

# SURVEY OF ILLINOIS LAW: AT LONG LAST, A LONG LOOK AT RESPONDENTS IN DISCOVERY

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## I. INTRODUCTION

Since 1976<sup>2</sup> the respondent in discovery (“RID”)<sup>3</sup> has been an oddity of Illinois civil procedure.<sup>4</sup> It is a creature of statute<sup>5</sup> and seems to have no counterpart in the law of Illinois’ sister states.<sup>6</sup> It is not recognized by federal district courts in Illinois as part of federal civil procedure.<sup>7</sup> It began as an accommodation to physicians<sup>8</sup> and now applies to all civil cases.<sup>9</sup>

The RID statute provides a process which appears, perhaps, as a distant relative of the pre-suit discovery process governed by Illinois

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  2. ILL. REV. STAT. § 110-21.1 (1976 Supp.).
  3. 735 ILL. COMP. STAT. 5/2-402 (2010). This is the current statute.
  4. The Illinois Code of Civil Procedure is found at 735 ILL. COMP. STAT. 5/1-101 *et seq.* (2010).
  5. *In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 658, 913 N.E.2d 1077, 1092 (1st Dist. 2009) (noting that section 2-402 encompasses a statutory right unknown at common law).
  6. Interestingly, a respondent in discovery statute has been proposed in Arizona by Representative Heinz as H. 2519, 50th Leg., 1st Reg. Sess. (Ariz. 2011). Representative Heinz is a physician by training. See Bio: Rep. Matthew Heinz, CONGRESS.ORG, <http://www.congress.org/bio/id/158381> (last visited July 5, 2011).
  7. *Murphy v. Schering Corp.*, 878 F. Supp. 124, 126 (N.D. Ill. 1995) (holding that 735 ILL. COMP. STAT. 5/2-402 does not provide a basis for including a physician as a party litigant-joinder is controlled by the federal rules of civil procedure); *Stull v. YTB Int’l*, No. 10-600-GPM, 2010 WL 3702424 at \*2 (S.D. Ill. Sept. 8, 2010); *Ebersohl v. Bechtel Corp.*, No. 09-1029-GPM, 2010 WL 2164451 at \*1 n.1 (S.D. Ill. May 31, 2010); *Lee v. Burlington N.*, No. 07 cv 5829, 2008 WL 4874052 (N.D. Ill. June 26, 2008); *Sargent v. Cottrell, Inc.*, No. 06-cv-1042-MJR, 2007 WL 4115811 at \*2-3 (S.D. Ill. Nov. 16, 2007); *Montclair-Bohl v. Janssen Pharm.*, No. 06 C 2166, 2006 WL 2700013 (N.D. Ill. Sept. 13, 2006). *But see* *Roe v. Little Co. of Mary Hosp.*, 815 F. Supp. 244 (N.D. Ill. 1992).
  8. See *Murphy v. Giardina*, 82 Ill.2d 529, 532, 413 N.E.2d 399, 400 (1980). Justice Moran includes in his opinion a history of the respondent in discovery statute. *Id.* at 532, 413 N.E.2d at 400-01.
  9. 735 ILL. COMP. STAT. 5/2-402 (2010) (noting that “the plaintiff in any civil action may designate as respondents in discovery . . .”). For examples of non-medical negligence cases, see *Evans v. Lima Lima Flight Team*, 373 Ill. App. 3d 407, 409, 869 N.E.2d 195, 198 (1st Dist. 2007). See also *Country Mut. Ins. Co. v. Olsak*, 391 Ill. App. 3d 295, 297, 908 N.E.2d 1091, 1094 (1st Dist. 2009).

Supreme Court Rule 224.<sup>10</sup> The RID statute, however, does not concern pre-suit discovery. It involves persons and entities in pending litigation who are designated as RIDs, but they are not parties.<sup>11</sup> Yet, RIDs are subject to discovery as if they are parties. They are served with process as if they are defendants.<sup>12</sup> Indeed, RIDs have been characterized as “hybrid litigant[s].”<sup>13</sup>

Despite its endurance for thirty-five years, the RID statute has not been closely studied.<sup>14</sup> That is the purpose of this paper.

## II. THE RESPONDENT IN DISCOVERY STATUTE—735 ILCS 5/2-402

The RID statute, a component of the Illinois Code of Civil Procedure,<sup>15</sup> provides as follows:

Sec. 2-402. Respondents in discovery. The plaintiff in any civil action may designate as respondents in discovery in his or her pleading those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.

Persons or entities so named as respondents in discovery shall be required 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.

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10. ILL. SUP. CT. R. 224 (2011).

11. See Shanklin v. Hutzler, 294 Ill. App. 3d 659, 666, 691 N.E.2d 7, 12 (1st Dist. 1997); Shanklin v. Hutzler, 277 Ill. App. 3d 94, 100, 660 N.E.2d 103, 106 (1st Dist. 1995); Delestowicz v. Labinsky, 288 Ill. App. 3d 637, 639, 681 N.E.2d 1008, 1009 (1st Dist. 1997).

12. 735 ILL. COMP. STAT. 5/2-402 (2010).

13. Coyne v. OSF Healthcare Sys., 332 Ill. App. 3d 717, 719, 773 N.E.2d 732, 735 (3d Dist. 2002).

14. For an excellent early look at RIDs, see Mary P. Tobin, *Respondents in Discovery: A Pre-Suit Answer to the Medical Malpractice Crisis*, 11 LOY. U. CHI. L.J. 833 (1980). A number of papers have commented upon RIDs but are not solely focused on the topic. See, e.g., Edward J. Kionka, *Things To Do (or Not) to Address the Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469 (2006); Garrett P. Hoerner & Stephen R. Wigginton, *Survey of Illinois Law: Civil Procedure*, 23 S. ILL. U. L.J. 859 (1999); Brad A. Elward, *Survey of Illinois Law: Civil Procedure*, 21 S. ILL. U. L.J. 691 (1997); Stephen J. Heine & Robert V. Dewey, *Survey of Illinois Law: Tort Development*, 20 S. ILL. U. L.J. 915 (1996); Jill Adams, *Survey of Illinois Law: Civil Procedure*, 20 S. ILL. U. L.J. 697 (1996); Beth C. Boggs, *Survey of Illinois Law: Civil Procedure*, 19 S. ILL. U. L.J. 683 (1995); JEFFREY A. PARNES, ILLINOIS CIVIL PROCEDURE § 8.02[9], 214–15 (3d ed. 2008). See also Edward J. Walsh & Elizabeth Farmer, “Empty Chair” / *Sole Proximate Cause Defense and Respondents in Discovery*, 2011 MEDICAL MALPRACTICE TRIAL NOTEBOOK (2010).

