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THE IMPACT OF RULE 76A: TRADE SECRETS CRASH AND BURN IN TEXAS

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**I. Why Rule 76a is Important to Litigants with Trade Secrets**

Rule 76a applies to the sealing of court records, and provides that all

court records are presumed to be open to the general public and may be sealed only upon a showing of . . .

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the [general] public health or safety; [and]

(b) no less restrictive means [other] than sealing records will adequately and effectively protect the specific interest asserted.<sup>1</sup>

Rule 166b(5) relates to protective orders. Subsection c of Rule 166b(5) states that a court may order, upon a showing of "good cause," that results of discovery be sealed or otherwise protected so that distribution is limited and disclosure restricted. Rule 166b(5)(c) was amended along with the enactment \*96 of Rule 76a to provide that any order under subparagraph c "shall be made in accordance with the provisions of Rule 76a with respect to all court records subject to that rule."<sup>2</sup>

While trade secret owners obviously are concerned about the fact that Rule 76a makes it more difficult to seal court records,

what makes Rule 76a particularly “far sweeping”<sup>3</sup> is that “court records” includes not just documents filed with the Court, but also all “discovery, not filed of record, concerning matters 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>4</sup> One of the few exceptions is for discovery in cases “originally initiated to preserve bona fide trade secrets or other intangible property rights.”<sup>5</sup>

What this means is that in a products liability case, or any case other than a misappropriation of trade secrets or confidential business information lawsuit, all documents and testimony produced during discovery, and all documents filed with the Court, are presumptively open to the public as court records. To protect this information from the public, the party must file a written motion to the court that establishes a specific, serious and substantial interest which clearly outweighs the presumption of openness and any probable adverse effect that sealing will have upon the general public health or safety.<sup>6</sup> In addition, the party also must show that no less restrictive means other than sealing court records will adequately protect the trade secrets.<sup>7</sup> The court must have a public hearing on the motion pursuant to Rule 76a(4) to determine if the trade secret owner has made the necessary showings under Rule 76a(1), and must issue a written opinion granting or denying the motion.<sup>8</sup> The court’s order is immediately appealable under 76a(8).

## **II. Why Trade Secrets Crash and Burn Under Rule 76a**

### ***A. Why Rule 76a Does Not Protect Trade Secrets***

Rule 76a in its present form presumes that all “court records” are open to the general public, even those with valuable trade secret information, if the documents are filed with the court.<sup>9</sup> As stated above, unfiled discovery in cases “originally initiated to preserve bona fide trade secrets or other intangible property rights” is excepted from the definition of court records.<sup>10</sup> Court records may be sealed, as discussed above in Part I, if certain strict procedural hoops and burdens of proof are met. Unfortunately, because the Texas Rules of Civil Procedure require that discovery (i.e., answers to interrogatories, requests for production, and requests for admissions) be filed with the court,<sup>11</sup> parties are exposed to having to file their valuable trade secret information with courts as soon as suit commences and the first discovery requests are made, even in a “bona fide” trade secrets case.

Further, any discovery not filed of record that contains trade secrets may also be accessible to the public, unless the case meets the definition of a case that was “initiated to preserve bona fide trade secrets or other intangible property rights.”<sup>12</sup> This phrase raises the question of what scope of cases fit within the exception, which is difficult to answer due to the vagueness of its terms. For instance, how do “bona fide” trade secrets compare with other trade secrets? The dictionary definitions of bona fide are “made **\*97** in good faith without fraud or deceit, . . . sincere, . . . genuine.”<sup>13</sup> Stated antonyms for the term are “counterfeit and bogus.”<sup>14</sup> Further, the phrase “other intangible property rights” also has not been interpreted by a Texas court. Another problem inherent in such a rule is the difficulty of defining a “trade secret.”<sup>15</sup>

The Texas Supreme Court indicated in *Eli Lilly and Co. v. Marshall*<sup>16</sup> that the above-noted phrase in 76a(2) (c) should be construed liberally to protect trade secrets. The court held that 76a(2) (c) “does not mean that access to trade secrets cannot be limited in other types of litigation. Regardless of the cause of action, a properly proven trade secret is an interest that should be considered in making the determination required by Rule 76a.”<sup>17</sup> *Eli Lilly* was initiated as a products liability suit involving the drug Prozac, and the defendants’ motion for a sealing order was held to have been denied without a proper hearing.<sup>18</sup> If the district and appellate courts follow this directive, there may be hope for preserving trade secret information in cases that are primarily environmental, product liability, tort, and medical malpractice cases. However, the Texas Supreme Court, itself, has sent mixed signals to the lower courts in some of its opinions concerning 76a due to vigorous dissents made by some of the Justices.<sup>19</sup>

