



IN THE SHADOWS

A Look Into the Texas Supreme Court's Overuse of Anonymous Opinions

May 2008

Introduction

Texas judges are elected and voters are expected to weigh the experience, judicial philosophy, and decision-making of the men and women who sit in judgment of individuals, corporations, and government entities. The problem is that more than half the time, voters have no way of knowing what individual members of the Texas Supreme Court think.

Our state's highest civil court relies to a startling degree on per curiam opinions which are anonymous opinions that are not signed by any justice. 57% of the opinions issued by the Texas Supreme Court during its 2006-07 term were unsigned. By contrast, the United States Supreme Court issued per curiam opinions only 5% of the time,¹ and the National Center for State Courts reports that per curiam opinions amount to only about one-third of opinions issued by state courts of last resort.² Unfortunately, this is not an anomaly. Over the last ten years, the Court has relied on per curiam opinions an average of 40% of the time while the US Supreme Court used unsigned opinions in only 4% of cases.

The Texas Supreme Court's overuse of per curiam opinions raises serious and important questions about the Court's transparency. Typically, per curiam opinions are used in non-controversial matters that do not have a significant impact on the law. All too often, the Texas Supreme Court uses per curiam opinions as a shield to hide behind when they render decisions that are controversial, leaving them unaccountable to the voters.

Signed opinions serve to accomplish a twofold goal: giving Texas voters a complete picture of the legal and judicial philosophy employed by each justice and providing future justices with insight into the Court's internal decision-making. By relying too heavily on unsigned per curiam opinions, the Court operates in the shadows, allowing little public scrutiny and failing to light the way for future jurists.

Background

Per curiam is a Latin term meaning "by the court." A per curiam opinion is an opinion issued by an appellate court that does not identify the author or the positions of the other justices. In such an

¹ Rupaul Doshi, Georgetown University Law Center Supreme Court Institute, Supreme Court of the United States October Term 2006 Overview (2007).

² National Center for State Courts, Examining the Work of State Courts (2003 through 2005).

opinion, all of the justices need not support the opinion and dissenting justices are not required to write their own opinions.

In the Texas Supreme Court, only six of the nine justices must support a per curiam opinion in order for the opinion to be released.³ Thus an opinion that is not necessarily unanimous is nonetheless issued as a per curiam opinion – an opinion “by the court” – when in fact it may not be.⁴

Per curiam opinions traditionally cover issues that are not controversial or that have an obvious legal answer, and therefore they tend to be short opinions. According to Professor Stephen L. Wasby, per curiam opinions “decide less controversial cases in a cost-effective manner; provide prompt direction to lower courts to follow recent decisions; rapidly answer obvious legal questions that, nonetheless, represent important issues; and extend major decisions incrementally.”⁵ This, in addition to the fact that they do not require dissenting justices to write an opinion, tends to make these opinions more time- and cost-effective for courts. The use of per curiam opinions in areas such as these has rarely been criticized as there is a recognized value in expediency for courts that process a great number of opinions.

When courts issue per curiam opinions in controversial cases, however, they cross the line into abusive use of these unsigned opinions and act in violation of the concept of public scrutiny. Unfortunately, the Texas Supreme Court routinely abuses its discretion by hiding behind these unsigned opinions.

Accountability

When a judge signs his name to an opinion he has written, he accepts responsibility for the decision and the logic used in reaching it. Whether the opinion is a stellar example of judicial wisdom or a blatant abuse of judicial authority, the author is accountable because his identity is known. Any judge who disagrees with an authored opinion must write or join a dissent, and thus that judge’s position is known as well, and he is equally accountable.

When a court releases a per curiam opinion, however, no judge accepts responsibility for the opinion, and no judge can be held accountable for it. The public does not know if all judges agreed with the holding. Judges who can hide behind this anonymity may not have an incentive to reach the legally correct conclusion or to justify the conclusion they do reach.