15. 735 ILL. COMP. STAT. 5/2-402 (2010).

A person or entity named a respondent in discovery may upon his or her own motion be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.

A copy of the complaint shall be served on each person or entity named as a respondent in discovery.

Each respondent in discovery shall be paid expenses and fees as provided for witnesses.

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. 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.

The plaintiff shall serve upon the respondent or respondents a copy of the complaint together with a summons in a form substantially as follows:

STATE OF ILLINOIS

COUNT OF \_\_\_\_\_

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

(or, In the Circuit Court of the \_\_\_\_\_ Judicial Circuit)

\_\_\_\_\_,

Plaintiff(s),

v.

No. \_\_\_\_\_

\_\_\_\_\_,

\_\_\_\_\_.

Defendant(s),

and

PLEASE SERVE:

\_\_\_\_\_,

\_\_\_\_\_.

Respondent(s) in Discovery.

#### SUMMONS FOR DISCOVERY

#### TO RESPONDENT IN DISCOVERY

YOU ARE HEREBY NOTIFIED that on \_\_\_\_\_, 20\_\_, a complaint, a copy of which is attached, was filed in the above Court naming you as a Respondent in Discovery. Pursuant to the Illinois Code of Civil Procedure Section 2-402 and Supreme Court Rules 201 et. Seq., and/or Court Order entered on \_\_\_\_\_, the above named Plaintiff(s) are authorized to proceed with the discovery of the named Respondent(s) in Discovery.

YOU ARE SUMMONED AND COMMANDED to appear for deposition, before a notary public (answer the attached written interrogatories), (respond to the attached request to produce), (or other appropriate discovery tool). We are scheduled to take the oral deposition of the above named Respondent, \_\_\_\_\_, on \_\_\_\_\_, 20\_\_, at the hour of \_\_\_\_ a.m./p.m., at the office of \_\_\_\_\_, Illinois, in accordance with the rules and provisions of this Court. Witness and mileage fees in the amount of \_\_\_\_\_ are attached (or)

(serve the following interrogatories, request to produce, or other appropriate discovery tool upon Respondent, \_\_\_\_\_ to be answered under oath by Respondent, \_\_\_\_\_, and delivered to the office of \_\_\_\_\_, Illinois, within 28 days from the date of service).

#### TO THE OFFICER/SPECIAL PROCESS SERVER:

This summons must be returned by the officer or other person to whom it was given for service, with endorsement or affidavit of service and fees and an endorsement or affidavit of payment to the Respondent of witness and mileage fees, if any, immediately after service. If service cannot be made, this summons shall be returned so endorsed.

WITNESS, \_\_\_\_\_

\_\_\_\_\_

Clerk of Court

Date of Service: \_\_\_\_\_, 20\_\_

(To be inserted by officer on copy left with Respondent or other person)

Attorney No.

Name:

Attorney for:

Address:

City/State/Zip:

Telephone:.

This amendatory Act of the 94<sup>th</sup> General Assembly applies to causes of action pending on or after its effective date.<sup>16</sup>

It has been suggested that the RID statute is largely “clear and concise,”<sup>17</sup> with “straightforward” “procedural requirements,”<sup>18</sup> but these suggestions are not accurate. The statute provides a vehicle for obtaining discovery from non-party<sup>19</sup> persons or entities<sup>20</sup> who are designated as RIDs<sup>21</sup> in a complaint.<sup>22</sup> Beyond that, the RID statute raises far more questions than it answers, such as:

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16. *Id.*

17. Bradley C. Nahrstadt & John E. Newton, *Understanding the Illinois Respondent in Discovery Statute*, 18 DUPAGE CTY. BAR ASS’N BRIEF 10 (May 2006).

18. *Id.* See also Nicholas C. Dranias, *The Illinois Misnomer Statute: A Refuge for Suits Against Unknown or Fictitious Entities or a Tool for Correcting Technical Naming Errors?*, 16 CBA RECORD 39 (May 2002) (erroneously suggesting that the RID statute provides for a “complaint for discovery”).

19. See *Shanklin v. Hutzler*, 277 Ill. App. 3d 94, 96, 660 N.E.2d 103, 104 (1st Dist. 1995); *Jass v. Prudential Health Care Plan*, 88 F.3d 1482, 1485 n.2 (7th Cir. 1996).

20. 735 ILL. COMP. STAT. 5/2-402.

21. *Id.*

22. *Roth v. St. Elizabeth’s Hosp.*, 241 Ill. App. 3d 407, 416, 607 N.E.2d 1356, 1362 (5th Dist. 1993) (stating that “section 2-402 allows full discovery of those named as respondents in discovery once a lawsuit against at least one defendant is filed.”).

- When is a respondent in discovery designated or named?  
 Is a respondent in discovery a party?  
 Can a respondent in discovery file an appearance?  
 Can a respondent in discovery file pleadings?  
 Can a respondent in discovery attend court hearings?  
 Can a respondent in discovery attend and participate in depositions of parties, witnesses and other RIDs?  
 What is the definition of probable cause for conversion from RID status to defendant?  
 Whether a complaint may name RIDs and no defendants and remain viable?  
 Whether an RID is entitled to counsel?  
 May an RID be converted to a defendant if no discovery is sought from and taken from the RID?  
 How does an RID obtain status termination if there is a failure of probable cause to convert or the conversion period expires?  
 What is the appropriate subject matter of RID discovery?  
 What is the RID conversion procedure?  
 Is a former RID subject to additional written/oral discovery upon conversion to a defendant?  
 What occurs when the RID conversion period expires but the statute of limitations has not expired?  
 What are "reasonable" extensions of time for RID conversion?

These questions are numerous and hit at the very heart of the statute. They raise serious doubts about the time and effort invested in drafting the RID statute. Perhaps these questions are answerable by statutory inference or Illinois case law. In any event, a comprehensive review of the law of RIDs is long overdue.<sup>23</sup>

### III. STATUTORY HISTORY AND PURPOSE

As previously mentioned, the Illinois legislature gave birth to the RID statute in 1976.<sup>24</sup> That statute provided as follows:

The plaintiff in any action based on an allegation of negligence in the performance of health care services may designate as respondents in discovery in his pleading those individuals,<sup>25</sup> other than the named

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23. See Tobin, *supra* note 14 (including a discussion of the RID statute in its infancy).

