Thumbs on the Scale

A Retrospective of the Texas Supreme Court

2000-2010

Court**Watch**

a project of Texas Watch Foundation

www.TexasWatch.org

Court Watch is a project of the Texas Watch Foundation, a non-partisan 501(c)(3) public education non-profit organization. Texas Watch Foundation is dedicated to fair and open access to the civil justice system for all Texans. Court Watch has been monitoring and reporting on the Texas Supreme Court and the impact its decisions have on Texas families since 1996.

Court Watch wishes to thank all of the fellows and interns whose research and reporting over the last decade contributed to this report and to better public understanding of the Texas Supreme Court's role in the lives of everyday Texans. For more information about Court Watch or to read past reports, visit www.TexasCourtWatch.org.

This publication was printed in-house.

Thumbs on the Scale: A Retrospective of the Texas Supreme Court, 2000-2010

"All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."

–Andrew Jackson

The Texas Supreme Court has a profound effect on the lives of everyday Texans, yet perhaps due to the complex legal issues it handles, the court largely escapes public scrutiny. The laws that the legislature passes and the governor signs are, in essence, ink on paper until they are interpreted and enforced by the high court. Andrew Jackson said that our rights are a "mere bubble" except when they are protected and upheld "by an independent and virtuous Judiciary." An independent, impartial, and just judiciary is vital to the proper functioning of a democratic government, but in Texas the bubble has burst under the weight of an activist, ideological Texas Supreme Court that is more interested in protecting the narrow desires of a few powerful special interests than the broader, more comprehensive needs of Texas families.

Rather than operating in fidelity with the law to bring about justice, the Texas Supreme Court has marched in lock-step to consistently and overwhelmingly reward corporate defendants and the government at the expense of Texas families.

Since 1996, Court Watch has tracked the Texas Supreme Court. This report draws upon this body of research to quantify how often defendants have won and consumers have lost their cases over the last decade. We focus on this period of time because it marks a paradigm shift on the court. The justices appointed to the

74% *Average defendant win percentage*

22% *Average plaintiff win percentage*

79% *Percentage of cases consumers have lost*

29% *Pro-consumer score of justices appointed by Gov. Rick Perry*

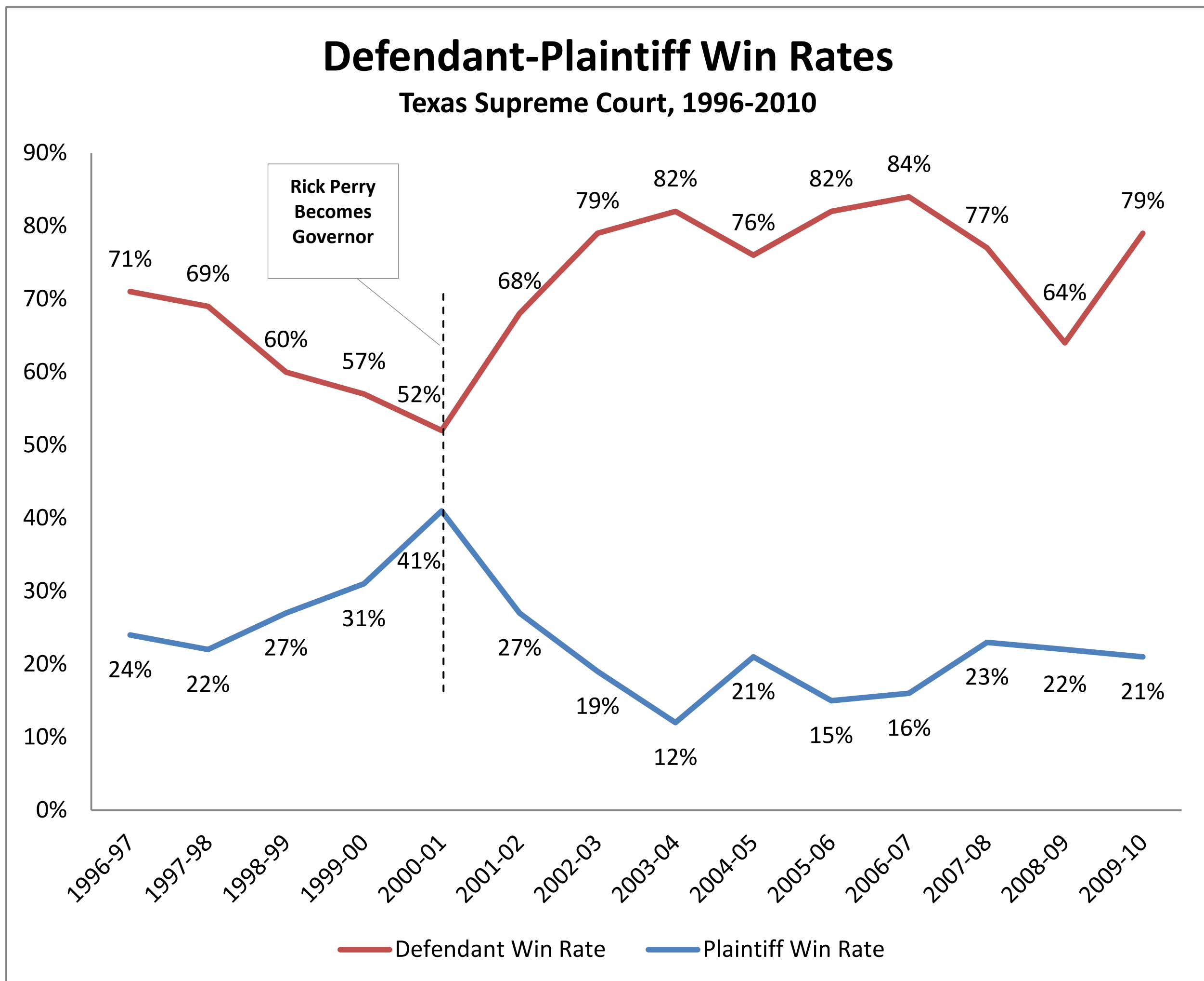
90% *Rate of agreement among justices on the Texas Supreme Court*

74% *Texas Supreme Court's jury reversal rate*

high court under then-Governor Bush, while generally defense-oriented, demonstrated reasoned and temperate judgment in a number of cases. In stark contrast, the justices that Governor Perry has appointed to the bench, and who were subsequently elected, have relentlessly and recklessly pursued an activist ideological agenda focused on immunity for corporate and state wrongdoers, subverting the rule of law from within and effectively turning the granite walls of the court into a mausoleum for plaintiffs.[1]

John Adams stated that our government should be one of "laws and not of men," but the justices on the Texas Supreme Court have turned that formulation on its head, employing twisted logic and eviscerating long-standing precedent to achieve political ends. We do not have the rule of law; rather, we have the rule of big business and big government, which makes law to enlarge and insulate its own power.

In the pages to follow, we further detail how the justices on the court: engage in groupthink in enacting their opinions; function as an über-jury by impermissibly second-guessing the facts proven in cases; and act as an über-legislature by applying statutes to fit their own ends, reading them broadly or narrowly, as the case may be, to reward to the powerful. Court Watch has traditionally issued a list of the worst



cases from each term of the court, and so we conclude this report with the most egregious cases of the decade.

WINNERS AND LOSERS

Justitia, the Roman goddess of justice, is pictured blind-folded with balanced scales in her hand. In Texas, after reviewing the empirical evidence, one can only conclude that the blind fold has been stripped away and nine thumbs are pressing heavily on one side of the scale.

