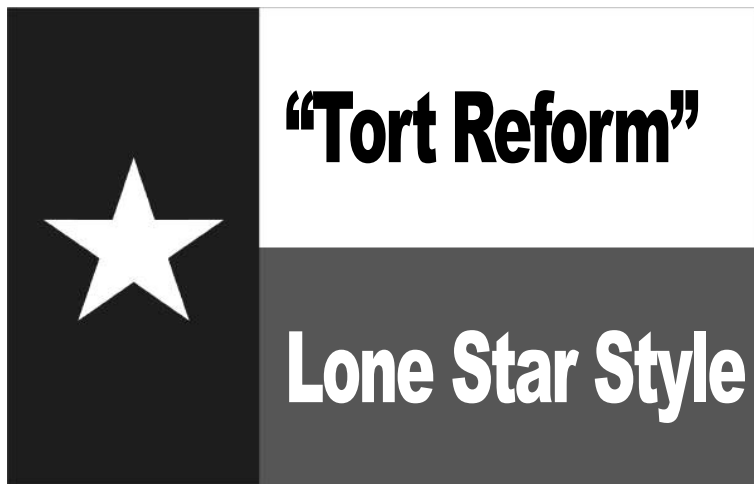


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# SOUTHERN EXPOSURE



**What "Tort Reform" Did to Texas —  
and What it Could Do to America**

**A Southern Exposure Special Investigation**

**By Stephanie Mencimer  
October 2004**

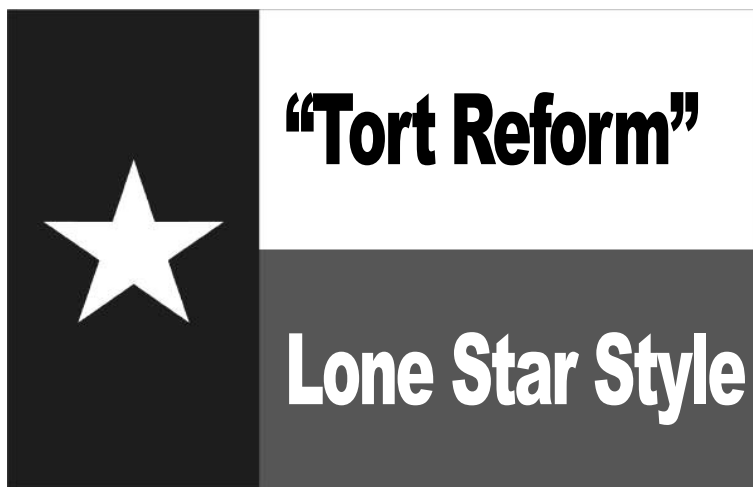
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We are pleased to present this *Southern Exposure* special investigation: "Tort Reform, Lone Star Style." As the issue of so-called "tort reform" attracts greater attention this election season, this ground-breaking report by Stephanie Mencimer explores questions rarely raised in the mainstream media: who are the forces behind "tort reform?" What do they stand to gain? And what will be the impact on ordinary people?

This *Southern Exposure* investigation was made possible in part by the Bob Hall Investigative Action Fund. Launched in November 2003, the Fund has sponsored some of the country's best reporting on issues from predatory banking to war profiteering, and Fund-supported reports have won several major awards, including the prestigious 2003 George Polk Award for Magazine Reporting. For more information or to make a contribution to support the Fund, please contact Chris Kromm at 919.419.8311 x26 or [chris@southernstudies.org](mailto:chris@southernstudies.org)

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**Under Governor Bush, Texas led the way in making it harder for ordinary citizens to get their day in court. What can we expect if the corporate-backed "tort reform" movement succeeds in its dream: making Lone Star justice the law of the land?**

**By Stephanie Mencimer**  
***Southern Exposure***  
**October 2004**

On June 23, 1999, 24-year-old Juan Martinez and his uncle Jose Inez Rangel were hydro-testing a pipe at the Phillips Chemical plant in Pasadena, Texas. The pipe was about 10 feet from a reactor that manufactured plastic used in drinking cups, food containers, and medical equipment. At a crucial moment, plant operators opened the valves in the reactor out of sequence, sending an excess of a volatile chemical into the reactor, where it mixed with a catalyst to create a vapor cloud—and a fiery explosion. The blast coated Martinez and Rangel with 500-degree molten plastic. They were burned alive.

