

POWER SHIFT: RETURNING TO DEFENDANT DOMINANCE

EXECUTIVE SUMMARY

The 2001-2002 Texas Supreme Court term saw a significant resurgence of corporate-defendant dominance over consumer plaintiffs, a power shift to the more activist justices on the court and significant setbacks for Texas workers and employees.

Out of the 83 cases decided by the Texas Supreme Court during the 2001-2002 session, the court ruled on 59 cases that pitted citizens, consumers and patients as plaintiffs against corporate, professional and government defendants. Court Watch found that court decisions reflected a significant resurgence of defendant victory at the expense of consumers and workers with defendants winning 40 decisions or 68 percent of the time, consumer plaintiffs winning a total of 16 decisions or 27 percent, and defendants and plaintiffs splitting 3 decisions.

...a significant resurgence of defendant victories at the expense of consumers and workers.

The chart below presents historical defendant/plaintiff win-rates over the past six years. Decisions of the 2001-2002 Texas Supreme Court continued a historic pattern of erecting barriers to justice for consumers, citizens and employees. The resurgence in the defendant win-rate recalls corporate defendant dominance of the mid-1990s as the court made it increasingly difficult for consumers to hold irresponsible doctors, insurance companies, manufacturers and employers accountable. A more detailed description of cases and consumer impact can be found on page 3 of this report.

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 %
2001-2002	68%	27%

Jefferson and Rodriguez gave new power to...the court's two most pro-corporate, activist justices

Underlying this corporate defendant resurgence is a significant voting power shift to the traditional pro-corporate faction of the court as Governor Perry's judicial appointees Wallace Jefferson and Xavier Rodriguez gave new power to Justices Hecht and Owen, the court's two most pro-corporate, activist justices. This new voting alliance shifts power from the more moderate core of justices to a newly strengthened activist faction that could potentially swing the court back to its pro-defendant heyday. Voting alliance and bloc voting tabulations for the 2001-2002 term can be found on page 6 of this report.

TAKING WHAT THEY'RE GIVING 'CAUSE I'M WORKING FOR A LIVING

The chart below documents how consumer plaintiffs fared in different categories of cases. Texas employees and workers suffered the brunt of consumer losses this past session, winning only 17 percent of their claims against employers. Worker losses included opinions that raised standards for injured employees to hold irresponsible employers accountable, limited whistleblower protections and held them subject to unfairly imposed mandatory binding arbitration agreements.

Texas employees and workers suffered the brunt of consumer losses...

Consumers were also on the losing end of insurance and medical cases, although not to the same degree as in prior years. There was an even split for consumers in the category considering legal procedures.

The most significant consumer losses are discussed in more detail in the Terrible Ten for Consumers found on page 3.

Defendants versus Plaintiffs
 in the Texas Supreme Court 2001-2002
 59 decisions*

Type of Case	Record (D-P-S)	% for D	% for P	% for Split
Employment/Workplace	9-2-1	75%	17%	8%
Insurance	3-2-1	50%	33%	16%
Medical	3-2-0	60%	40%	0
Legal Procedure	5-5-0	50%	50%	0
Government-Immunity	8-3-0	73%	27%	0
Property	6-1-0	86%	14%	0
Other	6-1-1	75%	13%	13%
<u>Overall</u>	40-16-3	68%	27%	5%

*Total number of cases including signed and per curiam opinions, that deal with consumer issues. The plaintiffs are individuals or business consumers suffering a property loss or personal injury. Cases dealing with family law issues were not included.

TERRIBLE TEN of 2001-2002

The *Terrible Ten of 2001-2002* represents the opinions that pose the most significant harm to consumers with rulings that favored employers, government entities, insurers and medical providers. A synopsis of case facts can be found on pages 14 – 18 of this report.

Shah v. Moss, (Baker, 5-4)

Limits injured patient's access to courts by ruling that the statute of limitations in a medical negligence case can begin to run before the patient suffers any injury.

In Re Halliburton Co. and Brown and Root Energy Services, (Phillips, 9-0)

Allowed employers to unfairly impose mandatory binding arbitration agreements covering all forms of employment disputes.

Columbia Hospital Corporation of Houston v. Moore, (Enoch, 6-3)

Reduces accountability of irresponsible medical providers to patients they injure.

TxDot v. Needham, (Baker, 9-0)

Significantly limited protections from retaliation for employees reporting wrongdoing under the Texas Whistleblower Act.

