Reverse Erie and Texas Rule 202: The Federal Implications of Texas Pre-suit Discovery*

I. Introduction

In recent years, the U.S. Supreme Court has raised federal pleading standards for civil actions. Plaintiffs must now support their claims with factual content, and they must do so before they are entitled to discovery. Given that defendants often control critical information, plaintiffs face a catch-22: they need information to reach discovery, but they need discovery to access information.

Texas Rule of Civil Procedure 202 (Rule 202) can be used as a solution. Unlike analogous provisions of the Federal Rules of Civil Procedure, Rule 202 allows plaintiffs to conduct pre-suit depositions to investigate potential claims. For example, prior to filing a § 1983 claim, a plaintiff could first conduct Rule 202 pre-suit depositions to identify the correct defendants, ascertain the nature of the parties' involvement, and collect evidence of discriminatory intent. Armed with this factual content, the plaintiff could then file suit in federal or state court, and she would be better positioned to meet federal pleading standards.

Though several other states allow pre-suit discovery for limited purposes, only Texas grants broad pre-suit discovery for the investigation of potential claims. Because of this advantage, Rule 202 encourages forum shopping. Plaintiffs that would otherwise be unable to satisfy federal pleading standards due to a lack of information will be in a better position to do so solely because of their connection to Texas. If used in this fashion, Rule 202 undermines the uniformity of federal pleading standards.

Although Rule 202 presents a potentially significant advantage to plaintiffs in Texas, there are two main obstacles—one in federal court and the other in state court—that can prevent the application of Rule 202 to federal claims. First, in federal court, Rule 202 proceedings will likely be dismissed because the federal rules do not permit pre-suit discovery for the investigation of potential claims. Therefore, the removal of a Rule 202 proceeding will amount to a de facto dismissal. Second, in state court, Rule 202 might be preempted by the Reverse Erie doctrine. A petitioner must be able

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to pass both obstacles (removal to federal court and preemption in state court) to use Rule 202 to investigate potential federal claims.

This Note proceeds in three Parts. Part II provides an overview of the scope of Rule 202 and its role in Texas courts. It discusses the goals of Rule 202, the mechanics of Rule 202 proceedings, and the role of pre-suit depositions in the federal system. Next, Part III examines the removability of Rule 202 proceedings and the obstacles that federal courts present to the application of Rule 202 to potential federal claims. Removal will not be possible for the vast majority of Rule 202 petitions. Because neither federal-question jurisdiction nor diversity jurisdiction will be proper for Rule 202 proceedings, removal will depend on alternative statutory grants of federal jurisdiction. These grants are far more limited—they typically address specific issues, such as antitrust, patents, or certain congressionally chartered organizations. But there is one type of case where removal will generally be proper: petitions seeking to depose federal officials acting under color of office will be removable under the federal officer-removal statute, § 1442.

Finally, Part IV assesses whether Rule 202 will be preempted in state court. Even though most Rule 202 proceedings will generally not be removable, they might still be preempted through the Reverse Erie doctrine.[1] Reverse Erie is a federal common law doctrine that applies when state courts adjudicate federal claims. It governs whether federal or state procedure applies in such instances. This Note contends that Reverse Erie will generally not preempt Rule 202 but that preemption may still arise if Rule 202 petitions explicitly rely on federal claims to justify the burdens of pre-suit depositions.

II. Pre-suit Discovery

While the federal courts and most state courts allow for some pre-suit discovery, only Texas grants broad power to investigate potential claims.[2] Most states limit pre-suit discovery to the preservation of witness testimony, which only applies when witnesses might become unavailable (e.g., by dying or leaving the jurisdiction).[3] Several jurisdictions allow pre-suit discovery when the plaintiff already has a claim and merely needs to determine the

1. Academics have used different terms when referring to this doctrine (e.g., "reverse Erie" or "Converse Erie"). This Note will refer to the doctrine as "Reverse Erie."

2. *See* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 240–42 (2007) (asserting that only Alabama and Texas allow for pre-suit depositions to investigate potential claims and describing the limitations of Alabama's rule—both in theory and in practice—relative to Texas's broad grant of pre-suit discovery).

3. *See id.* at 225, 235 (discussing typical pre-suit discovery mechanisms, which are limited to the preservation of witness testimony, and asserting that most states mirror the cramped federal pre-suit discovery rules).

proper party to sue.[4] Much broader in scope, Rule 202 does not require the potential plaintiff to have a well-defined claim; it allows pre-suit depositions even when the potential claims are highly speculative.[5] In addition, Rule 202 is not restricted to potentially liable defendants; it allows depositions of third-party witnesses.

This Note focuses on the application of Rule 202 to federal causes of action. One Texas court has faced this issue but managed to sidestep the larger questions of federal preemption. In *City of Houston v. U.S. Filter Wastewater Group, Inc.*,[6] a petitioner sought to depose City of Houston employees, but because governmental immunity barred most claims, the petitioner's only potential claim against the city (patent infringement) was exclusively federal.[7] The court circumvented the issue by identifying a potential state claim (civil conspiracy) between the petitioner and another corporation and allowed the depositions of the city employees as third parties to that claim.[8] The court did not rule on whether state courts could order Rule 202 depositions based on potential federal claims.[9] This Note seeks to answer that question.

A. The Scope of Rule 202

In 1999, the Texas Supreme Court created Rule 202 by combining two previous pre-suit procedures. The 1999 amendments combined former Texas Rule of Civil Procedure 737 (the equitable bill of discovery) and former Texas Rule of Civil Procedure 187 (the deposition to perpetuate testimony).[10] Of the two, Rule 737 was broader in scope: it allowed for the investigation of potential claims. Rule 187, on the other hand, only allowed pre-suit

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4. *See id.* at 225–26 (asserting that while several jurisdictions permit pre-suit discovery to confirm the proper party to sue, these forums "disallow discovery for the broader investigatory purpose of determining whether a cause of action exists").

5. *See infra* notes 18–24 and accompanying text.

6. 190 S.W.3d 242, 245 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

7. *See id.* at 245 (discussing the City's contention that it was "immune from any state law claims and that the only potentially actionable claim against it" was an exclusive federal patent infringement claim). Although the parties did not raise the issue, it is possible that Rule 202 hearings do not consider affirmative defenses. *See infra* notes 29–33 and accompanying text. The court in *City of Houston* did not decide whether qualified immunity—or other affirmative defenses—could make all suits so infeasible that no potential claims could reasonably exist.

8. *City of Houston*, 190 S.W.3d at 245. U.S. Filter justified the depositions by claiming that the City of Houston employees were the most knowledgeable individuals about facts relevant to the potential claim against Altivia. *Id.* at 244.

9. *See id.* at 245 (mentioning the City's argument that the state court lacked jurisdiction over the petitioner's federal claims but deciding the case on other grounds).

10. *See* NATHAN L. HECHT & ROBERT H. PEMBERTON, A GUIDE TO THE 1999 TEXAS DISCOVERY RULES REVISIONS, at G17 (1998), *available at* http://www.supreme.courts.state.tx.us/rules/tdr/disccle37.pdf (explaining the process by which Rule 202 was drafted); *see also* Roger W. Hughes, *Appealing a Deposition Order Under Tex. R. Civ. P. 202*, APP. ADVOC., Spring 2001, at 10, 10 (discussing the purpose of Rule 202).

depositions for anticipated suits.[11] But Rule 737 lacked several of the procedural safeguards of Rule 187, such as notice requirements.[12] In drafting Rule 202, the Texas Supreme Court retained the broad scope of Rule 737 by permitting pre-suit depositions either in anticipation of suit or to investigate potential claims, but the court also incorporated the notice provisions of Rule 187 as a safeguard against abuses like those that occurred under old Rule 737.[13]

Rule 202 proceedings begin with a petition, which must state that the petitioner either anticipates a suit or seeks to investigate a potential claim.[14] This Note focuses on petitions to investigate potential claims, as opposed to those in anticipation of a suit.[15] Petitions to investigate potential claims must give, among other things, a reason for each witness's testimony and the expected substance of the testimony.[16] In deciding whether to grant a petition, the court applies a balancing test: it asks whether "the likely benefit of allowing the petitioner to take the requested deposition . . . outweighs the burden or expense of the procedure."[17]

In practice, courts have granted petitions almost as a matter of course.[18] Even speculative claims will outweigh the typical burdens (e.g., time and cost) of allowing depositions. In fact, the Texas Courts of Appeals have consistently held that the petition does not need to explicitly state a viable claim[19] because the express purpose of Rule 202 is to allow potential litigants

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11. Hoffman, *supra* note 2, at 242. The State Bar's Court Rules Committee recommended the repeal of Rule 737. *Id.* at 243. Plaintiffs' groups countered that robust pre-suit discovery reduced frivolous lawsuits by enabling plaintiffs to determine the merits of potential claims without having to file suit. *Id.* at 244.