24. ILL. REV. STAT. § 110-21.1 (1976).

25. The original version of the RID statute and the 1985 version limited respondents in discovery to "individuals." The appellate court in *Perry v. Rush Pres. St. Luke's Med. Ctr.*, 178 Ill. App. 3d

defendants, believed by him to have information essential to the determination of who should properly be named as additional defendants in the action.

Persons so named as respondents in discovery shall be required 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.

A person named a respondent in discovery may upon his own motion be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.

A copy of the complaint shall be served on each person named as a respondent in discovery.

Each respondent in discovery shall be paid expenses and fees as provided for witnesses.

A person 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 he is named as a respondent in discovery, even though the time during which an action may otherwise be initiated against him may have expired during such 6 month period.<sup>26</sup>

Case law confirms that the RID statute was enacted to relieve the stress imparted upon physicians when named as defendants in medical negligence actions.<sup>27</sup> The appellate court has specifically noted that:

The legislative history of section 2-402 indicates that its purpose was to provide plaintiff's attorneys with a means of filing medical malpractice suits without naming everyone in sight as a defendant. It was believed that the label of 'defendant' in a medical malpractice suit contributed to the spiraling cost of medical malpractice insurance. (See transcript of proceedings, House of Representatives, June 10, 1976, pages 32-33).<sup>28</sup>

It has been suggested that the RID statute "was enacted for the purpose of reducing the number of malpractice suits by providing for pre-

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564, 568, 533 N.E.2d 437, 439 (1st Dist. 1988), noted that "[h]ospitals have an enormous potential for malpractice liability and are generally the first party named in a suit because the plaintiff was a patient in the hospital at the time the negligence occurred. [citation omitted] Accordingly, we believe the purpose of the statute would be carried out by allowing hospitals to be named as respondents in discovery." *Id.*

26. ILL. REV. STAT. § 110-21.1.

27. *Clark v. Brokaw Hosp.*, 126 Ill. App. 3d 779, 783, 467 N.E.2d 652, 655 (4th Dist. 1984).

28. *Id.*

suit discovery.”<sup>29</sup> Of course, “pre-suit”<sup>30</sup> is really a misnomer insofar as an RID is named in a filed complaint. The lawsuit is underway. Another commentator has referred to a pre-statute practical problem suffered by physicians, which is their displeasure “when local newspapers reported that they had been sued for malpractice.”<sup>31</sup> The RID statute was a response to a perceived medical malpractice crisis.<sup>32</sup> This remains a topic of heated discussion.<sup>33</sup>

#### IV. DESIGNATING THE RESPONDENT IN DISCOVERY

The RID statute does not clearly identify the method by which a “plaintiff in any civil action may designate in his or her pleading those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action.”<sup>34</sup> Although the RID statute does not specify the pleading in which the RID designation is made, surely the proper pleading in which the designation occurs is plaintiff’s complaint.<sup>35</sup> The statute does provide that the RID is to be served a copy of the complaint,<sup>36</sup> thus it is fair to interpret the RID statute to require that the RID designation occur in the complaint. A sample caption of the complaint is as follows:

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29. Tobin, *supra* note 14, at 11.

30. *Id.*

31. Kionka, *supra* note 14, at 26.

32. Tobin, *supra* note 14, at 11.

33. See Neil Vidmar, Russell M. Robinson & Kara MacKillop, “Judicial Hellholes:” *Medical Malpractice Claims, Verdicts and the “Doctor Exodus” in Illinois*, 59 VAND. L. REV. 1309 (2006). See also *The Whole Truth About Medical Malpractice and Insurance*, Ill. Trial Lawyers Ass’n (Feb. 2010); *The Whole Truth about the “Whole Truth,”* ISMIE (March 2010).

34. 735 ILL. COMP. STAT. 5/2-402 (2010).

35. *Clark v. Brokaw Hosp.*, 126 Ill. App. 3d 779, 782, 467 N.E.2d 652, 655 (4th Dist. 1984) (noting that the RID is first named in the complaint). See also *Gonzales v. Pro Ambulance*, 219 Ill. App. 3d 284, 286, 579 N.E.2d 1184, 1186 (4th Dist. 1991) (noting that the statute clearly indicates that the RID may be named in a complaint).

36. 735 ILL. COMP. STAT. 5/2-402.

IN THE CIRCUIT COURT OF COOK COUNTY	
COUNTY DEPARTMENT, LAW DIVISION	
<p>Sally Smith,<sup>37</sup></p> <p style="padding-left: 40px;">Plaintiff,</p> <p>vs.</p> <p>John Jones, M.D.<sup>38</sup> and</p> <p>XYZ Hospital,<sup>39</sup></p> <p style="padding-left: 40px;">Defendants,</p> <p>and</p> <p>Leo Lion, M.D.,<sup>40</sup></p> <p style="padding-left: 40px;">Respondent In Discovery.</p>	<p style="font-size: 4em;">}</p> <p>No 2011 L ____.</p>
<u>COMPLAINT</u>	

Special attention must be given to the RID statute's reference to "the named defendants."<sup>41</sup> This reference raises the issue of the propriety of a complaint naming only a fictitious defendant while actually designating identifiable RIDs. This issue was phrased by an appellate court as follows: "whether 'John Doe' may properly be considered a 'named defendant' under section 2-402 is one of first impression in the state."<sup>42</sup> This issue is a close relative of the following: may plaintiff simply file a complaint naming only respondents in discovery and no defendants? In 1994, the First District Appellate Court held that the "named defendants" language of the

37. Fictitious name supplied by author.

38. Fictitious name supplied by author.

39. Fictitious name supplied by author.

40. Fictitious name supplied by author.

41. 735 ILL. COMP. STAT. 5/2-402.

42. *Bogseth v. Emanuel*, 261 Ill. App. 3d 685, 688, 633 N.E.2d 904, 907 (1st Dist. 1994).

RID was ambiguous and further held that a “John Doe” defendant would satisfy the requirement of naming a defendant.<sup>43</sup> Other appellate court opinions have held that “complaints in discovery,”<sup>44</sup> naming no defendants, fictitious or otherwise, are improper.<sup>45</sup> Therefore, the inquiry is whether a realistic interpretation of the RID statute is to equate a “John Doe,” or fictitious defendant, with a named defendant. It is not. The “John Doe” or fictitious defendant is merely a “placeholder” for an unnamed party defendant which would allow the filing of a complaint within the applicable limitations period. If the complaint naming a fictitious defendant and respondents in discovery was filed at or near the expiration of the limitations period, and the complaint was a nullity, when the limitations period expired the cause of action would be extinguished. In medical and hospital negligence actions, the most popular uses of the RID statute, there are medical and hospital records available which provide the names of the treating physicians and other treating health care providers. Plaintiff should be obligated to identify at least one actual defendant in a complaint which designates respondents in discovery. The RID statute should not relieve plaintiff’s counsel of the obligation to engage in pre-suit investigation.

