



# Court Watch

a project of the Texas Watch Foundation

## **A DECADE OF WATCHING AND WAITING** The Texas Supreme Court Year-In-Review 2005-2006 March 2007

### **Executive Summary**

The Texas Supreme Court has a long history of pro-defendant decision making. At Court Watch, we are in our tenth year of monitoring the Court and how its decisions impact Texas families, patients, consumers, and small businesses. Year in and year out, the Court has trampled the rights of Texas families and rewarded government and corporate interests. This trend was repeated during the Court's 2005-2006 term as the Court repeatedly catered to corporate wrongdoers at the expense of Texas families.

As we have discussed in previous reports, the Court's long-term statistical trends are illuminating and disturbing. Over the last decade the Court has ruled in favor of corporate and governmental defendants an average of 70%.<sup>1</sup>

In this report, we focus on the legal trends that emerged during the 2005-2006 term. We have explored many of these trends in the past, but they are worth revisiting because of their broad, significant impact on Texas families. Other trends emerged just this year and give us a glimpse into the Court's direction in future decisions.

The Court considered 69 cases this past term in which individual consumers were pitted against corporate or government interests, and among those cases several trends emerged. The Court considered numerous cases involving arbitration, knowledge of the defendant, medical malpractice, employment relations, and the ability to recover fees imposed illegally. In virtually every single case, defendants emerged as the clear victors while individual Texans saw even more erosion of their rights.

Also, for the first time in Court Watch's ten year history, we closely examined the Court's use of unsigned per curiam opinions over the term. We discovered that the Court frequently uses such opinions in controversial decisions – not simply run of the mill decisions that would elicit little controversy. Using unsigned opinions allows the individual justices to escape accountability for these pro-defendant decisions. Last term, 58% of the Court's decisions were issued as per curiam opinions; in contrast, the United States Supreme Court used such opinions only 6% of the time.<sup>2</sup>

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<sup>1</sup> A case is categorized as a consumer case if the outcome of the case affects consumers, either directly or indirectly, and regardless of whether the consumer was the plaintiff or the defendant.

<sup>2</sup> Georgetown University Law Center Supreme Court Institute, Supreme Court of the United States, October Term 2005 Overview.

The extensive use of these opinions allows the justices – who are elected officials – to take away the rights of consumers without disclosing their individual votes.

Finally, we are including our tenth annual Terrible 10 list of the most pro-defendant cases decided by the Court during the 2005-2006 term (see page 8). These cases are wide-ranging and far-reaching. From denying whistleblower protections to shielding negligent hospitals to unfairly expanding the use of arbitration, this year's Terrible 10 once again shows the Court's penchant for protecting wrongdoers over Texas families.

As has been the case in each of the past nine annual reviews, this report is meant to serve as a guidepost for the public. The Texas Supreme Court is the highest civil court in our state; however, it continues to operate in relative obscurity with few Texans outside of the legal profession aware of how large an impact its decisions have on our daily lives. Whether it is how we interact with our family doctor, how we are treated at work, or whether or not we can exercise the basic right to gain access to the legal system, the Texas Supreme Court weighed in during the 2005-2006 term.

All too often, the Court sided with defendants over the interests of individual Texans. While disturbing, this is not surprising given the Court's long tradition of protecting corporate and governmental defendants over Texas families.

## **Arbitration**

Arbitration is generally a very good deal for businesses but a very bad deal for consumers. It presents many obstacles to justice that do not exist in courtrooms. Arbitration is more costly for the consumer than seeking justice through our courts.<sup>3</sup> Moreover, arbitrators are likely to be biased in favor of defendants because businesses are repeat customers for arbitrators, often selecting the arbitrator for a given dispute. Thus, an arbitrator has a personal interest in satisfying that business. Additionally, decisions by arbitrators generally cannot be appealed, even if an arbitrator makes a decision that clearly contradicts the law.

Moreover, arbitration is typically confidential and the consumer may not reveal the details, limiting corporate accountability by allowing businesses to hide their wrongdoing behind a cloak of secrecy. If a company does not have to answer to the public or its shareholders for its dangerous or outrageous behavior, it has little incentive to change its ways.

