

## Discovery Sharing in Texas: Litigant Confidentiality v. Litigation Costs

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I.	Introduction.....	622
II.	The Development of Discovery Sharing.....	625
	A. Confidential Discovery .....	631
	B. Discovery Sharing.....	634
	C. Implicit Sharing Ban?.....	637
III.	The Attack on Discovery Sharing.....	640
	A. Evidence-Based Protective-Order Standards .....	644
	B. The Freedom to Disseminate Discovery Information .....	645
	C. Competitor Cases .....	648
	D. Modification and Jurisdiction Issues.....	651
IV.	Discovery Sharing and Court Efficiency .....	657
	A. Discovery Sharing’s Relationship with Litigation Efficiency .....	657
	B. State and National Efficiency Trends.....	661
V.	Conclusion .....	665

### I. INTRODUCTION

Texas courts have long allowed discovery sharing between similar cases.<sup>1</sup> Discovery sharing has a multitude of systemic benefits—not the least of which is reducing pretrial litigation costs.<sup>2</sup> Despite these

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<sup>1</sup>See *Garcia v. Peebles*, 734 S.W.2d 343, 348 (Tex. 1987).

<sup>2</sup>See, e.g., Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2229 (2014) (describing the efficiencies of discovery sharing); see also MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004) (endorsing sharing).

advantages, some contend that the Supreme Court of Texas should forbid the practice in cases involving trade secrets.<sup>3</sup> But the court should not limit discovery sharing—doing so would run contrary to Texas’s efforts to reduce undue litigation expenses.<sup>4</sup>

Discovery sharing is prevalent in product-liability cases involving nationally distributed products.<sup>5</sup> Indeed, recent media coverage of the GM defective-ignition crisis (and GM’s surprising simultaneous attack on sharing at the supreme court) has highlighted the war over discovery sharing in Texas.<sup>6</sup> Sharing’s widespread use in products cases is not surprising: identical products (if defective) tend to injure people similarly across the products’ distribution area. Attorneys representing those injured people tend to be interested in similar information across cases—the product design, design and manufacturing processes, safer alternative designs, and information surrounding the manufacturing company’s knowledge of the defect.<sup>7</sup>

Discovery sharing allows these attorneys, representing people with similar claims against common or related defendants, to avoid reinventing the wheel.<sup>8</sup> Put simply, attorneys and parties in a sharing system reuse the

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<sup>3</sup> See, e.g., Brief of Amicus Curiae Alliance of Automobile Manufacturers in Support of Relator’s Petition for Writ of Mandamus at 2, *In re Gen. Motors, LLC*, No. 13-0794 (Tex. Aug. 8, 2014, *pet. dismissed*), 2014 WL 3898459 [hereinafter *Automobile Manufacturers’ Amicus Brief*] (former Supreme Court of Texas Chief Justice Wallace B. Jefferson, as counsel, contending that Texas’s qualified trade secret privilege limits sharing in trade secret cases); cf. also *Zappe v. Medtronic USA, Inc.*, No. C-08-369, 2009 WL 792343, at \*1 (S.D. Tex. Mar. 23, 2009) (approving a non-sharing order in a case involving trade secrets based on a reading of post-*Garcia* (Texas’s seminal sharing decision) case law as overruling *Garcia*).

<sup>4</sup> See, e.g., TEX. R. CIV. P. 169 cmt. 1 (explaining 2013’s legislature-directed rule changes to reduce pretrial cost burdens in certain civil cases); 3 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 13:2 (2d ed. 2014) (highlighting 1999 discovery reform efforts meant to streamline pretrial practice).

<sup>5</sup> See Gary L. Wilson, Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055, 1055 (1985).

<sup>6</sup> See Sue Ambrose, *Could Texas’ High Court Curb Trade-Secret Sharing in Safety Lawsuits?*, DALL. MORNING NEWS (Apr. 18, 2015), <http://www.dallasnews.com/news/metro/2015-04-18-experts-expect-attempt-to-curb-trade-secret-sharing-in-suits.ece>.

<sup>7</sup> Cf., e.g., FRANCIS H. HARE, JR. ET AL., CONFIDENTIALITY ORDERS 69–70 (1988) (discovery often “must be repeated anew” as a result of repeating information needs).

<sup>8</sup> E.g., Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 497 (1991) (“Barring sharing smacks too much of requiring each litigant to reinvent the wheel.”).

discovery information obtained in previous cases to avoid wasteful rediscovery.

Someone not familiar with the issue might wonder, “What could possibly be wrong with sharing information between similar cases? Isn’t that commonsense?” But despite its somewhat obvious appeal as a cost-saving measure, discovery sharing often runs head on into another important interest in pretrial discovery: the protection of proprietary information.<sup>9</sup>

Litigants routinely ask courts to enter orders to limit the dissemination of competitively sensitive discovery information (like product designs).<sup>10</sup> They putatively do so, at least in part, to keep the information from competitors.

Sharing proceeds on the theory that the practice does not hamper the competitive value of discovery information shared only among non-competitor litigants.<sup>11</sup> If the audience for discovery information is limited to similar litigants, the reasoning goes, the value of the proprietary or trade secret information remains intact.<sup>12</sup>

But those who oppose sharing contend otherwise—sharing trade secrets, even among non-competitors, increases the risk of inadvertent or intentional disclosure to competitors by sharing attorneys and litigants.<sup>13</sup> Moreover, according to some of these voices, sharing violates Texas’s qualified trade secret privilege by allowing collateral litigants to receive information without demonstrating that the information is necessary in their *particular* cases.<sup>14</sup>

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<sup>9</sup> See *Garcia v. Peeples*, 734 S.W.2d 343, 345–47 (Tex. 1987) (balancing trade secret holder’s interest against the “public policies favoring the exchange of information”); see also, e.g., Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 824–25 (1990) (opposing discovery sharing for, among other reasons, its potential to undermine the value of proprietary information).

<sup>10</sup> See, e.g., Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1784 (2014) (describing the frequent use of protective orders in civil litigation to protect proprietary discovery information).

<sup>11</sup> See, e.g., *Garcia*, 734 S.W.2d at 348 (holding that trial court should have balanced competing needs for information by sharing litigants against producing party’s interest in preventing dissemination to competitors).

<sup>12</sup> See *id.*

<sup>13</sup> See, e.g., Campbell, *supra* note 9, at 824–25 (contending that discovery sharing increases risk of disclosure of competitively sensitive information).

<sup>14</sup> Cf., e.g., *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011).

This Article is the first piece of scholarship to evaluate these arguments in light of historic and recent efforts to make Texas and federal pretrial procedure more efficient. After evaluating both pro- and anti-sharing positions, the Article concludes that sharing furthers pretrial efficiency without unduly compromising trade secret and other confidential information.

The Article proceeds in four parts. First, it examines the development of discovery sharing as a routine practice. Second, the Article considers some common arguments against discovery sharing. Third, it briefly examines the relationship between sharing and efforts to reduce pretrial costs, both in the Texas and federal court systems. Finally, the Article contends that sharing is a practice that both reduces costs and is compatible with litigants' proprietary-information interests, even in cases involving trade secrets.

## II. THE DEVELOPMENT OF DISCOVERY SHARING

The story of discovery sharing and the story of protecting trade secrets in discovery have been intertwined from the beginning.<sup>15</sup> This entanglement comes from a practical reality in product-liability cases: parties simultaneously allege that the design of the product is both dangerous and a trade secret.<sup>16</sup> Indeed, plaintiffs seeking to prove that a dangerous product caused injury send over volleys of discovery requests for the product's design as proof of its danger.<sup>17</sup> The party resisting these requests (typically the defendant) often contends that the product's design is a privileged trade secret.<sup>18</sup>

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<sup>15</sup> See, e.g., *Garcia*, 734 S.W.2d at 344–45, 348 (entering non-sharing protective order was abuse of discretion in a trade secret case); cf. also, e.g., Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 364–65 (1999) (recognizing that “injury to a cognizable privacy or property interest” can weigh against discovery sharing).

<sup>16</sup> In another typical version, a corporate defendant alleges that its practices constitute trade secrets while a plaintiff alleges that those same practices were injurious. See, e.g., *Endicott*, 81 So. 3d at 488.

<sup>17</sup> See, e.g., *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885, 885–86 (Cal. Ct. App. 1995) (assessing protective order in case involving designs of an allegedly injurious forklift); *Garcia*, 734 S.W.2d at 344–45.

<sup>18</sup> See, e.g., *Garcia*, 734 S.W.2d at 344–46.

Courts and litigants facing this fight often compromise.<sup>19</sup> Instead of denying discovery of product designs (undoubtedly vital proof in many products cases), courts typically allow discovery of the information subject to a “protective order.”<sup>20</sup> These protective orders vary in their particulars, but in general they limit the audience for the discovery information at stake to something less than the general public.<sup>21</sup> For instance, a protective order might restrict discovery access to just the parties and attorneys in the particular case (a “non-sharing” protective order).<sup>22</sup> In contrast, a more lenient order might allow access for individuals in similar cases (a “sharing” protective order).<sup>23</sup>

Note that in both versions, the protective orders’ audience limitation implicitly excludes product-producing competitors (who are corporations that will almost certainly not be injured physically by a competing product and therefore are unlikely to be “similar” litigants).<sup>24</sup> And many protective orders exclude competitors with language that expressly declares that discovery information shall not be shared with competitors, even if they are in similar litigation.<sup>25</sup>

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<sup>19</sup> See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (recognizing that stipulated protective orders are common).

<sup>20</sup> *Id.* But see, e.g., *In re Bass*, 113 S.W.3d 735, 745–46 (Tex. 2003) (denying discovery of trade secret information where party failed to establish that the information was necessary proof in case); *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 615 (Tex. 1998) (same).

<sup>21</sup> See FED. R. CIV. P. 26(c)(1)(G) (allowing courts to limit the audience for discovery materials); TEX. R. CIV. P. 192.6 (same).

<sup>22</sup> See, e.g., *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1–2 (D. Ariz. Apr. 29, 2010) (denying request for sharing provision in otherwise agreed protective order); see also, e.g., David Timmins, Note, *Protective Orders in Products Liability Litigation: Striking the Proper Balance*, 48 WASH. & LEE L. REV. 1503, 1509 (1991) (“[A] protective order may create absolute restrictions on disclosure, meaning that a protective order allows no dissemination beyond the parties themselves.”).

<sup>23</sup> See, e.g., *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885, 886 (Cal. Ct. App. 1995) (upholding a trial court’s protective order providing that “plaintiffs counsel may disclose said discovery so designated as confidential to counsel in other pending similar litigation”).

<sup>24</sup> *Cf.* *Pincheira v. Allstate Ins. Co.*, 190 P.3d 322, 337 (N.M. 2008) (noting that “sharing among other litigants and witnesses” is often appropriate where those sharing the information “are not competitors of the [producing] defendant”).

<sup>25</sup> See, e.g., *Garcia v. Peoples*, 734 S.W.2d 343, 348 (Tex. 1987) (“Out of an abundance of caution, the trial court, after determining which documents are true trade secrets, can require those wishing to share the discovered material to certify that they will not release it to competitors or others who would exploit it for their own economic gain.”).

By excluding competitors, these orders protect the value of product-design information.<sup>26</sup> Indeed, trade secrets are valuable precisely because they are secret from a particular group—competitors who would make use of the information to gain an undue advantage in the marketplace.<sup>27</sup>

So, for instance, imagine that a company spends millions to design a product and keeps its efforts secret. If a competing company gained access to the information, it would have the benefit of the first company's research and development without spending substantial resources.<sup>28</sup> This windfall would simultaneously devalue the design for the first company because it would now potentially compete, on equal or similar design footing, with the company that obtained the design. Presumably, competition between the two would cause the price of the product to fall, reducing the first company's profits.

This hypothetical highlights the theory behind audience-limiting protective orders—not all audiences are created equal. An injured individual who seeks a product design for use in a lawsuit does not have the capability (or likely the interest) to use the information to build the product and compete in the marketplace against a product manufacturer.<sup>29</sup> And so long as that individual is ordered not to disclose the information to such competitors, a court order to turn over the information in discovery does not injure the product-producing company.<sup>30</sup>

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<sup>26</sup> See, e.g., *Jampole v. Touchy*, 673 S.W.2d 569, 574 (Tex. 1984) (holding that trial court abused its discretion by denying discovery of product information where protective order keeping information from competitors would have sufficiently protected manufacturer's interest).

<sup>27</sup> See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984) ("We emphasize that the value of a trade secret lies in the competitive advantage it gives its owner over competitors."); cf. also RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939) ("A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.").

<sup>28</sup> See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995) ("[T]he protection of trade secrets has been justified as a means to encourage investment in research by providing an opportunity to capture the returns from successful innovations.").

<sup>29</sup> See, e.g., *Garcia*, 734 S.W.2d at 348 (noting that trade-secret-holder defendant's interest was in protecting proprietary product designs from competitors; plaintiff's interest was in effectively preparing for trial).

