THE TEXAS SUPREME COURT IN 1998-1999:
Moderating the Counter-Revolution

A Report By Court Watch,
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SUMMARY

The Texas Supreme Court's hostility to the appeals of consumers, crime victims, the elderly, medical patients, and employees appears to be moderating somewhat after a decade long struggle within the high court to ensure Texas law favors the defendant in most cases.

During the court's 1998-1999 term, the state's highest civil court decided 116 cases, including 77 cases that pitted defendants against consumers, patients, and crime victims seeking damages from corporate, professional or governmental defendants. Defendants won 46 decisions —or 60 percent of the decisions — while plaintiffs won 21 and 10 cases had split decision. The defendants' 60 percent win rate was significantly less than the 69 and 71 percent won by defendants in the previous two terms, and far less than the 82 percent favoring defendants in 1995, the year that pro-defense conservative Republicans gained the upper hand on the court.

The court's moderation is accompanied by a realignment of voting alliances among justices. Party is no longer a factor in internal court disputes, as the last two Democrats left the court at the end of 1998. But a contingent of four justices initially appointed by Gov. George W. Bush appear to be intent on eliminating the excesses of the GOP old guard elected between 1988 and 1994. Led at times by justices Deborah Hankinson, Greg Abbott and James Baker, and finding high agreement with new justices Alberto Gonzales and Harriet O"Neill, the "New Guard" increasingly is challenging the intellectual leadership of conservative activist Nathan Hecht and his allies.

MODERATION: THE REASONS WHY

Lawyers and other court watchers have suggested several possible factors that led to this moderation:

The court is becoming more liberal and progressive: This theory is easily dismissed because a strong majority of decisions still favor defendants. While defendants won 9 percent less of the decisions in the past year, there has been only a 3 percent increase in wins for consumers and others who sue to recover damages.

The justices face no substantial challenges from "liberal" or "progressive" Democrats and therefore the justices feel less pressure to satisfy their pro-defense supporters: This explanation fails to reflect the blurring of party lines and philosophies. Although Republican conservatives assumed all nine seats on the court in 1999 following the retirement of Justice Raul Gonzalez and the electoral defeat of Rose Spector, the tilt of the court did not alter. Gonzalez was one of the court's most conservative, pro-defense justices, and Spector, a moderate, was not inclined to stake out an absolute position for the plaintiffs. There had not been an effective political or philosophical challenge to the conservative faction since 1994.

The conservative agenda has been achieved and now they're not fighting over anything significant anymore: This explanation has the support of many lawyers who say the court's moderation was expected once it achieved its overhaul of the law in favor of defendants. This analysis seems particularly true in insurance cases, where the most important changes in insurance law were wrought between 1993 and 1996, with the court mopping up after that.

Moderation shows up in cases dealing with procedure, but is less apparent when substance of the law is at issue: This explanation has some appeal because of the emerging differences of approach between the court's leading judicial conservative, Justice James Baker, and its leading judicial activist, Justice Nathan Hecht. While both are highly conservative on substantive decisions, Baker repeatedly objects to the use of interim judicial orders to bail out defendants in mid-trial, and has garnered substantial support for that approach. Other justices have expressed concerns about procedural shortcuts taken by the court, and have dug in their heals at continuing the aggressive activism in favor of judicial conservatism. The change is readily apparent to lawyers. One court watcher aptly describes the change this way: "They no longer send in the Marines to bail out the defendant at the first sign of trouble."

What moderation by the court means for the injured consumer is that the court will no longer follow the practice of the last five years: Go anywhere at anytime to make sure defendants win. The court is remains ready to apply or change the law to favor defendants, but the court is more frequently drawing a line at bailing out outrageous corporate or professional behavior when the defense lawyers miss deadlines, fail to raise timely objections and retroactively add issues to appeals. By balking at the use of judicial orders and intermediate appeals to intervene in cases, the court is ensuring that more plaintiffs will get their day in court.

NEW CHALLENGES

Even as the court appears ready to let the pendulum swing back into the middle after swinging widely to either side in the past 20 years, it still faces two major challenges.

The first is how — or if — it will evolve the law to keep pace with rapidly changing technology and the emergence of a global society drawing on widely differing cultures and legal traditions. Inaction or reliance on ancient precedent and legal tradition will not solve all emerging problems.

One example of the court's current approach is the water use case it decided this year. In *Sipriano v. Great Spring Waters of America,* the court maintained the 19th century right-of-capture that allows a water bottler to pump unlimited water from an underground aquifer, even if the pumping results in lowered well levels for others using the aquifer. The court chose to defer to the Legislature in *Sipriano*, hoping that legislative water use plans would prove effective. However, the court failed to address the archaic basis for allowing unlimited pumping from underground water — that in the 19th century, no one knew how to determine flows and resources within the aquifer. Technology has given modern society the ability to do so, yet the court chose not to act on a crucial issue in a state where water resources limit growth. The question remains whether the court is willing to act if legislation fails to protect a scarce resource.

The second challenge is one of justice. The court clearly is re-injecting fairness in the legal process with its more frequent refusals to bail out defendants with procedural problems. But the popular support for a legal system is measured by the sense of justice that ordinary citizens and non-citizens garner from the legal system, and the Texas Supreme Court still fails to project a perception that it is just to both doctor and patient, to both insurer and policyholder, and to both worker and employer.

