Inside Counsel

Two unique forms of pre-lawsuit discovery that can help win Texas-based or bankruptcy cases

Texas Rule of Civil Procedure 202 and the Bankruptcy Rule 2004 examination tool can both significantly advance a client's position

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Inside counsel should be aware of two unique forms of pre-lawsuit discovery — Texas Rule of Civil Procedure 202 and the Bankruptcy Rule 2004 examination tool — that can significantly advance a client's position or, conversely, be used to obtain discovery from your organization.

Pre-suit deposition discovery under Texas Rule 202

While the Federal Rules and most states allow some form of pre-suit discovery to perpetuate testimony, Texas permits much broader pre-suit discovery. Specifically, parties may take depositions not just to perpetuate testimony, but also "to investigate a potential claim or lawsuit." As the Texas Supreme Court recently stated: "[N]o other American jurisdiction allows pre-suit discovery as broadly as Texas does." Some states, like New York CPLR 3102(c) and Illinois Supreme Court Rule 224, allow for some pre-suit discovery primarily to identify potential defendants, but often pre-suit discovery cannot be used to determine whether a cause of action exists or in situations where the plaintiff has sufficient information to frame a complaint.

In contrast, Texas Rule 202 commonly has been used not only to identify potential defendants, but also causes of action and to refine legal theories. And it often is used against third parties who may never be defendants. To take pre-suit discovery, a petition must establish either that "allowing the petitioner to take the deposition may prevent a failure or delay of justice in an anticipated suit;" or that "the likely benefit of allowing the petition to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure."

Having to respond to discovery without having a lawsuit to frame the issues can be concerning to the targets of discovery. Thus, the Texas Supreme Court has stated that "Rule 202 depositions are not now and never have been intended for routine use. There are practical as well as due process problems with demanding discovery from someone before telling them what the issues are." At the same time, Rule 202 "does not require a petition to plead a specific cause of action; instead, it requires only that the petition state the subject matter of the anticipated action, if any, and the petitioner's interest therein."

As a result, a plaintiff need not articulate its theory of the case before obtaining discovery. This creates a risk that witnesses will be deposed without understanding the issues in dispute. In addition, witnesses often can be deposed more than once (once during pre-suit discovery and once during the

actual lawsuit). Thus, when a request for pre-suit discovery comes in the door, inside counsel should be vigilant and seek to limit the discovery.

Given Rule 202's broad scope, parties have sought to employ it when the subject of discovery has a presence in Texas, even if the potential defendant does not. In *In re Doe*, the Texas Supreme Court recently scaled back this practice by requiring that the court have personal jurisdiction over the potential defendant. In doing so, the court made clear that "[w]e will not interpret Rule 202 to make Texas the world's inspector general." The ruling further says, "Rule 202 is already the broadest pre-suit discovery authority in the country. If a Rule 202 court need not have personal jurisdiction over a potential defendant, the rule could be used by anyone in the world to investigate anyone else in the world against whom suit could be brought within the court's subject-matter jurisdiction." Despite this important limitation, parties will likely continue to seek to use Rule 202 discovery to take significant discovery before a lawsuit is filed.

Discovery under Bankruptcy Rule 2004

Another commonly used method to obtain pre-suit discovery in certain situations is Federal Rule of Bankruptcy Procedure Rule 2004. Under Rule 2004, "any party in interest" may move the court for the examination of "any entity." Rule 2004(b) provides that an examination "may be related only to acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Thus, Rule 2004 allows for a deposition-like examination that permits broad pre-suit questioning and is often used to discover frauds and other wrongful acts of both the debtors and creditors.

Parties subject to Rule 2004 discovery also are frequently required to produce documents along with sitting for the examination. And often the document requests become the primary motivation of such discovery. One important aspect of Rule 2004 is that any "party in interest" (trustees, creditors, and debtors) may pursue discovery. Like the Texas pre-suit discovery proceeding under Texas Rule 202, the scope of the examination is not limited to the issues that are raised in a formal pleading. As multiple courts have observed, Rule 2004 examination "can be legitimately compared to a fishing expedition."

In large bankruptcy proceedings, the debtors/trustees often obtain an order to serve Rule 2004 discovery without filing a separate motion for each subpoena. This rule provides a powerful tool for debtors/trustees to obtain discovery often without being subject to reciprocal requests. Notably, however, the 2004 examination process may not be used to obtain information for use in a pending litigation. Thus, debtors/trustees often will resort to serving extensive Rule 2004 discovery before filing adversary proceedings, objecting to claims, or otherwise triggering a contested matter, thus potentially obtaining a one-sided discovery advantage.

In sum, in certain circumstances, creative parties can obtain significant advantages by obtaining pre-suit discovery. These can be powerful tools in developing a litigation strategy and should be considered before filing litigation.

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