<sup>30</sup> See, e.g., *Jampole*, 673 S.W.2d at 574 ("Jampole is not GMC's business competitor, and GMC acknowledged that, if the documents were relevant, any proprietary interest could be safeguarded by a protective order.").

The story gets more complicated, though, because many allegedly defective products injure many people who pursue lawsuits contemporaneously. Imagine that our product is a defective drug sold by a national company to treat a common condition.<sup>31</sup> The history of pharmaceutical claims shows that when a nationally distributed drug purportedly causes injury, hundreds (if not thousands) of people file suit.<sup>32</sup> In each of these suits, one core issue almost certainly will be whether the design of the drug is dangerous.<sup>33</sup> Should the plaintiff in each suit be forced to litigate his or her entitlement to this design information? Should the courts be forced to resolve hundreds of identical discovery disputes?<sup>34</sup>

These questions are particularly acute in light of what some have characterized as a discovery-cost crisis. According to these voices, the costs of discovery in U.S. litigation outweigh its benefits in many cases.<sup>35</sup> Litigants and courts, the reasoning goes, are forced to expend resources to facilitate the discovery of information with scant connection to the merits of the case.<sup>36</sup> And with the technological revolution of the past two decades,

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<sup>31</sup>The Yaz birth control lawsuit provides a real-world analogue—women across the country filed suit alleging that the drug injured them by creating blood clots, strokes, and heart attacks. *See, e.g.*, 120 AM. JUR. *Trials* § 429 (2011) (“More than 50 women claim in lawsuits filed in Indianapolis that they suffered strokes, heart attacks or other serious health problems while taking the birth control pills Yasmin or Yaz, manufactured by Bayer Healthcare Corporation. Across the nation, dozens of lawsuits have been filed in the past few months by women claiming similar health problems after taking the pills.”).

<sup>32</sup>*See id.*

<sup>33</sup>*See, e.g., id.* (woman brought products liability suit for defective design of a birth control patch).

<sup>34</sup>*See id.* Many national-scale products suits, including the Yaz lawsuits mentioned above, end up in multidistrict litigation. *Id.* This trend has the effect of consolidating discovery for all cases subject to the MDL and presumably, reducing the need for informal discovery sharing. *See id.*

<sup>35</sup>FED. R. CIV. P. 26(b)(1) (Advisory Committee’s note to 2015 proposed amendment) (“The 1983 Committee Note stated that [provisions limiting the breadth of discovery] were added ‘to deal with the problem of over-discovery.’ The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”); *cf.* Richard Marcus, *Procedural Postcard from America*, 1 RUSS. L.J. 9, 17 (2013) (“As a political matter, the notion that American litigation is too costly and time-consuming has gained much force. As an empirical matter, proving or evaluating such claims is difficult and involves contentious value judgments.”).

<sup>36</sup>FED. R. CIV. P. 26(b)(1) (Advisory Committee’s note to 2015 proposed amendment).

the amount of all information subject to discovery (connected strongly to the merits or not) has soared to terabytes in many cases.<sup>37</sup>

Over the years, in the federal and Texas systems, rule makers have attempted to reign in discovery costs.<sup>38</sup> Some commentators have questioned the efficacy of their efforts.<sup>39</sup> Whatever the merits of that debate, recent amendments to the Federal Rules of Civil Procedure expressly target the lack of “proportionality” between the costs of discovery and its benefits.<sup>40</sup> Those amendments are discussed in some depth in Part IV.B.

Outside of the recent discovery amendments, several procedural innovations have sought to reduce litigation costs in repeating case contexts, like product liability. For instance, multi-district litigation has become prevalent over the past thirty years, allowing a single court to resolve common issues in similar cases.<sup>41</sup> But for similar cases not subject to MDL, questions persist about the sanity of allowing multiple courts to resolve virtually identical discovery issues.

Courts and litigants have grappled with informal solutions. Some courts enter sharing protective orders to allow litigants to cooperate and share information.<sup>42</sup> Litigants have attempted to capitalize on sharing orders by

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<sup>37</sup> Cf., e.g., Dana A. Remus, *The Uncertain Promise of Predictive Coding*, 99 IOWA L. REV. 1691, 1696 (2014) (“The unmanageable scope and extent of e-discovery offered new opportunities for abuse and quickly became a principal cause of increasing costs and delays in the court system.”).

<sup>38</sup> See, e.g., MCDONALD & CARLSON, *supra* note 4, § 13:2 (observing that 1999 amendments to the Texas Rules of Civil Procedure “were made to streamline discovery procedures and to reduce costs and delays associated with discovery practice”); Benham, *supra* note 2, at 2218–19 (chronicling federal efforts).

<sup>39</sup> See Jordan M. Singer, *Proportionality’s Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 148 (2012) (observing that attempts to reign in broad discovery have had “virtually no impact”).

<sup>40</sup> See Supreme Court of the United States, Order Amending the Federal Civil Rules of Procedure (Apr. 29, 2015), [http://www.supremecourt.gov/orders/courtorders/frcv15\(update\)\\_1823.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15(update)_1823.pdf).

<sup>41</sup> See Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 116 (2015) (“Since its inception in the late 1960s, MDL has become more and more common, to the point where today its use could almost be called routine.”).

<sup>42</sup> See, e.g., *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871, \*3–4 (S.D. Tex. Feb. 17, 2011) (allowing discovery sharing); *Miller v. Gen. Motors Corp.*, 192 F.R.D. 230, 231, 233 (E.D. Tenn. 2000) (rejecting non-sharing provision in favor of discovery sharing).



creating information exchanges of varying levels of formality.<sup>43</sup> These exchanges typically stockpile discovery information in repeating cases and allow members to access it for a fee, subject to the terms of applicable protective orders.<sup>44</sup> Corporate defendants have resisted the sharing phenomenon, contending that shared discovery increases the risk of inadvertent or intentional disclosure of secret information to a competitor or the public at large.<sup>45</sup>

In the mid-1980s, the Supreme Court of Texas stepped into the middle of this fight by enshrining sharing protective orders in Texas practice with its landmark decision, *Garcia v. Peebles*.<sup>46</sup> *Garcia* was a paradigmatic case—an individual plaintiff alleged that the fuel system in a common General Motors vehicle was defective and caused a deadly fuel-fed fire.<sup>47</sup> The plaintiff and his attorneys sought to share design information with litigants in similar lawsuits; GM contended that doing so would compromise its trade secrets.<sup>48</sup>

But the story of trade secrets and discovery sharing in Texas did not begin and end with *Garcia*. Before the case, Texas courts had at least a partial framework for protecting trade secrets in discovery.<sup>49</sup> And long after *Garcia* was decided, Texas courts continue to grapple with questions about

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<sup>43</sup> See, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 579 (D. Colo. 1982) (“Facing a single large manufacturer capable of coordinating its defenses nationwide, and a complex design engineering problem, about fifty attorneys representing the plaintiffs in many of these cases have organized an information exchange or clearing house for sharing information obtained by any of them through discovery.”).

<sup>44</sup> See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 396 (2000) (“The Attorney’s Information Exchange Group (AIEG), a nonprofit cooperative comprised of ATLA members representing plaintiffs in products liability cases, provides members with extensive discovery information. AIEG describes its primary objective: ‘to provide plaintiffs’ counsel with the same collaborative benefits that defense attorneys have long enjoyed.’ AIEG information has been credited with aiding plaintiff victories against manufacturers of all-terrain vehicles and other products. One products liability lawyer called AIEG ‘the first and least expensive step in evaluating [product] design.’”).

<sup>45</sup> Cf. *Campbell*, *supra* note 9, at 824–25 (“[T]he likelihood of [protective order] violation[s], inadvertent or otherwise, will increase in direct proportion to the number of disclosures.”).

<sup>46</sup> 734 S.W.2d 343, 349 (Tex. 1987).

<sup>47</sup> *Id.* at 344.

<sup>48</sup> *Id.* at 344–45.

<sup>49</sup> See *infra*, Part II.A.

sharing trade secrets and the more fundamental question of whether they are discoverable in the first place.<sup>50</sup>

### A. Confidential Discovery

For more than fifty years, Texas has protected trade secrets in discovery,<sup>51</sup> and the supreme court has routinely reiterated the importance of doing so.<sup>52</sup> The trade secret privilege (which existed at common law) was enshrined in Texas Rule of Evidence 507 in 1983.<sup>53</sup> This qualified privilege gives litigants grounds to refuse to produce trade secret information except in cases where not producing the information would work a fraud or injustice.<sup>54</sup> Moreover, and as discussed in more depth in Part III, Rule 507

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<sup>50</sup> See, e.g., *In re Bass*, 113 S.W.3d 735 (Tex. 2003); *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609 (Tex. 1998).

<sup>51</sup> See former TEX. R. CIV. P. 186(b) (West 1957, repealed 1984), replaced with the current protective-order rule, TEX. R. CIV. P. 192.6.

<sup>52</sup> See, e.g., *In re Bass*, 113 S.W.3d at 739 (adopting a multi-factor test to protect trade secrets); *In re Cont'l*, 979 S.W.2d at 612 (Texas's trade secret privilege "recognizes that trade secrets are an important property interest, worthy of protection."); *Garcia*, 734 S.W.2d at 346 (noting that Texas courts have long observed the "importance" of protecting trade secrets); *Lehnhard v. Moore*, 401 S.W.2d 232, 235 (Tex. 1966) (recognizing a qualified trade secret privilege).

<sup>53</sup> See TEX. R. EVID. 507.

<sup>54</sup> See *id.* Texas Rule of Evidence 507 mandates that trade secrets are privileged but fails to define what a "trade secret" is. *Id.* Courts in Texas have filled the gap. In 2003, the Supreme Court of Texas clarified the trade secret definition. *In re Bass*, 113 S.W.3d at 739. In *Bass*, the court recognized the Restatement of Torts' six-factor test for determining whether information is a trade secret:

- (1) the extent to which the information is known outside of his business;
- (2) the extent to which it is known by employees and others involved in his business;
- (3) the extent of the measures taken by him to guard the secrecy of the information;
- (4) the value of the information to him and to his competitors;
- (5) the amount of effort or money expended by him in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.* The court went on to recognize that the Restatement (Second) of Torts did not include the trade secret definition. *Id.* Rather, the test was relocated to the Restatement (Third) of Unfair Competition. *Id.* That Restatement included the six-factor test in the reporter's notes to section 39. *Id.* Those notes observe that the test is relevant in determining whether information is a trade secret, but the factors are not exclusive or dispositive. *Id.* The supreme court agreed, holding that a party seeking trade secret status for information need not demonstrate that all six of the restatement factors weigh in its favor. *Id.* at 740. Rather, courts may consider some or all of the factors in assessing whether information merits trade secret status. *Id.*

requires courts to provide “adequate” protection for trade secret information when litigants are forced to produce it.<sup>55</sup>

In this way, the Texas trade secret privilege dovetails with Texas Rule of Civil Procedure 192.6, the rule that gives courts rule-based authority to enter audience-limiting protective orders.<sup>56</sup> This protective-order rule, like its federal counterpart, Rule 26(c), allows courts to mitigate the ill effects of what would be public disclosure of secret information in pretrial discovery.<sup>57</sup>

The Texas rule is silent on the burden to obtain such an order, but the supreme court has suggested that the federal “good cause” framework under Rule 26(c) is analogous.<sup>58</sup> Federal law (and presumably consistent Texas law) requires parties seeking an audience-limiting order to make two showings. First, litigants must typically demonstrate that the information is in fact “confidential.”<sup>59</sup> “Confidential information” is a broader category than “trade secrets” and sometimes includes secret, non-privileged commercial or personal information.<sup>60</sup> Thus, the rule recognizes that much of the information exchanged in discovery will not meet the more onerous trade secret standard yet still be secret, sensitive, or private.<sup>61</sup> The paradigm

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<sup>55</sup> TEX. R. EVID. 507(c).

<sup>56</sup> See TEX. R. CIV. P. 192.6.

<sup>57</sup> Compare TEX. R. CIV. P. 192.6(5), with FED. R. CIV. P. 26(c)(1)(G).

<sup>58</sup> See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 345 n.1 (Tex. 1987) (noting that amendments to Texas’s protective order rule brought it closer to the language of Rule 26(c) and discussing federal protective order burdens); see also Benham, *supra* note 2, at 2191–93 (describing the federal protective-order framework).

<sup>59</sup> See, e.g., *United States v. Int’l Bus. Machs. Corp.*, 67 F.R.D. 40, 47–48 (S.D.N.Y. 1975) (finding that no protection was warranted where no evidence supported a representation that information was confidential); cf. also 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2043 (3d ed. 2010) (noting that Rule 26(c) generally provides protection for confidential information, in addition to other categories of information).

