# TEXAS SCOPE OF DISCOVERY REVIEW - 2012
# "FRACKING FOR GEMS AND TRENDS"

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**State Bar of Texas**
**Advanced Trial Strategies 2012**
**February 9 – 10, 2012**
**New Orleans**

**CHAPTER 10**

## ACKNOWLEDGMENT

I wish to thank my partner, Donna M. Aversano, for her patience and support while I was formulating ideas for (helping me keep the good ones and getting rid of the bad ones, mostly) and writing this paper, and for editing the final draft for accuracy.

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**PAUL N. GOLD**

The purpose of this paper is to highlight recent Texas discovery cases that inform the discussion of scope of discovery, and attempt to analyze the opinions for particular policies and trends that might inform the trial bar's pre-trial strategy and practice.

## A. PLEADINGS DEFINE THE SCOPE

**1.** ***In re Dow Agrosciences LLC,*** Not Reported in S.W.3d, 2011 WL 4574644 (Tex. App.-Hous. [14th Dist.]). This opinion reinforces the proposition that the scope of discovery is defined by the pleadings in the case. The dispute arose from a Settlement and License agreement resolving an earlier suit in which Cooper claimed patent infringement against ABB regarding a vegetable oil (BIOTEMP). Cooper filed litigation claiming ABB breached the settlement agreement. Several lawsuits were filed. The mandamus arose from litigation in which Cooper asserted claims of tortious interference and civil conspiracy against Dow, with whom ABB contracted to manufacture the product that was at the heart of the patent infringement dispute. The discovery dispute arose from the following request for production that Cooper served on Dow:

> all documents relating to communications between ABB and Dow concerning (1) the Settlement and License Agreement; (2) any agreement between ABB and Dow concerning any agreement between ABB and Cooper; and (3) BIOTEMP. Cooper further requested any and all documents relating to communications between ABB and Dow concerning (1) any "Other Vegetable Oil–Based Dielectric Fluid;" (2) any Cooper patents; (3) the litigation between Dow and Cooper in Indiana federal court; (4) any indemnity agreement between ABB and Dow concerning the Cooper Patents, BIOTEMP, or any "Other Vegetable Oil–Based Dielectric Fluid;" and (5) sales to ABB of BIOTEMP or "Other Vegetable Oil–Based Dielectric Fluid."

Dow objected and asserted various privileges were invaded by the request, but also that the request exceeded the scope of permissible discovery. The privilege issues were deferred and the question before the trial court was scope of discovery. The trial court overruled Dow's scope objection. Dow contended that the scope of discovery was limited to the patents identified in the Settlement and License Agreement *and in Cooper's petition.*

The appellate court sided with Dow, holding as follows:

> We conclude that Cooper's discovery requests for documents relating to any of the Cooper patents other than those defined in the Settlement and License Agreement are overbroad. We further conclude that discovery for any product other than BIOTEMP is beyond the scope of the pleadings before the court.

**2.** ***In re Chinn Exploration Co.,*** 349 S.W.3d 805 (Tex. App.–Tyler 2011, no pet.). This case arose from an oil and gas lease. The plaintiffs were claiming conversion of funds and additionally pled for an accounting of proceeds from a particular well. Plaintiff served the following requests for production:

> *Request No. 103:* Produce any accounting records related to the Subject Well.
>
> *Request No. 113:* Produce all documents concerning royalty payments on production from the Subject Well.
>
> *Request No. 114:* Produce all documents concerning royalty payments being held in suspense on production from the Subject Well.

The defendant exploration company objected that the requests were overbroad. One of the defendant's accounting employees testified by deposition that the exploration company maintained only three accounts for all its producing wells: a revenue account, a distribution account, and an operating account. She testified that most of their pipeline companies deposit directly into the revenue account, but that some deposit directly into the distribution account. When the exploration company pays its royalty and working interest owners, it transfers funds from the revenue

account into the distribution account. The exploration company confided that its revenue was commingled into one account, but that it could generate reports regarding particular suspense funds by using a computer program. Plaintiffs then sent an informal request for the following additional documents:

> 4. A report indicating the amount in suspense for Wood Gas Unit and the Wood No. 9 Well;
>
> 5. A report indicating the amount in suspense from all of Chinn's Gas Units;
>
> 6. A report indicating the balances kept in the Wells Fargo Revenue Account (the suspense account); and
>
> 7. A report indicating the balances held in the Wells Fargo Distribution Account.

The trial court issued an order overruling all objections to the above requests and ordering the exploration company to produce all documents responsive to the requests. The appellate court found that the trial court had not abused its discretion. Important to this determination was the fact that plaintiffs had pled "conversion". Critical to proving conversion was evidence that the exploration company continued to have plaintiff's funds in one of its accounts. Because of the way the exploration company maintained its accounts, there was no other way (and the exploration company in fact did not offer another way) for plaintiffs to obtain discovery relevant to their conversion claim:

> Although Chinn Exploration has strenuously objected to the production of these records, its own accounting and financial procedures created Plaintiffs' need for the records to establish their conversion claim and possible damages. And Chinn Exploration has not suggested any other means by which Plaintiffs can accurately determine what happened to the proceeds attributable to their claimed mineral interests.

Supra, 810-811

**3.** ***In re HEB Grocery Co., L.P.,*** Not Reported in S.W.3d, 2010 WL 4523765 (Tex. App.-Corpus Christi). See discussion below under Overbreadth.

**4.** ***MUST A VALID CLAIM BE DEMONSTRATED?***

While it is clear at this point that the pleadings are the beginning point for determining whether a discovery request is relevant, there does seem to be a lack of clarity on whether the party seeking discovery must first demonstrate that the claim for relief or defense is viable as a matter of law (of course, the requirement that there be legally sufficient evidence to support the claim would result in a circular analysis, since the party seeking discovery would be able to argue that due process was being denied if the party were unable to obtain the necessary evidence to establish the predicate). There are several cases that touch on this issue, but it is difficult to tease a hard rule from them. For instance, in ***Lunsford v. Morris,*** 746 S.W.2d 471 (Tex.,1988) with regard to discovery of net worth, the Texas Supreme Court made the following observations:

> We hold that in cases in which punitive or exemplary damages may be awarded, parties may discover and offer evidence of a defendant's net worth. . .***Some states allowing discovery of net worth require a prima facie showing of entitlement to punitive damages*** before information about a defendant's net worth may be sought. . . ***Our rules of civil procedure and evidence do not require similar practices before net worth may be discovered.*** Absent a privilege or specifically enumerated exemption, our rules permit discovery of any "relevant" matter; thus, there is no evidentiary threshold a litigant must cross before seeking discovery. Tex. R. Civ. P. 166b(2)(a). [emph. added]

***Lunsford ,*** 746 S.W.2d at 473.

The Dallas Court of Appeals in ***In re Islamorada Fish Co. Texas, L.L.C.,*** 319 S.W.3d 908 (Tex. App.-Dallas 2010, orig. proceeding) noted the holding in ***Lundsford*** and observed that the corollary "is that when punitive damages clearly are not recoverable, information about net worth is not relevant and, as a result, not discoverable." *Supra* at 912. The case involved a dram shop action. Plaintiffs alleged that Islamorada wrongfully served the defendant driver

alcohol and that the defendant driver was intoxicated at the time that he collided with Plaintiffs. Plaintiffs sought discovery of Islamorada's net worth. The appellate court noted that under Tex. Civ. Prac. & Rem. Code §41.005(a) punitive damages were not allowed.[1] Since Plaintiffs had pled the defendant driver was intoxicated, the statute was implicated. Since there was *no legal basis* for punitive damages, discovery of Islamorada's net worth was disallowed.