Martinez and Rangel were not the first workers to die at the Phillips plant. All told, 30 workers had been killed and hundreds severely wounded at the plant in the previous 11 years. The worst of the accidents happened in 1989, when an explosion killed 23 people at the plant. The chemical company paid out \$40 million to compensate for the death of one of the victims.

In a lawsuit filed a decade later by Martinez's widow, attorney John Eddie Williams would write, "No other serial killer in this state has been allowed to go unpunished and virtually unbridled for so long."

A few months after he wrote that line, Williams was downtown taking the deposition of a worker from the plant. Williams looked out the window and saw smoke. Another explosion at the plant. And another worker dead—a man who had survived the 1989 blast. Seventy others were hurt, including four men who suffered third-degree burns over half their bodies. The explosion set off car alarms a mile away and closed nearby schools. "The guy being deposed would have been there," says Williams.

All the pieces were in place for a big verdict—a statement from a jury of average citizens who would punish the company for its long record of death and indifference. After he presented the case to a mock jury, Williams says, the mock jurors were so horrified by the facts some of them began boycotting Phillips products.

But Phillips had little reason to worry. The company didn't even bother to make a settlement offer to Martinez's family. It knew it could come into court cushioned by a series of "tort-reform" measures championed by George W. Bush during his first term as governor of Texas. Among them was a cap on punitive damages, signed into law by Bush in 1995, which limited such awards to the greater of \$200,000 or twice the economic damages, plus up to \$750,000 for non-economic damages such as pain and suffering.

Bush hailed the cap as way of reducing "frivolous" lawsuits. In order for the jury in the Martinez case to award punitive damages in excess of the cap, it would have to find that Phillips had "intentionally and knowingly" killed Martinez. In layman's terms, the legalese meant that the aggrieved had to prove Phillips murdered Martinez, on purpose—a standard no civil case in Texas has ever met.

The jury, which was not told about the damage cap during the trial, found Phillips had been negligent and acted with malice in Martinez's death. It awarded his widow, daughter, and parents \$7.8 million in actual

## **"In the same way that Reagan legitimized the Christian Right, Bush legitimized tort reform."**

damages and \$110 million in punitive damages—the equivalent of one month's profits for the company. But state law would reduce the punitive damages to \$3.2 million, making the entire award a fraction of one percent of Phillips's annual profits.

For Texas trial lawyers, awards of that size give mega-corporations like Phillips the green light to make business and safety decision based on life-versus-profit calculations they term "Pinto math." That's the crude calculation used by the Ford Motor Company in the late 1960s and early '70s when it decided it was cheaper to let hundreds of people die each year than to spend about \$5 per vehicle to prevent Pintos' gas tanks from exploding in rear-end accidents. Without the threat of high punitive damages in wrongful death lawsuits, Texas oil and chemical companies like Phillips have little incentive to spend money to improve unsafe plants and pipelines. Certainly the government isn't going to make an impact: Federal officials cited Phillips for serious safety violations in the 1999 explosion that killed Martinez and Rangel, but fined the company just \$140,000. Steven Daniels, a researcher with the American Bar Foundation, says, "Workers are just at the mercy now of their employers and the insurance companies."

It's a state of affairs whose genesis can be traced back to Bush's long-shot run for governor of Texas in 1994. Bush won by running a relentlessly on-message campaign, harping on three or four key issues – among them his proposed limit on "junk lawsuits" by consumers and injured workers. In January 1995, just a few days after he took office, Bush met with members of a corporate-funded group, Citizens Against Lawsuit Abuse, at a salsa factory outside Austin. Declaring a legislative emergency on out-of-control lawsuits, Bush said, "Tort reform is the most constructive and positive and meaningful economic development plan Texas can adopt." Calling the laws a "job creation package," Bush

## **The number of personal injury suits filed in Texas has plummeted 40 percent, despite a rapid increase in the state's population.**

went on to sign a series of measures that severely restricted citizens' ability to seek civil justice.

