



# Court Watch

a project of the Texas Watch Foundation

## NO END IN SIGHT

The Texas Supreme Court Maintains Its Longstanding Tradition of Pro-Defendant Bias

Annual Report, 2006-2007

### INTRODUCTION

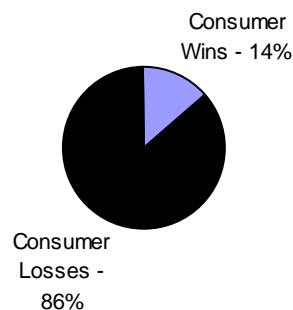
Court Watch is in its eleventh year of monitoring the Texas Supreme Court and its decisions' impacts on Texas consumers. Since our first report in 1997, we have monitored how the Texas Supreme Court has issued decisions undermining the rights of Texas consumers and families in order to protect the interests of businesses and government. Sadly, but not surprisingly, our study this year shows that the Supreme Court remains a pro-defendant, anti-consumer body that is continuing to trample on the rights of everyday Texans.

During the 2006-2007 term, the Court considered 80 cases in which individual consumers were pitted against government and corporate interests.<sup>1</sup> The Court considered cases touching on a broad array of consumer issues, ranging from medical malpractice to employment disputes to premises liability. The vast majority of these decisions were rendered in favor of the corporate or government interests.

The Court has a longstanding tradition of bending the law in favor of corporate and governmental defendants. Perhaps the most disturbing aspect of this report is that there appears to be no effort by the Court to change its anti-consumer policy. In fact, in many ways, this session was the worst session for consumers since Court Watch first began monitoring the actions of the Court. Of the 80 consumer cases heard last session, 86% were consumer losses. This number defeats the previous record for consumer loss rate of 84%, set during the 2005-2006 term.

Further, regular readers of our report will notice that this year's report does not contain

Consumer Win-Loss Rate, 2006-2007



<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.



our usual Terrible Ten list of anti-consumer cases issued by the Court. Ten cases were not enough to adequately show the damage done by the Court during the 2006-2007 term. In its place, we have provided the Dirty Dozen—twelve cases that embody the anti-consumer sentiments of the Court. Not since the 1999-2000 term have we expanded our list from a Terrible 10.

The Texas Supreme Court is the highest civil court in our state. The impact of its decisions are far-reaching and touch the lives of each and every Texan. Few Texans outside the legal community, however, understand the drastic impact that these decisions can have on their everyday lives. As elected officials and arbiters of justice, however, it is important that these justices issue decisions by the rule of law and not by the rule of big government and big business. We hope this report encourages Texans to become more involved in a system that has a dramatic effect on their lives.

## BY THE NUMBERS

Keeping with our practice of the past ten years, we reviewed each opinion issued by the Court during the 2006-2007 term (July 1, 2006-June 30, 2007), giving particular attention to the opinions which pitted individuals against insurance, medical, and corporate defendants. Eighty of the 124 cases issued by the Court were classified as consumer cases.

Of these 80 consumer cases, only 11 were consumer victories, a trifling 14%. Consumers lost 86% of the time. This loss rate surpasses the record set during the 2005-2006 term of 84%. We noted in that report that the increased consumer loss rate reflected a deepening animosity towards consumers. Indeed, this new record shows that this was not merely an anomaly, but an anti-consumer trend with no end in sight.

## Consumer Scorecard

Once again, all nine justices on the Texas Supreme Court received an “F” on our Consumer Scorecard.<sup>2</sup> With a score of just 39%, Justice Harriet O’Neill again proved herself the closest thing the Court has to a champion for working families. And once again, Justice Willett maintained his reputation of looking out for the big guy while trampling on the little guy. He voted in favor of consumers just 7% of the time. The average score was a paltry 21%. Unfortunately for consumers, nobody on the Court is willing to stick up for their rights even half of the time.

### Texas Supreme Court Consumer Scorecard, 2006-07

Justice	Score
Harriet O’Neill	39%
David Medina	31%
Wallace Jefferson	28%
Phil Johnson	21%
Dale Wainwright	18%
Scott Brister	19%
Paul Green	12%
Nathan Hecht	11%
Don Willett	7%

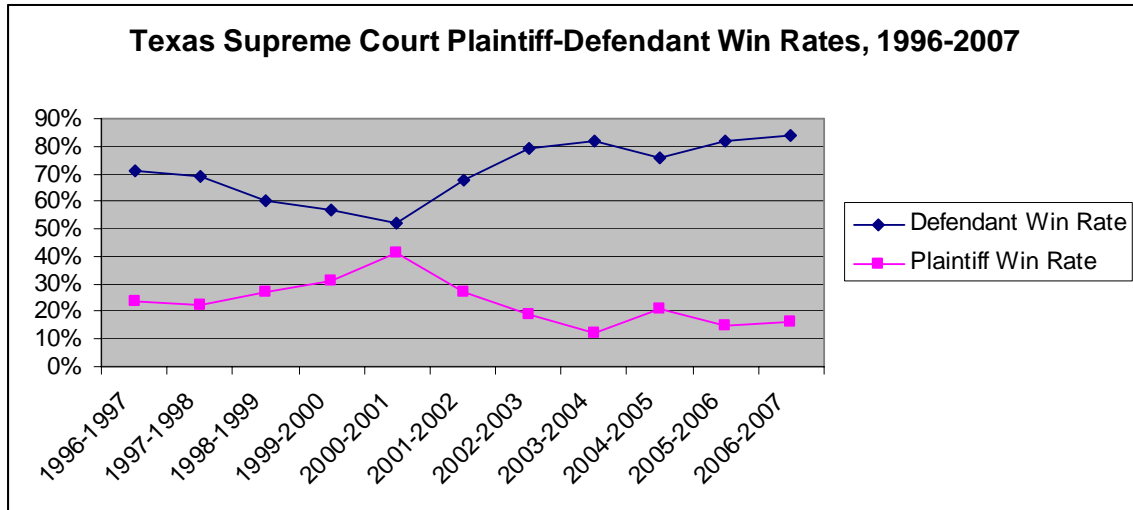
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<sup>2</sup> Scores were calculated based on each justice’s voting record in the 40 authored consumer cases with signed opinions rendered during the Court’s 2006-2007 term. The Court only ruled in favor of consumers in 13% (5 of 40) of these signed opinions.



