

Access to Texas Courts Denied

In its 2000-2001 term, the Texas Supreme Court erected significant barriers to citizen and consumer access to the civil justice system, issuing blows to government accountability by citizens and diverting consumers from the justice system by enforcing arbitration.

Out of the 86 cases decided by the Texas Supreme Court during the 2000-2001 session, the court ruled on 60 cases that pitted citizens, consumers and patients as plaintiffs against corporate, professional and government defendants. Court Watch found that court decisions emerged more evenly between consumer plaintiffs and corporate defendants than in previous years, with defendants winning 31 decisions or 52 percent of the time, consumer plaintiffs winning a total of 25 decisions or 41 percent, and defendants and plaintiffs splitting 4 decisions.

This climb in the consumer-win rate--while still more than 10 percent lower than the defendant win-rate--has been a long time coming for Texas consumers after many years of distinct defendant dominance in the win ratios. The following chart presents historical win-rates documents in Court Watch reports over the past five years.

	Defendant Win Rate	Plaintiff Win Rate
1996-1997	71 %	24 %
1997-1998	69 %	22 %
1998-1999	60 %	27 %
1999-2000	57 %	31 %
2000-2001	52%	41 %

In preceding years, Court decisions have made it increasingly difficult for consumers to hold irresponsible doctors, insurance companies, manufacturers and employers accountable. In these past sessions, the court has favored corporate defendants over consumer—and even small business—plaintiffs by overwhelming percentages. Their decisions stripped consumers, employees, patients, clients, insurance policyholders and workers of many rights and protections.

Beneath this narrowing in corporate-defendant/ consumer-plaintiff wins, however, the court is operating as a Dr. Jeckyll and Mr. Hyde for Texas consumers. While at the same time finding for consumers in an increased number of cases, the court erected significant barriers that will hamper consumer access to the civil court and justice system. The lasting effect of these barriers will have negative implications far outreaching the wins the court found on behalf of Texas consumers. For many consumers, the decisions of the 2000-2001 Texas Supreme Court may bar them from even entering the halls of justice to begin with.

Texas Supreme Court Locks the Courthouse Doors

The *Terrible Ten of 2000-2001* (Page 7) highlights several cases that stripped consumers of important protections. One of the striking themes to emerge in this session's opinions is the way in which the Texas Supreme Court closed the courthouse doors to citizens, consumers and small businesses from having the opportunity to make their case, including:

- Enforcing inappropriate binding arbitration agreements
- Reducing paths of citizen access to government accountability
- Preventing taxpayers from holding taxing authorities accountable
- Reducing access to government documents and actions

Slamming the Courthouse Doors!

In the 2000-2001 term, the Texas Supreme Court decided three important cases involving arbitration. Unfortunately for consumers, the two most significant cases were major losses, while the one winning case will have little precedential value for consumers. Defendants won 67% of cases, compared to 33% for consumers. Two of the cases involved the purchase of defective mobile homes, including fraudulent inducement and warranty disputes. The Court upheld the arbitration clauses in the purchase contracts, notwithstanding the egregious offenses and high costs associated with arbitration.

The Magnuson Moss Act is a federal law that prohibits enforcement of pre-dispute binding arbitration agreements in warranty disputes, and offers substantial protection to consumers. However, the Texas Supreme Court usurped the protection of the Act in its decision in *American Homestar & Nationwide Housing*, ruling that a company may force a consumer to submit to binding arbitration for a product covered by a warranty. Moreover, the Court's decision allows business interests to side-step federal laws which mandate access to a trial by jury for Texas consumers if they have been sold substandard goods and services. The growing use of binding arbitration is a disturbing trend in consumer transactions, and the Texas Supreme Court has given its stamp of approval to this procedure that blocks access to the courtroom.

In another blow to consumers involving the purchase of defective products, the Texas High Court forced a family to submit to costly arbitration in *In Re First MeritBank & Mobile Consultants*. The de los Santos family purchased a mobile home that came loaded with defects, no sewer system, and lacked countless amenities. When the family sought to revoke the contract in court, the mobile home lenders filed a motion to compel arbitration. The Court dismissed plaintiff's defenses against binding arbitration including seller's breach of contract, fraudulent inducement, and the high cost of arbitration.

As is often the case, many consumers cannot afford the steep arbitration fees. In many cases the costs will actually be greater than the object or property that is in dispute. Consumers who sign contracts that include arbitration clauses are usually blind-sighted as to the fees and costs associated with the process. And, as these pro-defense decisions

demonstrate, consumers who sign arbitration agreements forfeit their constitutional right of free access to the courts.

