

# **OBSTACLE TO JUSTICE**

A Look into the Activist Behavior of the  
Texas Supreme Court & How It Impacts  
Texas Families

*Texas Supreme Court Annual Review 2004-2005*



prepared by

**Court Watch**

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[www.txwfoundation.org](http://www.txwfoundation.org)



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# OBSTACLE TO JUSTICE

## A Look into the Activist Behavior of the Texas Supreme Court & How It Impacts Texas Families

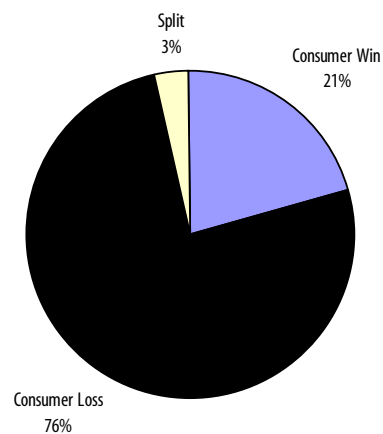
As the state's highest court for civil disputes, the Texas Supreme Court is responsible for interpreting and following the law, not rewriting and ignoring the law. As a judicial body, it stands for the rule of law, not the rule of judges. And as the state's highest appellate court, its scope of authority is restricted to legal questions, not factual questions.<sup>1</sup>

Today's Texas Supreme Court is barely recognizable, however, as the judicial body laid out in the Texas Constitution. Indeed, the Court often functions as an unconstitutional superjury and superlegislature, ignoring the verdicts of independent citizen juries and rewriting statutory law. Ideologically, it is activist and staunchly pro-defendant, frequently siding with the insurance industry, corporations, state government, and medical interests.

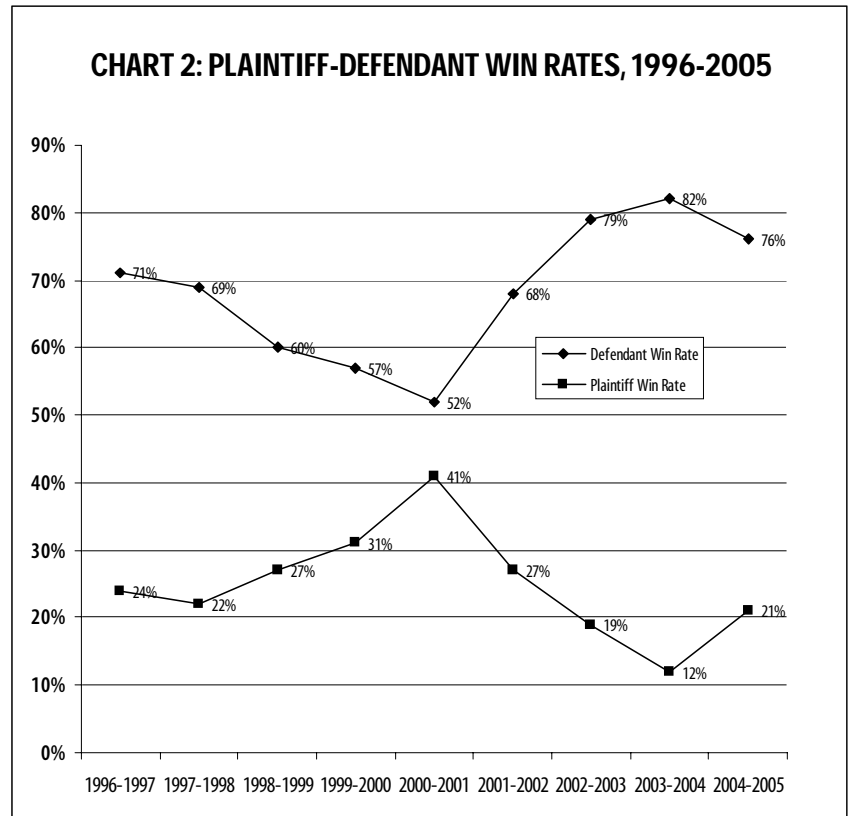
Statistically, the Court's pro-defendant record speaks for itself. In the 2004-2005 term, the Court decided 62 consumer-related cases. Incredibly, defendants won 47 -- or 76 percent -- of those cases, representing close to a four-to-one win ratio.<sup>2</sup>

Placed in historical perspective, the Court's pro-defendant record continues a trend we observed in 1997 when Court Watch issued its first report. In 2001 and 2002, the pro-defen-

**CHART 1: CONSUMER WIN-LOSS RATE, 2004-2005**



dant ideology of the Court intensified when a group of judicially temperate and moderate justices left the Court. As a result, a group of justices ideologically sympathetic to defendants and hostile to injured plaintiffs began controlling the direction of the Court. This trend, we argue, strongly suggests that ideology and politics are behind the Court's decisions.



In this report, the ninth in Court Watch's series on the Texas Supreme Court, we focus on two interrelated trends: the Court's propensity for judicial activism, and its anti-consumer, pro-defendant ideology. These trends are clearly not mutually exclusive. To the contrary, the Court's activism is a product of its ideology: its desire to protect defendants from liability requires it to be activist.

In the section entitled "The Texas Supreme Court: A Case Study in Judicial Activism," we discuss at length the Court's activist tendencies, including a number of cases in which the Court ignored established procedures, statutes, and precedents to advance its agenda. The cases demonstrate how the Court distorted the Texas Constitution and the law by:

- interfering with the Texas Legislature by rewriting statutory law;<sup>3</sup>
- ignoring long-standing legal precedent;<sup>4</sup>
- displaying a contempt for citizen juries;<sup>5</sup>
- weighing conflicting evidence despite having no constitu-

tional authority to do so;<sup>6</sup>

- deciding cases based on ideology and politics;<sup>7</sup>
- engaging in ideological conformity rather than judicial independence; and
- rejecting moderation, balance, and restraint as judicial virtues.

Then in “What the Numbers Say,” we employ a traditional statistical analysis of the Court and its decisions. The numbers show a Court intent on protecting wrongdoers and insurance companies over individual plaintiffs. For example, the Court reversed jury verdicts in 78 percent of the 23 consumer-related cases originally decided by a jury. Juries, of course, are a fundamental part of the judicial system, representing the careful deliberations and judgments of independent citizens. In reversing jury verdicts against defendants, however, the Court unlawfully expanded its authority and subverted the traditional role of juries.

Finally, in “The Withering of Consumer Rights,” we turn to the devastating impact the Court’s pro-defendant decisions have on Texas families. In the 2004-2005 term, the Court:

- created new loopholes for defendants who negligently expose workers to dangerous products;<sup>8</sup>
- consolidated the bargaining power of the insurance industry;<sup>9</sup>
- weakened long-standing protections under Texas’s Deceptive Trade Practices Act;<sup>10</sup>
- protected hospitals that allow doctors who abuse drugs on their staffs;<sup>11</sup>
- expanded the scope of its authority to review trial evidence;<sup>12</sup>
- rewrote the established rules for jury selection to allow biased jurors to serve;<sup>13</sup> and
- erected new evidentiary obstacles in products liability claims.<sup>14</sup>

As a whole, the Court’s decisions were characterized by a palpable hostility to Texas families who have been injured by negligent defendants.

When Court Watch began in 1997, we identified a disturbing trend on the Texas Supreme Court. In a majority of its decisions, the Court shielded negligent defendants from liability and left injured plaintiffs with few legal remedies. Today, that is the modus operandi of the Court. Interpreting the law stands for protecting the interests of defendants. For the majority of Texans, the Texas Supreme Court is a substantial obstacle to justice.

# TEXAS SUPREME COURT

## A Case Study in Judicial Activism

As a judicial body, the Texas Supreme Court holds a defined mandate—to interpret the law. Obviously, the Court was not created to be a political instrument answerable to corporate interests or a quasi-legislative body with the unbridled authority to rewrite the law by judicial fiat. It represents, rather, the principle that we are a people who live by the rule of law, not by the rule of judges.

Judging from the Court’s record, however, that principle is frequently ignored. Its loyalty to the rule of law depends on what interests are at stake, and, as we explain, the interests of defendants are evidently close to the Court’s heart.

*“To substitute judicial intent for legislative intent, and Supreme Court findings for trial court findings, is judicial activism.”<sup>15</sup>*

**Justice Nathan Hecht**

### **Defining Activism**

Since the 1980s, conservatives have had a monopoly on popular understandings of judicial activism. In conservative circles, the label has been synonymous with political and unprincipled judges motivated by a liberal

social agenda. In this report, we broaden the debate on judicial activism, arguing that conservative judges frequently ignore the rule of law and engage in judicial activism. Because judicial activism is often misunderstood, it is important that we define the label.

