced damages.)
   - Generally, DTPA actions are now allowed only for economic damages and are subject to the proportionate responsibility statute.
   - Comprehensive detailed changes were enacted to remove a broad range of one-sided pro-plaintiff provisions.
10. **Appeal Bonds (2003).** A defendant who has been found liable for monetary damages has the right to appeal that judgment. At the same time, the successful plaintiff has a right to try to seek collection during the appeal, *unless* the defendant posts a bond to satisfy the judgment if the appeal is unsuccessful. In 2003, the Texas Legislature passed a law to perfect the statute as follows:
   - No appeal bond can exceed the lesser of $25 million, one-half of defendant's net worth, or the total compensatory (not punitive) damages awarded to the plaintiff.
   - The trial court has discretion to lower the bond amount further if the amount required is so large that it effectively cannot be posted.
11. **Multidistrict Litigation (MDL) Panel (2005).** Texas had no similar procedure prior to this reform. Modeled on federal MDL procedure, a Texas Multidistrict Litigation Panel has the power to transfer factually related cases from multiple counties to a single trial court for consolidated or coordinated pre-trial proceedings. Consolidated proceedings help ensure consistency and save time and money when multiple lawsuits arise from the same facts in multiple counties. Cases not settled are returned to the original counties for trial on the merits.
12. **Attorney General Penalty Power (2019).** In Texas, the DTPA may be used by Texas's Attorney General (AG) and local prosecutors to curtail deceptive conduct. Before the 2019 amendments, the AG could seek to recover a penalty of $20,000 *per alleged violation* of the DTPA on top of recovering restitution on behalf of injured consumers and obtaining an injunction to stop improper conduct. Because the $20,000 per violation penalty created untoward leverage for alleged violation of the DTPA, the Legislature halved the penalty in 2019 to $10,000 per violation.

II. SPECIFIC-NEED REFORM LEGISLATION

1. **Attorney Advertising (2019).** Advertisements for legal services are ubiquitous. They often are designed to frighten consumers in to becoming new clients. In 2019, the Legislature amended the statutes that govern attorney television advertising as follows:
   - The advertisement must disclose that it is an *advertisement* and identify the sponsor of the ad.
   - The advertisement must disclose the name of the attorney who will represent a person who responds to the advertisement. Selection of an attorney is the most important decision a person makes when considering a civil lawsuit. But because the advertisements often are sponsored by solicitors who do not actually provide legal services in Texas, the prospective client is farmed out to an unknown lawyer chosen by the advertiser based on the advertiser's economic considerations, not the client's best interest.

- If the purpose of the advertisement is to generate clients to sue for prescription drug–related injury, the ad must state that the viewer should *not* discontinue use of a prescription medicine without first consulting a physician. These ads often frighten consumers into discontinuing use of important medications, with disastrous results.

2. **Government Contingent Fee Contracting (1999, 2007 & 2019).** State and local governments (cities, counties, school boards, and others) throughout the nation are heavily recruited by attorneys to file lawsuits against private companies for all kinds of cases, from lawsuits against general contractors for alleged defects in construction of public buildings to lawsuits against pharmaceutical companies for harm caused by opioids. The attorneys always promise "no-cost" representation, unless the case is successful. Often, these are arrangements involving taxpayer resources without public input and/or consideration of the payment terms. Because taxpayers populate the juries, these lawsuits are uniquely challenging to defendants.

   - A 1999 law outlaws the award of contingent legal fees for representing the State of Texas based on a percentage of the recovery. This law was a direct result of the State paying over $3 billion to five law firms in the tobacco litigation, for relatively little work. Only hourly based contingent fee arrangements are permitted under the 1999 law. The law allows the attorney to charge a premium fee of up to four times the otherwise reasonable hourly rate to account for the risk assumed by the attorney.
   - In 2007, the Legislature established that many local governments in Texas also could not enter into a percentage-based contingent fee contract with a private attorney without complying with the same restrictions applicable to the State. The local governments' contracts became subject to review and approval by the Comptroller of Public Accounts. As a result, many local governments were somewhat restricted in their ability to contract with private attorneys through percentage-based contingent-fee contracts.
   - In 2019, the Legislature shifted the contract-review process from the Comptroller to the AG and made restrictions on contingent-fee contracting applicable to *all* local governments. In addition, the 2019 law requires local governments to use a public and fully transparent process to retain contingent-fee lawyers.