<sup>60</sup> *In re Ford Motor Co.*, 211 S.W.3d 295, 299–300 (Tex. 2006) (“Although a trial court often considers protective orders in the context of trade secrets, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 346 (Tex.1987), the express terms of the parties’ agreed protective order make clear that trade secrets are not the only materials worthy of protection.”).

<sup>61</sup> See *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). Some courts have suggested that Rule 26(c) provides protection in some circumstances even when the information at issue is not “confidential research information.” *Id.* (“The law, however, gives district courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.”); cf. also WRIGHT ET AL., *supra* note 59, § 2043 (dispelling argument that Rule 26(c) provides for protective orders only when

category of non-trade secret confidential information would be personal medical records: no one would dispute a litigant's legitimate interest in keeping medical information private, yet it could virtually never qualify as a trade secret.<sup>62</sup> Still, the rule allows courts to limit the audience for medical records just as it does for trade secrets or other proprietary commercial information.<sup>63</sup>

Second, to obtain an audience-limiting protective order, litigants must demonstrate that public dissemination of the confidential information would be seriously harmful.<sup>64</sup> In cases involving trade secrets and commercial information, the harm put forward is typically economic. As discussed above, the theory goes that forcing litigants to disclose proprietary information, unprotected from competitors, devalues the information.<sup>65</sup>

The supreme court has been unequivocal on the quantum of proof required to establish both prongs. Parties seeking protective orders must provide "a particular and specific demonstration of fact as distinguished from stereotyped conclusory statements."<sup>66</sup> Moreover, "sweeping

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"true" trade secrets are involved). But without some minimal showing of confidentiality, an audience-limiting protective order does not make sense as a protective measure. Indeed, if information were generally known, limiting the audience for the information would hardly do the person seeking the order much good.

<sup>62</sup>See, e.g., *Pearson v. Miller*, 211 F.3d 57, 60–61 (3d Cir. 2000) (medical and psychiatric records).

<sup>63</sup>*Id.* at 61.

<sup>64</sup>See, e.g., *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993) ("With respect to [a] claim of confidential business information, [the good cause] standard demands that the company prove that disclosure will result in a 'clearly defined and very serious injury to its business.'"); cf. also 6 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 26.104 (Daniel R. Coquillette et al. eds., 3d ed. 2015); WRIGHT ET AL., *supra* note 59, at § 2043.

<sup>65</sup>But in some cases, putatively confidential information (even trade secret information) has little value to protect. For instance, stale commercial information regarding a decades-old product or practice might well be confidential, but its dissemination would not harm the company that had kept it secret. See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 348 n.3 (Tex. 1987) (admonishing courts to be wary of protecting "stale" information); see also *United States v. Int'l Bus. Machs. Corp.*, 67 F.R.D. 40, 49 (S.D.N.Y. 1975) (denying confidentiality request where "[n]one of this data is current; it reveals directly little, if anything at all, about Honeywell's current operations" and determining that "[b]y a fair reading of [the party seeking the protective order's] own representation, the value of this data to [that party's] competitors is speculative").

<sup>66</sup>*Garcia*, 734 S.W.2d at 345 (citations and quotations omitted); see also, e.g., *In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999) ("A party resisting discovery, however, cannot simply make conclusory allegations that the requested discovery is unduly burdensome or unnecessarily harassing. The party must produce some evidence supporting its request for a protective order.").

predictions” or harm without “specific examples” are insufficient to support a protective order.<sup>67</sup> This burden largely mirrors federal protective-order requirements.<sup>68</sup>

### B. Discovery Sharing

A discovery-sharing dispute gave the Supreme Court of Texas an opportunity to examine the contours of the protective-order burden.<sup>69</sup> In *Garcia v. Peebles*, the court reviewed a trial judge’s broad protective order, putatively issued to protect General Motor’s trade secrets.<sup>70</sup> The order forbade dissemination of vehicle design documents to anyone outside of the specific case.<sup>71</sup> The critical question before the court: was the trial court’s order too broad where it stopped the plaintiff’s attorney from sharing the documents with other (non-competitor) attorneys involved in similar litigation?<sup>72</sup>

Predictably, the sharing/trade secret issue arose in a product-liability case. Manuel Garcia, the plaintiff, was the sole survivor of a post-collision fuel-fed fire in a GM vehicle.<sup>73</sup> He sued and requested fuel-system design documents from GM.<sup>74</sup> GM produced the fuel-system documents in the case but asked the trial court to protect them from wider dissemination because the documents apparently contained trade secrets.<sup>75</sup> The trial judge

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<sup>67</sup> *Garcia*, 734 S.W.2d at 345.

<sup>68</sup> *See, e.g.*, *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (denying protective order where allegations of confidentiality were not “particularized” and allegations of “competitive harm [were] vague and conclusory when specific examples are necessary”); *see also* MOORE, *supra* note 64, at § 26.102; WRIGHT ET AL., *supra* note 59, at § 2035 (“The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause.”); *cf.* Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) That the Federal Rules Do Not Declare That Discovery is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 348 (2006) (observing that the protective order burden is “somewhat exacting” but not an insurmountable hurdle that would create public access right).

<sup>69</sup> *See Garcia*, 734 S.W.2d at 344–45.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 346.

<sup>72</sup> *Id.* The court also decided two collateral issues in *Garcia*, holding that certain notes and indexes were attorney work product and also allowing GM to enforce protective orders from other jurisdictions. *See id.* at 348–49.

<sup>73</sup> *Id.* at 344.

<sup>74</sup> *Id.*

<sup>75</sup> *See id.* at 344–45.

(David Peeples) issued an onerous protective order that, among other restrictions, allowed only the plaintiff, his attorneys, and his experts to access the documents.<sup>76</sup>

Garcia sought mandamus relief, contending that GM's evidence did not support the order's breadth.<sup>77</sup> In particular, Garcia contended that he should be allowed to share the fuel-system-design information with litigants involved in similar litigation against GM.<sup>78</sup> Doing so, the reasoning went, would not harm GM because litigants in product-liability cases were almost certainly not competitors.<sup>79</sup> Moreover, Garcia contended that public policy favored discovery sharing as a mechanism to encourage full candor in discovery and a method to increase court efficiency.<sup>80</sup>

The supreme court agreed.<sup>81</sup> Justice Kilgarlin, writing for the majority, observed that GM did have a legitimate interest in keeping its trade secrets from competitors.<sup>82</sup> But the court went on to hold that sharing discovery information between non-competitor litigants would not harm GM in a manner that outweighed the public policies favoring sharing.<sup>83</sup>

The court accepted at least two of the oft-stated policy rationales that support sharing: discovery integrity and litigation efficiency. With respect to the first, the court bemoaned "the lack of candor during discovery in complicated litigation."<sup>84</sup> Parties in cases with similar discovery requests and shared discovery, the court reasoned, "are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."<sup>85</sup>

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<sup>76</sup> See *id.* at 346 n.2.

<sup>77</sup> *Id.* at 345–46.

<sup>78</sup> *Id.* at 346.

<sup>79</sup> See *id.* at 348.

<sup>80</sup> *Id.* at 346–47.

<sup>81</sup> *Id.* at 348.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 347. Discovery sharing's propensity to increase candor in disclosure is a laudable feature even without sharing's efficiency benefits. See, e.g., *id.* Likewise, sharing creates the ability for plaintiff's counsel to collaborate in discovery for similar cases—a practice that would be forbidden in many instances in a non-sharing regime. A byproduct of this collaboration may very well be increased efficiency as a result of better-tailored discovery requests. Cf., e.g., *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153–54 (W.D. Tex. 1980); cf. also Benham, *supra* note 2, at 2199, 2206.

<sup>85</sup> *Garcia*, 734 S.W.2d at 347.

The court also recognized the obvious efficiencies of discovery sharing. A non-sharing system “forces similarly situated parties to go through the same discovery process time and time again, even though the issues involved are virtually identical.”<sup>86</sup> A sharing order, on the other hand, would allow parties in similar cases to benefit from previous discovery while denying the defendant in those cases the undue benefit of requiring re-discovery by each party bringing a suit against it.

The *Garcia* court found that the protective order was too broad.<sup>87</sup> Importantly, GM’s legitimate interest in the protective order was to prevent dissemination to *competitors*, not non-competitor litigants like Garcia.<sup>88</sup>

*Garcia* left Texas courts with several important takeaways for issuing protective orders in trade secret cases. First, parties that produce trade secret information in discovery are typically entitled to an order protecting the information from competitors.<sup>89</sup> Second, a party seeking such protection must produce specific, concrete evidence that it will indeed be harmed in the absence of the order.<sup>90</sup> Third, the court implicitly held that protective orders must be no broader than the evidence supports.<sup>91</sup> If evidence only supports a party’s contention that it will be harmed by disclosure to Person A, a protective order preventing dissemination to both Person A and Person B is overbroad (assuming that under the more lenient order Person B would be forbidden from providing Person A with the information). Fourth, courts should consider the systemic impact of orders restricting the dissemination of discovery information.<sup>92</sup> These systemic considerations—discovery

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<sup>86</sup> *Id.*

<sup>87</sup> *See id.* at 348; *cf. also In re Quality Safety Sys. Co.*, No. 05-10-00801-CV, 2010 WL 4192897, at \*1 (Tex. App.—Dallas Oct. 26, 2010, no pet.) (mem. op.) (citing *Garcia* to deny petition for writ of mandamus seeking to limit discovery sharing with third parties); *Am. Honda Motor Co. v. Dibrell*, 736 S.W.2d 257, 259 (Tex. App.—Austin 1987, no writ) (holding that trial court did not abuse its discretion by entering sharing order in case involving trade secrets). *But see In re Universal Coin & Bullion, Ltd.*, 218 S.W.3d 828, 833 (Tex. App.—Beaumont 2007, pet. denied) (warning, in dicta, that potential protective order was not adequate where it did not limit sharing to suits concerning the same subject matter).

<sup>88</sup> *See Garcia*, 734 S.W.2d at 348.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; *cf. also In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 189 (Tex. 1999) (stating that in *Garcia*, the court “held that a motion for protection from discovery must be based on ‘a particular, articulated and demonstrable injury’”).

<sup>91</sup> *Garcia*, 734 S.W.2d at 348.

<sup>92</sup> *Id.* at 346–47.

integrity and litigation efficiency—obviously extend beyond the proprietary interests of the parties to the litigation.<sup>93</sup>

A few years after *Garcia*, then-Justice (now-Senator) Cornyn, writing for the majority, reaffirmed the court’s commitment to discovery sharing. In *Eli Lilly & Co. v. Marshall*, the court considered the propriety of an order compelling production of information that a pharmaceutical company previously submitted to the FDA.<sup>94</sup> The information related to the health care provider’s reports about problems with the drug Prozac, and no party contended that the information comprised trade secrets.<sup>95</sup> Instead, the pharmaceutical company resisted production on the basis that the FDA regulations made the information secret.<sup>96</sup>

While the court did find that the trial court abused its discretion by ordering production of at least some of the information, it went on to express its commitment to shared discovery.<sup>97</sup> Justice Cornyn observed that “under the doctrine of shared discovery, the fruits of discovery are available not only to the parties in a particular case but may be disseminated in turn to other litigants and potential litigants.”<sup>98</sup> Indeed, the court noted that with respect to the discoverable portion of the FDA information, the requesting parties were entitled to “to share that discovery with their expert witnesses and litigants in other cases.”<sup>99</sup>

### C. Implicit Sharing Ban?

While the supreme court has revisited the discoverability of trade secrets several times, it has not directly addressed trade-secret discovery-sharing

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<sup>93</sup>With all protective-order determinations, the evidence supporting the order matters. One might read *Garcia* to mean that protective orders must always include sharing provisions, but this interpretation ignores the case-by-case nature of the inquiry. One feature of *Garcia* is undoubtedly mandatory—trial courts should not enter protective orders absent evidence of significant and serious harm that would occur absent the order. *Id.* at 248. Because well-crafted sharing provisions almost always exclude competitors from access to discovery materials and prevent discovery-dissemination-based harms, it follows that sharing orders are mandatory in most cases.

<sup>94</sup>850 S.W.2d 155, 156–57 (Tex. 1993).

<sup>95</sup>*Id.* at 156–57, 160.

<sup>96</sup>*Id.* at 157.

<sup>97</sup>*Id.* at 160.

<sup>98</sup>*Id.*

<sup>99</sup>*Id.*



since *Garcia*.<sup>100</sup> Nonetheless, according to opponents of sharing, the court implicitly overruled *Garcia* in a later trade secret case, *In re Continental*.<sup>101</sup> This argument is flawed for several reasons, as discussed in Part III. Still, it is worth examining *In re Continental*—the case sheds light on the relationship between the discoverability of trade secrets and the best methods to protect them during litigation.