Legal scholars have identified concrete and salient examples of judicial activism: departing from judicial precedent, not respecting the authority of the legislative branch, departing from legal history or tradition, authoring broad holdings, and deciding cases based on ideology or political preferences.<sup>16</sup> According to Ernest Young, a law professor at the University of Texas, the above examples “all involve a refusal by the court deciding a particular case to defer to

other sorts of authority at the expense of its own independent judgment about the correct legal outcome.”<sup>17</sup>

That is a particularly apt description of the Texas Supreme Court’s judicial philosophy. When the interests of defendants are at stake, the Court often refuses to defer to the judgments of independent citizen juries, to settled precedent, and to the authority of the Texas Legislature. If that is not activism, it is not clear what is. The statistical record on defendant wins further demonstrates that the justices are strongly ideological. Neutral interpreters of the law they are not.

Typically, charges of judicial activism stand for fundamental disagreement with the results of a decision, and in that respect they are pejorative. Political pundits, for example, are notorious for branding judges as “activists,” when in fact they are only guilty of reaching a result based on a slightly different interpretation of the law. We have taken great pains to avoid that kind of grandstanding in this report. We use the label cautiously to describe the institutional and jurisprudential problems with the Court. Our disagreement centers on the Court’s failure to follow recognized legal procedures and established methods of interpretation.

In criticizing the Texas Supreme Court, we are not questioning its institutional authority or its standing in Texas government. We recognize that the Court plays a central role in Texas government and deserves the greatest of respect from Texas citizens. What we are questioning is the *present* Court’s fidelity to the rule of law.

## **Judicial Activism Writ Large**

*F.F.P. Operating Partners v. Dueñez*<sup>8</sup> and *Excess Underwriters v. Frank’s Casing*<sup>9</sup> are representative of the Texas Supreme Court’s judicial hubris and disrespect for the rule of law. They demonstrate, rather disturbingly, that ideology and politics are the trump cards on the Court.

### ***F.F.P. Operating Partners***

After drinking a case-and-a-half of beer, Robert Ruiz drove to a convenience store owned by F.F.P. Operating Partners and purchased a twelve-pack of beer. Just minutes later an intoxicated Ruiz collided head-on with a car driven by the Dueñez family, causing life-threatening injuries. After a trial, a jury returned a verdict against F.F.P. A court of appeals and the Texas Supreme Court affirmed the judgment of the trial court based on a strict reading of Texas’s Dram Shop Act.

Dissenting, Justice Priscilla Owen,<sup>20</sup> a pro-defendant ideologue on the Court, strongly objected to the Court's interpretation of the Act. "I do not believe," she wrote, "the Legislature intended the single phrase parsed by the Court to mean that a provider of alcohol is liable for 100 percent of the damages caused by an intoxicated person . . . ."<sup>21</sup> But that is precisely what the language of the Act mandated.<sup>22</sup> In arguing otherwise, Justice Owen ignored traditional rules of statutory construction and the Court's limited constitutional mandate.

Justice Owen's attempt to rewrite a key provision of Texas's Dram Shop Act was a disturbing example of judicial hubris. She may have her way, however, because in April 2005 the Court decided to grant F.F.P.'s motion for rehearing.

Granting a motion for rehearing is not in itself unusual or suspect, but the behavior and timing of the Court in granting this particular motion is questionable for a number of reasons: 1.) three justices who voted with the five-justice majority in the original decision are no longer on the Court; 2.) the Court waited six months before granting the rehearing; and 3.) the case was extensively briefed at the Supreme Court. According to Bill Dorsaneo of Southern Methodist University's Dedman School of Law, the Court's decision was "highly unusual." Agreeing to rehear a case after three justices have left, he said, "brings what has been reasonably settled doctrine into question."<sup>23</sup> In fact, questioning "settled doctrine" is often judicial activism.

*F.F.P. Operating Partners* is indeed a troubling example of how an activist faction on the Court treats the law and a judgment it disagrees with. Nothing in the Court's original decision, though, was particularly controversial. Because Ruiz was a customer of F.F.P. and intoxicated when he purchased the twelve-pack, the Court concluded that F.F.P. was responsible for Ruiz's liability. It was a holding that faithfully followed the language of the Texas Dram Shop Act.

### ***Frank's Casing***

*Frank's Casing* holds a dubious honor in the Court's history of judicial activism. Not only did the Court deliberately ignore settled Texas precedent, it also adopted California law.

In a nutshell, the case involved the right of insurance carriers to be reimbursed by their policyholders in coverage disputes. Five years earlier in *Texas Association of Counties v. Matagorda County*,<sup>24</sup> the Court had held that insurance carriers were entitled to reimbursement from policyholders in only very limited circumstances.<sup>25</sup>

Justice Harriet O’Neill authored the majority opinion in that case, which was joined by six other justices.<sup>26</sup> Justice Owen, joined by Justice Nathan Hecht, dissented, defending an insurer’s right to reimbursement.

By May 2005, when *Frank’s Casing* was decided, the six justices who joined Justice O’Neill in *Matagorda County* were no longer on the Court. For the judicial activists on the Court, *Frank’s Casing*, then, provided the perfect opportunity to reverse *Matagorda County*. And that is what happened, as Justice Owen adopted her dissent from *Matagorda County* as the majority opinion in *Frank’s Casing*.

Besides ignoring its earlier holding in *Matagorda County*, the Court decided to adopt California law, despite the fact that California law is not binding on Texas. For an ideological Court motivated by results that was just an inconvenient fact without consequence.

### **Reweighing Evidence: The Court as Superjury**

The Texas Supreme Court is not authorized by the Texas Constitution to weigh conflicting evidence. That responsibility belongs primarily to independent citizen juries.<sup>27</sup> The Court’s authority is limited to questions of law, not fact.

Before she was confirmed to serve on the federal bench, Justice Owen admonished the Court’s majority in *In re Doe* for weighing evidence:

*“The right of trial by jury shall remain inviolate.”<sup>28</sup>*

**Texas Constitution  
Article1, Section 15**

Rather than conduct an appellate review to determine if there was evidence to support the lower courts’ determination, this Court has usurped the role of the trial court, reweighed the evidence, and drawn its own conclusions. The Court has forsaken any semblance of abiding by principles of appellate review ... . Now that the Court has, after the fact, issued an opinion, it has obliterated, with the stroke of a pen, more than fifty years of precedent regarding appellate review of a trial court’s findings. The Court’s actions raise disturbing questions about its commitment to the rule of law and to the process that is fundamental to the public’s trust in the judiciary.<sup>29</sup>

In a related case, Justice Hecht objected to the majority’s “deep-seated ideology” and criticized the Court for:

steadfastly refus[ing] to give trial courts' fact-findings the deference they would command in any other context. The reason for this lack of deference is that the Court intends to act as the trial court in these cases, even though it cannot see or hear the witnesses or assess their credibility.<sup>30</sup>

He concluded with a definition of judicial activism: "To substitute judicial intent for legislative intent, and Supreme Court findings for trial court findings, is judicial activism."<sup>31</sup>

Justices Owen's and Hecht's lofty pronouncements on judicial activism deserve to be quoted at length because they describe the proper role of the Court. Ironically, though, they describe, perhaps by accident, how the two justices and a majority on the Court treat jury verdicts they disagree with. When confronted with evidence against defendants, the Court often ignores the factual findings of a jury and substitutes its own judgment. Not only do the Court's decisions weaken the traditional role of the jury system, they misunderstand the proper appellate role of the Court as well.

As an example, consider *Volkswagen of America, Inc. v. Ramirez*,<sup>32</sup> a case in which a majority on the Court reversed the trial and appeals courts by weighing disputed evidence and ignoring the jury's factual

findings. In a strongly worded dissent, Chief Justice Wallace Jefferson, joined by Justice O'Neill, criticized the majority for abusing its appellate authority: "We are supposed to indulge inferences in *favor* of the verdict, not *against* it." [Emphasis in the original.] Rather than deferring to the jury verdict, the majority, Chief Justice Jefferson wrote, "adopt[ed] a contrary approach, tipping the scale in the opposite direction to dismiss as 'conclusory' expert testimony that supports the verdict.

*"We are supposed to indulge inferences in favor of the verdict, not against it."*<sup>33</sup>

**Chief Justice Wallace  
Jefferson**

This Court is constitutionally bound to conduct only a legal—not factual—sufficiency review."<sup>34</sup> When the Chief Justice of the Texas Supreme Court publicly lectures his fellow justices on what the Texas Constitution says, it is a not-so-subtle sign that the Court is abusing its authority. Respecting reasonable jury verdicts is what separates responsible judges faithful to the rule of law from ideological judges motivated solely by results.

On occasion, Justice O'Neill has objected to the Court's distortion of facts. Writing in *Southwestern Bell Telephone Co. v. Garza*,<sup>35</sup> she charged the majority with ignoring the constitutional prohibition on weighing facts. The majority, she wrote, usurped the fact-finding

authority of appeals courts, “misstat[ing] the role that truly undisputed evidence should play in a legal sufficiency analysis and impermissibly expand[ing] the Court’s scope of review.”<sup>36</sup>

Until the Court recognizes that it is not a superjury and is not authorized to weigh conflicting evidence, it will continue to subvert the rule of law.

