

Feature Article

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The Abused Respondent in Discovery Statute

The respondent in discovery statute, codified at 735 ILCS 5/2-402, permits plaintiffs in any civil action to name those “respondents believed to have information essential to the determination of who should properly be named as additional defendants in the action.” 735 ILCS 5/2-402. The statute allows plaintiffs to obtain unilateral, unlimited discovery from non-parties and tolls the statute of limitations for at least six months. *Id.* It states:

A person or entity named as a respondent in discovery in any civil action may be made a defendant in the same action at any time within 6 months after being named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him or her may have expired during such 6 month period.

735 ILCS 5/2-402. In 1976, the respondent in discovery statute was enacted to protect physicians (Transcript of proceedings, House of Representatives, June 10, 1976, p. 35). It was designed as a way for a physician to avoid the stigma and financial stress of being named as a party to a lawsuit because a physician named as a respondent in discovery would not need to notify his/her malpractice insurance carrier or hospital credentialing committees unlike a physician who was a named defendant.

Unfortunately, the RID statute is frequently abused and not applied as the legislature intended. This article will address some of these misuses including extensions of time to convert RIDs, how the statute is used to pressure physicians to testify against each other, payment for the RID physician, and proposed legislation related to the RID statute. Finally, thoughts for defense lawyers who are representing RID physicians are outlined.

Extensions of Time to Convert the RID

When the statute was originally enacted, it did not provide for any extensions of time beyond the original six-months and so the physician knew in six months whether he was “in” or “out” of the lawsuit. 735 ILCS 5/2-402 (1982). In 2004, the court in *Robinson v. Johnson*, 346 Ill. App. 3d 895 (1st Dist. 2004), strictly construed the statute and held that a trial court “may not extend section 2-402’s six-month period during which a respondent in discovery may be made a defendant.” *Robinson*, 346 Ill. App. 3d at 898. The *Robinson* court noted that the six-month period begins to run when the complaint is filed. *Id.*

But times have changed, and what was originally created to protect physicians from the spiraling costs of medical malpractice insurance has increasingly been used against them. Subsequent to the holding in *Robinson*, in 2006, the General Assembly amended section

2-402 to allow courts to grant plaintiffs one 90-day extension for good cause and additional extensions only if the respondent had failed to comply with discovery. The current version of the respondent in discovery statute states in pertinent part:

An extension from the original 6-month period for good cause may be granted only once for up to 90 days for (i) withdrawal of plaintiff’s counsel or (ii) good cause. Notwithstanding the limitations in this Section, the court may grant additional reasonable extensions from this 6-month period for a failure or refusal on the part of the respondent to comply with timely filed discovery. . . .

735 ILCS 5/2-402.

Despite statutory language expressly providing only **one** 90-day extension for good cause, in practice, courts routinely allow multiple extensions beyond the 90-day limit for good cause. Other than the one 90-day extension, the statute allows the court to use its discretion to order “reasonable extensions” beyond the six month period only if there is “a failure or refusal on the part of the respondent to comply with timely filed discovery.” *Id.*

About the Author



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There are no reported decisions analyzing whether the failure of one respondent in discovery to answer discovery can extend the conversion date for another respondent who has complied with discovery. However, the RID statute is considered a special statutory cause of action. *Hugley v. Alcaraz*, 144 Ill. App. 3d 726, 733-34 (1st Dist. 1986). Courts have, therefore, routinely held that “when a plaintiff is proceeding on a special statutory cause of action, ... all of the requirements mandated in the statute” must be scrupulously observed. *Robinson*, 346 Ill. App. 3d at 903. Thus, based on the plain language of the statute (“failure of the respondent”), the failure of one respondent in discovery to answer discovery or sit for his deposition, should not delay plaintiffs’ conversion date for another respondent in discovery who has complied with all discovery. Nevertheless, plaintiffs frequently use the failure of one RID to answer discovery to request an extension of the conversion deadline as to all RIDs and these requests are frequently granted. Plaintiffs also frequently request time for their expert consultants to review the deposition transcripts of all respondents in discovery in order to determine whether to move to convert the RIDs. If one 90-day extension has already been granted for good cause, a “review of transcripts” is not a reason for an extension, as neither the statute nor case law permit it.