*In re Continental* said much about when trial courts may order production of trade secrets.<sup>102</sup> But it said little to nothing about whether parties may share the information after exchanging it. In *In re Continental*, a trial court ordered a defendant tire company to produce its “skim stock” formula—essentially a portion of the tire’s ingredients.<sup>103</sup> The plaintiffs conceded that the formula was a trade secret.<sup>104</sup> Thus, the issue in the case was whether the qualified trade secret privilege (Texas Rule of Evidence 507) allowed the tire company to withhold the information in discovery.<sup>105</sup>

Texas Rule of Evidence 507 provides a privilege to withhold trade secret information when doing so does not “tend to conceal fraud or otherwise work injustice,”<sup>106</sup> subject to an “appropriate protective order.”<sup>107</sup> In *In re Continental*, the court grappled with exactly when courts are allowed to order production of trade secret information in discovery to prevent “injustice.”<sup>108</sup>

There are at least three ways to approach the trade secret discoverability problem in the routine (non-fraud) case. First, courts could allow discovery of the information so long as it is relevant to the case.<sup>109</sup> The *In re Continental* court rejected this approach, reasoning that if a bare relevance threshold could defeat the trade secret privilege, Rule 507 would be

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<sup>100</sup> See, e.g., *In re Bass*, 113 S.W.3d 735, 737 (Tex. 2003); *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 610 (Tex. 1998).

<sup>101</sup> See, e.g., *Zappe v. Medtronic USA, Inc.*, No. C-08-369, 2009 WL 792343, at \*1 (S.D. Tex. Mar. 23, 2009) (reading *In re Continental* to approve a non-sharing order); *In re Cont’l*, 979 S.W.2d at 615.

<sup>102</sup> See *In re Cont’l*, 979 S.W.2d at 612–14.

<sup>103</sup> *Id.* at 610.

<sup>104</sup> *Id.* at 615.

<sup>105</sup> *Id.* at 610.

<sup>106</sup> TEX. R. EVID. 507.

<sup>107</sup> *In re Cont’l*, 979 S.W.2d at 613.

<sup>108</sup> *Id.* at 610–13.

<sup>109</sup> *Id.* at 613–14.

rendered meaningless.<sup>110</sup> Indeed, information that is not relevant is generally not discoverable in any event, making relevance an illusory floor in trade secret cases.<sup>111</sup> A second approach (advocated by the defendants in *In re Continental*) reads Rule 507 as something approaching an absolute privilege.<sup>112</sup> According to this line of reasoning, a protective order “can never adequately protect a sensitive trade secret” because of the risk of intentional or inadvertent disclosure.<sup>113</sup> The court rejected this approach because it would effectively nullify the qualification language in Rule 507 that expressly allows production of trade secrets in certain circumstances.<sup>114</sup> But the court noted that trial judges should balance “potential inadequacies” of protective orders when deciding to compel production of trade secrets (or not).<sup>115</sup>

The court settled on a third approach, somewhere in the middle, requiring parties requesting trade secrets to demonstrate “necessity.”<sup>116</sup> When a party establishes that information sought in discovery comprises trade secrets, “[t]he burden . . . shifts to the requesting party to establish that the information is necessary for a fair adjudication of its claims.”<sup>117</sup> The court went on to hold that the plaintiffs in *In re Continental* had not established that the tire formula was necessary for a fair adjudication of its claims and barred discovery of the information.<sup>118</sup>

Along the way to this holding, the court dropped a footnote that has engendered a wave of anti-sharing litigation, multiple mandamus proceedings across the state, and several granted petitions for review by the supreme court.<sup>119</sup> When noting that trial courts that order trade secret

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<sup>110</sup> *Id.*

<sup>111</sup> See TEX. R. CIV. P. 192.3 (“In general, a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter of the pending action”).

<sup>112</sup> *In re Cont’l*, 979 S.W.2d at 614.

<sup>113</sup> *Id.*

<sup>114</sup> See *id.*

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 613.

<sup>117</sup> *Id.*

<sup>118</sup> See *id.* at 615.

<sup>119</sup> See, e.g., *id.* at 613 n.3; *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871, at \*1–2 (S.D. Tex. Feb. 17, 2011) (denying request for non-sharing order and holding that *In re Continental* did not overrule *Garcia*); *Zappe v. Medtronic USA, Inc.*, No. C-08-369, 2009 WL 792343, at \*1 (S.D. Tex. Mar. 23, 2009) (citing *In re Continental* before entering a non-sharing protective order); see also *In re Quality Safety Sys. Co.*, No. 05-10-00801-CV, 2010 WL 4192897, at \*1 (Tex. App.—Dallas Oct. 26, 2010, no pet.) (mem. op.); Order Granting Oral

production must do so subject to an appropriate protective order, the court (in its rift-creating footnote) wrote, “In this case, for example, the trial court limited access to the information to the parties in this lawsuit, their lawyers, consultants, investigators, experts and other necessary persons employed by counsel to assist in the preparation and trial of this case.”<sup>120</sup> In other words, a non-sharing order was apparently appropriate in the *In re Continental* proceeding.

This murky footnote, undoubtedly dicta, led to arguments that the supreme court had implicitly overruled *Garcia*'s holding that sharing provisions were often required in protective orders.<sup>121</sup> And the arguments went further—after *In re Continental*, many litigants argued that the supreme court had actually forbidden discovery sharing altogether.

### III. THE ATTACK ON DISCOVERY SHARING

Litigants (usually large corporate interests) have asked the supreme court to forbid discovery sharing in Texas trade secret cases multiple times in the past decade.<sup>122</sup> And since 2004, the court has agreed to hear the issue at least three times, though it has never issued an opinion revisiting the *Garcia* question.<sup>123</sup> If granted, the requests to overrule *Garcia* and prohibit sharing would undercut the practice in sharing jurisdictions across the country.

To make these extraordinary requests to change the law seem plausible, the proponents usually conflate the standard governing the *discoverability* of trade secrets with the standard for *protecting them after disclosure*.<sup>124</sup> Sharing protective orders in trade secret cases, the reasoning goes, would nullify Texas Rule of Evidence 507 (a rule aimed at discoverability, not protective-order standards.)<sup>125</sup>

The typical three-part attack on *Garcia* and sharing in trade secret cases:

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Argument, *In re Gen. Motors, LLC*, (No. 13-0794), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=1e0473a2-4940-4485-a8c8-b820c88b60e1&coa=cossup&DT=SUBMISSIONSET&MediaID=4428246b-840b-4ae7-a8ee-54d0f09c334e> (Tex. Aug. 22, 2014).

<sup>120</sup> *In re Cont'l*, 979 S.W.2d at 613 n.3.

<sup>121</sup> See *Idar*, 2011 WL 688871, at \*2.

<sup>122</sup> See *Ambrose*, *supra* note 6.

<sup>123</sup> *Id.*

<sup>124</sup> See, e.g., Automobile Manufacturers' Amicus Brief, *supra* note 3.

<sup>125</sup> See, e.g., *id.* (“Sharing orders eliminate [Rule 507's] requirement that necessity be demonstrated on a case-by-case basis.”).

- To obtain trade secret information in discovery, Rule 507 requires requesting parties to establish that the information is necessary to prove a claim or defense.
- Similarly situated third-party litigants who would receive the information under a sharing protective order must individually demonstrate that the information is necessary in their particular cases.
- If courts enter sharing protective orders that allow parties to disseminate trade secret information to similar third-party litigants, those courts ignore Rule 507's necessity requirement.

Only the first of these three propositions is demonstrably true.<sup>126</sup> *In re Continental* itself belies the other two.<sup>127</sup> Indeed, *In re Continental* separates the trade secret discoverability inquiry (one that allows discovery of trade secrets (absent fraud) only if they are necessary proof in the case) from the standard governing the adequacy of audience-limiting protective orders.<sup>128</sup>

The case actually held that *after* trial courts determine that trade secret information “is necessary for a fair adjudication” of the requesting party’s claims, trial courts should “ordinarily” compel production of the information subject to “an *appropriate* protective order.”<sup>129</sup> The term “protective order,” as used in *In re Continental*, plainly refers to an order that was available under former Texas Rule of Civil Procedure 166b(5)—titled “Protective Orders”—and succeeded by identically titled Rule 192.6.<sup>130</sup> The court correctly recognized, consistent with decades of similar decisions in Texas and around the country, that a protective order is the appropriate mechanism to limit the audience for otherwise discoverable information.<sup>131</sup>

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<sup>126</sup> See *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998).

<sup>127</sup> See *id.* at 611–13.

<sup>128</sup> See *id.* at 613.

<sup>129</sup> See *id.* (emphasis added).

<sup>130</sup> TEX. R. CIV. P. 192.6; TEX. R. CIV. P. 166b(5) (West 1983, repealed 1998).

<sup>131</sup> See *In re Cont’l*, 979 S.W.2d at 613; see also, e.g., *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (recognizing protective orders as method to limit discovery access); *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987) (evaluating propriety of protective order to limit access to trade secrets in discovery); cf. *In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (allowing parties to limit the audience when discovery is conducted).

*In re Continental* thus acknowledged two important pieces of pretrial-discovery and protective-order bedrock: (1) the audience-limiting protective-order inquiry is distinct from the discoverability inquiry;<sup>132</sup> and (2) some protective orders are “appropriate” to protect trade secret discovery information while others are not.<sup>133</sup>

By using the modifier “appropriate” before “protective order,” the court did indeed recognize that some protective orders might fail because they do not satisfactorily protect trade secrets.<sup>134</sup> Likewise, some protective orders might not be “appropriate” because they are too severe, restricting disclosure to an audience more narrow than evidence of harm would support.<sup>135</sup>

Thus, the question in trade secret-sharing cases is whether narrowly drawn sharing protective orders adequately protect otherwise discoverable trade secret information and are therefore “appropriate.” The question is not (as those attacking discovery sharing would contend) whether other similarly situated litigants must establish “necessity” under Rule 507 after the discovering party has already done so.<sup>136</sup>

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<sup>132</sup>See *In re Cont'l*, 979 S.W.2d at 613; *Chapa v. Garcia*, 848 S.W.2d 667, 678 n.8 (Tex. 1992) (Doggett, J., concurring) (“While discoverability by the parties is often confused with disclosability to the public, discoverability and disclosability issues must be resolved separately.”). No doubt the two inquiries inform one another—courts should consider the efficacy of protective measures when deciding to order production of trade secrets or other sensitive information. See *In re Cont'l*, 979 S.W.2d at 614.

<sup>133</sup>See *In re Cont'l*, 979 S.W.2d at 613–14.

<sup>134</sup>See *id.*

<sup>135</sup>*Cf.*, e.g., *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 274 F.R.D. 576, 584 (E.D. Va. 2010) (refusing to enter protective-order provision that would have denied in-house counsel access to trade secrets and other confidential information in lawsuit between competitors).

<sup>136</sup>Even if courts were required to consider “necessity” before allowing sharing orders in trade secret cases, most already do so (at least implicitly) when crafting the sharing provision in the order. See *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1995) (rejecting argument that necessity requirement of California trade secret privilege foreclosed sharing protective orders and noting that “[s]ince plaintiff’s attorney may share this discovery only with counsel in other similar cases, it must be assumed that the information is also discoverable in these other similar cases”). The sharing provision in a sharing protective order defines the class of similar litigants who are entitled to receive the discovery information. Sharing provisions are often quite specific. So, for instance, a sharing provision might provide that the sharing class includes all persons with pending claims against the defendant in the sharing case for injuries stemming from the particular product at issue in the sharing case. Assuming the discovery at issue is necessary to resolve the sharing case, it would presumably be relevant and necessary in the receiving cases as well. See *id.* Product design information, for

Two uncontroversial legal principles support framing the inquiry in this way. First, absent a valid protective order, litigants may freely distribute information that they obtain in discovery.<sup>137</sup> Thus, discovery sharing, and even public dissemination, is the default without a valid order to the contrary.

Second, a contested protective order is valid only where the party seeking it establishes good cause (or an analogous legal standard) for the order by producing concrete evidence of a serious and clearly defined injury.<sup>138</sup>

Federal courts and state courts routinely reject requests for non-sharing orders because inadequate (or no) evidence of competitive harm supports the requests.<sup>139</sup> By doing so, courts also further their own interest (and the public's interest) in litigation efficiency.<sup>140</sup>

Proponents of a no-discovery-sharing regime reject this evidence-based approach and the efficiency benefits that flow from it.<sup>141</sup> They would

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instance, would likely be necessary in any case where the parties allege the product is defective. Assuming the sharing provision in the protective order limits sharing to cases where parties allege the product is defective, the court has effectively found the information necessary in those later cases.

<sup>137</sup> See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984); *Exum v. U.S. Olympic Comm.*, 209 F.R.D. 201, 205 (D. Colo. 2002) (“Parties to litigation have a First Amendment right to disseminate information they obtained in discovery absent a valid protective order.”); see also *infra* Part III.B.