## A Legacy of Pro-Defendant Decision Making

Most of the time in civil cases involving consumers, the plaintiff is the consumer and the defendant is the corporate or government entity that has committed the alleged violation against the consumer. To this end, Court Watch has been monitoring the plaintiff-defendant win rate in consumer cases at the Court since 1996. This past term, defendants in consumer cases were victorious 84% of the time.<sup>3</sup> This marked the highest defendant win rate in Court Watch's history. This was good news for the already bloated pocketbooks of the defendants. Consumers, on the other hand, were forced to walk away empty-handed.



The chart above depicts the plaintiff and defendant win rates over the past 11 years. While the Court has favored defendants consistently throughout the past eleven years, the trend has been one of increasing marginalization of plaintiffs since 2000, when the more moderate Bush appointees left the Court and were replaced by Governor Perry's appointees. To be sure, the Texas Supreme Court has been a decidedly pro-defendant body for well over a decade; however, the defendant win rates have exploded under Governor Perry's appointees. Time and again, Governor Perry has been called upon to make balanced appointments that will foster judicial diversity in the Court. Unfortunately, he refuses to heed those calls and has instead made ideological appointments that fail to serve the interests of judicial balance.

## Overturning Jury Decisions

The Constitution of the United States guarantees a trial by jury. Embedded in this guarantee is the value of having one's peers decide the facts in a case. The Texas Supreme Court has been more than willing to overturn these findings when it comes to consumer cases. The Court overturned 72% of the consumer cases decided by juries. Compare this to non-consumer cases where a jury rendered a decision: only 50% of such cases were overturned. The justices' willingness to readily

<sup>3</sup> The plaintiff-defendant win rate is calculated based on consumer cases. In all cases except two, the consumer was the plaintiff. In two cases, however, businesses were the plaintiff suing a consumer defendant. In each of these cases, the court ruled in favor of the businesses, and thus the cases were counted as plaintiff victories even though they were in reality consumer defeats. If these cases were excluded from the calculation, the true plaintiff win rate would only be 14%.



overturn jury decisions reveals a disrespect for the jury system, which is fundamental to civil liberties and civil rights, and a mindset to protect corporate defendants at the expense of individuals.

### Agreement with Majority

Our legal system is adversarial in nature. Opposing parties are allowed to present their case, and by reviewing the two competing contentions, a court of law should be able to render a legal decision. Theoretically, by the time a case comes before the Texas Supreme Court it has been litigated to a point where there is a serious question of law. Since no one person would be capable of fairly rendering judgment on this question of law, the Supreme Court consists of nine seated justices. Consequently, one would think there would be a lot of room for dissent among the justices. Not so. As the chart below shows, the rate of agreement with the majority ranged between 81% and 98%. The average rate of agreement was 90%.

**Agreement with Majority, 2006-2007**

Justice	Agree	Disagree	Total Cases	Score
Jefferson	46.5	6.5	53	88%
Brister	50	3	53	94%
Green	49	1	50	98%
Hecht	49	5	54	91%
Johnson	50	3	53	94%
Medina	43.5	9.5	53	82%
O'Neill	39.5	9.5	49	81%
Wainwright	51	3	54	94%
Willett	47.5	4.5	52	91%

*\*This analysis includes majority and unanimous opinions. It does not include per curiam opinions as it is not possible to accurately discern the positions of individual justices on anonymous opinions. The total cases category lists the number of cases in which each justice participated.*

Compare these numbers with those of the Supreme Court of the United States. Justices in our nation's high court agreement with the majority ranged from 61% to 98% during the 2006 term.<sup>4</sup> The average rate of agreement was 79%.<sup>5</sup>

A court's ability to disagree shows a broad spectrum of opinions and ideologies, reflective of the diverse views of the public at large. The failure of the Texas Supreme Court to routinely engage in such vigorous debate shows how our current Supreme Court lacks an independent or moderate center and is betraying its proper judicial mandate to interpret the law.

<sup>4</sup> RUPAL DOSHI, GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE, SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2006 OVERVIEW (2007).

<sup>5</sup> See *id.*



## Voting Bloc Analysis

The diagram in Appendix 1 further elucidates the alignment between justices in rendering decisions. The average rate of agreement between individual justices was a shocking 86%. The highest rates of cohesion were found between the most anti-consumer justices. Indeed, Justices Willett and Hecht, the two justices who scored lowest on our consumer scorecard, had a 100% rate of agreement. Such alignments on a court reduce the possibility for any meaningful debate. See Appendix 1 of this report to see the Texas Supreme Court voting bloc analysis for 2006-2007.