The Texas Supreme Court has a long history of forcing consumers into arbitration even when doing so is grossly unfair to the consumer.<sup>4</sup> This past term, the Court considered nine cases in which a consumer requested a trial rather than arbitration, and the Court ordered arbitration in every case.<sup>5</sup> No justice filed a dissent in any of these cases. In fact, the Court actually extended the reach of

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<sup>3</sup> Public Citizen, *Cost of Arbitration*, 2002. See <http://www.citizen.org/congress/civjus/arbitration/articles.cfm?ID=7546>.

<sup>4</sup> See e.g. *In re Halliburton Co.* (2002), *In re First Merit Bank* (2001), *In re American Homestar of Lancaster* (2001), *In re Oakwood Mobile Homes* (1999).

<sup>5</sup> The nine cases heard by the Court involving arbitration were *In re McKinney and Edward D. Jones & Co., L.P.* (docket number 04-0651), *In re Weekley Homes, L.P.* (docket number 04-0119), *In re Dillard Department Stores, Inc. and Reeder* (docket number 05-0250), *In re Dillard Department Stores, Inc.* (docket number 04-1132), *In re Vesta Insurance Group, Inc.* (docket number 04-0141), *In re Palm Harbor Homes* (docket number 04-0490), *In re Dallas Peterbilt, Ltd., L.L.P.* (docket number 05-0706), *In re Palacios* (docket number 05-0038), and *In re D. Wilson Construction Co.* (docket number 05-0326).

arbitration, creating new levels of unfairness for individuals while blatantly favoring corporate interests.

In one of the most damaging arbitration cases of the term, Patricia Von Bargen developed asthma after Weekley Homes was forced to make numerous repairs to her grandfather's home. While Ms. Von Bargen lived with her widower grandfather, Vernon Forsting, in the home, he was the sole owner of the home and signed the contract with Weekley. The contract contained a clause requiring Mr. Forsting to resolve any claims against Weekley in arbitration rather than in court.

The Supreme Court held that even though Ms. Von Bargen had not signed the contract to buy the house, she was nonetheless subject to the arbitration clause. In so doing, the Court has unreasonably limited access to the courts for individuals who were not even a party to a contract compelling arbitration.

In another particularly egregious case, *In re Palacios*, the Court held that while a business may appeal a court's decision that a consumer is not required to arbitrate, individuals do not have the same right to appeal a court's decision forcing them into arbitration. In light of the fact that arbitration already overwhelmingly favors businesses, it seems unconscionable that the Court would destroy one of the few remaining consumer protections – the right to due process – while protecting that same legal right for corporate defendants.

### **Knowledge of One's Actions**

In order for a person to be legally responsible for something he did, he generally must have been aware of what he was doing. For example, if a woman is in a batting catch swinging a bat, and a man walks up behind her without her knowledge, and she accidentally hits the man with the bat, she will usually not be responsible for having injured him. If, however, the woman knew the man had walked up behind her and she swung her bat anyway, injuring the man, she would likely be liable for his injuries.

The Supreme Court considered four cases this past term addressing whether a defendant knew of its actions when it injured or killed the plaintiff.<sup>6</sup> In each of these cases the Court sided with the defendant despite the fact that in three of these cases a jury had decided that the defendant did have knowledge of its actions.

In *Castillo v. Price Construction*, Roberto Castillo was killed in a head-on collision that occurred in a construction zone maintained solely by Price Construction. Price had failed to properly maintain the road lines dividing lanes, making it unclear for drivers in which lane they should be driving. The company had also received numerous inspection reports noting deficiencies in the construction zone. The jury found that Price had created the condition, and thus clearly knew about it, and therefore was responsible for Mr. Castillo's death.