<sup>138</sup> See, e.g., *Masinga v. Whittington*, 792 S.W.2d 940, 940 (Tex. 1990) (holding that party “must show particular, specific and demonstrable injury by facts sufficient to justify a protective order”).

<sup>139</sup> See, e.g., *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 221 (D. Mont. 1986) (ruling that “burden will be upon defendants to make a specific showing of harm or competitive disadvantage which will result from disclosure” to similar litigants); cf. Benham, *supra* note 2, at 2191–93.

<sup>140</sup> See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) (“[S]hared discovery makes the system itself more efficient.”); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 464–66, 466 n.61, 495–96 (1991) (endorsing at least some form of discovery sharing, noting pro-sharing state legislation); Miller, *supra* note 8, at 498–99 (embracing sharing where it furthers efficiency); see also HARE, JR. ET AL., *supra* note 7, at 69–70 (observing that non-sharing protective orders mean that discovery “must be repeated anew in every case”).

<sup>141</sup> Cf., e.g., *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011).

instead inject a de facto presumption of harm into every trade secret case to justify forbidding sharing protective orders categorically.<sup>142</sup>

But a no-evidence-required take on protective orders would nullify decades of Texas law and would put the Supreme Court of Texas in conflict with federal and state courts across the country.<sup>143</sup> A discovery-sharing ban in trade secret cases would also make litigation more expensive and run contrary to Texas procedural reform aimed at increasing litigation efficiency.

### A. Evidence-Based Protective-Order Standards

As detailed in Section II.A, Texas and federal courts require parties requesting protective orders to produce evidence of “a particular, articulated and demonstrable injury, as opposed to conclusory allegations.”<sup>144</sup> Along the same lines, courts have long recognized that in the context of trade secrets or confidential commercial information, parties must establish that an economic or competitive harm would occur without entry of a protective order.<sup>145</sup>

Despite this baseline proof requirement, courts have undeniably broad discretion in tailoring protective orders, “frequently finding protection justified and frequently denying protection.”<sup>146</sup> This discretion is rooted in

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<sup>142</sup>*Id.* Florida courts, for instance, have found sharing protective orders to be inconsistent with that state’s trade secret privilege. *Id.* In *Wal-Mart v. Endicott*, an intermediate appellate court held that a sharing protective order conflicted with Florida’s qualified trade secret privilege. *Id.* Moreover, the court found that the sharing order’s failure to adequately identify litigants with similar pending claims would harm Wal-Mart’s interests, whether competitors were in the sharing class or not. *See id.*

<sup>143</sup>*See, e.g.,* *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1995) (holding trial court did not abuse its discretion by allowing sharing order in case involving trade secrets). *But see Endicott*, 81 So. 3d at 490.

<sup>144</sup>*Masinga v. Whittington*, 792 S.W.2d 940, 940 (Tex. 1990); *Garcia*, 734 S.W.2d at 345.

<sup>145</sup>*See, e.g.,* *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 484 (3d Cir. 1995) (finding that parties seeking protective order failed to establish harm from disclosure and refusing to upset trial court’s denial of protective order); *see also, e.g.,* *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (denying protection where GM failed to prove that discovery information was “confidential and that disclosure [would have] create[d] a competitive disadvantage for the party”).

<sup>146</sup>WRIGHT ET AL., *supra* note 59, at § 2036; *see also* Benham, *supra* note 2, at 2192.

trial courts' unique position in managing the pretrial discovery process and the fact-intensive nature of the protective-order inquiry.<sup>147</sup>

But discretion does have limits.<sup>148</sup> As guidance, several federal circuits have articulated factors to shepherd trial courts exercising protective-order discretion. For instance, in a widely cited analysis from *Glenmede Trust Co. v. Thompson*, the Third Circuit held—consistent with the Texas high court's public policy-based approach in *Garcia*—that courts should consider, among other factors, “whether the sharing of information among litigants will promote fairness and efficiency.”<sup>149</sup>

Thus, along with Texas courts, federal courts have constructed a protective-order system of bounded discretion, demarcated by proof of good cause and influenced by public policy considerations. And like Texas courts, federal courts value discovery sharing, though courts in the federal system differ with one another on how best to accomplish it. Some federal courts enter sharing protective orders.<sup>150</sup> Others disfavor upfront sharing protective orders and instead prefer later, case-by-case modification to allow sharing.<sup>151</sup>

### B. *The Freedom to Disseminate Discovery Information*

If a court does not find adequate cause for a protective order, parties are free to disseminate the materials to other litigants or the public at large.<sup>152</sup> Thus, the decision to “allow” discovery sharing is actually a decision not to enter a protective order to forbid it. Over the past four decades, the idea that

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<sup>147</sup> See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (“To be sure, Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.”).

<sup>148</sup> See, e.g., Benham, *supra* note 2, at 2192 (citing, e.g., *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011) (applying multi-factor analysis to assess “good cause” for protective order)).

<sup>149</sup> 56 F.3d at 483; cf. *Garcia*, 734 S.W.2d at 348 (holding that sharing promotes “public policies” of efficient, transparent court operations).

<sup>150</sup> See, e.g., *In re Abbott Labs. Sec. Litig.*, No. 92 C 3869, 1993 WL 616693, at \*4 (N.D. Ill. Nov. 15, 1993) (allowing sharing with attorneys in pending cases).

<sup>151</sup> See *Bertetto v. Eon Labs, Inc.*, Civ. No. 06-1136 JCH/ACT, 2008 WL 2522571, at \*2 (D.N.M. May 29, 2008) (rejecting a sharing provision in preference to a system of case-by-case protective-order modification). Some might argue that sharing decisions should be made on a case-by-case basis through after-the-fact protective order modifications. Modifying protective orders on a case-by-case basis, however, is often less efficient than Texas's current sharing-protective-order framework. See Benham, *supra* note 10, at 1781.

<sup>152</sup> See, e.g., *Exum v. U.S. Olympic Comm.*, 209 F.R.D. 201, 205 (D. Colo. 2002).



discovery can be made public unless a court orders otherwise has become entrenched.<sup>153</sup> This freedom, it turns out, has a constitutional root.

In *Seattle Times Co. v. Rhinehart*, the United States Supreme Court considered whether a litigant had a First Amendment right to publish pretrial discovery information.<sup>154</sup> The dispute began when a Washington state trial court entered a protective order in a quirky defamation case.<sup>155</sup> The order forbade a defendant newspaper from publishing religious information it obtained in discovery from the defamation plaintiffs (a religious sect and its leader).<sup>156</sup>

Writing for the Court and striking a pragmatic tone, Justice Lewis Powell observed that civil discovery can be particularly invasive.<sup>157</sup> Nonetheless, the Court held that the First Amendment protects the dissemination of pretrial discovery.<sup>158</sup> Ultimately, however, the Court also held that discovery was a special context, and thus protective orders were not the type of prior restraints that would require the usual exacting First Amendment scrutiny.<sup>159</sup>

Instead, the Supreme Court held that protective orders satisfy the First Amendment only where they are “*entered on a showing of good cause as required by Rule 26(c)*, [are] limited to the context of pretrial civil discovery, and [do] not restrict the dissemination of the information if

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<sup>153</sup> See, e.g., Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938–2006*, 78 U. COLO. L. REV. 817, 825 n.35 (2007) (cataloguing cases in which courts noted the right to disseminate pretrial discovery absent a valid protective order).

<sup>154</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 22 (1984); see also Benham, *supra* note 10, at 1781.

<sup>155</sup> See *Seattle Times Co.*, 467 U.S. at 26–27.

<sup>156</sup> See *id.* at 27.

<sup>157</sup> See *id.* at 34–35.

<sup>158</sup> See *id.* at 31 (“It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court.”).

<sup>159</sup> See *id.* at 33–34. *Seattle Times* is often cited for the blanket proposition that there is no First Amendment right of “access” to pretrial discovery materials. See, e.g., *Bond v. Utreras*, 585 F.3d 1061, 1077 (7th Cir. 2009). *Seattle Times* does so hold, but this aspect of the case does not speak to whether parties may disseminate discovery. Parties may not have a protected right to access discovery information, but they do have a First Amendment right to disseminate discovery information. *Seattle Times Co.*, 467 U.S. at 37. This speech interest may be restricted only by a protective order that satisfies *Seattle Times*’ requirements. *Id.*

gained from other sources . . . .”<sup>160</sup> Thus, courts that enter protective orders without good cause (or presumably a standard requiring a similar evidentiary showing) violate the First Amendment in addition to ignoring the requirements of the applicable rules of civil procedure.

The evidence-based good cause analysis approved in *Seattle Times* works to constrict the breadth of protective orders. The decision to grant or deny a protective order is not binary: A court considering a protective-order request does not simply decide to enter an order or not. Instead, courts must evaluate whether the scope and breadth of the particular order is justified.<sup>161</sup>

At one end of the spectrum, an audience-limiting protective order might limit the audience for discovery materials to an *in camera* review.<sup>162</sup> At the other end, a court might deny a protective-order request altogether, allowing widespread public dissemination of discovery materials.<sup>163</sup>

The distinction between the two scenarios, and scenarios along the spectrum in between, often lies in differences between the proof of harm put forward by the party seeking the order. Protective orders crafted on a proof-of-harm basis answer the concern that litigants engaged in intrusive discovery might suffer serious harm without a sufficient audience limitation (e.g. an order forbidding access to competitors or the media). But the proof-of-harm requirement also protects speakers who have a right to share what they learn in discovery when doing so is not harmful.

Presuming harm (expressly or implicitly) in trade secret cases through an outright ban on discovery sharing would turn this evidence-based

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<sup>160</sup> See *Seattle Times Co.*, 467 U.S. at 37 (emphasis added). Courts are divided on whether the proper First Amendment test for protective orders is simple good cause or intermediate scrutiny. Cf. *In re Requests for Investigation of Attorney E.*, 78 P.3d 300, 310 (Colo. 2003) (en banc) (applying intermediate scrutiny to a protective order under an attorney discipline rule analogous to Rule 26(c)). For a full discussion of the split and its implications, see Benham, *supra* note 10, at 1784–85. For purposes of this case, and without conceding that the good cause standard sufficiently protects plaintiffs’ speech rights, it is incontestable that good cause is the *minimum* standard a protective order must meet to satisfy the First Amendment. See *Seattle Times Co.*, 467 U.S. at 37.

<sup>161</sup> See *Seattle Times Co.*, 467 U.S. at 36 (Protective-order rule “confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.” (emphasis added)).

<sup>162</sup> See, e.g., *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 221 (D. Mont. 1986).

<sup>163</sup> See, e.g., *Stone Connection, Inc. v. Simpson*, No. 4:07-CV-431, 2008 WL 1927033, at \*1 (E.D. Tex. Apr. 28, 2008) (denying protective order in trade secret case where “conclusory statements” did not “suffice” to establish good cause for the order).

approach on its head, obviating the First Amendment burden typically placed on parties seeking speech-restricting protective orders.<sup>164</sup>

### C. *Competitor Cases*

One argument against sharing protective orders is that attorneys in the sharing class (representing similar litigants, not competitors of the producing party) might inadvertently or intentionally leak protected documents.<sup>165</sup> Those documents, the reasoning goes, could then fall into the hands of competitors.

But how do courts address the risk of harmful disclosure in the higher risk context of cases *between* competitors? It turns out that they require specific and substantial evidence of harm before denying access to proprietary discovery information, even in cases involving *direct* competitors.<sup>166</sup>

For example, in *Volvo Penta of the Ams., Inc. v. Brunswick Corp.*, a federal district court refused to enter an onerous “outside-counsel-only” protective-order provision in a competitor case.<sup>167</sup> This provision would have prevented virtually everyone but the parties’ outside counsel from viewing discovery information.<sup>168</sup> The court declined to include the provision because there was no evidence that an in-house lawyer was involved in competitive decision making for her employer.<sup>169</sup>

In *Volvo*, like most complex cases, both parties had agreed that some form of protective order was appropriate.<sup>170</sup> The disagreement before the court was which of two competing orders was adequate—a narrower version allowed in-house counsel access while a broader version forbade it.<sup>171</sup> The court’s decision was particularly high stakes because *Volvo* and *Brunswick* were apparently “hostile” competitors.<sup>172</sup>

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<sup>164</sup> See, e.g., *Kamp Implement*, 630 F. Supp. at 220 (approving sharing protective order and recognizing that the “burden” to obtain a non-sharing order remains “squarely upon defendants, as is required by Rule 26(c) and the first amendment”) (internal quotations omitted).

<sup>165</sup> See *Volvo Penta of the Ams., Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 243, 245 (E.D. Va. 1999).

<sup>166</sup> See *id.* at 242.

<sup>167</sup> *Id.* at 245.

<sup>168</sup> See *id.* at 241.

<sup>169</sup> *Id.* at 242–45.

<sup>170</sup> *Id.* at 241.