When consumers “sign on the dotted line,” they sacrifice one of their most important tools for accountability and protection. More and more companies are slipping mandatory arbitration clauses into the fine print of contracts with consumers, and as the Court has shown, it stands ready to enforce these clauses.

Reducing Government Accountability

In a dramatic shift from the Court Watch *1999-2000 Year-in-Review* report in which the court found overwhelmingly against government entities in favor of consumers, the court in this session found for government entities in 11 out of the 14 cases on the issue.

In the 2000-2001 term, the Texas Supreme Court rallied for the government by granting significant wins in cases involving sovereign immunity and citizens’ ability to hold their government accountable. The Court sided with government entities in 79% of all cases, up from 41 percent in the 1999-2000 term. Consumers received little support from the court in their actions against governmental entities. Winning only 3 cases out of 14, consumers prevailed in only 21% of their cases against the government, down from a 53 percent win-rate in the 1999-2000 term.

Claims against the government included:

- Failure to provide appropriate taxpayer notice about tax authority spending;
- Reducing open records and open government provisions;
- Increased government protections from liability for injuries and damages to citizens.

Sovereign Reign

Sovereign immunity was a major area of contention as the Court stretched to define the legal means and methods that allow the waiver of the shield that protects and prevents the government from being sued. Statutorily defined exceptions apply under the Texas Tort Claims Act that allows consumers to pierce the shield. However, the Court has been inconsistent in defining the exceptions -- grappling with semantic distinctions that fall clearly to the detriment of Texas consumers.

In *Texas Natural Resources Conservation Commission v. White*, the Court ruled that the exception involving the “use” of “motor driven equipment” listed in the Texas Tort Claims Act could not apply to White because the injury occurred due to the “non-use” of motor driven equipment (i.e. failure to provide the equipment) rather than the use of it. White attempted to sue the TNRCC because it removed a motorized pump the agency had placed there to dissipate gas on his property. White claimed the agency removed the pump too early, causing gas to accumulate and a resulting fire destroyed White's property.

Likewise in *Texas Department of Criminal Justice v. Miller*, the court ruled that medical equipment used in the treatment of a prisoner who died could not be defined as “tangible

personal property” to pierce the Tort Claims Act barrier, despite previous rulings that defined x-rays and medical charts as “tangible personal property.”

These opinions, which appear to contradict historical interpretations, prevent consumers from pursuing government accountability when government actions cause injury or harm.

No Standing

In several taxpayer dispute cases, the court again ruled against the ability of citizens to hold governmental entities accountable for the way in which duties and taxes were discharged.

In *Bland Independent School District v. Blue*, the school district entered into a financial arrangement for the construction of a new building but did not give taxpayers the statutorily required notice of the expenditures. The Court ruled that the Blue's--taxpayers in this taxing authority district--did not have standing to contest tax expenditures after the school district failed to meet required notice provision of this tax expenditure.

In *The Honorable Lee Brown v. Todd*, a taxpayer and a Houston city council member challenged an executive order issued by Houston's Mayor forbidding discrimination based upon sexual orientation by city employees. The order was issued after voters declined to pass an ordinance prohibiting such discrimination. The Court ruled that neither individual had suffered any special injury and thus had no standing to challenge the executive order.

In narrowly defining "injury," the court in both these cases denied citizens tools to hold government entities accountable for what citizens believed were miscarriages of governmental authority.

Keep your eyes to yourself

Two notable cases decided by the Court placed limitations on the free flow of government information and a citizen's right to know under the Texas Open Meetings Act. In *City of Georgetown and Russell*, problems were detected in the city's wastewater treatment plant prompting the city of Georgetown to hire an expert to provide an analysis. When two newspapers wanted to see the report, the city refused to release it. Although the Texas Public Information Act provides that a governmental body must disclose completed reports and evaluations, the Texas Supreme Court held the report was confidential and that the city did not have to disclose it.

In *Re The Texas Senate & The Honorable Rodney Ellis*, various media groups sought to prevent the Texas Senate from electing the Lieutenant Governor by secret ballot. Under the Texas Open Meetings Act, the Senate is prohibited from electing one of its members to an executive office such as Lieutenant Governor except by open vote. However, the Court gave thumbs up to the secret ballot election by ruling that the Texas Constitution provides an exception to the open vote provision for the election of Senate and House officers.

These decisions issued blows to citizen ability to know and monitor government activity and decision-making by granting new shields and defenses to government entities.