*“[The Pirate’s] Code is more what you’d call ‘guidelines’ than actual rules.”<sup>37</sup>*

**Justice Harriet O’Neill**

## **Rewriting the Law: The Court as Superlegislature**

*“The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”<sup>38</sup>* The Texas Constitution, Article II

Article II of the Texas Constitution unambiguously prohibits the Texas Supreme Court from playing the part of the Texas Legislature. A fundamental principle of government in Texas, Article II recognizes that democracy is built on the separation of powers. Unfortunately, in its desire to protect defendants, the Court frequently ignores this most basic constitutional principle.

*PPG Industries, Inc. v. JMB/Houston Center Partners Ltd.*<sup>39</sup> is a key example of the Court’s contempt for Article II and the separation of powers. In that case, the Court considered whether assignments of legal claims under Texas’s Deceptive Trade Practices Act (DTPA) were valid. (An assignment is a transfer of a property right. When you purchase property from its original owner, for example, you may be assigned the mineral rights to the property.) After purchasing a building with defective windows manufactured by PPG Industries, JMB sued PPG for violations under the DTPA and breach of warranties. A jury returned a verdict against PPG, and an appeals court affirmed, holding that DTPA claims are in fact assignable.

*“In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.”<sup>40</sup>*

**Texas Government Code**

Writing for a majority on the Supreme Court, Justice Scott Brister reversed, holding that DTPA claims are not assignable, despite clear language in the DTPA protecting consumers from precisely

the sort of conduct in *PPG Industries*.

In its legal reasoning, Justice Brister's opinion was remarkable because the Texas Legislature had expressly stated that the DTPA was to "be liberally construed and applied to promote its underlying purposes, which are to protect consumers ... ." <sup>41</sup> The Legislature's intent, in other words, was hardly ambiguous. But the statute clashed with Justice Brister's ideological sympathies with defendants, and, as a result, he ignored the clear intent of the Legislature.

This is definitely not the proper method of interpreting legislative statutes. As the Court is in the habit of saying, its "objective is to determine and give effect to the Legislature's intent," and that involves following the "plain and common meaning of [a] statute's words."<sup>42</sup> No legislative statute or provision in the Texas Constitution allows the Court to ignore the intent of the Texas Legislature.

Judges today are often admonished to interpret the law, not make the law. In a democracy, the lawmaking function is best left to the legislative branch and the will of the people. A court that distorts the intent of a legislative statute for ideological and political reasons is making law by judicial fiat.

### **Ignoring Precedent: The Death of Settled Law**

It is widely recognized that the rule of law depends on a respectful attitude toward precedent and the doctrine of *stare decisis* (translated from Latin as "to stand by things decided"). Precedent helps guide the decisions of lower courts and, in a literal sense, serves as an anchor by providing predictability and stability in the law. Without precedent, the judicial system would likely be in a perpetual state of chaos. Ignoring precedent, then, is often tantamount to judicial activism.

*"We disagree that there is such a rule, and to the extent these decisions conflict with our opinion here, we disapprove [sic] those cases."* <sup>43</sup>

**Justice David Medina**

In *Cortez v. HCCI-San Antonio, Inc.*,<sup>44</sup> the Texas Supreme Court ignored settled Texas precedent. For forty years, Texas courts agreed that if a prospective juror expressed bias, he was disqualified as a *matter of law*. It was a rule set forth in the Court's 1963 decision, *Compton v.*

*Henrie*.<sup>45</sup> As a Texas appellate court described the decision, "Once a prospective juror admits bias or prejudice, he cannot be rehabilitated and affirmations that bias and prejudice can be set aside and the case decided on the law and evidence must be entirely disre-

garded.”<sup>46</sup>

In *Cortez*, Justice David Medina, a new appointee of Governor Perry, departed from that long-standing precedent, just “disapprov[ing] [of] those cases.” When precedent conflicts with statutory law or a constitution, courts often have legitimate reasons for revisiting precedent. But in *Cortez*, that was not the case. A responsible court, having no legitimate reason for reversing precedent, would have respected the doctrine of *stare decisis*. The Texas Supreme Court, unfortunately, is not a model example of judicial responsibility.

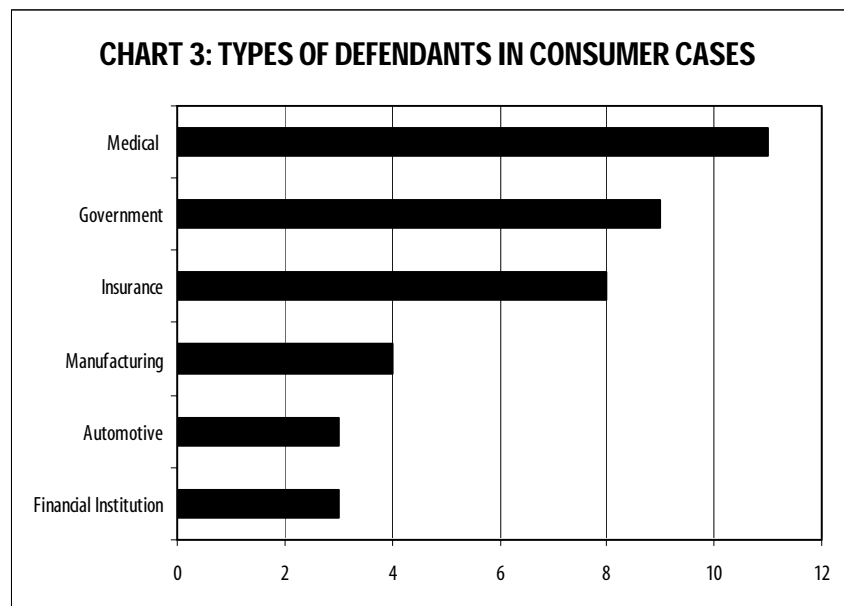
# WHAT THE NUMBERS SAY

## A Statistical Analysis of the Court

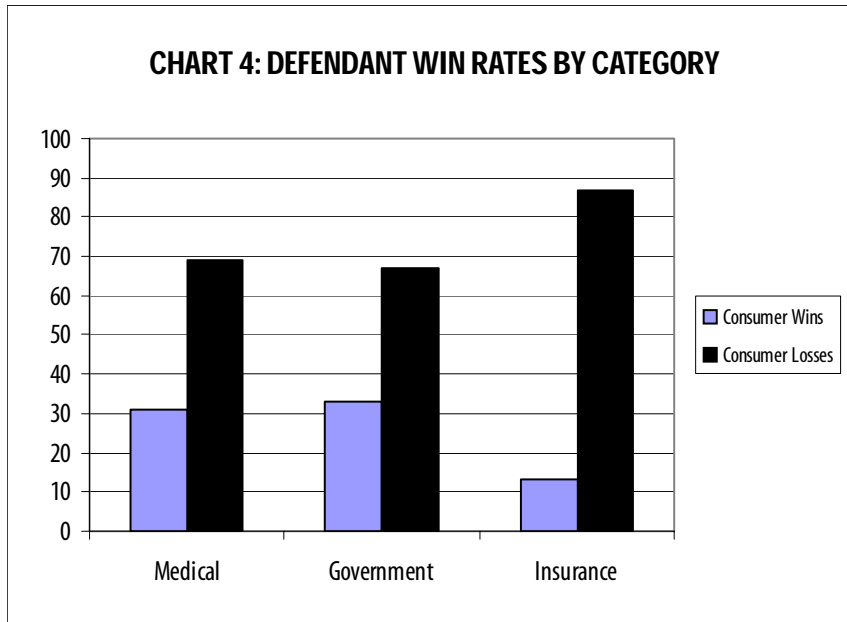
By themselves, the Court's individual decisions paint a disturbing picture of judicial activism. When coupled with statistics on the Court's decisions, however, the picture becomes even more alarming. Not only is the Court activist, it is also defined by ideological conformity and pro-defendant sympathies.

### A Pro-defendant Court

To demonstrate how defendants performed in the Texas Supreme Court, we categorized the 62 consumer-related cases by type of party. Chart 3 shows what type of defendant was before the Court. Medical interests and government agencies are the most common defendants, followed closely by insurance companies, industry, and financial institutions.



As Chart 4 demonstrates, the Court sided with insurance companies 87 percent of the time. The win rates of medical interests and government agencies were second and third respectively, the medical industry winning 69 percent of the cases and government winning 67 percent.