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

The district court, citing the seminal circuit case on outside-counsel protective orders, denied the outside-counsel-only provision.<sup>173</sup> The court went on to observe that Brunswick's in-house counsel testified in an affidavit that she had no role in "competitive decision making."<sup>174</sup> Volvo produced no specific contrary evidence to establish that disclosing the documents to the in-house lawyer would harm its competitive position other than to contend she *might* inadvertently disclose the information to someone in her company with the power to make a competitive decision.<sup>175</sup>

The court recognized the risk of inadvertent disclosure by an otherwise protective-order-abiding in-house attorney but noted that in-house lawyers "like any other retained attorney, must serve as 'officers of the court' and must abide by the 'same Code of Professional Responsibility and ethics.'"<sup>176</sup> As a result, the court "could not merely assume that in-house attorneys would allow confidential information to fall into the hands of their employer."<sup>177</sup> After concluding that no evidence indicated that Brunswick's in-house lawyer played a role in the company's competitive decision making, the court held that it should enter the less restrictive protective order and allow her access.<sup>178</sup>

*Volvo* is one among dozens of representative cases applying the "competitive-decision-making" analysis to limit the scope of protective orders in direct competitor cases.<sup>179</sup> In many of these cases, including decisions emanating from Texas federal courts, trial judges allow one competitor's in-house counsel access to another competitor's proprietary information.<sup>180</sup> And in many instances, courts do so because the party seeking to exclude in-house lawyers from viewing the information does not put forward specific evidence of serious harm that would flow from such a

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<sup>173</sup> See *id.* at 243.

<sup>174</sup> *Id.* at 244.

<sup>175</sup> See *id.* at 243.

<sup>176</sup> *Id.* (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)).

<sup>177</sup> *Id.*

<sup>178</sup> See *id.* at 243–45.

<sup>179</sup> See also, e.g., *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 274 F.R.D. 576, 583–84 (E.D. Va. 2010).

<sup>180</sup> See, e.g., *Life Techs. Corp. v. Biosearch Techs., Inc.*, No. 2:09-CV-283-TJW-CE, 2011 WL 1157860, at \*3 (E.D. Tex. Mar. 29, 2011) (allowing access to competitor's in-house attorneys where no specific evidence supported risk of disclosure).

disclosure—even where the lawyer works *directly for* the competing company.<sup>181</sup>

Like in-house attorneys who are allowed access to their competitors' trade secrets, the non-competitor attorneys in the typical discovery-sharing case who would receive trade secret information under the sharing provision should be required to agree not to disclose the information inappropriately.<sup>182</sup> And although there is some negligible risk of inadvertent disclosure under any protective order, sharing or non-sharing, attorneys receiving shared discovery “must serve as ‘officers of the court’ and must abide by the ‘same Code of Professional Responsibility’ and ethics” as the attorneys who first receive the information in the original case.<sup>183</sup>

A similar argument against sharing posits that protective orders have been violated in the past and therefore could be violated in the future.<sup>184</sup> But this argument ignores the reality that all protective orders, sharing and non-sharing, can be violated. Thus, if one accepts a version of the world where the violability of protective orders means they are always inadequate, no protective order would ever suffice to protect trade secret information. Some have suggested as much—arguing to the court that all protective orders may be insufficient to protect trade secrets.<sup>185</sup> Accepting this argument could mean Texas Rule of Evidence 507 would function much like an absolute privilege—trade secrets would be beyond litigants' reach, even if justice depended on their disclosure.

By its own language, Rule 507 is not an absolute privilege, however.<sup>186</sup> The court recognized this, holding that “protective orders” may be “appropriate” to protect trade secrets and rejecting a contention that Texas Rule of Evidence 507 should function like an absolute privilege.<sup>187</sup> To accept the position that speculative, unspecified protective-order violations

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<sup>181</sup> See, e.g., *id.*

<sup>182</sup> See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (noting that trial courts can require parties to agree not to disclose shared discovery information inappropriately).

<sup>183</sup> See *Volvo Penta of the Ams., Inc.*, 187 F.R.D. at 243 (quoting *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984)).

<sup>184</sup> Cf., e.g., Brief of Amicus Curiae Product Liability Advisory Council, Inc., In Support of Relator at 7, 9–12, *In re Cont'l Tire of the Ams., LLC* (No. 12-0124), 2012 WL 6042916 (Tex. May 7, 2012).

<sup>185</sup> *Id.* at 7 (“... the reality is that protective orders in trade secret cases frequently do not work . . .”).

<sup>186</sup> See TEX. R. EVID. 507.

<sup>187</sup> See *In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d 609, 612–13 (Tex. 1998).

make protective orders unsuitable is to accept that the second half of Rule 507, which provides for the disclosure of trade secrets pursuant to protective orders, is meaningless.<sup>188</sup> This absolute reading of Rule 507 is inconsistent with Texas and federal law.<sup>189</sup>

#### *D. Modification and Jurisdiction Issues*

Perhaps one explanation for Texas's affinity for sharing protective orders is a possible limitation on Texas courts' jurisdiction to modify protective orders after a final judgment.<sup>190</sup>

Federal courts, by contrast, have long recognized that parties or non-parties (including similar litigants, media, and members of the public) may intervene and request to modify a protective order.<sup>191</sup> This is even true long after cases settle or otherwise reach final judgment.<sup>192</sup>

Many federal courts, in fact, prefer later protective-order modifications to upfront, *Garcia*-style sharing provisions.<sup>193</sup> To understand the difference between an upfront sharing provision and a later modification, imagine that in Case 1, Party X sues Corporation Y alleging that Y's widget injured X. The court in Case 1 enters a non-sharing protective order, allowing X and Y to use discovery information only for the purpose of resolving Case 1. Case 1 settles and is disposed of through a final order or judgment.

Some years later, Party A sues Corporation Y in Case 2, alleging that Y's widget injured A. Party A would like to use discovery from Case 1 (same defendant, same widget) to avoid having to repeat the efforts of Party X.

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<sup>188</sup> See TEX. R. EVID. 507.

<sup>189</sup> See *In re Cont'l*, 979 S.W.2d at 614 (rejecting tire manufacturer's argument that the Rule 507 trade secret protection should operate as an "absolute" privilege).

<sup>190</sup> See *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987) (per curiam) (holding that trial court did not have power to "unseal" litigation documents after plenary power expired).

<sup>191</sup> See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990); cf. Benham, *supra* note 2, at 2210.

<sup>192</sup> See *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988) ("We note that the courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify."); see also MOORE, *supra* note 64, at ¶ 26.106[1] ("As long as a protective order remains in effect, the court that entered the order retains the power to modify it, even if the underlying suit has been dismissed.").

<sup>193</sup> See Benham, *supra* note 2, at 2228–29.

Because the protective order in Case 1, however, is non-sharing, Party X cannot share the information with Party A. Party A may, however, petition the court in Case 1 to modify its protective order to allow Party A to use the Case 1 information in Case 2. Under federal law, the court in Case 1 has ongoing jurisdiction to do so, and courts routinely engage in such modifications.<sup>194</sup>

Texas case law, on the other hand, gives a less-than-clear answer on post-plenary protective-order jurisdiction. In April 1987, a few months before the Texas Supreme Court decided *Garcia v. Peebles*, it decided a lesser-known case that arguably undermined trial-court power to modify existing protective orders.<sup>195</sup> In *Times Herald Printing Co. v. Jones*, a non-party newspaper moved to unseal court files and discovery materials in a civil lawsuit more than five months after an agreed final judgment in the case.<sup>196</sup>

Chief Justice Hecht, then presiding trial judge of the 95th District Court in Dallas, denied the motion.<sup>197</sup> The Dallas Court of Appeals affirmed, agreeing that the trial court had jurisdiction to consider the motion and affirming on the merits.<sup>198</sup>

On writ of error, the Texas Supreme Court reversed in a summary opinion, holding that the trial court's plenary power over the sealing order had expired pursuant to Texas Rule of Civil Procedure 329b.<sup>199</sup> At a minimum, *Times Herald* raises questions about a trial court's power to modify protective orders after cases settle or otherwise reach a final judgment. And one could speculate that *Garcia v. Peebles*, decided months later in July 1987, could very well have been the court's pragmatic recognition that *Times Herald* made sharing through later, post-plenary protective-order modifications untenable.

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<sup>194</sup> See, e.g., *United Nuclear*, 905 F.2d at 1427 (relying on continuing jurisdiction to modify protective orders); see also Benham, *supra* note 2, at 2228–29.

<sup>195</sup> *Times Herald*, 730 S.W.2d at 648.

<sup>196</sup> 717 S.W.2d 933, 935 (Tex. App.—Dallas 1986), *vacated and dismissed*, 730 S.W.2d 648 (Tex. 1987).

<sup>197</sup> *Id.* at 933.

<sup>198</sup> *Id.* at 935.

<sup>199</sup> *Times Herald*, 730 S.W.2d at 649. Specifically, the court took issue with both the trial court hearing a motion from a non-party (the newspaper) that did not intervene before the trial court's plenary power expired and with the court of appeals implying that the district court "only lost its plenary power to *alter* or *change* the judgment and that it still had plenary power to *uphold* the judgment." *Id.*

Since *Times Herald*, the court has not definitively overruled the case to provide for definitive continuing protective-order modification jurisdiction. This uncertainty is in tension with the court's approach to post-plenary injunction modifications outside the protective-order context.

Protective orders are similar, in many senses, to prohibitory injunctions—both forbid certain conduct. An injunction could prohibit a wide range of conduct, e.g., the sale or disposal of property or the enforcement of a particular law. At their root, protective orders forbid a specific type of conduct—speech.<sup>200</sup>

Texas courts have long recognized the power to modify injunctions in light of changed circumstances, even when their plenary power has expired.<sup>201</sup> Any reading of *Times Herald* as an absolute prohibition against post-plenary protective-order modifications (even with evidence of changed circumstances) seems to conflict with the rule that allows courts to modify final injunctions after the ordinary time for doing so has passed.

This conflict may be reason enough to reject *Times Herald* as a limit on protective-order modification. The better approach to modification would allow trial courts to liberally revisit protective orders, even after ordinary jurisdiction has expired. The Texas Supreme Court, however, has not yet explicitly overruled the case in the protective-order context. But Texas Rule of Civil Procedure 76a did create post-judgment jurisdiction for at least a subset of protective and sealing orders.<sup>202</sup> This sliver of jurisdiction has turned out to be quite narrow.<sup>203</sup>

In 1990, the court adopted Texas Rule of Civil Procedure 76a.<sup>204</sup> Rule 76a(7) does create jurisdiction in some protective-order cases.<sup>205</sup> This continuing jurisdiction provision may very well have been, at least in part, a reaction to *Times Herald's* apparent anti-modification holding. Indeed, one of 76a's primary proponents expressly recognized that before the adoption of Rule 76a, intervening to modify a protective order after plenary power

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<sup>200</sup> See generally Donald J. Rendall, Jr., *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766 (1980).

<sup>201</sup> See, e.g., *City of San Antonio v. Singleton*, 858 S.W.2d 411, 412 (Tex. 1993) (“A trial court generally retains jurisdiction to review, open, vacate or modify a permanent injunction upon a showing of changed conditions.”).

<sup>202</sup> See TEX. R. CIV. P. 76a.

<sup>203</sup> See *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 524–25 (Tex. 1998).

<sup>204</sup> See TEX. R. CIV. P. 76a.

<sup>205</sup> See *id.* 76a(7).



expired “was improper because the court entering the order had lost jurisdiction when the judgment became final.”<sup>206</sup>

At a cursory glance, 76a(7) might automatically provide jurisdiction to modify protective orders to allow sharing in all cases. But the rule actually provides continuing jurisdiction to modify protective orders only in cases involving “court records” as opposed to ordinary unfiled discovery.<sup>207</sup> “Court records” under 76a include *filed* documents “of any nature” and a subset of *unfiled* discovery materials that “have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government . . . .”<sup>208</sup>

At another quick glance, then, Rule 76a might apply in a case where the allegations in the petition indicate that unfiled discovery information could reveal that the health and safety of thousands of widget-injury victims (to borrow from the hypothetical above) is in jeopardy. This unfiled discovery could, therefore, be considered “court records” subject to Rule 76a. If so, the rule would provide continuing trial-court modification jurisdiction. But one of the supreme court’s seminal Rule 76a decisions has largely narrowed this route to post-plenary protective-order jurisdiction.<sup>209</sup>

In *General Tire, Inc. v. Kepple*, the court held that trial courts have no self-executing obligation to determine whether unfiled discovery materials are “court records” under Rule 76a.<sup>210</sup> Indeed, where “no party or intervenor contends that the discovery is a ‘court record,’ a trial court need not conduct a hearing or render any findings on that issue.”<sup>211</sup> And Rule 76a’s notice and sealing provisions do not apply to non-court-record discovery.<sup>212</sup>

If Rule 76a’s sealing provisions do not apply, it is unlikely that its continuing jurisdiction provision would apply either. The text of Rule

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<sup>206</sup> Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 681 n.186 (1991) (citing *Times Herald Printing Co. v. Jones*, 730 S.W.2d 648, 649 (Tex. 1987)).