## PAVING THE WAY TO AN EGREGIOUS FUTURE

We have discussed many of the Supreme Court's trends that Court Watch has been monitoring over the past eleven years. Each year, however, different trends emerge which are often good indicators of the direction of future Supreme Court decisions and their impacts on consumers. The following are some of the trends we observed from the past term.

### Premises Liability

Generally speaking, a business is responsible for protecting customers from dangers on its premises. A duty is placed on the owners to protect customers who come onto their property to conduct business.<sup>6</sup> The business owner must exercise reasonable care in keeping the premises reasonably safe for the customer.<sup>7</sup> If this sort of liability was not placed on the business owner, then there would be less incentive to keep the business operating in a safe manner to protect patrons. The Supreme Court's decisions this term, however, indicate a willingness to release business owners from this liability.

In *Bed, Bath & Beyond v. Urista*,<sup>8</sup> a customer was injured when a trash can was knocked off of a twelve-foot high shelf by one of the employees. The customer, Rafael Urista, was knocked unconscious and later developed back injuries. The Supreme Court, however, found that it was proper to determine such an injury to be an "unavoidable accident." This sets an extremely dangerous precedent for future claimants. If knocking a customer unconscious with a garbage can be considered an "unavoidable accident," what other kinds of actions will be considered unavoidable?

In *F.F.P. Operating Partners v. Duenez*,<sup>9</sup> a convenience store employee sold a twelve-pack of beer to a man who had already consumed thirty-six beers that day and was clearly inebriated. The drunken customer got back into his truck, opened a beer, placed it between his legs, and drove his truck into an automobile carrying five members of the Duenez family, seriously injuring everyone in the family. The Duenezes sued F.F.P Operating Partners, the owner of the convenience store, under the Texas Dram Shop Statute.

The Dram Shop Statute was passed by the Texas Legislature in an attempt to reduce the risk posed to Texas families by drunk drivers. The idea behind such a statute is that by placing liability on a bar or liquor store for a customer's action, the establishment will take precautions in order to deter the sale of liquor to intoxicated patrons, thereby potentially preventing drunk driving.<sup>10</sup> The Court

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<sup>6</sup> See, e.g., *Smith v. Henger*, 226 S.W.2d 425 (Tex. 1950).

<sup>7</sup> *Id.*

<sup>8</sup> Docket number 04-0332.

<sup>9</sup> Docket number 02-0381.

<sup>10</sup> See Chief Justice Jefferson's dissent in *F.F.P. Operating Partners*.



majority, however, turned this statute on its face, declaring that in this case, the customer was so intoxicated that the sale of additional beer could not have been a cause of the accident. In his dissent, Chief Justice Jefferson notes the irony that a statute intended to prevent the sale of alcohol to an intoxicated customer is invalidated when the customer is excessively drunk.<sup>11</sup>

These two cases act as mere illustrations of the level of injustice that resulted from the Court's decisions in premises liability cases. Whether it was a woman injured by a protruding floorplate at the airport or a bicyclist injured by an errantly placed sprinkler head, the Court was consistent in its message: businesses and governments will not be held responsible for persons injured on their premises.

### **Government Immunity in the Wake of *Tooke***

Last year's Terrible Ten list included *Tooke v. City of Mexia*.<sup>12</sup> In that case, the Court overturned a 26 year old legal precedent that the Legislature had relied on in drafting more than 80 statutes. The decision held that governments would be immune from lawsuits even if the city charter contained language allowing it to "sue and be sued." The practical effect of this decision was to allow municipalities to renege on contracts with individuals and small business owners.

This session, the Court relied on *Tooke* to overturn six lower court decisions.<sup>13</sup> Whether it was a group of 321 firefighters who were denied wages or a small business that was not allowed to enforce its contract with the government, the Court consistently upheld its previous decision in *Tooke*, which held that a "sue and be sued" provision actually means "can't be sued."

The fact that six of these cases were overturned in just this one session is an indicator of the far-reaching effect of *Tooke*. These cases comprised nearly five percent of the Court's decisions last session. In the future, cases such as these will not even come before the Supreme Court since it is now virtually impossible for individuals and small businesses to hold local governments accountable. Not only has the Supreme Court made decisions that will hurt consumers, but it has rendered a decision that has effectively precluded them from even bringing valid claims against government entities.

### **Employment Disputes**

Once again, the Supreme Court heard a number of cases involving employment disputes and, unsurprisingly, employers came out on top. In cases ranging from wrongful termination disputes to workers' compensation claims, the Court consistently rendered judgment in favor of the employer.

In *In re RLS Legal Solutions* the Supreme Court ruled that Amy Maida, an employee of RLS, was subject to an arbitration clause and therefore could not litigate her employment dispute.<sup>14</sup> Ms. Maida showed extensive evidence indicating that she had signed the agreement under duress, signing only after RLS had withheld her paycheck until she agreed to sign the new employment contract.

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<sup>11</sup> *Id.*

<sup>12</sup> 197 S.W.3d 325 (Tex. 2006).

<sup>13</sup> The six cases decided on *Tooke* grounds were: *City of Elsa v. M.A.L.* (Docket number 06-0516), *City of Pasadena v. Kinsel Indus.* (Docket number 06-0353), *City of Arlington v. Matthews* (Docket number 06-0251), *Abilene Hous. Auth. v. Gene Duke Builders* (Docket number 05-0631), *City of Houston v. Williams* (Docket number 06-0159), *City of Sweetwater v. Waddell* (Docket number 05-1033).