Another significant problem with Rule 76a is that it makes all discovery, both filed and unfiled, “court records”, subject to a few exceptions. In a typical lawsuit thousands, and often tens of thousands, of documents are exchanged by the parties. The scope of discovery under the Rules is very broad, such that a company or individual complying with discovery requests is faced with exposing all kinds of private records to the public. This means that interested third parties may make time-consuming and expensive requests for inspection and copying of discovery documents while a case is preparing for trial. Rule 76a also provides no instruction on when public access to unfiled documents ceases. Typically, once litigation ends through trial or settlement, the parties exchange the many documents they obtained from each other or destroy them. Does 76a(7) now impose a costly burden on litigants to store discovery documents for years? A review of the transcript of the proceedings for the Texas Supreme Court Rules Advisory Committee reveals that the committee considered this issue when writing Rule 76(a) without reaching a satisfactory resolution.<sup>20</sup> Because Texas is the *only* legal jurisdiction in the country that makes unfiled discovery documents presumptively open to the public,<sup>21</sup> the Texas Supreme Court or Legislature will hopefully revisit the issue of unfiled discovery soon.

Another intricacy of Rule 76a is that discovery from nonparties is allowed under the Rules, such that third party trade secrets are subject to public access. In addition, court opinions and orders may not be sealed at all.

Furthermore, compelling courts to hold open hearings and to make written findings before they can seal court records is time-consuming for the judiciary and costly to litigants. Moreover, litigants may be forced to stall or limit discovery proceedings while waiting for a ruling from the courts. Often this would delay other discovery such as depositions because discovery of documents is often needed before it is practical to depose the witnesses in a case. Even in cases initiated to preserve trade secrets, one of the parties (often the defendant) may question whether the trade secrets are “bona fide” to avoid an \*98 implied admission that it has been sued over trade secrets that are protectible. This leaves open the question of whether the notice and hearing requirements would then have to be followed.

Rule 76a arguably may lead to unconstitutional takings of property without just compensation under both the U.S. and Texas Constitutions.<sup>22</sup> This is unfortunate since public access to discovery does not add significantly to the administration of justice. Rather than facilitate an efficient and complete examination of the facts and issues, a public right of access unduly complicates the process requiring courts to make extensive evidentiary findings whenever a request is made, and may lead to lengthy and expensive interlocutory appeals.<sup>23</sup> Parties have more incentive now to initiate protracted discovery battles whenever valuable trade secrets are involved.

In summary, as a trade-off for broad public access to all court records, Texas litigants and the State of Texas face the following: destruction of trade secrets through public disclosure; loss of business in Texas, both old and new; additional litigation costs for companies to defend their trade secrets; more protracted discovery battles; and nonparty loss of trade secrets through discovery by the parties. Trade secrets, like some automobiles, appear to be on a collision course in Texas that will cause them to crash and burn.

### ***B. How Rule 76a Has Been Handled By The Courts***

The *Texas Lawyer* surveyed the first fourteen cases under Rule 76a where public notices were posted for motions to seal.<sup>24</sup> It found that eight had resulted in sealings, five had not been ruled upon, and one was denied. The requests to seal had been opposed in only five of the cases. Further, five of the eight sealings were of the whole case file, despite 76a’s “unrealistic requirement of document-by-document review.”<sup>25</sup>

Since the *Texas Lawyer* survey (done in 1991 at the latest), about thirteen cases involving Rule 76a have been published in the reporters. Appendix 1 attached hereto contains a summary of the cases citing Rule 76a which are pertinent to this article. Five of the listed opinions are from products liability cases involving automobiles; another five are from products suits over drugs; and the others are from random cases. The most publicized cases involve products liability suits over the Ford Bronco II vehicle. Numerous articles have been written concerning those lawsuits, some of which are biased toward upholding Rule 76a in its present form.<sup>26</sup>

One of the more interesting cases testing the limits of Rules 76a and 166b(5) is *Ford Motor Co. v. Benson* which was most recently before the Texas Court of Appeals.<sup>27</sup> The appellate court decision revolved around a procedural issue, i.e., that a party may seek a protective order under Rule 166b without seeking a sealing order under 76a. Of particular interest is the long list provided of documents considered by the trial court. Under a Rule 76a analysis, which was found to involve the wrong legal standard, the trial court held that many documents fell outside the “court records” definition, including materials specification documents, market research data, general descriptions of engineering test procedures, and developmental evaluation sheets. The plaintiff apparently failed to show that the documents concerned matters that would adversely affect public health and safety. The Supreme Court opined, surprisingly, that under a 166b(5) analysis, which requires a showing of good cause for protecting \*99 documents from disclosure, the trial court would probably have protected fewer documents from disclosure.

Also of interest is the recent decision in *Eli Lilly and Co. v. Marshall*.<sup>28</sup> The Texas Supreme Court in a mandamus proceeding held that confidential FDA documents were subject to the “good cause” analysis of 166b(5), regardless of the federal regulations holding the information confidential.