> On this record, we conclude that section 41.005(a) applies to bar recovery of punitive damages in this case as a matter of law. The trial court did not properly apply the law relating to punitive damages and ordered Islamorada to produce discovery that is not relevant. [footnote omitted]

***In re Islamorada Fish Co. Texas, L.L.C***., 319 S.W.3d at 913.

From ***Lundsford*** and ***Islamorada,*** we may conclude that if there is a legal basis for a claim of punitive damages, then net worth is discoverable without first proving the factual basis for the claim. However, if there is no legal basis for the claim of punitive then discovery of net worth may be denied. This begs the question of whether this rationale extends to other claims and defenses.

The discovery issue in ***In re Bass*****,** 113 S.W.3d 735 (Tex. 2003) did not involve gross negligence or punitive damages. Rather, the Plaintiffs who were non-participating royalty interest owners sued Bass, the mineral estate owner, for multiple claims in the trial court. The claim in issue before the Texas Supreme Court was Bass' alleged breach of an implied duty to the plaintiffs to develop Bass' land. The discovery issue concerned the Plaintiffs' request for seismic information, which Bass claimed was protected by the trade secret privilege. The court found that seismic data was in fact protected as a trade secret, but that Plaintiffs might be able to obtain discovery of trade secrets upon a showing that information was necessary to a fair adjudication of their breach of an implied duty claim. "However, in order for trade secret production to be material to a litigated claim or defense, a claim or defense must first exist." Supra at 743. The Court then analyzed whether the Plaintiffs had established a legal basis for a claim of breach of fiduciary duty and found that Plaintiffs had not established such a legal basis. Accordingly, the discovery of trade secret seismic data was disallowed.

> No lease exists in this case. Furthermore, without exercising his power as an executive, Bass has not breached a fiduciary duty to the McGills as non-executives. Because the record both fails to demonstrate the existence of an oil and gas lease that would create an implied duty to develop and fails to show that Bass has breached his duty as the executive, we hold the trial court abused its discretion in compelling trade secret production. ***In re Continental General Tire, Inc.***, 979 S.W.2d 609, 615 (Tex. 1998); ***Walker v. Packer,*** 827 S.W.2d 833, 839 (Tex. 1992).

***In re Bass*****,** 113 S.W.3d at 745.

Lastly, there is ***Ford Motor Co. v. Castillo,*** 279 S.W.3d 656 (Tex., 2009). This case dealt with jury misconduct. In the course of dealing with this issue, the Court emphasizes how low the threshold is for obtaining discovery that is relevant to the claims and defenses in the case.

During jury deliberations, the presiding juror sent out a note asking what the maximum amount of damages was that could be awarded. Based upon this note, Ford reportedly entered into a settlement agreement with Castillo. Thereafter, Ford learned from other jurors that the note was not authorized by the other jurors. Ford obtained affidavits to this effect, but Castillo moved to strike the affidavits as hearsay, which the court granted. Ford moved to delay the settlement agreement and for leave to obtain discovery. The trial court observed that Ford did not need to conduct formal discovery, but could and had conducted an independent investigation in support of its claim of jury misconduct. Ford additionally argued that when it withdrew its agreement to settle, Castillo's only remedy was to file a claim for a breach of contract (presumably as to which Ford would assert an affirmative defense of mistake). Castillo did not plead

[1] Section 41.005(a) of chapter 41 states:

> In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.

breach of contract, but instead merely filed a motion for summary judgment without a pleading. The trial court overruled Ford's motions for continuance to allow Ford to obtain discovery and granted Castillo's motion for summary judgment. The appellate court upheld the Court's ruling. The Texas Supreme Court agreed with Ford and reversed:

> Ford asserts that the court of appeals erred by holding that Ford waived error as to its discovery requests. Next, Ford urges that the trial court erred in denying it the right to conduct discovery because Castillo's claim for breach of the settlement agreement is the same as any other claim for breach of contract and is subject to the same procedures, including discovery procedures that apply to any other breach of contract claim. We agree with Ford.

At the heart of this dispute is the consensus that when a party withdraws its consent to a settlement agreement, even if prior to entry of judgment on the agreement, the remedy is a claim for breach of contract. Castillo effectively made such a claim when filing a motion to enforce the settlement agreement. In other words, regardless of whether Castillo filed a formal complaint for breach of contract or a motion for enforcement of the settlement agreement, the effect was the same. In either event, the Texas Supreme Court ruled that Ford was entitled to obtain discovery in support of its defense to such claim or motion.

> Parties are "entitled to full, fair discovery" and to have their cases decided on the merits. ***Able Supply Co. v. Moye,*** 898 S.W.2d 766, 773 (Tex.1995) (orig. proceeding); *see* ***State v. Lowry,*** 802 S.W.2d 669, 671 (Tex.1991) ("Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery.").

The Texas Supreme Court ruled that the trial court had denied Ford discovery that went to the heart of Ford's defense. Therefore, the trial court abused its discretion:

> A trial court abuses its discretion when it denies discovery going to the heart of a party's case or when that denial severely compromises a party's ability to present a viable defense. ***Able,*** 898 S.W.2d at 772.

Ford sought discovery regarding its defense of "mutual mistake." Castillo argued that the discovery Ford sought was immaterial because "mutual mistake" was not a valid defense in this instance. The court's response contains language that on first blush appears inconsistent with the narrow view of scope of discovery it has taken over the last decade (*See* ***Texaco v. Sanderson***, 898 S.W.2d 813 (Tex., 1995).

> The parties disagree as to whether mutual mistake is applicable in this case, ***but a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery.*** Rather, a party may obtain discovery "regarding any matter that is not privileged and is relevant to the subject matter of the pending action." TEX.R. CIV. P. 192.3. The phrase "relevant to the subject matter" is to be "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial." ***Axelson, Inc. v. McIlhany,*** 798 S.W.2d 550, 553 (Tex.1990). ***The trial court's preemptive denial of discovery could have been proper only if there existed no possible relevant, discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract.*** [emph. added].

It would seem from this analysis that a party seeking discovery does not have to first prove a *prima facia* factual basis for the claim or defense in order to obtain discovery relevant to the claim or defense. As long as there is a potential legal basis for a claim or defense, discovery should be allowed that is relevant to the allegation, subject to the rules limiting the scope of discovery.

## B. OVERBREADTH

**1.** While the scope of permissible discovery in Texas is quite broad, there are limits. The broad scope of discovery is limited by the legitimate interests of the opposing party in avoiding overly broad requests, harassment, or the disclosure of privileged information.

***In re Am. Optical Corp.,*** 988 S.W.2d 711, 713 (Tex. 1998) (orig. proceeding). As a general rule in determining overbreadth, the focus is on whether the request could have been more narrowly tailored to avoid including tenuous information. *See* ***In re CSX Corp.*** 124 S.W. 3d 149, 153 (Tex. 2003) (orig. proceeding). ***In re EOG Resources, Inc.,*** Not Reported in S.W.3d, 2011 WL 455280 (Tex. App.-Waco) provides a good discussion of this concept as well as the issue of specificity.