Silver Linings

Once consumers made it into the courtroom this past session, the Court helped to clarify procedures, and confirmed some important protections, particularly in cases involving federal and state regulations.

Although relating to age discrimination, *Quantum Chemical v. Toennies*, may have a larger impact on other employment discrimination cases. The Court ruled that an employee claiming wrongful termination due to age discrimination could follow a more lenient burden of proof than stipulated in federal law, proving that age was one “determining factor” in the termination rather than *the* determining factor. The opinion may have been written broadly enough to include other forms of employment discrimination, granting employees increased protections against discriminatory termination.

Likewise, in *Great Dane Trailers v. Wells*, the Court ruled that a company could be held to stricter state common law safety standards—rather than relying solely on more lenient federal regulations—if the state standards do not conflict with federal laws. In this case, a trucking company claimed that it could not be held liable for injuries under more restrictive state common law because the truck met the more lenient federally mandated standards. The court affirmed consumer protections in holding the trucking company to the stricter state standards.

Professional Accountability

One of the biggest areas for plaintiffs came in the area of attorney-client issues, with plaintiffs winning 6 out of 7 cases against attorneys. Five of those wins came on behalf of clients seeking legal malpractice claims. By issuing five opinions on this issue alone, the court resoundingly increased responsibility for attorneys, specifying that the clock for statute of limitations for legal malpractice does not begin ticking until all appeals are completed.

We applaud the court for increasing professional responsibility on behalf of consumers of professional services and would anticipate the extension of this responsibility to additional professional lines. The extension of professional responsibility is a marked shift from Texas Supreme Court decisions in recent years that have reduced professional responsibility to consumers.

In the 2000-2001 term, the court limited accountability for professional accountants (*Ernst & Young v. Pacific Mutual*) ruling that accountants bear no responsibility to third parties who rely on fraudulent financial statements. This decision offers significant risk to investors who make investment decisions based on published audited statements provided by companies to assess the financial strength of that investment.

Likewise, in *Gross v. Kahanek*, an opinion issued in the 1999-2000 term, the court ruled that the statute of limitations for medical malpractice cases begins running on the last day a patient received treatment from a doctor, even if the injury occurs during the ongoing therapy prescribed on that particular day. In the case, plaintiffs sued when their child died from prescriptive drug poisoning prescribed by her doctor. Although the drug therapy continued until her death, Although the child died as a result of the ongoing drug treatment prescribed by the doctor, the Court ruled the statute of limitation began to run on the last day of treatment, which meant the plaintiff's wrongful death action was barred.

These opinions benefit not only traditional consumers seeking justice against an irresponsible corporation, but any consumer of legal advise. The increase of professional responsibility is a step that we hope will be consistently applied to professions outside of the legal arena.

Legal Procedure

In another resounding statement, the court issued xx opinions to clarify legal procedures involving the so-called "Mother Hubbard" rule or clause.

A Mother Hubbard clause in a motion asserts the finality of judgment in cases settled prior to trial. The motion, which precludes an appeal on settled cases, has been a significant source of confusion in multiparty cases. The court ruled in several cases that if a Mother Hubbard clause is used in a settlement achieved with one party in a multi-party case, that clause does not terminate the cases of the other parties. These opinions prevent a defendant from evading accountability for claims against it through a procedural technicality.

The result of these opinions do not offer relief or benefit specifically to plaintiff consumers, the procedural clarification prevents the inappropriate dismissal of claims.

Alignments

While a study of voting alignments in the 2000-2001 Texas Supreme Court term must be tempered by the changing cast of characters experienced during the term with the replacement of Justice Gonzales with Justice Jefferson and the early departure of Justice Abbott the court appeared to not retain the same degree of cohesion represented in the 1999-2000 term.

The chart on page xx documents the relative lack of cohesion among justices and the four true voting blocs that emerged:

- Justices Hecht and Owen continued to form the strongest voting alliance as well as the lowest level of agreement with the majority.
- Justice Baker formed two blocs, one with Justice Hankinson and another with Justice Phillips.
- Justice Jefferson formed the strongest voting bloc with Justice Phillips, agreeing with Phillips in all 25 opinions signed by the new justices.

Justices Hecht and Owen again trailed behind their colleagues in agreement on majority opinions, with Justice Hecht agreeing with the majority in 52.3 percent of opinions and Justice Owen agreeing in 54.5 percent of opinions.