Excel Corporation v. Apodaca, (Hankinson, 9-0)

Increased liability protections for employers by making it harder for injured employees to hold employers accountable.

Southwestern Electric Co. v. Grant, (Baker, 9-0)

Gives the Texas Public Utility Commission authority to allow utility companies to shield themselves from liability for injuries resulting from their negligence.

Utts v. Short, (Baker, 4-2-3)

Makes it easier for defendants to escape full responsibility in cases involving multiple defendants.

American Type Culture Collection Inc. v. Coleman, (Jefferson, 9-0)

Creates loophole for out-of-state companies to shield themselves from liability regardless of harm caused to Texas consumers.

Southwest Key Program Inc. v. Gil-Perez, (Rodriguez 7-2)

Raised the causation standard, placing a high burden on the plaintiff to prove with absolute certainty that an injury would not have occurred if safety measures had been taken.

In Re Van Waters and Rogers Inc., et. al Realtors, (per curiam)

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

SILVER LININGS

There were two bright spots for consumers in the 2001-2002 term, with the court holding insurance companies accountable for abiding by the terms of policies and protecting subcontractors and independent contractors for whom they bore responsibility. Case summaries can be found on pages 19-21 of this report.

1). Insurance Company Responsibility:

Continental Casualty Co. v. Downs, (Hankinson, 5-4)

Ensured that workers compensation carriers were accountable for abiding by notice provisions of coverage to claimants.

King v. Dallas Fire Insurance Co.,(Enoch, 9-0)

Enforced the duty of the employer to defend an employee according to the terms of a commercial liability policy.

Rocor International, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, (O'Neill, 7-2)

Allowed insured to hold insurer accountable for failure to represent the insured in a lawsuit.

2). Protecting Subcontractors and Independent Contractors:

Lee Lewis Construction Inc. v. Harrison, (Hankinson, 9-0)

Held a general contractor accountable for failing to ensure workplace safety where the contractor retained control over the jobsite.

D. Houston Inc. v. Love, (Phillips, 9-0)

Decision states that an employer owes an independent contractor a duty to take reasonable care of the independent contractor if the employer requires the independent contractor to consume alcohol in sufficient amounts.

POWER SHIFTS

A Return to Judicial Activism

The 2001-2002 Texas Supreme Court was marked by a significant power shift as pro-corporate, activist factions of the court found new allies, pulling strength from the more moderate core. This renewed activist group drew dissent from members of the moderate core for reviewing facts reserved for juries and mis-interpreting legislative actions and intent.

...pro-corporate, activist factions of the court found new allies, pulling strength from the more moderate core.

In recent years, a more moderate core group comprised of Justices Hankinson, Baker and O'Neill brought a degree of balance between corporate defendants and consumer plaintiffs to the court. As the mid-1990's approached, Bush appointees brought moderation to the Court, Justices Hecht and Owen were increasingly isolated on the court. As documented in previous Court Watch reports, historically, Justices Hecht and Owen logged the highest level of disagreement with majority opinions and drafting the most dissents against consumer wins.

The 2001-2002 term, with its resurgence of pro-defendant opinions, was also marked by Justices Hecht and Owen dramatically increasing their level of agreement, drawing the majority on opinions favoring defendants with the participation of Perry appointees, Justices Jefferson and Rodriguez.

Justices Hecht and Owen have increased their participation in majority opinions (52.3 to 77 percent for Justice Hecht; 54.5 to 82 percent for Justice Owen) and Justice Owen now also forms a voting bloc with Perry appointee Wallace Jefferson. While Justice Rodriguez does not form any voting blocs, his level of agreement with Justices Owen and Hecht (84 percent) is much higher than the other justices on the court.

... the more moderate core increasingly pulled away from the pro-corporate faction, dissenting on concerns of judicial activism

Simultaneously, Justices Hankinson, O'Neill and Baker, who shared the highest level of agreement with the majority in the 2000-2001 term, now share the lowest level of agreement in the 2001-2002 term. Justice Hankinson now also forms a voting bloc with Justice O'Neill.

Members of the more moderate core increasingly pulled away from the more pro-corporate faction, dissenting on concerns about the majority's interpretation of legislative intent or review of facts evaluated by juries. Examples of these dissents are detailed in a chart on pages 12-13.