12. *See id.* at 242 (contrasting Rules 187 and 737 and noting the absence of a fifteen-day notice requirement in Rule 737).

13. *Id.* at 245.

14. TEX. R. CIV. P. 202.2.

15. Unless otherwise specified, subsequent discussions of Rule 202 should be interpreted to mean petitions to investigate potential claims as opposed to depositions for the preservation of testimony.

16. TEX. R. CIV. P. 202.2(g).

17. *Id.* R. 202.4(a)(2). The balancing test applies only to investigations of potential claims. Anticipated suits have their own test. *Id.* R. 202.4(a)(1).

18. *See* Hoffman, *supra* note 2, at 258 (describing large-scale, though nonscientific, survey results that indicated that 60%–70% of Rule 202 petitions are granted); Hughes, *supra* note 10, at 10 ("Courts in some parts of the state grant Rule 202 petitions as a matter of course so long as the evidence sought is not privileged.").

19. *See, e.g.*, *In re* Emergency Consultants, Inc. 292 S.W.3d 78, 79 (Tex. App.—Houston [14th Dist.] 2007, no pet.) ("Rule 202 does not require a potential litigant to expressly state a viable claim before being permitted to take a pre-suit deposition."); *In re* Allan, 191 S.W.3d 483, 488 (Tex. App.—Tyler 2006, no pet.) (holding that Rule 202 petitions are appropriate prior to the filing of a health care liability claim and despite a stay of discovery), *mand. conditionally granted*, *In re* Jorden, 249 S.W.3d 416 (Tex. 2008).

to discover whether they have a cause of action at all.[20] For example, in *In re Emergency Consultants, Inc.*[21] the court allowed a doctor to conduct pre-suit depositions even though the doctor's petition did not identify any viable claims.[22] Specifically, the court held that "a potential litigant should be permitted to explore whether claims exist without having to file a lawsuit to do so."[23] The court reasoned that a contrary holding would "eviscerate the investigatory purpose of Rule 202 and essentially require one to file suit before determining whether a claim exists."[24]

There are special considerations, however, that considerably increase the burdens of allowing Rule 202 depositions.[25] For instance, after a team of employees resigned from Dell and joined Hewlett Packard (HP), Dell filed a Rule 202 petition to depose its former employees.[26] Given that the depositions might have required the disclosure of trade secrets, thereby causing "grave and irreparable harm" to HP,[27] the court held that the substantial burdens of granting the depositions outweighed the likely benefits.[28]

Additionally, some Texas courts have held that courts should not address affirmative defenses during pre-suit discovery proceedings. For instance, in *Parker v. Lindsey*,[29] the plaintiff claimed that she was the true creator of the toy dinosaur Barney, and her petition pointed to potential claims over the misappropriation of trade secrets and conversion.[30] Although her claims might have been preempted by federal copyright law and barred by the statute of limitations, the court held that the petitioner was not required to conclusively negate potential affirmative defenses—all that was

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20. *See Emergency Consultants*, 292 S.W.3d at 79 (discussing how a potential litigant should, under Rule 202, be permitted to explore whether claims exist without having to file suit).

21. *Id.* at 78.

22. The doctor's best claim would have involved a violation of the Texas Medical Practice Act, but unfortunately the Act did not provide a private cause of action. Instead, the court allowed the depositions based on the nebulous possibility of a potential contract claim. *See id.* at 79 (upholding the district court's order permitting several depositions despite the lack of specifically identifiable claims).

23. *Id.*

24. *Id.*

25. For example, trade secrets pose a substantial burden because they receive heightened protection during discovery. *In re* Hewlett Packard, 212 S.W.3d 356, 362 (Tex. App.—Austin 2006, no pet.).

26. *Id.* at 359–60.

27. *Id.* at 361. Dell did not dispute this claim. *Id.* at 362.

28. *Id.*

29. No. 05-98-01249-CV, 1999 WL 446067 (Tex. App.—Dallas June 2, 1999, pet. denied) (not designated for publication).

30. *Id.* at *1. This case bridges the 1999 amendments to the Texas Rules of Civil Procedure. The plaintiff first filed a petition for bill of discovery when former Rule 737 was still in effect, but the Court of Appeals reviewed the decision after Rule 202 had replaced Rule 737. *See id.* at *1 n.1 (specifying that the court would apply Rule 737 to the case because Rule 202 only applies to discovery requests filed on or after January 1, 1999).

required was a reasonable basis for believing that a cause of action existed.[31] The court reasoned that pre-suit proceedings could not address affirmative defenses without leading to a full-blown trial on the merits.[32] Furthermore, if the court ruled on the applicability of future defenses that might be asserted, the court would create an impermissible advisory opinion on the merits of those defenses.[33]

B. Federal Pre-suit Discovery

Unlike Texas, the Federal Rules of Civil Procedure do not allow pre-suit discovery for the investigation of potential claims.[34] Federal Rule 27, the primary pre-suit discovery mechanism, only allows pre-suit depositions for the preservation of testimony and requires that the petitioner unequivocally state that he expects to be a party to an action.[35] Thus, Federal Rule 27 resembles former Texas Rule 187—both authorize pre-suit depositions solely for the preservation of testimony in anticipated suits.[36]

Because federal courts have limited mechanisms for pre-suit discovery, federal pleading standards play a critical role in restricting access to discovery. Federal pleading standards have grown more stringent in recent years. *Bell Atlantic Corp. v. Twombly*[37] replaced the traditionally lenient "no set of facts" standard with a stricter "flexible plausibility" standard.[38] Under *Twombly*, plaintiffs must plead enough factual content to allow the

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31. *Id.* at *3.

32. *Id.* at *3 n.8.

33. *Id.*

34. *See* Hoffman, *supra* note 2, at 227 (stating that the established interpretation of the Federal Rules of Civil Procedure does not allow broad pre-suit discovery).

35. FED. R. CIV. P. 27(a)(1).

36. Federal courts might theoretically retain an equitable bill of discovery, a holdover from before the merger of law and equity that stems from an inherent equitable power of federal courts to authorize broad discovery. *See* Hoffman, *supra* note 2, at 232–33 (indicating that Federal Rule 27(c) permits independent actions in the nature of an equitable bill of discovery). In fact, former Texas Rule 737—which explicitly allowed for the investigation of potential claims—codified a similar, preexisting equitable procedure in Texas. *See id.* at 242 (explaining that although former Rule 737 did not include explicit language allowing for the investigation of potential claims, Texas courts interpreted it to include this power based upon equitable principles). The federal equitable bill of discovery, however, has become disfavored. It arguably was disfavored after the 1938 introduction of the Federal Rules of Civil Procedure. *See id.* at 228–29 (noting that several scholars commented disapprovingly of a pre-suit bill of discovery during the Advisory Committee meetings leading up to the 1938 Federal Rules of Civil Procedure). It was explicitly disfavored after the 1991 amendments to the Federal Rules, in which the Advisory Committee Notes "suggest that there is almost no need for a court to invoke an inherent power outside of the Federal Rules to authorize an equitable discovery action." *Id.* at 234.

