

INSIGHTS

Texas Supreme Court Holds Trial Court Must Have Personal Jurisdiction Over Potential Defendants Targeted by Rule 202 Pre-suit Discovery

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Introduction and Summary

Rule 202 of the Texas Rules of Civil Procedure allows a Texas trial court to authorize a pre-suit deposition to investigate a potential claim before an actual lawsuit is filed. In *In re John Doe a/k/a "Trooper,"* No. 13-0073, __ S.W.3d __ (2014), the Supreme Court of Texas held that when a petitioner brings a Rule 202 petition, the trial court must have personal jurisdiction over not only the respondent (the party whose deposition is sought), but, if applicable, also over the subject(s) of the pre-suit investigation about whom the respondent is expected to be deposed. Emphasizing that the Rules of Civil Procedure afford defendants with jurisdictional protections to an actual suit, the Court held that a proper court must have personal jurisdiction over third-party potential defendants about whom the pre-suit deposition is sought. In cases such as this one, where the potential defendant's identity is unknown and where that defendant may reside outside of Texas, Rule 202 does not guarantee access to information for every petitioner who claims to need it, even where the party in possession of such information is located in Texas.

Factual and Procedural Background

An anonymous blogger posting under the pseudonym the "Trooper" launched an on-line attack of Reynolds & Reynolds Co., a company that develops and markets software for use by auto dealerships (the "Company"), and its chairman and CEO. The CEO lives in Houston and the Company is headquartered in Ohio but has offices in Texas. The anonymous blogger posted what he called "Reynolds News and Information" which included highly critical commentary about the Company, its products and the CEO.

In response to the blog posts, the Company filed a Rule 202 petition in Harris County district court, noting that they anticipated a suit against John Does a/k/a "Trooper" for alleged libel, business disparagement and breach of fiduciary duty. In the petition, the Company and the CEO sought to depose the service provider that hosted the blog and requested that the service provider disclose the name, address, and telephone number of the owner of the blog and the email address listed on the blog. The Company and the CEO, with the Court's approval, provided the blogger with the required notice of the petition by sending it to the email address listed on the blog.

Appearing anonymously through counsel as "John Doe," the blogger opposed and moved to quash the Rule 202 petition and filed a special appearance based on lack of personal

jurisdiction, asserting his only contact with the State of Texas is that his blog is available to be read in the state. Unpersuaded, the Harris County district court ordered the service provider's deposition. The blogger sought mandamus relief in the court of appeals, which was denied, and then at the Supreme Court of Texas.

Opinion of the Supreme Court of Texas

Analyzing the history of pre-suit discovery in Texas, which dates back to 1879, the Court explained that pre-suit deposition requests have always required that the request be filed in a "proper court." The current rule authorizing such discovery, Rule 202, is no different, requiring that a pre-suit deposition petition be filed in a "proper court of any county" where venue of the anticipated suit may lie, if a suit is anticipated, or where the witness resides, if no suit is yet anticipated. *See* Tex. R. Civ. P. 202 (b). While the rule when enacted "certainly referred to venue," the Court noted that implicitly a proper court must also possess subject-matter jurisdiction over the anticipated action. As the Court explained, "[t]he rule cannot be used, for example, to investigate a potential federal antitrust suit or patent suit, which can be brought only in federal court." The Court went on to hold that, for two reasons, a proper court must also have personal jurisdiction over the potential defendant.

First, the Court stated that "[t]o allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford" and "would circumvent the protections of Rule 120a" regarding special appearances because "the potential claimant could simply conduct discovery under Rule 202 before filing suit" even though such discovery would not be permitted in an actual lawsuit under Rule 120a. Second, the Court stated that "[t]o allow a Rule 202 court to order discovery without personal jurisdiction over a potential defendant unreasonably expands the rule" because "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." Though Texas courts have a history of being "so welcoming of litigation unrelated to the State that even the Supreme Court was forced to acknowledge" that Texas constituted itself the "world's forum of final resort," the Legislature has firmly disclaimed that objection. Therefore, the Court emphasized: "We will not interpret Rule 202 to make Texas the world's inspector general."

Important Takeaways

The Texas Supreme Court's holding is significant in many respects and means that establishing personal jurisdiction over the subject of a Rule 202 investigation will become an important hurdle to properly plead a Rule 202 petition. Rule 202 has been increasingly relied on by plaintiffs in their efforts to investigate internet users by deposing service providers or web site operators, particularly where the users' identities were hard to otherwise ascertain. The Texas Supreme Court's opinion deals a heavy blow to that strategy. According to the Court, a proper court must have personal jurisdiction over the subject of the investigation, even an anonymous one, and this will be an important obstacle for potential plaintiffs seeking discovery under Rule 202. As the Court concludes, "[t]he burden is on the plaintiff in an action to plead allegations showing personal jurisdiction over the defendant," and "[t]he same burden should be on a potential plaintiff under Rule 202." With this hurdle, a potential plaintiff will have a more significant burden to obtain pre-suit discovery under Rule 202 by initially pleading allegations showing personal jurisdiction not only over the proposed respondent, but also over the ultimate subject of the investigation.

Attorneys at Bracewell & Giuliani have experience defending businesses against Rule 202 petitions that seek proprietary or confidential information through pre-suit discovery. If you have any questions about this case or how it impacts your business, please contact any of the authors or the Bracewell & Giuliani attorney with whom you usually work.