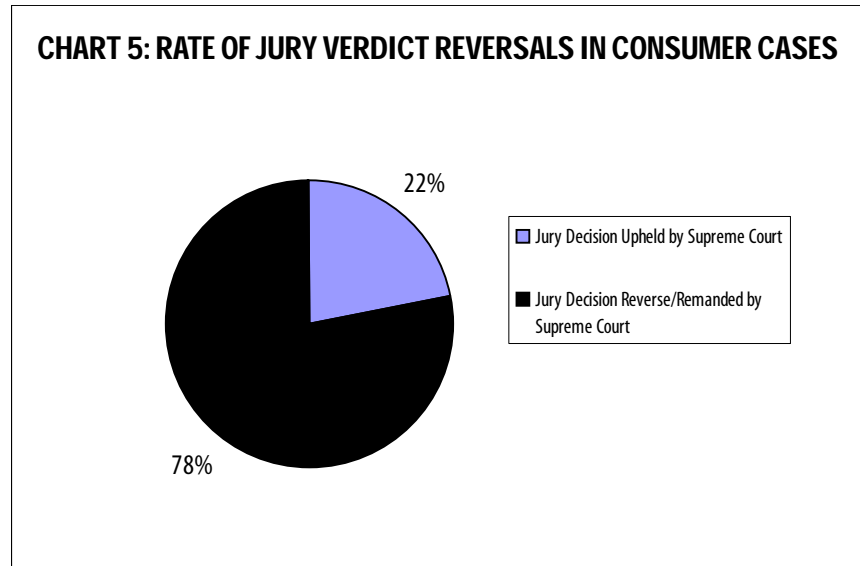
Statistics are a reliable, albeit rough, indicator of the Court's pro-defendant ideology. They show in the aggregate that the Court interprets the law and weighs evidence to benefit defendants. The Court's decisions, as a consequence, often are not based on neutral and balanced principles of interpretation and legal analysis. Indeed, as we explained earlier, the Court consistently violates rules of statutory interpretation and appellate review by distorting the law and facts and ignoring jury verdicts. The evidence, which we have documented in past reports, strongly points to a deliberate political agenda on the Court to shield defendants from liability.

## Reversing Jury Verdicts

Juries are not perfect, which is why we have appellate courts. Juries, of course, are not always wrong either. It seems as though the current members of the Texas Supreme Court are all too quick to assume that a jury verdict against a defendant is wrong. Of the 23 consumer jury verdicts against defendants, the Court reversed and remanded 18 of them, representing a remarkable 78 percent reversal rate (Chart 5).

Often judges may not agree, ideologically, with jury verdicts against defendants, but ideology is no substitute for the rule of law and

judicial restraint. Deference should be paid to citizen juries, and reversing jury verdicts on ideological grounds destroys the public's trust in the judicial branch as an institution.



### **A Court Without a Center**

In past reports, we alerted the public to the strong voting blocs on the Court and the pro-corporate ideology of the justices. In particular, we noted that justices sympathetic to defendants voted as a bloc and controlled the ideological direction of the Court. Absent from the Court was a group of moderates to counterbalance the pro-defendant justices on the Court.

In the 2004-2005 term, that trend continued as the strength of the Court's voting blocs increased. Whereas the average agreement on the Court in 2003-2004 was 86 percent, that figure jumped to 92 percent in 2004-2005, an astounding statistic for an institution that should depend on judicial independence and a healthy exchange of differing viewpoints.

Following historical voting patterns, Justices Owen and Hecht voted as a single bloc, agreeing in 99 percent of the signed decisions in which they participated. Justice Brister, a loyal follower of pro-defendant ideologues on the Court, agreed with Justice Hecht in 98 percent and Justice Owen 96 percent of time. Relatively quiet on the Court, Justice Dale Wainwright consistently voted with Justices Hecht, Owen, and Brister.

A second, though not as dominant, voting bloc centered on then-Chief Justice Thomas Phillips. Before becoming Chief Justice, Justice Jefferson had a 100 percent agreement rate with Chief Justice Phillips. Justice O'Neill agreed with Phillips in 98 percent

of the signed decisions in which they participated. The voting records and the occasional vociferous dissents of Chief Justice Jefferson and Justice O’Neill may signal a streak of independence and moderation on the Court.

Just how strong is agreement on the Texas Supreme Court? The U.S. Supreme Court, recognized for its fierce judicial independence and intellectual and legal rigor, rarely reaches levels of agreement comparable to those on the Texas Supreme Court.<sup>47</sup> Justices on the U.S. Supreme Court vigorously, and on occasion passionately, disagree, a fact that often produces decisions that reflect the broad spectrum of public opinion in the United States. The unprecedented record of agreement on the Texas Supreme Court, on the other hand, reflects the narrow ideological interests of defendants.

The agreement statistics on the Texas Supreme Court are profoundly troubling, indicating a pattern of lock-step voting. They point to a Court without an independent and moderate center; a Court that seldom engages in rigorous disagreement; and a Court that persistently betrays its proper judicial mandate to interpret the law.

**CHART 6: AGREEMENT WITH MAJORITY ON RESULT**

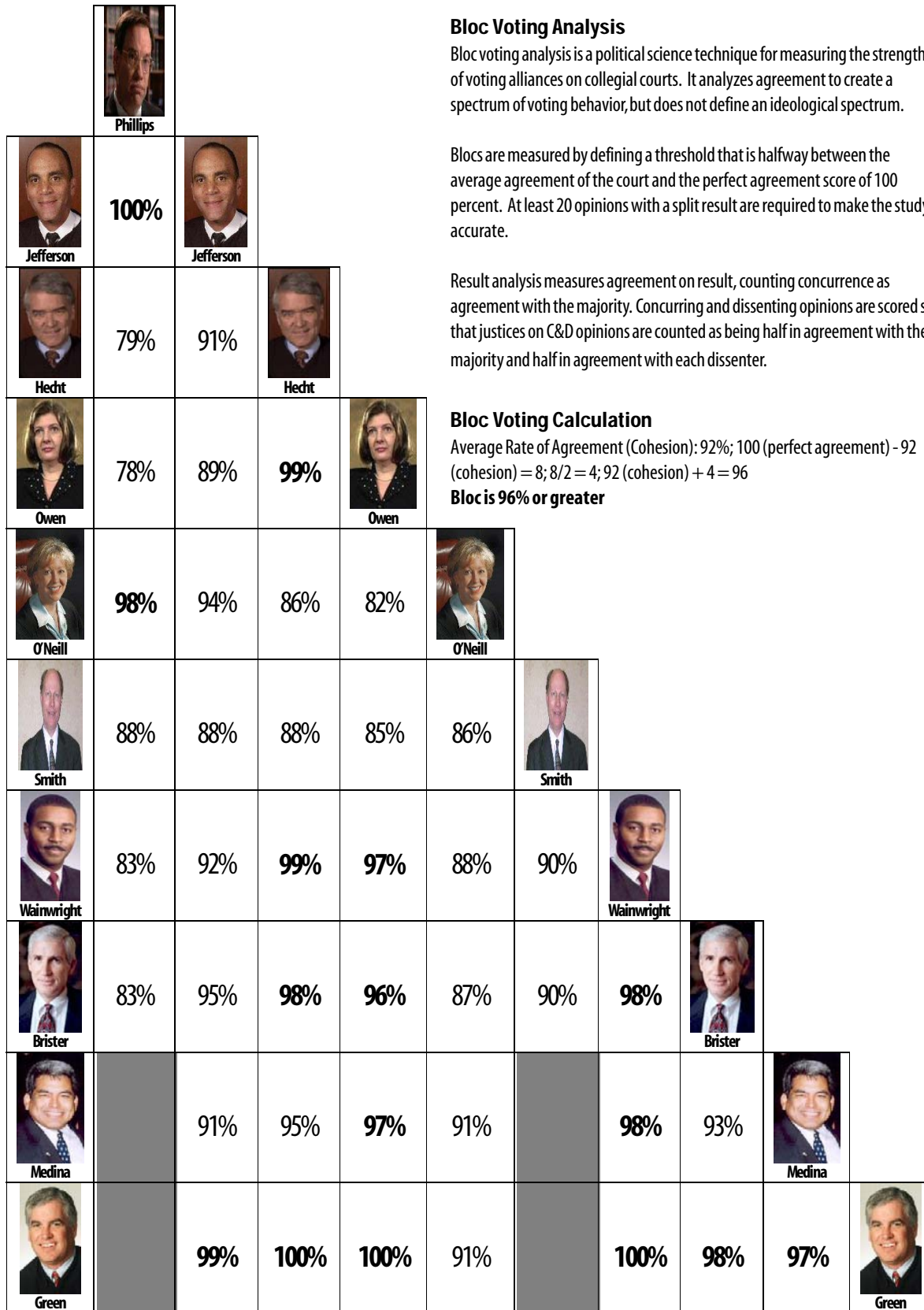
	Majority Opinions (31 Decisions)		Unanimous & Majority (76 Decisions)	
	Agreed/Cases	Agreement %	Agreed/Cases	Agreement %
<b>Phillips</b>	13/15	87%	22/24	92%
<b>Jefferson</b>	26/30	87%	70/74	95%
<b>Hecht</b>	28/31	90%	73/76	96%
<b>Owen</b>	25/29	86%	67/71	94%
<b>O’Neill</b>	21/30	70%	65/73	89%
<b>Schneider</b>	7/10	70%	14/17	82%
<b>Smith</b>	22/24	92%	39/41	95%
<b>Wainwright</b>	28/30	93%	73/75	97%
<b>Brister</b>	26/29	90%	66/69	96%
<b>Medina</b>	10/12	83%	39/41	95%
<b>Green</b>	7/7	100%	30/30	100%
<b>Johnson</b>	1/1	100%	4/4	100%

**Understanding the Voting Blocs: An Ideological Interpretation**

The Court’s unprecedented record of agreement is indeed alarming for a judicial body. It is not just the agreement itself that is alarming, however. The Court regularly protects defendants from liability by ignoring legally defensible jury verdicts. In this respect, there is a particular type of ideological agreement on the Court.