Over the course of the decade, we have reviewed 624 consumer cases, carefully categorizing and compiling win-loss rates, with the scope of these consumer cases encompassing instances where individuals, patients, policyholders, and small business owners were pitted against corporate or governmental entities. The court's apologists have sought desperately to dismiss this measure as anecdotal or isolated; however, in the end, these arguments collapse under the weight of the many hundreds of cases decided over myriad years.

On average, defendants have won an overwhelming 74% of their cases and plaintiffs have won just 22% of the time over the last decade.[2] Furthermore, since 2005, consumers have lost an astonishing 79% of their cases before the Texas Supreme Court.[3]

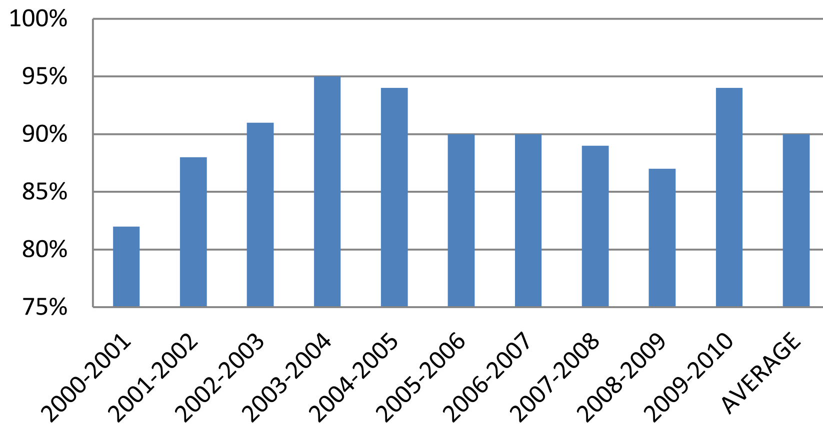
PERRY'S JUDGES: How Perry's Appointees Shaped the Court

In the late 1990s – when Court Watch began to monitor the Texas Supreme Court – the court, while defense-oriented, maintained a relative impartiality. This sharply contrasts with the court's pro-defendant penchant after 2000 when Rick Perry became governor and began appointing justices. His appointees corporatized the court. When one looks at the voting histories of these men and women, it becomes clear that they have a strong and unmistakable prejudice against consumers.

Since 2005, we have tracked the percentage of cases in which a justice has ruled in favor of the consumer. The average consumer score for Governor Perry's justices follows:

JUSTICE	CONSUMER SCORE (AVERAGE)
Eva Guzman	35%
Wallace Jefferson	34%
David Medina	33%
Phil Johnson	28%
Scott Brister	23%
Don Willett	19%

* Perry appointees Xavier Rodriguez and Michael Schneider served on the Texas Supreme Court before Court Watch compiled consumer scores; therefore, they are not included in this analysis. Justice Debra Lehrmann, a recent Perry appointee, only participated in four of twenty-nine consumer cases during the 2009-2010 term; therefore, her information was not included in this analysis. Justice Eva Guzman was appointed to the court in 2009, and her score reflects the 2009-2010 term. The other justices' consumer scores were averaged across their various terms on the court (beginning in 2005). For their individual scores, *see* Court Watch's Annual Reports on the Texas Supreme Court, http://www.texaswatch.org/issues/court-watch/. The relevant years and page references are as follows: 2005-2006 (p. 2); 2006-2007 (p. 2); 2007-2008 (p. 3); and 2008-2009 (p. 3). The consumer scores for justices during 2009-2010 term were not compiled in a standalone report. For this term, the individual scores are as follows: Jefferson (38%); Hecht (28%); O'Neill (48%); Wainwright (30%); Medina (36%); Green (32%); Johnson (35%); Willett (32%); and Guzman (35%).



An unmistakable trend line has emerged from this data that demonstrates exactly how the powerless are punished and the powerful are privileged by the court. The court's bias has been manifested and verified over time as a consistent pattern and practice. To those who benefit from the current court and wish to refute reality, we again invoke John Adams: "Facts are stubborn things."

The numbers tell the story, empirically, about how the legal rights of consumers, patients, workers, and families have been decimated in this state over the last decade. Far from upholding equal protection under the law, the Texas Supreme Court has disproportionately favored corporate and state wrongdoers, regularly rewarding those who cheat, injure, and kill at the expense of those who have been harmed through no fault of their own. Fair dealing in the marketplace is rendered quaint, and safety is sacrificed in our workplaces, hospitals, as well as on our roads. The Texas Supreme Court has become a reliable friend to those who seek to escape the consequences of their actions; its justices are the ultimate guardians for the moneyed and powerful who wish to shirk responsibility.

Consumers, patients, workers, and families who seek justice from the highest civil court in the state are being forced to play Russian roulette with a revolver that has at least four bullets in the cylinder. The overwhelming odds that plaintiffs face embolden wrongdoers to compel settlements on the cheap, meaning that victims, their loved ones, and ultimately taxpayers are unfairly forced to bear these costs. The Texas Supreme Court, through legal alchemy, ensures that the accountable are rarely, if ever, held to account.

GROUPTHINK

The justices on the Texas Supreme Court share an ideology that favors corporate and state defendants. This, when coupled with the win-loss rates detailed above, is evidenced by the amount of cohesion, or groupthink, between the justices. Unlike the United States Supreme Court, a more deliberative body that engages in vigorous debate and whose justices possess a variety of perspectives, the Texas Supreme Court has become, at base, a mutual admiration society. It is a mechanized, dependable instrument of corporate and state power. While there may be dissents lodged here and there on different cases, they are basically token in nature, not even amounting to sand in the gears. There is no faction or force on the court that raises any real threat of consumers

carrying the day if the law was faithfully and fairly applied.

Over the last decade, the justices on the Texas Supreme Court have agreed with the majority in decisions an overwhelming 90% of the time.[4] And their average rate of agreement with one another, also known as the cohesion rate, is in the same range, a shocking 85% for the years tracked.[5] For the sake of comparison, the United States Supreme Court, a body that has also gone out of its way to expand corporate power, had a cohesion rate of only 70% in 2008-2009, indicating a greater degree of independence than the Texas high court.[6]

The Texas Supreme Court is a court without even a moderate center, let alone a countervailing pole, and its justices view the law through a very narrow ideological lens. We have repeatedly called on Governor Perry to fill vacancies on the high court with those who possess a greater degree of diversity in their judicial philosophy and professional experience. Those calls have gone unheeded.

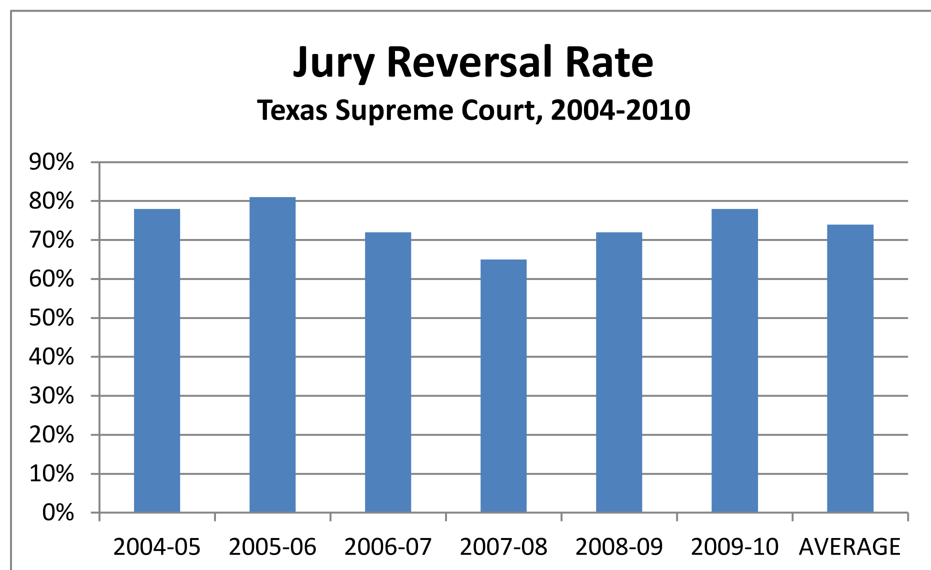
Absent a healthy exchange of differing viewpoints, a court may easily lead itself astray, making law to suit its mutual prejudices. When enough wrong turns are confirmed by your fellow travelers, you end up driving off of a cliff. This is precisely what has happened in Texas over the last ten years.