In *Dunshie v. General Motors*,<sup>29</sup> the appellate court affirmed the trial court’s ruling that certain documents in a products liability case were not “court records” within the meaning of Rule 76a. The sealed information related to an automobile manufacturer’s development and testing of the restraint system of a car.<sup>30</sup> The trial court did not abuse its discretion in finding that the documents were not “court records” because they were unfiled and did not concern matters that would have a probable adverse effect upon the general public health or safety.<sup>31</sup> The evidence before the court on this issue consisted of the

testimony of an expert witness who reviewed the documents and stated that they did not involve a probable adverse effect upon the general public health and safety.<sup>32</sup>

### ***C. Solutions For The Rule 76a Problems***

The simplest solution to the organizational and substantive problems of Rule 76a is to delete it from the Rules entirely. Following this approach, the amendment to Rule 166b(5) referencing 76a would also be deleted.

The next most effective solution would be to replace Rules 76a and 166b(5) with a concise rule such as FED. R. CIV. P. 26(c). This is attractive because the Rule has been tested in the federal courts and there is plenty of case law construing it. Further, the Texas Supreme Court may find this solution workable since it has held that the federal court standard for determining “good cause” under FED. R. CIV. P. 26(c)(7) also should apply to a motion for a protective order under TEX. R. CIV. P. 166b(5).<sup>33</sup>

Another approach would be to amend Rule 76a. Rule 76a would be improved dramatically if it were amended as follows:

#### **Rule 76a. Sealing Court Records**

1. Standard for Sealing Court Records. Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed, *except that portions thereof may be redacted in part to protect information that the court has ruled should be sealed*. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest, *such as a trade secret or other intangible, property right* which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

2. Court Records. For purposes of this rule, court records means:

(a) all documents of any nature filed in connection with any matter before any civil court, except:

(1) documents filed with a court in camera, solely for the purpose of obtaining a ruling on the discoverability of such documents;

(2) documents in court files to which access is otherwise restricted by law;

\*100 (3) documents filed in an action originally arising under the Family Code;

(4) *documents filed in an action initiated to preserve trade secrets or other intangible property rights.*

(b) settlement agreements not filed of record, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.

(c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except discovery *involving trade secrets or other intangible property rights.*

3. Notice Court records may be sealed only upon a party’s written motion.

4. Hearing. A hearing on a motion to seal court records shall be held as soon as practicable, but not less than fourteen days after the motion is filed. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings, upon payment of the fee required for filing a plea in intervention. The court may inspect records in camera when necessary. The court may determine a motion relating to sealing or unsealing court records in accordance with the procedures prescribed by Rule 120a.

5. Temporary Sealing Order. A temporary sealing order may issue upon motion and notice to any parties who have answered in the case pursuant to Rules 21 and 21a upon a showing of compelling need for specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held as otherwise provided herein. The temporary order shall set the time for the hearing required by paragraph 4 and shall direct that the movant immediately give the public notice required by paragraph 3. The court may modify or withdraw any temporary order upon motion by any party or intervenor, notice to the parties, and hearing conducted as soon as practicable. Issuance of a temporary order shall not reduce in any way the burden of proof of a party requesting sealing at the hearing required by paragraph 4.

6. Order on Motion to Seal Court Records. A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. The order shall not be included in any judgment or other order but shall be a separate document in the case; however, the failure to comply with this requirement shall not affect its appealability.

7. Continuing Jurisdiction. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order. Such circumstances need not be related to the case in which the order was issued. *The burden of showing that a sealing order should be modified shall be on the party seeking to make the change.*

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

9. Application. Access to documents in court files not defined as court records by this rule remains governed by existing law. This rule does not apply to any court records sealed in an action in which a final judgment has been entered before its effective date. This rule applies to cases already pending on its effective date only with regard to:

(a) all court records filed or exchanged after the effective date;

(b) any motion to alter or vacate an order restricting access to court records, issued before the effective date.

Other amendments could be made to improve 76a in its present form, but the above proposal provides at least a roadmap for a better rule.

### **\*101 III. Preventing Trade Secrets From Crashing and Burning**

#### **A. Scenario One: The Case Was Brought To Preserve Bona Fide Trade Secrets**

If you are in a Texas court representing a client with trade secrets or confidential business information, there are several matters to consider. The first item to consider is whether or not the lawsuit was “originally initiated to preserve bona fide trade secrets or other intangible property rights.” If the case was initiated to protect bona fide trade secrets, then under Rule 76a, the unfiled discovery in the case is not a court record.<sup>34</sup> If the plaintiff in suit believes there is a risk that trade secrets may be produced during discovery, then the plaintiff should conduct a full investigation to determine whether it has a legitimate claim for trade secret misappropriation. If so, the trade secret claim should be asserted to remove discovery materials from the definition of court records. Thus, for example, if your client intends to bring suit under a covenant not to compete provision in an employment contract, the facts should be fully investigated to determine if a claim for trade secret misappropriation also can be asserted.

Even if the case was initiated to protect bona fide trade secrets, a protective order should, of course, be sought under TEX. R. CIV. P. 166b(5)(c) to prevent the distribution and disclosure of the trade secret information. Hopefully, the parties will agree to the terms of the protective order so that an agreed order can be submitted to the court. If the parties cannot agree to the terms of a suitable protective order, then a motion for a protective order must be filed under Rule 166b(5)(c).