<sup>14</sup> Docket number 05-0290.



Normally, such conditions would render a contract void. The employer, RLS, argued that because the employee not only objected to the arbitration provision in the contract, but objected to multiple provisions of the contract, she would need to settle the dispute through arbitration. Despite the labyrinthine illogic used to come to this ludicrous decision, the Court found it compelling and rendered judgment in favor of the employer.

In *Jack in the Box v. Skiles*, the Court ruled that Jack in the Box had no duty to warn its employee of the dangers associated with his job because the dangers were obvious.<sup>15</sup> In *City of Houston v. Williams*, 321 firefighters were denied wages on jurisdictional grounds.<sup>16</sup> There was no consistent rule of law cited by the Court in rendering the decision. The one thing that was consistent was the Court's favoritism for employers in employment disputes.

## Jurisdiction

In law, jurisdiction refers to a court's ability to decide a case or issue a decree. Generally, Texas courts have jurisdiction over events involving Texans that take place in Texas. Jurisdictional issues often arise, however, when the parties in a lawsuit live in different states or when the actions giving rise to the lawsuit occurred in multiple jurisdictions. Texas courts can assert personal jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.<sup>17</sup>

Each state has the discretion to limit the reach of its long-arm statute as long as it is within the parameters proscribed by the Due Process Clause of the United States Constitution and the relevant case law. The language of the Texas long-arm statute is extremely broad. The Texas Supreme Court has noted that it allows Texas courts to "reach as far as the federal constitutional requirements of due process will allow."<sup>18</sup> In two extremely important and complex decisions rendered by the Supreme Court, the Court rendered judgments that limited the jurisdictional reach of Texas courts and harmed consumers.

In *Moki Mac River Expeditions v. Drugg*, the Court overturned a lower court decision that granted jurisdiction to hear a wrongful death claim.<sup>19</sup> The deceased, a thirteen-year-old Texan named Andy Drugg, was killed during a rafting trip in the Grand Canyon. Andy died outside of Texas, but the district court granted jurisdiction because Moki Mac had made purposeful contacts within the State of Texas. Moki Mac had purposefully marketed its services in the State of Texas and actively sought Texans to participate in its river rafting expeditions. In keeping with previous Texas Supreme Court holdings, both the trial and appellate courts found that these actions were sufficient to bring Moki Mac within Texas' jurisdiction.

Despite the fact that the events were well within the reach of the Texas long-arm statute and in conformity with the Due Process Clause, the Texas Supreme Court decided to overturn the lower courts' decisions granting jurisdiction. For the first time ever, the Court adopted the "substantial connection to operative facts" test—a narrower, more stringent test than the Court had previously

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<sup>15</sup> Docket number 05-0911.

<sup>16</sup> Docket number 06-0159.

<sup>17</sup> *Schlobohm v. Shapiro*, 784 S.W.2d 355, 356 (Tex. 1990).

<sup>18</sup> *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 226 (Tex. 1991).

<sup>19</sup> Docket number 04-0432.



required. The practical result is that fewer plaintiffs will be allowed to bring their cases in Texas. Since most plaintiffs cannot afford to travel across state lines to litigate, this means that many plaintiffs won't be able to bring suits at all.

In *Coca-Cola Bottling Co. v. Harmar Bottling Co.*, the Court overturned a jury verdict finding Coca-Cola guilty of violating the Texas Free Enterprise and Antitrust Act.<sup>20</sup> Coca-Cola had used a calendar marketing agreement that severely limited the ability of other soft drinks to compete with Coca-Cola products, thereby unfairly limiting consumer choice. Under these calendar marketing agreements, retailers were paid to raise the price of competing soft drinks. Retailers were often prohibited from advertising competing brands and were required to place these competing brands in less conspicuous locations.

The Supreme Court, however, held that Texas courts lacked jurisdiction in this case because the calendar marketing agreements covered parts of Arkansas, Louisiana, and Oklahoma. The issue of jurisdiction, however, had not even been at issue in this case. The dissent noted, "Instead of resolving this choice-of-law issue with choice-of-law rules, the Court treats it as a jurisdictional defect. Until today, no one has ever suggested the trial court had no subject-matter jurisdiction of this case. Certainly not Coke . . ." This case sets a dangerous precedent whereby future courts may find a jurisdictional defect simply because part of a cause of action arises in another state.

These two cases show a frightening trend emerging to limit the jurisdiction of Texas courts. Not only is this bad from a jurisprudential standpoint, but it poses practical dangers to consumers as well. Consumers who are scammed by out-of-state parties may have difficulty bringing lawsuits in Texas courts. Additionally, given the Court's proven anti-consumer track record, the Court is liable to dismiss valid claims on jurisdictional grounds if it merely finds that the laws of another state might be implicated. In an attempt not to step on the toes of other states, the Court has effectively crushed the feet of Texas consumers.