COURT AS ÜBER-JURY

In our system of justice, it is the jury that we look to in order to evaluate the evidence, separate fact from fiction, and assess damages. The jury is our smallest, most direct, and least corrupted form of government. It ensures that all litigants will receive justice from their peers. The jury is local control exemplified – the fact finders closest to the community and closest to the case, the greatest lie detector ever devised by man, equipped with 24 eyes, 24 ears, and 12 brains to personally sift through mountains of information and determine credibility.

The jury forms the very heart of our judicial system and is guaranteed by the Bill of Rights, with the Seventh Amendment of the United States Constitution explicitly stating that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[7] The Texas Constitution likewise provides that "the right of trial by jury shall remain inviolate."[8]

The Texas Supreme Court, far removed from the witnesses who take the stand, is wisely



prohibited by the Texas Constitution from weighing disputed evidence; its authority is limited to questions of law, not fact.[9] Even Chief Justice Wallace Jefferson succinctly summarized these principles in his dissent to the *Volkswagen of America, Inc. v. Ramirez* opinion when he stated:

> "We are supposed to indulge inferences in *favor* of the verdict, not *against* it… This Court is constitutionally bound to conduct only a legal – not factual – sufficiency review."[10] [Emphasis in the original.]

However, the Texas Supreme Court has displayed a fundamental disregard for juries as evidenced by the fact that it has overturned an average of 74% of jury verdicts in consumer cases since Court Watch began tracking this data in 2004.[11]

David Anderson, a law professor at the University of Texas, has noted another way that the Texas Supreme Court has undermined juries:

> The most controversial method of producing defendant victories is by holding that there is no evidence to support a plaintiff's verdict. The Texas Supreme Court is doing this far more frequently now than in the past, particularly in tort cases… The extent of the present court's use of no-evidence determinations appears to be unprecedented.[12]

This has led James A. Baker, a moderate and principled justice who served on the Texas Supreme Court from 1995-2002, to state that the court's actions "cannot be reconciled with the Texas Constitution's prohibition of the Texas Supreme Court weighing evidence and judging credibility."[13]

The Texas Supreme Court is expected to respect reasonable jury verdicts, a hallmark that separates responsible justices who are faithful to the rule of law from ideological justices motivated solely by achieving their desired result. In the final analysis, the court fails this test, impermissibly usurping the authority of juries and demonstrating contempt for their verdicts.

COURT AS ÜBER-LEGISLATURE

The Texas Supreme Court also oversteps its bounds when it applies statutes passed by the legislature in a manner that suits its own ends. When it comes to considering and resolving any ambiguities in the statutory laws passed by a representative body, the high court should look to the plain language of the statute and the legislature's intent, not take legislative pen in hand and substitute their personal opinions for those of duly-elected policymakers who are accountable to their home constituency.[14]

A court that engages in such behavior threatens the separation of powers and checks and balances that are the bedrock of our system of government. These courts engage in what has come to be known as "judicial activism," which has been defined as: departing from judicial precedent; not respecting the authority of the legislative branch; departing from legal history or tradition; authoring broad holdings; and deciding cases based on ideology or political preferences.[15] According to Professor Ernest Young of The University of Texas School of Law, these examples "all involve a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its

own independent judgment about the correct legal outcome."[16]

It should be noted that judicial activism is not synonymous with one political ideology or another. Neither end of the ideological spectrum has a monopoly on activist behavior. In Texas, our supreme court regularly engages in activist behavior, interpreting statutes broadly or narrowly, as the circumstances warrant, to reach a result that favors the powerful.

A leading example of the court interpreting a statute narrowly, despite the express wishes of the legislative branch, can be found in the *PPG Industries, Inc. v. JMB/Houston Center Partners Ltd.* opinion.[17] In this case, the Texas Supreme Court considered whether one could properly assign, or transfer, legal claims pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). This long-standing statute is the primary means of consumer protection in our state, and the legislature underscored its importance for future courts by clearly stating, "*This subchapter shall be liberally construed and applied to promote its underlying purposes*, which are to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection."[18] [Emphasis added.] Despite the legislature's edict to construe this statute in favor of consumers, the Texas Supreme Court disregarded this and moved in the completely opposite direction, ruling that consumers may not assign their DTPA claims. This hurts consumers who are the subsequent purchasers of defective goods or services and ultimately rewards businesses who engage in shoddy work.

In Texas, our supreme court regularly engages in activist behavior, interpreting statutes broadly or narrowly, as the circumstances warrant, to reach a result that favors the powerful.

Conversely, the court interpreted a statute so broadly in *Entergy Gulf States v. Summers* as to reach levels of absurdity.[19] The business lobby had long sought to lasso laborers who are not employed by a premises owner but are hurt on the job into the workers' compensation system, which has ironclad restrictions on liability that favor employers. Over the course of many sessions, the legislature wisely rejected these efforts to make workers' compensation the exclusive remedy,[20] preserving the ability of these injured laborers to access our judicial system for redress as a matter of public policy. Business interests were undeterred, however, and found a much more receptive audience in the Texas Supreme Court, which was willing to go to exceptional lengths to reward negligent premises owners who purport to act as their own general contractor.

In an effort to make sure that our laws are clear and uniform, the legislature periodically recodifies our statutes. In doing so, they take great care to state that these recodifications are non-substantive in nature; they are merely revisions in form and style. Seeing an opening, however, the Texas Supreme Court seized upon recodified language to broaden the statute and give premises owners the immunity they coveted through the utilization of the workers' compensation system.[21]

Paul Burka, the dean of the Capitol press corps, remarked:

> [T]he Texas Supreme Court in the Entergy case completely disregarded the rule that recodifications do not change substantive law… So long as the Texas Supreme Court remains a wholly owned subsidiary of Texans for Lawsuit Reform, the Legislature engages in recodification at its peril and should be prepared for the Court to rewrite the laws at will to accomplish the purposes of its sponsors.[22]

Facing an outcry for its activism, the court granted a rehearing on the case and denied four lawmakers their request for ten minutes of the court's time to explain legislative intent.[23] In their subsequent opinion, the court inexplicably found that premises owners had actually been immunized from such tort liability since 1917, apparently unbeknownst to industry, their lobbyists, laborers, and previous generations of jurists.[24] In doing so, the court further asserted its authority, dismissively declining "consideration of lawmakers' post-hoc statements as to what a statute means"[25] and declaring that "[i]t has been our consistent view that '[e]xplanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.'"[26]

Noting the effect of the court's ruling, the editorial board at the Austin American-Statesman wrote, "The system, the Legislature has rightly judged, must not provide plant owners incentive to cut back on the expense of maintaining a safe plant simply by paying a contractor's workers' compensation insurance policy. And lawmakers should spell it out in terms that even a majority of the Texas Supreme Court can't reinterpret to please certain business interests."[27]

Another area where the Texas Supreme Court has broadened statutes to the point of absurdity lies in the context of "health care liability claims." One may reasonably think that such a term would relate to claims concerning liability for health care, such as medical malpractice suits. But in the bizarre world of the Texas Supreme Court's jurisprudence, this term, and the stringent statutory shield from accountability it provides, has been stretched to also include claims involving spider bites,[28] sexual assaults,[29] and defective beds.[30]

A review of the record amply demonstrates that the Texas Supreme Court is an activist court by any definition. In the rare instances that the legislature poses an obstacle for the powerful, the court can be counted on to put profits over people and deliver the desired results.

