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DEALING WITH RELEVANT BUT OVERBURDENSOME DISCOVERY REQUESTS IN INSURANCE LITIGATION

BY

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I. INTRODUCTION

For those of us who defend insurance carriers in Bad Faith and Coverage litigation, there is usually one thing we can bank on, regardless of the amount in controversy in the particular lawsuit. That is, we can normally expect to be served with incredibly broad discovery requests geared toward forcing our client to bear its corporate soul and perhaps dirty laundry for the plaintiff's use in developing a case to recover extracontractual damages over and above the amount of the claim or applicable policy limits. In our experience, it does not matter whether the litigation concerns an Automobile Insurance policy with statutory minimum limits or an Excess Liability policy with $25 Million limits. Overly broad discovery requests have a way of surfacing in Bad Faith and Coverage litigation.

This article will attempt to spot some of the issues and suggest some recognized ways for carriers to deal with relevant but overburdensome discovery requests in insurance litigation. Reference will be made primarily to Texas authorities, however, we will also refer to federal authorities construing the Federal Rules of Civil Procedure.

II. THE CONCEPT OF RELEVANCY

Discovery requests are subject to objection if they request irrelevant information and materials. The scope of relevancy, however, provides little in the way of limitation for determining what is discoverable in insurance litigation. Specifically, Rule 166b of the Texas Rules of Civil Procedure permits "discovery regarding any matter which is relevant to the subject matter in the pending action . . . . It is not ground for objection that the information sought will be inadmissable at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissable evidence." From the standpoint of federal procedure, Fed.R.Civ.P. 26(b)(1) is materially similar to the Texas rule for discoverability.

The stated purpose for allowing this broad and wide-open discovery is "to seek the truth, so that disputes may be decided by what the facts reveal, not by what

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facts are concealed." Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984). See also M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 103 F.R.D. 635, 637 (D.C. Mass. 1984) ("The basic philosophy of the present federal procedure is that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged.") Our experience has been that courts are more and more inclined to find a request valid in questionable situations.

Although the scope of what is discoverable appears quite broad, it is expanding due to changes in the relevancy concept. For example, Texas courts recognize that when an insurance litigation plaintiff is required to prove a course of conduct to prevail in a punitive damage cause of action, that plaintiff is entitled to a wider range of discovery than what would otherwise be allowed. The sought after information and materials can involve other claims files and other lawsuits, as well as marketing and underwriting information and materials. See e.g., Aztec Life Ins. Co. of Tex. v. Dellana, 667 S.W.2d 911, 913, 915 (Tex. App. - Austin 1984, no writ). Additionally, Texas courts now hold that a defendant's net worth is relevant and discoverable in cases seeking the recovery of punitive damages. Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988). Thus, as far as Texas Bad Faith and Insurance Coverage lawsuits are concerned, insurance carriers are operating in an atmosphere of very liberal discovery.

Similarly, the federal courts are permitting extensive discovery. In Dunn v. Midwestern Indemnity, 88 F.R.D. 191, 195 (S.D. Ohio 1980), the court allowed discovery of an insurer's computer programs because they were relevant to show a pattern of discrimination in denying insurance to certain homeowners. It is noteworthy that when the underlying substantive claim involves an important political issue, such as civil rights or labor relations, federal courts acknowledge a very broad scope of relevancy. See Orbovich v. Macalester College, 119, F.R.D. 411, 415 (D.C. Minn. 1988) (regarding allegations of sex discrimination in the denial of tenure for college professor); Roseberg v. Johns-Manville Corp., 85 F.R.D. 292, 294 (E.D. Pa. 1980) (involving an employer's failure to provide laborers with safeguards from asbestos products).

III.

IMPROPER DISCOVERY REQUESTS

When confronted with overly broad discovery requests, insurance carriers should first determine whether the requests are valid. This determination ties in the concepts of relevancy, privilege and specificity. If a discovery request seeks information or materials which are beyond the scope of discovery, then the responding objection should include a claim that the request itself is invalid or improper. Likewise, if the discovery request does not describe what is to be inspected with "reasonable particularity," then it is similarly objectionable. See Tex.R.Civ.P. 167(c) (concerning Requests for Production). Thus, it is often necessary to distinguish between valid/proper and invalid/improper requests when combating an overburdensome discovery request. While it may be difficult to convince a court that a particular discovery request is invalid on

its face, case law exists to support a court ruling that certain requests are invalid.