The appellate court reversed, however, claiming that there was insufficient evidence that Price actually knew of the dangerous condition of the construction zone. The Supreme Court refused to review the case, and Justice O'Neill wrote a dissent from this denial of review criticizing the

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<sup>6</sup> The four cases heard by the Court addressing actual or constructive knowledge of the defendant were *Diamond Shamrock Refining Co., L.P. v. Hall* (docket number 02-0566), *Castillo v. Price Construction* (docket number 04-0625), *Wal-Mart Stores, Inc. v. Spates* (04-1046), and *Minnesota Life Insurance Co. v. Vasquez* (docket number 04-0477).

appellate court for refusing to allow the jury to make the obvious and legally accepted inference that if Price had created the condition, Price knew of the condition. In her dissent, Justice O’Neill wrote: “The creator of a dangerous condition may not escape responsibility by looking the other way and claiming no knowledge of the danger it created.”<sup>7</sup> She goes on to add that “it is within the factfinder’s [jury’s] province to decide whether an inference of actual knowledge against one who creates a dangerous condition is justified in light of the circumstances presented.”<sup>8</sup>

In another case, *Diamond Shamrock Refining Co., L.P. v. Hall*, the Court reversed a jury’s finding that a refinery had created a dangerous condition and was consciously indifferent to the danger that someone would be seriously injured by it. The Court improperly reconsidered the facts of the case – an act that is legally the sole province of the jury – to decide that while there was a dangerous condition at the refinery, Diamond Shamrock did not necessarily know about it and did not disregard the chance of injury. In so doing, the Court allowed the company to escape responsibility for an innocent man’s death.

### **Medical Malpractice**

In recent years, the Texas Legislature has made it increasingly difficult for patients injured by their doctors to obtain justice. To make matters worse, the Texas Supreme Court seems determined to make the already difficult process of holding a bad doctor accountable next to impossible. The Court heard six cases this term concerning patients who had been seriously injured or killed by their doctors, and in every case the Court ruled in favor of the doctor.<sup>9</sup> Three of these cases were not even filed as medical malpractice claims, yet the Court held that each of them was such a claim, and dismissed each one for failing to meet the higher standards required of medical malpractice claims.<sup>10</sup>

The patient in *Olveda v. Sepulveda* was Frieda Hernandez, a woman in her third trimester of pregnancy who went to the hospital complaining of severe abdominal pain. The doctors subsequently performed surgery on Ms. Hernandez, but failed to monitor her uterine contractions and the fetal heart rate, and as a result of that failure, Ms. Hernandez’s baby died. A few days later, Ms. Hernandez died as well.

Ms. Hernandez’s family took the doctors to court and hired an obstetric anesthesiologist to testify as to how one of the doctors in the case – a urologist – had failed to properly treat Ms. Hernandez. The appellate court held that because the expert hired by the Hernandez family was not the same type of doctor as the doctor being sued, the expert was not qualified to testify.

The Supreme Court refused to hear the case, but Justice O’Neill dissented, stating that the expert hired by the Hernandez family was qualified to testify because she would be addressing a medical standard to which all doctors are held when treating pregnant patients, regardless of the specialty of the doctor.

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<sup>7</sup> 209 S.W.3d 90, 93 (Tex. 2005).

<sup>8</sup> *Id.* at 92.

<sup>9</sup> The six medical malpractice claims heard by the Court were *Murphy v. Russell* (docket number 02-1101), *Diversicare General Partner, Inc. v. Rubio* (docket number 02-0849), *Olveda v. Sepulveda* (docket number 04-0707), *St. Luke’s Episcopal Hospital v. Marks* (docket number 05-0693), *Larson v. Downing* (docket number 05-0155), and *Jernigan v. Langley* (docket number 05-0299).

<sup>10</sup> The three cases not filed as medical malpractice claims but which the Court decided to classify as medical malpractice claims were *Murphy v. Russell* (docket number 02-1101), *Diversicare General Partner, Inc. v. Rubio* (docket number 02-0849), and *St. Luke’s Episcopal Hospital v. Marks* (docket number 05-0693).

*Diversicare General Partner, Inc. v. Rubio* involved Maria Rubio, an elderly woman, in a nursing home who was sexually assaulted numerous times by a patient known to be dangerous. Ms. Rubio's family brought suit against the nursing home claiming that it was negligent in failing to keep Ms. Rubio safe. The Supreme Court held that Ms. Rubio's claim against the nursing home was a medical malpractice claim because it involved a question of "safety," and because her claim was not filed in the very short period allowed for medical malpractice claims, it was dismissed.