THE "DIRTY DOZEN" OF THE LAST DECADE

Our Court Watch reports have regularly tracked the most anti-consumer opinions delivered by the Texas Supreme Court each year. In that vein, we give you the twelve worst decisions, divided by topic and ranked in no particular order, of the last decade.

THE DIRTY DOZEN OF THE DECADE

Fortis Benefits v. Cantu:
Injured plaintiffs now have to reimburse insurance company payments before they can recover full medical expenses.

Brainard v. Trinity Universal Insurance Co.:
Incentivizes the denial of uninsured/underinsured motorist claims by insurance companies.

Fiess v. State Farm Lloyds:
Undermines insurance policyholders by finding that contracts with unclear language favor insurance companies.

Tooke v. City of Mexia:
Allows municipalities to renege on contracts with small business owners by reversing a 26-year-old case the legislature had relied on in passing more than 80 statutes allowing such lawsuits.

Entergy Gulf States v. Summers:
Shields premises owners from accountability if they purchase a blanket insurance policy, thereby eliminating true accountability and placing workers and the public at large at risk.

Borg-Warner Corp. v. Flores:
Adopts a heightened standard for establishing causation in cases involving asbestos exposure, making it even more difficult for Texans to hold employers accountable for asbestos-related injuries.

Diversicare General Partner, Inc. v. Rubio:
Shields health care facilities that fail to properly maintain safety from responsibility by putting an onerous burden on injured patients seeking accountability.

BIC Pen Corporation v. Carter:
Prevents the legislature from passing consumer protections more stringent than national laws.

PPG Industries, Inc. v. JMB/Houston Center Partners Ltd.:
Prevents the legislature from passing consumer protections more stringent than national laws.

In Re Weekley Homes, L.P.:
Limits open access to our courts by forcing an individual into arbitration even if that person never signed an arbitration agreement with the company.

Hyundai Motor Co. v. Vasquez:
Forbids the asking of questions to determine impermissible juror bias.

Brookshire Grocery Co. v. Taylor:
Creates an incentive for companies to avoid repairing dangerous conditions on their premises.

INSURANCE

Fortis Benefits v. Cantu
(Willett, 9-0, 2007)[31]

Impact: Injured plaintiffs now have to reimburse insurance company payments before they can recover full medical expenses.

Vanessa Cantu suffered severe injuries in an auto accident. Fortis, her insurance company, covered $247,500 of her total $378,500 in expenses. Ms. Cantu sued multiple parties, including the manufacturer of the automobile, for her injuries and settled for $1.4 million. This amount, however, would only cover a portion of Ms. Cantu's future medical expenses, which were estimated to be between $1.7 million and $5.3 million. Fortis filed suit against Ms. Cantu, arguing that it should be reimbursed for the medical coverage it provided.

For over 25 years, settlement awards to insured people have been governed by the following doctrine: "when 'either the insurer or the insured must to some extent go unpaid, the loss should be borne by the insurer for that is the risk the insured has paid it to assume.'"[32] The court determined that language under the "Subrogation Rights" section of the contract was good enough to allow Fortis first recovery from any settlement proceeds. By reserving to itself "all rights of recovery" and by not suggesting that Ms. Cantu must first be "made whole" for Fortis to recover, Fortis had retained an "unfettered right" to be made whole before Ms. Cantu. The court overturned the 1995 decision of *Esparza v. Scott and White Health Plan*, which held that a policyholder's equitable interest in being made whole superseded express provisions of the policy contract.[33] Policy language will now trump an insured's interest in being made whole. This ruling will embolden insurance companies to delay and deny payment to deserving policyholders. As a result of this decision, money will be placed in the hands of those who need it least at the expense of those who need it most. With *Fortis*, the Texas Supreme Court has turned the concept of insurance on its head – instead of policyholders being protected from the risk of loss, it is now the insurers who receive protection through judicial fiat.

Brainard v. Trinity Universal Insurance Co.
(Jefferson, 7-0, 2006)[34]

Impact: Incentivizes the denial of uninsured/underinsured motorist claims by insurance companies.

Edward Brainard II was killed in a head-on collision with another vehicle. Brainard's widow and children sought Uninsured/Under-Insured Motorist (UM/UIM) benefits from Trinity Universal Insurance Company. UM/UIM benefits provide coverage if another at-fault party either does not have insurance or does not have enough insurance. Once a policyholder submits a claim, an insurance company has 30 days to pay before the insurer may be responsible for the policyholder's legal fees if he or she decides to sue. Prior to *Brainard*, this 30-day timeline started when the policyholder filed a claim for UM/UIM coverage with the insurer. Now, a policyholder's 30-day timeline does not begin until after he or she sues the insurer in court and a court finds that the insurer must pay.

This new policy gives insurers a strong incentive to deny claims for UM/UIM coverage, as policyholders will no longer be able to recover their attorney's fees if they sue. Thus even if a policyholder can afford to hire an attorney to sue the insurer and wins the suit, the insurer

will still have to pay no more than if it had paid the claim when it was originally filed. The practical result of this is that insurers are less likely to pay valid claims.

Fiess v. State Farm Lloyds
(Brister, 7-2, 2006)[35]

Impact: Undermines insurance policyholders by finding that contracts with unclear language favor insurance companies.

The Fiesses sued State Farm in federal court to recover insurance claims for damages caused by mold. The policy covered damage ensuing from water damage, but also stated that it did not cover losses caused by mold. This language, however, was ambiguous in that it is unclear whether mold would be considered a damage ensuing from water damage. Much evidence was presented to show that the insurance contract was ambiguous as to whether mold damage was covered. The Texas Department of Insurance, the author of the homeowner's policy and the regulatory authority charged with ensuring compliance, determined that mold would be covered under the contract. The Supreme Court, however, disagreed, even while acknowledging that "[p]arts of the policy sometimes make it difficult to decipher." Two justices filed dissenting opinions.

Under Texas law, when insurance policy language is susceptible to more than one reasonable interpretation, it is considered ambiguous; and when this ambiguity concerns an exclusionary provision, any uncertainty as to its meaning must be resolved in favor of the insured. The majority noted, "If an exclusion has more than one reasonable interpretation, we must construe it in favor of the insured as long as that construction is not unreasonable." Despite reasonable alternative interpretations offered by both dissenting justices and the Texas Department of Insurance, the majority inexplicably came to the conclusion that the insurance policy was unambiguous.

This decision poses an extreme danger to all holders of homeowners insurance policies, making it impossible to receive compensation for mold damage. As a result, many consumers will be forced to live with mold damage, resulting not only in deterioration to their homes, but in serious health risks ranging from allergies to asthma to systemic fungal infection.

