The Supreme Court of Texas:
A balanced Court
A Special Issue Report

by Aaron M. Streett

TX OCTOBER 2008

ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars, and other individuals, located in every state and law school in the nation, who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce "white papers" on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved, and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about The Federalist Society,
please visit our website: www.fed-soc.org.

The Supreme Court of Texas:
A Balanced Court

Aaron M. Streett

The Supreme Court of Texas: A Balanced Court

Aaron M. Streett

The Supreme Court of Texas has come through a period of rapid transition, and what some have called the court's "conservative counterrevolution" certainly has not ended with the departure of its leader, Chief Justice Thomas R. Phillips, who retired from the Court in 2004. The court has set about establishing a consistent, moderately conservative approach that resists expansion of novel causes of action and theories of liability, while continuing to prune some of the precedents established during the previous era.

After a period of remarkable turnover in the early 2000s, the court has not seen a vacancy since Justice Don Willett was appointed by Governor Rick Perry in August 2005. Even with this stability, commentators have remarked that, unlike the U.S. Supreme Court, is it often difficult to predict the lineup of justices in any given case, and varied coalitions frequently comprise a majority.[1] This unpredictability suggests that the court examines each case as it comes, rather than applying rigid methodological frameworks.

A few themes emerge about the court's jurisprudence. First, the court is quite protective of parental rights and religious liberties.The court recently decided a trilogy of high-profile and important cases involving the relationship between church and state. In each case, the court upheld a religious institution's autonomy from significant oversight by state agencies and courts. And in a parental rights case with religious overtones, the court ordered the return of children seized by Family Protective Services from the Fundamentalist Church of Jesus Christ of Latter-Day Saints. Second, as the number of case names beginning "*In re*" attests, the court has been increasingly willing to use its mandamus power when rogue lower courts make clearly erroneous decisions that, if left unreviewed, would impose substantial costs on the parties and judicial system. Finally, in the bread-and-butter tort and commercial cases that make up most of its docket, the court has rigorously enforced agreements to arbitrate, upheld federal preemption of tort suits, and been generally skeptical of attempts to expand liability. The court has also upheld the legislature's tort-reform agenda by restricting medical-malpractice lawsuits and class actions.It should be noted, however, that the present court is not unwilling to rule for a plaintiff when the facts warrant and has recently taken several cases to reverse erroneous pro-defendant rulings by lower courts.[2] This is a court that is conservative, but cannot be easily caricatured as ideological or activist.

** Aaron M. Streett is an appellate attorney with Baker Botts L.L.P. in Houston, Texas. He is a former law clerk for Chief Justice William H. Rehnquist.*

Protecting Churches and Upholding Parental Rights

The court decided five key cases concerning religion and parental rights in the last two years. In each case, the court held for the religious institution or parents. The religion cases were not traditional Establishment Clause or Free Exercise disputes; they could better be characterized as religious autonomy cases.

In the first case, *Westbrook v. Penley*, a former congregant sued her ex-pastor for publicly revealing her adulterous relationship in the course of "church discipline" prescribed by the church's constitution.[3] The plaintiff had agreed to abide by the church's constitutions when she became a member. Nonetheless, she claimed that the pastor committed professional negligence because she allegedly confided her affair to the pastor in his capacity as a secular marriage counselor. The unanimous supreme court held that the principle of church autonomy inherent in the Free Exercise Clause barred the lawsuit.Although the plaintiff argued that the pastor violated a neutral and generally applicable duty of confidentiality by disclosing her affair, the court reasoned that "this disclosure cannot be isolated from the church-disciplinary process in which it occurred," and subjecting the pastor to tort liability "would clearly have a chilling effect on churches' ability to discipline members."[4] Thus, the court applied the U.S. Supreme Court's rule that "[c]ourts have no jurisdiction to 'revise or question ordinary acts of church discipline.'"[5]

In *HEB Ministries, Inc. v. Texas Higher Education Coordinating Board*,[6] the court invalidated a statute that prohibited a religious school from using the term "seminary" and issuing "degrees" without first obtaining permission from the Board.The court unanimously

invalidated the restrictions on the use of "seminary"—a distinctly religious term—because they specifically targeted religion and therefore triggered strict scrutiny under the Free Exercise Clause. A plurality also thought the restrictions on granting degrees violated the Free Exercise and Establishment Clauses by preferring approved religious institutions over others, while two justices would have invalidated the "degree" provisions as an unconstitutional infringement on the right to engage in commercial speech. In *Pleasant Glade Assembly of God v. Schubert*, a teenaged church member sued her church for assault and false imprisonment.[7] Her injuries were allegedly suffered during a youth group meeting at which one of the youth claimed to have seen a demon near the sanctuary. The court held that her claims were primarily for emotional and psychological injuries, and that the Free Exercise Clause generally bars such claims when they arise out of a church's religious practices.