A per curiam opinion is therefore much like graffiti. No one bears the responsibility for such writing as it is done anonymously, and likewise, no one can be punished. One doesn’t hear about unsigned Picassos, after all. Whether a per curiam opinion is unsigned because it is not a masterpiece the author is proud to have written or because it is a scourge on the law, the public will never know. But just as it is very unlikely that a person would be willing to graffiti a wall with a police officer looking on, it is unlikely that a judge would release a sub-par opinion if he were forced to sign his name to it.

³ Texas Rule of Appellate Procedure 59.1.

⁴ James A. Vaught, R. Darin Darby, Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 Tex. Tech. L. Rev. 63, 2000.

⁵ Stephen L. Wasby et al., The Per Curiam Opinion: Its Nature and Functions, 76 Judicature 29, 38 (1992).

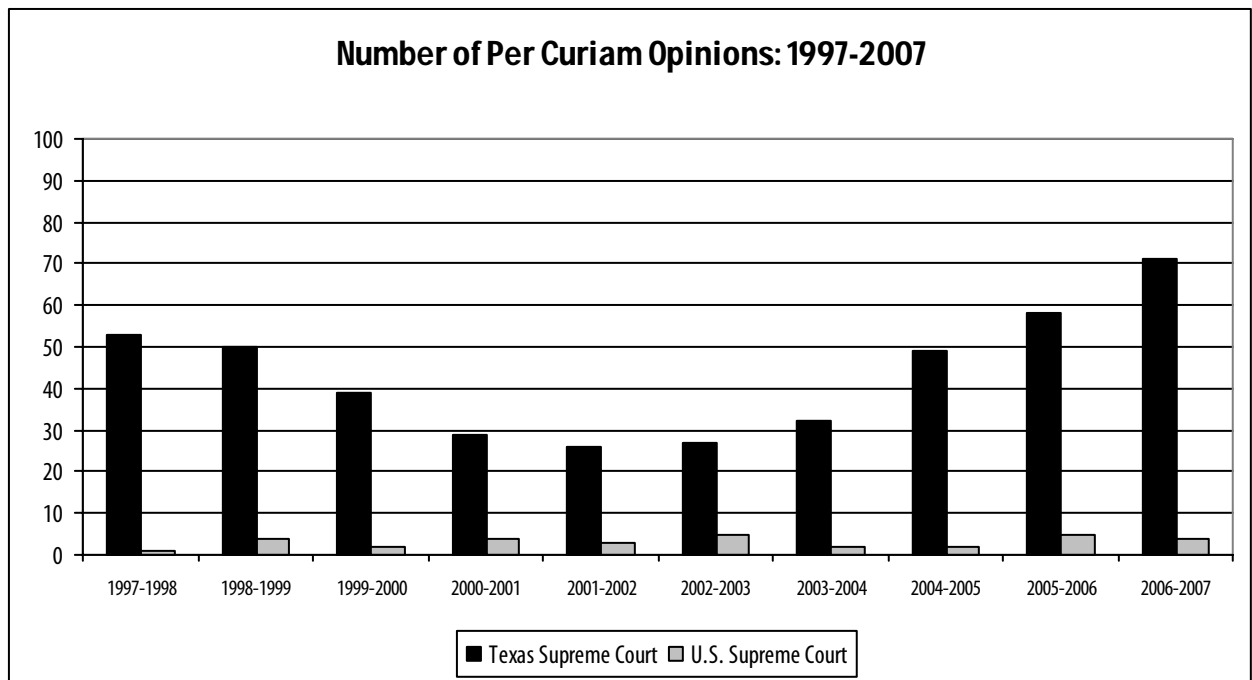
Comparison With Other Courts

Comparisons of the Texas Supreme Court to other state courts of last resort and the US Supreme Court illustrate just how outside the mainstream the Texas high court is.