A.
Interrogatories

In Gutierrez v. Dallas Independent School District, 729 S.W.2d 691 (Tex. 1987), the Texas Supreme Court indicated that the responding party could properly refuse to answer an Interrogatory seeking the names of persons who it planned to call as witnesses. The court contrasted this Interrogatory from the valid Texas Interrogatory seeking the identity of all persons with knowledge of relevant facts and reasoned that the request on its face was an invasion of the work-product exemption. Id. at 693. In other words, the court could look at the Interrogatory and determine that the request sought information which was exempted from discovery.

In Lunsmann v. Spector, 761 S.W.2d 112 (Tex. App. - San Antonio 1988, orig. proceeding), the San Antonio Court of Appeals found a similar Interrogatory improper as a matter of law. Lunsmann analyzed an Interrogatory seeking the name of any person who may have or claim to have knowledge of any fact relating to the cause of action or of any factual disputes which may arise in the future. The court held that this Interrogatory was too broad since it was not restricted to persons with actual knowledge of relevant facts. Id., at 114. Additionally, the court noted that the Interrogatory improperly sought the names of persons having knowledge of factual disputes which did not presently exist. Id.

An example of an invalid Interrogatory in federal court litigation is present in Marker v. Union Fidelity Life Ins., Co., 125 F.R.D. 121 (M.D.N.C. 1989). In Marker, the Plaintiff sought the identity of "all civil or criminal suits arising out of [the defendant's] denial or termination of benefits under health insurance policies and to provide identifying information as to docket number, court and location, parties and their status, nature of the litigation, and ultimate disposition of the suit." Id. at 122. The court found that since there was no prima facie showing of the insurer's bad faith, the information was not relevant, and the Interrogatory was invalid. Id. at 125. Interestingly, the court concluded that production of litigation histories was "by its nature burdensome." Id.

B.
Request for Production

In Loftin v. Martin, 776 S.W.2d 145 (Tex. 1989), the Texas Supreme Court was faced with determining the validity of certain Requests for Production in a lawsuit against an insurance carrier. One of the disputed requests sought production of all documents, which the insurer contended supported its defensive allegations. Id. at 148. Here, the Texas Supreme Court agreed with the insurer that the request failed to satisfy the reasonable specificity requirement, and thus, it was void for vagueness. The court noted that this request did not seek production of any particular documents, but instead, it was a general request to peruse through the evidence that the insurer might have. Id.

A contested Request for Production in In re: Multi-Piece Rim Products Liability Lit., 653 F.2d 671 (D.C. Cir. 1981) sought

information provided to government agencies by the Insurance Institute for Highway Safety. The court held the request invalid, because it was too broad "[g]iven the sweeping nature of [the] desired inquiry, the quantity of documents already made available, and the lack of any showing of [a need for] discovery". Id. at 680. See also Motton v. Owens, 128 F.R.D. 72, 73 (M.D. Pa. 1989) ("[plaintiff's] failure to have requested production pertaining to a relevant time period itself makes Plaintiff's discovery overbroad and unduly burdensome.")

IV.

WHEN DOES AN OTHERWISE PROPER DISCOVERY REQUESTS BECOME OVERBURENSOME?

Although the Texas and federal courts have provided some insight between valid and invalid discovery requests, the determination of when a valid/relevant discovery request becomes overburdensome involves less specific standards. The Texas and Federal Rules of Civil Procedure provide trial courts with certain powers to enter appropriate orders to adjudicate discovery disputes concerning overburdensome discovery requests. Under Tex.R.Civ.P. 166b(5):

> The court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights. . . . Specifically, the court's authority as to such orders extends to, although it is not necessarily limited by, any of the following:
>
> A. Ordering that requested discovery not be sought in whole or in part, or that the extent or subject matter of discovery be limited, or that it not be undertaken at the time or place specified.

Under Fed.R.Civ.P. 26(b)(1)(iii):

> The frequency or extent of use of the discovery methods set forth in [Fed.R.Civ.P. 26(a)] shall be limited by the court if it determines that: . . . the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources and the importance of the issues at stake in the litigation.