The protective order obviously should limit disclosure and distribution of trade secret material to protect the property right. The order also should include a statement that the case was brought to protect bona fide trade secrets, and, therefore, that the discovery in the case does not comprise a court record under Rule 76a. Another recommended provision would place an affirmative duty on each party to notify the other party in advance of any filings to the court which would include confidential material. This notice provision gives the owner of the confidential information time to file a motion to seal under Rule 76a. An example of a recommended protective order for a case originally filed to protect bona fide trade secrets appears as Appendix 4 to the authors' previous article on the same subject.<sup>35</sup>

In addition to obtaining a suitable protective order, it must be remembered that any information filed with the court, including trial exhibits, is subject to Rule 76a and is presumed to be open to the public.<sup>36</sup> Consequently, the owner of any trade secret material must move to seal any pleadings or trial exhibits, or any other court records, which include trade secret information.

### ***B. Scenario Two: The Lawsuit Was Not Filed To Protect Trade Secrets***

If the lawsuit was filed for any reason other than to protect bona fide trade secrets, then the definition of court records in Rule 76a includes all of the discovery in the case, even though it was not filed of record, if it "concern [[s] matters that have a probable adverse effect upon the general public health or safety . . . ."<sup>37</sup> The first concern for the trade secret owner, therefore, is to seek to minimize the number of discovery documents and other discovery materials that fall within the definition of court records in Rule 76a.

The easiest way to restrict the number of discovery materials that comprise court records is to negotiate a protective order with the other litigant. The order should specify that because of the property \*102 interests that exist in the trade secret, and because of the possibility that the trade secrets would be lost if publicly disclosed, good cause exists for protecting this information. To adequately protect unfiled discovery materials, the protective order should be limited to all trade secret and confidential information produced during discovery, and should only extend to those documents that do not have a probable adverse effect upon the general health or public safety. If the opposing party agrees, the Rule 166b(5) protective order could include a provision acknowledging that none of the trade secret discovery materials (with perhaps some limited exceptions) concern matters that have a probable adverse effect upon the general public health or safety. Such a provision should effectively eliminate the discovery materials from the definition of court records in Rule 76a because if neither party contends that the discovery materials are court records, then the trial court should not address this issue.<sup>38</sup> The protective order also should restrict the disclosure and distribution of the trade secret discovery materials.

In the protective order, the burden should be placed on the party opposing the designation of confidentiality of any particular document to prove that the document comprises a "court record" under Rule 76a. This practice is in conformance with the holding of *Ford Motor Co. v. Benson*, in which the Fourteenth Court of Appeals held that a party opposing a Rule 166b(5) (c) protective order has the burden of showing the trial court that there first must be compliance with Rule 76a because some of the documents are "court records."<sup>39</sup>

Finally, the protective order should include a provision to the effect that no confidential information will be filed with the Court or used in trial, unless adequate notice is provided to permit the owner of the trade secret to take the necessary steps under Rule 76a to protect this information by obtaining a sealing order. A proposed draft of a protective order that could be used in a lawsuit filed other than to protect bona fide trade secrets appears as Appendix 5 to the authors' previous article cited at footnote 34. Thus, if the litigants are willing to agree to the protective order, an appropriate protective order can be drafted with the necessary language to avoid the requirements of Rule 76a. While the protective order will not extend to sealing of court records, it will protect unfiled discovery.

If the opposing party, however, refuses to agree to a protective order, then the owner of the trade secret should move for a suitable protective order under Rule 166b(5) (c). Under Rule 166b(5) (c), the movant must establish that there is good cause for seeking the protective order to protect matter disclosed in discovery.<sup>40</sup> Normally, trade secrets are sufficient to establish good cause for such a protective order.<sup>41</sup>

When explaining the necessity of the protective order, the owner of the trade secret should note that trade secrets have been recognized as property by the Texas Supreme Court,<sup>42</sup> and the Fifth Amendment of the United States Constitution protects a party's property rights in its trade secrets.<sup>43</sup> Unless public disclosure of the trade secrets is prevented, the trade secrets are irretrievably lost.<sup>44</sup> Once the trade secret owner establishes good cause for a protective order, the order should issue unless the non-movant proves that the discovery documents are court records.

If the non-movant cannot establish that the documents at issue "have a probable adverse effect on the public health and

safety”<sup>45</sup>, then Rule 76a should not come into play. Even if the non-movant does \*103 carry his burden and shows that the discovery documents are court records, the trade secret owner can still obtain a sealing order under Rule 76a if the necessary showing is made. A flow chart illustrating the steps necessary to obtain a protective order for trade secret discovery documents is attached as Appendix 2.

Finally, as to any documents filed with the Court, or any trial exhibits containing proprietary or confidential information, a party must move the court for an order sealing the pertinent court records under Rule 76a.