According to its annual survey, the National Center for State Courts reports that only 33.6% of opinions issued by state high courts were per curiam.⁶

The United States Supreme Court uses per curiam opinions at a drastically reduced rate compared with the Texas Supreme Court. Last year, for example, the U.S. Supreme Court handed down 78 opinions and a mere four of those were per curiam opinions, for a total of 5.1%.⁷ The Texas Supreme Court, on the other hand, heard 125 cases and issued an astounding 71 per curiam opinions, for a total of 56.8%. This trend is consistent over the past decade. The ten year average for percent of per curiam opinions issued by the U.S. Supreme Court is 3.4%, while the ten year average for the Texas Supreme Court is a whopping 40.6%.

It is ironic that justices on the U.S. Supreme Court who are appointed for life terms rarely use per curiam opinions, while justices on the Texas Supreme Court who are elected make use of such opinions nearly half the time.



The Effect in Texas

Judges in Texas are elected, and voters assess the performance of judges based on their work product. For a trial judge, the work product is public information – the judge acts alone and thus is responsible for all of her own rulings. But appellate judges hear cases in groups, and can release per curiam opinions – opinions that voters cannot identify as the work of any given judge. When a

⁶ See footnote 2.

⁷ Supreme Court Journal, <http://supremecourtus.gov/orders/journal.html>

significant percentage of cases a judge has heard are decided in secret, voters cannot accurately assess that judge's performance.

Per curiam opinions released by the Texas Supreme Court present an additional problem. Justices on the Supreme Court raise a significant amount of money to run for re-election. Some of the top contributors to campaigns of the justices are the very lawyers and businesses that frequently appear before the Court. The Court's use of per curiam opinions in such cases is particularly troubling as the individual votes of the justices are concealed, and thus it is not apparent how a justice voted in a case that involved one of his campaign donors.

We have compiled a list of all per curiam decisions issued over the past two terms and examined how much, if any, each justice took from the parties and attorneys involved in those cases for each justice's most recent fundraising period. We discovered that the justices have accepted \$967,081.81 in campaign contributions from parties with an interest in cases that resulted in anonymous opinions. Voters can not determine whether a conflict of interest exists because of the lack of transparency in these cases.

Amount Donated to Justices' Campaigns from Parties in Per Curiam Cases	
JUSTICE	AMOUNT
Wallace Jefferson	\$69,000.00
Nathan Hecht	\$198,250.00
Harriet O'Neill	\$46,750.00
Dale Wainwright	\$19,250.00
Scott Brister	\$110,250.00
David Medina	\$87,440.00
Paul Green	\$94,551.37
Phil Johnson	\$84,850.00
Don Willett	\$256,740.44
TOTAL	\$967,081.81

Controversial Per Curiam Opinions Issued by the Texas Supreme Court

The Texas Supreme Court also refuses to limit its use of per curiam opinions to non-controversial cases. Since its inception more than a decade ago, Texas Watch has annually compiled the ten most anti-consumer cases issued by the Texas Supreme Court. Since 1997, fourteen of these opinions have been per curiam. These cases involve important and significant legal questions that have a broad impact on consumers dealing with issues as varied as workplace safety, the use of arbitration agreements, informed consent, whistleblower protections, and the duties of insurance companies. Each of these fourteen cases is briefly explained in Appendix 2 of this report.

Conclusion

There has been an ongoing debate in recent years about the legislature's use of non-record votes, which are also known as voice votes. Members of the press and public have been demanding greater transparency in the legislative process by seeking recorded votes on all legislation. This led to the passage of a constitutional amendment requiring public votes on final passage of all bills.

The concerns raised about a lack transparency in the legislative process can certainly be applied to the Texas Supreme Court. By using per curiam opinions in about half of its decisions each term, the Supreme Court of Texas is not conducting itself as a body open to public scrutiny. In particular, the Court's use of such opinions in controversial cases goes against all notions of accountability of elected officials to the voters.

We do not advocate that all of the Court's decisions be signed; however, per curiam opinions should be limited to only those cases that do not have a broad impact or that do not set a significant legal precedent.