## Insurance Coverage

It should be no surprise to our readers that the Court's decisions reflected strong favoritism toward the insurance industry. Ten cases pitted the insurance industry against the interests of consumers.<sup>21</sup> Only one of these cases resulted in a consumer-friendly decision.<sup>22</sup>

In *Fortis Benefits v. Cantu*, the Supreme Court overturned 25 years of precedent that required insured people to be "made whole" prior to reimbursing insurance company payments. In *Fortis*, Vanessa Cantu was seriously injured in an automotive accident. Her insurance only covered a portion of her medical costs, so she sued multiple parties to recover her medical expenses. The settlement she received only covered a portion of her future medical expenses. Normally, an insured person must

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<sup>20</sup> Docket number 03-0737.

<sup>21</sup> The ten cases involving insurance companies were: *Blue Cross Blue Shield of Texas v. Duenez* (Docket number 05-0521), *Fiess v. State Farm Lloyds* (Docket number 04-1104), *Brainard v. Trinity Universal Ins. Co.* (Docket number 04-0537), *State Farm Mut. Automobile Ins. Co. v. Nickerson* (04-0427), *State Farm Mut. Automobile Ins. Co. v. Norris* (Docket number 04-0514), *Citizens Ins. Co. v. Daccach* (Docket number 03-0505), *Farmers Group Inc. v. Lubin* (Docket number 05-0169), *In re Allstate County Mut. Ins. Co.* (Docket number 06-0878), *Fortis Benefits v. Cantu* (Docket number 05-0791), and *Ben Bolt-Palito Consolidated I.S.D. v. Texas Political Subdivisions Property/Casualty Joint Self-Ins. Fund* (Docket number 05-0340).

<sup>22</sup> *Ben Bolt-Palito Consolidated I.S.D. v. Texas Political Subdivisions Property/Casualty Joint Self-Ins. Fund* (Docket number 05-0340).



recover all of her expenses—or be “made whole”—before being required to remit payment to the insurance company, even if the insurance policy expressly stated otherwise. The Supreme Court departed from this sensible and fair policy, and ruled that insurance policy language will now trump an insured’s interest in being made whole. Insurance claimants will now have a more difficult time recovering medical expenses. The practical effect for consumers is that they can now be left with inadequate compensation to cover their basic medical needs.

In *Brainard v. Trinity Universal Insurance Co.*, the Court extended the deadline for an insurance company to pay uninsured/under-insured motorist (UM/UIM) benefits.<sup>23</sup> UM/UIM benefits are mandated by law and are designed to protect insured motorists who are injured by uninsured or underinsured drivers. *Brainard* limits recovery of attorney’s fees in UM/UIM claims to instances where the insurance company does not timely pay after the insured obtains a judgment against the third party. No attorney’s fees are collectable when the insurance company does not timely pay the claim before the judgment. This ruling gives insurance companies a strong incentive to deny claims to UM/UIM coverage as policyholders will no longer be able to recover their attorney’s fees. The award of attorney’s fees is extremely important in consumer cases because consumer attorneys often take cases on a contingency fee basis, meaning that they do not receive payment unless they successfully assist their clients in acquiring funds. If it is unlikely that the attorney will receive payment for his service, he will be less inclined to agree to representation. As a result, insurers are less likely to pay valid claims.

In *Fiess v. State Farm Lloyds*, the Court ruled that an insurance policy with ambiguous language concerning mold coverage did not cover mold damage.<sup>24</sup> Under Texas law, insurance policy language susceptible to multiple reasonable interpretations is supposed to be read in the light most favorable to the policyholder. This has been a long-held standard that is designed to protect policyholders from ambiguities or discrepancies included on contracts written by their insurance provider.

Today, as premiums remain inflated and coverage options continue to be whittled away, policyholders are getting less and less for their insurance dollars. At the very least, the Court should protect these consumers by enforcing the laws already on the books. Instead, the Supreme Court continues to tip the already drastically slanted playing field further in the direction of the insurance companies.

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<sup>23</sup> Docket number 04-0537.

<sup>24</sup> Docket number 04-1104.



# THE DIRTY DOZEN

## 2006-2007

### ***F.F.P. Operating Partners v. Duenez (Wainwright 7-2)***

Impact: Guts the Texas Dram Shop Statute by eliminating responsibility for liquor store owners who sell alcohol to already intoxicated customers, placing Texans in greater dangers from drunk drivers.

### ***Borg-Warner Corp. v. Flores (Jefferson 9-0)***

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.

### ***Bed, Bath, & Beyond v. Urista (Green 7-2)***

Impact: Shields premises owners from responsibility by allowing courts to instruct juries that a finding of unavoidable accident may be appropriate in instances where there is clear evidence of negligence.

### ***Brainard v. Trinity Universal Insurance Co. (Jefferson 7-0)***

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

### ***Coca-Cola Bottling Co. v. Harmar Bottling Co. (Hecht 5-4)***

Impact: Permits gross violations of antitrust laws when states other than Texas are implicated.

### ***Fiess v. State Farm Lloyds (Brister 7-2)***

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

### ***Fortis Benefits v. Cantu (Willett 9-0)***

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

### ***In re RLS Legal Solutions (Per Curiam)***

Impact: Employees who are forced to sign arbitration agreements under duress can still be subject to the arbitration clause.

### ***Moki Mac River Expeditions v. Drugg (O'Neill 7-2)***

Impact: Expands protections for some out-of-state companies, allowing them to escape responsibility even when they do business in Texas and harm Texas citizens.

### ***Brookshire Grocery Co. v. Taylor (Hecht 7-2)***

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

### ***Schaub v. Sanchez (Per Curiam)***

Impact: A patient's refusal to allow a medical procedure can, in some instances, constitute informed consent to the procedure.