On the assumption that a complaint, naming at least one identifiable defendant and respondents in discovery is filed, the RID statute requires each RID to be served with the complaint and summons.<sup>46</sup> Despite the requirement of service of the complaint upon the RID, the RID is not a party<sup>47</sup> and there is no action pending against the RID.<sup>48</sup> Nevertheless, once the RID has been named “and service of summons has been properly executed upon him, the court acquires *in personam* jurisdiction”<sup>49</sup> over the RID.<sup>50</sup>

Next, it is necessary to understand the relationship between the designation of the RID in a complaint and the timeliness of the complaint.

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43. *Id.* at 692, 633 N.E.2d at 909.

44. *Armour v. Peterson*, 219 Ill. App. 3d 289, 290–91, 579 N.E.2d 1188, 1189 (4th Dist. 1991). *See also Gonzales v. Pro Ambulance*, 219 Ill. App. 3d 284, 284, 579 N.E.2d 1184, 1184 (4th Dist. 1991); *Jacobs v. Abbott*, 213 Ill. App. 3d 998, 1001, 572 N.E.2d 1231, 1233 (5th Dist. 1991).

45. *See Armour*, 219 Ill. App. 3d at 291, 579 N.E.2d at 1189.

46. 735 ILL. COMP. STAT. 5/2-402 (2010).

47. *Delestowicz v. Labinsky*, 288 Ill. App. 3d 637, 639, 681 N.E.2d 1008, 1010 (1st Dist. 1997). *See also Coyne v. OSF Healthcare*, 332 Ill. App. 3d 717, 719, 773 N.E.2d 732, 735 (3d Dist. 2002).

48. *See Delestowicz*, 288 Ill. App. 3d at 639, 681 N.E.2d at 1010.

49. *See Coyne*, 332 Ill. App. 3d at 719, 773 N.E.2d at 734.

50. *Whitley v. Lutheran Hosp.*, 73 Ill. App. 3d 763, 766, 392 N.E.2d 729, 733 (3d Dist. 1979). *See also In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 659, 913 N.E.2d 1077, 1093 (1st Dist. 2009); Rhonda Wasserman, *The Subpoena Power: Pennoyer’s Last Vestige*, 74 MINN. L. REV. 37, 105 (1989).

The case of *Peoples Bank v. Bromenn Healthcare Hospitals*<sup>51</sup> stands for the proposition that an RID must be designated in a complaint filed before the applicable statute of limitation or period of repose has expired. In *Peoples Bank*,<sup>52</sup> a pregnant woman was admitted to the defendant medical center in June 2003 and three hours later delivered a child by cesarean section.<sup>53</sup> The baby died the following morning.<sup>54</sup>

Almost two years later (May 2005) a complaint was filed against defendants, which was amended four months thereafter. “In January 2008, plaintiffs filed an addendum to their amended complaint, designating”<sup>55</sup> RIDs. The next month the RIDs filed motions to terminate their RID status.<sup>56</sup> The trial court agreed with the RIDs and granted the motions. On appeal, the appellate court stated:

Section 2-402 also provides that (1) as long as a person or entity is named as a respondent-in-discovery within the statute of limitations period and (2) depending at what point in the statute-of-limitations period plaintiff filed the complaint designating the person or entity as a respondent-in-discovery, a plaintiff may have an additional six months past the statute-of-limitations period to file a motion converting the respondent-in-discovery into a defendant.

Here, the four-year statute of repose (and likely the two-year statute of limitations) was triggered by Abigail’s death on June 21, 2003. Thus, the additional six-month period afforded Peoples Bank by section 2-402 of the Code notwithstanding, it had until June 21, 2005, pursuant to the statute of limitations, to designate additional respondents-in-discovery, which it then could have converted into defendants. Even if the statute of limitations had not been triggered by Abigail’s death (a contention about which we are skeptical), Peoples Bank would have been barred from bringing any medical malpractice action after June 21, 2007. Because Peoples Bank did not file the addendum to the amended complaint seeking to designate appellees as respondents-in-discovery until January 2008, the trial court did not err by granting appellees’ respective motions to terminate their respondents-in-discovery status.<sup>57</sup>

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51. *Peoples Bank v. Bromenn Healthcare Hosp.*, 388 Ill. App. 3d 1097, 905 N.E.2d 339 (4th Dist. 2009).

52. *Id.*

53. *Id.* at 1098, 905 N.E.2d at 340.

54. *Id.*

55. *Id.* at 1099, 905 N.E.2d at 341.

56. *Id.* It should be noted that the RID statute, neither expressly nor otherwise, provides for this process.

57. *Id.* at 1102, 905 N.E.2d at 343.

The trial court was affirmed. The RID designation did not occur in a timely fashion.

It is important to note that the Federal Rules of Civil Procedure neither encompass nor recognize respondents in discovery. The RID statute is simply inapplicable in federal court.<sup>58</sup> This point is particularly significant to a hypothetical case originally filed in Illinois state court, with RIDs designated, and subsequently removed<sup>59</sup> to federal court. Those previously designated RIDs cannot be converted to defendants in the federal court action. This matter has been explained in detail by the federal district court in *Montclair-Bohn v. Janssen Pharmaceutica*.<sup>60</sup> Although the quoted material is lengthy, its substantial republication here is meaningful, particularly to counsel for prospective plaintiffs:

Joinder of defendants in federal cases is governed by Federal Rules of Civil Procedure (“Rules”) 19 and 20 and 28 U.S.C. § 1447(e). Rule 19 addresses compulsory joinder . . . Like Rule 19, section 2-402 sets forth a species of compulsory joinder, mandating that respondents in discovery be joined as defendants, upon timely motion, if there is probable cause to believe they are liable. Thus, section 2-402 is in direct conflict with both Rule 19, which instructs courts to consider a variety of factors to determine whether a defendant must be joined, and section 1447(e), which grants courts discretion to deny joinder in removal cases. Because there is a conflict between the state law and federal procedure, the Supremacy Clause dictates that the latter controls.

Even if there were no conflict, section 2-402 would still not apply because it is procedural, not substantive. . . .As originally enacted, section 2-402 applied to only one substantive area of the law—medical malpractice.<sup>61</sup> In 1989, however, the Illinois Legislature amended the statutory language . . . section 2-402 now applies to all civil suits, not just to suits that implicate one substantive area of the law.