Consider, for example, the voting records of Justices Hecht, Owen, Brister, and Wainwright. They voted for non-consumer defendants in 100 percent of the signed decisions in which consumers lost.<sup>48</sup>

## CHART 7: TEXAS SUPREME COURT VOTING ALLIANCES



### 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 measured by defining 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.

Result analysis measures agreement on result, counting concurrence as agreement with the majority. Concurring and dissenting opinions are scored so that justices on C&D opinions are counted as being half in agreement with the majority and half in agreement with each dissenter.

### Bloc Voting Calculation

Average Rate of Agreement (Cohesion): 92%; 100 (perfect agreement) - 92 (cohesion) = 8; 8/2 = 4; 92 (cohesion) + 4 = 96

**Bloc is 96% or greater**

Statistically, the pro-defendant voting records of Justice Hecht and company are remarkable figures for a Court that depends on judicial independence. Defendants are practically guaranteed favorable votes by Justice Hecht and company. A court that predictable is not a court that interprets the law; it is a results-oriented court that arbitrarily distorts the law to further a political and ideological agenda.

The pro-defendant ideology of Justice Hecht and company is particularly troubling because the Court lives by the “rule of five.” (Five votes constitute a majority.) If four justices consistently vote for defendants, building a majority hinges on just a single vote, and on a Court that is largely pro-defendant that vote will not be hard to come by.

Justice O’Neill has, on occasion, proved the exception to the rule. When the Court has misinterpreted the law or ignored jury verdicts, she has filed vocal dissents. Of the 30 consumer losses in which opinions were signed, she authored or joined dissents in a record 5 cases.<sup>49</sup>

Given the Court’s turnover in recent years and the governor’s power to appoint replacements, Governor Perry has a responsibility to ensure that justices reflect the ideological diversity of the legal community. We encourage the governor to use his power to moderate the actions of the Court by appointing individuals who have broad experience representing individuals and families—not just insurance companies, medical interests, and corporate defendants.

*Additional charts can be found in Appendix 1 of this report.*

# THE WITHERING OF CONSUMER RIGHTS

## The Consequences for Texas Families

If judicial activism defined the Texas Supreme Court's institutional philosophy last year, a visceral hostility to Texas families defined the Court's opinions. The major losers last year were, in fact, Texas families, as they confronted a Court that helped manufacturers escape responsibility for defective products, protected hospitals responsible for negligent hiring, handicapped Texas law designed to protect consumers, and rewrote the rules on jury selection. Just as often, Texas families found themselves before a Court that weighed or ignored evidence, functioning as a superjury, despite having no constitutional authority to do so.

Below, we focus on the practical consequences of the Court's decisions and what they mean for Texas families.

### **Ignoring the DTPA: Shielding Fraudulent Businesses**

Imagine buying a used Mustang from your neighbor. Talking to your neighbor, you learn that she purchased the Mustang from a used-car dealer a couple of months ago. After buying the car, you discover that the car dealer tampered with the odometer and broke a Texas law designed to protect consumers.

It often happens in today's used-car market: consumers are the victims of deceptive business practices. But if you wanted to right a wrong and file suit against the used-car dealer for breaking Texas law, you would be out of luck thanks to the Supreme Court's decision in *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd.*<sup>50</sup>

Texas's Deceptive Trade Practices Act (DTPA) was at the center of the dispute in *PPG Industries*. The Act was intended "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to

provide efficient and economical procedures to secure such protection.”<sup>51</sup> As originally understood, it was to be a strong legal remedy for consumers injured by fraudulent and deceptive business conduct. In recent years, however, the Act has been aggressively targeted in the Texas Legislature and courts by pro-corporate ideologues hostile to consumers and resistant to accountability.

*PPG Industries* further weakens the DTPA. After JMB purchased a building with defective windows manufactured by PPG Industries, it sued PPG for violations of the DTPA and breach of warranties. A jury returned a verdict against PPG, and an appeals court affirmed. But Justice Brister, writing for a majority on the Court, held that DTPA claims are not assignable, despite the fact that property-related claims have traditionally been assignable. Not only that, Justice Brister also deliberately ignored the legislative intent of the DTPA.

*PPG Industries* is a huge defeat for consumer rights and the legal viability of the DTPA. It openly contradicts the purposes of the DTPA and protects businesses that engage in fraudulent and deceptive conduct.

## **Abusing the Privilege: Protecting Hospitals Responsible for Negligent Patient Care**

Hospitals have an ethical and legal responsibility to uphold credible standards of patient care. A hospital that knowingly credentials a doctor with a history of drug abuse and negligence breaches that responsibility and jeopardizes the health of its patients.

That is what happened in *Romero v. KPH Consolidation, Inc.* In 1994, Dr. Merrimon Baker was given staff privileges by Columbia Kingwood Medical Center, despite having abused drugs and having a documented history of negligently caring for patients. In 1998, as Baker was performing back surgery on Ricardo Romero, Romero lost the majority of his blood. As a result of Baker’s negligence, Romero suffered permanent brain damage and today is unable to care for himself. A jury found the Medical Center liable for negligence and maliciously credentialing Baker. A court of appeals agreed that Baker’s drug habit posed a serious risk to patients but reversed the jury verdict.

Despite undisputed evidence that the Medical Center was aware of Baker’s drug habit, the Supreme Court ruled in favor of the hospital. According to the Court, the hospital’s communications about Baker were protected by what is known as the peer-review privilege. But this was a clear distortion of the privilege’s purposes. As

Justice O’Neill noted, the privilege was designed to improve the quality of patient care—not protect hospitals from liability.

*KPH Consolidation* will have a devastating impact on victims of medical malpractice. After the decision, hospitals that credential doctors with a history of drug abuse have a clever defense against liability—the peer-review privilege. The Supreme Court is sending a disturbing message to irresponsible hospitals: they will not be held responsible for their malicious conduct. Patients, as a result, will be left without a legal remedy when they are permanently injured by doctors with a documented history of drug abuse and negligence.

### **Products Liability: The Shrinking Duty to Warn**

For years, Texas law required manufacturers to provide warnings for potentially dangerous products. Intended to promote safety, the duty helped prevent potential injuries and accidents. As public

policy, the duty recognized that manufacturers were in a unique position to understand the potential dangers of their products. The sophisticated-user doctrine, though, was a limited exception to the duty. It protected manufacturers from liability when users had adequate knowledge of a product’s dangers.

*“As applied by the Court today . . . the sophisticated-user exception swallows the rule, absolving manufacturers of the duty to warn even when the product is admittedly dangerous and the manufacturer could easily provide an effective warning.”<sup>52</sup>*

**Justice Harriet O’Neill**

Until *Humble Sand & Gravel, Inc. v. Gomez*, the sophisticated-user doctrine was just that—an exception to the duty. In *Humble Sand & Gravel*, the Supreme Court ignored precedent and expanded the scope of the doctrine. Humble Sand & Gravel distributed flint, which is composed of crystalline silica and can be fatal if inhaled. After the original plaintiff in the case, Raymond Gomez, a sandblaster by trade, contracted silicosis, he sued and won a jury verdict against Humble. The judgment

was affirmed by a court of appeals.

Yet despite the recognized dangers of silica and Humble’s failure to provide adequate warnings, Justice Hecht, writing for a majority on the Supreme Court, reversed and remanded the case, refusing to hold Humble responsible.

The Court’s decision in *Humble Sand & Gravel* signals a major shift in products liability law and public policy. As Justice O’Neill wrote in her dissent, “Breathtaking in scope, the Court’s decision today

ventures where no court has gone before, adopting confusing and legally immaterial evidentiary proof requirements to re-examine whether a duty that we have long recognized exists in the first instance.”<sup>53</sup> For workers in the sandblasting industry, the decision is a dangerous precedent that weakens critical safety regulations in the workplace. Indeed, after *Humble Sand & Gravel*, manufacturers of dangerous products may not have a legal duty to warn workers that silica is potentially fatal.