Now, as Bush seeks his second term in the White House, he and his backers have gleefully attacked Democratic vice presidential nominee John Edwards as a parasitic trial lawyer – and Bush is fighting for another four years in office in which he hopes to get a chance to finally spread his Texas tort reform agenda nationwide. “He’s trying to take some of the worst policy with the state of Texas and import it nationally,” says Austin plaintiff attorney Mark Perlmutter. Nine years into the transformation of the Lone Star State’s civil justice system, the experience of Texas is a preview of what the rest of the country might look like if Bush succeeds.

### **The lions of tort reform**

Whether they realize it or not, Americans are constantly hearing pitches for tort reform. A famous example is the case of the too-hot coffee from McDonald’s. In 1994, Stella Liebeck, an 80-year-old woman from New Mexico, won a \$2.7 million jury award from McDonald’s for burns she suffered after spilling coffee purchased at one of the chain’s drive-through windows.

Jay Leno and other talk-show comedians had a blast, riffing on lawyers and hot beverages for monologue laughs. The punch lines, however, wouldn’t have worked too well with a more detailed set-up: Liebeck suffered third-degree burns on her private parts. She needed an eight-day hospital stay plus skin grafts to recover from the injury. At first, she had asked McDonalds to simply pay her medical bills, but the company refused. Documents uncovered during her lawsuit showed coffee buyers had filed more than 700 claims against McDonalds alleging that its

coffee was too hot for human consumption. When the case went to trial, jurors did indeed award \$2.7 million in punitive damages – to punish McDonalds for failing to remedy the problem that it knew was injuring lots of people. A judge subsequently slashed the award to \$480,000 – a detail that late-night comedians and tort reformers haven’t seen fit to mention, either.

Facts and nuance notwithstanding, the tort-reform lobby thrives by convincing the public that courthouses nationwide are passing out multimillion-dollar awards for spilled coffee every day. The real victims, tort reformers claim, are thousands of small businesses that are careening into bankruptcy as they try to defend themselves from frivolous claims. And in the early 1990s, they began a massive PR campaign insisting that Texas, with some of the best trial lawyers in the country, was a “plaintiffs’ paradise” and a magnet attracting people to the state to play the “lawsuit lottery.” Tort reformers asserted that the legal system needed an overhaul to make Texas more business-friendly. Tops on their wish list was a cap on punitive damages.

To push that agenda, Texas’s tort-reform pioneers coalesced under the banner of Texans for Lawsuit Reform (TLR), which opened for business in 1994, the year Bush ran for governor. At its kickoff, founder Richard Weekley proclaimed that lawsuit abuse was “the No.1 threat to Texas’ economic future.” Like most other tort-reform offensives, TLR’s seized on a populist notion with adherents from coast to coast—namely, that lawyers are ruining America by bankrupting corporations with outrageous claims against honest companies. Yet some of TLR’s die-hard members hardly seem like innocent, abused entrepreneurs. A sampling:

■ Enron CEO Ken Lay gave \$25,000 in start-up funds for TLR. Lay had written to Bush in 1994 that if Texas didn’t do something about its “permissive” legal climate, Enron might just have to leave the state. Today, after more than 4,000 Enron employees have lost their jobs and their retirement funds invested in the company, Lay’s reasons for wanting legal immunity seem pretty obvious. But back then, Lay had more

pedestrian concerns about its gas and energy operations. In 1994, one of the company's methanol gas plants exploded in Pasadena, Texas, injuring several people working nearby. A neighboring chemical corporation sued Enron to block the plant from coming back on line, arguing that it had a long history of flagrant violations that were endangering workers.

■ Richard Weekley, the driving force behind TLR, is a strip mall developer whose family owns David Weekley Homes, one of the nations' largest homebuilding companies. David Weekley Homes is notorious in Texas for shoddy home construction and a host of worker safety violations. Dozens of homeowners with cracked and shifting foundations have attempted to file suit against the firm, alleging that their new homes began falling apart almost immediately after they moved in.

■ James Leininger, founder of the Texas Public Policy Institute, which did the early polling to come up with the term "lawsuit abuse." Leininger heads up Kinetic Concepts, a company that makes high-tech hospital beds that have prompted a rash of lawsuits from patients and nurses alleging that the rotating beds had dropped or crushed patients.