SOVERIEGN IMMUNITY

Tooke v. City of Mexia
(Hecht, 7-1, 2006)[36]

Impact: Allows municipalities to renege on contracts with small business owners by reversing a 26-year-old case the legislature had relied on in passing more than 80 statutes allowing such lawsuits.

J.E. Tooke & Sons entered into a three-year contract with the City of Mexia to collect leaves and brush for the city. In reliance on the contract, the Tookes purchased additional equipment and began performance of the contract. After a little over a year, the city cancelled the contract, and the Tookes sued for breach of contract, claiming they had relied on the three year commitment when they purchased additional equipment. The trial court rejected the city's assertion that it could not be sued, but the appellate court reversed, saying that the city's charter allowing it to "sue and be sued" did not constitute a waiver of the city's sovereign immunity. This case reached the Supreme Court with numerous other cases like it, where business owners sought to sue city governments for breach of contract.

In 1970, the Texas Supreme Court held in *Missouri Pacific R.R. Co. v. Brownsville Navig. Dist.* that a city could be sued if its charter contained the sue and be sued language.[37] For 26 years this decision was widely accepted legal precedent. In fact, more than 80 statutes now contain the sue and be sued language that was defined in *Missouri Pacific*. Additionally, the U.S. Supreme Court has consistently held for more than 90 years that sue and be sued language does waive sovereign immunity.

The Texas Supreme Court ignored this clearly established and long relied upon precedent. In choosing to ignore the actions of the legislature, the Court has usurped the law-making function that is constitutionally dedicated solely to the legislature. In response to this blatant judicial activism, the dissenting opinion noted that the Court was clearly assuming "that the legislature had no idea what it was doing when fashioning and recodifying these statutes."[38]

WORKER SAFETY

Entergy Gulf States v. Summers
(Willett, 9-0, 2007; Green, 6-3, 2009)[39]

Impact: Shields premises owners from accountability if they purchase a blanket insurance policy, thereby eliminating true accountability and placing workers and the public at large at risk.

John Summers worked for International Maintenance Corporation (IMC). IMC had contracted with Entergy Gulf States to perform construction and maintenance on Entergy's premises. Summers sustained injuries while working at Entergy's Sabine Station plant and subsequently sued Entergy. Entergy argued that it was a general contractor, and therefore an employer shielded from Summers's tort suit under the Texas Workers' Compensation Act. Summers argued that Entergy was the premises owner and that IMC was his direct employer.

The Supreme Court agreed with Entergy, holding that Entergy was a general contractor and because it had purchased workers compensation coverage, it was exempt from Summers's tort claims, even though Entergy was the owner of the premises when he was injured. Essentially, the court carved out an enormous loophole for large business owners to escape the consequences of their actions on their property, creating a roadmap to immunity for premises owners to follow.

Workers expect to be provided with a safe working environment and this decision makes a mockery of this reasonable expectation. The *Entergy* decision places Texas workers and those communities surrounding them at greater risk. Until this decision is overruled by either the legislature or the court, Texas workers will not receive the protection they expect and deserve.

Borg-Warner Corp. v. Flores
(Jefferson, 8-0, 2007)[40]

Impact: Adopts a heightened standard for establishing causation in cases involving asbestos exposure, making it even more difficult for Texans to hold employers accountable for asbestos-related injuries.

Arturo Flores worked as a brake mechanic for 30 years. He performed about 15 to 20 brake jobs a week during this period. As part of his job, Mr. Flores was responsible for grinding brake pads, which generated clouds of dust that Flores inhaled. The room he worked in measured roughly 8 by 10 feet. Mr. Flores developed a lung disease which was later diagnosed as asbestosis.

The testifying expert acknowledged that Borg-Warner brake pads contained asbestos, but since he was unfamiliar with the make-up of the particular brake pads with which Mr. Flores worked, the testimony was ruled insufficient to establish causation. Hence, evidence that a plaintiff merely had "some" exposure to asbestos is legally insufficient to prove causation, even if the plaintiff is able to identify a specific defendant's product and show that it contained asbestos.

Since manufacturers no longer use asbestos in manufacturing brake pads, it is difficult, and often times impossible, to perform epidemiological tests on now non-existent products. This poses a particular problem to asbestosis patients. Asbestosis is a latent injury, meaning that the symptoms do not manifest until years after the asbestos exposure. By creating an extremely difficult causation standard, it will now be even more difficult for persons injured by asbestos exposure to successfully bring legal claims.

MEDICAL MALPRACTICE

Diversicare General Partner, Inc. v. Rubio (Wainwright, 5-4, 2005)[41]

Impact: Shields health care facilities that fail to properly maintain safety from responsibility by putting an onerous burden on injured patients seeking accountability.

Maria Rubio was an Alzheimer's patient in a nursing home owned by Diversicare. While living at the nursing home, she was sexually assaulted on numerous occasions by a patient the nursing home knew to be violent. Ms. Rubio's family sued the nursing home on her behalf, claiming that the nursing home had failed to provide adequate supervision. The trial court ruled that her claim was a medical malpractice claim subject to a two year statute of limitations.

The appellate court reversed, holding that Ms. Rubio's case was not a medical malpractice claim because it was not based on a departure from accepted medical care or medical safety. The Supreme Court reversed, holding that any departure from safety standards at a medical facility, even safety standards that are in no way related to the provision of medical care, is a medical claim. Three justices dissented, stating that only safety as it relates to medical care should be classified as a medical claim.

As a result of this broad holding, any injury that arises when a patient is in a medical facility could be classified as a medical malpractice claim, subject to much stricter limitations. For example, seven months after issuing its decision in *Diversicare*, the Court held in *St. Luke's Episcopal Church v. Marks* that a man who had been injured when the support rail on his hospital bed broke must bring his suit as a medical malpractice claim rather than as an ordinary negligence claim. [42]

CONSUMER PROTECTION

BIC Pen Corporation v. Carter (Medina, 8-0, 2008; Johnson, 8-0, 2011)[43]

Impact: Prevents the legislature from passing consumer protections more stringent than national laws.

Five-year-old Jonas Carter accidentally set his six-year-old sister on fire with a BIC lighter, causing serious burn injuries. The Carter family sued BIC, alleging manufacturing and design defects. The jury found for the Carter family, awarding $3 million in damages. BIC appealed

the decision, arguing that the state common law claims were preempted because they might frustrate the federal objective of the Consumer Product Safety Commission. This is a tough fish to fry because the objective of the Commission is to "protec[t] the public from unreasonable risks of injury or death."[44]

In a fact-intensive decision, the Court examined the methods of determining whether a lighter was childproof and determined that the Commission had properly balanced the safety of children with the interests of the adult users. The Commission tested the lighters by giving 200 children flame-free lighters. As long as no more than 29 of those children were able to activate the lighter, it passed the safety inspection. The Court reasoned that if BIC had made the lighters too difficult to use, people would have foregone purchasing childproof lighters.

After invalidating the plaintiff's design defect claim, the Supreme Court sent the case back to the appellate court. When the appellate court affirmed the trial court's judgment based on a manufacturing defect finding, the Supreme Court then held that no evidence supported the finding that a manufacturing defect caused injuries, reversing and rendering judgment for BIC.

In most states, it is legal for the state to provide its own consumer protections in state laws, provided that the protections are as stringent or more stringent than the federal counterparts. After all, who knows better what the needs are of a state's citizens than the state legislature? The Supreme Court, however, refused to honor the legislature's attempt to protect its constituents and ruled that the state law was preempted by the federal regulations governing lighter safety. The Court argued that to impose our own laws would undermine the careful balancing test used to create the federal regulation. As a result, many efforts by the Texas legislature to protect consumers will be rendered useless.

