

IN THE SUPREME COURT OF TEXAS

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No. 97-1171
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IN RE ALFORD CHEVROLET-GEO, ET AL., RELATORS

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ON PETITION FOR WRIT OF MANDAMUS
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Argued on September 8, 1998

JUSTICE HECHT, joined by JUSTICE OWEN, concurring in part and dissenting in part.

Relators are not, I agree, entitled to further abatement of plaintiffs' claims under the Deceptive Trade Practices—Consumer Protection Act,¹ but they are, I think, contrary to the Court's conclusion, entitled to a measure of protection from plaintiffs' initial broad discovery requests pending class certification, as plaintiffs themselves candidly acknowledge. The Court holds that because relators have not proposed a specific, detailed pre-certification discovery plan, the district court did not abuse its discretion in denying the motions for protection in their entirety with a two-sentence order that leaves relators under the obligation to respond fully to plaintiffs' requests for information far exceeding what should reasonably be produced — or for that matter, what plaintiffs can reasonably review — to determine whether the class should be certified. The responsibility for fashioning fair restrictions on pre-certification discovery — something the Court, every authority it cites, and the parties to this proceeding all agree should be done — cannot be cast solely upon the defendants; it must be shouldered by plaintiffs and defendants together, and by the trial court.

¹T EX. BUS. & COM. CODE §§ 17.41-.63.

Defendants should not be denied all protection from overly broad discovery requests merely because they have initially offered to produce too little, any more than plaintiffs should be denied all discovery merely because they have initially asked for too much. The Court faults the defendants for failing to prove what restrictions should be placed on pre-certification discovery without requiring plaintiffs to show how much pre-certification discovery is justified. Responsibility for discovery planning cannot be this one-sided.

I do not argue that the district court in the present case should simply have granted relators' motions and ordered "bifurcation"; such an order would provide no more guidance to the parties than the order denying the motions. I argue only that the district court was required to grant relators more protection than it did from broad discovery on the merits of the putative class's claims before a class is certified, and that its failure to do so was an abuse of discretion. From the Court's contrary conclusion, I respectfully dissent.

I

The named plaintiffs, Jett Jones, Envo-Tech, Inc., Sheryl M. Nickerson, and Leon M. Andrews, III, allege that the motor vehicle dealer from whom each purchased a vehicle added to the negotiated price a charge for a vehicle inventory tax, either misrepresenting that the tax was to be paid by the purchaser or failing to disclose that it was owed by the dealer. Plaintiffs sued 636 Texas motor vehicle dealerships on behalf of all persons who bought vehicles from them since January 1, 1994 — allegedly more than 500,000 persons — contending that defendants all made the same charges accompanied by similar misrepresentations or nondisclosures, and that they conspired to do so. Most of the defendants, now relators in this Court, moved to abate plaintiffs' DTPA claims until

after plaintiffs had given notice of their claims as required by the statute, moved to transfer venue, and challenged plaintiffs' standing to sue. Plaintiffs moved for certification of the class.

Plaintiffs' initial discovery request consisted of twenty interrogatories and two requests for production of documents. Relators objected to the request on several grounds, among them that the information sought related to class claims of liability and damages which should not be the subject of discovery until after a ruling on defendants' preliminary motions and certification of a class. Relators moved for protection on this same ground. Relators also objected that production of the requested information would be overly burdensome, but they did not move for protection on this ground except to argue that premature discovery is burdensome.

At a hearing on relators' motions for protection, relators' counsel proposed "that the court grant our motion for protective order and say that plaintiffs are entitled to have discovery" on preliminary issues "and then hav[e] us hammer out exactly what that means". Plaintiffs' counsel responded:

[W]e know this is a matter that we're not going to reach an agreement on. I will say this, and I'll hold out a small olive branch: if there are some very onerous requests in this discovery that are very difficult for counsel, I'll be the first to listen to them to try to accommodate them

* * *

[W]e do not want to put some terrible burden on somebody and I will volunteer that. If they come forward and they say to me, "This is a terrible burden, we can't do that," I will do my best to work it out. But I don't know that — I don't know that there's anything in [the discovery request that's] improper.