### ***C. Obtaining A Sealing Order For Court Records***

Rule 76a details the steps that must be taken to obtain an order sealing court records. In doing so, it should be kept in mind that any court order or opinion issued in the adjudication of a lawsuit cannot be sealed. A flow chart illustrating the necessary steps to seal a court record is attached as Appendix 3. Initially, the trade secret owner must file a written motion to the court requesting an order sealing the desired court records.<sup>46</sup> This motion “shall be open to public inspection.”<sup>47</sup> The movant must post a public notice in the appropriate place and the notice must inform all interested parties of the time and date of the hearing so that they can attend and intervene if they desire.<sup>48</sup> The notice also must include the style and number of the case; a brief description of the nature of the case and records sought to be sealed; and the identity of the movant.<sup>49</sup> A verified copy of the notice must be filed with the clerk of the court and the clerk of the Supreme Court.<sup>50</sup>

A public hearing must be held on the motion to seal not less than fourteen days after the date that the motion is filed and notice is posted.<sup>51</sup> Any party may participate in the hearing, including non-parties who may intervene as a matter of right by paying a fee.<sup>52</sup> Rule 76a(4) also provides that the court may inspect records *in camera* if necessary, and that the procedures prescribed in Rule 120a (Special Appearances) should be followed. Rule 120a provides that the court shall decide the matter on the basis of pleadings, stipulations, affidavits, other discovery, and oral testimony.<sup>53</sup> Affidavits must be served at least seven days before the hearing.<sup>54</sup>

A motion to seal (or unseal) court records must be decided by a written order, which is open to the public.<sup>55</sup> The order must include “specific reasons for finding and concluding whether the showing required by paragraph 1 [[[of Rule 76a] has been made; the specific portions of the court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed.”<sup>56</sup> An order granting or denying a motion to seal is a final decision and may be appealed immediately.<sup>57</sup>

In addition to this procedure, Rule 76a(5) also provides for obtaining temporary sealing orders. A temporary sealing order may be obtained “[U]pon a showing of compelling need from specific facts shown by affidavit or by verified petition that immediate and irreparable injury will result to a specific interest of the applicant before notice can be posted and a hearing held . . . .”<sup>58</sup> The issuance of a temporary order does not relieve the movant from later complying with the provisions of 76a, subsections \*104 (3) and (4) (notice and public hearing). If the temporary order is issued, the order must set the time for the hearing and must order the movant to immediately post the required public notice.

## **IV. Conclusion**

Rule 76a poses a threat to trade secrets that are produced during discovery. To protect their property interests, trade secret owners should initially attempt to minimize the number of unfiled discovery materials that fall within the definition of court records provided in Rule 76a. This can be accomplished by obtaining a suitable protective order exempting trade secret discovery materials from court records and placing the burden on the other party to show that the unfiled discovery materials are court records pursuant to *Ford Motor Co. v. Benson*. If the other party successfully argues that the discovery materials have a probable adverse effect on the public health and safety, and thus constitute court records, a motion to seal under Rule 76a must be filed. To obtain an order sealing court records, the procedural hurdles of Rule 76a must be complied with and the requisite showing of Rule 76a(1) must be made.

## **\*105 V. Appendix A: Survey of Cases Citing Rule 76a**

### ***1. Eli Lilly and Co. v. Marshall, 36 Tex. Sup. Ct. J. 507 (Feb. 3, 1993). [[[Interesting case due to its analysis of 166b].***

Second mandamus arising out of a products liability suit concerning the drug Prozac. Trial court ordered production of FDA documents, including any adverse reaction or drug experience reports from physicians and other health care providers, with

only the patients' names redacted. According to 21 CFR 314.430(e) (4) (ii), the FDA must keep confidential the identities of the patient and the reporting party. The Supreme Court considered the issue of whether the federal regulation preempts state law and, therefore, the trial court's order, such that the trial court's order compelling disclosure of the reporters' identities should be set aside. The Court found that the FDA regulations do not preempt Texas tort or discovery law. However, the trial court ordered full disclosure without according any weight to the vital public interest embodied by the FDA regulations and, therefore, failed to apply the correct legal standard for determining if this confidential information should be disclosed under Rule 166b. The reporters' identities should not be disclosed without a showing of particularized relevance and need, in contravention of important congressional objectives.

[J. Cornyn; Dissent by Doggett and Gammage noted]

**2. *Ford Motor Co. v. Benson*, No. C14-92-00369-CV, 1993 Tex. App. LEXIS 4 (Houston [14th Dist.] Jan. 7, 1993).**

Court reversed and remanded. Ruled that the trial court erred in finding that the manufacturer had to comply with Rule 76a before the court could rule on a motion for a protective order under Rule 166b, because no party had made a Rule 76a motion to seal records.

Court held that a party does not have to seek a Rule 76a sealing order if it only wants a protective order under Rule 166b. In other words, you may seek a protective order without seeking a sealing order.