The court continues to retain an “Old Guard/New Guard” distinction despite significant turnover in the “New Guard” camp. Justices elected between 1988 and 1994—justices Phillips, Hecht, Owen and Enoch—representing the Old Guard wrote 70 of the 132 opinions, concurrences and dissents. The “New Guard” comprised of justices appointed by, or elected under, Governor George Bush—including justices Baker, Abbott, Hankinson, Gonzales and O’Neill—trailed just behind, writing 62 of the 132 opinions.

The “New Guard” however led the court in writing 33 unanimous/majority opinions to the “Old Guard’s” 23 unanimous/majority opinions.

Of particular note to consumers is the consistent dissent by justices Hecht and Owen on cases representing “wins” for consumers. In cases of consumer losses,

Data on swing votes was inconclusive in the 2000-2001 term due to the significant turnover on the court, including the mid-term departure of justices Gonzales and Abbot and Justice Jefferson’s late-term addition. As certain times, only eight justices participated in the opinions.

THE TERRIBLE TEN OF 2001

American Airlines Federal Credit Union v. Martin

Impact: Decision allows banks to limit consumer protections established in the Texas Business and Commerce Code designed to protect banking customers against fraud and forgeries.

Facts: When Martin opened an account with American Airlines Federal Credit Union, the bank adhered to the Texas Business and Commerce Code regulations providing customers one year to discover and report fraudulent funds transfers and forgeries. Martin's girlfriend made 14 fraudulent withdrawals in five months totaling \$49,800 from his account to hers. During this time, AAFCU modified this rule and, despite state regulations, shortened the time period to notice and notify of fraudulent activity. When Martin notified AAFCU and sought restoration of his funds, the bank refused, citing the changed rule. In court proceedings, the trial and appeals courts found for Martin, indicating the bank rule change conflicted with the TX Business and Commerce Code. The Texas Supreme Court ruled that those rules may be modified by agreement. The Court ruled that written notice provided after the account was open constituted adequate agreement, despite the fact that the customer did not receive the notice.

Texas Natural Resource Conservation Commission v. White and Texas Department of Criminal Justice v. Miller

Impact: Decisions broaden the shield of sovereign immunity for governmental bodies by restricting definitions under the Texas Tort Claims Act and further limiting citizen ability to hold a governmental entity accountable.

Facts: In *TNRCC v. White*, natural gas accumulated on White's property and TNRCC brought in a motorized pump to dissipate the fumes. Several days later they removed it and did not return. The fumes collected and caused a fire, destroying White's business. Under the Texas Tort Claims Act, sovereign immunity for government agencies is waived in the case of damages caused by motor-driven equipment. Despite contrary rulings in the trial and appeals courts, the Texas Supreme Court ruled that this case did not involve the use of motor-driven equipment, but rather the non-use of motor-driven equipment. This semantic distinction protected TNRCC under sovereign immunity and White could not hold the agency accountable under the Texas Tort Claims Act.

In *Texas Department of Criminal Justice v. Miller*, a prison inmate, died from meningitis. Under the Texas Tort Claims Act, sovereign immunity for government agencies is waived in the case of damages caused by use of personal property. The inmate's wife claimed his death was due to medical

malpractice by the prison doctor and sued the TDCJ under the Texas Tort Claims Act, claiming that the misuse of medical equipment, pain medication and intravenous fluids in her husband's treatment constituted the use of personal property. The Texas Supreme Court ruled that these objects did not qualify as personal property, despite ruling in other cases that x-ray readings, *and other* items did constitute personal property.

In Re City of Georgetown

Impact: Court decision provides new ways to undermine the Texas Public Information Act and governmental accountability by restricting public access to government information.

Facts: The city of Georgetown hired an expert to provide an analysis of the city's wastewater treatment plant. When the city refused to release the analysis to two newspapers, the papers sued the city under the Freedom of Information Act. Under the Texas Public Information Act, reports must be disclosed unless "the category of information is expressly made confidential under other law." The court ruled that the Texas Rules of Civil Procedure—which apply to civil court proceedings—are "other law" and under the TRCP, consulting-expert reports are considered confidential. Therefore, the City does not have to disclose the report.

Lawrence v. CDB Services and Lambert v. Affiliated Foods, Inc.

Impact: This decision stripped Texas employees of basic workers compensation rights and protections by granting employers who opt of the workers comp system additional legal protections and immunity.

Facts: Two workers comp cases involving workers whose companies did not participate in the state Worker's Compensation system, but instead offered their own employee benefits package. Workers who agreed to accept the companies benefit plan were required to sign a waiver of their right to sue the company and its affiliates. When the workers were injured on-the-job, they sued the company for negligence. The company claimed they could not sue because they had waived their right to do so. The petitioners claim that under the Texas WC laws, only companies that offer the state WC benefits are protected from lawsuits, but non-subscribing companies may be sued by workers who are negligently injured on the job. The Court held that waiver agreements are not prohibited by the Worker's Compensation Act and such agreements are not contrary to public policy.