. . . Even in the absence of section 2-402, plaintiffs can add respondents as defendants in federal court pursuant to Rules 19 and 20 and

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58. See *Stull v. YTB Int’l*, No. 10-600-GPM, 2010 WL 3702424 at \*2 (S.D. Ill. Sept. 8, 2010). See also *Ebersohl v. Bechtel Corp.*, No. 09-1029-GPM, 2010 WL 2164451 at \*1 n.1 (S.D. Ill. May 31, 2010); *Lee v. Burlington N.*, No. 07 cv 5829, 2008 WL 4874052 (N.D. Ill. June 26, 2008); *Sargent v. Cottrell, Inc.*, No. 06-cv-1042-MJR, 2007 WL 4115811 at \*2–3 (S.D. Ill. Nov. 16, 2007); *Montclair-Bohl v. Janssen Pharm.*, No. 06 C 2166, 2006 WL 2700013 (N.D. Ill. Sept. 13, 2006); *Morris v. Health Prof’ls, Ltd.*, No. 10-01227, 2011 WL 573799 (C.D. Ill. Feb. 15, 2011). But see *Roe v. Little Co. of Mary Hosp.*, 815 F. Supp. 244 (N.D. Ill. 1992).

59. 28 U.S.C. § 1441 (2002).

60. See *Montclair-Bohl*, 2006 WL 2700013.

61. See 1989 Ill. Legis. Serv. Pub. Act 86-843 (West).

section 1447(e). Consequently, the availability of section 2-402 will not give plaintiffs any incentive to choose one court system over the other.

. . . Respondents are not defendants in the lawsuit, so they have no right to remove. *See* 28 U.S.C. § 1446(a). . . the only way a respondent can “get into federal court” is by voluntarily joining the suit which. . . would bring about the very result—their joinder—that removal to federal court was supposed to avoid.

Not applying section 2-402 in federal court also would not encourage defendants to remove. . . it is far better for them if the risk of judgment is spread among many defendants rather than limited to one.

Not applying the section to diversity cases also would not lead to dissimilar results in similar cases because all referral courts would be using the same joinder rules. If, however, section 2-402 is applied in federal court, the outcome of a joinder motion may depend on the location of the court. Illinois federal courts, who could not deny joinder in accordance with section 1447(e), would be forced to permit diversity-destroying defendants to be joined and, as a result, to remand such cases to state court. Federal courts in other states, however, would retain their discretion to deny joinder, creating the potential for different joinder decisions in similar cases in different federal courts.

In short, applying section 2-402 to diversity cases would be inconsistent with both the Supremacy Clause and the *Erie* doctrine. Therefore the Court declines to do so.<sup>62</sup>

Also worthy of mention is that the citizenship of an RID designated in an Illinois state court, then removed to federal court, is irrelevant for purposes of diversity.<sup>63</sup>

Finally, the appellate court has spoken to the relationship between designation of the RID and an automobile insurance company’s duty to

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62. *Montclair-Bohl*, 2006 WL 2700013 at \*1–2. The court also said that “A substantive state law, the Seventh Circuit has said, is one that is: (1) “procedural’ in the ordinary sense of the term, [but] is limited to a particular substantive area”; or (2) so likely to dictate the outcomes of cases that, if not applied in diversity cases, forum shopping or dissimilar decisions on similar cases may result, and “so entwined with procedures prescribed by the federal rules that it is likely to impair the integrity of federal procedure if it is applied in diversity cases.” *Id.* Section 2-402 satisfies neither test.” *Id.* *See also* *Murphy v. Schering Corp.*, 878 F. Supp. 124, 126 (N.D. Ill. 1995) (noting that Illinois law provides substantive rules of decision in a diversity action but not procedural rules).

63. *Jass v. Prudential Health Care Plan*, 88 F.3d 1482, 1485 n. 3 (7th Cir. 1996).

defend.<sup>64</sup> In *Economy Fire & Casualty Co. v. Brumfield*,<sup>65</sup> the court held that since no damages were sought against an RID, the insurance company had no duty to defend the RID based upon his designation in the complaint.<sup>66</sup>

## V. DISCOVERY AND THE RESPONDENT IN DISCOVERY

The RID statute<sup>67</sup> is not exceedingly helpful in explaining the RID's role in the discovery process. The statute does provide an example of a "Summons For Discovery,"<sup>68</sup> and that summons specifically indicates that the RID may be required to appear for a deposition, a discovery device applicable to parties and non-parties,<sup>69</sup> answer interrogatories, otherwise applicable only to parties<sup>70</sup> and respond to a production request, otherwise applicable only to parties.<sup>71</sup> The statute does provide that the RID "shall be required to respond to discovery by the plaintiff in the same manner as are defendants."<sup>72</sup> Indeed, it has been held that the "action brought pursuant to section 2-402<sup>73</sup> provides for unilateral discovery by a plaintiff."<sup>74</sup>

However, the RID statute<sup>75</sup> does not explain the extent to which the RID may participate in the discovery process, which will likely occur simultaneously as to parties (and perhaps non-party witnesses) and RIDs. Is the RID personally or by counsel entitled to attend and participate in depositions of other RIDs, witnesses and parties? The RID statute<sup>76</sup> does provide that the RID "may upon his or her own motion be made a defendant in the action."<sup>77</sup> Construing "motion" broadly, the RID will want carefully to avoid an unintentional conversion from RID to defendant by participating in a deposition of another RID, party or witness. With no guidance provided by the statute,<sup>78</sup> the best advice is to obtain an advance agreement of all counsel to allow the RID to fully participate without

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64. *Econ. Fire & Cas. Co. v. Brumfield*, 384 Ill. App. 3d 726, 730, 894 N.E.2d 421, 425 (4th Dist. 2008).

65. *Id.*

66. *Id.* at 731, 894 N.E.2d at 426.

67. 735 ILL. COMP. STAT. 5/2-402 (2010).

68. *Id.*

69. ILL. SUP. CT. R. 202 (2011).

70. ILL. SUP. CT. R. 213 (2011).

71. ILL. SUP. CT. R. 214 (2011).

72. 735 ILL. COMP. STAT. 5/2-402.

73. *Id.*

74. *Knapp v. Bulin*, 392 Ill. App. 3d 1018, 1025, 911 N.E.2d 541, 548 (1st Dist. 2009). *See also* *Froehlich v. Sheehan*, 240 Ill. App. 3d 93, 103, 608 N.E.2d 889, 897 (1st Dist. 1993).