PPG Industries, Inc. v. JMB/Houston Center Partners Ltd.
(Brister, 5-3, 2004)[45]

Impact: Weakens long-held consumer protections under the Deceptive Trade Practices Act.

PPG Industries involved the validity of assignments under the Deceptive Trade Practices Act (DTPA). (An assignment is transfer of a property right.) After purchasing an office building in Houston with defective windows, JMB sued PPG Industries, the manufacturer of the windows, for breach of warranties and for violating the DTPA. The jury found PPG Industries liable, and the court of appeals affirmed.

Distorting the legislative rationale behind the DTPA, the Supreme Court reversed in part, holding that DTPA claims are not assignable or, in other words, not transferable from the original owner of the building to JMB. Despite a legislative mandate that the DTPA be "liberally construed," the Court ruled otherwise and construed the law much more narrowly than the legislature intended.

PPG Industries is a huge defeat for Texas consumers victimized by fraudulent and deceptive business practices. After PPG Industries, consumers holding assignments on houses and vehicles, for example, will no longer be able to rely on the DTPA for legal protection.

ARBITRATION

In Re Weekley Homes, L.P.
(Brister, 8-0, 2005)[46]

Impact: Limits open access to our courts by forcing an individual into arbitration even if that person never signed an arbitration agreement with the company.

Vernon Forsting contracted with Weekley Homes to have a home built. Mr. Forsting was a 78-year-old widower, and intended to live in the home with his granddaughter, Patricia Von Bargen, and her family. In order to facilitate the building of the home, Ms. Von Bargen worked with Weekley on a number of matters, but she never signed any contract with Weekley and was not the owner of the home.

There were numerous problems with the home after it was completed, and Weekley made frequent repairs. As a result, Ms. Von Bargen developed asthma and sued Weekley. Weekley claimed that Ms. Von Bargen – who had never signed an arbitration agreement – was bound to arbitrate her claim with Weekley. The trial court held that Ms. Von Bargen was not bound to arbitrate because she had never signed an arbitration clause, and the appellate court refused to hear Weekley's appeal.

The Supreme Court reversed, holding that by handling details about the construction of the home and by living in the home, Ms. Von Bargen had induced substantial action from Weekley and was thus bound to arbitrate, even though her claim was not related to the contract and she had not signed the arbitration agreement.

As a result of this far-reaching decision, a person may now be frozen out of the courts and forced to arbitrate a claim even if he never entered into an arbitration agreement with the company that injured him.

PROCEDURE

Hyundai Motor Co. v. Vasquez
(Bland, 6-3, 2006)[47]

Impact: Forbids the asking of questions to determine impermissible juror bias.

Amber Vasquez, a four-year-old child, died in a low-impact auto accident after her airbag inappropriately deployed and broke her neck. Amber's parents sued Hyundai, claiming that the carmaker had positioned the airbag incorrectly and that the airbag had deployed with too much force in the low-impact accident.

During voir dire – the process during which prospective jurors are questioned about their backgrounds and their potential biases – the Vasquezes' lawyer asked jurors whether the fact that Amber had not been wearing a seatbelt at the time of the accident would determine their verdict. After numerous jurors were dismissed when they admitted they would be swayed by that fact, the judge refused to allow the Vasquezes' attorney to continue asking the question. The judge instructed the attorney that he could ask general questions about seatbelts and whether the jurors wore them, but could not tell the jurors that Amber was not wearing a seatbelt at the time of the crash. Because of this restriction, there were likely many people accepted as jurors who had a strong bias against non-users of seatbelts. After a trial, the jury found that Hyundai was in no way responsible for Amber's death.

The Vasquezes appealed, claiming that the judge had improperly disallowed questions

during voir dire that would reveal impermissible juror bias. The court of appeals agreed.

The Supreme Court reversed, however, holding that the Vasquezes had no right to ask questions that could reveal how much weight potential jurors would put on a particular piece of information. The result of this opinion is that parties may no longer attempt to determine juror bias if doing so could also reveal the weight the juror would put on that piece of evidence. Coupled with *Cortez v. HCCI San Antonio, Inc.* from 2005,[48] the Court has demonstrated its willingness to allow clearly demonstrated bias into the jury box.

PREMISES LIABILITY

Brookshire Grocery Co. v. Taylor (Hecht, 7-2, 2006)[49]

Impact: Creates an incentive for companies to avoid repairing dangerous conditions on their premises.

While shopping at Brookshire Grocery, Mary Francis Taylor slipped on a piece of partially melted ice from a soft drink dispenser. Ms. Taylor injured her knee and sued the grocery store on the grounds of premises liability. A jury found Brookshire liable and awarded damages. The appellate court affirmed. In reviewing the case, the Supreme Court examined two issues: whether the dispenser itself posed an unreasonably dangerous condition and whether there was any evidence that Brookshire was or should have been aware of the condition.

Despite evidence that the machine routinely spilled ice on the floor, as well as testimony by Brookshire employees that further safety precautions could have been taken to avoid dangerous situations, the court held that the soft drink machine, in itself, could not be found to pose a dangerous condition. The court made the inane distinction that the ice that fell on the floor from the dispenser was the dangerous condition. The court used this distinction to reason that in order for the owner to have constructive knowledge of the spill, there would need to be knowledge of the specific piece of ice that caused the injury. Knowledge that a machine regularly causes these dangerous conditions is not sufficient—the company must have knowledge of the specific individual condition causing the injury.

As a result, business owners have little incentive to correct problems on their premises. Indeed, under this ruling, it is in companies' best interests to avoid repairing dangerous conditions since they know they will not be held responsible for those dangers.

We, as a society, clothe our judges in robes and refer to them as "Your Honor" because we give them our trust to perform one of the most difficult and important jobs imaginable. The role they play in enforcing society's rules and preserving the peace through dispute resolution is crucial. Without the rule of law, we devolve into the rule of the jungle where might makes right.

By conferring such respect on judges, we also expect that they perform their duties at the highest level, exhibiting impartiality, independence, and faithfulness to the law. Judges must put their personal biases aside and look in a reasoned and honest way at both sides of an issue, only allowing the law to be their guide. This is what separates them from other politicians. They should not be vessels for narrow special interests. They should not be

advocates. They are intended to be arbiters who must act with integrity.

Over the last decade, the Texas Supreme Court has acted as a star chamber,[50] violating the trust of Texans in every respect. Instead of upholding the Jacksonian ideal of the judiciary, it has sullied its virtue. The body of evidence amassed during this period thoroughly demonstrates that the scales of justice have been weighted heavily in favor of corporate and governmental entities. The Texas Supreme Court has acted as an echo chamber, where an ideology that reveres the powerful reverberates.

As a result, injustice abounds. The court acts with impunity through veiled obscurity. Who will tell the people?

ENDNOTES

[1] For more on the court's metamorphosis, *see* "Perry's Texas Supreme Court picks criticized as too business-friendly," Sommer Ingram, Dallas Morning News, 10/31/11, http://www.dallasnews.com/news/politics/perry-watch/headlines/20111031-perrys-texas-supreme-court-picks-criticized-as-too-business-friendly.ece.