37. 550 U.S. 544 (2007).

38. *Id.* at 560–61.

reasonable inference that the defendant is liable for the alleged misconduct.[39] Essentially, the plaintiff must amplify a claim with factual allegations.

To collect the necessary facts, plaintiffs traditionally relied on discovery. In 2009, however, *Ashcroft v. Iqbal*[40] held that plaintiffs must pass the flexible plausibility standard *before* they are entitled to discovery.[41] Thus, after *Twombly* and *Iqbal*, plaintiffs must support their claims with specific factual allegations in order to reach discovery, even though discovery is often essential to unearthing the relevant facts. With *Iqbal*, the Supreme Court has created a procedural catch-22 that restricts access to federal courts. In Texas, Rule 202 can mitigate the severity of the federal pleading standards by providing access to pre-suit depositions. Rule 202 could give a potential plaintiff the opportunity to flesh out his claims with specific facts before having to file a complaint or face a motion to dismiss for failure to state a claim.

III. Rule 202 in Federal Courts

On occasion, defendants attempt to remove Rule 202 proceedings to federal court. Given that federal pre-suit discovery does not allow for the investigation of potential claims, these proceedings would likely be dismissed without prejudice.[42] Thus, the removal of Rule 202 petitions essentially amounts to a de facto dismissal.

This Part analyzes the different bases for removing Rule 202 proceedings to federal court. Although federal courts have consistently remanded Rule 202 proceedings to state courts, they have done so for different reasons. Because federal-question and diversity jurisdiction will not be proper, the vast majority of Rule 202 proceedings correctly remain in Texas courts. Removal should be allowed, however, in the limited circumstances where other statutes grant original jurisdiction to federal courts. This suggestion is controversial. Some might argue that Rule 202 proceedings are not removable even when other statutes grant original jurisdiction to federal

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39. *See id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true . . . ." (citations omitted)); *see also* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

40. 129 S. Ct. 1937 (2009).

41. *See id.* at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery . . . .").

42. Although federal law typically governs procedural matters in federal courts, it remains unclear whether federal or state procedure would apply to Rule 202 proceedings after removal. The procedural nature of Rule 202, however, would likely result in federal procedure applying. *See In re* Enable Commerce, Inc., 256 F.R.D. 527, 531–32 (N.D. Tex. 2009) (asserting that while "the law to be applied after removal is unclear," Rule 202 is by nature procedural and thus likely requires the application of federal law).

courts because Rule 202 proceedings are not "civil actions."[43] In fact, district courts have split on whether Rule 202 proceedings are civil actions within the meaning of § 1441. This Note contends that they are and argues that as such, Rule 202 proceedings should be removable when there is a statutory grant of federal jurisdiction. In addition, irrespective of whether they are considered removable under § 1441, Rule 202 proceedings against federal officials should be removable under the federal officer removal statute, § 1442, for activities conducted under color of office.

A. Subject-Matter Jurisdiction

Because a Rule 202 petition does not assert any claims and may never lead to a lawsuit, federal courts have difficulty determining with any certainty whether federal-question or diversity jurisdiction is proper.[44] As courts of limited jurisdiction, federal courts resolve doubts regarding federal jurisdiction with a presumption against removal.[45] Accordingly, many district courts have held that subject-matter jurisdiction is not proper for Rule 202 proceedings.[46]

1. Diversity Jurisdiction.—There are two main sources for subject matter jurisdiction: federal-question and diversity jurisdiction. Diversity jurisdiction will never be proper for Rule 202 proceedings. Under § 1332, the diversity statute, both parties must be completely diverse, and the amount in controversy must be greater than $75,000.[47] In Rule 202 proceedings, however, the amount in controversy will be difficult to determine because Rule 202 does not require the petitioner to allege specific claims or damages.[48] Thus, the scope of future litigation—if suit is filed at all—will be unclear at the time of the Rule 202 hearing.[49]

For example, in *In re Enable Commerce, Inc.*,[50] the defendant sought to remove the Rule 202 proceeding based on diversity of citizenship, citing the transactions between the parties (valued at $200,000 that year) and the total size of the business that would be subject to the potential action (valued at

43. *See infra* notes 73–76 and accompanying text.

44. *Id.* at 531.

45. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994).

46. *See, e.g.*, *Enable Commerce*, 256 F.R.D. at 533 (finding lack of diversity jurisdiction); Page v. Liberty Life Assurance Co. of Bos., No. 4:06-CV-572-A, 2006 WL 2828820, at *5 (N.D. Tex. Oct. 3, 2006) (remanding the case for lack of subject-matter jurisdiction); Mayfield-George v. Tex. Rehab. Comm'n, 197 F.R.D. 280, 283–84 (N.D. Tex. 2000) (finding lack of federal-question jurisdiction).

47. 28 U.S.C. § 1332(a) (2006).

48. *Enable Commerce*, 256 F.R.D. at 532.

49. *Id.*

50. 256 F.R.D. 527 (N.D. Tex. 2009).

$12 million annually).[51] But because the petitioner sought the pre-suit depositions to determine whether to pursue any claims at all, the size and scope of future litigation was unclear.[52] As a result, the court held that the defendant had failed to establish the value of the amount in controversy.[53] The speculative nature of the Rule 202 petition prevented accurate monetary valuation, and the court held that doubts over removal should be resolved against federal jurisdiction.[54]

It is important to note that all diversity cases require some amount of speculation over the amount in controversy. In typical diversity cases, the amount claimed by the plaintiff will control unless the claim was not made in good faith, or it appears "to a legal certainty that the claim is really for less than the jurisdictional amount."[55] This rule should not apply to Rule 202 where the defendant—as opposed to the plaintiff—estimates the amount in controversy, thus adding an additional layer of speculation. In the normal diversity scenario, there is only one layer of speculation: the plaintiff estimates the value of her claim. If she acts in good faith, it is plausible she could recover that amount. In the Rule 202 scenario, the defendant must speculate as to what claims the plaintiff might bring, as well as to the value of those claims. Even if the defendant acts in good faith, she cannot reliably predict which claims, if any, the potential plaintiff may bring.

2. Federal-Question Jurisdiction.—Likewise, federal-question jurisdiction will not be proper for Rule 202 proceedings. Under § 1331, the federal-question statute, federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[56] The Supreme Court has long interpreted § 1331 as requiring a federal question to appear on the face of a well-pleaded complaint,[57] and federal district courts have applied the well-pleaded-complaint rule to Rule 202 petitions.[58] But even when they are based on potential federal claims, Rule 202 petitions will not satisfy the well-pleaded-complaint rule.[59] Rule 202

51. *Id.* at 532.

52. *Id.*

53. *Id.* at 533.

54. *Id.* at 532–33 (quoting Acuna v. Brown & Root Inc., 200 F.3d 335, 339 (5th Cir. 2000)).

55. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288–89 (1938) (citations omitted).

56. 28 U.S.C. § 1331 (2006).

57. *See generally* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908) (establishing the well-pleaded-complaint rule, which requires that the federal question arise from the pleadings rather than from potential defenses).

58. *See, e.g.*, Mayfield-George v. Tex. Rehab. Comm'n, 197 F.R.D. 280, 283 (N.D. Tex. 2000) (asking whether the Rule 202 petition contains a claim or right arising from the Constitution).

59. *See id.* (describing the respondent's contention that a petition based on potential federal claims can be removed and calling the contention baseless).

petitions contain *potential*, as opposed to *actual*, claims.[60] Therefore, actual federal claims will never appear on the face of a well-pleaded Rule 202 petition.