When analyzing whether a relevant discovery request is improperly overburdensome, the Texas and Federal courts apply a balancing test. Under this balancing test, courts will find a relevant request to be overburdensome when the probative value of the information and materials sought is less than the burden of producing the information and materials. Independent Insulating Glass/Southwest, Inc. v. Street, 722 S.W.2d 798, 803 (Tex. App. - Fort Worth 1987, writ dism'd). See also Mack v. Great Atlantic and Pacific Tea Co., Inc., 871 F.2d 179, 187 (1st Cir. 1989) ("[m]anagement of discovery is a largely empirical exercise, requiring judges to balance the inquirer's right to know against the responder's right to be free from unwarranted intrusions, and then to factor in systematic concerns.")

Certain factors are relied on by courts to determine whether a relevant discovery request is overburdensome. In Martinez v. Rutledge, 592 S.W.2d 398, 401 (Tex. Civ. App. - Dallas 1980, writ ref'd n.r.e.), the court noted that implicit in any order of discovery is the ability or means to comply. In Jampole v. Touchy, 673 S.W.2d 569, 573 (Tex. 1984), the Texas Supreme Court held that the broad grant of discovery should be limited only by the legitimate interest of the responding party.

In Marshall v. Westinghouse Electric Corporation, 576 F.2d 588 (5th Cir. 1978), the court held that a discovery request seeking statistical information about terminations of employment was relevant to show a pattern of discrimination, but was too broad and oppressive. The court noted that the "request encompassed some 7,500 employees in thirty-two districts and three manufacturing plants". Id. at 592. The court applied the balancing test and determined that the burden of producing this information was greater than the potential benefit. Id.

V.

HOW TO COMPLAIN ABOUT RELEVANT BUT OVERBURDENSOME DISCOVERY REQUESTS

In insurance Bad Faith and Coverage litigation, plaintiffs not only request information and materials contained in the claim file for the matter at hand, but they often seek discovery from the insurer of all claim files similar to the claim at issue. Also, when an insurer's denial of coverage is at issue, plaintiffs often seek discovery of files for other claims that were denied for similar reasons. Likewise, insurance Bad Faith and Coverage plaintiffs are prone to request extensive discovery of an insurer's historical, marketing and underwriting information and materials. These plaintiffs contend that discovery of this information and materials is necessary to prove that the insurer has engaged in an illegal course of conduct that justifies the awarding of punitive damages.

Serious problems arise because few insurance carriers organize their claim files in a way to permit retrieval of claim files that are "similar to" or that "relate to" the allegations in the particular lawsuit. Production of other insurer corporate information and materials, including those pertaining to marketing or underwriting, often involves similar problems. Thus, while discovery requests directed toward obtaining this type of information and material may be theoretically relevant (depending on the allegations and basis of liability), compliance with the requests may be impossible from a practical standpoint. Accordingly, it may become necessary for an insurance carrier to undertake appropriate measures to combat a relevant but overburdensome discovery request and to preserve the carrier's rights to contest a judicial ruling compelling discovery by Writ of Mandamus in the appellate courts.

A.

Procedure for Objecting to Relevant But Overburdensome Discovery Requests

In Texas, the particular procedure involved in objecting to discovery requests is specifically outlined in the Texas Rules of Civil Procedure, as construed by

recent Texas Supreme Court case law. See Tex.R.Civ.P. 166b(4) and McKinney v. National Union Fire Ins. Co., 772 S.W.2d 72 (Tex. 1989). To avoid waiver, the responding party in Texas must first object to the discovery request and specifically plead a particular exemption or immunity. Gutierrez v. Dallas Independent School District, 729 S.W.2d 691, 693 (Tex. 1987). An unverified global allegation that a privilege or exemption exists is insufficient to satisfy the legal standard for a specific objection. Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56, 58 (Tex. 1986).

Once a party lodges a specific objection to a discovery request, it then bears the burden of proving the validity of its objection, if the issue is raised by the party serving the discovery request. See Tex.R.Civ.P. 166b(4) and McKinney v. National Union, 772 S.W.2d at 75. Normally, this will take place at a Hearing set for a Motion to Compel filed by the discovery proponent. At the Hearing, the objecting party must produce evidence in the form of affidavits, live testimony or the documents themselves to support each objection. Tex.R.Civ.P. 166b (4). See also State By Dept. of Highways v. Bentley, 752 S.W.2d 602, 606 (Tex.App.--Tyler, 1988 no writ). If the evidence is insufficient to demonstrate the applicability of a privilege or exemption, then waiver results and the objecting party will be forced to comply with the request. Hobson v. Moore, 734 S.W.2d 340, 341 (Tex. 1987).