The case arises out of a personal injury incident. A worker was seriously injured when a mobile trailer on a well site was toppled during a severe storm. A number of entities were sued. The plaintiff sought production of documents pertaining to all similar trailers at all similar sites in the United States and several other countries. Additionally, the request sought documentation regarding other types of trailers than the one involved in the incident as follows:

> all documents relating to "portable offices and sleeping quarters," "any other trailer leased by EOG for use as temporary offices and living quarters," "temporary trailers used as dwellings and temporary offices at EOG drilling sites," "trailers," and "substantially similar trailers at its drilling sites."

The trial court granted the motion in part, but limited the production requested to all of EOG's well sites in the United States for the five years preceding the date of the accident as to certain requests.

The appellate court found that while the Court had appropriately tailored the time period for the request, the Court had failed to adequately tailor the request as to the geographical area and type of structures involved. In these latter regards, the appellate court considered the request and the Court's order overbroad.

The opinion also addressed two very common requests. The first request sought "all Documents on which you will rely to support any defense you assert in this case." The appellate court found that this request was improperly overbroad because it was not specific as to particular types and categories of documents requested. While this is true, it also would appear that the request is for the responding party to "marshal" its evidence on this particular issue, which is improper. However, marshaling is not discussed in the opinion. The other request was for "all Documents relating to the damages claimed by Plaintiffs in this case." The court found that this request was improper because it is not specific with regard to the type of damages for which the discovery is requested (i.e. lost earning capacity, physical impairment). However, even if the request were specific as to the damages, it would still appear to be in violation of the rule against "marshaling" evidence.

**2.** ***In re Family Dollar Stores of Texas, LLC*****,** Not Reported in S.W.3d, 2011 WL 5299578 (Tex.App.-Beaumont). See discussion below, under Computer Files.

**3.** ***In re Halliburton Energy Services, Inc.,*** Not Reported in S.W.3d, 2011 WL 4612726 (Tex. App.-Hous. [1st Dist.]). It is an abuse of discretion to issue orders that allow for overbroad discovery. This means that it could be an abuse of discretion for a trial court to overrule an objection to an overbroad request for production, and it also could be an abuse of discretion for the trial court to craft an order that is even more overbroad than the discovery request. This latter indiscretion is what was at issue in ***In re Halliburton***.

> The discovery ordered by the trial court was much broader even than Lane's original discovery request, as the trial court compelled production of "all documents evidencing fees paid by [HESI] to outside law firms." This order compels discovery that is overbroad, and it "could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary, pertinent information." *See* ***In re CSX,*** *124 S.W.3d at 153.*

The discovery dispute arose in the context of a breach of contract claim. An attorney was claiming that Halliburton had breached a contract to retain the attorney on various personal injury claims arising in the Gulf of Mexico region. The attorney sought discovery regarding what firms Halliburton had hired and what it had paid those firms in an effort to develop evidence of damages. After negotiations, the Plaintiff asked the court to issue an order requiring production of documents. However, instead of tracking the Plaintiff's request, the Court effectively broadened the scope of the request.

When the parties were unable to come to

> a resolution, Lane informed the trial court that he had narrowed his discovery request to **"documents that show outside counsel fee information for matters related to offshore, longshoremen, automobile accident, and blowout claims originating in Louisiana and the Gulf of Mexico Region since July 1, 2007 to present"** and requested that the court rule on his motion to compel. On April 13, 2011, the trial court ordered that HESI "shall produce all documents evidencing fees paid by [HESI] to outside law firms ***for legal matters*** originating in Louisiana and the Gulf of Mexico region since July 1, 2007 to the present and through the trial of this cause." [emphasis added].

**4.** ***In re HEB Grocery Co., L.P.,*** Not Reported in S.W.3d, 2010 WL 4523765 (Tex. App.- Corpus Christi).

An eighty-five year old woman was shopping at an HEB store in Corpus Christi, Texas, when she was struck by another customer driving a motorized electric cart provided by HEB. She sustained severe physical injuries requiring hospitalization and surgery. She filed suit and propounded the following request for production:

> All incident reports of injuries to property, displays, and people related to motorized vehicles ridden by customers inside the HEB stores in any of the HEB stores in Texas or any complaint of such for the years 2004-November 30, 2009.

HEB did not object that the request at issue was unduly burdensome or that the five-year period of time for production was overbroad. Instead, HEB objected that the discovery order was overly broad as ***a matter of law*** insofar as it required the production of incident reports from HEB stores other than the one where the incident involved in the lawsuit occurred. In other words, HEB advanced the argument that, as a matter of law, discovery of incidents occurring at other stores is always irrelevant and impermissibly overbroad. This is a common and provocative argument. Has the Texas Supreme Court ruled that any request for information regarding incidents beyond the site of the incident involved in the lawsuit is beyond the scope of discovery? And has the Texas Supreme Court ruled that a request beyond a certain time period (e.g. 3, 5, 10 years) is as a matter of law beyond the scope of permissible discovery? HEB argued that the Texas Supreme Court had answered these questions affirmatively in ***Dillard Dep't Stores, Inc. v. Hall,*** 909 S.W.2d 491 (Tex. 1995) and ***K Mart Corp. v. Sanderson,*** 947 S.W.2d 428 (Tex. 1996) (orig. proceeding). The court in HEB; however, found that the answer was no and that ***Dillard Department Stores*** and ***K Mart*** were distinguishable from the facts in ***HEB.*** The ***HEB Grocery*** court's analysis supports the proposition that these determinations are fact specific, and are influenced by the pleadings and material issues in the case. *See also,* ***In re Waste Management of Texas, Inc.,*** Not Reported in S.W.3d, 2011 WL 3855745 at p. 9 (Tex. App.-Corpus Christi) ("In examining the appropriate breadth of discovery, it is fundamental that each lawsuit concerns a specific claim arising from a specific set of facts), discussed below.

Notably, the plaintiff in ***HEB Grocery*** alleged that HEB was negligent in the formulation of its policies and procedures that were in effect at all its stores and that these policies derived from HEB's experience at all its stores nationwide. In other words, plaintiff argued that the experience at all HEB's stores went to the issue of foreseeability.

> Campbell thus argues that HEB's general corporate policies regarding the management of electric carts are deficient insofar as, for example, the carts are keyless, unsupervised, and accessible to anyone. Campbell seeks discovery regarding other accidents involving motorized electric carts to show that HEB had notice of other incidents pertaining to electric cart usage and considered but failed to make appropriate changes in its nation-wide policies and procedures.

In distinguishing HEB Grocery from ***Dillard Department Stores*** and ***K Mart,*** the appellate court observed that the plaintiffs in ***Dillard Department Stores*** and ***K Mart*** failed to demonstrate a nexus between their allegations and the scope of discovery requested. There was in a sense the same type of "analytical gap" often discussed in limiting the testimony of experts under ***Daubert.*** The plaintiffs

were unable to show the relevancy of occurrences at other stores to the issue alleged in their respective cases, therefore, the discovery requests in those instances were vulnerable to the charge of "fishing." The situation, however, in ***HEB Grocery*** was different.

> In contrast, the instant case concerns allegations of negligence on the part of HEB based not only on a premises defect specific to a particular location, or on employee conduct at a specific location, or on criminal conduct occurring at a particular location, but on its nation-wide policy decisions regarding the provision and utilization of mechanized electronic carts for customers. Thus, unlike ***Dillard Department Stores*** and ***K Mart,*** the discovery sought in this case is relevant to the specific allegations at issue in this lawsuit.
>
> * * *
>
> There is a direct relationship between the claims at issue and the discovery sought. Significantly, ***Texaco v. Sanderson*** [898 S.W.2d 813 (Tex. 1995)] confirmed that the "plaintiffs are entitled to discover evidence of defendants' safety policies and practices ***as they relate to the circumstances involved in their allegations"*** [emphasis added].