<sup>207</sup> See TEX. R. CIV. P. 76a(7), (9).

<sup>208</sup> *Id.* 76a(2)(c).

<sup>209</sup> See *Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 522–25 (Tex. 1998).

<sup>210</sup> See *id.* at 525. This article does not express an opinion on the correctness or wisdom of the *Kepple* holding.

<sup>211</sup> *Id.*

<sup>212</sup> See *id.*

76a(7) says as much.<sup>213</sup> Indeed, the rule indicates that a court retains jurisdiction over a “sealing order” (a term typically used to refer to orders sealing court records as opposed to protecting ordinary unfiled discovery).<sup>214</sup> Another sentence of the same provision establishes the right of a third party to intervene “at any time before or after judgment *to seal or unseal court records.*”<sup>215</sup> Nowhere does the rule expressly indicate that trial courts have continuing jurisdiction to modify protective orders restricting access to non-court-record unfiled discovery.<sup>216</sup>

Likewise, the text of Rule 76a(9) (Application) expressly indicates that Rule 76a does not apply to run-of-the-mill, non-court-record protective orders.<sup>217</sup> The provision states that “documents in court files not defined as court records by this rule” are subject to “existing law” and not Rule 76a, presumably including its provision for continuing jurisdiction.<sup>218</sup>

Unfiled discovery is a “court record” under Rule 76a only when a party establishes that it concerns public health or the operation of government.<sup>219</sup> But in run-of-the-mill protective-order cases (where no party establishes such facts), the text of Rule 76a(7) and 76a(9), along with the court’s decision in *Kepple*, likely eliminates Rule 76a as a source of post-plenary protective-order jurisdiction.<sup>220</sup>

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<sup>213</sup> See TEX. R. CIV. P. 76a(7). Parties who might seek to obtain continuing jurisdiction over a protective order by filing discovery materials would also be out of luck in Texas. Texas Rule of Civil Procedure 191.4 specifically forbids parties from filing myriad forms of discovery. TEX. R. CIV. P. 191.4 (prohibiting parties from filing documents and tangible things produced in discovery, among other discovery materials).

<sup>214</sup> TEX. R. CIV. P. 76a(7) (emphasis added).

<sup>215</sup> *Id.* (emphasis added).

<sup>216</sup> Courts would undoubtedly have post-plenary jurisdiction to consider whether unfiled discovery comprises “court records” pursuant to Rule 76a(2)(c) and 76a(7). See TEX. R. CIV. P. 76a(7); cf. *Kepple*, 970 S.W.2d at 522–25 (reviewing “court records” determination post-judgment). If unfiled discovery were, indeed, “court records,” courts would also have jurisdiction to modify a protective order (treated as a “sealing” order when court records are involved) restricting dissemination of the material. See TEX. R. CIV. P. 76a(7) (“A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order.”).

<sup>217</sup> See TEX. R. CIV. P. 76a(9).

<sup>218</sup> See *id.* The phrasing is curious in the unfiled-discovery context. Unfiled discovery does not reside in “court files” and discovery comprises more types of information than just “documents.”

<sup>219</sup> See *id.* 76a(2)(c).

<sup>220</sup> Even in cases where courts indisputably have jurisdiction (e.g. before final judgment), Texas law arguably gives trial courts broad discretion to strike interventions aimed at modifying protective orders. Indeed, Texas Rule of Civil Procedure 60 allows trial courts to strike an

This potential lack of jurisdiction would seriously hamper discovery sharing in a jurisdiction that simultaneously forbids upfront sharing provisions (in even a subset of protective orders). In many instances, discovery materials that could aid courts and litigants in resolving pending disputes exist in closed cases.<sup>221</sup> If those materials were produced subject to non-sharing protective orders, and if courts have no power to modify those orders, sharing would be impossible. Individual cases may last two years, one year, or even less than a year. The discovery exchanged in those cases, however, may be pertinent to other similar cases for the better part of a decade (or beyond).<sup>222</sup> In a system without upfront discovery sharing provisions in trade secret cases (the system anti-sharing advocates currently demand), the Texas Supreme Court might react in at least one of three significant ways:

1. A categorical upfront sharing ban would force the court to interpret Rule 76a to provide for continuing jurisdiction over all protective orders, including those that do not restrict dissemination of “court records,” contrary to Rule 76a’s plain language and the court’s decision in *Kepple*;
2. An upfront sharing ban would require the court to overrule *Times Herald* expressly and allow liberal post-plenary modification (the court should do this in any event—courts should have post-plenary power to modify protective orders); OR

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intervention when it is not “almost essential to effectively protect the intervenor’s interest.” *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990). This stands in contrast to federal law, where intervening to modify a protective order is liberally allowed under Federal Rule of Civil Procedure 24. *See, e.g., San Jose Mercury News, Inc. v. U.S. Dist. Court—N. Dist. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir. 1999) (“Nonparties seeking access to a judicial record in a civil case may do so by seeking permissive intervention” under Federal Rule of Civil Procedure 24.). A more malleable intervention standard, like the federal approach, is preferable in the protective-order context.

<sup>221</sup> *See Garcia v. Peebles*, 734 S.W.2d 343, 347 (Tex. 1987).

<sup>222</sup> The prevalence of “return-or-destroy” provisions in many protective orders would also make sharing through later modification untenable. If parties were required to return or destroy otherwise sharable discovery almost immediately after cases close, post-plenary case-by-case sharing would largely fail. Indeed, parties that no longer possess documents would be unable to share them, protective order modification or not.

3. A sharing prohibition would require the court to amend Rule 329b to provide courts continuing jurisdiction to modify protective orders that do not implicate 76a.

Perhaps the easy answer is simply to continue to allow upfront discovery sharing protective orders—orders that are signed when trial courts undisputedly have jurisdiction to do so.<sup>223</sup>

#### IV. DISCOVERY SHARING AND COURT EFFICIENCY

As *Garcia v. Peeples* recognized, one of the “public policies” favoring shared discovery is increased court efficiency.<sup>224</sup> Courts and commentators around the country have long lauded discovery sharing as a mechanism to avoid wasteful rediscovery of the same information in similar lawsuits.<sup>225</sup> The value of these features is echoed by historical and current discovery-reform efforts.

##### A. Discovery Sharing’s Relationship with Litigation Efficiency

While there are subtle disagreements as to the proper mechanism to effectuate sharing, virtually no authority categorically opposes the practice.<sup>226</sup> This unanimity flows largely from sharing’s recognized efficiency benefits.<sup>227</sup> The civil rules echo this pro-efficiency sentiment.<sup>228</sup>

Contrary to frequent anti-sharing arguments, e.g., that courts should focus myopically on particular party interests when considering sharing

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<sup>223</sup> See *Garcia*, 734 S.W.2d at 347.

<sup>224</sup> *Id.* at 346–47.

<sup>225</sup> See, e.g., *Raymond Handling Concepts Corp. v. Superior Court*, 45 Cal. Rptr. 2d 885, 887–88 (Cal. Ct. App. 1995) (affirming trial court’s entry of sharing protective order and citing *Garcia* for the proposition that sharing increases systemic efficiency); *Timmins*, *supra* note 22, at 1543 (preferring protective orders with sharing provisions).

<sup>226</sup> Compare Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 21–22 (1983) (arguing that collateral litigants should establish entitlement to discovery information before sharing, presumably in an intervention and modification proceeding), with *Timmins*, *supra* note 22, at 1543 (preferring protective orders with sharing provisions); see also *Benham*, *supra* note 2, at 2192, 2199–2200. But see *Campbell*, *supra* note 9, at 784 (opposing discovery sharing).

<sup>227</sup> See, e.g., *Garcia*, 734 S.W.2d at 347.

<sup>228</sup> See TEX. R. CIV. P. 1; FED. R. CIV. P. 1.

requests, the rules suggest that courts should actually construe procedural rules to foster systemic efficiency while furthering the quality of justice.<sup>229</sup>

For example, Federal Rule of Civil Procedure 1, largely similar to its Texas counterpart, commands courts and parties to construe and administer the civil rules to “secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>230</sup> Courts’ responsibility to secure efficiency in every case implies that they should account for the systemic impact of rulings in particular cases. Similarly, Texas Rule of Civil Procedure 1 commands courts to give the rules a “liberal construction” to attain justice “at the least expense both to the litigants and the state as may be practicable . . . .”<sup>231</sup>

Well-crafted discovery-sharing provisions complement Rule 1, making litigation less costly for the state’s courts and litigants on both sides of the docket.<sup>232</sup> The efficiencies generated by sharing are relatively straightforward: Parties in litigation obtain previously produced discovery materials and thereby avoid wasteful rediscovery in contemporaneous or subsequent similar cases.

The savings to litigants comes in the form of having to draft fewer discovery requests, fewer responses to those requests, and fewer motions to compel responses because much discovery information is already available from another case.<sup>233</sup> The savings to the court system flows from not having to police discovery disputes, a particularly irksome task for trial judges that is both time consuming and tedious.<sup>234</sup> Fewer discovery requests mean fewer disputes over those requests.<sup>235</sup>

In response to the obvious, commonsense appeal of sharing as a cost-saving measure, anti-sharing advocates contend that sharing actually makes litigation *less* efficient through several clever but flawed arguments.<sup>236</sup> For instance, some contend that defendants will stop

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<sup>229</sup> See TEX. R. CIV. P. 1; FED. R. CIV. P. 1.

<sup>230</sup> FED. R. CIV. P. 1. (emphasis added).

<sup>231</sup> TEX. R. CIV. P. 1.

<sup>232</sup> See Benham, *supra* note 2, at 2216.

<sup>233</sup> See *id.*

<sup>234</sup> Cf., e.g., Brad N. Friedman, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered By a Protective Order*, 60 N.Y.U. L. Rev. 1137, 1154 (1985).

<sup>235</sup> Cf. *id.*

<sup>236</sup> To refute the idea that shared discovery reduces discovery costs, some litigants have cited an increase in discovery costs since *Garcia* was decided in 1987. See, e.g., Relator’s Brief on the

cooperating in discovery to some extent if subjected to sharing orders.<sup>237</sup> According to this pick-up-my-marbles-and-go-home version of the world, trade secret holders are more likely to fight discovery of trade secrets aggressively unless courts forbid trade secret sharing.<sup>238</sup>

It is less than clear that trade secret holders are generally less cooperative in a sharing system. No one has put forward any empirical data to suggest that discovery disputes are more frequent in courts that allow sharing. And defendants still have substantial incentives to cooperate in discovery, whether sharing is allowed or not. Resisting discovery is costly, and in many cases those costs could exceed the negligible value (if any) of avoiding the risk of inadvertent or intentional sharing protective order violations.

The particular incentives are, of course, dependent on the nature of the sharing provision and the nature of the information at issue. Trial courts would be in the best position to determine whether a particular protective-order provision creates a significant incentive to resist discovery.<sup>239</sup> So instead of a categorical no-sharing approach, those courts should be afforded the discretion to include sharing provisions or not, as appropriate to further case and systemic efficiencies based on the circumstances.

Some have also suggested that a decision forbidding trade secret sharing would have a minimal impact because trade secrets do not comprise a large percentage of discovery information.<sup>240</sup> It is true that trade secret information comprises something substantially less than the whole of discovery information.<sup>241</sup> Evidence of the relative percentage of trade secret

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Merits at 42, *In re Gen. Motors LLC*, 2014 WL 1510890 (Tex. Apr. 16, 2014) (No. 13-0794). This argument ignores what most would acknowledge is a substantial, if not primary, driver of increased discovery costs—the explosion of electronic information subject to discovery. *See, e.g.*, WRIGHT ET AL., *supra* note 59, at § 2008.2 (“Electronically stored information can present particularly severe problems” of disproportionate discovery; “One of the consequences of the introduction of the computer has been to increase the amount of information available for a variety of purposes. One of these purposes is responding to discovery . . .”).

<sup>237</sup> *See, e.g.*, Campbell, *supra* note 9, at 824 (“Defendants faced with the prospect that documents produced in one case will generate similar claims throughout the country will more aggressively resist disclosure.”).

<sup>238</sup> *See, e.g., id.*

<sup>239</sup> *See Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987).

<sup>240</sup> *See, e.g.*, Automobile Manufacturers’ Amicus Brief, *supra* note 3, at 40.

<sup>241</sup> *See id.*

information in discovery is scant or non-existent. Thus, the true impact of a trade-secret-sharing ban is likely to remain a guess.

And even if the relative percentage of discovery impacted by a no-trade-secret-sharing rule is in fact small, alleged trade secrets are often among the most important information in the case—the designs of an allegedly defective product, for example, or information about potentially safer alternative product designs. Sharing this vital information among similar cases (where its importance likely means it is requested in every case) would obviate the need to wastefully rediscover it.