In re Texas Department of Family & Protective Services, perhaps "[t]he largest child protection case documented in the history of the United States," involved the warrantless seizure of 468 children from the complex owned by the Fundamentalist Church of Jesus Christ of Latter-Day Saints.[8] The Department of Family Protective Services (FPS) removed the children based on a phone call alleging child abuse at the complex, as well as concerns about forced underage marriage and polygamy. The court refused to reinstate the trial court's order granting custody to FPS, concluding that "[o]n the record before us, removal of the children was not warranted."[9] The court noted that that FPS had other available means to protect the children "short of separating them from their parents."[10] In the less controversial case of *In re Chambless*,[11] the court unanimously held that a trial court may not order grandparental visitation without first giving the custodial parent the opportunity to be heard. The court relied upon the U.S. Supreme Court's seminal parental rights decision in *Troxel v. Granville*,[12] affirming that "[p]arents enjoy a fundamental right to make decisions concerning 'the care, custody, and control of their children.'"[13]

Torts and Products Liability Cases

The court resisted attempts to expand a defendant's duty for attenuated and unforeseeable injuries. For example, in *Trammell Crow Central Texas Ltd. v. Gutierrez*, the court held that a premises owner owed no duty to a plaintiff who was shot to death on the premises by a robber, reversing a jury verdict for the plaintiff.[14] But the court adopted a moderate rule imposing a duty to prevent crimes similar to those that had occurred in the past. Likewise, in *General Electric Co. v. Moritz*, the court held by a vote of 6-3 that a landowner has no duty to warn employees of an independent contractor about open and obvious hazards on the premises.[15] But the no-duty trend was not unbroken. In *Bushnell v. Mott*, the court unanimously reversed the court of appeals and held that a dog owner has a duty to attempt to stop her dog from attacking a person once an attack has begun, even when the dog was not previously known to be vicious.[16]

The court refused to expand strict liability in *New Texas Auto Auction Services., L.P. v. Gomez de Hernandez*, and harmonized its case law with prevailing standards.[17] The court reversed a court of appeals decision imposing strict liability on an auctioneer who sold a vehicle with defective tires to another auctioneer, who in turn sold it to a car dealer, who in turn sold the vehicle to plaintiff. The court noted that *Restatement (Third) of Torts* specifically excludes auctioneers from strict liability. In addition, the car was sold as-is, which generally means the buyer accepts the risks of defects.

The court remained willing to reverse jury verdicts when it found no evidence to support causation or negligence. In one closely divided case, *Providence Health Ctr. v. Dowell*, the court reversed a jury verdict by a 5-4 vote, finding no evidence that a hospital's discharge of a suicidal man caused his suicide less than two days later.[18] The court noted that the man told a doctor and nurse that he was not suicidal and promised to go to a mental health treatment center in three days and stay with his family until then. Moreover, the man would not have consented to treatment at the hospital, and there was no evidence that he could have hospitalized involuntarily. Therefore, the court found the hospital's discharge to be too attenuated from the suicide.

However, the court unanimously reversed summary judgment in favor of a doctor in a medical malpractice case in *Hamilton v. Wilson*.[19] The court has also seemed slightly more willing to affirm punitive-damages awards, perhaps because the legislature has strictly limited the availability and amount of such

awards in recent years.[20] In *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, for example, the court by a 7-2 vote found sufficient evidence of gross negligence to support the jury's award of exemplary damages. [21]

Finally, the court has followed the recent trend set by the United States Supreme Court in finding state-law tort suits preempted by federal law.[22] In *BIC Pen Corp. v. Carter*, the court unanimously preempted a claim that a cigarette lighter contained design defects, when the lighter had been certified as compliant with federal regulations by the Consumer Product Safety Commission.[23]