In Re the Texas Senate & the Honorable Rodney Ellis

Impact: Allows secret meetings by the Texas legislature to elect officers. The Texas Constitution requires open voting for all elections of the Senate and House, but provides an exception for the election of their officers. This decision undermined the Texas Open Meetings Act by allowing the Texas Senate to elect an executive office of the state in secrecy.

Facts: When the Texas Senate sought to elect a new Lt. Governor by secret ballot, several newspapers and a magazine sued to open the ballot, claiming the Texas Open Meetings Act prohibited election of one of its members as Lt. Governor except by public vote. Despite the fact that the Lt. Governor is an executive officer, not an officer of the Senate, the court ruled that the Texas Constitution provides an exception that authorizes the Senate to elect its officers by secret ballot if it so chooses.

Spradlin v. Jim Walter Homes

Impact: Procedural protection is not available to consumers in home equity lending cases which involve construction of new homes. The protection under section 50 of the Texas Constitution only applies to “repair or renovation of existing improvements.”

Facts: JWH's contracted to build a home for Spradlin and secured a lien on his homestead. Spradlin sought to invalidate the lien claiming it did not comply with the procedural protections of Section 50a(5) of the Texas Constitution. District court granted summary judgment for JWH holding that subparts A-D do not apply to JWH's mechanic's lien for construction of new improvements. The court ruled that Subparts A-D of Section 50a(5) only apply to "work and material used to repair or renovate existing improvements" on homestead property, and not to "work and material used in construction new improvements." Thus, JWH was not required to comply with subparts A-D, and because Spradlin signed a written contract, the resulting lien is valid.

Bland Independent School District v. Blue

Impact: This decision undermines government accountability by limiting taxpayer standing to hold taxing authority accountable and rendering official public notice provisions meaningless.

Facts: Taxpayers sued the school district to stop it from making future payments due on a financing agreement on a new building, claiming the school district did not comply with the required notice provisions to enter into such agreements. The court ruled that the taxpayers could show no injury and therefore did not have standing to sue the school district. The court ruled that unless a taxpayer could show a special injury, granting them standing to sue for notice provision failures would cause too much disruption of government operations.

American Transitional Care Centers v. Palacios

Impact: A medical expert's report must advise each defendant of the conduct complained of as well as how the conduct violated a particular standard of care. The Palacios' expert report was held insufficient because it only provided a conclusory statement that the standard of care was breached, and did not provide a factual statement of the applicable standard of care.

Facts: Palacios was seriously injured on the job and had serious brain damage. Although physicians had ordered bed restraints for Palacios, he fell out of bed and suffered additional injuries. A medical expert's report was submitted substantiating the injuries, but ATCC contended that the report did not meet the statutory requirements and did not represent a good faith effort to comply with the definition of an expert report. The court concluded that a report that merely states the expert's conclusions about the standard of care, breach, and causation does not fulfill the requirements.

In Re American Homestar & Nationwide Housing

Impact: This decision forces consumers into binding arbitration for disputes over warranted products, despite federal regulations that protect consumers against arbitration in these cases. This decision opens the door for business to evade accountability in Texas civil courts.

Facts: Consumers purchased a mobile home with a warrantee. The mobile home was delivered with significant defects that were not corrected; the purchasers filed suit to secure the improvements. The mobile home seller moved for binding arbitration as stipulated in the purchase contract. The buyers contested binding arbitration, claiming the federal Magnuson- Moss Act and the Federal Trade Commission prohibit binding arbitration remedies in warranty disputes that involve consumer-product purchases. The Texas Supreme Court however ruled that the MMA does not override another federal policy that favors arbitration.

In Re First Merit Bank & Mobile Consultants

Impact: This decision creates hurdles to consumer justice by expanding the reach of binding arbitration clauses

Facts: The de los Santos family financed the purchase of a mobile home that was delivered without contracted land, driveway and septic tank and was riddled with other defects. When the family sought to revoke the contract, the seller moved to compel arbitration. Under arbitration regulations, a consumer may be exempted from arbitration if he or she can prove the company violated the contract, forced the contract signing under duress and that the costs posed an unreasonable bar. When the de los Santos' signed the contract for the mobile home, they were told the arbitration

process dealt only with the financing arrangements. The de los Santos family claimed they could not afford to enter the arbitration process, citing market rates for arbitration services and that the seller could not arbitrate because it had violated the contract by failing to deliver contracted items. The court determined the arbitration clause related to all matters associated with the purchase and there was no proof they would actually be charged the high arbitration fees.