■ Jim "Mattress Mac" McIngvale, another TLR funder, is a furniture store owner who got sued after a 300-pound African lion kept at his Texas Flea Market mauled an 8-year-old girl and tore off part of her skull in 1987. The girl required extensive reconstructive surgery and faced the prospect of permanent brain damage. Her parents, who had no health insurance, sued McIngvale for allowing the lion (which was owned by somebody else) on the premises.

The questionable business habits of many of Texas' leading tort reformers is one reason their efforts had been mostly unsuccessful before 1994. But Bush changed things. Austin consumer attorney David Bragg says Bush was the friendly face TLR and the others needed to make lawsuit reform palatable to the public. "In the same way

### **"Workers are just at the mercy now of their employers and the insurance companies."**

that Reagan legitimized the Christian right, Bush legitimized tort reform in Texas," Bragg says.

Backing tort reformers, the governor endeared himself to a broad coalition of wealthy industry groups that had been attempting to push through limits on civil lawsuits nationally since the mid-1980s, particularly the tobacco industry. The year of Bush's first gubernatorial campaign, the tobacco industry set aside \$100,000 to underwrite a PR campaign in Texas heralding the epidemic of "lawsuit abuse" in the state. Tobacco money also helped create Citizens Against Lawsuit Abuse and provided \$15,000 in seed money to TLR.

When Bush lined up on their side, that money started flowing his way. People and groups associated with tort reform donated more than \$4 million to his statewide campaigns, more than any interest category other than oil and gas companies. As Bush's longtime political advisor (and former tobacco industry consultant) Karl Rove explained to the *Washington Post* in 2000, once Bush declared war on "junk lawsuits," "business groups flocked to us."

The tort reform campaign also gave Bush a big stick with which to bash trial lawyers like John Eddie Williams, who plow their multi-million-dollar legal fees back into the Democratic party. Trial lawyers are, along with unions, one of the biggest sources of funding for the party.

One thing the measures promoted by Bush didn't do was combat frivolous lawsuits. After all, it wasn't the little "slip and fall" suits Enron was worried about. As Williams says, "Frivolous lawsuits by definition are worth nothing." Besides, a state rule had been on the books for 15 years that allowed for sanctions against lawyers who file groundless lawsuits. "What they've done is outlaw big recoveries in good lawsuits," says attorney Perlmutter.

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## Does the tort reform movement consider your state a “JUDICIAL HELLHOLE?”

**F**our days before Christmas in 1999, 12 jurors in tiny Jefferson County, Mississippi, made national headlines when they slapped a drug company with a \$150 million judgement for injuries that its diet drug fen-phen caused to five local citizens.

The headlines, though, weren't about the behavior of American Home Products (now Wyeth), which knew its product was dangerous but aggressively marketed it anyway. (Fen-phen has killed several hundred people and injured an estimated 45,000 others.)

Instead, the news was all about how a group of poor, uneducated jurors in the South had helped a few gold-digger plaintiffs hit the “jackpot” at the expense of a deep-pocketed corporation. The verdict catalyzed the business community, which went on to launch a multi-million lobbying and PR campaign in Mississippi to make sure such verdicts became a thing of the past.

Reporters took the bait and flocked to Mississippi to tell the story of the nation's most generous jurors. In November 2002, viewers of the TV news magazine *60 Minutes* learned that tiny Fayette, in Jefferson County, was a place where “plaintiffs' lawyers have found that juries in rural, impoverished places can be mighty sympathetic when one of their own goes up against a big, rich, multinational corporation.” In the story, Morley Safer interviewed a local florist who had received a multi-million dollar settlement in a fen-phen lawsuit. The unnamed florist alleged that trial lawyers were bribing jurors to give big awards. “The jury awarded these people this money because they felt as if they were going to get a cut off of it,” he told Safer. Beyond that anonymous comment, the show that bills itself as TV journalism's most respected news organization offered no other evidence about payoffs to jurors.

During the broadcast, Safer interviewed Wyatt Emmerich, a newspaper publisher in Jackson, who explained a few big verdicts there by saying, “Look at the jurors. These are disenfranchised people. These are people who've been left out of the system, who feel like, ‘Hey, stick it to the Yankee companies. Stick it to the insurance companies. Stick it to the pharmaceutical companies.’ The African Americans feel like it's payback for disenfranchisement. And the rednecks, shall we say, it's like, ‘Hey, you know, revenge for the Civil War.’ So there's a lot of resentment, a lot of class anger, a lot of racial anger. And it's very easy to weave this racial conflict and this class conflict into a big pot of money for the attorneys.”