TEXAS SUPREME COURT VOTING ALLIANCES

Texas Supreme Court Voting Alliances

2001-2002 Result Analysis

44 decisions*

	Hecht	Phillips	Enoch	Hankinson	O’Neill	Baker	Jefferson	Rodriguez
Owen	93	77	68	64	68	64	89	82
Hecht		73	68	59	64	68	80	82
Phillips			77	84	86	80	80	75
Enoch				70	77	70	75	75
Hankinson					91	86	64	77
O’Neill						80	70	80
Baker							64	77
Jefferson								80
Rodriguez								

* All opinions signed during 2001-2002 term---per curiams not included.(83 cases total, 44 signed, 15 percuriams)

- ❑ **New Judicial Activist Power:** Perry appointees Wallace Jefferson and Xavier Rodriguez demonstrate increased agreement with justices Hecht and Owen, the two historical outliers on the court. Justice Jefferson formed a new bloc with Justice Owen and Justice Rodriguez had a higher level of agreement with both Justice Owen and Justice Hecht than any other justice on the court.
- ❑ **Alliances for 2001-2002:** Three voting blocs emerged in the 2001-2002 term. Justice Hecht and Justice Owen continue to form the strongest voting bloc at 93 percent agreement; Justice Owen also formed a voting bloc with Justice Jefferson at 89 percent; Justice Hankinson and Justice O’Neill formed a bloc at 91 percent agreement.
- ❑ **Lack of Cohesion:** The below average agreement for justices Hankinson, O’Neill and Baker with justices Hecht, Owen, Jefferson and Rodriguez document the lack of cohesion between the more moderate faction of the court and the new alliance comprised of traditional conservative justices and the new Perry appointees.

Average agreement (cohesion) = 75.4 percent (2717/36)

Bloc calculation: $100 - 75.4 = 24.6$

$24.6/2 = 12.3$

$75.4 + 12.3 = 87.7$

Bloc is 88 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
2001-2002

<u>Justice</u>	Majority Opinions		Unanimous Opinions and Majority Opinions	
	<u>Agreed/Cases</u> 22 Decisions*	Agreement (%)*	<u>Agreed /Cases</u> 59 Decisions **	Agreement (%) **
Hecht	17/22	77%	39/44	89%
Owen	18/22	82%	40/44	91%
Phillips	17/22	77%	39/44	89%
Enoch	18/22	82%	40/44	91%
Hankinson	13/22	59%	35/44	80%
Baker	14/22	64%	36/44	82%
O'Neill	16/22	73%	38/44	86%
Jefferson	20/22	91%	42/44	95%
Rodriguez	18/22	82%	40/44	91%

*Includes only majority opinions. Does not include unanimous or per curiams.

** Includes majority and unanimous

Four's Company

- ❑ Justices Jefferson, Rodriguez, Owen and Enoch have the highest level of agreement with the majority on majority opinions. Jefferson and Rodriguez agreement with Hecht and Owen brought them off of the island on which they had resided during recent terms.

Going Out Fighting

- ❑ Justices Hankinson and Baker—justices who had the highest level of agreement in previous terms—had the lowest level of agreement with the majority on majority and unanimous opinions, exhibiting a move away from the activist efforts pulling the court in the 2001-2002 term.

Still Friends

- ❑ Despite increased splits in agreement, the Court still logs a relatively high level of agreement in finding for corporate defendants.

Shifts in Agreement Between Moderate and Activist Cores
2000-2001 to 2001-2002 terms

Justice	Term	MAJORITY CASES			UNANIMOUS & MAJORITY CASES		
		Agreed/ Cases	Agreement (%)	Change	Agreed/ Cases	Agreement (%)	Change
Hecht	2000-2001	11.5/22	52.3	+24.7	44.5/56	79	+10
	2001-2002	17/22	77		39/44	89	
Owen	2000-2001	12/22	54.5	+27.5	47/56	84	+7
	2001-2002	18/22	82		40/44	91	
Hankinson	2000-2001	20.5/22	93.2	-34.2	49.5/52	95	-15
	2001-2002	13/22	59		35/44	80	
O'Neill	2000-2001	18/19	94.7	-21.7	50/52	96	-10
	2001-2002	16/22	73		38/44	86	
Baker	2000-2001	19.5/22	88.6	-24.6	51.5/55	94	-8
	2001-2002	14/22	64		36/44	82	

- ❑ Reversing their historical trend as the most disagreeable justices, Owen and Hecht have dramatically increased their agreement levels, logging the biggest increases in agreement with majority and unanimous opinions between the 2001-2002 terms.
- ❑ Hankinson, O'Neill and Baker demonstrated a corresponding decrease in their agreement levels, logging the biggest decreases in agreement with majority and majority and unanimous opinions between 2000-2001 and 2001-2002 terms.