### ***Jackson v. Axelrad (Brister, 9-0)***

Impact: Doctors receiving medical treatment will be held to a higher standard than other patients, allowing some negligent physicians to escape accountability when they harm physician patients.



## **THE DIRTY DOZEN**

Over the past 11 years, we have included a listing of the most anti-consumer cases of a given Court term. That list is traditionally known as our “Terrible Ten” list. Some years, however, require us to expand our list because there are simply too many cases that have a broad negative impact on consumers to limit the list to just ten. Unfortunately, the 2006-2007 term of the Court was one of those years. This report includes a “Dirty Dozen” list of the most pro-defendant cases of the year.

### ***F.F.P. Operating Partners v. Duenez*<sup>25</sup> (Wainwright 7-2)**

**Impact:** Guts the Texas Dram Shop Statute by eliminating responsibility for liquor store owners who sell alcohol to already intoxicated customers, placing Texans in greater dangers from drunk drivers.

After spending the entire day chopping wood and consuming a case and a half of beer, a clearly intoxicated Roberto Ruiz drove his truck to a Mr. Cut Rate convenience store owned by F.F.P. Operating Partners and purchased another twelve-pack of beer. Mr. Ruiz returned to his truck, cracked open a beer, and placed it between his legs before pulling into traffic. Mr. Ruiz drove erratically, causing two cars to swerve off the road. About a mile and a half from the convenience store, Mr. Ruiz swerved into the adjacent lane and hit the Duenez family’s car head-on. All five members of the family were injured.

The Duenez family brought a civil suit against F.F.P. Operating Partners under the Dram Shop Statute. The Dram Shop Statute is a law passed by the Texas Legislature which holds companies liable when they sell alcohol to obviously intoxicated individuals. The intent of the legislation was to reduce the risk posed to Texas families by drunk drivers by creating a strong deterrent against selling alcohol to drunk patrons. The trial court found F.F.P. liable and awarded damages and an appellate court upheld the decision. The Supreme Court, however, found that because Mr. Ruiz was so grossly intoxicated after consuming 36 beers, the store owner could not possibly be responsible for contributing to his inebriated state and the subsequent accident.

In his dissent, Chief Justice Jefferson succinctly stated the majority’s illogic:

The dram shop thus has a perverse incentive to establish at trial that its customer was in such a drunken state that selling him “one for the road” could not have contributed to the harm his intoxication later caused. I cannot agree that the Legislature intended as a defense to liability proof that the dram shop completed a sale that the statute quite sensibly forbids.

As a result of this decision, Texas consumers and families will no longer have the protection of the Dram Shop Statute if the defendant can prove that the patron was excessively drunk.

### ***Borg-Warner Corp. v. Flores*<sup>26</sup> (Jefferson 9-0)**

**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.

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<sup>25</sup> Docket number 02-0381.

<sup>26</sup> Docket number 05-0189.



Arturo Flores worked as a brake mechanic for thirty years. He performed about fifteen to twenty 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 eight by ten 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.

### ***Bed, Bath, & Beyond v. Urista*<sup>27</sup> (Green 7-2)**

**Impact: Shields premises owners from responsibility by allowing courts to instruct juries that a finding of unavoidable accident may be appropriate in instances where there is clear evidence of negligence.**

While shopping at Bed, Bath & Beyond, Rafael Urista was hit on the head by a garbage can that fell from a twelve-foot tall shelf. Mr. Urista was knocked unconscious and later developed back injuries. Mr. Urista’s wife testified that the garbage can was knocked over by a store employee and the store manager testified that this was likely the case. The trial court, however, instructed the jury that they could find the incident was an “unavoidable accident.” Accordingly, the jury returned a verdict for the defendant. Mr. Urista appealed the decision, arguing that the jury should not have been instructed concerning the harmless accident instruction.

Under Texas law, the issue of an unavoidable accident is only applicable if the evidence does not raise the issue that something other than negligence of one of the parties to the event caused the occurrence raised. In the instant case, there was uncontested evidence that the injury was probably caused by an employee standing on a ladder trying to retrieve a garbage can with a broom handle. The instructions resulted in a jury failing to find Bed, Bath & Beyond responsible for Mr. Urista’s injury. Future defendants who face premise liability suits may be able to avoid responsibility by arguing that it was an “unavoidable accident,” even if there is evidence that the actions of the company were directly responsible for a customer’s injury.

### ***Brainard v. Trinity Universal Insurance Co.*<sup>28</sup> (Jefferson 7-0)**

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

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<sup>27</sup> Docket number 04-0332.

<sup>28</sup> Docket number 04-0537.



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.

### ***Coca-Cola Bottling Co. v. Harmar Bottling Co.*<sup>29</sup> (Hecht 5-4)**

**Impact: Permits gross violations of antitrust laws when states other than Texas are implicated.**

Five soft drink bottlers who distributed Royal Crown Cola products in Texas, Arkansas, Louisiana, and Oklahoma sued the Coca-Cola Company and several of its distributors for using calendar marketing agreements (CMA) with retailers to unreasonably restrain the dealers, monopolize the market, and conspire to monopolize the market. The plaintiffs alleged violation of the Texas Free Enterprise and Antitrust Act of 2003.

Under Coca-Cola's CMAs, retailers were paid to raise the price of competing soft drinks. Retailers were often prohibited from advertising competing brands and were required to place these competing brands in less conspicuous locations. In light of this and several other pieces of evidence, a jury found Coca-Cola guilty of violating the Texas Free Enterprise and Antitrust Act.