Ernst & Young v. Pacific Mutual Life Insurance

Impact: This decision hinders consumers' and investors' ability to hold fraudulent third parties accountable when they release financial misrepresentations.

Facts: Pacific Mutual Life Insurance Company purchased notes issued by InterFirst and Republic Bank, relying on an audit report stating its financial strength produced by Ernst & Young. When Republic Bank declared bankruptcy, Pacific Mutual sued Ernst & Young for fraudulent misrepresentation in the audit report produced for Republic Bank. The Texas Supreme Court ruled that Pacific Mutual could not hold Ernst & Young accountable because E&Y would have no reason to believe a third party would rely upon its audit statements.

Furr's Supermarket v. Bethune

Impact: While the statutory requirement that provides the losing party in litigation pay the winning party's court costs can be waived for "good cause," an elderly woman's emotional distress and suicidal behavior is not good cause.

Facts: 60-year-old Bethune was assaulted and robbed in the parking lot of a Furr's Supermarket. She sued for lack of adequate security and lost. Although the prevailing party is normally awarded all costs, if good cause exists, the trial court has the discretion to order each party to pay its own costs. Noting her emotionally distressed and even suicidal behavior during the trial, the Trial court held there was good cause and ruled each party pay its own costs. The court of appeals agreed. The Texas Supreme Court, disputed the trial court's assessment of good cause, voided the trial court's statutory discretion and ordered the woman to pay all costs.

SILVER LININGS OF 2001

Pustejovsky v. Rapid American Corp:

Impact: In this narrow decision, the court ruled that an individual who settled an asbestos-related claim with one company might later hold another company accountable for a distinct malignant asbestos-related condition.

Facts: Pustejovsky's work exposed him to asbestos, and he was later diagnosed with asbestosis. He sued, and the lawsuit was settled in an out of court settlement. Over twelve years later he developed malignant lung cancer and filed suit against several suppliers of asbestos. The company claimed the action was barred by the statute of limitations and the previous settlement agreement. The court ruled that a previous lawsuit or settlement of a claim for a non-malignant asbestos-related disease will not prevent a subsequent action for a distinct malignant asbestos-related condition.

Utts v. Short

Impact: This decision prevents a defendant from offsetting liability to injured parties with settlements undertaken by co-defendants in the same case.

Facts: Clifton Short died from blood loss and infection following a botched surgery. His family members and executor sued the medical center and Utts, the doctor. One of the parties settled with the medical center for \$200,000 and dropped the suit against the doctor. When the other litigants sued the doctor and won, Utts argued they had benefited from the previous settlement and that it should be applied as a credit toward the recovery amount in his case. The court said that Utts is not entitled to a credit from the previous settlement.

Quantum Chemical v. Toennies:

Impact: This decision increases protections against discrimination in the workplace.

Facts: When Toennies was fired from his job, he filed an employment discrimination claim under the Texas Human Rights Act claiming he was fired because of his age. The standard of proof in employment discrimination cases differs, and federal courts often conflict on which standard to apply. The court determined that a worker need to prove only that age was "a determining factor" and not the sole determining factor in the company's decision to fire him.

Lozano v. Lozano:

Impact: In this decision, the Court upholds jury decision-making power, allowing a jury to make decisions based on circumstantial evidence. Reverses a tendency by the Court to overturn jury decisions on issues of fact rather than on issues of law.

Facts: When Deana Lozano’s estranged husband disappeared with their 20-month old child, there was evidence that his family members had aided him in abducting the child. She sued the ex-husband’s siblings and parents for providing financial assistance to him, and for hampering efforts to find the child by removing posters with pictures of the child plastered throughout the community. The court ruled that there was legally sufficient evidence to support the jury’s verdict against two of the family members, and that a jury may make a finding based upon circumstantial evidence.

American Home Products v. Clark:

Impact: In this decision, the Court indicates that once venue is established in a class action case, it cannot be challenged by an interlocutory appeal.