**5.** ***In re Waste Management of Texas, Inc.,*** Not Reported in S.W.3d, 2011 WL 3855745 (Tex. App.- Corpus Christi).

This was a motor vehicle collision case. The plaintiff's vehicle was hit by a garbage truck that plaintiff alleged was being operated in the ordinary course of business for Waste Management. Plaintiff claimed Waste Management was negligent particularly with regard to faulty safety practices and training. Later, after taking the deposition of a Waste Management Corporate representative and learning that there were no safety directors in the area where the incident occurred, Plaintiff amended his petition to allege gross negligence in these regards.

The discovery dispute centered on the following request for production:

> Produce pleadings, discovery (including corporate representative depositions, answers to: interrogatories, requests for disclosure, requests to produce documents, and requests to admit), on all other lawsuits involving incidents in which Waste Management of Texas, Inc. has been sued in Texas and in which unsafe driving on the part of a Waste Management of Texas, Inc. driver has been alleged and/or in which it is alleged Waste Management of Texas, Inc. did not employ proper safety and/or was negligent with regard to its policies for the operation of its vehicles, the training of its drivers, or in setting safety policies.

Waste Management objected with what at this point could be considered the "standard objection" to a request for production served in Texas:

> Defendant objects that the request is overly broad, not relevant, not reasonably calculated to lead to the discovery of admissible evidence and not reasonably limited in subject matter, geography or time.... Further, this request is unduly burdensome and harassing because the burden or expense of the proposed discovery outweighs its likely benefits, taking into account the needs of the case the amount in controversy, and the importance of the proposed discovery in resolving the issues.... Finally, Defendant objects that this request is compound and confusing.

Waste Management provided no further response. Plaintiff filed a motion to compel and in response Waste Management served an affidavit from one of its attorneys describing the undue burden involved in responding to the request. **Plaintiff responded that the discovery was relevant to its allegation of faulty safety practices and training.** The court granted the motion to compel but limited the scope to *"those litigation files relating to garbage trucks in Texas in the past five years."*

Waste Management filed a motion for re-hearing and submitted a second affidavit from the same attorney who produced the first affidavit. This

affidavit, too, discussed the putative cost in time and money in attempting to comply with the request. The court then conducted a non-evidentiary hearing on the motion for reconsideration and issued the following order:

> Produce pleadings, discovery (including representative depositions, answers to interrogatories, requests for disclosure, requests to produce documents, and requests to admit), on all other lawsuits involving garbage truck accidents in which Waste Management of Texas, Inc. has been sued in Texas in the five years preceding the date of this order, and in which unsafe driving on the part of a Waste Management of Texas, Inc. driver has been alleged and/or in which it is alleged Waste Management of Texas, Inc. did not employ proper safety and/or was negligent with regard to its policies for the operation of its vehicles, the training of its drivers, or in setting safety policies. Any material related to any person's healthcare information subject to HIPAA is excluded from production and may be redacted by Defendants. [footnote omitted]

The new order essentially tracked plaintiff's original request, but excluded healthcare information. Waste Management pursued mandamus relief claiming that the order required the production of irrelevant and overbroad discovery that was unduly burdensome to produce.

Waste Management first argued that Plaintiff had wrongfully attempted to distract from the ordinary negligence claim in the case and arbitrarily expanded the scope of discovery by pleading gross negligence. However, as the appellate court pointed out, Waste Management never attacked Plaintiff's pleadings by filing special exceptions, motions for sanctions, or motions for summary judgment. This raises a noteworthy point that comes up frequently in discovery disputes involving scope of discovery. Whose burden is it with regard to relevancy? Must the requesting party establish that the request is relevant or must the responding party establish that the request is not relevant? The answer was provided by the Texas Supreme Court in ***Ford Motor Co. v. Castillo,*** 279 S.W.3d 656 (Tex. 2009).

> The parties disagree as to whether mutual mistake is applicable in this case, ***but a party is not required to demonstrate the viability of defenses before it is entitled to conduct discovery.*** Rather, a party may obtain discovery "regarding any matter that is not privileged and is relevant to the subject matter of the pending action." TEX. R. CIV. P. 192.3. The phrase "relevant to the subject matter" is to be "liberally construed to allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial." ***Axelson, Inc. v. McIlhany,*** 798 S.W.2d 550, 553 (Tex. 1990). The trial court's preemptive denial of discovery could have been proper only if there existed ***no possible relevant,*** discoverable testimony, facts, or material to support or lead to evidence that would support a defense to Castillo's claim for breach of contract. This record does not demonstrate such a situation. [emphasis added]
>
> *Supra*, at 664.

Arguably, all that the requesting party must do to satisfy its burden of seeking "relevant" discovery is demonstrate that there is a nexus between what is sought and the claims and defenses alleged in the lawsuit. The burden then shifts to the responding party to demonstrate that in fact the request is not relevant in whole or in part:

> We note that this Court and others have placed the burden of proof regarding relevance, or lack thereof, on the party seeking to avoid discovery. *See e.g.,* ***In re Frank A. Smith Sales, Inc.,*** 32 S.W.3d 871, 874 (Tex. App. – Corpus Christi 2000, orig. proceeding) ("Generally, the party resisting discovery has the burden to plead and prove the basis of its objection."); ***Valley Forge Ins. Co. v. Jones,*** 733 S.W.2d 319, 321 (Tex. App. – Texarkana 1987, orig. proceeding) (holding that, as a general rule, the burden of pleading and proving the requested evidence is not relevant falls upon the party seeking to prevent discovery).

The appellate court disposed of the **"fishing expedition"** argument with the following observations:

> This is not a case where Garza is attempting to justify an overbroad discovery request by proving a general corporate strategy regarding unspecified safety laws, but a discovery request specifically targeted to the safety policies and practices as they relate to the circumstances involved in this lawsuit, and as evidenced in previous discovery responses. *See* ***Texaco, Inc. v. Sanderson****, 898 S.W.2d 813, 815 (Tex. 1985) (orig. proceeding).*

The opinion next addressed Waste Management's **overbreadth** argument. The court found that the request for production was tied to the plaintiff's allegations regarding a time period that was set out as well as a geographical area. Accordingly, there was no basis for finding that the trial court had abused its discretion.

> In the instant case, the trial court's order limits the request for production to the temporal period of five years, the geographical region of Texas, and the subject matter of litigation files concerning garbage truck accidents where the case involved unsafe driving, and negligent or improper policies regarding vehicle safety, training, or operation. The cases cited by Waste Management do not support the proposition that any of these limitations is per se overbroad. The litigation files sought are factually similar to the case at hand, are closely related in temporal proximity, and concern similar legal issues. Accordingly, the trial court may have concluded that the request for production at issue was relevant and not overbroad.

Further, with regard to Waste Management's argument that some of the litigation files might contain private, confidential information such as healthcare information, social security or tax information, the court noted that the proper procedure would be for Waste Management to produce that which is not privileged and then follow Tex. R. Civ. P. 193 with regard to those file contents for which protection is warranted.