The Supreme Court, however, overturned this jury finding. This decision was rendered in large part because Coca-Cola's CMAs covered parts of Arkansas, Louisiana, and Oklahoma. There were, however, no conflicts between the Texas law and the laws of the other states. The dissent noted, "Instead of resolving this choice-of-law issue with choice-of-law rules, the Court treats it as a jurisdictional defect. Until today, no one has ever suggested the trial court had no subject-matter jurisdiction of this case. Certainly not Coke . . . ."

Under this logic, subsequent court decisions could find a jurisdictional defect simply because part of the cause of action arises in another state. The dissent further noted that, under this ruling, an appellate court will be able to assume that a Texas law conflicts with another state's law if the issue was not raised during trial. The dissent stated, "Not only does this reverse dozens of our own cases and our own rules of evidence, it allows appellate judges to dismiss jury verdicts on appeal—without notice or argument—whenever they think verdicts 'dictate to other states what can and cannot be tolerated.'"

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<sup>29</sup> Docket number 03-0737.



### ***Fiess v. State Farm Lloyds*<sup>30</sup> (Brister 7-2)**

**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.

### ***Fortis Benefits v. Cantu*<sup>31</sup> (Willett 9-0)**

**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.'"<sup>32</sup> 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

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<sup>30</sup> Docket number 04-1104.

<sup>31</sup> Docket number 05-0791.

<sup>32</sup> *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)).



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.<sup>33</sup> Policy language will now trump an insured’s interest in being made whole. This ruling will remove incentive for policyholders to bring suits against insurance companies to recover medical costs not covered by the insurance policies. 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.

### ***In re RLS Legal Solutions*<sup>34</sup> (Per Curiam)**

**Impact:** Employees who are forced to sign arbitration agreements under duress can still be subject to the arbitration clause.

Amy Cob Maida was the Chief Financial Officer for RLS Legal Solutions. She had signed previous employment agreements containing arbitration provisions. RLS gave her a new contract containing a new arbitration clause. Maida disapproved of the arbitration clause as well as several other clauses in the new contract. She expressed these concerns to friends and coworkers. RLS informed her that her pay would be withheld if she did not sign the new contract. When RLS did indeed withhold her salary, Maida became worried and signed the agreement, but told her employer that she was signing it under duress.

Maida later brought an employment dispute against RLS. RLS argued that her dispute was subject to the arbitration clause in her employment agreement. In bringing this employment dispute, Maida contested that the arbitration clause was unenforceable since RLS improperly withheld her salary payment to force her to accept the arbitration provision. There was uncontested evidence that Maida objected generally to the new employment agreement as well as the arbitration agreement specifically. The Court looked to its previous decision in *In re FirstMerit Bank*, in which the Court stated that duress and other defenses must “specifically relate to the Arbitration Addendum itself, not the contract as a whole, if they are to defeat arbitration.”<sup>35</sup> The Court extended this reasoning to the present case, stating, “Unless the arbitration provision alone was singled out from the other provisions, the claim of duress goes to the agreement generally and must be decided in arbitration.”

Since there was evidence that Maida objected specifically to the agreement, the Court’s decision effectively holds that an employee’s objection to multiple components of an employment agreement, including an arbitration provision, will nullify the employee’s ability to contest the arbitration agreement. In order to contest an arbitration agreement, an employee must object to the arbitration agreement alone and no other portions of the contract.

### ***Moki Mac River Expeditions v. Drugg*<sup>36</sup> (O’Neill 7-2)**

**Impact:** Expands protections for some out-of-state companies, allowing them to escape responsibility even when they do business in Texas and harm Texas citizens.

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<sup>33</sup> 909 S.W.2d 548 (Tex. App.—Austin 1995, writ denied).

<sup>34</sup> Docket number 05-0290.

<sup>35</sup> 52 S.W.3d 749 (Tex. 2001).

<sup>36</sup> Docket number 04-0432



Andy Drugg, a thirteen-year-old boy, died in June 2001 on a river-rafting trip in Arizona with Moki Mac River Expeditions, a Utah based river-rafting outfitter. Andy's parents, Charles and Betsy Drugg, filed suit in Texas for wrongful death due to Moki Mac's negligence and for intentional negligent misrepresentation. Moki Mac argued that the court lacked specific jurisdiction (i.e., they argued that the case could not be heard in a Texas court). In order to establish specific jurisdiction, a legal claim must "arise from or relate to" purposeful contacts in the forum (Texas). In order for a Texas forum to properly exercise specific jurisdiction in the case, it must be shown that 1) Moki Mac made minimum contact with Texas by purposely availing itself of the privilege of conducting business here, and 2) Moki Mac's liability must have arisen from or related to these contacts.

The Court acknowledged that Moki Mac's actions were intended to serve the Texas market—they knowingly sold rafting trips to Texas residents and purposefully directed marketing efforts to Texas with the intent of soliciting business from the state. The Court therefore concluded that the first prong of the jurisdictional analysis had been satisfied. Both the trial court and the intermediate appellate court agreed that these contacts resulted in Andy's death, thereby satisfying the second causation prong. The United States Constitution gives broad discretion to states in determining the legal standard for determining causation as it relates to a jurisdictional analysis. The Texas Supreme Court acknowledged that the trial and appellate courts' findings of causation were well within these Constitutional guidelines and yet, inexplicably, decided to establish a narrower, more stringent causation standard.