3. **Texas Citizens Participation Act (2019).** The Texas Citizens Participation Act (TCPA), which passed in 2003 without TLR involvement, is a law providing for the quick dismissal of a lawsuit filed by one person to harass another person for exercising his or her First Amendment rights. The lawsuit, called a "Strategic Lawsuit Against Public Participation" (SLAPP), is not designed to redress a wrong, but instead to impose so much litigation expense on the defendant that she will

cease exercising her constitutionally protected right to speak freely. The TCPA as initially drafted was overly broad and used to dismiss many lawsuits having nothing to do with the First Amendment. In 2019, with TLR's engagement, the Legislature amended the law to return it to its intended purpose of protecting freedoms of speech, press and association.

4. **Judicial Campaign Finance Limitations (1995 & 2019).** Since 1876, the citizens of Texas have elected their judges in partisan elections. The judges who seek to serve on the bench must raise funds to pay for advertisements and other campaign activities. Many of the contributions to judges are made by attorneys who practice in their courts, which, at the very least, creates an appearance of impropriety.

   - The 1995 reforms imposed disclosure requirements on the process of judicial fundraising and imposed limits on the amount of funds that any individual or any law firm may make to a judicial candidate.
   - In 2019, the Legislature amended the law to remove ambiguities and aspects that, under recent U.S. Supreme Court decisions, probably were unconstitutional. The 1995 limits on contributions to judicial candidates, however, remain in place.

5. **Weather-Related Litigation (2017).** Following Hurricane Ike in 2008, a large number of lawsuits were filed against the Texas Windstorm Insurance Association (TWIA), which is the insurer of last resort along the Texas coastline. The mass of lawsuits filed against TWIA caused it to become insolvent. Starting in 2013, the litigation model that was used against TWIA was being used against private insurers statewide following severe weather events, like hailstorms and forest fires, causing an increase in insurance rates.

   - In 2011, the Legislature passed a law creating a new process for resolving disputed claims, requiring the parties to use independent experts to determine the validity and value of the claim, virtually eliminating the use of attorneys in TWIA claims disputes.
   - In 2017, to address the explosion in lawsuits against private insurers, the Legislature passed a law requiring policyholders to give their insurers 60 days' notice and a description of the problem before filing a lawsuit, thus giving the insurer time to reevaluate the dispute and work toward a resolution.

6. **Americans With Disabilities Act (ADA) Lawsuits (2017).** The ADA imposes architectural standards on places that are open to the public to ensure that these public facilities are accessible by people with disabilities. The law also creates liability for the failure to comply with the standards. Texas has a parallel law, which also creates liability. Beginning in 2015, a number of lawsuits were filed against Texas businesses by the same attorney representing a single client, all of which alleged

technical—and easily repaired—violations of the ADA. This kind of "drive-by" litigation under the ADA has been vexing California businesses for decades.

In 2017, the Legislature passed a statute requiring that before a lawsuit may be filed alleging that an architectural barrier prevents a disabled person from accessing a public facility, the owner or lessee of the property must be given notice of the impediment and an opportunity to fix it. If it is not fixed within the allotted time, the lawsuit may proceed. The goal of the law is to encourage business owners to comply with the architectural requirements of the ADA so that every business is accessible to all Texans while discouraging "drive-by" lawsuits by plaintiffs.