Furthermore, even if potential claims could justify federal-question jurisdiction, federal law would not be incorporated into the state cause of action (i.e., Rule 202) simply because the petition mentions federal claims. Though the existence of potential federal claims may help justify the benefits of allowing pre-suit depositions, the outcome of Rule 202 proceedings will not be determined by applying or resolving issues of federal law. Rule 202 proceedings will be decided purely by the application of Texas procedure; they will not depend on the merits of any potential claims or on the bodies of law from which the potential claims might arise. The court need not adjudicate any aspect of federal law to decide the outcome of a Rule 202 proceeding. Therefore, federal issues are only tangentially related, and petitions to investigate potential federal claims will not arise under federal law.

Similarly, the nebulous nature of potential claims will undermine attempts to establish subject-matter jurisdiction through the complete-preemption doctrine. The complete-preemption doctrine can grant subject-matter jurisdiction but only in "extraordinary circumstances when Congress intended not only to preempt the state law . . . , but to replace it with a federal law."[61] In *Page v. Liberty Life Assurance Co. of Boston*,[62] the petitioner sought to depose employees of Liberty Life Assurance Company under Rule 202.[63] Liberty removed the proceedings to federal court, claiming that the potential state claim would be completely preempted by the Employee Retirement Income Security Act (ERISA).[64] The federal district court remanded the case, holding that it was not required to consider "preemption issues that might arise in a later action."[65] The court's reasoning resembles the approach that some Texas courts have taken with respect to affirmative defenses in Rule 202 hearings. Because such inquiries might lead to impermissible advisory opinions and full-blown trials on the merits of those defenses, some Texas courts have refused to address affirmative defenses in Rule 202 proceedings.[66] The same concerns apply when federal courts consider preemption issues that may or may not arise in a later action. Therefore, the *Page* court was correct in holding that the complete-

60. *Id.*

61. Page v. Liberty Life Assurance Co. of Bos., No. 4:06-CV-572-A, 2006 WL 2828820, at *4 (N.D. Tex. Oct. 3, 2006).

62. *Id.*

63. *Id.* at *1.

64. *Id.*

65. *Id.*

66. *See supra* notes 29–33 and accompanying text.

preemption doctrine should not be a basis for the removal of Rule 202 proceedings.

B. Removal Under § 1441

As has been shown, federal courts typically will not have subject-matter jurisdiction over Rule 202 proceedings because federal-question and diversity jurisdiction will not be proper. Removal could still be possible, however, when other statutes grant original jurisdiction to the federal courts. Section 1441 allows for removal of civil actions when federal district courts have original jurisdiction over the action.[67] Several statutes could potentially provide this basis for removing Rule 202 proceedings, such as those regarding patents, antitrust, or suits involving national banks.[68]

But even if a statute grants federal jurisdiction, Rule 202 proceedings will not be removable unless they are considered civil actions.[69] The definition of a civil action varies among statutes, and in certain instances, two different definitions may need to be satisfied. To begin, all Rule 202 proceedings must meet the definition as outlined in § 1441. For petitions that involve congressionally chartered organizations, this first requirement alone is sufficient. Otherwise, Rule 202 proceedings must also be considered civil actions under the various statutes granting jurisdiction, e.g., § 1333 or § 1337. This Note will focus on the definition of civil actions under § 1441 because that definition applies to all Rule 202 proceedings. The definitions of a civil action for other, more specific jurisdictional statutes are beyond the scope of this Note.

District courts have split on whether Rule 202 proceedings are civil actions under § 1441. In the year after Rule 202 was created, three federal district courts examined whether Rule 202 proceedings were removable. In *In re Texas*,[70] the court held Rule 202 proceedings to be removable civil

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67. 28 U.S.C. § 1441 (2006).

68. Several statutes in Title 28 grant original jurisdiction for certain types of cases, such as admiralty, antitrust, or intellectual property. *See id.* § 1333 ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction . . . ."); § 1337(a) ("The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies . . . ."); § 1338 ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks."). In addition, federal jurisdiction will exist for suits that involve certain congressionally chartered organizations, such as national banks or the Red Cross. *See, e.g.*, Am. Red Cross v. S.G., 505 U.S. 247, 255–57 (1992) (holding that congressional charters provide separate and independent grants of federal jurisdiction if their "sue or be sued" provisions specifically mention federal courts).

69. *See* 28 U.S.C. § 1441(a) (2006) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . .").

70. 110 F. Supp. 2d 514 (E.D. Tex. 2000), *rev'd on other grounds sub nom.* Texas v. Real Parties in Interest, 259 F.3d 387 (5th Cir. 2001).

actions.[71] Conversely, in *Mayfield-George v. Texas Rehabilitation Commission*[72] and *McCrary v. Kansas City Southern Railroad*,[73] the courts held that Rule 202 proceedings were not civil actions under § 1441 and were therefore categorically unremovable.[74] Subsequently, district courts have split, with some citing *In re Texas* for the proposition that Rule 202 proceedings are removable civil actions,[75] and the majority of courts citing *Mayfield-George* and *McCrary* for the opposite conclusion.[76] The Fifth Circuit specifically declined to determine the issue in *Texas v. Real Parties in Interest*.[77]

The *Mayfield-George* and *McCrary* courts held that a civil action within the meaning of § 1441 must assert a cause of action.[78] Rule 202 petitions merely request pre-suit depositions; they do not set forth any claims for relief and thus are not civil actions.[79] In addition, the *McCrary* court considered the § 1441 definition of civil action in the context of § 1446. As the court pointed out, "section 1446(b) details the procedures of removal and states that 'the notice of removal . . . shall be filed within thirty (30) days after the receipt . . . of a copy of the initial pleading *setting forth the claim for relief upon which such action or proceeding is based*.'"[80] Because Rule 202 proceedings do not have pleadings or set forth actual claims, they do not constitute civil actions within the meaning of either § 1441 or § 1446.[81]

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71. *Id.* at 521–22.

72. 197 F.R.D. 280 (N.D. Tex. 2000).

73. 121 F. Supp. 2d 566 (E.D. Tex. 2000).

74. *See Mayfield-George*, 197 F.R.D. at 283 (holding that Rule 202 petitions do not assert claims and therefore are not civil actions); *McCrary*, 121 F. Supp. 2d at 569 (holding that Rule 202 proceedings are not civil actions within the meaning of § 1441).

75. *See, e.g.*, Page v. Liberty Life Assurance Co. of Bos., No. 4:06-CV-572-A, 2006 WL 2828820, at *3 (N.D. Tex. Oct. 3, 2006) (citing *In re Texas*, 110 F. Supp. 2d at 514) (holding that a Rule 202 proceeding had all of the elements of a civil action and thus would be treated as such).

76. *See In re* Enable Commerce, Inc., 256 F.R.D. 527, 530 (N.D. Tex. 2009) ("The majority of Texas courts that have considered whether a Rule 202 proceeding is removable have held that it is not."); *see also, e.g.*, Sawyer v. E.I. Du Pont de Nemours, No. Civ.A. 06-1420, 2006 WL 1804614, at *2 (S.D. Tex. June 28, 2006) (finding *Mayfield-George* and *McCrary* persuasive); Davidson v. S. Farm Bureau Cas. Ins. Co., No. H-05-03607, 2006 WL 1716075, at *2 (S.D. Tex. June 19, 2006) (citing *Mayfield-George* and *McCrary*); *cf.* Waller v. Wal-Mart Stores, Inc., No. 4:01-CV-629-Y, 2002 U.S. Dist. LEXIS 3586, at *1 & n.1 (N.D. Tex. Mar. 4, 2002) (discussing the positions of *Mayfield-George*, *McCrary*, and *In re Texas* but ultimately avoiding the issue by holding that subject-matter jurisdiction was not proper).

77. 259 F.3d 387, 395 (5th Cir. 2001).

78. *See Mayfield-George*, 197 F.R.D. at 283 ("First, the Petition is not a 'civil action' under § 1441(b) because it asserts no claim or cause of action upon which relief can be granted."); *McCrary*, 121 F. Supp. 2d at 569 ("First, a Rule 202 Request is not a civil action within the meaning of § 1441 because it asserts no claim or cause of action upon which relief can be granted.").