Opinions to which the justices attach their names give Texas voters, scholars, and members of the legal community a peek into the justices' minds. This helps to infuse stability and predictability into the legal system. Instead, the Court operates in the shadows, allowing little public scrutiny or accountability.

Appendix 1

Texas Supreme Court Per Curiam Cases

Term	Total # of Cases	Number of Per Curiam Decisions	Percent of Per Curiam Decisions
2006-2007	125	71	56.8%
2005-2006	110	58	52.7%
2004-2005	121	49	40.5%
2003-2004	85	32	37.6%
2002-2003	82	27	32.9%
2001-2002	83	26	31.3%
2000-2001	86	29	33.7%
1999-2000	117	39	33.3%
1998-1999	116	50	43.1%
1997-1998	137	53	38.7%
Ten Year Average	106	43	40.6%
Ten Year Total	1062	434	40.9%

U.S. Supreme Court Per Curiam Cases

Term	Total # of Opinions	Number of Per Curiam Opinions	Percent of Per Curiam Opinions
2006-2007	78	4	5.1%
2005-2006	87	5	5.7%
2004-2005	87	2	2.3%
2003-2004	91	2	2.2%
2002-2003	84	5	6.0%
2001-2002	88	3	3.4%
2000-2001	87	4	4.6%
1999-2000	81	2	2.5%
1998-1999	88	4	4.5%
1997-1998	94	1	1.1%
Ten Year Average	87	3	3.4%
Ten Year Total	865	32	3.7%

Appendix 2

In re RLS Legal Solutions (2007)⁸

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 signed the agreement, but told her employer that she was signing it under duress.

Maida 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*,⁹ in which it had held 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.” 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 is 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.

Schaub v. Sanchez (2007)¹⁰

Impact: A patient’s refusal to allow a medical procedure can 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. 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.

⁸ Docket number 05-0290.

⁹ Docket number 00-0548.

¹⁰ Docket number 06-0375.

The Court held 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, and thus had no claim.

The Court failed to note, however, that while 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.

Ed Rachal Foundation v. D'Unger (2006)¹¹

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

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

An appellate court affirmed the wrongful termination claim, but the Supreme Court reversed, holding that whistleblower protection extends only to those who refuse to commit crimes, not to those who report crimes. In its opinion, the Court went to great effort to applaud the courage of employees who report crimes, declaring that such responsible citizenship should be encouraged; but ultimately held that even though it had created whistleblower protection in the first place, it was not the province of the Court to extend the protection.

As a result of the Court's cowardice in the face of employers, employees remain unprotected if they report a crime being committed by the employer. If the choice is being a responsible citizen or maintaining one's job, the choice is not really a choice at all. If the court really sought to encourage responsible citizenship, it would protect employees who report crimes.

In re E.I. DuPont de Nemours (2004)¹²

Impact: Makes it easier for corporate defendants to shield documents from the courts.

A group of individuals affected by toxic pollution requested documents relating to their disease from DuPont. Pointing to an affidavit in which a paralegal states merely that the documents were addressed to the legal department, DuPont claimed that the documents were privileged as either communications between attorney and client or work product. The trial and appellate courts denied this claim, saying that DuPont had failed to meet the minimum standard for a privilege claim.

¹¹ Docket number 03-1101.

¹² Docket number 03-0464.

Without reviewing the contents of the documents and relying solely on the paralegal's affidavit, the Supreme Court ruled that DuPont did meet the minimum standard. This decision allows corporate defendants to shield information from plaintiffs that previously would have been subject to discovery.

Old American County Mutual Fire Ins. Co. v. Renfrow (2004)¹³

Impact: Enables insurance companies to arbitrarily deny coverage for permitted use of insured company vehicles.

Michael Renfrow regularly used a company truck for personal use with the permission of his employer. After Renfrow was involved in an accident in Saginaw, which is a number of miles from his home and work, the employer's automobile insurer (Old American) refused to pay on the policy, claiming that Renfrow was not insured as a "permissive user." The trial court found that Renfrow was covered during the accident.