Authors of Opinions
Texas Supreme Court
2001-2002

<u>Justice</u>	<u>Unanimous</u>	<u>Majority</u>	<u>Concurring</u>	<u>Concurring & Dissenting</u>	<u>Dissenting</u>	<u>Total</u>
Hecht	1	1	4		2	8
Owen	1	1	2		1	5
Enoch	4	3	4	1	2	14
Hankinson	5	3		1	2	11
Baker	5	5			3	13
O'Neill	2	5			2	9
Phillips	1	1	2		1	5
Jefferson	1		3		1	5
Rodriguez	3	2	1		1	6
<u>TOTALS</u>	23	21	16	2	15	77

- The split between the two factions of the court can also be seen in the dissenting opinions written by Justices Hankinson, O'Neill, Baker and Enoch. Whereas in the 2000-2001 term, Justices Hankinson and O'Neill were the least likely to dissent, they each dissented in similar proportions to other justices.

Consumer Win/Loss Dissents, Year 2001-2002

<u>Justices</u>	<u>Total Dissents</u>	<u>Consumer Wins Dissents</u>	<u>Consumer Losses Dissents</u>
Hecht	3	3	0
Owen	3	3	0
Jefferson	2	2	0
Rodriguez	2	1	1
Hankinson	10	2	8
O'Neill	6	1	5
Baker	8	2	6
Phillips	5	0	5
Enoch	2	0	2

*Although Hecht, Owen, and Rodriguez dissented on Utts v. Short, a consumer loss, their dissent did not dispute the outcome, but rather the process of the outcome and was not included in this tally.

What's All the Fuss About?

Members of the more moderate core increasingly pulled away from the more pro-corporate faction, dissenting on concerns about the majority's interpretation of legislative intent or review of facts evaluated by juries.

<u>CASE</u>	<u>Impact</u>	<u>Reason for the Dissent</u>
Improper interpretation of facts considered by a jury.		
<p><u><i>Southwest Key Program et. al. v. Gil Perez</i></u> Majority: Rodriguez, Hecht, Owen, Enoch, Jefferson, Phillips, Baker Dissent: O'Neill, Hankinson Consumer Loss</p>	<p>Raised the causation standard, placing a high burden on the plaintiff to prove with absolute certainty that an injury would not have occurred if the proper protective gear had been used.</p>	<p>O'Neill and Hankinson dissent with the majority of the Court and accuse the majority of conducting an improper legal sufficiency review, by considering evidence contrary to the verdict and ignoring testimony that supports causation. The dissenters also state the Court placed a higher standard of proof on the plaintiff than was required. Both dissenters state that the plaintiff, "was not required to show that if Southwest Key had provided protective gear his safety was "absolute", or "guaranteed." The dissent also disagrees with the majority of the Court because their decision usurped the power of the jury, by reversing the trial court decision.</p>
<p><u><i>Shah v. Moss</i></u> Majority: Hecht, Owen, Jefferson, Rodriguez, Baker Dissent: O'Neill, Hankinson, Phillips, Enoch Consumer Loss</p>	<p>Rules in a medical negligence case that the statute of limitations in a medical negligence case can begin to run before the patient suffers any injury, thus eliminating patients' access to the courts.</p>	<p>The dissenters state that the Court's analysis is flawed because it applied an inappropriate review standard. The Court is bound by precedent and must review the summary judgment record and resolve factual disputes in the respondents favor. Another words the Court is not in the position to resolve factual disputes of any kind.</p>
<p><u><i>Gulf States Utilities Co. v. Low</i></u> Majority: Jefferson, Hecht, Owen, Enoch, Baker Dissent: Hankinson, Phillips, O'Neill, Rodriguez Consumer Loss</p>	<p>Usurps the power of the jury system, by overturning a jury verdict, and raises the standard of evidence and testimony necessary to prove the actual loss of value of property.</p>	<p>The dissenters dissent with the majority of the Court for holding the plaintiff's testimony to a higher standard, by stating that because the plaintiff had not been able to testify to the actual worth or monetary value of the property, then the jury was not competent enough to evaluate the damages properly. The dissenters also disagree with the majority of the Court because the majority concluded that the jury award was based on insufficient evidence, and therefore needed to be reduced.</p>