Three justices dissented, stating that "safety" issues covered by medical malpractice are clearly meant to cover safety issues as they relate to medical care. They noted that protecting a patient from a known dangerous patient does not involve any expert knowledge and does not involve the provision of medicine, and thus is not a medical malpractice claim.

As a result of the Court's holding in this case, most any claim that occurs in a hospital or nursing home – regardless of whether it relates to medical care – will be classified as a medical malpractice claim, subject to limits that are difficult for patients to meet.

## **Employment**

Employees in Texas already have little protection against their employers, yet this past term the Supreme Court succeeded in reducing what little protection there is. In twelve cases involving employee disputes with employers, the Court held in every instance and without dissent that the employers' actions were protected.<sup>11</sup> The Court ruled against a broad category of employees, including retail employees, school district employees, fire fighters, a county jailer, and a police officer.

In one of the most egregious cases, *Ed Rachal Foundation v. D'Unger*, the Court held that an employee may be fired for reporting a crime being committed by his or her employer. The Court acknowledged that while an employee who refused to commit a crime could not be fired, an employee who reported a crime was undeserving of the same protection. With inflated rhetoric, the Court applauded the civic virtue of those people who would report crimes of their employers, noting that failure to report crimes is "a badge of irresponsible citizenship."<sup>12</sup> But for all of its praise of these employees, the Court ultimately refused to protect them.

In another case, *Kroger Co. v. Elwood*, the Court overturned a jury verdict in favor of a grocery store employee who was injured because he had not been properly trained to perform a dangerous function of his job. Billy Elwood was injured after a customer slammed his hand in a car door while he was loading groceries into her car. The store's parking lot was on an incline and Mr. Elwood had put his hand in the door jam to keep his balance while he unloaded the grocery cart. The store had never provided any training on the proper way to unload groceries. In holding that Kroger's failure

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<sup>11</sup> The 12 cases heard by the Court involving employment disputes were *SAS Institute, Inc. v. Breitenfeld* (docket number 04-1103), *Ysleta Independent School District v. Monarrez* (docket number 02-1185), *In re Dillard Department Stores, Inc. and Reeder* (docket number 05-0250), *Matagorda County Hospital District v. Burnwell* (docket number 03-0111), *In re Dillard Department Stores, Inc.* (docket number 04-1132), *In re Vesta Insurance Group, Inc.* (docket number 04-0141), *City of Houston v. Jackson* (docket number 04-0465), *Thomas v. Long* (03-0204), *Ed Rachal Foundation v. D'Unger* (docket number 03-1101), *Kroger Co. v. Elwood* (docket number 04-1133), *City of Houston v. Clark* (docket number 04-0930), and *City of Waco, Texas v. Kelley* (docket number 04-1113).

<sup>12</sup> 207 S.W.3d 330, 333.

to train its employees did not make the grocer legally responsible for Mr. Elwood's injuries, the Court ignored the fact that the sloped parking lot greatly increased the possibility that without training an employee would be injured. Because Kroger did not carry workers' compensation insurance and because the Court released Kroger from responsibility, Mr. Elwood was not compensated by his employer for an injury that occurred while he was working.

### **Voluntary Payment Rule**

The Court this term revived a rule it has used only once in the past 40 years in order to prevent consumers from recovering damages from companies that acted illegally.<sup>13</sup> The rule – called the voluntary payment rule – has historically been used to prevent a taxpayer who willingly paid a tax later found to be illegal from reclaiming the tax by suing the government. The public policy supporting the rule is that the government must be able to rely on taxes collected as firm income, without concerns of budget shortfalls at a later date caused by being forced to return taxes. Even if the Court had consistently been applying this rule over the past 40 years, the rationale behind it would not support application to the two cases to which it applied the rule this past term.<sup>14</sup>

In *BMG Direct Marketing v. Peake*, customers who paid late fees that were illegally imposed sued for recovery of the fees. The Court held that because the customers had paid the fees willingly, they could not recover them, even though the fees may have been illegal. Applying the voluntary payment rule here does not serve the recognized public policy goal of protecting the government's reliance on collected taxes, but serves to protect a company that had deliberately charged an illegal fee.