The court then asked for argument on each interrogatory and request for production. There followed a lengthy discussion in which relators' and plaintiffs' counsel offered the court reasons why each discovery request, one by one, pertained more to class certification issues or to the putative class's

claims on the merits. As they proceeded, relators' counsel conceded that some requests pertained to certification issues, and plaintiffs' counsel agreed to clarify several requests and to withdraw as premature interrogatories 8(iv), 17, 19, and 20. At the conclusion of the hearing, each side summarized its position. Relators stated:

I would like to state to the court what our position is with respect to each one of these interrogatories, whether we think it's class or merit [discovery], and we believe that Interrogatories No. 1, 2, 3, and 9(a) are class [discovery], and that each one of the remaining Interrogatories, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 are all merit [discovery] and should be abated pending the disposition of the certification of the class. Similarly, we believe that both the requests for production are merit discovery and not class discovery to the — except with respect to [Request No.] 1 to the extent it relates to documents which are identified in Interrogatories 1, 2, 3, and 9(a).

Plaintiffs' counsel responded:

I'm not able to tell the court to what extent these — the answers to these questions and production of this information will be certain to relate to questions only related to class or merit. In my purview at this time all of these questions are important on issues before us: of venue, of the nature of the conspiracy and the defenses to the conspiracy, and to whether or not a class should or should not be certified. I don't know. I can't draw a line that fine, Your Honor, and I think if we're within the discovery rules, we should be allowed to make use of it for all those purposes.

On November 4, 1997, the district court issued a brief order denying defendants' motions for protection without explanation. On November 20, 1997, the court ruled on defendants' objections to specific discovery requests, sustaining some and overruling others. The court's order recites that plaintiffs had withdrawn three interrogatories — 8, 19, and 20 — and the second request for production of documents. This recitation conflicts with plaintiffs' counsel's statements at the hearing, where counsel agreed to withdraw not only Interrogatories 19 and 20 but Interrogatory No. 17 as well, and only subpart (iv) of Interrogatory No. 8. Interrogatory No. 17 asked that for all persons identified as having knowledge of relevant facts relating to the lawsuit and the transactions

or events out of which it arose, “state the information (concerning the subject matter of this lawsuit, whether it relates to the Plaintiffs’ claims or a Defendant’s defense) of which you believe said person has knowledge.” Interrogatory No. 8 asked:

(i) identify each purchaser from whom you have collected vehicle inventory tax since January 1, 1994; (ii) state the amount of vehicle inventory tax collected from each such purchaser; (iii) identify your salesman making the sale of the vehicle to said purchaser; (iv) identify each of your employees who had communications with said purchasers; and (v) identify each document which relates or pertains to the vehicle inventory tax collected from said purchasers, including, but not limited to sales contracts, deal sheets, and “special inventory tax statements” required to be filed by *Tex. Property Tax Code* §23.12B.

Interrogatories 19 and 20 asked for defendants’ current net worth and all 1994 and 1995 balance sheets or similar financial statements. Request for production No. 2 called for all documents relating to defendants’ current net worth.

Following the court’s November 4 and November 20 orders, each of the 636 defendants was required to produce the following information:

- the defendant’s name and dealer number, and each business alias and address for all periods since January 1, 1994
- the name of each automobile trade association of which defendant has been a member since January 1, 1992, the dates of membership, and all documents provided by each such association relating to (i) the liability of an automobile dealer or automobile purchaser [to be defined by plaintiffs] for the payment of the vehicle inventory tax, and (ii) the collection of the vehicle inventory tax
- the date and content of, and the parties to, each communication made by the defendant to an automobile purchaser [to be defined by plaintiffs] at the time of sale concerning (i) the defendant’s responsibility or liability to pay the vehicle inventory taxes collected from said purchaser, (ii) the purchaser’s responsibility or liability to pay vehicle inventory taxes, and (iii) the purchaser’s agreement to reimburse the defendant for vehicle inventory taxes; and all documents reflecting such communications

- the date and content of, and the parties to, each non-privileged communication between the defendant and any other person concerning the collection of vehicle inventory taxes from the purchasers of vehicles [within a time frame to be specified by plaintiffs]
- the name, address, telephone number, and period of employment of each officer, director, and employee who made the decision to collect vehicle inventory taxes from purchasers of vehicles; the documents on which each such person relied; and the date and content of, and the parties to, each non-privileged communication between defendant's employees concerning (i) the collection of vehicle inventory taxes from purchasers of vehicles, and (ii) the explanations to be given purchasers of vehicles concerning the collection of vehicle inventory taxes from them
- the total amount of vehicle inventory tax collected from purchasers of vehicles since January 1, 1994
- the names of all purchasers, salesmen, sales managers, and finance/insurance people with knowledge of relevant facts and the transactions and events pertaining to this lawsuit, and the information such people are believed to have (the Court says that relators were ordered to identify all persons with knowledge of relevant facts,² but the November 20 order limits the people to be identified to certain categories)
- all statutes and governmental regulations that defendant contends authorize collection of vehicle inventory taxes from purchasers of vehicles.