An example of how the court falls short can be drawn from *Drilex Systems v. Flores,* a case in which the court addressed settlement credits in cases where one defendant settles and the other does not. The court chose to interpret ambiguous legislation on crediting settlements in a way that protects defendants from manipulation by plaintiffs and their lawyers. Acknowledging that the results of the court's interpretation could "seem harsh," the court ignored arguments that it was creating the same opportunities for manipulations on the part of the defendant.

For justice to be served in *Drilex,* or in any other case, the court must not protect one party over another, but must seek the same protections and prerogatives for both defendant and plaintiff, consumers and manufacturers, and insurers and policyholders. Until it does, the court cannot be said to have re-established justice in Texas.

SILVER LININGS

Decisions That Were Good For Consumers And Citizens

1. Read v. The Scott Fetzer Co.: An independent contractor who failed to screen a rapist who entered a home as a door-to-door vacuum salesman can be held sued for damages. (6-3, majority opinion by R. Gonzalez)

2. NME Hospitals v. Reynolds: An employee may sue someone other than her own employer for violating the Texas Labor Code in preventing her from becoming a partner. (9-0, Hankinson)

3. GTE Southwest Inc. v. Bruce et al.: A jury verdict for employees against a profane and harassing supervisor is upheld. (9-0, Abbott)

4. In re Alford Chevrolet-Geo et al.: A class action suit against 636 auto dealers for wrongfully collecting inventory taxes from customers is allowed to proceed. (7-2, Hankinson)

5. McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests: Having previously ruled out legal malpractice suits against lawyers by injured third-parties who were not clients, the court allows third-party law suits based on negligent misrepresentations made by lawyers. (8-0, Hankinson)

6. Rhône-Poulenc Inc. v. Steel: The family of cancer victims who allegedly died from contact with radioactive materials at work and from contact with materials inadvertantly carried home in the worker's clothes and body will get their day in court. (8-1, Baker)

7. Fitzgerald v. Advanced Spine Fixation Systems Inc.: State law requires manufacturers to pay for the legal expenses of a seller of a defective product who is sued, then dismissed because he did even if he did not sell the actual product that injured the consumer. (5-4, A. Gonzales)

8. Mid-Century Insurance Co. v. Lindsey: An auto insurance policy covers injuries caused by a rifle stored in a truck gun rack that went off when bumped by someone entering the car. (6-3, Hecht)

9. In re Nolo Press/Folk Law Inc.: The court's Unauthorized Practice of Law Committee may not use a secret process and secret rules to challenge the sale of legal self-help materials in Texas. (8-0, Hecht)

10. Bradley v. State of Texas: The court voids the removal of a mayor who resisted the attempts of other city council members to de-annex portions of the town to satisfy a prominent developer. (9-0, Baker)

AUTHORS OF OPINIONS
Texas Supreme Court
1998-1999

Out Of The Shadows: Per curiam opinions were once the favorite method for the court to correct lower court error, especially between 1995 and mid-1997, when the court issued more of unsigned per curiam opinions than signed opinions. Because the court can issue a per curiam when up to three justices disagree with the majority, some court observers believed the court was hiding its votes on major changes in the law by issuing so many unsigned opinions. The good news is that in the last two years, the trend has reversed. In the last term, 51 cases were decided by unsigned opinions, while justices took credit for 66.

Writer's Cramp: With the departure of Raul Gonzalez, a pro-business Democrat who liked to express his own particular views of cases, Justice Nathan Hecht is most likely to have writer's cramp. For the second year in a row, Hecht was the most prolific author of opinions, penning 18, three more than justices Priscilla Owen and Craig Enoch. Owen wrote the most signed opinions — 11 — stating the majority opinion.

He Begs To Disagree: Justice James Baker is currently the court's great dissenter. Hecht wrote one more opinion with a dissenting element, but four of his eight dissents were solo shots at the court for failing to hear cases.

Justice	Unanimous	Majority	Concurrence	Concurring & Dissenting	Dissent	Total
Hecht	4	4	2	2	6	18
Owen	6	5	1	0	3	15
Enoch	6	2	2	0	5	15
Baker	1	3	2	0	7	13
Abbott	5	3	0	1	2	11
Phillips	3	4	1	0	0	8
Hankinson	6	1	0	0	0	7
A. Gonzales	3	2	0	0	0	5
R. Gonzalez	1	1	0	1	2	5
O'Neill	4	0	0	0	0	4
Spector	1	1	0	0	0	2
TOTALS	40	26	8	4	25	103

Signed opinions	66
Unsigned per curiam opinions	45
Per curiam opinions on rehearing	6
Total opinions	117

THE SWING VOTE

Identifying the one justice who makes the difference in the court's close decisions — the swing vote — is best accomplished through an analysis of the court's decisions in which the justices split 5-4 on result. Five such decisions were issued in the last year.

- **The Center:** Justices Nathan Hecht and Craig Enoch both voted for the majority position four out of five cases that split 5-4, with three other justices voting in the majority three times. Enoch, who agreed with the majority decision in 81 percent of all cases in 1998-99 compared to Hecht's 54 percent, is more likely the justice who holds the balance in close cases. The previous year, Enoch had the lowest agreement in 5-4 cases.

- **Most Likely Not To Swing:** Baker is least likely to tilt the balance of the court in close cases. He voted against the majority in all five 5-4 cases where a single vote would switch the result, securing the perception that he is the court's leading dissenter.

Voting With the Majority in 5-4 Decisions

1998-1999

Hecht	4-1
Enoch	4-1
Owen	3-2
Phillips	3-2
Abbott	3-2
Spector	2-0
O'Neill	2-1
R. Gonzalez	1-1
A. Gonzales	1-2
Hankinson	1-3
Baker	0-5