Facts: 11 plaintiffs sued various defendants claiming injuries from taking the diet drug fen-phen. Only one of the eleven plaintiffs lived in Johnson County. American Home Products filed a Motion to Transfer Venue, claiming that venue was not proper in Johnson County as to the ten plaintiffs who did not reside in Johnson County. The trial court said that each plaintiff had established venue against a Johnson County physician named as a defendant. The Court of Appeals then ruled that it did not have jurisdiction to rule on a venue determination by the trial court because the Legislature decided that interlocutory appeals would not be allowed once a trial court has determined the venue question. The Supreme Court agreed that when the trial court decides venue is proper under section 15.002 of the Civil Practice and Remedies Code, neither the court of appeals nor the Supreme Court could review the propriety of the trial court's venue decision.

Great Dane Trailers v. Estate of Wells:

Impact: In this decision, the court holds a company accountable to stricter state common law protections rather than federal safety regulations, ruling that the common law protections do not interfere with federal rules.

Facts: A driver was killed when his car crashed into a jackknifed tractor-trailer that was not adequately equipped with lights or reflectors. State law imposed stricter standards for trailer reflectors but Great Dane argued federal law preempted the state common law standards. The court determined that federal law does not preempt the state law because there is no conflict and the manufacturer could comply with both. Congress structured the National Traffic and Motor Vehicle Safety Act so that state common law may indeed impose higher standards than those found in the safety act's regulations.

PLAINTIFFS V. DEFENDANTS CHART

Plaintiffs versus Defendants
in the Texas Supreme Court
2000-2001
60 decisions*

Type of case	Record (D-P-S)	% for D	% for P	% Split
Legal Procedure	3-3-0	50	50	0
Insurance	1-1-1	33	33	33
Government	11-3-0	79	21	0
Employment	4-2-0	67	33	0
Medical	1-1-0	50	50	0
Banking/Mortgage	3-1-0	75	25	0
Legal Malpractice/fees	0-6-1	0	86	14
Product Liability/PI	0-3-2	0	60	40
Class Action	1-2-0	33	67	0
Arbitration	2-1-0	67	33	0
Other	5-2-0	71	29	0
OVERALL	31-25-4	52	41	7

* Total number of cases includes per curiam opinions. The plaintiffs are individuals or business consumers suffering a property loss or personal injury.

Tabulation without legal malpractice cases: (53 decisions) When the tabulation considers only cases involving consumers and corporate-entities, the consumer win-rate drops from 41 percent to 36 percent. Defendant win-rate rises to 58 percent from 52 percent. These figures fall into line with tabulations from the past three years of court opinions.

	(D-P-S)	% for D	% for P	% Split
<i>Overall</i>	(31-19-3)	58%	36%	6%

Government Gains Against Citizens: --- for 2000-2001: Citizens lost most of their claims against the government, losing 11 out of 14 cases. Losses to the government (79%) include issues pertaining to taxpayers rights, sovereign immunity, freedom of information, and open meetings.

Arbitration In – Consumer’s Access to Courts Out: --- for 2000-2001: Three important arbitration cases decided in last year’s session resulted in devastating losses to consumers. Of the 3 cases, the two most crucial decisions held that consumers who purchase defective products can be forced into costly arbitration. One minor win for consumers paled in comparison to the two major losses which cut off consumers’ access to the judicial system.

TEXAS SUPREME COURT VOTING ALLIANCES

2000-2001
Result Analysis
56 decisions*

Scores indicate percentage of decisions where each pair agreed; figures rounded

	Hecht	Phillips	Gonzales	Abbott	Hankinson	Enoch	Baker	O'Neill	Jefferson
Owen	94	77	58	83	82	76	79	81	92
Hecht		72	63	84	74	69	74	78	84
Phillips			83	88	90	87	95	89	100
Gonzales				79	77	83	92	92	-
Abbott					81	79	86	86	91
Hankinson						88	93	89	96
Enoch							85	89	94
Baker								92	96
O'Neill									91

* All signed opinions. Does not include per curiam decisions.

- **Alliances for 2000-2001:** Of the justices sitting on the Court for the full term, Justice Baker formed two blocs with Justice Phillips (95 percent agreement) and Justice Hankinson (93 percent agreement). Justices Hecht and Owen continue to exhibit a strong alliance with 94 percent voting agreement.
- **New Justice – Strong Alliance:** The new justice joining the Court, Justice Jefferson, built strong alliances with all of the current justices sitting on the Court. Signing on to 25 opinions in a two and one-half month period, Justice Jefferson agreed with Justice Phillips in every case, forming a 100 percent voting agreement. Strong alliances are indicated with all other justices.
- **Changes on the Court:** During the 2000-2001 term, two justices announced their resignation from the Court, and one new Justice joined the Court. Justice Gonzales headed for Washington, D.C., and resigned effective on December 22, 2000. The number of opinions he signed onto for the term is 12. Justice Jefferson joined the court effective on April 18, 2001, and the number of decisions he participated in is 25. Justice Abbott announced his candidacy for office and resigned effective on June 6. Justice Abbott signed on to 40 opinions. Except for the above noted terms, voting alliances are based upon 56 signed opinions, unless the justice was absent from the court.