Relators have petitioned for relief from the November 4 order only, arguing that discovery related to the merits of the putative class's claims should be deferred until after the class is certified, if indeed it is. Plaintiffs in response do not quarrel with relators' argument in the abstract but contend that the information ordered produced is relevant to certification issues.

While the case has been pending in this Court, plaintiffs have offered to settle the discovery issue with the following stipulation:

That all discovery, including but not limited to deposition questions, interrogatory answers, and production of documents, that *relates solely* to matters other than

² *Ante* at ____.

certification or pre-certification issues, shall be delayed pending certification or non-certification of the class.

(Emphasis added.) Relators argue that the proposed “relates solely” standard is too broad because it is too easy to find *some* connection between information sought and certification issues. Relators have offered instead this stipulation:

Prior to certification, parties may obtain discovery regarding any matter that is reasonably calculated to lead to the discovery of admissible evidence relevant to class certification. Evidence that *relates primarily* to the proof of liability and damages shall not be discoverable.

(Emphasis added.) Plaintiffs argue that the “relates primarily” standard is too vague and may be used by relators to cut plaintiffs off from information necessary to show that the class should be certified, notwithstanding the first sentence of the proposed stipulation.

Thus, the parties have tried to resolve their discovery dispute, both with respect to specific kinds of information and by attempting to devise a general guideline to be followed, but they have been unsuccessful.

II

What the Court calls “basic discovery principles”³ are not in dispute. When resolution of a threshold issue — like class certification — may significantly simplify or foreclose claims made in a lawsuit, to save the parties undue burden the court should initially restrict discovery to that issue if it is feasible, fair, and efficient to do so. Whether and how to stage discovery necessarily depends on the nature of the specific suit, and while basic guidelines can be generalized, it may often be difficult to determine precisely what discovery should be allowed and what should be deferred. The responsibility for making that determination lies with the trial court assisted by all parties. As the

³ *Ante* at ____.

Manual for Complex Litigation states, “the court should call for a specific discovery plan from the parties”.⁴

Having said all this, the Court then holds that the burden of devising a discovery plan falls solely on the party resisting discovery, and if that party’s plan does not provide for all the discovery to which the requesting party is entitled, the resisting party is entitled to no protection whatever and all the information requested must be produced. Thus, the Court “conclude[s] that, because Relators did not clearly distinguish class and merits discovery, Relators are not entitled to an order bifurcating the two.”⁵ Unless a motion for protective order shows “that the class and merits issues are clearly separable” and that “the requested discovery is relevant only to the merits and not to the certification issues,”⁶ it should be denied. This is a tall order for an advocate: the party seeking protection cannot urge its own adversarial position but must fully accommodate the opponent’s request, as it may be determined to be legitimate, or risk loss of all relief.

The Court states that a “party must produce some evidence supporting its request for a protective order” from “unduly burdensome or unnecessarily harassing” discovery requests,⁷ citing *Garcia v. Peebles*.⁸ There we held that a motion for protection from discovery must be based on “a particular, articulated and demonstrable injury”.⁹ We explained that “a movant must show ‘a particular and specific demonstration of fact as distinguished from stereotyped conclusory

⁴M ANUAL FOR COMPLEX LITIGATION (THIRD) § 30.12 (1995).

⁵ *Ante* at ____.

⁶ *Ante* at ____.

⁷ *Ante* at ____.

⁸ 734 S.W.2d 343 (Tex. 1987).