75. 735 ILL. COMP. STAT. 5/2-402.

76. *Id.*

77. *Id.*

78. *Id.*

jeopardizing the RID status. In this fashion, if the RID is later converted to a defendant, the former RID may be able to avoid seeking re-depositions.

Although the RID statute<sup>79</sup> suggests the purpose of RID discovery as the search for “information essential to the determination of who should properly be named as additional defendants in the action,”<sup>80</sup> the statute does not address whether an RID may be questioned about the standard of care,<sup>81</sup> liability or damages. Again, an agreement of counsel should be reached about these topics.

Referring to the same provision of the RID statute as to the scope of discovery,<sup>82</sup> the statute does not limit the discoverable information to the designated RID. In other words, the statute<sup>83</sup> does not prohibit plaintiff from obtaining discovery from an RID which may implicate another RID or defendant, or another person or entity not yet named as a defendant or RID. Therefore, the RID may be subject to the range of discovery to which any party or witness may be subject.

Although related to the conversion process to be discussed later in this article, it should be noted that the RID statute does not mandate plaintiff to seek discovery from a designated RID.<sup>84</sup> The failure to seek discovery from the RID will, therefore, not prejudice a plaintiff in the quest to convert the RID to a defendant.

It should be noted that the scope of discovery permitted under the RID statute is much broader than provided for by Illinois Supreme Court Rule 224,<sup>85</sup> governing pre-suit discovery. Rule 224 provides:

(a) Procedure.

(1) *Petition.*

(i) A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.

(ii) The action for discovery shall be initiated by the filing of a verified petition in the circuit court of the county in which the action or proceeding

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79. *Id.*

80. *Id.*

81. *See Iaccino v. Anderson*, 406 Ill. App. 3d 397, 411–12, 940 N.E.2d 742, 755 (1st Dist. 2010) (explaining the standard against which a defendant physician’s conduct is measured).

82. 735 ILL. COMP. STAT. 5/2-402.

83. *Id.*

84. *Long v. Mathew*, 336 Ill. App. 3d 595, 602, 783 N.E.2d 1076, 1082 (4th Dist. 2003). *See also* *Torley v. Foster C. McGaw Hosp.*, 116 Ill. App. 3d 19, 21, 452 N.E.2d 7, 8 (1st Dist. 1983).

85. ILL. SUP. CT. R. 224 (2011).

might be brought or in which one or more of the persons or entities from whom discovery is sought resides. The petition shall be brought in the name of the petitioner and shall name as respondents the persons or entities from whom discovery is sought and shall set forth: (A) the reason the proposed discovery is necessary and (B) the nature of the discovery sought and shall ask for an order authorizing the petitioner to obtain such discovery. The order allowing the petition will limit discovery to the identification of responsible persons and entities and where a deposition is sought will specify the name and address of each person to be examined, if known, or, if unknown, information sufficient to identify each person and the time and place of the deposition.

(2) *Summons and Service.* The petitioner shall serve upon the respondent or respondents a copy of the petition together with a summons in a form substantially as follows:

. . . .

(b) *Expiration and Sanctions.* Unless extended for good cause, the order automatically expires 60 days after issuance. The sanctions available under Supreme Court Rule 219 may be utilized by a party initiating an action for discovery under this rule or by a respondent who is the subject of discovery under this rule.

(c) *Expenses of Complying.* The reasonable expenses of complying with the requirements of the Order of Discovery shall be borne by the person or entity seeking the discovery.<sup>86</sup>

The language of Supreme Court Rule 224 has been examined by the appellate court, which concluded that the scope of discovery is limited to the “identification process.”<sup>87</sup> “Once the identity of [potential defendants] has been ascertained, the purpose of the rule has been accomplished and the action shall be dismissed.”<sup>88</sup> In some circumstances, the petitioner referred to in Rule 224 may be entitled to obtain “knowledge of the connection of an individual to the injury involved . . . .”<sup>89</sup> Unlike the RID statute, Rule 224 does not contain a conversion process and appears to have no impact on an applicable statute of limitations or repose.<sup>90</sup>

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86. *Id.*

87. *Roth v. St. Elizabeth’s Hosp.*, 241 Ill. App. 3d 407, 413, 607 N.E.2d 1356, 1359 (5th Dist. 1993).

88. *Id.*

89. *Beale v. EdgeMark Fin. Corp.*, 279 Ill. App. 3d 242, 252, 664 N.E.2d 302, 308 (1st Dist. 1996).

90. *Roth*, 241 Ill. App. 3d at 409–10, 607 N.E.2d at 1358 (referring to the expiration date for statute of limitations).

## VI. OTHER INVOLVEMENT OF RESPONDENTS IN DISCOVERY

As previously noted, RIDs are not parties.<sup>91</sup> The RID “statute does not require [RIDs] to file appearances or answer in any other manner before plaintiff has initiated discovery.”<sup>92</sup> More precisely, the RID statute simply does not authorize the RID to file appearances or other pleadings. RIDs, as non-parties, cannot file motions to dismiss.<sup>93</sup> Nevertheless, some RIDs erroneously file motions to dismiss<sup>94</sup> and at least one appellate opinion has referred to a trial court having entered an order dismissing an RID.<sup>95</sup>

The RID statute<sup>96</sup> “provides for unilateral discovery by the plaintiff”<sup>97</sup> and, implicitly, suggests that the only authorized filings by the RID are responses to written discovery requests (answers to interrogatories, responses to production requests). It is traditional that RIDs are represented by counsel and that appearances on behalf of RIDs are filed. A special appearance<sup>98</sup> is not appropriate despite having been recognized as a tactic by an appellate court.<sup>99</sup> An appearance filed on behalf of the RID, a strategy not explicitly prohibited by the RID statute, will entitle the RID’s counsel to receive notices and pleadings filed by other participants in the case. It will allow the RID’s counsel to follow the progress of the case and communicate more effectively with the RID regarding cases status.