79. *McCrary*, 121 F. Supp. 2d at 569.

80. *Id.* (quoting 28 U.S.C. § 1446(b)).

81. *Id.*

Conversely, the court in *In re Texas* held that Rule 202 proceedings were civil actions.[82] The court traced the historical scope of federal removal statutes, which before 1948 used the term *suit* instead of civil action, and emphasized the broad definition of *suit* in each iteration of the statute.[83] Originally, Chief Justice Marshall interpreted the term, as used in the Judiciary Act of 1789, to cover "any proceeding in a court of justice, by which an individual pursues [a] remedy."[84] After the 1875 reenactment of the removal statute, the Supreme Court interpreted suit to mean "a dispute between litigants before a tribunal that has the power to determine questions of law and fact."[85] When the Supreme Court interpreted the 1911 revision of the removal statute, the Court listed the elements of removable proceedings.[86] The *In re Texas* court adopted this definition and concluded that Rule 202 satisfied each element.[87] Rule 202 proceedings involve "a controversy between parties; there are pleadings (the [Rule 202] petition); relief is sought (. . . a court order authorizing the taking of depositions); . . . a judicial determination is required" (the court must weigh the benefits of allowing the depositions against the likely burdens of the procedure); and the decision results in an enforceable, appealable order.[88] Unlike *Mayfield-George*, which focused on a single criterion in isolation—the assertion of a cause of action—the *In re Texas* court insisted on examining the proceeding as a whole.[89]

Although a majority of cases have relied on *Mayfield-George* and *McCrary* to conclude that Rule 202 proceedings are not civil actions, this Note contends that *In re Texas* presents a more thorough and historically

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82. 110 F. Supp. 2d 514, 521–22 (E.D. Tex. 2000), *rev'd on other grounds sub nom.* Texas v. Real Parties in Interest, 259 F.3d 387 (5th Cir. 2001).

83. *See id.* at 519–20 (chronicling the history of removal provisions and statutes, starting with the Judiciary Act of 1789, to demonstrate how terms used to describe removal proceedings have been construed increasingly broadly).

84. *Id.* at 519 (quoting Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829)).

85. *Id.* (citing Upshur Cnty. v. Rich, 135 U.S. 467, 477 (1890)).

86. *Id.* at 520. According to the Court,

> a removable proceeding is one in which there are one or more of the following: a dispute between parties; a prayer for relief (either at law or in equity); pleadings; a tribunal with the power to determine questions of law and fact; the determination of the tribunal is subject to review; and enforceable orders.

Id.

87. *Id.* at 521–22.

88. *Id.* The Texas Supreme Court has yet to rule on whether Rule 202 decisions are appealable. Its cases on pre-suit discovery appeals all predate Rule 202 and are based on the distinction between the equitable bill of discovery (former Rule 737) and depositions to perpetuate testimony (former Rule 187). For a discussion of how petitions to depose opposing parties in anticipated suits—which would have fallen under former Rule 187—are ancillary to the anticipated suit and thus not appealable, while investigations of potential claims—which would have fallen under former Rule 737—are independent, appealable actions, see Hughes, *supra* note 12.

89. *In re Texas*, 110 F. Supp. 2d at 522.

accurate definition. The *In re Texas* analysis is supported by the Supreme Court's interpretation of prior removal statutes. Conversely, the only authorities cited by *Mayfield-George* and *McCrary* are district court decisions from other states.[90] Furthermore, the holding in *Mayfield-George* may have been based predominately on a lack of federal-question jurisdiction under § 1331 as opposed to the definition of a civil action under § 1441.[91]

In re Texas also challenged *McCrary*'s conclusion that § 1446 implies a narrow interpretation for § 1441. Section 1446 creates a thirty-day window for removal after the "initial pleading setting forth the claim for relief."[92] *McCrary* reasoned that, because Rule 202 petitions do not state claims, Rule 202 petitions are not removable. The interplay between § 1441 and § 1446, however, could be interpreted another way. Supporters of *McCrary* can point to a Fifth Circuit decision that held an equitable bill of discovery (the predecessor to Rule 202) was not an "initial pleading" and thus did not trigger the § 1446 removal window.[93] Nevertheless, a petition may be a removable civil action under § 1441 even if it does not trigger the removal window of § 1446. As explained in *In re Texas*, § 1446 merely defines procedures relating to removal; it does not define what kind of proceedings are removable—that is the purpose of § 1441.[94] Because *In re Texas* provides the most thorough and historically accurate understanding of § 1441, Rule 202 proceedings should be considered civil actions under § 1441. They should thus be removable in the limited circumstances where original jurisdiction is proper through means other than federal-question or diversity jurisdiction.

C. The Federal Officer Removal Statute

In addition to the limited circumstances of removal under jurisdiction-granting statutes, a defendant can also potentially remove a Rule 202 proceeding to federal court under § 1442. Section 1442 allows for the removal of civil actions against federal officers or agencies for activities carried out under color of office. Provided these conditions are met, Rule 202 petitions against federal officers will be removable if Rule 202 proceedings are considered civil actions under § 1442. Recently, a federal district court held

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90. *See* Mayfield-George v. Tex. Rehab. Comm'n, 197 F.R.D. 280, 283 (N.D. Tex. 2000) (citing *In re* HiNote, 179 F.R.D. 335, 336 (S.D. Ala. 1998), and Sunbeam Television Corp. v. Columbia Broad. Sys., Inc., 694 F. Supp. 889, 891 (S.D. Fla. 1988)); McCrary v. Kansas City S. R.R., 121 F. Supp. 2d 566, 569 (E.D. Tex. 2000) (citing *Mayfield-George*, 197 F.R.D. at 283).

91. *See Mayfield-George*, 197 F.R.D. at 283 (stressing that even if it can be argued that the petition is a civil action, "it surely is not removable under § 1441(b) because it is not a 'civil action of which federal district courts have *original jurisdiction* founded on a claim or right arising under the Constitution, treaties or laws of the United States.'").

92. 28 U.S.C. § 1446(b) (2006).

93. Wilson v. Belin, 20 F.3d 644, 651 n.8 (5th Cir. 1994).

94. *In re Texas*, 110 F. Supp. 2d at 523.

that, because they do not assert claims, Rule 202 petitions are not civil actions.[95] This Note contends, however, that removal under § 1442 should value substance over form, and it should not hinge on a technical definition of a civil action.

The purpose of § 1442 has been clearly established: it prevents hostile state courts from interfering with the legitimate exercise of federal authority.[96] Section 1442 protects an important federal interest in the "enforcement of federal law through federal officials" by providing a federal forum where federal officers can raise defenses arising from their official duties.[97] According to the Supreme Court,

> The federal officer removal statute is not "narrow" or "limited." . . . At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law . . . . Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).[98]

Therefore § 1442 should be given "a sufficiently broad reading so as not to frustrate its underlying rationale."[99] In other words, § 1442 should look to the substance rather than the form of the state proceeding and should allow removal when state proceedings interfere with the exercise of federal authority.

When Rule 202 is used to depose federal officers, it potentially interferes with the exercise of federal authority. Because Rule 202 does not require courts to address affirmative defenses that may arise in the future,[100] it could potentially bypass the federal qualified immunity defense, which helps shield federal officials from excessive discovery.[101] Section 1442

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95. *See* Price v. Johnson, 600 F.3d 460, 462 (5th Cir. 2010) (discussing the district court's reasoning and dismissing the appeal for lack of appellate jurisdiction to review the particular grounds for remand).

96. *See* Willingham v. Morgan, 395 U.S. 402, 405–06 (1969) (detailing the purpose and history of federal officer removal statutes); Tennessee v. Davis, 100 U.S. 257, 262–65 (1879) (explaining the purpose of federal officer-removal statutes and articulating their constitutional basis in the Necessary and Proper Clause).

97. *Willingham*, 395 U.S. at 406.

98. *Id.* at 406–07 (citations omitted).