7. **Forum Shopping in Dredging Cases (2007).** Texas has no natural seaports. All Texas seaports are manmade, typically at the mouths of rivers emptying into the Gulf, which must be regularly dredged to be deep enough to function. In 2005, the companies that dredge Texas's seaports began to see an unusual increase in the number of personal injury lawsuits by former employees being brought in notorious South Texas counties far from the location of the accidents. In many instances, the employee had never reported an injury to the dredging company before filing a lawsuit. Dredging companies were leaving Texas because of their litigation exposure.

   To address the lawyer-driven spike in litigation, the 2007 reform fixed the 1995 venue statute that allowed lawsuits to be pursued in the county in which the plaintiff resides. "Injuries on the seas" now must be pursued in the county in which the injury occurred or the county in which the defendant has its principal place of business in Texas. As a result of this reform, abusive dredging lawsuits evaporated.

8. **Asbestos and Silica Cases (2005, 2013 & 2015).** Lawsuits for alleged asbestos-caused diseases constitute the United States' longest-running mass tort litigation. Because Texas has a strong industrial sector, and for a period of time had permissive statutes governing venue, proportionate responsibility and punitive damages, Texas was the preferred forum for asbestos lawsuits. Tens of thousands of plaintiffs filed asbestos lawsuits in Texas's courts. Then, in the early 2000s, the asbestos lawsuit model was applied to silica-related injuries.

   - The 2005 legislation
     - » required courts to use strict, medically sound diagnostic criteria to determine if a plaintiff truly has a disease caused by exposure to asbestos or silica, to address the problem of lawyers filing lawsuits on behalf of unimpaired people;
     - » transferred asbestos and silica cases pending in Texas state courts to two multidistrict litigation (MDL) courts for coordinated and highly efficient pretrial proceedings;
     - » moved pending cases by unimpaired plaintiffs to two "inactive dockets" managed by the MDL courts, where the cases remain pending until each plaintiff establishes an actual impairment under the statutory medical criteria;
     - » required dismissal of new asbestos or silica cases that do not satisfy the statutory medical criteria, but allowed a plaintiff to re-file his lawsuit later if actual impairment is demonstrated;
     - » prohibited "bundling" of hundreds of plaintiffs' cases into a single lawsuit, a tool regularly used before 2005 by personal injury trial lawyers to leverage settlements on behalf of unimpaired plaintiffs;
     - » limited the use of diagnostic materials obtained through mass medical screenings paid for by trial lawyers and used to identify potential clients, most of whom have no actual asbestos- or silica-caused disease; and
     - » extended the statute of limitations to allow an asbestos or silica lawsuit to be filed within two years after diagnosis of actual impairment no matter when the harmful exposure happened, thus ensuring access to the courts for anyone suffering from an asbestos- or silica-caused disease.
   - Legislation enacted in 2013 required the MDL pretrial courts to dismiss all unimpaired plaintiffs' cases sitting on the inactive docket, but these cases can be refiled at any time the plaintiffs demonstrate an asbestos or silica-related injury.
   - Legislation enacted in 2015 requires asbestos claimants to pursue their claims against special bankruptcy trusts that have funds available to compensate claimants for asbestos illnesses before a lawsuit against solvent defendants can move forward in a Texas court. The claimants must file all possible trust claims—and disclose the claims and money received from them—to the defendants in the lawsuit. By requiring this disclosure, asbestos lawyers are prevented from making inconsistent allegations in the bankruptcy trust process and the lawsuit. In other words, the lawyer cannot allege that companies X, Y and Z are solely responsible for a claimant's injury in the bankruptcy process, and then say that companies A, B and C are solely responsible for the same injury in the lawsuit.

9. **Healthcare Providers' Liability (2003).** Before 2003, physicians were leaving Texas in large numbers because they could not afford the medical malpractice insurance premiums. The problem was especially acute in high-risk specialties (like obstetrics), in the Texas Rio Grande Valley, and in rural areas. The Texas Legislature addressed the problem with a comprehensive reform package in 2003.