## VII. CONVERTING THE RESPONDENT IN DISCOVERY TO A DEFENDANT

The process by which an RID is converted to a defendant is, undoubtedly, the most significant aspect of the RID statute. This portion of the statute provides:

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91. *Shanklin v. Hutzler*, 277 Ill. App. 3d 94, 100, 660 N.E.2d 103, 106 (1st Dist. 1995). *See also* *Delestowicz v. Labinsky*, 288 Ill. App. 3d 637, 639, 681 N.E.2d 1008, 1009 (1st Dist. 1997).
  92. *Browning v. Jackson Park Hosp.*, 163 Ill. App. 3d 543, 547, 516 N.E.2d 797, 800 (1st Dist. 1987).
  93. *Shanklin*, 294 Ill. App. 3d at 665–66, 691 N.E.2d at 14.
  94. *Cutler v. Nw. Suburban Cmty. Hosp.*, 405 Ill. App. 3d 1052, 1056, 939 N.E.2d 1032, 1036 (2d Dist. 2010).
  95. *Id.*
  96. 735 ILL. COMP. STAT. 5/2-402 (2010).
  97. *Knapp v. Bulin*, 392 Ill. App. 3d 1018, 1024, 911 N.E.2d 541, 547 (1st Dist. 2009).
  98. It should be noted that the Illinois Code of Civil Procedure no longer refers to a “special appearance” limited to challenging the court’s jurisdiction. 735 ILL. COMP. STAT. 5/2-301 (2010). *See* PARNES, *supra* note 14, at 117–18.
  99. *See* *Coley v. St. Bernard’s Hosp.*, 281 Ill. App. 3d 587, 594, 667 N.E.2d 493, 498 (1st Dist. 1996).

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. 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.<sup>100</sup>

An RID must be designated in a complaint filed before the expiration of the applicable statute of limitations or repose period.<sup>101</sup> “The six-month period in which a respondent in discovery may be converted to a defendant begins to run on the day the complaint [naming the RID] is filed.”<sup>102</sup> This is significant as counsel may erroneously believe the RID designation date is triggered by service of process.

For a plaintiff to seek conversion of the RID to a defendant, a motion for conversion must be filed.<sup>103</sup> Filing of the motion, not the mailing of it,<sup>104</sup> must occur within the six month conversion period.<sup>105</sup> If the motion for conversion is timely filed, the RID may be converted to a defendant even if the hearing on the motion to convert is not held until after the conversion period.<sup>106</sup> An important practice point is that the motion to convert the RID to defendant cannot be set as a routine motion<sup>107</sup> “because asking a court to rule on a motion as routine tells the court that it need not make any evidentiary determinations, a message . . . contrary to the statute’s mandate.”<sup>108</sup> Therefore, the statutory provision that RIDs “may, on motion of the plaintiff, be added as defendants if the evidence discloses the existence of probable cause”<sup>109</sup> requires an evidentiary hearing.<sup>110</sup>

The RID statute, however, does not well define the evidence necessary to convert an RID to a defendant.<sup>111</sup> What, then, is the evidentiary standard

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100. 735 ILL. COMP. STAT. 5/2-402 (2010).

101. See *Peoples Bank*, *supra* note 50.

102. *Knapp*, 392 Ill. App. 3d at 1024, 911 N.E.2d at 548. See also *Brown v. Jaimovich*, 365 Ill. App. 3d 329, 339, 847 N.E.2d 870, 878 (1st Dist. 2006).

103. See *Knapp*, 392 Ill. App. 3d at 1026, 911 N.E.2d at 549.

104. *Id.*

105. *Clark v. Brokaw Hosp.*, 126 Ill. App. 3d 779, 782, 467 N.E.2d 652, 654–55 (4th Dist. 1984).

106. *Id.*

107. *Froehlich v. Sheehan*, 240 Ill. App. 3d 93, 99, 608 N.E.2d 889, 894 (1st Dist. 1993).

108. *Id.* at 102, 608 N.E.2d at 896.

109. 735 ILL. COMP. STAT. 5/2-402 (2010).

110. *Froehlich*, 240 Ill. App. 3d 93, 99, 608 N.E.2d at 894.

111. See 735 ILL. COMP. STAT. 5/2-402.

of “probable cause”? Probable cause for conversion is shown when “a man of ordinary caution and prudence would entertain an honest and strong suspicion that the purported negligence of the respondent in discovery was a proximate cause of plaintiff’s injury.”<sup>112</sup> This is not the degree of evidence involved in a ruling on a motion for summary judgment<sup>113</sup> and does not require plaintiff to demonstrate a prima facie case,<sup>114</sup> as would be necessary at trial. The burden, therefore, is not particularly harsh. “The probable cause requirements of section 2-402 should be liberally construed to the end that controversies may be determined according to the substantive rights of the parties.”<sup>115</sup> Of course, this simply suggests that plaintiffs need not endure much pain in the conversion process.

What evidence is enough to warrant the conversion of the RID to a defendant? Certainly, if plaintiff’s counsel obtains the required health professional’s report and provides the attorney’s affidavit necessary to satisfy the section 2-622 filing requirements,<sup>116</sup> a trial court will grant the request for conversion.<sup>117</sup> Short of section 2-622<sup>118</sup> compliance, a court may consider an attorney’s affidavit regarding opinions of consulting physicians,<sup>119</sup> medical records<sup>120</sup> and the deposition testimony of the RID<sup>121</sup> as evidence to support probable cause for conversion of the RID to a defendant. Again, the conversion process does not require a plaintiff to overcome a very high hurdle.<sup>122</sup>

The six-month conversion period is subject to extensions of time, but the statutory language is clumsy.<sup>123</sup> The statute provides for a one time “good cause” extension, defined as resulting from the withdrawal of plaintiff’s counsel or good cause.<sup>124</sup> Essentially, this provision defines “good cause” as “good cause.”<sup>125</sup> Any subsequent extensions of the

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112. *Ingle v. Hosp. Sisters Health Sys.*, 141 Ill. App. 3d 1057, 1061–62, 491 N.E.2d 139, 142 (4th Dist. 1986). *See also Froehlich*, 240 Ill. App. 3d at 100, 608 N.E.2d at 894.

113. *Ingle*, 141 Ill. App. 3d at 1065, 491 N.E.2d at 144.

114. *Id.* at 1065, 491 N.E.2d at 144.

115. *Jackson-Baker v. Immesoete*, 337 Ill. App. 3d 1090, 1095, 787 N.E.2d 874, 879 (3d Dist. 2003).

116. 735 ILL. COMP. STAT. 5/2-622 (2010).

117. *Long v. Mathew*, 336 Ill. App. 3d 595, 604, 783 N.E.2d 1076, 1083 (4th Dist. 2003); *Williams v. Medenica*, 275 Ill. App. 3d 269, 273, 655 N.E.2d 1002, 1005 (1st Dist. 1995).

118. 735 ILL. COMP. STAT. 5/2-622 (2010).

119. *See Coley v. St. Bernard’s Hosp.*, 281 Ill. App. 3d 587, 593–94, 667 N.E.2d 493, 498 (1st Dist. 1996).