At the time of the episode, the U.S. Chamber of Commerce was spending \$100,000 on an advertising campaign in Mississippi to push for a cap on damages in lawsuits against corporations, and it had been sued by the state for improperly giving money to judicial elections. Nationally, the Chamber's Institute for Legal Reform had also committed to spend \$60 million lobbying for restrictions on citizens' rights to sue. Those facts weren't included in the story. Meanwhile, the florist, Beau Strittman, went public and retracted his comments about the payoffs, saying, “I just said it as a joking statement.” CBS spokesman Kevin Tedesco said the network could not comment on the fallout of the segment because several jurors have sued CBS for libel over the broadcast.

Nonetheless, the day after the program aired, the legislature passed new restrictions on lawsuits, and shortly afterwards, the FBI launched an investigation into the charges of jury corruption. That investigation thus far has not resulted in the prosecution of any jurors or lawyers, but in early September, 12 people were arrested for allegedly filing false claims to the fen-phen trust fund, which was set up after the jury verdict to compensate hundreds of people injured by the diet drug.

The *60 Minutes* episode hewed carefully to the media strategy of the tort reformers by reviving the old canard that poor and minority jurors are overly generous to plaintiffs—a phenomenon often called

the “Bronx effect.” The term was coined back in 1987, when author Tom Wolfe, in his novel, *The Bonfire of the Vanities*, described a plaintiffs’ lawyer who files malpractice claims in the Bronx rather than in Westchester County because he believes that the poor, minority Bronx juries were a “vehicle for redistributing the wealth.”

The legend of a Bronx effect has lived on, although the allegedly pro-plaintiff venues tend to change with the political winds. After the Bronx, there was “The Bank,” a heavily minority county in Los Angeles. Then there was Alabama, where in 1999, jurors in mostly black

Hale County hit the Whirlpool Financial National Bank (now Transamerica Bank) with a \$581 million verdict for a scheme to defraud elderly and illiterate people on satellite dish sales. And now, thank to the fen-phen verdict, Mississippi is the favorite plaintiffs’ paradise, particularly Jefferson County, which has the highest percentage of black residents and the highest unemployment rate in the state.

Legend notwithstanding, there’s not much empirical evidence that poor black jurisdictions routinely dole out big awards to plaintiffs. In 2002, Cornell law professor Theodore Eisenberg did an empirical study to see whether demographics actually corresponded to jury verdicts. He found that large black populations actually correlated negatively with award levels—i.e., jury awards were lower in areas with lots of African Americans. Duke law school professor Neil Vidmar undertook a similar study in the Bronx and found no statistically significant evidence that jurors in the heavily minority burough were more generous or more pro-plaintiff than in neighboring jurisdictions.

In Hale County, Alabama, the 1999 verdict against Whirlpool was hardly a trend. According to lawyer Tom Methvin, who litigated the case, the county hadn’t seen a verdict bigger than \$200,000 in 150 years. The Whirlpool case just happened to be particularly egregious.

Salespeople from Whirlpool, some of whom were convicted criminals, went door to door in the state selling satellite dishes to elderly and illiterate customers for \$1,100. The purchases were financed on bogus “Whirlpool” credit cards that carried 22 percent interest rates and an unlimited number of payments—facts that the company didn’t disclose. The same equipment could have been purchased in a retail store for \$199. The company bilked consumers out of millions of dollars through the scheme. “On the right set of facts, the juries get upset,” Methvin says. “They were just tired of being oppressed by these big companies taking advantage of them.”

David Stout, the former head of the New Mexico trial lawyers’ association, says that critics of juries in poor places tend to forget that “big money” is a relative term. “There is a school of thought that people from a poor background think \$100,000 is a lot of money,” and for that reason, some trial lawyers don’t want them on juries where they are aiming for damages in the nine-figure range.