[2] *See* Court Watch's Annual Reports on the Texas Supreme Court, http://www.texaswatch.org/issues/court-watch/. The relevant years, percentages, and page references are as follows: 2000-2001 (52% v. 41%), at p. 1; 2001-2002 (68% v. 27%), at p. 1; 2002-2003 (79% v. 19%), at p. 1; 2003-2004 (82% v. 12%), at p. 1; 2004-2005 (76% v. 21%), at p. 1; 2005-2006 (82% v. 15%), at pp. 2-3; 2006-2007 (84% v. 16%), at p. 3; 2007-2008 (77% v. 23%), at p. 3; and 2008-2009 (64% v. 22%), at p. 3. The defendant and plaintiff win rates for the 2009-2010 term were not compiled in a standalone report. For this term, defendants won 79% of their cases and plaintiffs won 21% of their cases.

[3] As compared to general win rates for plaintiffs and defendants in consumer cases, the win-loss rates for consumers, whether situated as plaintiff or defendant in a case, were calculated from 2005 to 2010. The average consumer win rate for this period was only 20%. *See* Court Watch's Annual Reports on the Texas Supreme Court, http://www.texaswatch.org/issues/court-watch/. The relevant years, percentages, and page references are as follows: 2005-2006 (13% v. 84%), at p. 1; 2006-2007 (14% v. 86%), at p. 1; 2007-2008 (25% v. 75%), at p. 1; and 2008-2009 (27% v. 73%), at pp. 1 & 3. The consumer win-loss rate for the 2009-2010 term was not compiled in a standalone report. For this term, consumers won 21% and lost 79% of their cases.

[4] *See* Court Watch's Annual Reports on the Texas Supreme Court, http://www.texaswatch.org/issues/court-watch/. The relevant years, percentages, and page references are as follows: 2000-2001 (82%), at p. 18; 2001-2002 (88%), at p. 8 (averaging the figures for "Unanimous Opinions and Majority Opinions"); 2002-2003 (91%), at p. 7; 2003-2004 (95%), at p. 7; 2004-2005 (94%), at p. 15; 2005-2006 (90%), at p. 3; 2006-2007 (90%), at p. 4; 2007-2008 (89%), at p. 4; and 2008-2009 (87%), at pp. 1 & 4. The "agreement with majority" figure for the 2009-2010 term was not compiled in a standalone report. For this term, the justices agreed with the majority 94% of the time.

[5] *See* Court Watch's Annual Reports on the Texas Supreme Court, http://www.texaswatch.org/issues/court-watch/. The relevant years, percentages, and page references are as follows: 2000-2001 (84%), at p. 16; 2001-2002 (75%), at p. 7; 2002-2003 (90%), at p. 6; 2003-2004 (86%), at p. 6; 2004-2005 (92%), at pp. 14 & 16; 2006-2007 (86%), at pp. 5 & 19-20; 2007-2008 (85%), at pp. 4 & 5; and 2008-2009 (83%), at pp. 4 & 5. Cohesion is measured through bloc voting analysis, which is a political science technique for measuring the strength of voting alliances on collegial courts. It analyzes agreement to create a spectrum of voting behavior, but does not define an ideological spectrum. Blocs are defined by measuring a threshold that is halfway between the average agreement of the court and the perfect agreement score of 100 percent. At least twenty opinions with a split result are required to make the study accurate. Result analysis measures agreement on result, counting concurrence as agreement with the majority. A concurring and dissenting opinion is scored so that justices on such opinions are counted as being half in agreement with each justice in the majority and half in agreement with each dissenting justice. There were only 13 consumer cases with dissents during the 2009-2010 term; therefore, bloc voting analysis was not able to be

conducted for this term due to there being an insufficient number of opinions with a split result. Cohesion was not tracked for the 2005-2006 term.

[6] *See* "SCOTUSBlog StatPack Final Data: Agreement Stats for OT08," SCOTUSBlog, 6/29/09, at p. 3, http://www.scotusblog.com/wp-content/uploads/2009/06/full-stat-pack.pdf (averaging agreement statistics for the "in part, all, or judgment" fields).

[7] U.S. CONST. amend. VII, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

[8] TEX. CONST. art. I, § 15, http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.1.htm.

[9] TEX. CONST. art. V, § 6, http://www.statutes.legis.state.tx.us/Docs/CN/htm/CN.5.htm.

[10] Case no. 02-0557, opinion delivered 12/31/04, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=16765. For more on this case, *also see* "Obstacle to Justice: A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families," Court Watch, Texas Watch Foundation, 2004-2005, at pp. 8, 21, & 27-28, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/Obstacle2Justice.pdf.

[11] *See* Court Watch's Annual Reports on the Texas Supreme Court, http://www.texaswatch.org/issues/court-watch/. The relevant years, percentages, and page references are as follows: 2004-2005 (78%), at pp. 3 & 13; 2005-2006 (81%), at p. 4; 2006-2007 (72%), at p. 3; 2008-2009 (72%), at p. 3. The jury reversal rates for the 2007-2008 and 2009-2010 term were not compiled in a standalone report. For these terms, the Texas Supreme Court reversed 65% and 78% of consumer jury verdicts, respectively.

[12] *See* "Judicial Tort Reform in Texas," David A. Anderson, Review of Litigation, 2007; U of Texas Law, Public Law Research Paper No. 116, at pp. 17 & 21. Available at SSRN: http://ssrn.com/abstract=976114.

[13] *Id.* at p. 21.

[14] Appellate and supreme court justices effectively – and properly – set policy through the common law process wherein established legal rules, developed through carefully-considered precedent, are applied to novel sets of facts. This is a defining feature of our jurisprudence, and the stability such judge-made law lends, through the evaluation of scores of cases across many years, is not to be denigrated. However, when judicial review is required of legislative acts, judges must exercise restraint and be respectful of the policy choices of this co-equal branch of government (provided, of course, that they are within the confines of higher law, such as the constitution).

[15] *See* "Judicial Activism and Conservative Politics," Ernest A. Young, 73 U. COLO. L. REV. 1139, 1144-1145 (2002); *also see* "The Origin and Current Meanings of 'Judicial Activism,'" Keenan D. Kmiec, 92 CAL. L. REV. 1441 (2004). These articles were originally cited in "Obstacle to Justice: A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families," Court Watch, Texas Watch Foundation, 2004-2005, at p. 4, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/Obstacle2Justice.pdf.

[16] Young, *supra* note 15, at 1145.

[17] Case no. 01-0346, opinion delivered 7/9/04, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=15273; *also see* "Obstacle to Justice: A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families," Court Watch, Texas Watch Foundation, 2004-2005, at p. 9, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/Obstacle2Justice.pdf.

[18] TEX. BUS. & COM. CODE § 17.44(a), http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.17.htm.

[19] Case no. 05-0272, opinions delivered 8/31/07 & 4/3/09, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=25985.

[20] *See* the following legislation, which failed to pass: HB 2279 by Combs, et al. (1995); HB 3024 by Brimer (1997); SB 1404 by Fraser (1999); HB 3120 by Ritter & HB 3459 by Brimer (2001); SB 675 by Estes & HB 2982 by Nixon (2003); and HB 1626 by Nixon (2005). Bill text and actions may be viewed at the Texas Legislature Online: http://www.capitol.state.tx.us/BillLookup/BillNumber.aspx. For more, *see* "Legislators concerned about Texas Supreme Court's disregard for legislative authority," Press Release, Rep. Craig Eiland & Sen. Jeff Wentworth, 10/15/08, linked at "Lawmakers unhappy Supremes would not grant them 10 minutes during Entergy oral argument tomorrow," Quorum Report, 10/15/08, http://www.quorumreport.com/Subscribers/Article.cfm?IID=12802 (subscription required).