99. Murray v. Murray, 621 F.2d 103, 107 (5th Cir. 1980).

100. *See supra* notes 29–33 and accompanying text.

101. *See* Ashcroft v. Iqbal, 219 S. Ct. 1937, 1953 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))).

addresses this precise situation—where removal to federal courts is necessary to assert federal defenses that state courts might not otherwise respect.[102]

Thus, even if Iqbal had been a Texas plaintiff, Rule 202 should not have helped his case. Had Iqbal filed Rule 202 petitions to depose Attorney General Ashcroft, Director Mueller, or other federal officers, the defendants could have removed to federal court where the federal rules do not permit pre-suit depositions to investigate potential claims.[103] Thus, Rule 202 will rarely if ever be used to depose federal officials. Rule 202 can, however, be useful in potential § 1983 claims against state officials. As a policy matter, this makes sense. If Texas wants to open its own officials to pre-suit discovery via Rule 202, that should be a matter for Texas courts to decide.

IV. Preemption of Rule 202

Because Rule 202 proceedings are typically not removable, they will generally remain in Texas courts even when the proceedings implicate potential federal claims. There are, however, still obstacles to utilizing Rule 202 for potential federal claims in state court. The most significant is that, depending on the nature of the federal claim and the implicit or explicit role that it plays in the case, Rule 202 might be preempted by the Reverse Erie doctrine. When Rule 202 implicates federal claims implicitly, the pre-suit depositions are justified solely on the basis of potential state claims. The possibility of federal claims simply lurk implicitly in the background. But in some instances, plaintiffs may not be able to justify pre-suit depositions through state claims alone and may be forced to justify the benefits of pre-suit depositions by *explicitly* discussing potential federal claims.

Rule 202 will not be preempted when the federal claims are merely implicit. When Rule 202 proceedings explicitly rely on federal claims to justify pre-suit depositions, however, preemption would be appropriate for certain federal claims. In this Part, I begin with an overview of the Reverse Erie doctrine. Next, I examine Reverse Erie preemption based on implicit federal claims. Finally, I apply Reverse Erie to explicit federal claims.

A. The Reverse Erie Doctrine

Reverse Erie is a federal common law doctrine that governs choice-of-law issues when state courts hear federal claims.[104] State courts of general

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102. The federal qualified immunity defense is particularly important to § 1442. *See Willingham*, 395 U.S. at 405 ("[T]he test for removal should be broader, not narrower, than the test for official immunity.").

103. *See supra* note 42.

104. *See* Kevin M. Clermont, *Federal Courts, Practice & Procedure—Reverse*-Erie, 82 NOTRE DAME L. REV. 1, 4, 20 (2006) ("Just as the *Erie* methodology itself is specialized federal common law, the reverse-*Erie* judicial choice-of-law methodology is a federal-common-law creation of the U.S. Supreme Court that the state courts must follow."). Whereas "standard" Erie doctrine applies

jurisdiction cannot decline to hear cases based on federal law,[105] but as a general rule, state courts are free to apply their own procedure.[106] While the Reverse Erie doctrine occasionally forces states to adopt federal procedure, preemption is the exception and not the rule. There is a "presumption against pre-emption" due to concerns over state judicial autonomy.[107]

Given its ability to affect the outcome of exclusive federal claims or future suits in federal court, Rule 202 undermines a central premise of the presumption against preemption. For example, many cases cite a famous article by Professor Hart to support arguments in favor of state and local rules.[108] Hart argued that while Congress can force states to enforce federal rights, "federal law takes the state courts as it finds them."[109] If Congress wants certain claims to be governed by federal procedure, Congress can grant exclusive jurisdiction to the federal courts.[110] Congress does not have this option with Rule 202. Even if Congress grants exclusive jurisdiction, plaintiffs can still seek pre-suit depositions under Rule 202, and those proceedings will generally not be removable to federal court.[111]

The presumption against preemption should not be overstated. As the Supreme Court has explained, "Federal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'"[112] Thus, despite concerns over state judicial autonomy, the Reverse Erie doctrine will occasionally preempt state law. Though the Reverse Erie doctrine is not well-defined,[113] the Supreme Court has frequently considered two factors in its leading Reverse Erie cases. First, the Court has asked whether the state

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when federal courts sitting in diversity hear state claims, Reverse Erie deals with the opposite scenario—when state courts hear federal claims.

105. Testa v. Katt, 330 U.S. 386, 394 (1947).

106. Johnson v. Fankell, 520 U.S. 911, 919 (1997); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 507 (1954) (describing how Hamilton, in the *Federalist No. 82*, predicted that absent special prohibitions, state courts would enforce federal law as they do their own); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1131 (1986) (asserting that long ago the Supreme Court declared that state law and practice are just as applicable when federal rights are in controversy). *But see* Clermont, *supra* note 107, at 34 ("[T]here is no reason that state interests in state court should weigh more heavily than federal interests do in federal court. Any presumption here in favor of state law, like the presumption against preemption, is more a figure of speech than a real rule.").

107. *See Fankell*, 520 U.S. at 918–19 (discussing the basis for the "normal presumption against pre-emption").

108. *See, e.g.*, *id.* at 919; Felder v. Casey, 487 U.S. 131, 150 (1988).

109. Hart, *supra* note 106, at 508.

110. *Id.* at 507.

111. *See supra* notes 73–76 and accompanying text.

112. *Felder*, 487 U.S. at 150 (citations omitted).

113. *See* Clermont, *supra* note 104, at 2 ("While everyone has an *Erie* theory and stands ready to debate it, almost no one has a theory of reverse-*Erie*, and no one at all has developed a clear choice-of-law methodology for it: reverse-*Erie*, often misunderstood, mischaracterized, and misapplied by judges and commentators, goes strangely ignored by most scholars.").

procedure unnecessarily burdens or interferes with federal law. Second, the Court has examined whether the application of state procedure would be outcome determinative.

In several leading Reverse Erie decisions, state procedures were preempted for their interference with federal rights. For example, *Dice v. Akron, Canton & Youngstown Railroad Co.*[114] preempted an Ohio practice in which judges could resolve factual questions of fraud.[115] The Supreme Court held that, for Federal Employers' Liability Act (FELA) cases, the jury must decide factual issues of fraud because the right to a jury trial was "part and parcel of the remedy afforded railroad workers under [FELA]."[116] Similarly, *Brown v. Western Railway of Alabama*[117] preempted Georgia's strict pleading standards due to the standards' burden on FELA rights.[118] The Supreme Court forced Georgia to apply more lenient federal pleading standards, holding that "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[119] If states could defeat federal rights under the guise of local practice, "desirable uniformity in [the] adjudication of federally created rights could not be achieved."[120]

Unlike most Reverse Erie cases, however, where state procedures restrict federal rights, Rule 202 arguably expands them. Rule 202 extends access to discovery, which can help plaintiffs enforce their federal rights (i.e., their potential federal claims). In reality, though, the distinction is inconsequential: while states may not unnecessarily burden federal rights, neither may they impermissibly expand them. In *Atlantic Coast Line Railroad v. Burnette*,[121] a state law expanded plaintiffs' rights by extending the statute of limitations for FELA claims.[122] The Supreme Court invalidated the extension, holding that Congress created the right and in doing so set the limits of that right.[123] The distinction between restricting and expanding federal rights is therefore irrelevant to the Reverse Erie analysis. When Rule 202 interferes with a cause of action that represents a congressionally determined balance of rights, Rule 202 should be preempted.

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114. 342 U.S. 359 (1952).

115. *Id.* at 362–63.

116. *Id.* at 363 (internal quotations omitted).

117. 338 U.S. 294 (1949).

118. *Id.* at 298–99.

119. *Id.*

120. *Id.* at 299.

121. 239 U.S. 199 (1915).

122. *See id.* at 200 (referring to FELA as "the Employers' Liability Act of April 22, 1908," and holding that recovery after the expiration of the statute of limitations was an error).