Disputing Legislative Intent		
<p><u><i>Rocor International Inc. v. National Union Fire Ins. Co.</i></u> Majority: Hecht, Owen, Enoch, Jefferson, Rodriguez, O’Neill, Phillips Dissent: Baker, Hankinson Consumer Win</p>	<p>Allowed insured to hold insurer accountable for failure to represent the insured in a lawsuit.</p>	<p>The dissenters dissent from the majority and accuse the rest of the Court of overstepping their bounds and legislating from the bench, by making the law instead of administering the law the way that it was written. The dissenters also dissent with the majority of the Court because they state the justices strayed from the plain language of the Texas Insurance Code. The dissenters conclude that the case should be remanded back to the trial court to enter judgment consistent with the jury’s verdict.</p>
<p><u><i>Churchill Forge v. Brown</i></u> Majority: Owen, Hecht, Rodriguez, Jefferson, Enoch Dissent: Hankinson, Phillips, Baker, O’Neill Consumer Loss</p>	<p>Ruled that a commercial landlord may contractually obligate its tenant to be responsible for damages caused by the tenant or guest despite Property Code protections for tenants.</p>	<p>The dissenters dissent with the majority of the Court for interpreting the Property Code in a way that fails to follow legislative intent. The dissenters state that the Legislature had severely limited the circumstances under which landlords and tenants may contract for tenants to be responsible for the condition of the premises which permits the tenant to live free of serious defects to health and safety.</p>
<p><u><i>Columbia Hospital Corporation of Houston v. Moore</i></u> Majority: Hecht, Owen, Jefferson, Rodriguez, Enoch, O’Neill joined only in Part III Dissent: Hankinson, Baker, Phillips Consumer Loss</p>	<p>Eliminates incentive for health care facilities and physicians to settle their claims in a timely manner.</p>	<p>Chief Justice Phillips and the other dissenters dissent with the majority of the Court for going beyond the plain meaning of the new subchapter added by the Legislature in 1995 to the Medical Liability and Insurance Improvement Act. The subchapter includes a prejudgment interest mandate specifically for health-care liability claims. The dissenters primary concern is that the Court is imposing a statutory cap on a prejudgment interest award that was not intended to be limited.</p>

TERRIBLE TEN OF 2001-2002

The *Terrible Ten of 2001-2002* represents the opinions that pose the most significant harm to consumers with rulings that favored employers, government entities, insurers and medical providers.

Shah v. Moss, (Baker, 5-4)

Impact: Limits injured patient's access to courts by ruling that the statute of limitations in a medical negligence case can begin to run before the patient suffers any injury.

Facts: Ronald Moss claimed that medical negligence as part of an ongoing course of treatment by Dr. Harshad G. Shah cost him his eyesight. Dr. Shah performed eye surgery on Ronald Moss for a detached retina on June 21, 1991. Shah provided additional treatments and checkups to this surgery on an ongoing and regular basis. At a scheduled checkup to examine the eye four years after the original surgery, Moss complained of problems. Moss thereafter lost all sight due to a detached retina in the eye that Dr. Shah had been treating. The trial court dismissed Shah's suit, claiming that the 2 year statute of limitation had already expired on his claim despite of the ongoing treatment. The court of appeals held that because Moss was undergoing ongoing treatment, the statute of limitations had not expired. The Supreme Court ruled that the statute of limitations began to run in the middle of Moss's continuing treatments—and before he suffered any injury—thereby eliminating Moss's claim.

In Re Halliburton Co. and Brown and Root Energy Services, (Phillips, 9-0)

Impact: Allowed employers to unfairly impose mandatory binding arbitration agreements covering all forms of employment disputes.

Facts: James D. Myers had been a thirty-year employee of Brown & Root Energy Services, a subsidiary of Halliburton Company. In November 1997, Halliburton sent notice to all employees that it was adopting a Dispute Resolution Program with binding arbitration designated as the exclusive method for resolving all disputes between the company and its employees. The notice informed employees that by continuing to work after January 1, 1998, they would be accepting the new program. Myers acknowledges receiving this notice, but claims that he did not fully understand it and continued working for Halliburton after January 1, 1998. After a 1998 demotion, Myers filed suit against Halliburton claiming discrimination. Halliburton asked the trial court to compel arbitration under the Program and to either stay or dismiss the lawsuit. The trial court and appeals courts denied Halliburton's motions, indicating the at-will nature of Dyer's employment and the take-it-or-leave-it situation forced upon Dyer precluded mandatory arbitration. The Texas Supreme Court, however, rejected these decisions and compelled Dyer into arbitration.