Nonetheless, the idea that poor, minority jurisdictions are hostile to business is actively encouraged by groups like the U.S. Chamber of Commerce and the American Tort Reform Association (ATRA) In 2003 ATRA published a study, *Bringing Justice to Judicial Hellholes*, identifying jurisdictions its members consider “judicial hellholes” because they are “very plaintiff-friendly.” Among the 2003 “hellholes” were



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all the heavily African-American counties in Mississippi, two mostly Latino counties in Texas, the heavily Latino Miami-Dade county in Florida, and the mostly black Orleans Parish in Louisiana.

Earlier this year, the Center for Justice and Democracy (CJD), the nation's only anti-tort reform advocacy group, published an analysis of *Bringing Justice to Judicial Hellholes*. Noting that the hellholes are not selected on any empirical basis (but rather by a survey of ATRA's membership), CJD compared the 12 jurisdictions to census data. Of the 12, nine are in predominantly minority areas, and all but one are areas that have larger minority areas than the rest of the state they are located in. The U.S. Chamber of Commerce has likewise released an annual survey on state litigation climates and of the 18 jurisdictions identified as problematic, 15 are predominantly minority—including Mississippi's Jefferson County, featured on *60 Minutes*.

Despite the obvious racial undertones to the hellholes study, it has been cited authoritatively over the past two years by the *Chicago Tribune*, *St. Louis Post-Dispatch*, *Los Angeles Times*, *Philadelphia Daily News*, *New Orleans Times Picayune*, *Dallas Morning News*, *Forbes*, *Business Week*, *Wall Street Journal*, *Washington Times*, and *USA Today*. (None, incidentally, covered the CJD report.) The stories, especially those in a host of smaller news outlets, tend to quote civic leaders like Emmerich wringing their hands over their standing on the list and demanding that the legislature take action by passing restrictions on lawsuits.

Rarely do they take a more nuanced approach to exploring why the verdicts were so large in the first place. As Methvin suggests, Southern states like Alabama, where one in six residents is functionally illiterate, are fertile grounds for bad actors looking to make a buck. In Alabama, he says, weak consumer protection laws mean that the only recourse people have against fraud is a lawsuit.

Indeed, the Whirlpool verdict and ensuing publicity prompted Alabama state legislators to pass strict caps on punitive damage awards to make sure juries could never get so carried away again. Meanwhile, those same legislators did nothing, though, to prevent finance companies from perpetrating fraud on unwitting consumers the way Whirlpool and eight other out-of-state finance companies had done in the satellite dish scam.

Methvin says that there are also flip sides to these stories about the judicial hellholes, like the counties where "you couldn't get a dime if the Pope was run over by a drunk driver."

According to the U.S. Bureau of Justice Statistics (BJS), many of those types of jurisdictions do exist—such as the entire state of Massachusetts, where in the three largest counties, BJS reports that plaintiffs won only 29 percent of cases that went to trial. (In Worcester County, plaintiffs won only 19 percent of trials.) Or take Lancaster, Pennsylvania, where state court data reveals that out of 17 trials in medical malpractice cases between January 2000 and July 2003, plaintiffs won exactly zero. Nearby Philadelphia, meanwhile, is tagged as a "hellhole" by ATRA for being too plaintiff-friendly. But according to BJS, Philadelphia jury-verdicts in 2001 were split right down the middle between defense and plaintiffs.

Indeed, many of the "hellholes" identified by ATRA don't appear all that friendly to plaintiffs when more closely examined. ATRA cites several counties in Texas as hellholes, which is hard to fathom, given the radical changes in the state tort law last year, which, severely limited citizens' rights to sue, as well as the hard-right conservatives that dominate the state's appellate courts. In the largest counties in Texas, plaintiffs won at trial only 45 percent of the time in 2001, according, to BJS data. The *Houston Chronicle* reported recently that in 2002, the median award in Texas was \$25,000, compared with \$41,894 in the nation as a whole.

Meanwhile, Stout finds the presence of New Mexico in the ATRA "hellhole" report puzzling, because, he says, "We had tort reform in the 1970s," he says. "For us to even be on the chart of the tort reform movement is really silly."