The opinion then turns to Waste Management's **undue burden** argument. This analysis is less clear than the court's analysis of the fishing and overbreadth issue, in large part because of the "lack of objective data." While Waste Management provided affidavits setting out estimated time and expense, the appellate court observed that the trial court could have discounted the representations as being exaggerated. Also, the court noted that there was no evidence in the record regarding the size of plaintiff's claims. This is a noteworthy point, which often is overlooked in the day to day fights over the scope of discovery. It is one thing to claim that the expense of complying with a request is substantial. However, the test is whether the burden is "undue."

> The fact that a discovery request is burdensome is not enough to justify protection; "it is only undue burden that warrants nonproduction." ***ISK Biotech Corp. v. Lindsay,*** 933 S.W.2d 585, 568 (Tex. App. – Houston [1st Dist.] 1996, no pet.).

In this regard, Tex. R. Civ. P. 192 requires a balancing test, comparing the size of the claims in the litigation with the costs.

> discovery should be limited if the burden or expense of the proposed discovery ***outweighs*** its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. *See* TEX. R. CIV. P. 192.4(b) [emphasis added]; ***In re Weekley Homes, L.P.,*** 295 S.W.3d 309, 317 (Tex. 2009) (orig. proceeding).

When the court is only provided data on one side of the scales, there is insufficient data upon which the court may make a reasonable determination. And for the same reason, the appellate court will have insufficient evidence to weigh as to whether the trial court abused its discretion in allowing the discovery.

**6.** ***In re Baker,*** Not Reported in S.W.3d, 2011 WL 1679841 (Tex. App.-Waco). How many times

have you been involved in litigation in which a party sent discovery requests that you considered overbroad, only to have the requesting party at the motion to compel hearing say something like "Judge, what we really want and need is this. . ." The opinion in ***Baker*** pivots on such a situation.

Baker involves claims of breach of warranty, deceptive trade practices and fraud with regard to a Chrysler dealer failing to inform a purchaser that diesel fuel injectors were prone to contamination from water. The purchaser did not know this and believed that Chrysler and the Dealer should be responsible for replacing the contaminated injectors estimated to cost about $10,000. The litigation was complicated by Chrysler Corporation filing for bankruptcy. Chrysler, a new corporation, came in and assumed limited liabilities for the prior corporation. Plaintiffs limited their claims against Chrysler to these assumed liabilities. However, they sought the full range of claims against the dealer. Here is a sample of the discovery requests:

> ***INTERROGATORY NO. 5:*** Identify by customer/purchaser name, address, and telephone number and date all reports and/or complaints made or received by Chrysler, either directly or through any of its dealers or other sources concerning the failure of or problems with the ejectors [sic] in engines like that in the vehicle in question resulting from or connected with alleged water in the fuel used in said engines.
>
> ***INTERROGATORY NO. 6:*** Identify by name or title and by location any and all documents or records of any kind whatsoever, whether created and/or stored electronically, manually, or mechanically that constitute or tend to evidence each of the reports or complaints made the subject of Interrogatory 5 above.
>
> ***INTERROGATORY NO. 7:*** Identify by city, county, state, cause number, and / or any dealer in Chrysler products or other party purporting to act on behalf or to represent Chrysler in any capacity arising out of or connected in any way with the failure of or problems with the injectors in engines like that in the vehicle in question resulting from or connected with alleged water in the fuel used is [sic] said engines.
>
> ***REQUEST NO. 5:*** Any and all documents identified by defendant in its answer to Interrogatory 6 above.

The defendant objected to these requests on the basis of vagueness, relevancy, overbreadth and undue burden. A hearing was conducted on the objections, at which the plaintiff's attorney confided the following:

> "Our whole lawsuit is based on the diesel engines in these trucks in 2007 and 2008. And the inquiry is to vehicles with engines like the one involved in this transaction. That's what we're asking."

The appellate court noted that an party may limit a discovery request orally in open court citing ***Gen. Motors Corp. v. Lawrence,*** 651 S.W.2d 732 (Tex. 1983). (orig. proceeding) (holding that discovery was to be limited in scope to that represented by plaintiffs' counsel in trial-court hearing and in mandamus pleading). Nonetheless, the trial court sustained the objections.

The appellate court on the issue of **relevance** concludes that while the discovery was not relevant to the claims against Chrysler (recall the claims against Chrysler were limited by the bankruptcy), but were relevant to the claims against the Dealer. The appellate court noted that Chrysler had not provided any authority that it did not have to produce discovery that was relevant to a claim against a co-defendant.

It is important to note, however, that a request may be relevant but overbroad. This is what the appellate court determined in this instance. The court noted the oral representations by the plaintiffs' attorney limiting the scope of necessary discovery and held that the discovery requests exceeded that scope and therefore were overbroad. The appellate court upheld the trial court's order granting the defendant's objections and granted plaintiffs leave to redraft their discovery more narrowly.

**7.** ***In re GMAC Direct Ins. Co.,*** Not Reported in S.W.3d, 2010 WL 5550672 (Tex. App.-Beaumont).

The discovery dispute in this matter highlights the

need to tailor discovery as narrowly as possible to avoid sweeping up tenuous data.

> "**A central consideration in determining overbreadth is whether the request could have been more narrowly tailored to avoid including tenuous information and still obtain the necessary**, **pertinent information.**" ***In re CSX Corp.,*** 124 S.W.3d 149, 153 (Tex. 2003).

The appellate court found that Plaintiffs' requests in this instance on their face failed to comply with this admonition. The underlying case dealt with a claim of unfair insurance practices in relation to a Hurricane Ike claim. Plaintiff alleged various claims of tort and breach of contract. Plaintiff served the following requests, which the court compelled by submission:

> (1) "[a]ll computer files, databases, electronically-stored information or computer-stored information regarding property damage, hurricane damage, water damage and/or roof damage that have been [compiled], prepared and/or supervised by Defendant, whether or not they are in Defendant's possession or in the possession of another entity[,]"
>
> (2) "[a]ny and all correspondence from Defendant to and from vendors regarding any instructions, procedures, changes, training, payments and billing for property, property damage, hurricane, flood and catastrophe claims for 2000 through the present, including but not limited to computer disk, e-mails, paperwork and manuals [,]" and
>
> (3) "[a]ll documents and communications, including electronic, between any engineer(s) or engineering company(s), used to evaluate this Plaintiffs' claim(s), or other person(s) used in handling Plaintiffs' claim(s) and Defendant in the last five years regarding, in any way, the investigation of a homeowners residence, commercial building or church involving damages to the structures or its contents."

Plaintiffs contended they were harmed by the Relators' "deliberate business practice of fraudulently adjusting property-damage claims in an outcome-oriented manner so as to minimize the amounts they paid out under the homeowners' policies they issued." Based upon these allegations, Plaintiffs argued that their requests were designed to produce evidence of a company-wide business practice for which the Plaintiffs were entitled to recover statutory additional damages and exemplary damages.

The appellate court found that the above requests were not tailored for a particular time period. Nor were they tailored for the specific allegations in the case. Instead, the court found that Plaintiffs were fishing for larger claims, which was found improper:

> Rather than tailor the request to include the electronic information actually used in adjusting the Carlsons' claim, the request asks for any electronically-stored information regarding any property damage without regard to time or geographical location. The tenuous connection to the Carlsons' claim is that if an analysis of the data shows that it is somehow "skewed" in favor of the insurance company, then the Carlsons might be able to use that information to establish exemplary damages. ***This is precisely the sort of fishing expedition that harvests vast amounts of tenuous information along with the pertinent information that was used in adjusting the Carlsons' claim.*** [emphasis added].