Justice Wainwright noted in a concurring opinion that the result of applying the rule in this case is that consumers are taken advantage of and a wrongdoing business is rewarded. He writes: "Here, the application of the voluntary payment rule rewards the wrongdoer and punishes the innocent."<sup>15</sup>

In *Dallas County Community College District v. Bolton*, the Court's application of the voluntary payment rule was even more egregious. In that case, the college district wanted to begin charging a new fee and was required by law to put the fee to a vote. The vote failed, but the district decided to charge the fee anyway, in clear violation of the law. The only way students could avoid paying the fee was to dramatically reduce their credit hours, go to a different college, or apply for a waiver that was available to only 10% of the student body. Despite the unreasonableness of these options, the Court held that the students were not under duress when they paid the fees as these three options were available to them.

Three justices dissented, noting that these options were not reasonable at all and amounted to duress. Thus, even if it were appropriate to revive this old rule – and these justices felt that it was not – it should not apply to the students here because they did not pay the fees willingly.

### **Over-reliance on Anonymous Per Curiam Opinions**

Per curiam opinions are anonymous opinions that are not signed by any justice. Only six of the nine justices on the Court must support the opinion, and justices who disagree with the opinion do not

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<sup>13</sup> *Continental Casualty Co. v. Huizar*, 740 S.W.2d 429 (Tex. 1987).

<sup>14</sup> The two cases heard by the Court involving the voluntary payment rule were *BMG Direct Marketing v. Peake* (docket number 03-0547) and *Dallas County Community College District v. Bolton* (docket number 02-1110).

<sup>15</sup> 178 S.W.3d 763, 779 (Tex. 2005).

write dissents.<sup>16</sup> While per curiam opinions have their place in non-controversial cases, the Texas Supreme Court makes use of these opinions far too frequently. Last term, 58% of the opinions issued by the Texas Supreme Court were unsigned per curiam opinions. By contrast, the United States Supreme Court issued per curiam opinions only 6% of the time.<sup>17</sup>

Judges in Texas are elected, and voters have a right to know the positions judges are taking in cases – particularly in controversial cases that affect consumers. Last term, the Court released six controversial anti-consumer decisions as per curiam opinions.<sup>18</sup> The Court’s actions in these cases included refusing to protect employees who report crimes of their employers,<sup>19</sup> allowing the State to take actions that dramatically devalue a person’s land without compensating the landowner,<sup>20</sup> making it more difficult for injured patients to obtain justice against the doctors who harmed them.<sup>21</sup>

There has been an ongoing debate in recent years about the legislature’s use of non-record votes, which are also known as voice votes. Members of the press and public have been demanding greater transparency in the legislative process by seeking recorded votes on all legislation. The concerns raised about a lack of transparency in the legislative process can certainly be applied to the Texas Supreme Court. By issuing an inordinate number of unsigned opinions, the Court denies the public the opportunity to fully weigh each justice’s decision-making.

We do not advocate that all of the Court’s decisions be signed; however, per curiam opinions should be limited to only those cases that do not have a broad impact or that do not set a significant legal precedent. Signed opinions serve to accomplish a twofold goal: giving Texas voters a complete picture of the legal and judicial philosophy employed by each justice and providing future justices with insight into the Court’s internal decision-making process.

## Conclusion

Specific trends have varied over the past decade, but one overarching and unifying theme has remained constant: the virulent pro-defendant bent of the Court. Whether it be through restrictions on open access to our courts or overt protections for the medical industry, insurance companies, state government, and irresponsible employers, the Texas Supreme Court demonstrates a shocking and fundamentally unfair bias. This has left patients, policyholders, workers, and families with little ability to hold wrongdoers accountable.

The Texas Supreme Court works under a cloak of anonymity. Not only do few Texans understand the scope and breadth of the Court’s influence on their lives, but even fewer are aware of the Court’s strident pro-defendant ideology. For ten years, we have been monitoring the Court in hopes that we will find evidence that the tide could be turning in favor of Texas families. We will continue to watch and wait.

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<sup>16</sup> Texas Rule of Appellate Procedure 59.1.