The Supreme Court overruled the lower courts' holdings, even though they acknowledged the decision was constitutionally permissible and did not stray from previous Texas case law. The Court adopted the "substantial connection to operative facts" test—a narrower, more stringent test than the one applied by the lower courts.

This decision will give Texas courts the power to deny hearing cases involving out-of-state actors if they don't find a "substantial connection" between the claim and the actions of the out-of-state party. In the instant case, even though Moki Mac purposely advertised in Texas and sent mailings to Andy Drugg and his parents, a court could hold that the nexus between the two events was too remote to allow the Texas family to file suit in Texas courts. Ultimately, fewer Texans will be allowed to bring their cases in their home state. Since most consumers cannot afford to travel across state lines to litigate, this means that many consumers won't be able to bring suits at all.

### ***Brookshire Grocery Co. v. Taylor*<sup>37</sup> (Hecht 7-2)**

**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

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<sup>37</sup> Docket number 03-0408.



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.

### ***Schaub v. Sanchez*<sup>38</sup> (Per Curiam)**

**Impact: A patient's refusal to allow a medical procedure can, in some instances, constitute informed consent to the procedure.**

Janie Sanchez had undergone two stellate ganglion blocks (SGB). An SGB is a spinal anesthesia injection to certain nerves in the patient's neck. Ms. Sanchez told the doctors that she did not want another SGB performed, so the doctors suggested a wrist manipulation procedure as an alternate approach. Sanchez signed a consent form agreeing to this new procedure. During the surgery her hand began to swell, which can cause some post-operation pain. The doctors performed a third SGB to mitigate the swelling. Sanchez presented evidence that performing the block while she was unconscious deviated from the accepted medical standard of care. This caused an infection that resulted in spinal surgery. Sanchez sued the doctors for operating without informed consent.

The Court ruled that Sanchez could prevail on her informed consent claim only if she showed that the doctors negligently failed to disclose the procedure's risks or hazards. Since she had previously undergone two SGBs, the Court ruled that she had been made aware of the procedure's risks and hazards. They therefore ruled that Ms. Sanchez's cause of action for informed consent could not prevail.

The Court failed to note, however, that while Ms. Sanchez had been informed of the risks of the SGB prior to her previous procedures, there was no evidence showing that she had been informed that the alternative operation may result in an SGB. In fact, she specifically requested the alternative procedure because she did not want to receive another SGB. Under this holding, a doctor can avoid liability for lack of informed consent even if the patient never consented in the first place.

### ***Jackson v. Axelrad*<sup>39</sup> (Brister, 9-0)**

**Impact: Doctors receiving medical treatment will be held to a higher standard than other patients, allowing some negligent physicians to escape accountability when they harm physician patients.**

Dr. Axelrad, a psychiatrist, consulted Dr. Jackson for medical treatment, complaining of months of intermittent abdominal cramps and diarrhea and subsequent abrupt onset of acute pain. Dr. Jackson prescribed an enema, which ruptured Dr. Axelrad's colon. Dr. Axelrad went to the emergency room, where he discovered he was suffering from diverticulitis. People with this condition should not be

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<sup>38</sup> Docket number 06-0375.

<sup>39</sup> Docket number 04-0923.




















prescribed enemas due to the risk of a perforated colon. Dr. Axelrad sued Dr. Jackson for negligence and Dr. Jackson countersued for negligence. The jury found both parties negligent, but found Dr. Axelrad (the patient) 51% negligent, thereby rendering a take-nothing judgment.

Had Dr. Axelrad been a normal patient (i.e. not a doctor), he certainly would not have been held liable. The jury was instructed, however, to evaluate Dr. Axelrad's negligence using a heightened standard based on Dr. Axelrad's medical expertise. The Court argues that because of his medical training as a psychiatrist, he should have been more accurate in the description of his pain (Dr. Axelrad claimed that he explained the nature of his stomach pains, but Dr. Jackson denied this). The Court determined that even though the attending doctor only asked general questions, he would not be expected to ask the same questions he would ask of an ordinary patient. Instead, since his patient is a doctor, it is acceptable for him to ask less specific questions about the pain. This decision is dangerous because it could make it extremely difficult for doctors to bring medical malpractice suits as patients.



## APPENDIX 1: Voting Bloc Analysis, 2006-2007

	 Jefferson								
 Hecht	80%	 Hecht							
 O'Neill	81%	70%	 O'Neill						
 Wainwright	90%	89%	83%	 Wainwright					
 Brister	88%	87%	85%	92%	 Brister				
 Medina	85%	80%	81%	80%	85%	 Medina			
 Green	89%	95%	79%	92%	93%	83%	 Green		
 Johnson	89%	85%	79%	92%	88%	84%	94%	 Johnson	
 Willett	82%	100%	70%	89%	87%	80%	94%	85%	 Willett

### Bloc Voting Analysis

Bloc voting analysis 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 20 opinions with a split result are required to make the study accurate. Twenty-five majority opinions, and twenty-nine unanimous decisions were considered in tallying these statistics.



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.

### Bloc Voting Calculation

Average rate of agreement (cohesion): 86%

$100$  (perfect agreement)  $- 86$  (cohesion)  $= 14$ ;  $14/2 = 7$ ;  $86$  (cohesion)  $+ 7 = 93\%$

**Bloc is 93% or greater**

