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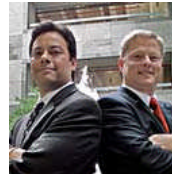
Home > This Week's Issue > Friends of the Court: More Amici Try to Win Justices to Their Way of Thinking

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Friends of the Court: More Amici Try to Win Justices to Their Way of Thinking

By **John Council**
 Texas Lawyer
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Ernest Martin (left) and E. Thomas Bishop
 Image: Steven Phelps

When clients want to influence legislators before they pass a law, those clients hire a lobbyist to do their bidding. But when clients want to persuade justices who will interpret that law, they hire an attorney to make their case in an amicus curiae brief.

Dozens of lawyers wrote and sent amicus briefs to the clerk's office of the Texas Supreme Court during the high court's just-finished 2005-2006 term, which began on Sept. 1, 2005, and ends Aug. 31.

Take for example E. Thomas Bishop, who wrote an amicus brief in *Lamar Homes Inc. v. Mid-Continent Casualty Co.* on behalf of the Property Casualty Insurers Association of America.

The 5th U.S. Circuit Court of Appeals sent Lamar Homes to the Texas Supreme Court via certified question last year, asking the justices to address three important Texas Insurance Code issues involving how general liability policies apply to construction defects in homes.

Even before the high court accepted the case for review in November 2005, various construction trade groups and insurance associations had mailed 10 amicus briefs to the clerk's office, stressing the importance of the issues in Lamar Homes.

"Now, more than ever, we have a court that is interested in and willing to listen to the views of amici," says Bishop, a partner in Dallas' Bishop & Hummert.

Bishop says he was busy over the past year, filing amicus briefs on behalf of the insurance industry in nearly a dozen cases pending before the high court. Part of the reason Bishop feels the need to cover the high court with so much paper is because of the new faces on the bench. The makeup of the Texas Supreme Court has changed significantly over the past five years.

Justice Dale Wainwright joined in January 2003; Justice Scott Brister joined in November 2003; Justice David Medina joined in September 2004; Justice Paul Green joined in January 2005; Justice Phil Johnson joined in March 2005; and Justice Don Willett joined in August 2005. At present, only Justices Nathan Hecht and Harriet O'Neill and Chief Justice Wallace Jefferson have been on the high court bench for more than five years — Hecht since January 1989, O'Neill since January 1999 and Jefferson since March 2001.

"The changeover in the court is, in my view, why we do have more amicus briefs. When you have a court that is fairly unchanged for a decade, the lawyers are confident that the justices either know or have staked out positions," Bishop says.

"When you have new faces on the court, you're not as sure that the justices have had experience in a particular area of the law, and they have probably not staked out a position," Bishop adds. "So if you can persuade in an amicus brief, you might have an ally in achieving a result that is best for all."

Bishop's amicus briefs pitching the interests of the insurance industry prompt lawyers such as Dallas' Ernest Martin to write amicus briefs representing the opposite concerns of his policyholder clients. Martin wrote an amicus brief to the high court regarding Lamar Homes, explaining the interests of his clients, Ericsson Inc. and five other large companies.

"The insurance side is keenly aware of what the courts are up to. They'll call up a lawyer and say, 'We need an amicus brief,' " says Martin, a partner in Haynes and Boone. "Policyholders are the opposite. That's not the only issue they've got going on. . . . They might not be aware of what's going on in the court or what's in the pipeline.

"If there is an issue that I think is going to impact in a significant way my client base, I'm going to get on

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the phone and talk to people and explain to them why it's important to be concerned and to be proactive," Martin adds.

"We sure read them. And I'd say we definitely pay attention to them," says Brister of amicus briefs. "After all, we're not deciding the case just between these two folks that are up before us. We're deciding cases based on appeals that lots of courts of appeals are going to have to decide. Amicus briefs allow us to focus on: "Here's the same issue with a different twist."

But some amicus briefs have more impact than others, Jefferson says.

"There are some that explore the issues in a greater depth than even the parties' [briefs], and even better explain the importance of the case to the jurisprudence of the state. And those are helpful," Jefferson says of amicus briefs. "Others by advocacy groups that want a certain outcome are not helpful."

To gauge the impact amicus briefs have had on the high court in 2005-2006 term, look no further than *Excess Underwriters at Lloyd's, London, et al. v. Frank's Casing Crew & Rental Tools Inc.*, says Shawn Stephens, a partner who heads the appellate practice group at Houston's Baker Hostetler. The Texas Supreme Court issued its original 7-0 opinion in the case in May 2004, holding that an insurance company has an extracontractual right to be reimbursed from its insured for an uncovered claim even though the insured never agreed to the reimbursement.