⁹ *Id.* at 345.

statements.’ Sweeping predictions of injury and ‘[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning,’ do not justify a protective order.”¹⁰ These statements are true in the context in which they were written, namely, a defendant’s motion to limit plaintiff’s use and distribution of trade secret information produced in discovery. We held in *Garcia* that defendant’s affidavit established a confidential interest that the district court properly protected. But *Garcia* does not hold that evidence is always a prerequisite to protection from overly broad discovery requests, and indeed, we have recently reached the opposite conclusion in *In re American Optical Corp.*¹¹

There, plaintiffs claiming asbestos-related injuries requested production of documents that “were not tied to particular products which plaintiffs allegedly used or to the time periods of such use.”¹² The trial court modified plaintiffs’ requests slightly but otherwise overruled the defendant’s objection that the requests were overly broad. In effect, the court’s ruling required the defendant “to produce virtually every document ever generated relating to its products, without tying the discovery to the particular products the plaintiffs claim to have used.”¹³ We held that the court had abused its discretion:

The trial court must make an effort to impose reasonable discovery limits. . . . While the trial court has discretion in fashioning discovery, simply ordering a defendant to produce virtually all documents regarding its products for a fifty-year period is an abuse of that discretion.¹⁴

¹⁰ *Id.* (citations omitted).

¹¹ 988 S.W.2d 711 (Tex. 1998) (per curiam).

¹² *Id.* at 712.

¹³ *Id.* at 711-712.

¹⁴ *Id.* at 713.

The defendant in *American Optical* did not offer evidence in support of its argument that plaintiffs' request was overly broad; rather, it relied on the lack of any discernible relationship between many of the documents requested and the claims pleaded. The defendant argued that because plaintiffs' request was overly broad, it should be struck in its entirety. We disagreed, concluding that although plaintiffs were not entitled to all the information they had requested, they were entitled to significant discovery. Accordingly, we conditionally granted mandamus relief, directing the district court to vacate its order compelling production of documents, but instructed that court to reconsider what discovery should be allowed in light of our opinion.

This Court has never before today assigned the responsibility for determining appropriate discovery to a defendant filing a motion for protection. Repeatedly — in *K Mart Corp. v. Sanderson*,¹⁵ *Dillard Department Stores, Inc. v. Hall*,¹⁶ *Texaco, Inc. v. Sanderson*,¹⁷ and *R.K. v. Ramirez*¹⁸ — we have required not only that the defendant explain why a discovery request was excessive, but also that a plaintiff in response justify the breadth of the request. Today's decision is a sharp and unexplained departure from these cases, requiring a defendant to “specifically differentiate[] class and merits discovery.”¹⁹ It is not good enough for a defendant to show that *some* of the proposed discovery is overly broad, for relators here have done that, as plaintiffs themselves concede. The discovery ordered by the district court essentially requires 636 car dealers to name

¹⁵ 937 S.W.2d 429 (Tex. 1996) (per curiam).

¹⁶ 909 S.W.2d 491 (Tex. 1995) (per curiam).

¹⁷ 898 S.W.2d 813 (Tex. 1995) (per curiam).

¹⁸ 887 S.W.2d 836 (Tex. 1994).

¹⁹ *Ante* at ____.

every person and produce every document related to any transaction in which the inventory tax was involved. By plaintiffs' own estimate, there are hundreds of thousands of such people. Plaintiffs candidly conceded at the hearing before the district court that requiring a statement of what everyone with relevant information is believed to know is too broad at this juncture in the case. In counsel's exact words:

I think that's burdensome at this time, Your Honor. I agree with [relators'] counsel. We'll withdraw that interrogatory [No. 17]. I think it is. At a later point we may try to refine it once we know who the salesmen are.

Notwithstanding, the district court required relators to provide the information, and from that ruling this Court affords relators no relief.

The Court surmises — without any showing by the plaintiffs — that “class and merits discovery *are likely to be intertwined* because the Plaintiffs allege oral and written misrepresentations that vary from one class member to another.”²⁰ The Court is so anxious to invent arguments for plaintiffs it lapses into illogic. For example, the Court explains:

Because whether a fraud was committed may depend on how the add-on charge was characterized, the variations in those characterizations may undermine the requisite commonality and typicality needed for class certification. Classwide discovery may uncover further variations in those representations weighing against class certification.²¹

In other words, full discovery of what representations were made to every putative class member might defeat class certification. But that is not a reason to allow *plaintiffs* classwide discovery. Plaintiffs do not want the broad discovery they have requested so that after going to the expense of

²⁰ *Ante* at ____ (emphasis added).

²¹ *Ante* at ____ (citations omitted).

finding out what was told every one of the more than 500,000 possible class members, the class will not be certified!