**8.** ***In re Hernandez,*** Not Reported in S.W.3d, 2011 WL 4600706 (Tex. App.-Hous.[14th Dist.]). The discovery dispute here arises from a wrongful settlement suit. The Plaintiffs appear to have alleged that they had gotten short shrift by a "global settlement" obtained by the Abraham Watkins firm in the BP Explosion litigation. Plaintiffs served a request for all settlement agreements that had been entered into by Abraham Watkins for all its clients in the BP Explosion litigation. It is noteworthy that Abraham Watkins filed an affidavit in support of its opposition to the request demonstrating that Abraham Watkins had not commingled the expenses of the various clients and had not entered into a global settlement. Accordingly, the court found that there was not a "joint client" exception to the attorney client privilege. The law firm also alleged that the other settlements were protected by confidentiality agreements and that the plaintiffs had not tailored the request to other "similar

claims."

> The Attorneys correctly point out that the Clients seek information about all of the Attorneys' BP clients. Moreover, the Clients concede that their claim for improper settlement depends upon a showing that "the Lawyers settled claims similar to those of the Clients for a higher amount." The Clients' discovery is not tailored to discover information about similarly situated clients—rather the Clients' discovery requests are directed to "joint clients."

*See also,* ***In re Rogers*****,** 200 S.W.3d 318, 324 (Tex. App. – Dallas 2006, orig. proceeding) (holding that trial court abused its discretion in compelling production of documents from another lawsuit that were subject to confidentiality agreement or protective orders).

**9.** ***In re Univar USA, Inc.,*** 311 S.W.3d 183 (Tex. App- Beaumont 2010, no pet h.), ***K Mart Corp. v. Sanderson,*** 937 S.W.2d 429, 431 (Tex. 1996) (per curiam). While most discovery disputes involving the scope of discovery and overbreadth involve requests for production, it is important to remember and note that the scope of discovery in Tex. R. Civ. P. 192 pertains to all discovery tools, including oral depositions. This point is emphasized in this ***Univar*** opinion. The plaintiffs brought a wrongful death case arising from the decedent's alleged exposure to benzene. The plaintiffs sought the deposition of a defendant that reportedly supplied benzene to plants at which the decedent worked. Apparently, plaintiffs produced testimony that the decedent recalled that benzene was delivered to the plants at which he worked in either black or green and white 55 gallon drums. There was evidence that the supplier from whom the plaintiff was requesting a corporate representative deposition had supplied benzene to one of decedent's employers in black drums. Accordingly, the trial court found that the deposition (the topics on which the representative was to testify unfortunately are not delineated or discussed in the opinion) was designed to lead to admissible evidence. Therefore, the scope was relevant. The appellate court agreed. In conjunction with the deposition, the plaintiffs requested various documents. Many of the requests were not adequately limited to place and time:

> Most of the topics listed in both the notice and the subpoena contain no geographical restrictions. Both the notice and the subpoena require discovery regarding medical policies and medical surveillance that is not limited to benzene.

Defendant objected on the basis of over breadth. The appellate court held that the trial court had abused its discretion in not tailoring or requiring that the discovery be tailored to the places and times relevant to the claims and defenses pled.

**10.** ***In re Swift Transp. Co.,*** Not Reported in S.W.3d, 2011 WL 4031029 (Tex. App.- Hous. [14th Dist.]). This case, like ***Univar***, above, deals with the scope of discovery in the context of an oral deposition.

This case arose from injuries allegedly sustained by the plaintiff in a truck wreck. Amongst other allegations, the plaintiff alleged that Swift was negligent and grossly negligent based upon theories of negligent hiring, negligent supervision, negligent training and respondeat superior. The plaintiff issued a notice of deposition for a witness relevant to these issues and pertinent documents:

> Swift's "risk manager or person(s) most knowledgeable about any and all injury or death claims, ***for the ten (10) years prior to the wreck*** made the basis of this lawsuit, filed against Swift; this request includes, but is not limited to, the person or persons who have the ability to produce loss run reports and/or other summary information regarding claims, as well as claims information and/or claims files." [emphasis added]

Swift filed an objection to the scope of the topic and request, a motion for protection and a motion to quash. All were overruled. The appellate court found that the trial court had abused its discretion in not tailoring the topic and the request.

> Shealey has not established the relevance of the information requested. Shealey asserts that the information sought "might well show" that Swift has engaged in a pattern of negligent hiring and supervising that would support her gross negligence claim. It appears that the information sought amounts to an

> impermissible "fishing expedition." *See* ***In re Lowe's Companies, Inc.,*** *134 S.W.3d 876, 879 (Tex. App. – Houston [14th Dist.] 2004, orig. proceeding).*

The take away point from this opinion is that the time period must have a relevancy nexus to the pleadings. While it often is going to be difficult to establish a relevant time period with precision, there is going to need to be some demonstration of at least why the selected time period is reasonable. Sometimes this might mean taking the deposition of a representative to attempt to determine whether the party uses particular time periods for evaluation or industry standards apply particular time periods for review assessments. While ten (10) years may not as a matter of law be beyond the scope of permissible discovery (See discussion of ***In re HEB Grocery Co., L.P.,*** Not Reported in S.W.3d, 2010 WL 4523765 (Tex. App.-Corpus Christi), above), in ordinary circumstances it often will be considered a lengthy period of time. Such a time period, if merely arbitrary, will be vulnerable to the objection that it is not sufficiently "tailored." It is predictable that when the request period exceeds 3-5 years, particularly when unduly burdensomeness is alleged, that the courts may require a greater showing of relevance. The requesting party in such circumstances should be prepared to demonstrate a factual basis for the time period and not just a conclusory argument that "under the circumstances, it is warranted." In this regard, it might be a good practice to consider serving such requests in increasing time increments, starting first with a generally accepted time period and expanding upon it.

**11.** Just as a trial judge may abuse his/her discretion by granting discovery that is overbroad, the judge also may abuse his/her discretion by wrongly limiting discovery. This is the focus of the opinion in ***In re State Auto Property & Cas. Ins. Co.,*** 348 S.W.3d 499 (Tex. App. –Dallas 2011, orig. proceeding [mandamus dismissed]).

The plaintiff brought a personal injury claim and an uninsured motorist claim. For those who do not handle personal injury cases, this means that the plaintiff brought a personal injury claim against a third party and then sued his own insurance carrier for failing to pay uninsured (underinsured) insurance benefits. The first action is a tort. The second is a breach of contract claim. Additionally, there can be an allegation that the carrier committed bad faith in not paying the underinsured benefits, which is in the nature of a tort action. These actions frequently are brought together subject to the trial court's discretion to sever them.