RID Physicians—Save Themselves

The RID statute provides a plaintiff with unfettered discovery. There is no authority that sufficiently narrows the inquiries to a RID physician. Illinois courts have held that plaintiffs can proceed with converting RIDs to defendants even without issuing discovery

Illinois courts have held that plaintiffs can proceed with converting RIDs to defendants even without issuing discovery or taking the RID’s deposition. Consequently, plaintiffs can use the respondent in discovery statute as a tool for simply tolling the statute of limitations and/or statute of repose against certain individuals and entities without ever issuing discovery.

or taking the RID’s deposition. *Long v. Mathew*, 336 Ill. App. 3d 595, 602 (4th Dist. 2003); *Torley v. Foster C. McGaw Hosp.*, 116 Ill. App. 3d 19, 21 (1st Dist. 1983). Consequently, plaintiffs can use the respondent in discovery statute as a tool for simply tolling the statute of limitations and/or statute of repose against certain individuals and entities without ever issuing discovery.

In a medical malpractice case, however, the statute is typically used in a different manner. Many times, plaintiffs will name several physicians as RIDs in hopes that they will criticize each other at their depositions. In the Illinois Trial Lawyers Association’s *Medical Malpractice Notebook*, one of the reasons stated for naming RIDs is that “the respondent physician will be much more willing to provide *honest* testimony, rather than testimony that will speciously attempt to assist a defendant or other health care provider.” ILLINOIS TRIAL LAWYERS ASSOCIATION, MEDICAL MALPRACTICE NOTEBOOK 324 (Keith Hebeisen, 2014). That is certainly plaintiffs’ perspective. From the defendants’ perspective, the RID statute is being used to coerce RID physicians into testifying against the defendant medical providers and other RIDs under

the threat of themselves being converted to defendants. The statute’s scope is not limited to those who may be converted to defendants, as the statute allows plaintiffs to name RIDs whom plaintiffs have no intention of converting to defendants. As plaintiffs’ attorneys know, finger pointing by physicians in a medical malpractice case can lead to a difficult defense and an earlier and larger settlement for the plaintiff.

Paying the RID Physician

Section 2-402 also provides: “[e]ach respondent in discovery shall be paid expenses and fees as provided for witnesses.” Illinois Supreme Court Rule 204 governs depositions of physicians and states that:

The discovery depositions of nonparty physicians being deposited in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or

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she will spend testifying at any such deposition. . .

Ill. S. Ct. R. 204(c).

The court in *Delestowicz v. Labinsky*, 288 Ill. App. 3d 637, 638-39 (1st Dist. 1997), held that “a lawsuit naming an individual as a respondent in discovery is not an action against that individual and the individual is not a party to that action.” *Delestowicz*, 288 Ill. App. 3d at 639. Yet, plaintiffs frequently claim that a respondent in discovery physician is not entitled to fees beyond the statutory witness fee for his/her deposition. In support of their claim, plaintiffs rely on the committee comments to Illinois Supreme Court Rule 204(c). The committee comments to subpart (c) state:

[P]aragraph (c) is made applicable only to ‘nonparty’ physicians. The protection afforded a physician by paragraph (c), including the payment of a fee for time spent, has no application to a physician who is a party to the suit. Such protection should likewise be unavailable to nonparty physicians who are closely associated with a party, such as physicians who are stockholders in or officers of a professional corporation named as a defendant, or a physician who is a respondent in discovery.

Ill. S. Ct. R. 204(c) cmt (1995).