**3. *Chandler v. Hyundai Motor Co.*, No. 01-91-00498-CV (Tex. App.-Houston [1st Dist.] Dec. 23, 1992).**

On remand, the court of appeals held that the Rule 76a hearing requirements were not met prior to entering a protective order and remanded the case to the trial court to conduct a proper evidentiary hearing.

**4. *Chapa v. Garcia*, 36 Tex. Sup. Ct. J. 399 (Dec. 31, 1992).**

Original mandamus proceeding brought on issue of whether the trial court abused its discretion in a products liability action by denying plaintiffs discovery of documents asserted to contain alternative design information for a Remington rifle. Trial court was directed to vacate its order, provide plaintiffs with *in camera* documents the Supreme Court identified for immediate release, and perform a careful review of the remaining documents. Otherwise, the writ of mandamus will issue.

[Gammage; Concurring opinion by Doggett; Dissenting opinion by Hecht, Phillips, Gonzales, and Cornyn]

\***106** Dissent opined that plaintiffs had an adequate remedy by appeal and, therefore, should not have received mandamus relief. Further, the plurality opinion ignored the trade secret privilege asserted to the Remington documents and the need for a protective order.

**5. *The Upjohn Co. v. Marshall*, No. 05-92-02380-CV (Tex. App.-Dallas Nov. 24, 1992).**

Upjohn appealed the trial court's denial of a Rule 76a sealing motion. The Court held that the trial court applied the wrong standard of proof to Upjohn's motion. The Court conditionally granted the writ and ordered the trial judge to reconsider Upjohn's motion. The proper standard of proof is a preponderance of the evidence, not the clear and convincing standard. Note: Upjohn was trying to seal trial exhibits pertaining to the manufacture of the drug Halcion.

**6. *Dallas Morning News, Inc. v. Fifth Court of Appeals*, 36 Tex. Sup. Ct. J. 100 (Oct. 21, 1992).**

This original mandamus proceeding derives from the *Freeman v. Upjohn Company* lawsuit. In that case, the court of appeals issued a temporary order under Rule 76a limiting disclosure of certain documents to the court, the jury, and those trying the case. The Dallas Morning News, Inc. and Public Citizen sought a writ of mandamus to force the court of appeals to withdraw its order and this was denied. The trial exhibits that were protected from disclosure contained trade secrets relating to the drug Halcion. The Court opined that the press and public do not have an absolute right to immediate physical access to all trial exhibits and denied the writ [R. Gonzales].

[Dissent by Doggett, Mauzy, Hightower and Gammage]

**7. *Dallas Morning News, Inc. v. Fifth Court of Appeals*, 36 Tex. Sup. Ct. J. 180 (Nov. 11, 1992).**

Substituted Opinions in Original Mandamus Proceeding [From Chief Justice Phillips and the Dissent by Doggett]

**8. *Davenport v. Honorable Carolyn Garcia, Judge*, 35 Tex. Sup. Ct. J. 894 (June 17, 1992).**

Petition for writ of mandamus conditionally granted in part. Relator contended that a gag order on the court's file constituted an unwritten sealing order in violation of 76a. The real parties in interest disputed this, stating that the file was never sealed. The Court opined that a district court may not escape the strict obligations of the rules by closing the record through an unwritten order. Case involved toxic tort litigation over alleged toxic chemical exposure at the Brio Dump site.

[Doggett; Concurring opinion by Hecht, Cook, and Cornyn]

**9. *Eli Lilly and Co. v. Honorable John Marshall, Judge*, 829 S.W.2d 157 (Tex. 1992) (per curiam).**

Plaintiffs requested discovery of documents relating to the drug Prozac in a products liability suit. Defendant's Rule 76a motion to seal the records was denied. On petition for writ of mandamus, the Texas Supreme Court opined that although Rule 76a's definition of "court records" excludes "discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights, . . . it does not mean that access to trade secrets cannot be limited in other types of litigation". Regardless of the cause of action, a properly proven trade secret is an interest that should be considered in ruling on a Rule 76a motion. Writ conditionally issued.

**\*107 10. *Public Citizen v. Ins. Service Office*, 824 S.W.2d 811 (Tex. App.--Austin 1992, no writ).**

Consumer group that had a representative present during hearing on motion to vacate a protective order was precluded from challenging the trial court's ruling in a subsequent intervention without showing a material change in circumstances. Considered to be an "intervenor who had actual notice" under Rule 76a(7).

**11. *Dunshie v. General Motors*, 822 S.W.2d 345 (Tex. App.--Beaumont 1992, no writ) (per curiam).**

Dismissed for lack of jurisdiction the interlocutory appeal of the trial court's determination that documents in a products liability case were not "court records" under Rule 76a. The sealed information related to automobile manufacturer's development and testing of the restraint system of a car. Trial court found that the documents were not "court records" because they were unfiled and did not concern matters that would have a probable adverse effect upon the general public health or safety. The Court of Appeals found that the trial court did not abuse its discretion in making this determination. Consequently, the provisions for an interlocutory appeal found in Rule 76a(8) did not apply, and the order was not reviewed by direct appeal prior to trial.