In this instance, the plaintiff settled his claim with the third party tortfeasor and then brought suit against his insurance carrier for UIM (underinsured motorist) benefits and extra-contractual damages for bad faith in failing to pay such benefits. The bad faith action is in the nature of a tort action. The insurance company moved to sever and abate the UIM claims from the extra-contractual claims. The trial court denied this motion, but ordered separate trials with separate juries, as well as a stay of discovery and proceedings on the extra-contractual claims until the disposition of the UIM claim. It is important to understand the following legal concept in this regard:

> A UIM insurer is under no contractual duty to pay benefits until the insured, here Graeber, obtains a judgment establishing the liability and underinsured status of the other motorist, who was Anderson in the negligence suit below. ***Brainard v. Trinity Universal Ins. Co.,*** 216 S.W.3d 809, 818 (Tex. 2006). While Graeber was entitled to settle, rather than proceed to judgment against Anderson, neither that settlement nor an admission of liability from Anderson establishes UIM coverage. ***Id.*** A jury could find that Anderson was not at fault or award damages that do not exceed Anderson's liability insurance. ***Id.***

The insurance carrier served the plaintiff with a notice of deposition, which the plaintiff moved to quash based on a claim that he had been deposed in the underlying suit against the third party tortfeasor and that it would be unduly burdensome, harassing, and duplicative to be "re-deposed" in the UIM lawsuit. Recall that the lawsuit against the third party tortfeasor had been brought and settled before the lawsuit against the insurance carrier was filed. The trial court issued an order allowing the deposition, but only within the following parameters:

> only as to (1) any diagnosis or treatment he "has had since he gave his prior deposition" in the Anderson lawsuit, (2) "any additional damages he claims to have incurred since the prior deposition; and (3) anything that has happened since

> the date of the prior deposition." The trial court further ordered that State Auto "shall pay $100 for any question asked of Mr. Graeber that was covered in his prior deposition."

The appellate court observed two points in finding that the trial court had abused its discretion. First, the appellate court pointed out that the insurance company was not a party to the underlying action and was not bound by the evidence in that case, including the deposition testimony of the plaintiff. Second, the plaintiff had failed to demonstrate with evidence as opposed to conclusory statements that an articulated harm that would result to him by giving a complete deposition. *See* ***Garcia v. Peeples,*** 734 S.W.2d 343, 345 (Tex. 1987) (evidence of an articulated harm is a pre-requisite to a protective order).

> The trial court's denial of discovery that prevents a party's ability to present a viable claim or defense at trial renders an appellate remedy inadequate. ***Able v. Moye,*** 898 S.W.2d 766, 772 (Tex. 1995) [Denial of discovery that severely compromises a party's ability to present a viable claim or defense at trial renders an appellate remedy inadequate].

## C. COMPUTER FILES

**1.** ***In re Clark,*** 345 S.W.3d 209 (Tex. App.– Beaumont 2011, no pet.).

Litigants and courts are continuing to etch out standards and parameters pertaining to electronic discovery, particularly with regard to requests for hard drives. ***In re Clark*** helps inform the area with regard to the balancing the interests of full discovery with concerns for privacy. The case arose from a dispute between a bank and a former loan officer. The loan officer signed a confidential information non-competition agreement. During her employment with the bank, the loan officer was privy to the bank's confidential information. The loan officer subsequently left the bank's employment and a dispute arose over whether the loan officer had violated the confidential information, non-competition agreement. A forensic examination of the officer's work computer revealed that the officer had communicated proprietary information to a bank competitor. The bank sought production:

> of all communications since June 1, 2010 between Clark and any person who was a TCB customer. TCB also requested all documents that Clark downloaded from a TCB computer, and all communications reflecting her involvement in the creation of the competitor's facility in Tomball. TCB requested production for inspection and copying any and all computers used or accessed by Clark since June 1, 2010.

The officer denied possessing any relevant information and objected to producing a personal computer that contained personal information pertaining to the officer and her family members. An issue also developed about whether the officer had intentionally tried to remove incriminating email from her work computer and transport such to her personal computer. The officer claimed that she had inadvertently deleted all the email from her personal computer. The bank filed a motion to compel the officer to produce her personal computer. The bank represented that it would have a forensic expert "carve" out all communications that contained key words suggesting protected attorney-client communications. The bank also produced affidavit testimony from its forensic expert that a search of the officer's personal computer would likely result in evidence that the data from the work computer had been improperly retrieved and was still on the officer's personal computer. The trial court granted the request.

The appellate court applied the analysis set out in ***In re Weekley Homes, L.P.,*** 295 S.W.3d 309, 314-315 (Tex. 2009). The court found that the trial court had not abused its discretion in ordering the production of the officer's personal computer, given the evidence that had been adduced:

> The trial court could reasonably conclude that Clark's persistence in asserting that she did not produce any electronic data because she had "cleaned" her personal e-mail account shows that she did not adequately search for relevant deleted e-mails.

The problem, however, was that the trial court had not imposed sufficient protection to protect the officer's privacy regarding matters on her computer that were irrelevant to the issue involved in the discovery exercise.

> The sole protection directed by the trial court consisted of excluding the surnames of Clark's lawyers, and the words "attorney" and "lawyer." No search parameters limited TCB's access to information of a personal and confidential nature that has no possible relevance to the litigation. The trial court's order failed to address privilege, privacy, and confidentiality concerns adequately.
>
> If it is not possible for the trial court to describe search protocols with sufficient precision to capture only relevant, non-privileged information, the trial court may order the forensic examination to be performed by an independent third-party forensic analyst. Moreover, the trial court must provide a mechanism through which Clark can withhold from discovery any documents or information that is privileged or confidential and provide instead a privilege log subject to in camera review by the trial court. [***In re Honza,*** 242 S.W.3d 578, 583-584 (Tex. App. – Waco 2008, orig. proceeding [mand. denied]]. Some method for screening privileged information must be provided that does not depend on the opposing party to do the screening. The current order essentially requires production of information claimed to be privileged to the opposing party for that party to screen.

**2.** ***In re Family Dollar Stores of Texas, LLC*****,** Not Reported in S.W.3d, 2011 WL 5299578 (Tex. App.-Beaumont). The opening sentence of this opinion tells you things are not going to turn out well for the requesting party: "This mandamus proceeding concerns an order requiring a defendant to create a document or report that does not currently exist." As the appellate court properly points out:

> The Texas Supreme Court, with respect to discovery requests, has specifically stated that a party "cannot be forced to prepare an inventory of the documents for plaintiffs." ***In re Colonial Pipeline Co.,*** 989 S.W.2d 938, 942 (Tex. 1998).

The context of the discovery dispute is a falling merchandise case. The plaintiff claimed to have been injured when some frames and other merchandise fell on her at a Family Dollar Store. Plaintiff served Family Dollar Store with a request for production of all "documents and records of similar incidents relating to falling merchandise in Family Dollar's stores on a nationwide basis." The scope of this request probably would have been problematical to begin with, however, the Court modified the request by order to require Family Dollar Store to produce a *"computerized listing ... of all incidents and lawsuits[.]"*

It appears that the plaintiff in this instance failed to obtain and produce the necessary predicate for pursuing computerized reports. While the plaintiff additionally sought reports created in the ordinary course of business, there is no evidence in the record that plaintiff ever established that Family Dollar Store created reports in the ordinary course of business or maintained such reports. Accordingly, the appellate court found that while the trial court's effort to tailor what was a very broad request was laudable, it was flawed and an abuse of discretion because it required Family Dollar Store to produce something that presumably did not exist.

> We conclude that requiring a party to reduce raw data from an electronic database to a paper report or to a list in an electronic form requires Family Dollar to make a list that does not currently exist. *See id.* (quoting ***McKinney v. Nat'l Union Fire Ins. Co.,*** 772 S.W.2d 72, 73 n.2 (Tex. 1989).