<sup>17</sup> See Footnote 2.

<sup>18</sup> The six controversial anti-consumer decisions issued as per curiam opinions were *Ed Rachal Foundation v. D’Unger* (docket number 03-1101), *Kroger Co. v. Elwood* (docket number 04-1133), *State of Texas v. Delany* (docket number 04-0628), *Wilhelm v. Flores* (docket number 04-0208), *Larson v. Downing* (docket number 05-0155), and *Wal-Mart Stores, Inc. v. Spates* (docket number 04-1046).

<sup>19</sup> *Ed Rachal Foundation v. D’Unger*.

<sup>20</sup> *State of Texas v. Delany*.

<sup>21</sup> *Larson v. Downing*.

## TERRIBLE 10 OF 2005-2006

***Castillo v. Price Construction, Inc.*** (O'Neill, dissent from denial of review)

**Impact:** Allows the creator of a very dangerous condition to escape responsibility by claiming it had no knowledge of the danger it created.

***The Ed Rachal Foundation v. D'Unger*** (Per Curiam)

**Impact:** Forbids whistleblower protections for employees who report crimes being committed by the employer.

***Diversicare General Partner, Inc. v. Rubio*** (Wainwright 5-4)

**Impact:** Shields hospitals who fail to properly maintain safety from responsibility by putting an onerous burden on injured patients seeking accountability.

***In Re Weekley Homes, L.P.*** (Brister 8-0)

**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.

***In re Palm Harbor Homes, Inc.*** (Johnson 9-0)

**Impact:** Enables a company to force a person into binding arbitration even if that person does not have the same right to demand arbitration from the company.

***BMG Direct Marketing v. Peake*** (O'Neill 9-0)

**Impact:** Prevents a customer from recovering illegal fees charged by a company by improperly utilizing a legal maneuver never applied to private businesses.

***Flores v. Millennium Interests, Ltd.*** (Medina 6-3)

**Impact:** Ignores legislative intent by stripping the only meaningful protection homebuyers have against some predatory lenders.

***Hyundai Motor Co. v. Vasquez*** (Bland 6-3)

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

***Tooke v. City of Mexia*** (Hecht 7-1)

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

***Loram Maintenance of Way, Inc. v. Ianni*** (Green 9-0)

**Impact:** Allows companies to condone illegal drug use by its employees without fear of liability.

## TERRIBLE 10 OF 2005-2006

### ***Castillo v. Price Construction, Inc.*** (O'Neill, dissent from denial of review)

**Impact:** Allows the creator of a very dangerous condition to escape responsibility by claiming it had no knowledge of the danger it created.

Roberto Castillo was killed in a head-on collision that occurred in a construction zone maintained by Price Construction. Evidence at trial showed that Price had not maintained the lines between lanes and it was therefore very difficult for drivers to determine their correct lane. Price itself had laid down the lines, and Price had received inspection reports noting that the lines were not properly marked. A jury returned a ruling against Price, finding that Price had actual knowledge of the dangerous condition, and was thus responsible.

The court of appeals reversed the jury's verdict, holding that there was insufficient evidence for the jury to conclude that Price knew of the dangerous condition. The Supreme Court of Texas refused to review the appellate court's holding, and Justice O'Neill wrote a dissent from this denial of review. She criticized the appellate court for refusing to allow the jury to draw the reasonable inference that if Price had created the condition, then Price must also know the situation existed. She noted that Price was exclusively responsible for maintaining the safety of the construction area and that it had clearly failed to do so.

By taking away the right of the jury to make a reasonable inference, *Castillo* stands for the very dangerous proposition that a company can create a dangerous situation while simultaneously disclaiming any knowledge of the danger it created.

### ***The Ed Rachal Foundation v. D'Unger*** (Per Curiam)

**Impact:** Forbids whistleblower protections for employees who report crimes being committed by the employer.

While working for the Ed Rachal Foundation, Claude D'Unger observed what he believed to be a series of illegal incidents. D'Unger reported these incidents to his supervisor, who instructed D'Unger to ignore the situation. Concerned that a crime had been committed, D'Unger reported these incidents to the authorities. After learning this, D'Unger's supervisor fired him. D'Unger sued the Foundation for wrongful termination on the grounds that he could not be fired for reporting illegal activity, and the jury returned a verdict in D'Unger's favor.