123. *See id.* at 201 ("[W]hen a law that is relied on as a source of an obligation in tort, sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther.").

Outcome determination is another important Reverse Erie consideration. In *Felder v. Casey*,[124] a Wisconsin statute imposed stringent notification conditions before plaintiffs could sue government officials in state court and required that plaintiffs refrain from filing suit for 120 days after the notification.[125] The Court preempted the statute on two grounds. First, the notice requirement imposed a burden that was "inconsistent in both design and effect with the compensatory aims of the federal civil rights laws."[126] Second, the Court held the enforcement of the Wisconsin statute would "predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court."[127] The Court prohibited the states from applying "such an outcome-determinative law when entertaining substantive federal rights in their courts."[128]

B. Implicit Federal Claims

Rule 202 is not preempted as a result of implicit federal claims. If Rule 202 could be preempted based on the inferred presence of potential federal claims, the result would eviscerate Rule 202. In such a scenario, petitions to investigate potential state claims could be preempted based on the mere speculation that potential federal claims might exist. Many Rule 202 proceedings, which often occur in the early stages of investigation, will contain at least a remote possibility of federal causes of action. Because Rule 202 does not require plaintiffs to clearly define the potential claims, this possibility will exist in almost all cases.[129] Furthermore, attempts to clearly define potential claims could lead to miniature trials on the merits of those claims.

Thus, if federal law could preempt Rule 202 based on the mere specter of potential federal claims, a large number of Rule 202 proceedings would be preempted. It would force Texas to restructure the operation of pre-suit discovery. Additionally, as established by the Supreme Court, respect for

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124. 487 U.S. 131 (1988).

125. *Id.* at 134. The 120-day delay gave the defendant "an opportunity to consider the requested relief." *Id.*

126. *Id.* at 141.

127. *Id.*

128. *Id.* In another leading Reverse Erie case, the outcome-determination test reached a different result. In *Johnson v. Fankell*, Idaho law did not grant the defendants an interlocutory appeal, contrary to federal practice, for the dismissal of their qualified-immunity defense. Johnson v. Fankell, 520 U.S. 911, 920 (1997). The Court held that, unlike the notice-of-claim statute in *Felder*, the Idaho appeals procedure was not outcome determinative—the claim would still be reviewable by the Idaho Supreme Court, and thus, the procedure would not affect the ultimate outcome of the case. *Id.* at 920–21.

129. If Rule 202 required plaintiffs to clearly state potential claims, it would contradict its goal of helping plaintiffs determine whether they even had a cause of action at all. *See supra* notes 19–20 and accompanying text.

state procedures and judicial autonomy must reach an "apex when . . . federal law requires a State to undertake something as fundamental as restructuring the operation of its courts."[130] The presumption against preemption is strengthened when dealing with "a neutral state Rule regarding the administration of the state courts."[131]

In our system of federalism, it is important that states retain control of their own judicial procedures. Accordingly, several leading Reverse Erie cases discussing the federal/state concern indicate that the Reverse Erie doctrine has often been applied to inconsequential state procedures. In his survey of federal claims in state courts, Professor Meltzer identified several recurring themes in the cases where the Supreme Court mandated federal law over state law.[132] Many cases dealt with state practices that were inconsistently followed[133] or with novel procedural requirements that surprised litigants and denied them an adequate opportunity to comply.[134]

Conversely, Rule 202 plays an important role in Texas courts. Unlike many of the procedures identified by Professor Meltzer, Rule 202 has been consistently applied and is not novel within the context of Texas litigation. In fact, Rule 202 petitions are granted almost as a matter of course, with a recent study showing that the majority (60%–70%) of petitions were granted.[135] Furthermore, Rule 202 proceedings are common in Texas—a recent study by Professor Hoffman shows that 53% of Texas attorneys have had some experience either serving or receiving notices of pre-suit depositions under Rule 202.[136]

Thus, when dealing with implicit federal claims, state autonomy concerns will weigh heavily against the preemption of Rule 202. Rule 202 petitions implicate *potential* federal claims; they do not involve *actual* federal claims. Potential claims are often vaguely defined and may never develop into actual suits. When plaintiffs are still investigating potential claims, there will often be at least some possibility for a federal cause of action. Reverse Erie has never been applied to situations based purely on the speculation that federal claims may materialize in the future.

C. Explicit Federal Claims

Rule 202 will only allow pre-suit depositions when the likely benefits of the depositions outweigh the burdens of the procedure. Typically the likely benefits are simply the potential claims. In most cases, plaintiffs will not

130. *Fankell*, 520 U.S. at 922.
131. *Id.* at 918.
132. Meltzer, *supra* note 106, at 1137–45.
133. *Id.* at 1138.
134. *Id.*
135. Hoffman, *supra* note 2, at 258.
136. *Id.* at 251.

need to mention potential federal claims because many federal causes of action have corresponding state causes of action.[137] If state causes of action are insufficient to justify Rule 202 depositions, however, the plaintiff may be forced to explicitly include potential federal claims. Explicit federal claims raise strong Reverse Erie concerns, and preemption could be analyzed under two theories. First, Rule 202 could be preempted because it undermines the uniformity of federal pleading standards. Second, Rule 202 could be preempted due to its interference with the underlying federal claims.

1. Preemption Based on Federal Pleading Standards.—If Rule 202 could be preempted based on federal pleading standards, preemption would occur any time a Rule 202 petition relied explicitly on a potential federal claim, which would promote uniformity in the federal courts. Federal pleading standards serve a gatekeeping function that plaintiffs must pass before they are entitled to discovery.[138] Rule 202 opens the doors to discovery for Texas plaintiffs. With Rule 202, Texas plaintiffs could investigate claims without first satisfying *Twombly*'s flexible plausibility standard—with Rule 202, the plaintiff is not even required to state a viable claim.[139]

Some aspects of the Reverse Erie doctrine support the preemption of Rule 202 due to its interference with federal pleading standards. To begin, the Reverse Erie doctrine looks to (1) whether the application of Rule 202 would be outcome determinative, and (2) whether it unnecessarily burdens a federal right.[140] Regarding the former, Rule 202 will generally be outcome determinative. Relative to the federal courts, Texas sets a far lower standard for plaintiffs to reach discovery, which will lead to both vertical (intrastate) and horizontal (interstate) forum shopping.[141] Rule 202 provides access to the discovery process for potential plaintiffs who might otherwise have their cases dismissed in federal court—the raison d'être of this Note. While it

137. *See* Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43, 61 (2010) (asserting that states "generally recognize analogous causes of action" for exclusive federal claims).

138. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (describing Rule 8 and pleading standards as the "doors of discovery" and holding that a plaintiff cannot unlock those doors with mere conclusions).

139. *See supra* note 19 and accompanying text.

140. *See supra* subpart IV(A).

141. The outcome-determination test arguably differs between standard Erie and Reverse Erie. Standard Erie promotes uniformity by discouraging vertical forum shopping and avoiding an inequitable administration of the laws due to state citizenship. *See* Clermont, *supra* note 104, at 36 (elaborating on the twin aims of *Erie*). In addition to these considerations, Reverse Erie considers horizontal forum shopping. *Id.* ("[H]ere the bigger danger is choosing among state court systems on matters of federal concern, rather than between state and federal court systems . . . . Federal rights and duties should not vary from state to state.").

could be argued that the outcome difference is beneficial,[142] the inquiry in Reverse Erie situations is not whether outcome differences are beneficial or harmful but instead whether the differences exist at all.[143] Rule 202 offers potential plaintiffs in Texas courts a significant advantage relative to potential plaintiffs in other states.

In addition to outcome determination, Reverse Erie cases also ask whether the state procedure burdens a federal right and whether the burden conflicts in purpose or effect with a federal right at issue. This assessment is made "in light of the purpose and nature of the federal right."[144] If an entitlement to federal pleading standards were considered a federal right, then part of the standards' purpose would be a gatekeeping function to prevent undue discovery.[145] Rule 202 burdens that right by creating an end around in the form of pre-suit depositions. By expanding access to discovery, Rule 202 conflicts with one of the purposes of federal pleading standards, as explained by *Iqbal* and *Twombly*.