The next part of the opinion deals with specificity and relevancy. Recall that the original request for production served by Plaintiff requested "the production of documents and records of similar incidents relating to falling merchandise in Family Dollar's stores on a nationwide basis." The appellate court observed that the plaintiff failed to establish the relevancy of the nationwide geographical range. Therefore, it was overbroad. The trial court attempted to correct this deficiency by limiting its order to "Family Dollar stores located in the county in which I–45 runs and all stores east to the Texas border of the store at issue in this lawsuit [located in Beaumont, Texas,] for the five (5) years prior to September 11, 2009." However, the appellate court found that the request still was overbroad because "similar lawsuits"

was not defined. To the extent that the request could be narrowed to lawsuits involving facts similar to the facts involved in the instant case, the court should have further narrowed the request. ***In re CSX Corp.,*** 124 S.W.3d 149, 153 (Tex. 2003).

> Here, the discovery could have been easily narrowed to require production for a relevant geographic area of claims involving merchandise that fell off shelves of a similar design as the one involved in the incident leading to Walters's injury.

The last aspect of the opinion also is informative with regard to the proper role of the trial court. "Generally, the scope of discovery is within the trial court's discretion, but the trial court must make an effort to impose reasonable discovery limits." ***In re Graco Children's Prods., Inc.,*** 210 S.W.3d 598, 600 (Tex. 2006) (orig. proceeding) (per curiam) (internal quotations omitted). However, there is a subtle difference between the court providing direction and shape to the discovery through orders and the court writing or re-writing the discovery propounded by the parties. The appellate court in ***Family Dollar Stores*** observed that it is not the role of the trial court to redraft the discovery. Instead, the trial court should provide the requesting party the opportunity to redraft the discovery in accordance with the Rules of Civil Procedure and the court's instructions.

> Under these circumstances, we conclude that the better practice is to require the parties to draft proper requests; therefore, we direct the trial court to withdraw its orders compelling production of lists. *See* Tex. R. App. P. 52.8(c). Should Walters desire to pursue further discovery about other similar incidents at other locations where Family Dollar conducts its business, we are confident that her requests will be narrowly tailored to the subject matter of her claims.

## D. TAX RETURNS

The general rule with regard to discovery of in financial records is that the burden on the discovery of financial records lies with the party seeking to prevent production. However, as observed by the court in ***In re Beeson*****,** --- S.W.3d ----, 2011 WL 3359711 (Tex. App.- Hous. [1st Dist.]), tax returns are treated differently from other financial records.

> Tax returns are treated differently than other types of financial records, as evidenced by the Supreme Court's expressed "reluctance to allow uncontrolled and unnecessary discovery of federal income tax returns." ***Hall v. Lawlis,*** 907 S.W.2d 493, 494-495 (Tex. 1995) (citing ***Sears, Roebuck & Company v. Ramirez,*** 824 S.W.2d 558, 559 (Tex. 1992).

Provided a responding party objects to a request for income tax returns, the burden shifts to the party seeking to obtain the documents to show that the tax returns are both relevant and material to the issues in the case. ***El Centro del Barrio, Inc. v. Barlow,*** 894 S.W.2d 775, 779 (Tex. App. – San Antonio 1994, no writ). Federal income tax returns are not material if the same information can be obtained from another source. ***In re Sullivan,*** 214 S.W.3d 622, 624-625 (Tex. App. – Austin 2006, orig. proceeding).

An important take away from Beeson is how the objection may be perfected. Beeson objected to the request on the basis of privacy rather than relevancy. The court agreed with Beeson that privacy and relevancy are intertwined and that relevancy was invoked by Beeson objecting on the basis of privacy.

Also noteworthy is the court's handling of the requesting party's assertions that it had attempted to obtain the information through less intrusive means and that the discovery responses of the responding party were inconsistent; therefore, warranting production of the income tax returns. The Court held that such assertions were conclusory. More was needed including facts showing what steps the requesting party had employed to obtain the material information and how the tax returns specifically and uniquely could resolve the putative inconsistencies.

## E. SETTLEMENT AGREEMENTS

**1.** ***In re Univar USA, Inc.,*** 311 S.W.3d 175 (Tex. App.–Beaumont, 2010). Under Tex. R. Civ. P. 192.3 (g) "A party may obtain discovery of the existence and contents of any relevant portions of a settlement agreement. Information concerning a settlement agreement is not by reason of disclosure admissible in evidence at trial." This opinion

addresses the scope of this provision.

The plaintiff filed a lawsuit against various manufacturers and suppliers of chemicals alleging that he had suffered injuries resulting from exposure to benzene. While the plaintiff was alive, a master set of requests for disclosure were served upon him. In response to the request for settlement agreements, he responded none. Subsequently, the plaintiff died presumably from his injuries and the action was amended to become a wrongful death and survivor case. Univar was added as a party at this time. Univar subsequently requested the plaintiffs to supplement their responses to disclosure particularly with regard to any settlements that had been entered into and "the total amounts of the settlements reached with any defendants listed individually by party."

Univar filed a motion to compel which was heard. At the hearing, the plaintiff produced no evidence. Instead they argued that they would reveal the defendants with whom they had settled, but the amounts of the settlements were subject to confidentiality agreements. No ruling was rendered, and the trial court did not require the settlement agreements to be produced for an in camera inspection. Consequently, the settlement agreements were not in the record before the appellate court. Thereafter, plaintiffs served the following supplemental response to disclosure:

> "Plaintiff objects to this Request for Disclosure pursuant to the holdings of ***Palo Duro Pipeline Co., Inc. et al[.] v. Hon. Ann Cochran, Judge,*** 785 S.W.2d 455 (Tex. App. – Houston [14th Dist. 1990)."

The opinion points out that the above response also contained no evidence to support the plaintiff's objection to producing the contents of the settlement agreements. The appellate court found that the ***Palo Duro*** case and the other cases cited by plaintiff were inapposite because they predated the 1999 amendments to the Texas Rules of Civil Procedure. The appellate court found that the trial court accordingly had abused its discretion.

> Because Univar demonstrated that the contents of the settlement agreements were relevant, and the Thompsons failed to establish that the provisions in the agreements prohibited disclosing the settlement amounts to nonsettling parties, the trial court was required by the Rules of Procedure to allow the discovery of the individual settlement amounts.

It also is important to note that with regard to the plaintiff's argument that the settlement agreements were confidential, that plaintiff failed to bring forth evidence on this point and thus waived it.

> Moreover, in this case, the Thompsons failed to follow the Texas Rules of Civil Procedure to support their claim that the settlement agreements contain provisions that would prohibit a court from disclosing the amount that each settling party paid to non-settling parties.

Compare how the argument of confidentiality was asserted and preserved in ***In re Hernandez***, discussed below.

**2.** *See* ***In re Hernandez,*** Not Reported in S.W.3d, 2011 WL 4600706 (Tex. App.- Hous. [14 Dist.]), discussed above under Overbreadth.

**3.** *See also,* ***In re Rogers*****,** 200 S.W.3d 318, 324 (Tex. App. – Dallas 2006, orig. proceeding) (holding that trial court abused its discretion in compelling production of documents from another lawsuit that were subject to confidentiality agreement or protective orders).

## F. OTHER SIMILAR LAWSUITS

**1.** ***In re Family Dollar Stores of Texas, LLC*****,** Not Reported in S.W.3d, 2011 WL 5299578 (Tex. App. - Beaumont), discussed above under Overbreadth.

**2.** ***In re Waste Management of Texas, Inc.,*** Not Reported in S.W.3d, 2011 WL 3855745 (Tex. App.- Corpus Christi), discussed above under Overbreadth.

**3.** For a good discussion of the importance of establishing a relevancy nexus between the prior litigation and the present litigation, *see* ***In re Nolle*****,** 265 S.W.3d 487, 493 (Tex. App.– Houston [1 Dist.], 2008).