D'Unger's claim was based on a Texas Supreme Court case from 1985, *Sabine Pilot Services, Inc. v. Hauck*, that made it unlawful to terminate an employee because the employee refuses to perform an illegal act. This type of protection is widely known as whistleblower protection.

An appellate court affirmed the wrongful termination claim, but the Supreme Court reversed, holding that whistleblower protection extends only to those who refuse to *commit* crimes, not to those who *report* crimes. In its opinion, the Court went to great effort to applaud the courage of employees who report crimes, declaring that such responsible citizenship should be encouraged; but

ultimately held that even though it had created whistleblower protection in the first place, it was not the province of the Court to extend the protection.

As a result of the Court's cowardice in the face of employers, employees remain unprotected if they report a crime being committed by the employer.

### ***Diversicare General Partner, Inc. v. Rubio* (Wainwright 5-4)**

**Impact:** Shields hospitals who 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.

### ***In Re Weekley Homes, L.P.* (Brister 8-0)**

**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 seventy-eight year old widower, and intended to live in the home with his granddaughter, Patricia Von Barga, and her family. In order to facilitate the building of the home, Ms. Von Barga 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 Barga developed asthma and sued Weekley. Weekley claimed that Ms. Von Barga – who had never signed an arbitration agreement – was bound to arbitrate her claim with Weekley. The trial court held that Ms. Von Barga 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.

### ***In re Palm Harbor Homes, Inc.* (Johnson 9-0)**

**Impact:** Enables a company to force a person into binding arbitration even if that person does not have the same right to demand arbitration from the company.

Raymond and Crystal Ripple contracted with Palm Harbor Village, the retailer, to purchase a manufactured home to be built by Palm Harbor Homes, the manufacturer. The contract contained a provision requiring arbitration for any dispute arising from the contract, but it also gave the manufacturer a 20 day window during which it could opt out of arbitration.

The Ripples had numerous problems with their home, and sued both the retailer and the manufacturer. Both the retailer and manufacturer claimed that the Ripples were obligated to arbitrate, but the trial court refused to order arbitration, stating that the provision allowing the manufacturer to opt-out of arbitration made the agreement unconscionable and thus unenforceable. The appellate court affirmed.

The Supreme Court reversed, holding that the arbitration agreement was not unconscionable, despite the fact that it openly favored the manufacturer over the buyer and that the buyer was forced to agree to it if he intended to purchase a home from Palm Harbor.

With *In re Palm Harbor Homes*, the Court has openly stated what it has implied for years: that it will protect businesses over individuals even in the face of ample evidence that consumers are deliberately treated unfairly.

### ***BMG Direct Marketing v. Peake* (O'Neill 9-0)**

**Impact:** Prevents a customer from recovering illegal fees charged by a company by improperly utilizing a legal maneuver never applied to private businesses.

BMG sells compact discs, and collects payment for the discs after the consumer has received them. When a customer makes a late payment, BMG assesses a late charge against the customer. In order for a company to assess a fee against a customer in Texas, the fee must be a reasonable estimation of the damages the company will suffer.

Patrick Peake was a long-time BMG club member who bought many CDs from the company. Peake brought a class action lawsuit against BMG claiming that the late fees he had been charged were not legal because the amount of the fee did not reasonably offset BMG's actual damages from receiving late payments.

The trial court certified the class, and the appellate court affirmed. The Supreme Court reversed, however, reviving the voluntary payment rule, which had been used in Texas only once in the past forty years, and had historically been used to protect the government.

The result of allowing a business to claim the protections of the voluntary payment rule is that the business can knowingly charge its customers illegal fees, and if the customers pay those fees, they will be unable to sue the company to recover the fees, even if they did not know the fees were illegal at the time they paid them. The result of such an unfair rule is that a wrongdoing company is rewarded and innocent consumers are punished for paying their bills.

### ***Flores v. Millennium Interests, Ltd.* (Medina 6-3)**

**Impact:** Ignores legislative intent by stripping the only meaningful protection homebuyers have against some predatory lenders.

