PRE-SUIT DEPOSITIONS UNDER RULE 202: A SURVEY OF HOT BUTTON ISSUES

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I. BACKGROUND OF RULE 202.

Texas Rule of Civil Procedure 202 provides for the taking of depositions prior to the filing of suit. Rule 202 was promulgated by the Texas Supreme Court in 1999 and "replaces and limits the 'bill of discovery' of repealed Rule 737."[1] Former Rule 737 allowed for depositions of any person to investigate potential claims or anticipated suits. The State Bar Court Rules Committee had advocated the repeal of Rule 737 because it was used to depose key witnesses for a later suit without giving notice to the target of that suit.

However, plaintiffs' lawyers asserted that Rule 737 investigatory depositions were useful tools to investigate potential claims and often led them to not pursue lawsuits. They further explained that, when investigating a claim, they could not swear that they anticipated filing suit or give notice to all potential parties, as the Court Rules Committee proposal required.

Rule 202 balances these concerns by "expressly permit[ting]] pre-suit investigatory depositions but limit[ing] the extent to which they can be used in a subsequent lawsuit if an eventual party did not receive notice of the deposition." Rule 202 also is "a rewrite of former Rule 187 that is broadened somewhat" and like former Rule 187, provides for pre-suit depositions to perpetuate testimony in anticipation of a lawsuit.

Thus Rule 202 specifies two scenarios where pre-suit depositions are proper: investigating a potential suit, or preserving witness testimony in an anticipated suit. As such, it is arguably the broadest provision for pre-suit depositions in the nation.[2] And although the Texas Supreme Court has cautioned that Rule 202 depositions are not for routine use,[3] they are an increasingly popular discovery tool in Texas. This paper summarizes some of the hot button issues regarding Rule 202.

II. DOES RULE 202 AUTHORIZE TWO, MUTUALLY EXCLUSIVE TYPES OF PRE-SUIT DEPOSITIONS?

There has been some confusion in Texas as to whether Rule 202 depositions to investigate suit on one hand, and Rule 202 depositions in anticipation of suit on the other, are mutually exclusive. For example, the Tenth Court of Appeals has identified "two distinct and separate reasons" for filing a Rule 202 petition."[4] In contrast, the Fourteenth Court of Appeals has implied that the two types of pre-suit depositions are not mutually exclusive.[5]

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[1] Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* G-17 (1998).

[2] Thirty two states have adopted Federal Rule of Civil Procedure 27, which provides for pre-suit depositions to perpetuate testimony, but not to investigate potential claims. FED. R. CIV. P. 27. Fourteen states use different language, but have adopted the same meaning and scope of Federal Rule 27. A few states allow discovery to perpetuate testimony and to confirm the proper defendant to sue or the factual allegations to be included in a suit. Only Alabama's rule is potentially as broad as Rule 202. *See, e.g.*, *Ex Parte Anderson*, 644 So.2d 961 (Ala. 1994).

[3] *In re Jorden*, 249 S.W.3d 416, 423 (Tex. 2007) (orig. proceeding).

[4] *In re Denton*, No. 10-08-00255-CV, 2009 WL 471524, at *1 (Tex. App.—Waco Feb. 25, 2009, orig. proceeding) (mem. op.)

[5] *In re Emergency Consultants, Inc.*, 292 S.W.3d 78, 79 (Tex. App.—Houston [14th Dist.] 2007, orig. proceeding) (per curiam) (By its terms, Rule 202 instead requires a trial court to order a deposition if it makes one of two findings . . . . After an evidentiary hearing, the trial court made both findings in this case. Relators have not established that the trial court abused its discretion in making these findings."); *see also Cognata v. Down Hole Injection, Inc.*, No. 14-06-

The text of the Rule suggests that it contemplates two distinct types of pre-suit deposition that are not interchangeable. For example, Rule 202.1 provides that a petitioner can request pre-suit depositions "either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."[6] Further, Rule 202 requires a petitioner to state "either [] that the petitioner anticipates the institution of suit . . . or that the petitioner seeks to investigate a potential claim."[7]

The Rule also articulates two, distinct standards that must be met before a trial court can order a pre-suit deposition, depending on whether the petitioner seeks a pre-suit deposition for an "anticipated suit" or to "investigate a potential claim." Thus, a pre-suit deposition to be taken for an "anticipated suit" may be granted only if the trial court finds that doing so "may prevent a failure or delay of justice."[8] A pre-suit deposition to be taken to investigate a potential claim or suit, on the other hand, may be ordered only if the trial court finds that the likely benefit to petitioner of taking such depositions outweighs the burden or expense imposed by the procedure.[9]

Rule 202 also sets forth differing venue provisions depending on whether the petition concerns pre-suit depositions for an anticipated suit or, alternatively, for investigating potential claims. Specifically, Rule 202.2(b) states that when suit is anticipated, the petition must be filed in a proper court of any county "where venue of the anticipated suit may lie."[10] But when the petition involves the investigation of a potential claim, *i.e.*, a Rule 202.1(b) pre-suit deposition, the Rule requires that the petition be filed in the county "where the witness resides."[11]

Finally, petitions for pre-suit depositions in anticipation of suit must conform to additional requirements. For example, Rule 202.2(e) requires that a petition seeking pre-suit depositions in an anticipated suit must "state the subject matter of the anticipated action, if any, and the petitioners' interest therein."[12] Further, Rule 202.2(f) requires that a petition seeking pre-suit depositions in an anticipated suit must provide the names, addresses, and telephone numbers of the persons a petitioner expects to have interests adverse to petitioners in the anticipated suit, or alternatively state that the information "cannot be ascertained through diligent inquiry, and describe those persons."[13]

There is also a notice requirement applicable only to petitions filed in anticipation of suit. Rule 202.3 provides that "if suit is anticipated," at least fifteen days before the Rule 202 hearing the petitioner must serve "all persons petitioner expects to have interests adverse to petitioners in the anticipated suit with a copy of the petition and notice of hearing."[14]

Recognizing these distinctions in Rule 202 between the procedures applicable to a pre-suit deposition for an "anticipated suit" as opposed to a pre-suit deposition to "investigate a potential claim," it appears that most Texas courts view Rule 202 as "offer[ing] two exclusive avenues of relief for

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00976-CV, 2012 WL 2312086, at *10 n.3 (Tex. App.-Houston [14th Dist.] June 19, 2012, pet. filed) (finding that trial court made required findings where trial court ruled that allowing depositions would prevent failure or delay of justice and benefit would outweigh burden).

[6] TEX. R. CIV. P. 202.1.

[7] *Id.* 202.2(d).

[8] *Id.* 202.4(a)(1).

[9] *Id.* 202.4(a)(2).

[10] *Id.* 202.2(b)(1).

[11] *Id.* 202.1(b)(2).

[12] *Id.* 202.2(e).

[13] *Id.* 202.2(f).

[14] *Id.* 202.3(a).

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