Columbia Hospital Corporation of Houston v. Moore, (Enoch, 6-3)

- Impact: Reduces accountability of irresponsible medical providers to patients they injure.
- Facts: Katherine Moore died after undergoing surgery at Columbia Bellaire Medical Center ("Columbia") in 1996. Her husband, two daughters, and estate (collectively "the Moores") sued the hospital and Katherine's two treating physicians under the wrongful death and survival statutes. The jury found for the Moores, allocating causal negligence between Columbia and the physicians and finding the Moores' actual damages to be \$3 million. The trial court applied the Act's subchapter K damages cap to reduce Columbia's actual damages liability to \$1,305,691, but excluded prejudgment interest from the cap, adding \$300,487.79 in prejudgment interest to the capped amount. The Texas Supreme Court ruled that the cap should include prejudgment interest. The opinion drew dissents from several justices refuting the court's interpretation of legislative intent about the cap and prejudgment interest.

Southwest Key Program Inc. v. Gil-Perez, (Rodriguez 7-2)

- Impact: Raised the causation standard, placing a high burden on the plaintiff to prove with absolute certainty that an injury would not have occurred if safety measures had been taken.
- Facts: Gil-Perez was a resident at La Esperanza Home for Boys in Brownsville, Texas. An employee supervised a game of football between residents and other individuals in which Gil-Perez suffered a dislocated knee. Gil-Perez sued Southwest Key, alleging that it was negligent in allowing him to play tackle football without providing any protective gear or equipment. At the trial court, the jury found Southwest Key one-hundred percent negligent and awarded Gil-Perez \$75,000 in damages, plus interest and costs, and the trial court rendered judgment on the verdict. The court of appeals affirmed the trial court's judgment. The Texas Supreme Court reversed increasing Gil-Perez's standard by ruling that while the Home might have been accountable, Gil-Perez also had to show with absolute certainty that if he had used protective gear he would not have suffered the injury.

TxDot v. Needham, (Baker, 9-0)

- Impact: Significantly limited protections from retaliation for employees reporting wrongdoing under the Texas Whistleblower Act.
- Facts: Eddie Needham, while an employee at the Texas Department of Transportation (TxDOT), discovered a co-worker was driving a state vehicle while intoxicated. Mr. Needham reported the violation of state law and employee policies to leadership at

TxDOT with the belief that he was preventing the improper use of state property. Shortly after reporting the intoxicated driver Needham, himself was accused and charged with thirteen violations of TxDOT policies and procedures. Needham had worked at TxDOT for 23 years without a reprimand for work performance. Needham eventually took early retirement and brought suit against TxDOT under the whistle-blower act, claiming retaliation by TxDOT for reporting the incident. The trial court ruled in favor of Needham and that decision was upheld at the court of appeals. The Texas Supreme Court reversed and rejected Needham's claim on the grounds that TxDOT was not an appropriate law enforcement authority to report the claim and therefore not subject to regulations against retaliation under Texas's whistleblower statute in this case.

Excel Corporation v. Apodaca, (Hankinson, 9-0)

Impact: Increased liability protections for employers by making it harder for injured employees to hold employers accountable.

Facts: Apodaca began working at Excel in 1978. He held a number of physically demanding positions before sustaining injuries to his neck, back, and wrist that ultimately resulted in his being unable to return to work in 1995. On May 2, 1995, Apodaca completed an Employee Statement of Injury, reporting pain in his left hand. He visited several physicians for treatment. While Apodaca's doctors determined he had injured his back, neck, and wrist, the only injury they agreed was work related was the carpal tunnel syndrome in his wrist. Accordingly, Excel paid for medical expenses related to the carpal tunnel injury. Apodaca eventually underwent three operations to treat his neck, lower back, and wrist. Despite feeling better after these surgeries, Apodaca continued to suffer pain and could no longer work or perform household duties, such as mowing the lawn or washing dishes. He sued Excel, a nonsubscriber under the Texas Workers' Compensation Act, for negligence and gross negligence for failing to provide a safe workplace. Apadoca presented evidence contending Excel failed to implement safety procedures that it knew could have prevented the type of injuries he suffered. The trial court rendered judgment on the jury's negligence verdict for Apodaca, and the court of appeals affirmed. The Texas Supreme Court concluded that while Apadoca presented evidence of alternative safety procedures Excel could have implemented, he did not prove that if they had done so, he would not have suffered injuries.