“[C]lasswide discovery”, the Court says, “*may* uncover a common thread of deceit running through the dealerships’ various representations weighing in favor of class certification.”²² That’s true, it may; but it just as well may not, and at this point, there is absolutely no way to tell. What is nearly certain is that it will not be necessary to interview a million or more people to determine if there is enough evidence of a conspiracy to certify a class. Pre-certification discovery should be limited, or at least conducted in phases, so as to focus on proof for certification rather than proof of liability. “Relators’ proposed bifurcation order”, the Court says, “*could* prevent Plaintiffs from obtaining facts essential to class determination.”²³ Assuming this is true, the Court’s conclusion — that relators are entitled to no relief whatever — does not follow. “An order abating all merits discovery”, the Court adds, “*could* prevent Plaintiffs from showing a common thread of deceit in Relators’ various representations or other elements of commonality and typicality, potentially defeating certification.”²⁴ Again, limits on discovery *could* hamper plaintiffs, but there is no showing that they *will*. To punish relators for arguments they *might* make by requiring them to produce vast amounts of information beyond the scope of immediate concerns cannot be justified. At one point the Court observes that “production obligations [should] be sequenced or phased, postponing production of the most sweeping discovery requests”,²⁵ but it does not require the parties to do so

²² *Ante* at ____ (emphasis added).

²³ *Ante* at ____ (emphasis added).

²⁴ *Ante* at ____ (emphasis added).

²⁵ *Ante* at ____.

in this case. Rather, it refuses to disturb the district court’s denial of any significant protection from full discovery on the claims of the putative class.

III

When a party’s attempted reach exceeds its legal grasp, we routinely limit the reach; we do not amputate the hand. So, for example, in *American Optical* we rejected defendant’s argument that “due to the overbreadth, plaintiffs’ entire request for production should be struck.”²⁶ Instead, we concluded that “rather than . . . attempting to set the precise bounds of discovery in the first instance, we believe the trial court should have an opportunity to reconsider its ruling in light of our opinion today.”²⁷ Likewise, when a party is less forthcoming than it must be in discovery, the solution is to order appropriate discovery, not force excessive discovery. Thus, in *K Mart Corp. v. Sanderson*, we concluded that defendant should be protected from only that part of a discovery request that was objectionable.²⁸ In *Texaco, Inc. v. Sanderson*, we held that plaintiffs were entitled to some discovery but were not entitled to compel production of all the information requested.²⁹ Our conditional grant of mandamus relief in that case expressly did not preclude plaintiffs from seeking appropriate discovery. And in *R.K. v. Ramirez*, we conditionally granted mandamus relief directing the trial court to reconsider what portions of defendant’s medical records should be discoverable.³⁰

²⁶ *American Optical*, 988 S.W.2d at 713.

²⁷ *Id.* at 713-714.

²⁸ *K Mart*, 937 S.W.2d at 431 (“We do not hold that a request as broad as [plaintiff’s — for all documents relating to the incident in which she was injured —] is proper in every circumstance. Here, however, the district court did not abuse its discretion in enforcing [plaintiff’s] requests, except for requiring production of work product.”).

²⁹ *Texaco*, 898 S.W.2d at 815 (“While plaintiffs are entitled to discover evidence of defendants’ safety policies and practices as they relate to the circumstances involved in their allegations, a request for all documents authored by [a corporate official] on the subject of safety, without limitation as to time, place or subject matter, is overbroad.”).

³⁰ 887 S.W.2d at 844.

Contrary to all these cases, the Court not only denies relators any relief, it makes any further relief in the trial court virtually impossible. Even if the Court contemplates that relators can go on filing motions for protection until they propose a discovery plan that is just right for everyone, given that relators have failed thus far, it is most unlikely that they — or anyone else in their position — can ever succeed.

The Court admonishes: “As with all litigants, we expect class-action litigants to cooperate on discovery plans and make any agreements reasonably necessary for the efficient disposition of the case.”³¹ The Court all but ignores the fact that plaintiffs and relators have tried to resolve their differences. Each side proposed a stipulation to guide discovery: plaintiffs offered to forego discovery “related solely” to issues other than certification, and defendants offered to produce all information reasonably calculated to lead to the discovery of admissible evidence relevant to class certification, deferring discovery “related primarily” to liability and damages. The parties discussed each specific request with the trial court. Counsel for plaintiffs and relators were very professional and remarkably cooperative in attempting to reach accord, but as plaintiffs’ counsel candidly told the trial court, “this is a matter that we’re not going to reach an agreement on.” Neither the parties nor their counsel should be faulted for refusing to “cooperate on discovery plans”.³² They have all tried but have not succeeded. When parties try but simply cannot in good faith resolve their differences over discovery and seek a judicial decision, the Court’s view is that the party resisting discovery loses.