The Supreme Court ruled that Renfrow was not covered as a permissive user in this instance. Although Renfrow had express permission to drive the truck home, and implied permission to drive it elsewhere on personal business, he did not have permission to drive it to Saginaw. The Court arbitrarily split hairs in an effort to allow the insurer to deny coverage using minor distinctions of difference.

Dallas Metrocare Services v. Pratt (2003)¹⁴

Impact: Weakens whistleblower protections of government hospitals in cases involving clear negligence.

After Dorothy Pratt's employment was terminated by Dallas Metrocare Center, she brought an action against the Center for retaliatory termination and intentional infliction of emotional distress, claiming whistleblower protect. The Center claimed that it was immune from suit on sovereign immunity grounds. The trial court ruled against the Center.

On appeal, the Court of Appeals upheld the protections granted to whistleblowers by holding that the statute in question authorized persons "who allege they were subject to retaliation for reporting a violation of law, or 'whistleblowers,' to sue both public and private mental health facilities."

Despite all of the this, the Supreme Court granted review and reversed both lower courts, holding that the Legislature did not manifestly waive the State's sovereign immunity by enacting the whistleblower provision in the Health and Safety Code, and that even though a "mental health facility" was within the scope of the code, the Center was protected.

Speed Boat Leasing, Inc. v. Elmer (2003)¹⁵

Impact: Reduces liability for injuries caused by certain types of commercial transportation companies.

¹³ Docket number 02-1087.

¹⁴ Docket number 03-0012.

¹⁵ Docket number 03-0037.

Doris Elmer, a seventy-year-old woman, fractured her spine while riding in a boat operated by tour boat company Speed Boat Leasing. At issue here is whether Speed Boat should be considered a “common carrier,” and therefore be held to a higher standard of care.

The Court concluded that Speed Boat was not a common carrier, in that it was not in the business of transporting people or goods. In an attempt at rationalizing this decision, the Court wrote: “The fact that it transports people is only incidental to its primary purpose.”

Common sense tells families that those who provide transportation to the public should have responsibility to the public. The Court created a loophole for companies that transport individuals for amusement, holding them to a lower standard than other carriers.

Tiller v. McLure (2003)¹⁶

Impact: Eliminates predictability in cases involving intentional infliction of emotional distress by stripping juries of their ability to interpret facts.

McLure contended that Tiller was responsible for intentional infliction of emotional distress through his conduct. Tiller made persistent and frequent telephone calls to McLure, who took over her husband’s contracting business, during her husband’s terminal illness. Tiller complained about the construction project, threatened to terminate the contract if the construction site was closed during the contractor’s funeral, and refused to make final contract payment. Tiller’s behavior and ultimate refusal to make a final contract payment caused the company to foreclose. The jury found for McLure.

The Supreme Court, however, supplanted the jury’s evaluation of Tiller’s behavior with its own, concluding that Tiller’s behavior was not extreme and dangerous. The Court, in an effort to assert more control, effectively took the fact interpretation out of the hands of the jury. The Court’s duty is to answer questions of law, not fact. If this is not enough evidence for intentional infliction of emotional distress, it is not clear what will be sufficient.

Marathon Corp. v. Pitzner (2003)¹⁷

Impact: Creates an impossibly high standard for evidence verification, thereby subjecting consumers’ expert reports to inconsistent and extreme standards.

Pitzner sued for injuries, which occurred while making repairs on the roof of a building owned by Marathon. Pitzner claimed that the building’s undisputed noncompliance with certain provisions of the city’s building and mechanical codes caused him to be electrocuted when he attempted to start the unit, causing him to fall off of the roof. The jury found for Pitzner.

The Supreme Court ruled that the evidence, which included circumstantial evidence and expert testimony, was legal insufficient. It contended the expert opinions were based on speculation piled upon speculation and that Pitzner could just as easily have been a victim of foul play, although there was no evidence to that effect. This places an extremely high standard on consumers to find indisputable evidence.

¹⁶ Docket number 02-0136.