- Based on experience garnered from a California statute, caps on non-economic damages (such as pain and suffering) were imposed on all healthcare liability cases. The caps are:
  - » A $250,000 per-claimant cap applies to all doctors and nurses.
  - » A separate $250,000 cap applies to each healthcare institution on a per-defendant basis, subject to a $500,000 aggregate cap in favor of all healthcare institutions in the case.
- An existing limitation on personal liability of government employees was extended to other healthcare professionals in government hospitals as well as to nonprofit operators of city hospitals or hospitals operated by special hospital districts.
- The 2003 law also provides additional liability limits to nonprofit hospitals or systems that provide (1) charity care and community benefits in an amount equal to at least eight percent of the net patient revenue of the hospital or system, and (2) at least 40 percent of the charity care provided in the county in which the hospital or system is located.

10. **Seat Belt Evidence (2003).** Texas courts had concluded that evidence of seat belt non-usage by a person injured in a vehicle accident was not admissible, even though it is the policy of the state to require seat belt usage and it was undisputed that the plaintiff's injury in many accidents would have been significantly lessened if a seat belt had been used. The 2003 law allows the jury to know whether a plaintiff was wearing a seat belt at the time of an accident for the purpose of allocating fault among the parties to the case.

11. **Migration of Air Particles (2003).** Creative plaintiff lawyers developed a theory that molecules released into the air by a defendant were "trespassing" onto neighboring property and causing injury. Under the common law that has existed for centuries, trespassing on land is presumed to cause injury to *the owner of the land*, without a showing of an actual injury. Using a trespass claim in regard to the "migration" of air particles created a new, broad liability without any proof of actual damages to the person who inhaled the particles. The 2003 law also narrowed the rules governing "toxic tort" cases to require that the migration or transportation of an air contaminant (other than an odor) may create liability only if there is a showing of actual and substantial damage to the plaintiff.

III. REFORMS TO PROTECT INDIVIDUALS

1. **Schoolteacher Immunity (2003).** A 2003 law updated protection for teachers against non-meritorious litigation related to actions taken by the teacher at school.

2. **Volunteer Immunity (1995, 1999 & 2003).**
   - The 1995 reform expanded immunity coverage of prior law to state and local elected and appointed officials, volunteers, employees, and board and commission members.
   - The 1999 reform extended protection to doctors and other health care providers who donate time and skill to treat persons unable to afford medical care.
   - A 2003 reform provides additional protection from lawsuits for volunteers of charitable organizations and volunteer firefighters.
3. **Claims Against Design Professionals (2003).** In a lawsuit against a registered architect or licensed professional engineer for an alleged design defect in a building or other structure, a 2003 law requires the plaintiff to provide an affidavit by a third-party registered architect or licensed professional engineer setting forth the specific acts of negligence allegedly committed by the defendant, at the time suit is filed. As a result, a plaintiff cannot file a lawsuit against an architect or engineer based on mere supposition that a structural failure was the result of a defective design.
4. **Landowner Liability to Trespassers (2011).** In 2011, the Texas Legislature passed a law ensuring that Texas landowners will not, in most cases, have liability to trespassers who are injured on the owner's property. This was a codification of long-standing Texas common law, which required landowners to protect invited guests, but not to protect trespassers. The exceptions in the common law and 2011 statute are that a landowner cannot intentionally injure a trespasser or create a feature of the land that is dangerous but so attractive to children as to invite them to trespass.
5. **Truthful Disclosures About Employees (1999).** Under a 1999 law, Texas employers are protected from civil liability when the employer discloses truthful information about a current or former employee, unless it is proven by clear and convincing evidence (a higher standard than a mere preponderance of the evidence) that the information provided by the employer was known to be false at the time the disclosure was made or that the disclosure was made with malice or in reckless disregard for the truth or falsity of the information disclosed.

In addition to the reforms listed, other important reforms have been enacted into law since TLR was founded in 1994. A more detailed summary of reform legislation in Texas during this period can be viewed at the TLR website:

www.tortreform.com

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