— STEPHANIE MECIMER

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And despite all the rhetoric, Texas never suffered from a "litigation explosion." "There was never a time when Texas juries gave away lots of money all the time," says Steven Daniels, the American Bar Foundation researcher who has studied the impact of Bush's tort reforms on Texas. "Juries in Texas are almost always stingy." Bragg, a former lawyer in the state attorney general's consumer protection office, once did a survey of the awards granted under the state's consumer protection act, which allowed defrauded consumers to recover triple damages from misbehaving businesses. It was hardly the major threat to the state's economy that the tort reformers portrayed. Before the law was eviscerated in 1995 by Bush's tort reforms, Bragg found that plaintiffs won their cases less than half the time in Dallas, and even when they did "win," they rarely got any money. "But tort reformers decided there was a problem and mounted a major effort to change that law," he says.

Under his campaign pledge of bipartisanship, Bush managed to persuade Democratic Lt. Gov. Bob Bullock to go along with a package of measures that severely limited citizens' ability to win damages against corporations, doctors, hospitals, and insurance companies. The tort reformers couldn't have been more pleased. Ralph Wayne, head of the Texas Civil Justice League and co-chair of Bush's 2000 presidential campaign, says, "It is amazing the way someone like George Bush can make a difference. It was a marvelous year for us. Had it not been for George Bush and his persuasiveness we would not have been as successful."

Those bipartisan "reforms" had their desired effect. Since Bush signed the bill in 1995, the number of personal injury suits filed in Texas has plummeted 40 percent, despite a rapid increase in the state's population. Consumer lawsuits against sleazy car dealers, shoddy mobile home dealers, and other crooked businesses have become almost nonexistent, as have the lawyers who used to handle them. Daniels says lawyers simply can't afford to take cases that don't hold

**The [corporate] behavior that spawned many of those suits hasn't disappeared. But without the lawsuits, the public simply doesn't know about it.**

the possibility of punitive damages or awards for mental anguish because the actual amount of money involved in such cases is often so small. "Whether it was intended to or not, it may have the effect of cutting off access to the courts. If [lawyers] don't want to take your case, you don't get into court," says Daniels. The behavior that spawned many of those suits in the past hasn't disappeared. But without the lawsuits, the public simply doesn't know about it.

### **Tort reform cure-all**

**T**he first thing President George Bush did this year when he went to meet with newly-elected California Gov. Arnold Schwarzenegger was declare his intention to discuss his campaign on frivolous lawsuits. "We need a little tort reform in this great state of California," Bush announced. "Unfair lawsuits harm a lot of good and small businesses. There are too many large settlements that leave the plaintiffs with a small sum and the lawyers with a fortune ... Job creation will occur when we've got legal reforms."

As president, Bush has continued to chat up tort reform at every opportunity. In fact, now that he's passed most of his tax cuts and an education bill, tort reform often seems to be the administration's only domestic policy initiative and its only answer to any of the nation's ills. What's the Bush plan for helping 44 million uninsured Americans? Medical malpractice "reform," a bill in Congress that would impose Texas-style lawsuit restrictions on the rest of the country, capping punitive damages in lawsuits against drug companies, hospitals, nursing homes, and medical device manufacturers. The White House response to the 3 million people who lost jobs in the administration's first three

**Texans may not become fully aware of what they've lost through tort reform until they need a lawyer.**

years? Class action reform, legislation that would federalize most class action lawsuits, essentially eliminating those pesky complaints against Wal-Mart in California alleging that the company stiffed its low-wage workers on earned overtime.

After listening to the rhetoric for the past eight years, at least one Republican small businessman back in Texas is no longer buying it. A few years ago, if you had asked Houston small business owner and Republican Walt Shofner whether he supported Bush and his war on lawsuits, he would have said yes. But in 2000, Shofner discovered the reality behind the PR campaign. His company designed software for insurance companies, and had recently beaten out a larger competitor on a bid to upgrade software at Prudential Life in New Jersey. Afterwards, the competitor, Computer Science Corp. (CSC), accused his firm of violating a nondisclosure contract and asked American Express and Prudential to cancel their contracts with Shofner, which they did. Shofner sued, arguing that CSC, a corporate giant with nearly \$10 billion in revenues in 2000, was simply trying to squelch competition. The jury agreed and awarded Shofner \$8 million in punitive damages.