Enforcing the Plain Language of Contracts and Arbitration Clauses

The court has consistently enforced the plain language of contracts—especially agreements to arbitrate—frequently granting mandamus where lower courts ignored such agreements. In a leading non-arbitration case, the court, splitting 7-2, enforced a contractual clause that disclaimed the parties' reliance on any extra-contractual statements, holding that the clause barred a fraudulent-inducement claim by a sophisticated party.[24] Likewise, in *In re U.S. Home Corp.*, the court reiterated that an arbitration clause is not rendered unenforceable merely because a business refuses to enter into a contract without one.[25] Nonetheless, the court has not been unwilling to invalidate arbitration clauses it finds unconscionable. In *In re Poly-America L.P. Industries*, the court invalidated an arbitration clause in an employment agreement that disallowed reinstatement remedies available under the Workers Compensation Act. [26]

A major development has been the court's refusal to let plaintiffs avoid arbitration clauses by suing non-signatories for a signatory's alleged wrongdoing. In two recent cases, the court held that arbitration clauses barred plaintiffs from suing a non-signatory, such as a signatory's agents or successors,[27] but refused to compel arbitration of a claim against an affiliate that did not commit concerted misconduct with the signatory.[28]

A Restrained Approach to Statutory Claims

Recent statutory cases demonstrate the court's unwillingness to expand liability beyond the plain language of the statute, especially when doing so would conflict with principles of federalism. In the leading antitrust case of recent years, *Coca-Cola Co. v. Harmar Bottling Co.*, the court reversed a $15 million verdict for Royal Crown Cola bottlers who alleged that Coca-Cola violated the Texas Free Enterprise and Antitrust Act of 1983 by entering into preferred marketing arrangements with retailers in Arkansas, Louisiana, Oklahoma, and Texas.[29] The court declined to interpret the TFEAA to have extraterritorial effect and thus reversed the district court's injunction against anti-competitive activities outside of Texas. The court explained that "[t]he principle of federalism... requires states to respect each others' divergent laws;" therefore, the Texas Legislature should not be presumed to have legislated against conduct occurring outside the State.[30]

Likewise, in *Houston Municipal Employees Pension System v. Ferrell*, the court found no jurisdiction to entertain a declaratory judgment action by municipal employees seeking to have time credited to their pension accounts, because the statute committed such disputes exclusively to the state pension board and did not explicitly permit judicial review. [31]

Procedural Constraints on Frivolous Lawsuits and Class Actions

The court regularly enforces statutory and procedural constraints on frivolous lawsuits and class actions. The court has put teeth in the tort-reform mandate that a plaintiff in a health care liability case submit an expert report supporting his claim within 120 days of filing suit.[32] In *In re McAllen Medical Center, Inc.*, the court not only dismissed a case because the expert who produced such a report was unqualified, it did so by granting a writ of mandamus before the case could go to trial.[33] In doing so, the court rebuked "some trial courts [that] are either confused by or simply opposed to the Legislature's requirement for early expert reports."[34] In the same context, the court also unanimously held that a defendant may seek sanctions on appeal for a plaintiff's filing of an inadequate expert report, even if the plaintiff voluntarily nonsuited the case.[35] The court's decision ensures that plaintiffs' lawyers cannot avoid sanctions by filing a frivolous case, then dropping it once the expert report is found inadequate.

The court has continued to aggressively police the requirements for certifying class actions. In two

recent cases, the court held that suits for "money had and received" cannot be certified because common issues of fact do not predominate, as required by Texas Rule of Civil Procedure 42(b)(3).[36] In another leading class-action case, *DaimlerChrysler Corp. v. Inman*, the court held that a putative nationwide class of plaintiffs lacked standing to sue for the cost of replacing allegedly defective seatbelts.[37] The court reasoned that "plaintiffs' fear of possible injury from an accidental release of a seatbelt" was too "remote" to create standing, where DaimlerChrysler had received only 50 reports of defects and the named plaintiffs themselves did not suffer any injuries.[38]

Finally, the court has enforced the Legislature's venue reforms. In *In re Pirelli Tire L.L.C.*, the court held that the trial court abused its discretion by refusing to dismiss a lawsuit by Mexican citizens, arising out of a traffic accident on a Mexican highway, allegedly caused by defective tires manufactured in Iowa, by a Delaware corporation.[39] The lower court should have dismissed the case under the forum non conveniens statute enacted as part of the 1997 and 2003 tort reforms.[40]

CONCLUSION

The Texas Supreme Court has continued on the path it forged in the late 1990s and the early years of the 21st Century. While certain lower courts remain friendly to novel theories of liability and broad class actions, those claims receive a skeptical reception in Texas's highest court.