## **Weighing Evidence: The Vanishing Jury Trial**

In Texas, independent citizen juries are responsible for weighing conflicting evidence. The right to a trial by jury is explicitly provided for in the Texas Constitution; according to Article I, the “right of trial by jury shall remain inviolate.”<sup>54</sup> For Texans, it is a fundamental part of the judicial system and the state’s traditions and history.

Yet the Supreme Court often reverses legally defensible jury verdicts against negligent defendants, blatantly substituting the factual findings of juries with its own unconstitutional explanation of the facts.

In *Volkswagen of America, Inc. v. Ramirez*, for example, the plaintiffs won a verdict against Volkswagen after a jury concluded that a defect in a Volkswagen Passat had caused a fatal accident. During the trial, the jury heard from two expert witnesses for the plaintiffs who testified that the defect had caused the accident. The judgment was affirmed by a court of appeals.

Writing for a majority on the Court, Justice Wainwright reversed the jury verdict, holding that the evidence from the expert testimony was conclusory and legally insufficient. Justice Wainwright, a judge with strong pro-defendant sympathies, ignored the reasonable inferences of the jury. As Chief Justice Jefferson wrote of the testimony of Edward Cox, one of the expert witnesses, “Reasonable jurors could have accepted Volkswagen’s theory and rejected Cox’s . . . or accepted Cox’s and rejected Volkswagen’s . . . , but unlike the jury, this Court lacks constitutional authority to weigh conflicting evidence.” The Court’s loyalties to defendants unfortunately trumped its loyalties to Texas law.

The judicial system in Texas depends on the reasoned judgments of citizen juries, not on the unconstitutional decisions of a superjury masquerading as a court of law. When the Court ignores reasonable jury verdicts, the jury system and justice itself are jeopardized. The right of juries to weigh evidence is a fundamental right that belongs

to Texans, not the Texas Supreme Court.

### **Jury Selection: The Biased Juror**

The right to a trial by jury is an empty right without an effective procedure for eliminating bias. Voir dire (translated from Latin as “to speak the truth”), the pretrial interviews of prospective jurors, used to be a reliable procedure in Texas courts for determining whether prospective jurors were biased.

In 1963, as we explained earlier, the Texas Supreme Court ruled in *Compton v. Henrie*<sup>55</sup> that prospective jurors who expressed bias were disqualified as a *matter of law*. Instead of encouraging subjective and arbitrary decisions from trial judges, *Compton* helped protect the fundamental right to a fair and impartial jury.

Until *Cortez v. HCCI-San Antonio, Inc.*,<sup>56</sup> *Compton* was the law of the land in Texas. In *Cortez*, authored by Justice Medina, the Court rejected forty years of decisions that followed *Compton*'s holding and declared that for questions of bias “the relevant inquiry is not where jurors *start* but where they are likely to *end*.”<sup>57</sup> [Emphasis in the original.] Now, a prospective juror who is openly biased, according to *Cortez*, may be “rehabilitated” by a clever lawyer and participate in a trial as an actual juror.

*Cortez* is a dangerous precedent for plaintiffs *and* defendants because it weakens the rules for eliminating biased jurors. Biased jurors often ignore evidence, and indeed the law, and for plaintiffs and defendants, that jeopardizes the fundamental right to an impartial jury and a fair trial. After *Cortez*, “stacking the jury” will increasingly be the rule, not the exception.

# CONCLUSION

## A Court for Corporate Wrongdoers

The rule of law is without question a fundamental principle of Texas's judicial system. Judges who adopt it as a guiding principle understand that restraint, neutrality, and moderation are admirable judicial virtues. They understand that respecting the authority of the legislature, judicial precedent, and the verdicts of citizen juries are what separate truly independent judges from activist ideologues who legislate from the bench.

By now it should be obvious that the Texas Supreme Court is short on the judicial virtues of restraint, neutrality, and moderation.

Having a gang of ideologues on the state's highest civil court was not in the original blueprint for Texas government, and it is definitely not what Texans expect from the Court today. They expect the Court to conduct itself as a neutral judicial body answerable to the rule of law, not to the moneyed "corporate citizens" of Texas. They deserve a Supreme Court worthy of the title.

# THE TERRIBLE TEN

## The Worst Consumer Cases of 2004-2005

### ***Romero v. KPH Consolidation, Inc.***<sup>58</sup>

**Impact:** Shields hospitals from liability when they negligently credential a doctor known to have a history of careless and negligent behavior.

After a delayed blood transfusion during surgery at Columbia Kingwood Medical Center, Ricardo Romero suffered permanent brain damage. As a result, he is profoundly disabled and unable to care for himself. Romero's wife sued Merrimon Baker, the surgeon, William Huie, the anesthesiologist, and the Medical Center. The jury returned a verdict against the Medical Center for negligence and maliciously credentialing Baker. The court of appeals reversed.

Despite the fact that Baker was the defendant in ten previous medical malpractice lawsuits and a drug addict with a record of negligence in caring for patients—he was suspended from another hospital for operating on the wrong leg of a patient—the Supreme Court held that the Medical Center had not maliciously credentialed Baker.

The Medical Center escaped liability by hiding behind and abusing the peer-review privilege. The privilege was not designed, however, to protect hospitals from negligent conduct but rather to improve the quality of patient care.

### ***PPG Industries, Inc. v. JMB/Houston Center Partners Ltd.***<sup>59</sup>

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

*PPG Industries* involved the validity of assignments under the Deceptive Trade Practices Act (DTPA). (An assignment is transfer

of a property right.) After purchasing an office building in Houston with defective windows, JMB sued PPG Industries, the manufacturer of the windows, for breach of warranties and for violating the DTPA. The jury found PPG Industries liable, and the court of appeals affirmed.

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

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

### ***Diamond Shamrock Refining Co. v. Hall*<sup>60</sup>**

**Impact:** Allows negligent industrial plant owners to escape responsibility by ignoring clear evidence of gross negligence.

Donna Hall’s husband, Charles, was severely burned after a Diamond Shamrock refinery, where he worked, exploded. He later died from the burns. Donna sued Diamond Shamrock for gross negligence, and a jury returned a verdict against Diamond Shamrock. The court of appeals affirmed the gross negligence verdict but reversed and remanded the case on other grounds.

Diamond Shamrock argued before the Supreme Court that there was no clear and convincing evidence of gross negligence. The Court agreed and rendered judgment for Diamond Shamrock, but only by ignoring conflicting evidence from the trial record. As the appeals court explained, “Diamond Shamrock knew the risks involved . . . yet proceeded with conscious indifference toward the safety of its operating personnel by defectively designing a system that allowed liquids into the compressor, by having inadequate start-up procedures, by inadequately training its personnel, and by covering the bleeder valves with dirt.”

### ***Nissan Motor Co. v. Armstrong*<sup>61</sup>**

**Impact:** Creates additional barriers for consumers introducing relevant and pertinent evidence that illustrates a pattern in product liability cases.

After Marian Armstrong’s Nissan 300ZX accelerated without

warning despite her applying the brakes, she sued Nissan, alleging that the throttle cable in her 300ZX was defective. Armstrong introduced evidence from a Nissan database of 757 complaints showing that ZXs had accelerated unintentionally. The jury returned a verdict against Nissan, and the court of appeals affirmed.

The Supreme Court reversed and remanded the case, holding that the 757 complaints received by Nissan were not admissible as evidence of a defective throttle cable in Armstrong's 300ZX. According to the Court, the hundreds of complaints raised no reasonable inference that Armstrong's throttle cable was defective. After *Armstrong*, plaintiffs have a higher evidentiary obstacle in products liability cases.

### ***Excess Underwriters v. Frank's Casing*<sup>62</sup>**

**Impact:** Adopts California law and creates an implied right of reimbursement for insurance carriers.

*Frank's Casing* involved a policy holder's obligation to pay its insurance carrier for a settled claim that was subsequently determined to be beyond the scope of the policy holder's coverage. Prior to *Frank's Casing*, Texas law recognized a carrier's right to reimbursement in only exceptional circumstances. A policy holder, in other words, was typically not required to later pay for a claim settled by its carrier. Following established precedent, a trial court and court of appeals found that the carrier in *Frank's Casing* was not entitled to reimbursement.

Writing for the majority on the Supreme Court, Justice Owen reversed, recognizing an implied right of reimbursement when either a policy holder demands or agrees that its carrier accept a settlement.

*Frank's Casing* defies logical explanation. Before the decision, it was widely recognized that carriers were the proper parties to decide whether a claim was worth settling. Now, that burden is on the shoulders of policy holders. Furthermore, if policy holders either demand or agree to a settlement, they now trigger an implied right to reimbursement. And yet, if policy holders refuse to consent to a settlement, they waive claims against their carriers. It is a classic example of a Catch-22. Policyholders lose regardless of whether they agree or disagree with their carriers.