Federal case law does not appear to provide the detailed guidance for making and supporting objections to discovery requests that exists under Texas law. The holdings of the pertinent federal case law, however, are consistent with the Texas cases cited above. For instance in Henderson v. National R.R. Passenger Corp., 113 F.R.D. 502, 506 (N.D. Ill. 1986), the court held that the responding party has the burden of making a specific objection and showing why the requests are overly burdensome. If a party merely makes a general objection, a federal court may hold that the objection is waived and that the discovery request must be answered. See In re: Folding Carton Antitrust Litigation, 83 F.R.D. 260, 264 (N.D. Ill. 1979). Also the mere fact that a discovery request is burdensome will not support an objection unless a showing is made that the information cannot be obtained quickly and efficiently. Fann v. Gaint Food, Inc., 115 F.R.D. 593, 596 (D.D.C. 1987). Thus to be safe, the same procedures for substantiating complaints regarding overburdensome discovery requests as set out in the Texas caselaw should be followed in federal court litigation as well.

B.

Practical Pointers for Presenting Evidence to Complain About Overburdensome Discovery Requests

While the proper proof to support an objection to a discovery request based on overburdensomeness can be satisfied in a variety of ways, it should always be framed to pass the "why" test. The "why" test is satisfied when the proof (affidavits or live testimony) sufficiently demonstrates why a request is overburdensome. Thus, the objecting party should present proof on what precise steps must be taken in order to comply with the discovery request. Also, the proof should

show why it would be overburdensome to take the steps necessary for compliance. Since review of discovery rulings is analyzed under an abuse of discretion standard, see, e.g., Meyer v. Tunks, 360 S.W.2d 518, 522 (Tex. 1962) and In re: Recticel Foam Corp., 859 F.2d 1000, 1006 (1st Cir. 1988); the objecting party should be very careful in making sure that the proof satisfies its burden.

The basic evidence for an insurance carrier to present in support of an objection to an overburdensome discovery request could include affidavit or live testimony by a company representative about the expected number of employee hours required, or the potential monetary costs involved in accomplishing the discovery task. Likewise, testimony relating to the carrier's organization of files and/or corporate information may be necessary to show why compliance with a particular discovery request is impracticable or impossible. Essentially, a lawyer's creativity is the only limit in satisfying the "why" test. The level to which the objecting party goes in presenting its proof will depend on what is at stake (number of documents, temperament of presiding judge, etc.).

An accepted tactic when confronted with a relevant but overburdensome discovery request is to allow production of the sought after information and materials contingent upon an agreement that the requesting party pays the production costs. See Van Arsdale v. Clemo, 825 F.2d 794, 798 (4th Cir. 1987) (in which the court required the requesting party "to finance their fishing expedition"). Also, the responding party can agree to production contingent upon the narrowing of the discovery request by time or scope to create a more manageable request. See Motton v. Owens, 128 F.R.D. 72, 73 (M.D. Pa. 1989) (in which the Magistrate commented that the Plaintiff would be "well advised" to file more narrow requests in the future).

VI.
CONCLUSION

While there are recognized procedures for obtaining judicial relief with respect to discovery disputes, the judicial system works best when the parties resolve the discovery disputes amongst themselves. In fact, the Texas Supreme Court in the McKinney case declared that trial courts should not have to spend their time resolving unnecessary discovery disputes. Thus, lawyers litigating cases in Texas state courts are duty bound to negotiate discovery disputes in good faith before seeking trial court intervention.

Because it is overly idealistic to think that discovery disputes will always be resolved by fair compromise between the parties, counsel must be prepared to deal with the problems raised by relevant but overburdensome discovery requests. In a nut shell, it is vital to create a strong evidentiary record demonstrating why a discovery request is overburdensome. Also, prudent counsel will be cognizant of the rule that conclusions without proper factual foundation are vulnerable to rejection by the trial court. With the proper evidentiary foundation, counsel for the objecting party will be in the best position to argue that the balancing test favors a ruling granting protection from the overburdensome discovery request.