But after the jury announced its verdict, the judge declared that he had to reduce the award to \$200,000 because of the damage caps Bush signed in 1995. Shofner—as well as the jury—was shocked. Fred Kronz, one of the jurors in the case, says he couldn't believe the news. Kronz says the jurors took their job seriously and spent a lot of time trying to come up with an adequate punishment for CSC, which they believed was clearly in the wrong. During the trial, everyone in the courtroom knew about the damage cap except the jurors, who only learned of it after they announced their verdict, making their deliberations seem like a charade, says Kronz.

The decision essentially killed Shofner's business. He says, "CSC had no trouble paying me off. They got two or three million in revenue after I left [the other firms]. I got zapped for chump change by my competition. They have almost a monopoly on the software now."

Shofner is now a vocal critic of lawsuit restrictions: "Tort reform assumes that all plaintiffs are crooks. But if a case gets far enough to get an award, that's not frivolous. I was a Republican. I guess I still am. But I've seen the light ... Any small business person in Texas is at risk."

**Unlitigated, unprotected**

In fact, Texans may not become fully aware of what they've lost through the state's tort reform until they need a lawyer. That's what happened to Jacque Smith last year. In November 2003, Smith's 85-year-old mother, an Alzheimer's patient, was living at the Heritage Duvall Gardens nursing home in Austin. Late one night, a staffer entered Smith's mother's room and allegedly raped the elderly woman. Another employee witnessed the assault, but apparently didn't bother to report it to anyone and went home after his shift finished. Smith only learned about the assault because the witness mentioned it to someone at the home during an unrelated conversation later the next day. After her mother was examined at a hospital, the assailant was arrested and charged with aggravated sexual assault.

Smith then consulted a lawyer about filing suit against the nursing home for poorly supervising its employees. In the past, such a suit might have garnered a multi-million dollar settlement or jury verdict for the victim. Texas has some of the worst nursing homes in the country. A 2002 study by the special investigations division of the U.S. House Committee on Government Reform found 40 percent of Texas nursing homes committed violations of federal regulations that caused harm to nursing home residents or placed them at risk of death or serious injury. More than ninety percent did not meet federal staffing standards.

The poor conditions of Texas nursing homes led to a cottage industry in the legal profession, whose lawsuits posed much larger threats than any state sanctions.

A Harvard University study found that nearly nine out of 10 nursing home plaintiffs received compensation, a success rate that the study deemed "off the scale" in personal injury litigation, and a sign that the negligence as well as the severity of injuries in the cases was clear-cut. Rather than pledge to clean up its act, the nursing home industry lobbied hard for the passage of legislation that would put the lawyers out of business. The state passed the nursing homes' favored medical malpractice bill in September 2003, capping pain and suffering awards at \$250,000.

The new law has produced the results desired by its backers. When Smith looked for an attorney, she discovered her first hurdle might be simply finding one willing to take the case. The first attorney she called declined, as few lawyers in Texas will now handle such a complaint. Then she contacted Bragg, who explained to her that the most her mother could win would be \$250,000, because there were no economic damages involved. Smith's mother, after all, didn't have a job to lose and she didn't incur significant medical bills. After taxes and legal fees, she would receive at most \$100,000. That would make her ineligible for Medicaid, meaning the money would end up being funneled back into the nursing home industry that failed her in the first place.

As a result, Smith says she's unsure whether she will pursue legal action because she worries that any money that might result from it would not be used to improve the quality of her mother's life. But she is frustrated by the prospect of simply dropping the case. "It feels like somebody should be held accountable," she says.

According to a study by the *Dallas Morning News*, since the bill's passage medical malpractice lawsuits in Texas have fallen off by 80 percent. Ironically, in giving advice to citizens on how to choose a nursing home, the Texas Attorney General's office suggests using the number of lawsuits against a home as a good gauge of

**"I was a Republican. I guess I still am. But I've seen the light. Any small business person in Texas is at risk."**

quality. Its web site counsels, "A nursing home that gets sued frequently should not be your first choice." How the public will make these choices in the future? The web site doesn't say.

**ABOUT THE AUTHOR:** *Stephanie Mencimer was a finalist for a National Magazine Award for her reporting in The Washington Monthly on the battle over medical malpractice and tort reform. She is the author of "The Price of Confession," which appeared in the Winter 2003/2004 edition of Southern Exposure. Funding for this story was provided by the Alicia Patterson Foundation, the Fund for Investigative Journalism and the Bob Hall Investigative Action Fund.*

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