As we explained earlier, *Frank's Casing* represents judicial activism on the Court writ large. It demonstrates that the Court's activism and pro-defendant ideology are mutually reinforcing. Activism serves as the handmaiden for pro-defendant ideology. For example,

Justice Owen, a staunch ideologue with a record of siding with defendants, was in the minority in *Texas Association of Counties v. Matagorda County*, the decision reversed by *Frank's Casing*. But after six justices from the *Matagorda County* decision left the Court, she adopted her minority opinion in that case as the majority opinion in *Frank's Casing*. That is judicial activism.

### ***Humble Sand & Gravel, Inc. v. Gomez***<sup>63</sup>

**Impact:** Weakens critical workplace safety measures and protects manufacturers of dangerous products from accountability.

After contracting silicosis from working as a sandblaster, Raymond Gomez sued Humble Sand & Gravel, a commercial supplier of flint. The jury found Humble liable for not providing adequate warnings that silica, found in flint, is dangerous and potentially fatal. The court of appeals affirmed.

Humble argued on appeal before the Supreme Court that it had no duty to warn its customers or the employees of its customers that silica was dangerous and potentially fatal. The Court basically agreed, holding that because the dangers of silica were industry knowledge, Humble had no duty to warn its customers. As for the employees of Humble's customers, the Court remanded the case and held that the duty to warn depended largely on whether the warning would have effectively reached employees.

In *Humble Sand & Gravel*, the Court ignored its own long-held precedent and distorted Section 338 of the Restatement of Torts, which includes factors for determining whether manufacturers have a duty to provide warnings. Before *Humble Sand & Gravel*, manufacturers of dangerous products, as a rule, had a duty to provide warnings. Today, that duty, fundamental to safety in the workplace and responsible corporate citizenship, is no longer a strict requirement. As a result, the public policy of encouraging safety and preventing accidents is in jeopardy.

### ***Volkswagen of America, Inc. v. Ramirez***<sup>64</sup>

**Impact:** Undermines reasonable citizen juries by unconstitutionally expanding the Supreme Court's scope of review.

Diana Ramirez Guerra and her daughter Jacquelyn were traveling westbound in a Ford Mustang when they were hit by a Volkswagen Passat traveling eastbound. Diana Guerra died as a result of the accident, and her daughter was severely injured. A lawsuit was filed by the Ramirez family on behalf of the Guerras alleging that a defect in the wheel assembly of the Passat caused the accident.

After listening to expert testimony and weighing evidence from the plaintiffs and defendant, the jury returned a verdict against Volkswagen, which was affirmed by the court of appeals.

Holding that the evidence was not legally sufficient to prove causation, the Supreme Court reversed and rendered judgment for Volkswagen. The Court, however, ignored the jury's reasonable inferences from the expert testimony presented at trial and instead substituted its judgment by unconstitutionally weighing evidence. *Volkswagen of America* is a dangerous precedent for proving causation in products liability cases.

### ***Cortez v. HCCI-San Antonio, Inc.***<sup>65</sup>

**Impact:** Jeopardizes the fundamental right to a fair and impartial jury trial by allowing biased individuals to serve on juries.

Jesus Cortez sued HCCI-San Antonio, which owned Alta Vista Nursing Center, for the negligent treatment of his heir, Carmen Puentes. During voir dire (the pretrial questioning of jurors), Snider, a prospective juror, said that he might have “preconceived notions” as a result being an insurance adjuster for automobile claims. “I would feel bias,” he said, explaining that he had seen “lawsuit abuse . . . so many times.” Cortez’s lawyer requested that Snider be removed for bias. After the trial court denied the request, Cortez’s lawyer used his last peremptory challenge to strike Snider. The jury returned a verdict against HCCI. Cortez’s lawyer appealed the trial court’s ruling, arguing that Snider was biased and should have been removed for cause.

The Supreme Court disagreed, ignoring established precedent that expressions of bias disqualified prospective jurors as a *matter of law*. “[T]he relevant inquiry,” according to the Court, “is not where jurors *start* but where they are likely to *end*.” [Emphasis in the original.] *Cortez* obliterates forty years of precedent that helped guarantee fair and impartial trials for plaintiffs as well as defendants.

### ***Republic Underwriters Insurance Co. v. Mex-Tex, Inc.***<sup>66</sup>

**Impact:** Gives insurance companies an unfair advantage in settlement negotiations with policyholders.

The roof of a property owned by Mex-Tex was damaged in a hail storm that was classified by the Texas Department of Insurance as a weather-related “catastrophe for the purpose of claims processing.” After the storm, Mex-Tex contacted Republic Underwriters, its property insurer, explaining that the roof had been destroyed.

Republic disputed the damages, but later paid Mex-Tex a portion of the costs to replace the roof. After accepting the partial payment, Mex-Tex sued Republic for breach of the policy and delay penalties under Article 21.55 of the Texas Insurance Code. The trial court ruled against Republic, holding that Republic's partial payment was intended as a final unconditional payment, a violation of Article 21.55. The court of appeals affirmed.

The Supreme Court disagreed, holding that there was no evidence that Republic's partial payment was unconditional and final. The evidence was disputed at trial, however, and the judgment of the trial court was reasonable and defensible. *Mex-Tex* is a disturbing example of the Supreme Court's penchant for ignoring trial courts and jury verdicts. As precedent, furthermore, the decision hands the insurance industry a powerful bargaining chip in future claims disputes.

### ***Northern County Mutual Insurance Co. v. Davalos***<sup>67</sup>

**Impact:** Broadens the scope of the insurance industry's control over litigation involving a policy holder.

After he was injured in an automobile accident, Timoteo Davalos sued the driver of the other car in Matagorda County. The driver then sued Davalos in Dallas County. Davalos's attorneys in the Matagorda County litigation filed a motion to transfer the Dallas suit to Matagorda County. Northern County Mutual Insurance, Davalos's automobile insurer, objected to his attorneys' defense of the Dallas case and to the motion to transfer venue.

Davalos sued Northern, alleging that it had breached its duty to defend the Dallas case and violated the Texas Insurance Code. The trial court ruled against Northern, and the court of appeals affirmed.

Northern argued before the Supreme Court that it had satisfied its duty to defend Davalos. The Court agreed and rendered judgment for Northern, holding that a venue dispute is not a "conflict of interest" that defeats the right of an insurance company to control the defense in a case. The decision, in other words, further consolidates the insurance industry's ability to control how it handles claims.

# APPENDIX 1

## Additional Charts

**CHART8: CONSUMER WIN-LOSS DISSENTS**

	Signed Consumer Wins (8 Total)	Consumer Wins: Dissents (authored or joined)	Signed Consumer Losses (30 Total)	Consumer Loss: Dissents (authored or joined)
Phillips	2	2	8	0
Jefferson	8	1	27	1
Hecht	8	2	29	0
Owen	8	2	28	0
O'Neill	8	1	28	6
Schneider	2	2	5	1
Smith	3	3	16	1
Wainwright	8	2	28	0
Brister	7	3	26	0
Medina	5	0	15	1
Green	5	0	8	0
Johnson	1	0	0	0

*NOTE: Justices Hecht and Owen have not dissented in a single consumer loss since 1999.*

**CHART 9: AUTHORS OF OPINIONS IN CONSUMER CASES**

	Unanimous	Majority	Concurring	Concurring & Dissenting	Dissenting	Total
Phillips	1	0	0	0	0	1
Jefferson	4	0	1	1	1	7
Hecht	4	5	2	0	0	11
Owen	2	3	0	0	2	7
O'Neill	6	2	5	2	3	18
Schneider	0	0	0	0	0	0
Smith	2	0	0	0	0	2
Wainwright	0	1	2	0	0	3
Brister	3	6	0	1	0	10
Medina	1	0	0	1	1	3
Green	0	0	0	0	0	0
Johnson	0	0	0	0	0	0

# APPENDIX 2

## Background Information

### Methodology

From July 2, 2004 to June 25, 2005, the Texas Supreme Court handed down opinions in 121 cases. For each case, Texas Watch identified basic information, including the type of petitioner and respondent, the legal questions in dispute, the legal holding of the Court, the type of decision, and the justices' respective votes. That information was then recorded in a comprehensive database, which was used to identify legal trends on the Court.

We broadly classified decisions as “consumer-related.” They included decisions in which the original plaintiff was an individual or class of individuals injured as a result of defective products, medical malpractice, discrimination and retaliation in the workplace, or questionable insurance policies. The original defendants were generally hospitals and doctors, automobile manufacturers, state and county agencies, financial institutions, and insurance companies. We excluded decisions in which the original parties were businesses unless the impact of the decisions will impact individual consumer rights.