Endnotes

1 John Council, *Justice Delayed: Appellate Bar Distressed by Texas Supreme Court's Backlog*, Tex. Lawyer 16-17 (Sept. 17, 2007) (*quoting* appellate practitioner Kurt Kuhn summarizing his study of the justices' voting patterns: "In the cases where there's a split, you get a bunch of different judges together, depending on the issue.").

2 In this regard, perhaps the court is responding to commentators who perceived a pro-defendant bias on the court and claimed that the court took cases only to reverse pro-plaintiff rulings. *See, e.g.*, David A. Anderson, *Judicial Tort Reform in Texas*, 26 Rev. Litig. 1, 7 (2007) (contending that "the court's tort law decisions disproportionately favor defendants and that the disparity cannot be readily explained by factors other than a determination to limit liability").

3 231 S.W.3d 389 (Tex. 2007).

4 *Id.* at 400.

5 *Id.* at 399 (*quoting* Watson v. Jones, 80 U.S. (13 Wall.) 679,,730 (1871)).

6 235 S.W.3d 627 (Tex. 2007).

7 51 Tex. Sup. Ct. J. 1086 (Tex. June 27, 2008).

8 255 S.W.3d 613, 615 (Tex. 2008).

9 *Id.* at 615.

10 *Id.*

11 257 S.W.3d 698 (Tex. 2008).

12 530 U.S. 57 (2000).

13 57 S.W.3d at 700 (*quoting* 530 U.S. at 65 (plurality opinion)).

14 51 Tex. Sup. Ct. J. 1355 (Tex. Aug. 29, 2008).

15 257 S.W.3d 211 (Tex. 2008).

16 254 S.W.3d 451 (Tex. 2008).

17 249 S.W.3d 400 (Tex. 2008).

18 51 Tex. Sup. Ct. J. 935 (May 23, 2008).

19 249 S.W.3d 425 (Tex. 2008).

20 Tex. Civ. Prac. & Rem. Code § 41.008 (capping punitive damages at two times economic damages plus an amount not to exceed $750,000 for non-economic damages); *id. at* § 41.003 (requiring jury to unanimously find clear and convincing evidence of fraud, malice, or gross negligence in order to award punitive damages).

21 51 Tex. Sup. Ct. J. 1220 (Tex. August 29, 2008).

22 Erwin Chemerinsky, *A Troubling Trend in Preemption Rulings*, 44 Trial 62 (May 2008) ("On February 20, [2008,] the Court handed down three decisions that address the question of when federal law trumps state law.All three found that the state law claims involved were preempted.").

23 251 S.W.3d 500 (Tex. 2008).

24 Forest Oil Corp. v. McAllen, 51 Tex. Sup. Ct. J. 1309 (Tex. Aug. 29, 2008).

25 236 S.W.3d 761 (Tex. 2007).

26 51 Tex. Sup. Ct. J. 1237 (Tex. Aug. 29, 2008).

27 In re H&R Block Fin. Advisors, Inc., 235 S.W.3d 177 (Tex. 2007); In re Kaplan Higher Educ. Corp., 235 S.W.3d 206 (Tex. 2007).

28 In re Merrill Lynch Trust Co. FSB, 235 S.W.3d 185 (Tex. 2007).

29 218 S.W.3d 671 (Tex. 2006).

30 *Id.* at 681-82.

31 248 S.W.3d 151 (Tex. 2007).

32 *See* Tex. Civ. Prac. & Rem. Code § 74.351(a).

33 51 Tex. Sup. Ct. J. 1302 (Tex. Aug. 29, 2008).

34 Slip. op. at 10.

35 Villafani v. Trejo, 251 S.W.3d 466 (Tex. 2008).

36 Best Buy Co. v. Barrera, 248 S.W.3d 160 (Tex. 2007); Stonebridge Life Ins. Co. v. Pitts, 236 S.W.3d 201 (Tex. 2007).

37 252 S.W.3d 299 (Tex. 2008).

38 *Id.* at 301.

39 247 S.W.3d 670 (Tex. 2007).

40 *See* Tex. Civ. Prac. & Rem. Code § 71.051.

The Federalist Society for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425 • Washington, D.C. 20036