But the opinion caused a hue and cry among policyholders, so the court reheard arguments in Frank's Casing in February 2006. The justices have not yet issued a new opinion.

"It was a year where amicus briefs had a dramatic impact on the court," Stephens says of the latest term. "For example, I believe that the rehearing that was granted in the Frank's Casing case in great part may be attributable to the flood of amicus briefs that were filed in the case" urging a rehearing.

Former Texas Supreme Court Justice James Baker, now a partner in the Dallas Office of Hughes & Luce, agrees with Stephens. Sometimes amicus briefs can be so influential, they wind up getting quoted in opinions, he says.

He believes some lawyers are writing more amicus briefs because their clients don't have anything to lose — especially with a court full of new justices.

"The speculation of lawyers with their clients on what a court is going to do with an issue goes down to who's going to vote which way. And about 90 percent of the time [the speculation] is wrong," Baker says.

So why do lawyers file amicus briefs for their clients? "It's a very interesting question," Baker says. "Maybe people say, 'We've got a new court and we don't know how they're going to go. With that unknown, we certainly can't lose by filing an amici brief [to] see if we can't win a vote.'"

Deborah Hankinson, another former Supreme Court justice who's now a Dallas appellate solo, says the court should be wary about cases that attract a great deal of amicus attention.

"The danger that judges have to be aware of is you don't stack up and see who you have the most briefs from," Hankinson says. "Courts have to be cognizant of the fact that just because you get a stack on one side" doesn't mean that those amici are right.

While the majority of amicus briefs concern insurance cases with millions of dollars at stake, even those cases with little or no financial interests attract amici attention.

Jerry Bullard says he wrote an amicus brief in *Westbrook v. Penley* on behalf of his client, Southwestern Baptist Theological Seminary.

Penley, a case of first impression in Texas, delves into whether courts should hear suits parishioners file against their churches in matters where church leaders discipline parishioners for allegedly questionable behavior.

Bullard's client worries that if the high court rules that state civil courts can hear such suits, students may no longer seek to become licensed counselors because of liability concerns.

In April, the court granted review in *Penley*; the justices will hear arguments in the case on Sept. 26.

"It's one that I had a feeling that the court would take an interest in, but the seminary wanted to be heard," says Bullard, an associate in Bedford's Adams, Lynch & Loftin. "I don't know if [the amicus brief] had any influence one way or the other, but I'm glad the Supreme Court is going to address the issue."

A Read on the Court

While some practitioners try to see what sticks with the court through amicus briefs, others get a sense of how the justices may rule by dissecting their opinions.

One of the term's most important decisions was March 10's *Hyundai Motor Co., et al. v. Vasquez, et al.*, a 6-3 opinion that said trial court judges can restrict questioning during voir dire that threatens to lead to

the disqualification of too many venire members on the basis of bias.

In Hyundai, two justices disagreed with the majority on an issue that impacts how trial attorneys do their jobs.

In dissent, Medina complained that the trial court in Hyundai had abused its discretion by cutting off a particular line of voir dire questioning involving the use of seat belts by motorists.

Wainwright also dissented, finding that the majority failed to examine whether cutting off such questioning had restricted the trial lawyers in Vasquez from intelligently using their peremptory strikes. The majority found that the plaintiffs had not preserved that issue for appeal, but Wainwright believed that they had.

"You're starting to see some independence in some of the newer judges," says David Keltner, an appellate lawyer with Fort Worth's Keltner Law Firm who represents Hyundai. "Wainwright obviously has a mind of his own and is very precise in his reasons for doing things. And for appellate practitioners, that's a wonderful thing to see."

This independence "presumes I'm dissenting a lot, and I'm really not," Wainwright says. "The process here is there is no trading of votes. And we try to arrive at what we believe is the proper law and reasoning of cases. We try to be very thorough in our research."

Medina did not return a telephone call seeking comment before presstime on Aug. 24.

Rare Victories

The Texas Supreme Court's 2005-2006 term did nothing if not reinforce some appellate lawyers' belief that the conservative justices love to side with defendants. Of the 45 majority opinions the court issued during the term, only a few went the plaintiffs' way. [See *related chart below*.]

Mark Cannan believes the defense-oriented justices are slamming the courthouse doors in plaintiffs' faces. "[T]he notable exception is my case," says Cannan, a shareholder in San Antonio's Clemens & Spencer who argued *Terk, et al. v. Oppenheimer, Blend, Harrison & Tate, et al.* on behalf of the plaintiffs. According to the May 5 decision, executors of a will can go forward with a suit initiated by a family member before she died in which she alleged that she received bad probate advice. "It opened up avenues in recovery for plaintiffs instead of closing them down," Cannan says of the 8-0 opinion.