### About Court Watch

Court Watch is a project of the Texas Watch Foundation, a nonpartisan research organization located in Austin, Texas, dedicated to protecting the consumer rights of Texans.

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 program to monitor the Texas Supreme Court and the impact its decisions have

on Texas families and consumers.

For additional copies of this report or to learn more about Court Watch and the Texas Watch Foundation, visit [www.txwfoundation.org](http://www.txwfoundation.org).

## Endnotes

<sup>1</sup>TEX. GOV'T CODE § 22.225(a) (“A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.”).

<sup>2</sup>Two of the sixty-two cases were split decisions.

<sup>3</sup>PPG Industries, Inc. v. JMB/Houston Center Partners Ltd., Tex. Sup. Ct. (July 9, 2004).

<sup>4</sup>Excess Underwriters v. Frank's Casing, Tex. Sup. Ct. (May 27, 2005); Cortez v. HCCI-San Antonio, Inc., Tex. Sup. Ct. (March 11, 2005); Humble Sand & Gravel, Inc. v. Gomez, Tex. Sup. Ct. (Sept. 17, 2004).

<sup>5</sup>Diamond Shamrock Refining Co. v. Hall, Tex. Sup. Ct. (Jan. 21, 2005); Haggard Clothing Co. v. Hernandez, Tex. Sup. Ct. (May 13, 2005); Nissan Motor Co. v. Armstrong, Tex. Sup. Ct. (Aug. 27, 2004); Military Highway Water Supply Corp. v. Morin, Tex. Sup. Ct. (Jan. 21, 2005).

<sup>6</sup>Republic Underwriters Insurance Co. v. Mex-Tex, Inc., Tex. Sup. Ct. (Nov. 19, 2004); Southwestern Bell Telephone Co. v. Garza, Tex. Sup. Ct. (Dec. 31, 2004); Volkswagen of America, Inc. v. Ramirez, Tex. Sup. Ct. (Dec. 31, 2004); General Motors Corp. v. Iracheta, Tex. Sup. Ct. (April 8, 2005).

<sup>7</sup>PPG Industries, Inc. v. JMB/Houston Center Partners Ltd., Tex. Sup. Ct. (July 9, 2004).

<sup>8</sup>Humble Sand & Gravel, Inc. v. Gomez, Tex. Sup. Ct. (Sept. 17, 2004).

<sup>9</sup>Northern County Mutual Insurance Co. v. Davalos, Tex. Sup. Ct. (July 2, 2004); Excess Underwriters v. Frank's Casing, Tex. Sup. Ct. (May 27, 2005); Republic Underwriters Insurance Co. v. Mex-Tex, Inc., Tex. Sup. Ct. (Nov. 19, 2004).

<sup>10</sup>PPG Industries, Inc. v. JMB/Houston Center Partners Ltd., Tex. Sup. Ct. (July 9, 2004).

<sup>11</sup>Romero v. KPH Consolidation, Inc., Tex. Sup. Ct. (May 27, 2005).

<sup>12</sup>Southwestern Bell Telephone Co. v. Garza, Tex. Sup. Ct. (Dec. 31, 2004); Volkswagen of America, Inc. v. Ramirez, Tex. Sup. Ct. (Dec. 31, 2004).

<sup>13</sup>Cortez v. HCCI-San Antonio, Inc., Tex. Sup. Ct. (March 11, 2005).

<sup>14</sup>Nissan Motor Co. v. Armstrong, Tex. Sup. Ct. (Aug. 27, 2004).

<sup>15</sup>In re Doe 3, Tex. Sup. Ct. (Mar. 13, 2000).

<sup>16</sup>Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1144-45 (2002); see also Keenan D. Kmicc, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004).

<sup>17</sup>Young, *supra* note 16, at 1145.

<sup>18</sup>Tex. Sup. Ct. (Sept. 3, 2004).

<sup>19</sup>Tex. Sup. Ct. (May 27, 2005).

<sup>20</sup>Priscilla Owen left the Texas Supreme Court in May 2005 after being confirmed to the U.S. Court of Appeals for the Fifth Circuit.

<sup>21</sup>Tex. Sup. Ct. (Sept. 3, 2004).

<sup>22</sup>According to the Act, the “liability of [alcohol] providers” is “for the actions of their employees, customers, members, or guests who are or become intoxicated ...” TEX. ALCO. BEV. CODE § 2.03(a).

<sup>23</sup>Mary Alice Robbins, *Rehearing Granted in Dram Shop Case: Three Justices in Original Majority No Longer on Court*, TEX. LAW., April 18, 2005, at 1.

<sup>24</sup>Tex. Sup. Ct. (Dec. 21, 2000).

<sup>25</sup>According to the Court, an insurer was entitled to reimbursement if, and only if, it “obtain[ed] the insured’s clear and unequivocal consent to the settlement

and the insurer's right to seek reimbursement.”

<sup>26</sup>They included Chief Justice Phillips and Justices Enoch, Baker, Abbott, Hankinson, and Gonzales.

<sup>27</sup>TEX. GOV'T CODE § 22.225(a) (“A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.”).

<sup>28</sup>TEX. CONST. art. I, § 15.

<sup>29</sup>In re Doe, Tex. Sup. Ct. (June 22, 2000).

<sup>30</sup>In re Doe 4, Tex. Sup. Ct. (March 22, 2000).

<sup>31</sup>*Id.* (quoting In re Doe 3, Tex. Sup. Ct. (March 13, 2000)).

<sup>32</sup>Tex. Sup. Ct. (Dec. 31, 2004).

<sup>33</sup>*Id.*

<sup>34</sup>Tex. Sup. Ct. (Dec. 31, 2004).

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

<sup>37</sup>Southwestern Bell Telephone Co. v. Garza, Tex. Sup. Ct. (Dec. 31, 2004).

<sup>38</sup>TEX. CONST. art. II, § 1.

<sup>39</sup>Tex. Sup. Ct. (July 9, 2004).

<sup>40</sup>TEX. GOV'T CODE § 312.005.

<sup>41</sup>TEX. BUS. & COM. CODE § 17.44(a).

<sup>42</sup>City of San Antonio v. City of Boerne, Tex. Sup. Ct. (June 26, 2003).

<sup>43</sup>Cortez v. HCCI-San Antonio, Inc., Tex. Sup. Ct. (Mar. 11, 2005).

<sup>44</sup>Tex. Sup. Ct. (March 11, 2005).

<sup>45</sup>Compton v. Henrie, Tex. Sup. Ct. (Jan. 16, 1963).

<sup>46</sup>State v. Dick, 69 S.W.3d 612, 620 (Tex. App.—Tyler 2001).

<sup>47</sup>Voting bloc statistics from the 2004-2005 U.S. Supreme Court term are available at <http://www.scotusblog.com/movabletype/archives/FinalVotingRelationships.pdf>.

<sup>48</sup>Justice Wainwright did not participate in one of the decisions. Justice Brister did not participate in four of the decisions and dissented in part in one.

<sup>49</sup>Humble Sand & Gravel, Inc. v. Gomez, Tex. Sup. Ct. (Sept. 17, 2004); Republic Underwriters Insurance Co. v. Mex-Tex, Inc., Tex. Sup. Ct. (Nov. 19, 2004); Volkswagen of America, Inc. v. Ramirez, Tex. Sup. Ct. (Dec. 31, 2004); Van Independent School Dist. v. McCarty, Tex. Sup. Ct. (May 27, 2005); Michiana Easy Livin' Country, Inc. v. Holten, Tex. Sup. Ct. (May 27, 2005).

<sup>50</sup>Tex. Sup. Ct. (July 9, 2004).

<sup>51</sup>TEX. BUS. & COM. CODE § 17.44(a).

<sup>52</sup>Humble Sand & Gravel, Inc. v. Gomez, Tex. Sup. Ct. (Sept. 17, 2004).

<sup>53</sup>*Id.*

<sup>54</sup>TEX. CONST. art. I, § 15.

<sup>55</sup>Tex. Sup. Ct. (Jan. 16, 1963).

<sup>56</sup>Tex. Sup. Ct. (March 11, 2005).

<sup>57</sup>*Id.*

<sup>58</sup>Tex. Sup. Ct. (May 27, 2005).

<sup>59</sup>Tex. Sup. Ct. (July 9, 2004).

<sup>60</sup>Tex. Sup. Ct. (Jan. 21, 2005).

<sup>61</sup>Tex. Sup. Ct. (Aug. 27, 2004).

<sup>62</sup>Tex. Sup. Ct. (May 27, 2005).

<sup>63</sup>Tex. Sup. Ct. (Sept. 17, 2004).

<sup>64</sup>Tex. Sup. Ct. (Dec. 31, 2004).

<sup>65</sup>Tex. Sup. Ct. (March 11, 2005).

<sup>66</sup>Tex. Sup. Ct. (Nov. 19, 2004).

<sup>67</sup>Tex. Sup. Ct. (July 2, 2004).