Southwestern Electric Co. v. Grant, (Baker, 9-0)

Impact: Gives the Texas Public Utility Commission authority to allow utility companies to shield themselves from liability for injuries resulting from their negligence.

Facts: Grant reported flickering lights and other electrical problems to SWEPCO. After it was determined to be a power supply problem rather than a problem due to internal wiring, SWEPCO repaired the line and restored regular voltage to the Grant home.

Grant suffered an electrical shock from either an appliance or electrical outlet affected by the fluctuating voltage. Grant claimed SWEPCO negligently failed to disconnect Grant's electricity service after it knew the fluctuating voltage had damaged Grant's appliances. The trial court granted SWEPCO's summary-judgment motion based on a tariff provision approved by the Texas Public Utility Commission that allowed SWEPCO to limit its liability for personal injury. The Court of Appeals ruled the tariff was *prima facie* unconscionable under the Uniform Commercial Code and that Grant produced enough evidence to raise a material fact issue about whether SWEPCO owed Grant a duty to prevent her injuries. The Texas Supreme Court overruled the Court of Appeals and upheld the liability limitation.

Utts v. Short, (Baker, 4-2-3)

Impact: Makes it easier for defendants to escape full responsibility in cases involving multiple defendants.

Facts: Clifton Short died from blood loss and infection related to a perforated colon that occurred during polypectomy surgery. Several members of Short's family sued doctors, including Utts, who performed the surgery and the medical center at which the surgery was performed. All family members dropped one of the doctors from their suit; one family member settled with the medical center, the others settled their cases against the medical center; one family member dropped her suit against Dr. Utts. In his defense against the remaining claims by other family members, Dr. Utts claimed he should receive credit for the other settlements reached in the case. In an opinion issued during the 2000-2001 term the Texas Supreme Court ruled that Dr. Utts could NOT receive credit for these settlements. Reversing this opinion, the opinion issued this term shifted the burden for denying settlement credits to the remaining defendant to the non-settling plaintiffs, requiring them to prove that they did not benefit from the other settlements.

American Type Culture Collection Inc. v. Coleman, (Jefferson, 9-0)

Impact: Creates loophole for out-of-state companies to shield themselves from liability regardless of harm caused to Texas consumers.

Facts: ATCC, a nonprofit research organization, sells biological research material to research institutes and commercial manufacturers throughout the United States and in forty-five countries. In 1994, Marshall Coleman and approximately 1,800 veterans of the Persian Gulf War sued ATCC and eighty-two other defendants alleging that the defendants sold material, equipment, and technology to Iraq that was used to create biological and chemical weapons that caused them harm. ATCC challenged personal jurisdiction. The trial court denied their challenge and the court of appeals affirmed, holding that jurisdiction was proper because ATCC's contacts with Texas and sales in Texas were "numerous and repetitive." The Texas Supreme Court reversed the court of appeals' judgment and dismissed, claiming that the quality of

their sales in Texas did not meet the standards needed to bring the case in Texas. The ruling gives wide latitude to mail order companies to avoid accountability in states to which they ship.

In Re Van Waters and Rogers Inc., et. al Realtors, (per curiam)

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

Facts: In this case, 448 workers in a chemical plant filed suit jointly in a “mass tort” 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 court of appeals conditionally granted partial relief. The Texas Supreme Court ruled to permit the relators to proceed with discovery from the plaintiffs.

SILVER LININGS

Continental Casualty Co. v. Downs, (Hankinson, 5-4)

Impact: Ensured that workers compensation carriers were accountable for abiding by notice provisions of coverage to claimants.

Facts: Mary Ann Downs filed a claim for workers' compensation benefits with Continental Casualty Company after her husband's fatal heart attack. Continental first notified Downs that it disputed the compensability of her claim forty-eight days after it received notice of the injury. The parties proceeded to a benefit-review conference and then a contested-case hearing at the Texas Workers' Compensation Commission. The hearing officer determined that Downs' husband's heart attack was not compensable and that Continental had timely contested compensability. An appeals panel affirmed that decision. Having exhausted her administrative remedies, Downs sought judicial review in the district court which affirmed the Commission's decision. Downs appealed, complaining that Continental failed to dispute the claim within required time limits. The court of appeals reversed and rendered judgment in favor of Downs, and it remanded Downs' claim for attorney's fees to the district court, holding that because Continental had not timely notified Downs of its refusal to pay benefits, it could not contest compensability. The Texas Supreme Court concluded that under Texas Labor Code §§ 409.021 and 409.022, a carrier that fails to begin benefit payments as required by the Act or send a notice of refusal to pay within seven days after it receives written notice of injury has not met the statutory requisite to later contest compensability.