Executory contracts – which include contracts for deed and rent-to-own agreements – have been used with increasing frequency in the past decade as predatory lenders prey on the immigrant, minority, and low-income populations of Texas. Under this type of contract, the seller holds the deed for the property until the buyer has paid in full. If the buyer does not pay in full for any reason, the seller keeps the deed and all of the money paid by the buyer. This applies even if the buyer is evicted by the seller; thus a seller may benefit greatly by evicting the buyer. Because of this potential for abuse, these types of contracts have become very popular among predatory lenders.

One of the only protections a buyer has under such a contract is the requirement that the seller provide an annual report to the buyer containing useful information, such as the amount owed on the property and the number of payments remaining. A late fee of \$250 per day is assessed for failure to provide the report on time with all required information. This fee adds up quickly, and thus sellers have a strong incentive to provide this report to buyers on time.

In this case, the seller had not included the amount paid on the home under the contract or the number of payments remaining – two crucial pieces of information for any homebuyer. The Supreme Court had to decide whether the \$250 per day fine applies if the seller provides the report but pertinent information is missing.

The Court held that unless the missing information is so serious as to constitute bad faith, the buyer is not entitled to the \$250 per day fine, and the Court did not find the missing information in this case to be that serious. Three justices dissented, noting that the statute clearly requires a seller to include all listed information in the report, and assesses the fine if all information is not included. The result of this decision, in which the Court flatly ignored the legislature's intent, is that Texans who purchase a house through executory contract have lost the only meaningful protection they had against predatory lenders.

### ***Hyundai Motor Co. v. Vasquez* (Bland 6-3)**

**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, the Court has clearly demonstrated its willingness to allow clearly demonstrated bias into the jury box.

### ***Tooke v. City of Mexia* (Hecht 7-1)**

**Impact:** Allows municipalities to renege on contracts with small business owners by reversing a 26 year old case the Texas 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. 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 ninety 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.”<sup>22</sup>

### ***Loram Maintenance of Way, Inc. v. Ianni* (Green 9-0)**

**Impact:** Allows companies to condone illegal drug use by its employees without fear of liability.

Roger Tingle worked for Loram Maintenance of Way, a company that performed maintenance on railroad tracks. It was a very labor-intensive job that required such long hours that employees were often forced to work for weeks without a day off. The job required frequent traveling and employees lived in a motel paid for by Loram while working. Tingle and many other employees began using crystal methamphetamine to stay alert, and the employer was aware of this. Tingle’s supervisor had given him time off from work to obtain more drugs for the crew and had even given drugs to Tingle himself when Tingle was passed out. Additionally, Tingle had attempted to assault a co-worker’s wife while high, and the incident had been reported to the company, yet the company took no action against him.

One evening after work, Tingle got into an argument with his wife and threatened her with a gun. Police Officer David Ianni witnessed the incident and tried to intervene. He was shot and seriously wounded by Tingle. Officer Ianni sued Loram, alleging that the company was negligent in retaining a dangerous employee, in failing to supervise that employee, and in encouraging drug use among its employees. The jury found that the company’s actions were grossly negligent, and the appellate court affirmed.

The Supreme Court reversed, however, holding that Loram owed no duty to protect Officer Ianni from its employee because the injury to Officer Ianni. The Court expressly held that the company’s knowledge that Tingle was a drug abuser and had threatened violence to others was insufficient to impose a duty on the company. As a consequence of this decision, companies in Texas can safely encourage their employees to use drugs while being assured that they will not be responsible for any crimes or injuries committed by those employees.

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#### **About Court Watch**

Court Watch is a project of the Texas Watch Foundation, a non-partisan consumer research organization located in Austin, Texas, dedicated to educating the public about the importance of strong consumer protections and the need to maintain fair and open access to our courts.

Since 1997, Court Watch has published an annual report on the Texas Supreme Court, describing the Court’s major decisions and its jurisprudence. Court Watch is the only ongoing project to monitor the Texas Supreme Court and the impact its decisions have on Texas families and consumers.

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<sup>22</sup> 197 S.W.3d 325, 362 (2006).