**12. *Chandler v. Hyundai Motor Co.*, 829 S.W.2d 774 (Tex. 1992) (per curiam).**

Products liability case alleging defective rear seat belt in Hyundai Excel. Plaintiff obtained discovery of documents relating to the design and manufacture of the seat belt system. Hyundai's request for a protective order limiting dissemination of this information was opposed by the plaintiff under Rule 76a. Plaintiff's request for a hearing under 76a was denied by the trial court. Texas Supreme Court reversed the appellate court's holding that mandamus under the provisions of 76a(8), rather than interlocutory appeal, was the proper method for complaining of the trial court's holding.

**13. *Chandler v. Hyundai Motor Co.*, No. 01-91-00498-CV (Tex. App.-Houston [[1st Dist.] 1991).**

Court held that Rule 76a does not address protection from disclosure of documents during discovery, so the remedy for an improper protective order restricting public access to discovery in a products liability case is by mandamus rather than through appeal procedures set out in Rule 76a(8) (Reversed and remanded by Tx. Sup. Ct.).

**14. *Eli Lilly and Co. v. Marshall*, 829 S.W.2d 156 (Tex. 1991).**

Dissenting opinion by Justice Doggett to order granting leave to file petition for writ of mandamus and to the protective order issued by the Supreme Court.

**15. *Boyles v. Kerr*, 815 S.W.2d 545 (Tex. 1991).**

Upheled trial court's denial of request to copy nondocumentary exhibit (a videotape) and denied Respondent's motion to seal without prejudice to the parties seeking appropriate relief in the trial court. Cited Rule 76a, which states that the trial court retains jurisdiction over its order limiting access to court records. Note: Trade secrets not at issue in this litigation; private information was.

Footnotes

<sup>a1</sup> Jenkens & Gilchrist, Houston, TX.

<sup>aa1</sup> Conley, Rose & Tayon, Houston, TX.

<sup>1</sup> TEX. R. CIV. P. 76a(1) (1990).

<sup>2</sup> TEX. R. CIV. P. 166b(5)(c) (1990).

<sup>3</sup> J. Kiernan and S. Huttler, *More Public Access to Discovery Documents?*, 18 LITIGATION 19, 19-22 (1991).

<sup>4</sup> TEX. R. CIV. P. 76a(2)(c) (1990).

<sup>5</sup> *Id.*

<sup>6</sup> TEX. R. CIV. P. 76a(1) (1990).

<sup>7</sup> *Id.*

<sup>8</sup> TEX. R. CIV. P. 76a(6) (1990).

<sup>9</sup> TEX. R. CIV. P. 76a(2) (1990).

<sup>10</sup> TEX. R. CIV. P. 76a(2)(c) (1990).

<sup>11</sup> TEX. R. CIV. P. 167(1)(c), 168, 169(1) (1990).

<sup>12</sup> TEX. R. CIV. P. 76a(2)(c) (1990).

<sup>13</sup> WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983).

<sup>14</sup> *Id.*

<sup>15</sup> See G. Peterson, *Trade Secrets and Employment Agreements in '92*, 6TH ANNUAL COMPUTER & INFORMATION TECHNOLOGY INSTITUTE, pp. 2-4 (Dallas, Tex. Sept. 16-18, 1992).

<sup>16</sup> 829 S.W.2d 157, 158 (Tex. 1992) (per curiam).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Chapa v. Garcia*, No. C-9639, 36 Tex. Sup. Ct. J. 399, 405 (Dec. 31, 1992) (Phillips, C.J., Hecht, Gonzales, and Cornyn, JJ., dissenting); *Dallas Morning News v. Fifth Court of Appeals*, 36 Tex. Sup. Ct. J. 100, 105-09 (Oct. 21, 1992) (Doggett, Mauzy, Hightower, and Gammage, JJ., dissenting); *Dallas Morning News v. Fifth Court of Appeals*, 36 Tex. Sup. Ct. J. 180, 182-86 (Nov. 11, 1992) (substituted opinion for both the majority and the dissent); *Eli Lilly and Co. v. Marshall*, 829 S.W.2d 156 (Tex. 1991) (Doggett and Mauzy, JJ., dissenting).

<sup>20</sup> See Transcript of Proceedings of the Supreme Court Rules Advisory Committee, Feb. 9, 1990, at 275.

<sup>21</sup> See J. Kiernan and S. Huttler, *More Public Access to Discovery Documents?*, 18 LITIGATION 1, 4-5 n.34, 19-22, 58-59 (Fall 1991); for more discussion of the Committee history prior to enactment of Rule 76a, see, M. Heim and J. Sickler, *Trade Secrets Crash and Burn in Texas*, STATE BAR OF TEXAS PROF. DEV. PROGRAM INTELL. PROP. LAW, vol. 1, § M, M4-M5 (1993).