King v. Dallas Fire Insurance Co.,(Enoch, 9-0)

Impact: Enforced the duty of the employer to defend an employee according to the terms of a commercial liability policy.

Facts: Carlyle King is the sole proprietor of Tiedown Construction Company, which was insured through a commercial general liability policy with Dallas Fire Insurance Company. Jankowiak, who was an employee of another company working on the same site as King, sued King, claiming that one of King's employees, Carlos Lopez, assaulted him. Jankowiak also alleges that King was liable for the injuries, on the basis of *respondeat superior*, because of King's own negligence in hiring, training, and supervising Lopez because he failed to run a criminal- background check and in failing to provide any training on how to “peaceably and responsibly handle work generated construction site situations.” Dallas Fire refused to defend King, claiming that Jankowiak did not allege an “occurrence” within the meaning of King's insurance policy. The trial court concluded that Dallas Fire did not owe King a duty to defend. A divided court of appeals affirmed. The Texas Supreme Court held that with respect to King, Jankowiak's petition alleges an “occurrence” and that Dallas Fire has the duty to defend King.

Lee Lewis Construction Inc. v. Harrison, (Hankinson, 9-0)

Impact: Found a general contractor possessed a duty to subcontractors for workplace safety.

Facts: Jimmy Harrison's family alleged negligence and gross negligence against Lee Lewis Construction, Inc. (LLC) after Harrison, a subcontractor's employee, fell from the tenth story of a construction site. Lee Lewis Construction asserted that it did not have control over subcontractors and was not responsible for his injuries. The trial court rendered judgment on the jury's verdict against LLC and awarded \$7.9 million in compensatory damages plus prejudgment interest and \$5 million in punitive damages. LLC appealed. The court of appeals affirmed and increased the damages award. The Texas Supreme Court concluded there was legally sufficient evidence that: LLC retained the right to control its subcontractor's fall-protection measures and thus owed a legal duty to Harrison; LLC's failure to ensure adequate fall-protection measures proximately caused Harrison's fall; and LLC was grossly negligent.

Rocor International, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA, (O'Neill, 7-2)

Impact: Allowed insured to hold insurer accountable for failure to represent the insured in a lawsuit.

Facts: Ralph Mueller, a truck driver for Rocor International, Inc., caused an accident that killed two highway patrol officers. Mueller was legally intoxicated at the time of the accident. The officers' families sued Rocor. Rocor carried a \$1 million primary liability policy issued by Guaranty National Insurance Company, with a \$1 million self-insured retention endorsement. Rocor was also insured under an \$8 million umbrella policy issued by National Union Fire Insurance Co. of Pittsburgh. The trial court rendered judgment on the jury's negligent finding and found that the insured, Rocor, could recover under a common-law negligence theory. Rocor claimed that National Union failed to promptly effectuate settlement prior to the jury award, violating Article 21.21 of the Insurance Code. National Union claimed that while common law provisions might hold them accountable, there was no statutory obligation for failure to represent. The Texas Supreme Court ruled that Article 21.21 did in fact create a duty for insurers to defend insureds, allowing Rocor's suit against National Union to proceed.

D. Houston Inc. v. Love, (Phillips, 9-0)

Impact: Decision states that an employer owes an independent contractor a duty to take reasonable care of the independent contractor if the employer requires the independent contractor to consume alcohol in sufficient amounts.

Facts: Melissa Love, an independent contracted dancer at Treasures night club, became intoxicated while dancing for customers. While Love was driving home, she had an accident in which she suffered serious personal injuries. Love sued Treasures under the Dram Shop Act for negligence and common negligence. The Texas Supreme Court held Treasures accountable, ruling that if an employer requires its independent contractor while working to consume alcohol in sufficient amounts to become intoxicated, it owes her a duty to take reasonable care to prevent her from driving when she leaves work. The Texas Supreme Court affirmed the judgment of the court of appeals.