A no-trade-secret-sharing rule could actually incentivize parties to seek trade secret status for a broader swath of information. And an increase in resource intensive trade secret hearings could significantly increase the cost of discovery. If a trade secret designation came with a guaranteed non-sharing protective order for any information so designated, defendants inclined to resist sharing could very well burden courts with trade secret hearings. On the other side of the docket, plaintiffs interested in sharing would likely contest trade secret status more frequently than they currently do. Trade secret hearings, particularly in complex cases involving terabytes of information, can be lengthy and onerous. Adopting a no-trade-secret-sharing rule would likely result in more of them.

Another argument proceeds that a no-sharing rule would impose minimal costs because parties can already share discovery *responses* (as opposed to actual discovery *information*) that identify, but do not include, trade secret data.<sup>242</sup> According to this argument, similarly situated litigants could simply request the same data described in the responses and seek to satisfy Rule 507 to the extent trade secrets are at issue.<sup>243</sup>

This suggestion exposes the devil in the details of the proposal—to obtain the information, a party would have to re-request it and potentially consume additional, unnecessary court time to establish the party is “entitled to access.”<sup>244</sup> Under a sharing protective order, on the other hand, parties and courts could skip that discovery fight altogether and simply obtain the materials subject to appropriate disclosure restrictions.

The efficiency gains under a sharing regime would benefit defendants along with plaintiffs. Thus, it is somewhat puzzling that (typically

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<sup>242</sup> See Relator’s Brief on the Merits, *supra* note 236, at 43.

<sup>243</sup> See *id.* at 44.

<sup>244</sup> See *id.*

corporate) defendants continue to vigorously resist the practice.<sup>245</sup> These companies contend, with putative earnestness, that they are concerned about protecting trade secrets and that sharing orders do not do enough to protect those secrets.<sup>246</sup>

But these same parties also stand to benefit from a non-sharing regime in other, less savory ways. In a non-sharing system, each plaintiff would be forced to seek the same discovery in virtually identical cases, imposing costs that might otherwise be avoided by sharing and raising the price of entry for legitimate claims.<sup>247</sup>

Indeed, even if a sharing ban were applied just to trade secret information, the cost of bringing some lawsuits might still increase. Assuming trade secret information is sufficiently necessary to be discoverable in one case under Rule 507, other similar cases would presumably need the information as well.<sup>248</sup> Making necessary information available only after parties run and rerun the expensive gauntlet of the discovery process and privilege fights in virtually identical cases is, in effect, a form of claim suppression.<sup>249</sup>

Based on the costs that a categorical non-sharing rule would impose on courts and litigants, the supreme court, and other courts facing similar questions, should affirm *Garcia's* commitment to efficiency.<sup>250</sup> In an era with increasing discovery and litigation costs, forbidding sharing in even a subset of cases runs contrary to Rule 1's laudable goal of making justice more affordable.

### B. State and National Efficiency Trends

Texas has a history of rulemaking that complements Rule 1's command to reduce litigation costs where possible.<sup>251</sup> In 1994, rule-recommending entities created by the supreme court reached a consensus that litigation had

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<sup>245</sup> See Benham, *supra* note 2, at 2206 (“In many cases, the putative reason for requesting a nonsharing order—to protect competitive information—may be pretextual.”).

<sup>246</sup> See, e.g., Automobile Manufacturers' Amicus Brief, *supra* note 3, at 24–29.

<sup>247</sup> See Benham, *supra* note 2, at 2204, 2206.

<sup>248</sup> See *id.*

<sup>249</sup> See *id.*

<sup>250</sup> See *Garcia v. Peebles*, 734 S.W.2d 343, 346–47 (Tex. 1987).

<sup>251</sup> See 47 ALEX WILSON ALBRIGHT & CHARLES HERRING, JR., TEXAS PRACTICE SERIES: HANDBOOK ON TEXAS DISCOVERY PRACTICE § 2:3 (2014).



become too expensive and burdensome.<sup>252</sup> Justice Hecht (now Chief Justice) expressed his hope for “real restrictions” on discovery.<sup>253</sup>

The rulemaking process ultimately produced what are now widely known as the 1999 discovery amendments.<sup>254</sup> The amendments were intended to “curb abuses and reduce cost and delay.”<sup>255</sup> They created a tiered system of presumptive limits on the number of interrogatories, time limits on depositions, and also a limit on the timeframe to complete discovery.<sup>256</sup> Courts retained the power to adjust the presumptive limits for any case, and parties retained substantial latitude to plead cases out of the most restrictive limits.<sup>257</sup>

More recent amendments to the Texas civil rules also focus on reducing discovery costs and went further in limiting court and party discretion to opt out of discovery restrictions in some cases.<sup>258</sup> In 2013, the court adopted Texas Rule of Civil Procedure 169 and amended Rule 190.2, creating an expedited discovery and trial process for smaller cases.<sup>259</sup> The changes were responsive to the Texas Legislature’s request for “rules to promote the prompt, efficient, and cost-effective resolution of civil actions when the amount in controversy does not exceed \$100,000.”<sup>260</sup>

Like Texas’s efforts, current federal rulemaking aims to make federal discovery efficient.<sup>261</sup> For more than thirty years, federal discovery practice has been the target of reform efforts.<sup>262</sup> These changes reflect a belief (by at least some) that discovery in the American pretrial litigation system can be uniquely intrusive and costly, in both time and money.<sup>263</sup> The costs,

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> MCDONALD & CARLSON, *supra* note 4, at § 13:2.

<sup>255</sup> Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Discovery Rules Revisions* (Nov. 11, 1998), <http://www.adr.com/law1/rules.htm>.

<sup>256</sup> *See* TEX. R. CIV. P. 190, 191, 192, 193, 196, 197, 198, 199; *see also* ALBRIGHT & HERRING, *supra* note 251, at § 2:3.

<sup>257</sup> *See* TEX. R. CIV. P. 190, 191, 192, 193, 196, 197, 198, 199; *see also* ALBRIGHT & HERRING, *supra* note 251, at § 2:3.

<sup>258</sup> *See* TEX. R. CIV. P. 169, 190.2.

<sup>259</sup> *See id.*

<sup>260</sup> TEX. R. CIV. P. 169 cmt. 1.

<sup>261</sup> *See* WRIGHT ET AL., *supra* note 59, at § 2008.1 (describing recent discovery rulemaking efforts); *see also* Benham, *supra* note 2, at 2219–25 (describing recent discovery reform efforts).

<sup>262</sup> *See, e.g.*, WRIGHT ET AL., *supra* note 59, at § 2008.1 (describing efforts to constrain the scope and cost of discovery).

<sup>263</sup> *See* Marcus, *supra* note 35, at 17.

according to these voices, flow from both overbroad discovery requests and unfounded boilerplate objections that consume party resources and court time.<sup>264</sup>

Over the past few decades, rule amendments have repeatedly targeted federal discovery.<sup>265</sup> In 1983, amendments formally introduced the concept that discovery should be “proportional.”<sup>266</sup> Later amendments narrowed the scope of discovery from information relevant to the “subject matter of the action” to information relevant to parties’ claims or defenses.<sup>267</sup>

Most recently, a group of judges, academics, and lawyers convened at Duke Law School in 2010 at the request of the federal Advisory Committee for Civil Rules for a major three-day conference.<sup>268</sup> Some at the conference contended that past amendments had not gone far enough in curbing excessive discovery.<sup>269</sup>

Responding to the Duke Conference concerns, the civil rules advisory committee proposed a package of rule amendments in fall 2013.<sup>270</sup> Among other changes, the proposal would promote the proportionality limitation into federal Rule 26(b)(1)’s discovery scope provision.<sup>271</sup> Based on this express limitation, lawyers framing discovery requests and courts considering discovery disputes should restrict discovery to that which is

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<sup>264</sup> See *id.* at 21.

<sup>265</sup> See, e.g., WRIGHT ET AL., *supra* note 59, at § 2008.1 (describing efforts to constrain the scope and cost of discovery). This Article does not express an opinion on the propriety, wisdom, or potential efficacy of the proportionality amendments.

<sup>266</sup> See Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 172 (1983); see, e.g., WRIGHT ET AL., *supra* note 59, at § 2008.1.

<sup>267</sup> See *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1184 (10th Cir. 2009) (observing 2000 amendment to narrow the scope of discovery).

<sup>268</sup> See Marcus, *supra* note 35, at 17. The conference largely ignored protective-order issues and instead focused on pleading and discovery standards.

<sup>269</sup> See *id.*

<sup>270</sup> See *id.* The Judicial Conference of the United States forwarded a revised version of the proportionality amendment to the Supreme Court for review in April 2015, and the Supreme Court subsequently sent the package of amendments to Congress. See Supreme Court Order, *supra* note 40; Zoe Tillman, *Federal Judiciary Approves Civil Discovery Rules Changes*, LEGAL TIMES (Sept. 16, 2014), <http://www.law.com/sites/articles/2014/09/16/federal-judiciary-approves-civil-discovery-rules-changes/>.

<sup>271</sup> See Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure 284–96 (2013), available at <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.

proportional to the case.<sup>272</sup> In 2015, the United States Supreme Court approved the amendment and forwarded it to Congress.<sup>273</sup> The proportionality amendment became law in December 2015.<sup>274</sup>

The rule now sets the scope of discovery to include relevant, non-privileged information in light of “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden of the discovery outweighs its likely benefit.”<sup>275</sup>

The debate over proportionality’s place in discovery has been heated. A public comment period during spring 2014 produced over 2,300 comments.<sup>276</sup> To some, the amendments did not go far enough in limiting discovery.<sup>277</sup> To others, the new limitations will result in a cataclysmic failure of American pretrial litigation.<sup>278</sup> As with most matters involving public comment by interested lawyers, the truth probably lies in the middle.<sup>279</sup> But it is possible that the changes will lead to at least some reduction of the amount of discovery information exchanged in federal courts.

Consistent with contemporary federal efforts, Texas has long attempted to control discovery costs, from the supreme court’s decision in *Garcia*, to the 1999 discovery amendments, to the recent expedited trial rules.<sup>280</sup> Limitations on discovery sharing stand in stark contrast to these efforts. A non-sharing rule in trade secret cases would be a step backward, forcing parties to engage in wasteful, avoidable rediscovery in similar cases and increasing the burden on the system.

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<sup>272</sup> See Marcus, *supra* note 35, at 20.

<sup>273</sup> See Supreme Court Order, *supra* note 40.

<sup>274</sup> See *id.*

<sup>275</sup> FED. R. CIV. P. 26(b)(1).

<sup>276</sup> See Tera E. Brostoff & Jeffrey D. Koelmay, *E-Discovery Rules Gets Late-Night Rewrite*, *Advisory Committee Approves Rules Package*, 82 U.S.L.W. 1549, 1550 (April 14, 2014).

<sup>277</sup> *Cf.*, e.g., Marcus, *supra* note 35, at 23–24 (“From the perspective of the rest of the world, this package of changes is likely to seem very modest, perhaps minimal.”).

<sup>278</sup> See Benham, *supra* note 2, at 2225.

<sup>279</sup> See *id.*

<sup>280</sup> See MCDONALD & CARLSON, *supra* note 4, at § 13:2; see also ALBRIGHT & HERRING, *supra* note 251, at § 2:3.

## V. CONCLUSION

One of the most curious features of the discovery-sharing fight is that it flips at least some of the players against their traditional positions. Corporate interests and defense lawyers, who typically line up to support pretrial efficiency reforms, lobby against a practice that creates those very efficiencies.<sup>281</sup> In response to this observation, those interests might say that efficiency is not the only important concern in pretrial litigation—protecting proprietary information from undue dissemination to competitors is also important. Sharing, according to these voices, increases the risk of that happening.<sup>282</sup>

But in almost thirty years of sharing in Texas, opponents of the practice have been unable to identify significant problems with attorneys in the sharing class leaking information to competitors or the public at large. The lack of evidence of actual past harm from discovery sharing is deafening in its silence. And it points firmly to another possible motivation: greater savings that might flow from increasing the cost of entry on those who benefit most from discovery sharing.<sup>283</sup> This group includes individuals who claim to have been injured by common products or business practices. While protecting trade secrets in discovery is important, so too is reducing the cost of litigation.

Sharing has few costs and many benefits. Based on the absence of significant evidence that sharing (over a three-decade time period) has deprived anyone of the value of a trade secret, the practice should continue in Texas and beyond.

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<sup>281</sup> See, e.g., Automobile Manufacturers' Amicus Brief, *supra* note 3.

<sup>282</sup> See, e.g., Campbell, *supra* note 9, at 824–25 (sharing increases risk of harm to producing parties).

<sup>283</sup> See, e.g., Benham, *supra* note 2, at 2206.