A fundamental problem with this argument is that pleading standards should not be considered federal rights. Although the distinction between substance and procedure can be problematic,[146] there are many reasons why pleading standards should not be considered substantive in the Reverse Erie context. To begin with, both the *First Restatement of Conflict of Laws* and the *Second Restatement of Conflict of Laws* characterize rules of pleading as procedural.[147] Furthermore, unlike other Reverse Erie cases where the underlying federal rights are typically created by congressional statute, pleading standards derive from Rule 8 of the Federal Rules of Civil Procedure. The Federal Rules, which were authorized by the Rules Enabling Act (REA), are by definition procedural: the REA authorizes the Supreme Court to prescribe rules, but "[s]uch rules shall not abridge, enlarge or modify any substantive

142. In a study by Professor Hoffman, a majority of lawyers reported that "a prime purpose for taking presuit discovery was to make sure that the case they were going to subsequently file would be valid under the rules." Hoffman, *supra* note 2, at 255.

143. *See* Clermont, *supra* note 104, at 36 (characterizing the problem of outcome differences as the "unfairness of treating similarly situated persons differently in a substantial way simply because certain classes of people have a choice of court systems").

144. Felder v. Casey, 487 U.S. 131, 139 (1988).

145. *See supra* note 138 and accompanying text.

146. In a leading Reverse Erie case, the Supreme Court considered whether local pleading rules were substantive or procedural. Brown v. W. Ry. of Ala., 338 U.S. 294, 296 (1949). The Court noted, "To what extent rules of practice and procedure may themselves dig into 'substantive rights' is a troublesome question at best . . . . Other cases in this Court point up the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure.'" *Id.* (citations omitted). The Court decided the case on other grounds. *Id.* at 299.

147. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 127 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 592 (1934).

right."[148] Rule 8 establishes a transsubstantive rule that governs pleading standards;[149] it does not create a substantive right.

Moreover, federal pleading standards do not preempt state procedure when state courts adjudicate concurrent federal claims. If federal pleading standards were substantive rights and strict adherence were necessary to maintain a uniform approach to discovery, preemption would be necessary for both Rule 202 and state pleading standards whenever federal claims were involved. It would be ineffective to preempt one without the other. The Reverse Erie doctrine has not preempted state pleading standards for concurrent federal claims.[150] Neither should it preempt Rule 202.[151]

2. Preemption Based on Potential Federal Claims.—Alternatively, Rule 202 could be preempted due to its interference with federal claims. Because Rule 202 will generally be outcome determinative,[152] preemption will depend on whether Rule 202 unnecessarily burdens a federal right (i.e., the potential federal claims that were explicitly relied upon to justify pre-suit depositions). In other words, does Rule 202 conflict with the nature and purpose of that federal right?

This determination will vary depending on the potential federal claims at stake.[153] For example, patent laws represent a careful balance of rights to be adjudicated exclusively by federal courts, and any state interference is impermissible.[154] Rule 202 disrupts federal uniformity, and it conflicts with the federal nature of patent law. Rule 202 should be preempted whenever patent claims are explicitly involved. If patent claims are merely implicit, as

148. 28 U.S.C. § 2072(b) (2006).

149. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009).

150. For an analysis on whether state pleading standards should be preempted, see Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008).

151. There is, however, a key difference between Rule 202 and the typical scenario in which state courts exercise concurrent jurisdiction over federal claims. The latter scenario is contained in state court. With Rule 202, the plaintiff could theoretically file a petition for pre-suit deposition in Texas state courts and subsequently file suit in federal court.

152. *See supra* notes 124–43 and accompanying text.

153. If this is true, the effectiveness of federal pleading standards in Texas may vary by the substantive cause of action, depending on whether Rule 202 is preempted for its interference with a potential federal claim. This would seemingly conflict with *Iqbal*'s holding that pleading standards are transsubstantive rights. But preemption under Reverse Erie has always been based on the cause of action asserted. *Compare, e.g.*, Felder v. Casey, 487 U.S. 131 (1988), Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359 (1952), *and* Brown v. W. Ry. of Ala., 338 U.S. 294 (1949) (all preempting state procedure based on the plaintiff's cause of action), *with* Johnson v. Fankell, 520 U.S. 911 (1997) (declining to preempt state procedure for a particular substantive right). Rule 202 preemption should be analyzed through the asserted cause of action, i.e., the potential claims at issue.

154. *See generally* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 160 (1989) (invalidating a state law due to its interference with federal patent laws).

was the case with *U.S. Filter*,[155] the court could limit the scope of the pre-suit depositions to preclude questions related solely to patent infringement.[156]

V. Conclusion

Plaintiffs must pass two hurdles before they can use Rule 202 to investigate potential federal claims. First, they must keep the proceedings out of federal court. If a Rule 202 proceeding is removed to federal court, it will likely be dismissed. Second, plaintiffs must prevent preemption in state court. Even if Rule 202 proceedings are not removable, the Reverse Erie doctrine might preempt Rule 202 in state courts.

Despite the potential impact on federal claims and federal courts, Rule 202 proceedings will generally not be removable because federal district courts lack federal-question and diversity jurisdiction. However, removal would still be possible in two scenarios as long as Rule 202 proceedings are properly considered civil actions under § 1441. First, removal would be possible in the limited circumstance where other statutes—aside from the federal-question and diversity statutes—grant federal jurisdiction. Second, federal officials can remove Rule 202 proceedings under § 1442. But these situations are not common, and most Rule 202 proceedings will remain in Texas courts.

Yet even if Rule 202 remains in Texas courts, it might be preempted through the Reverse Erie doctrine when plaintiffs explicitly use potential federal claims to justify pre-suit depositions. The implicit possibility of federal claims will be insufficient; the plaintiff must explicitly rely on potential federal claims. Preemption will vary depending on the potential federal claims at issue. When Rule 202—and its broad grant of pre-suit discovery—conflicts with the nature and purpose of a potential federal claim, Rule 202 should be preempted with respect to that claim.

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155. The potential claims consisted of state contract claims and a federal patent-infringement claim. Though potential patent claims existed, the pre-suit depositions were justified solely based on state contract claims. *See supra* notes 6–8 and accompanying text.

156. In *Iqbal*, the majority declined to "relax the pleading requirements on the . . . promises [of] . . . minimally intrusive discovery." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953–54 (2009). The Court held that "a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Id.* at 1953. *Iqbal* thus suggests that Rule 202 petitions should not be granted on the promise of carefully cabined discovery.

There is, however, a key distinction between the Rule 202 scenario and *Iqbal*. In *Iqbal*, the plaintiff did not have any other claims. When dealing with implicit federal claims, the Rule 202 depositions have already been justified by the state claims alone. Therefore, the reasoning in *Iqbal* does not apply. For explicit federal claims, carefully managed discovery will be irrelevant. Plaintiffs will only mention potential federal claims when they have no other choice. The federal claims are essential for the justification of the pre-suit depositions. Thus, it would be inconsistent to approve depositions to investigate potential federal claims while simultaneously limiting the depositions to preclude the investigation of those federal claims.

If Texas plaintiffs can overcome these two obstacles, they can use Rule 202 to their advantage. The broad scope of Rule 202 gives plaintiffs in Texas an opportunity to conduct pre-suit depositions without having to meet federal pleading standards, and after taking pre-suit depositions, plaintiffs can theoretically file in either federal or state court. Rule 202 allows some plaintiffs, who would otherwise have their cases dismissed under *Twombly* and *Iqbal*, to bring suit in federal court. Even though it is a state procedure, Rule 202 can have an outcome-determinative effect on cases in federal court. Rule 202 offers plaintiffs a powerful tool, and it presents courts with interesting questions of federalism, jurisdiction, and preemption.

—Jeffrey Liang