¹⁷ Docket number 01-0870.

In re Van Waters and Rogers, Inc. (2001)¹⁸

Impact: Strikes a blow to judicial economy in cases involving injuries to large numbers of individuals by keeping injured workers from joining their cases.

In this case, 454 workers in a chemical plant filed suit jointly against their employer for exposing them to dangerous chemicals. The trial court ruled that the cases of 20 individuals should be heard first to accurately gauge all the issues in the cases. The defendants resisted this order, claiming they wanted to conduct discovery on all 448 workers – a tactic that would impose cumbersome and time-consuming delays on the case.

Seven years after the case was originally filed, the defendants refused to start the case with the limited individuals specified by the trial court. The Texas Supreme Court held that the company must be allowed to conduct discovery on all plaintiffs at once, rather than allowing the first twenty plaintiffs to proceed. This ruling raises the bar on when injured workers will be allowed to join together to bring claims against their employers.

Walls Regional Hospital v. Bomar (1999)¹⁹

Impact: Eliminates avenues of justice for victims of sexual harassment in the workplace.

Two female employees filed suit against Walls Regional Hospital, claiming sexual harassment in the workplace. The employer sought coverage under workers compensation. The employees sought a court remedy, citing an exemption to the workers comp system that allowed suit in cases of injury due to personal reasons. The Court determined that sexual harassment did not qualify as a personal offense, setting up a distinction within sexual harassment policy. The decision forces harassment victims to seek justice through the workers compensation system despite an exemption that should apply in this situation.

Koch Refining Co. v. Chapa (1999)²⁰

Impact: Allows property owners to avoid responsibility of safety on the worksite even when they hire a safety manager to oversee the site.

Koch Refining Company, the property owner, hired a safety manager who was charged with overseeing safety of the worksite. When a subcontracted employee was injured after falling, the safety manager implemented additional safety procedures to prevent future falls. The Court determined that the presence of a safety manager paid for by the property owner does not indicate the property owner assumes responsibility for ensuring safety on the job site. The Court suggests that if the property owner hears to evil or sees no evil then he will not be forced to pay any damages.

In re Oakwood Mobile Homes (1999)²¹

Impact: A business that fails to respond to requests for arbitration from one of its customers can invoke arbitration to kill the resulting lawsuit.

¹⁸ Docket number 03-0777.

¹⁹ Docket number 99-0057.

²⁰ Docket number 99-0228.

²¹ Docket number 98-0662.

Shirley and David Brandon purchased a mobile home from Oakwood. Their contract for the home contained a provision requiring any disputes to be resolved by arbitration. After the Brandons began having serious problems with the home, they twice wrote to Oakwood requesting arbitration. Oakwood ignored both responses, and the Brandons were forced to sue. The Supreme Court held, however, that even though Oakwood had ignored the requests, it had not waived its right to arbitrate because the burden was on the Brandons – consumers with no experience in arbitration – to initiate arbitration proceedings.

American Home Assurance Co. v. Stephens (1998)²²

Impact: State policy does not prevent an insurance company from using a sexual encounter between a therapist and patient to reduce the amount it may have to pay under its policy, even though the claim against the therapist was based on misdiagnosis, not the sexual encounter.

Rory Ross sued her therapist, Billy Carl Stephens, for negligence and misdiagnosis, claiming that he did not treat her properly considering that she had been the victim of child abuse and incest. She later alleged that he had also coerced her to engage in sexual intercourse with him while she was his patient. Stephens admitted to his actions, and an arbitrator decided Stephens was liable for negligence and misdiagnosis in the amount of \$2.9 million.

Stephens carried a professional liability policy with a \$3 million limit, but the policy had a separate maximum limit of only \$25,000 if any sexual misconduct was alleged. The Supreme Court held that such a separate and lower limit for sexual misconduct did not violate Texas public policy, and that the insurer would only be required to pay \$25,000 even though Ross' claim was not related to the sexual misconduct.

²² Docket number 98-0396.