<sup>22</sup> See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (no First Amendment rights permitting access to discovery materials); *Anderson v. Cryovac*, 805 F.2d 1, 12-13 (1st Cir. 1986).

<sup>23</sup> *Anderson*, 805 F.2d at 12.

<sup>24</sup> J. Kiernan and S. Huttler, *More Public Access To Discovery Documents*, 18 LITIGATION 1, 58 (1991).

<sup>25</sup> *Id.*

<sup>26</sup> See Richard Connelly, *Plaintiffs 76a Victory On Bronco II Reversed*, TEX. LAW., Jan. 18, 1993, at 4; M. Geyclin and N. Templin, *Ford Attorneys Played Unusually Large Role In Bronco II's Launch*, WALL ST. J., Jan. 5, 1993, at \*\*\*\*\*; Steven Laird, *Rule 76a: the Public's Crowbar*, TEX. LAW., Dec. 21, 1992, at 12-13; Bill Hensel, Jr., *Ford To Appeal Court Order To Make Documents Public*, HOUSTON POST, Apr. 14, 1992, at A16; Bill Hensel, Jr., *Ford Wants Documents In Fatal Accident Case Sealed*, HOUSTON POST, Mar. 5, 1992, at A32.

<sup>27</sup> *Ford Motor Co. v. Benson*, No. C14-92-00369-CV, 1993 Tex. App. LEXIS 4 (Houston [14th Dist.] Jan. 7, 1993, no writ).

<sup>28</sup> *Eli Lilly and Co. v. Marshall*, 36 Tex. Sup. Ct. J. 507, 510 (Feb. 3, 1993).

<sup>29</sup> *Dunshie v. General Motors*, 822 S.W.2d 345, 347-48 (Tex. App. -- Beaumont 1992, no writ) (per curiam).

<sup>30</sup> *Id.* at 347.

<sup>31</sup> *Id.* at 347-48.

<sup>32</sup> *Id.*

<sup>33</sup> *Garcia v. Peeples*, 734 S.W.2d 343, 345 (Tex. 1987).

<sup>34</sup> TEX. R. CIV. P. 76a(2)(c).

<sup>35</sup> M. Heim and J. Sickler, *supra* note 21, at M18-M20 (provides other information about Rule 76a as well).

<sup>36</sup> See Rule 76a(1). See also *Dallas Morning News v. Fifth Court of Appeals*, 36 Tex. Sup. Ct. J. 180, 182 (1992) (Doggett, J., dissenting to the court's overruling the motion for leave to file a writ of mandamus).

<sup>37</sup> TEX. R. CIV. P. 76a(2)(c).

<sup>38</sup> See *Ford Motor Co. v. Benson*, No. C14-92-00369-CV, 1993 Tex. App. LEXIS 4, at \*10 (Houston [14th Dist.] Jan. 7, 1993) (error for trial court to determine *sua sponte* that discovery materials are court records under a Rule 166b(5)(c) motion for a protective order); *Dunshie v. General Motors*, 822 S.W.2d 345, 347 (Tex. App.--Beaumont 1992) (no abuse of discretion in trial court's decision that discovery documents in a products liability case were not court records when non-movant offered no evidence to the contrary).

<sup>39</sup> See *Ford Motor*, at \*10.

<sup>40</sup> *Garcia v. Peeples*, 734 S.W.2d 343, 346 (Tex. 1987); *Ford Motor*, at \*12.

<sup>41</sup> *Garcia*, 734 S.W.2d at 346; *Lehnhard v. Moore*, 401 S.W.2d 232, 236 (Tex. 1966) (citing *U.S. v. National Steel*, 26 F.R.D. 603 (S.D. Tex. 1960) (noting absence of absolute right of protection, but clearly placing matter within trial court's discretion)).

<sup>42</sup> See *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 773 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *K&G Oil Tool & Serv. v. G&G Fishing Tool Serv.*, 314 S.W.2d 782, 789-90 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

<sup>43</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). See also Article I, Section 17 of the Texas Constitution.

<sup>44</sup> *Ruckelshaus*, 467 U.S. at 1002.

<sup>45</sup> *Ford Motor Co. v. Benson*, No. C14-92-00369-CV, 1993 Tex. App. LEXIS 4, at \*9-10 (Houston [14th Dist.] Jan. 7, 1993).

<sup>46</sup> TEX. R. CIV. P. 76a(3).

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

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> TEX. R. CIV. P. 76a(4).

<sup>52</sup> *Id.*

<sup>53</sup> TEX. R. CIV. P. 120a(3).

<sup>54</sup> *Id.*

<sup>55</sup> TEX. R. CIV. P. 76a(6).

<sup>56</sup> *Id.*

<sup>57</sup> TEX. R. CIV. P. 76a(8); Eli Lilly and Co. v. Marshall, 829 S.W.2d 156 (Tex. 1991) (Doggett, J. dissenting).

<sup>58</sup> TEX. R. CIV. P. 76a(5).