³¹ *Ante* at ____.

³² *Ante* at ____.

The Court faults relators for not being definite enough in delineating pre-certification discovery. But the trial court and the parties in the present case went through each of plaintiffs' interrogatories and document requests one by one. They discussed at length the relevance of each to certification issues. It takes only a modicum of common sense to see that if plaintiffs must know what every one of more than 500,000 vehicle purchasers, every salesmen who sold any of them a vehicle, all those salesmen's sales managers, and all the finance and insurance personnel involved in the transactions knew about the charge of vehicle inventory taxes, either plaintiffs do not have any real chance of having the class certified, or they are using discovery to extort a settlement. Plaintiffs' counsel, to his credit, acknowledged to the district court that such discovery is overly broad. But this Court concludes that the district court did not abuse its discretion in denying relators protection from a discovery request plaintiffs conceded was excessive at this point in the litigation. Indeed, the Court will not even require that discovery be limited to information that relates primarily to certification issues in accordance with plaintiffs' offered stipulation.

Finally, the Court faults relators for failing to prove that plaintiffs' request is unduly burdensome. An assertion that discovery is burdensome should be supported by evidence, but relators make no such assertion. They expressly, repeatedly disavow any such assertion. Their claim is not that compliance with plaintiffs' discovery request will consume immense time and resources, although that is altogether obvious; rather, their claim is that the information requested is broader than necessary to resolve the threshold issue of class certification. Relators are entitled to make this claim based on the face of the request and the pleadings, just as was done in *American Optical*, *K Mart*, *Texaco*, and *Dillard*.

The Court asserts that “[r]elators did not give the trial court or this Court *any* guidance on how to distinguish merits and certification discovery, much less how to evaluate to what issue the challenged discovery ‘primarily’ relates.”³³ It is quite clear that relators did not give this Court *enough* guidance, and it is fairly clear that relators will be hard pressed to meet the Court’s demands, but it is flat not true that relators did not provide *any* guidance. The Court is equally incorrect in stating that relators seek “abat[ement] of *all* Plaintiffs’ discovery requests”.³⁴ Relators have volunteered to answer several of plaintiffs’ interrogatories and have offered to agree to discovery of all information that “relates primarily” to class certification issues. The Court faults relators for not “produc[ing] any evidence that their existing discovery obligations are unduly burdensome”³⁵ when burdensomeness is not their claim. In all fairness to relators and plaintiffs both, as well as their able counsel, the Court’s exaggerated criticisms are not the kind that can ever be satisfied.

IV

Often at some point in litigation, sometimes fairly early on, the game is no longer worth the candle. Defendants in this case must be close to that point. Plaintiffs in their DTPA notice letter demanded \$20 million in actual damages, a little less than \$40 for each putative class member. Divided equally among the 636 defendants, plaintiffs’ demand comes to almost \$31,500 apiece. Paying their own attorney fees and plaintiffs’, defendants can meet plaintiffs’ demand now for a fraction of what their expenses will be after today’s ruling. Or they can fight on, and if they prevail,

³³ *Ante* at ____ (emphasis added).

³⁴ *Ante* at ____ (emphasis added).

³⁵ *Ante* at ____.

incur expenses only several times over what they face today — a pyrrhic victory if ever there were one. For defeat to be preferable to victory is, or rather should be, an odd concept of justice.

The civil litigation system is pricing itself out of the dispute resolution market, and this case is a prime example. The principal legal issues — whether vehicle dealers have the right to charge vehicle inventory taxes to purchasers, and whether any misrepresentations of the charges were actionable — are not complex and should not require extensive discovery. The venue and certification issues are not much more complicated. The parties have tried to work through their differences on discovery but have been unsuccessful. What is needed is judicial direction, and that is what the Court denies.

I would direct the district court to reconsider relators' motions for protection and formulate a fair and efficient discovery plan. Because the Court refuses this course, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: June 10, 1999