Average agreement (cohesion) = 84.3 percent (3711/44)

Bloc calculation: $100 - 84.3 = 15.7$

$15.7/2 = 7.85$

$84.3 + 7.85 = 92.1$

Bloc is 92 or greater

Case source: Texas Supreme Court opinions

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.

Cases include unanimous and majority decisions. Per curiams and dissents on cases not taken are not included.

AGREEMENT WITH THE MAJORITY ON RESULT
Texas Supreme Court
1999-2000
22 decisions*

Justice	Agreed/Cases	Agreement (%)
Hankinson	20.5/22	93.2
O'Neill	18/19	94.7
Enoch	17.5/22	79.5
Phillips	19/22	86.3
Baker	19.5/22	88.6
Abbott	11/16	68.7
Owen	12/22	54.5
Hecht	11.5/22	52.3
Gonzales	7/7	100
Jefferson	8/8	100

* Signed majority opinions

Consumer Dissents

In cases involving consumer “wins,” Justice Hecht dissented in 50 percent of the decisions, with Justice Owen dissenting in 44 percent of the decisions favoring consumers. Neither justice dissented in cases involving losses for consumers on behalf of government, business or insurance interests.

	Total Consumer Wins	Consumer Wins Dissents	Total Consumer Losses	Consumer Loss Dissents
Hecht	16	8	26	0
Owen	16	7	26	0

AUTHORS OF OPINIONS

Texas Supreme Court 2000-2001

Justice	Unanimous	Majority	Concurring	Concurring & Dissenting	Dissenting	Total
Hecht	3	1	3	1	11	19
Owen	1	2	3		9	15
Enoch	4	5	6	3	4	22
Abbott	4	1	2		6	13
Baker	8	4	3	1	3	19
Gonzales	2					2
Phillips	3	4	3		4	14
Hankinson	5	2	6	1	2	16
O'Neill	3	4	3		2	12
Jefferson	-	-	-	-	-	-
TOTALS	33	23	29	6	41	132

- The “Old Guard,” comprised of Justices Phillips, Hecht, Owen and Enoch, wrote 70 of the 132 opinions, concurrences, and dissents. The “New Guard” of Justices Baker, Abbott, Hankinson, Gonzales and O'Neill authored 62. The “New Guard” wrote 33 of the courts unanimous/majority opinions. The “Old Guard” wrote only 23 of the unanimous/majority opinions.
- Justices Hankinson and O'Neill were least likely to dissent. Justices Hecht and Owen, were most likely to dissent.
- Justice Nathan Hecht returned again this term as the court's most disagreeable, writing 11 dissents. This number does not include Hecht's 3 dissents on cases where petition for review and writ of mandamus were denied.

- Nearly 35 percent of the opinions issued last term were unsigned, "per curiam" opinions. This number is fairly consistent with the number of per curiam decisions issued the past two terms. A per curiam opinion can be handed down when as many as three justices dissent but do not wish to write a dissenting opinion. Historical "per curiam" opinion percentages:

1996-1997	53 %
1997-1998	35 %
1998-1999	44%
1999-2000	40%
2000-2001	35%

THE SWING VOTE

Voting with the Majority in 5-4 Decisions 2000-2001

Identifying the one justice who makes the difference in the court's close decisions-the swing vote-is best accomplished through an analysis of the court's decisions in which the justices split 5-4 on result. However, with the in-term changes of justices sitting on the Court, at certain times the majority was comprised of only eight justices sitting on the Court. In such situations, a 5-3 decision could be viewed as a split vote. Three such decisions were issued during the last session. Justice Gonzales was not sitting for any of the three decisions, Justices Abbot sat for two of the decisions, and Justice Jefferson sat on the Court in only one decision.

Justice Enoch is the most likely swing vote in the Court's 2000-2001 term, having been in the majority 3 times. Justices Phillips, Owen, Hecht, O'Neill, and Hankinson each were in the majority two times. Of the three decisions, Justice Baker signed with the majority only once. Justice Abbott, who only participated in two of the three decisions, was never in the majority.

Enoch	3-0
Hankinson	2-1
Hecht	2-1
Owen	2-1
Phillips	2-1
Baker	1-2
O'Neill	2-1
Abbott	0-2
Jefferson	1-0