Further, in *Buckholtz v. MacNeal Hosp.*, 313 Ill. App. 3d 521 (1st Dist. 2000), the court held that the Illinois Supreme Court Rules unambiguously require that a nonparty physician who is deposed be paid a reasonable fee for time spent testifying, even if the physician is

closely associated with one of parties. *Buckholtz*, 313 Ill. App. 3d at 525-26. In *Buckholtz*, the non-party physician had treated the plaintiff while she was a resident at the defendant hospital. The court further noted that extrinsic matter such as committee comments must not be considered unless it is first determined that the rule’s language is ambiguous. *Id.* at 526. The Illinois Supreme Court has further held that committee comments to the rules are not binding and are not part of the rule. *People v. De Filippo*, 235 Ill. 2d 377 (2009). Moreover, the comments are contradictory, first stating that non-party physicians are entitled to a fee, and then creating a class of non-party physicians whom are allegedly not entitled to such a fee. Ultimately, whether a RID physician is entitled to a reasonable fee may depend on which judge is presiding over the matter.

To that end, many RIDs do not request compensation for their deposition in hopes that their free testimony will lessen the likelihood that they will be converted to a defendant. Once a plaintiff moves to convert the RID, an invoice for the deposition is generally sent at that time.

Proposed Legislation for Section 2-402

The current version of Section 2-402 requires RIDs to “respond to discovery by the plaintiff in the same manner as are defendants and may, on motion of the plaintiff, be added as defendants if the evidence discloses the existence of probable cause for such action.” 735 ILCS 5/2-402. Illinois courts have held that probable cause is that “evidence that would engender, in an ordinarily cautious and prudent person, an honest and strong suspicion that the respondent’s alleged

breach of the applicable standard of care was the factual and legal cause of the plaintiff’s injury.” *Froehlich v. Sheehan*, 240 Ill. App. 3d 93, 102 (1st Dist. 1992). The *Froehlich* court further held that an unsigned, unsworn and undated section 2-622 report could not provide the basis for conversion, as it was not evidence of probable cause. *Froehlich*, 240 Ill. App. 3d at 102-103.

The primary intent of the legislature’s enactment of the respondent in discovery statute was to protect physicians; yet, efforts are now being taken to amend the statute to be even less protective of physicians. The proposed amendment of section 2-402, which was introduced on January 14, 2015, lowers the burden of proof required to convert a RID to a defendant. The new legislation will allow plaintiff, on motion, to add the RIDs as defendants, if “a preponderance of the evidence discloses cause for such action,” rather than the former requirement that the evidence must disclose the existence of probable cause for such action. H.B. 96, 99th Gen. Assembly, (Ill. 2015). It further proposes that RIDs be required to answer requests for admission of facts or of genuineness of documents. This change is likely due to a number of attorneys for RIDs objecting when requests to admit were propounded on their RID clients.

Considerations When Representing a RID

When plaintiffs name RIDs in a medical malpractice action, it alters the sequence of discovery and accelerates the timing in which the discovery occurs. The normal sequence without the inclusion of RIDs would be to answer the plaintiff’s complaint, exchange answers to written discovery, obtain all of plain-

tiff's pre-occurrence, occurrence, and post-occurrence medical records, retain an expert consultant to review the matter, take the plaintiff's deposition, present the defendants for depositions, and then depose the treating physicians. When RID physicians are named in a medical malpractice action, defense attorneys are forced to take RIDs' depositions first without having taken the plaintiff's deposition and without having obtained the plaintiff's pre-occurrence and post-occurrence medical records. Usually, an expert consultant has not been retained at the time of the RIDs' depositions. Consequently, the RID can be placed at a significant disadvantage.

Section 2-402 allows a RID, upon his/her own motion, to be made a defendant in the action. While it is unconventional to do so, it may ultimately benefit the RID, especially if the RID is going to be converted anyway, if it can prevent the RID from having to give a deposition until later in the case. Defense lawyers should consider whether their clients are better served by converting their RID clients to defendants, thereby taking away plaintiff's weapon in medical malpractice cases. Defense lawyers should consider the likelihood of conversion, the facts at issue, the involvement of the RID, the statute of limitations, the statute of repose and the court and judge presiding over the case when deciding how to proceed. Unfortunately, this statute which was created with the intent to protect physicians, often does nothing but harm them.