Another rare plaintiffs' victory was June 23's *State of Texas and Texas Parks and Wildlife Department v. Shumake, et al.*, a 7-1 decision in which the court found that the state is not immune from a premises liability suit brought by the parents of a 9-year-old girl who drowned at a state park.

But the rest of the term's decisions were resounding victories for defendants. That's a concern for John Griffin, a partner in Victoria's Marek, Griffin & Knaupp who re-argued *F.F.P. Operating Partners v. Duenez, et al.* in December 2005 in an attempt to persuade the justices that they should let his clients' \$35 million jury verdict stand.

In September 2004, a 5-4 high court agreed to do just that. But after three justices who voted in that majority left the court, the court voted in 2005 to rehear the case. The justices have not yet released a new opinion.

"There's always the explanation that each time you flip a coin it's a 50-50 chance. But if the coin flip is 50 one way every time, we want to look at the coin," Griffin says, referring to the high court's propensity to rule for defendants.

It's curious that the court has taken away so many jury verdicts from plaintiffs during the term for various reasons, Griffin says.

"There is a fear that goes beyond the facts of the case that one side of the docket appears to be suffering a numerical misfortune at the court. And there's certainly no suggestion that anyone has a personal vendetta," Griffin says. "But the public needs to have the confidence that [at] all courts — trial, appellate and the highest court . . . the people are getting an even break and a level playing field."

Justice Brister says defendant victories are just a product of the type of cases appealed to the court. More often than not, defendants are the parties appealing cases, he says.

"People always seem to be surprised by that [defense wins]. But that seems to be the rule at most courts of appeals," Brister says. "A much higher percentage of multimillion-dollar verdicts are appealed than are take-nothing verdicts.

"In a lot of take-nothing verdicts, people give up," Brister says. "And it's always easier for a defendant to prove there was no evidence of one element than it is for a plaintiff to review a verdict because there was conclusive evidence of every element. That's tough."

Slow Going

While some lawyers are concerned about the snail's pace at which the court decides cases — some have

been pending for more than two years — no one is more concerned about production than Chief Justice Jefferson. [See "Texas Supreme Court Cases to Watch," page 18.]

"The court is still a relatively new court. And it takes a while to get up to speed on the internal operations of the court and to get an opinion out when you have eight judges looking over your back," Jefferson says. "But there is valid concern about the state of the court's docket."

During the past term, the court issued 45 published opinions. That compares with 61 published opinions released in the 2004-2005 term.

"The court is concerned about clearing those cases with as accurate statements on the law as possible. There are some judges who are much more efficient in getting opinions on the table," Jefferson says. "And one thing I'm concerned with is getting those judges who are farther behind getting their work done on time. There are some judges that are behind and the court as a whole is meeting to address those concerns."

Further complicating matters is the Legislature's July 24 mandate that all state agencies decrease their current budgets by 10 percent in spending levels. For the Texas Supreme Court, that \$1.6 million cut means possibly laying off staff attorneys and briefing clerks, Jefferson says. Less staff would likely lead to slower opinion production, he says.

"I believe in the saying that justice delayed is justice denied," Jefferson says.

Jefferson wants the Legislature to restore the money he had to cut from the budget.

"I think the legislature should, with the Supreme Court of Texas, not seek a 10 percent cut but instead consider an increase in funding to hire more staff attorneys to increase productivity," he says. "But it's very preliminary. We're early in the process."

Texas Supreme Court Caseload 2005-2006 Term

Justice	Majority	Per Curiam	Concur	Dissent	Concur/Dissent	Total
Wallace Jefferson	7	9	0	0	1	17
Nathan L. Hecht	4	13	2	3	0	22
Harriet O'Neill	6	2	2	5	0	15
Dale Wainwright	3	1	2	4	0	10
Scott Brister	7	11	3	3	0	24
David Medina	6	2	0	1	0	9
Paul Green	5	6	0	0	0	11
Phil Johnson	3	1	1	2	2	9
Don Willett	3	5	0	1	0	9
Total	45	50	10	19	3	127

Note: Justice Jane Bland of Houston's 1st Court of Appeals, sitting by assignment, wrote one majority opinion for the high court during the 2005-2006 term.
Source: Texas Supreme Court clerk's office. Numbers are for Sept. 1, 2005, to July 24, 2006.

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