[21] *See* Justice Willett, writing for the Court, in his opinion delivered 8/31/07: http://www.supreme.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionId=2001019&redir=1.

[22] "Entergy crisis," Paul Burka, Burka Blog, Texas Monthly, 4/28/09, http://www.texasmonthly.com/blogs/burkablog/?tag=hb-3545. The self-styled "Texans for Lawsuit Reform" is the leading tort reform lobby outfit in the state; it has been the driving force behind many of the liability restrictions written by the legislature and signed into law by the governor.
[23] "Lawmakers unhappy Supremes would not grant them 10 minutes during Entergy oral argument tomorrow," Quorum Report, 10/15/08, http://www.quorumreport.com/Subscribers/Article.cfm?IID=12802 (subscription required).
[24] *See* Justice Green, writing for the majority at part IV of his opinion delivered 4/3/09, http://www.supreme.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionId=2001358&redir=1.
[25] *Id.* at part VII.
[26] *Id.*
[27] "Lawmakers should correct Supreme Court workers' comp decision," Editorial, Austin American-Statesman, 4/17/09, http://www.statesman.com/opinion/content/editorial/stories/04/17/0417entergy_edit.html.
[28] *Omaha Healthcare Center, LLC v. Wilma Johnson, On Behalf of the Estate of Classie Mae Reed, Deceased*, case no. 08-0231, opinion delivered 7/1/11, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=29213; *also see* "Is a spider bite like a rickety staircase or a botched surgery?" Linda P. Campbell, Fort Worth Star-Telegram, 7/27/11, http://www.star-telegram.com/2011/07/27/3251137/is-a-spider-bite-like-a-rickety.html.
[29] *Diversicare General Partner, Inc., et al. v. Maria G. Rubio and Mary Holcomb as Next Friend of Maria G. Rubio*, case no. 02-0849, opinion delivered 10/14/05, http://www.supreme.courts.state.tx.us/opinions/case.asp?FilingID=17053.
[30] *Irving W. Marks v. St. Luke's Episcopal Hospital*, case no. 07-0783, opinions delivered 8/28/09 & 8/27/10, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=28692.
[31] Case no. 05-0791, opinion delivered 6/29/07, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=26499; *also see* "No End in Sight: The Texas Supreme Court Maintains Its Longstanding Tradition of Pro-Defendant Bias," Court Watch, Texas Watch Foundation, 2006-2007, at p. 14, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/FINALREPORT08-22-082.pdf.
[32] *Ortiz v. Great Southern Fire and Cas. Ins. Co.*, 597 S.W.2d 342, 344 (Tex. 1980) (quoting *Garrity v. Rural Mut. Ins. Co.*, 77 Wis.2d 537, 253 N.W.2d 512, 514 (1977)).
[33] 909 S.W.2d 548 (Tex. App.—Austin 1995, writ denied).
[34] Case no. 04-0537, opinion delivered 12/22/06, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=25104; *also see* "No End in Sight: The Texas Supreme Court Maintains Its Longstanding Tradition of Pro-Defendant Bias," Court Watch, Texas Watch Foundation, 2006-2007, at p. 12, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/FINALREPORT08-22-082.pdf.
[35] Case no. 04-1104, opinion delivered 8/31/06, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=25671; *also see* "No End in Sight: The Texas Supreme Court Maintains Its Longstanding Tradition of Pro-Defendant Bias," Court Watch, Texas Watch Foundation, 2006-2007, at p. 14, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/FINALREPORT08-22-082.pdf.
[36] Case no. 03-0878, opinion delivered 6/30/06, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=24259; *also see* "A Decade of Watching and Waiting: The Texas Supreme Court Year-In-Review," Court Watch, Texas Watch Foundation, 2005-2006, at pp. 13-14, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/CWTrends2005-2006.pdf.
[37] 453 S.W.2d 812, 813 (Tex. 1970).
[38] 197 S.W.3d 325, 362 (Tex. 2006).
[39] Case no. 05-0272, opinions delivered 8/31/07 & 4/3/09, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=25985; *also see* "Shining a Light," Court Watch, Texas Watch Foundation, 2007-2008, at pp. 6-7 & 11-12, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/CourtWatchReport0708final.pdf.

[40] Case no. 05-0189, opinion delivered 6/8/07, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=25902; *also see* "No End in Sight: The Texas Supreme Court Maintains Its Longstanding Tradition of Pro-Defendant Bias," Court Watch, Texas Watch Foundation, 2006-2007, at pp. 11-12, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/FINALREPORT08-22-082.pdf.

[41] Case no. 02-0849, opinion delivered 10/14/05, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=17053; *also see* "A Decade of Watching and Waiting: The Texas Supreme Court Year-In-Review," Court Watch, Texas Watch Foundation, 2005-2006, at pp. 5 & 10, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/CWTrends2005-2006.pdf.

[42] Case no. 05-0693, opinion delivered 5/5/06, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=26403; *also see* footnotes 20-22.

[43] Case no. 05-0835, opinion delivered 4/18/08, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=26542; *also see* "Shining a Light," Court Watch, Texas Watch Foundation, 2007-2008, at pp. 13-14, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/CourtWatchReport0708final.pdf. Case no. 09-0039, opinion delivered 6/17/11, http://www.supreme.courts.state.tx.us/opinions/case.asp?FilingID=30090.

[44] "CPSC Overview," U.S. Consumer Product Safety Commission, http://www.cpsc.gov/about/about.html (last accessed 1/13/11).

[45] Case no. 01-0346, opinion delivered 7/9/04, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=15273; *also see* "Obstacle to Justice: A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families," Court Watch, Texas Watch Foundation, 2004-2005, at pp. 9-10, 18-19, & 24-25, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/Obstacle2Justice.pdf.

[46] Case no. 04-0119, opinion delivered 10/28/05, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=24694; *also see* "A Decade of Watching and Waiting: The Texas Supreme Court Year-In-Review," Court Watch, Texas Watch Foundation, 2005-2006, at pp. 3, 8, & 10-11, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/CWTrends2005-2006.pdf.

[47] Case no. 03-0914, opinion delivered 3/10/06, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=24294; *also see* "A Decade of Watching and Waiting: The Texas Supreme Court Year-In-Review," Court Watch, Texas Watch Foundation, 2005-2006, at pp. 8 & 12-13, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/CWTrends2005-2006.pdf.

[48] Case no. 04-0181, opinion delivered 3/11/05 (allowing biased jurors to be "rehabilitated" during voir dire [i.e., the jury selection process]), http://www.supreme.courts.state.tx.us/opinions/EventInfo.asp?EventID=433982; *also see* "Obstacle to Justice: A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families," Court Watch, Texas Watch Foundation, 2004-2005, at pp. pp. 10-11, 22, & 28, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/Obstacle2Justice.pdf.

[49] Case no. 03-0408, opinion delivered 12/1/06, http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=17806; *also see* "No End in Sight: The Texas Supreme Court Maintains Its Longstanding Tradition of Pro-Defendant Bias," Court Watch, Texas Watch Foundation, 2006-2007, at pp. 16-17, http://www.texaswatch.org/wordpress/wp-content/uploads/2009/12/FINALREPORT08-22-082.pdf.

[50] The Star Chamber was an English court with broad jurisdiction, which was abolished in 1641 due to its abuses of power. The term is now used to denote "any secretive, arbitrary, or oppressive tribunal or proceeding." *See* Black's Law Dictionary, Seventh Edition, 1999, at p. 1414.