120. *Id.*

121. *Id.*

122. *Id.*

123. 735 ILL. COMP. STAT 5/2-402 (stating that “notwithstanding the limitations of this section, the court may grant additional reasonable extensions from this 6-month period . . .”).

124. *Id.*

125. *Id.* (stating that “an extension from the original 6-month period for good cause may be granted only once for up to 90 days for (i) . . . or (ii) good cause.”).

conversion period, apparently limitless in number, may be granted only if the RID fails or refuses to respond to appropriate discovery requests.<sup>126</sup> The first extension, for good cause, may be up to ninety days.<sup>127</sup> That extension may occur simply due to the built-in delay with the representation of the RID by counsel and obtaining the necessary materials from which to respond to written discovery requests. Difficulty in scheduling discovery depositions, particularly of physicians, may add to the delay and provide the basis for extensions of the six month conversion period. The result is that the conversion period, including extensions of time, may not elapse until the passage of a considerable period of time. To the extent that RIDs may believe that the statute provides for a quick determination of their ultimate status, that belief is mistaken.

It has been suggested that the six month conversion period is not capable of extension.<sup>128</sup> The current RID statute,<sup>129</sup> as amended in 2006, includes provisions for extension of the conversion period and became effective after the authority suggesting that the conversion period could not be extended.<sup>130</sup>

The RID statute does not speak to the interesting situation in which the RID is not converted to a defendant within the six month conversion period but the applicable statute of limitations has not yet expired.<sup>131</sup> Here, the argument is that if plaintiff's counsel chooses the vehicle of the RID statute, that is the only vehicle by which the RID may become a defendant, i.e., conversion to a defendant within the statutorily mandated conversion period.

Despite the position that "[s]crupulous adherence to the requirements of section 2-402 is a condition precedent to the plaintiff[s] right to seek a remedy,"<sup>132</sup> the appellate court has rejected the position that the expiration of the six-month conversion period trumps a remaining limitations period.<sup>133</sup> This merits some explanation as the appellate court's opinion in *Flores v. St. Mary of Nazareth Hospital*<sup>134</sup> has profoundly impacted the application of the RID statute.

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126. *Id.*

127. *Id.*

128. See PARNES, *supra* note 14, at 214 (citing *Robinson v. Johnson*, 346 Ill. App. 3d 895, 906, 809 N.E.2d 123, 132 (1st Dist. 2004)).

129. 735 ILL. COMP. STAT. 5/2-402 (2010).

130. *Robinson v. Johnson*, 346 Ill. App. 3d 895, 906, 809 N.E.2d 123, 132 (1st Dist. 2004).

131. See 735 ILL. COMP. STAT. 5/2-402.

132. *Knapp v. Bulin*, 392 Ill. App. 3d 1018, 1024, 911 N.E.2d 541, 548 (1st Dist. 2009).

133. *Flores v. St. Mary of Nazareth Hosp.*, 149 Ill. App. 3d 371, 376, 502 N.E.2d 1, 4 (1st Dist. 1986).  
See also *Arndt v. Resurrection Hosp.*, 163 Ill. App. 3d 209, 215, 517 N.E.2d 1, 4 (1st Dist. 1987).

134. See *Flores*, 149 Ill. App. 3d 371, 502 N.E.2d 1.

*Flores*<sup>135</sup> concerned a medical negligence based wrongful death action<sup>136</sup> on behalf of the deceased spouse and children.<sup>137</sup> The complaint was amended, naming respondents in discovery.<sup>138</sup> The trial court ultimately allowed plaintiff to further amend her complaint, adding two of the RIDs as defendants.<sup>139</sup> These RIDs challenged the trial court decision, urging that they were not named as defendants within six months after their designation as RIDs.<sup>140</sup> The trial court dismissed the former RIDs from the litigation and plaintiff appealed.<sup>141</sup>

Here, two different limitations periods applied to the lawsuit. The limitations period applicable to the children's claims had not expired by the time plaintiff sought conversion of the RIDs to defendants<sup>142</sup> but plaintiff's motion to convert the RIDs was not made within the limitations period applicable to the spouse.<sup>143</sup> The appellate court held that although the spouse's claims on her own behalf were time barred and the RIDs were not subject to conversion for those claims, plaintiff could simply prosecute an action on behalf of the children as the statute of limitations regarding their claims had not expired.<sup>144</sup> The appellate court stated:

We believe that the six-month period must be construed only to extend, and never to foreshorten, the limitations period. Section 2-402 is irrelevant to motions to add defendants made within the limitations period for a cause of action, even if the plaintiff previously named the new defendant as a respondent in discovery.<sup>145</sup>

Therefore, the argument that the RID statute is a more specific statute of limitations than the usually applicable statute of limitations and must be followed to the exclusion of an otherwise applicable limitations period will not succeed.

If a motion to convert the RID to a defendant is denied or plaintiff's counsel simply agrees not to convert the RID to a defendant, what is the appropriate procedure by which to liberate the RID from the lawsuit? The RID statute does not so provide,<sup>146</sup> but the RID should seek a court order

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135. *Id.*

136. Ill. Rev. Stat. ch. 70, par. 1.

137. *See Flores*, 149 Ill. App. 3d at 373, 502 N.E.2d at 2.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 373-74, 502 N.E.2d at 2-3.

143. *Id.*

144. *Id.* at 378, 502 N.E.2d at 5.

145. *Id.* at 376, 502 N.E.2d at 4.

146. *See* 735 ILL. COMP. STAT. 5/2-402 (2010).

terminating the RID status.<sup>147</sup> The RID's motion for termination of RID status is not a prohibited motion to dismiss<sup>148</sup> and accomplishes the goal of the RID.<sup>149</sup> Assuming that the statutes of limitation and repose have expired, the former RID will not be made a defendant but remains subject to a deposition<sup>150</sup> or trial subpoena.

### VIII. EPILOGUE

Does the RID statute<sup>151</sup> occupy a valuable and meaningful place in Illinois civil procedure? The statute is not well written. An examination of the statute yields more questions than answers. The statute was created with physicians in mind; however, it now applies to all civil actions.<sup>152</sup> To the extent that the early supporters of the statute envisioned a vehicle to appease physicians—to require their participation in litigation as non-parties with the opportunity for an early escape—that goal has been frustrated by the appellate court<sup>153</sup> and the statute.<sup>154</sup> As previously discussed, the requirements for conversion are not onerous.<sup>155</sup> The RID can become a defendant if the conversion period has expired but the statute of limitations/repose has not.<sup>156</sup> The six month conversion period can essentially lengthen an otherwise expired limitations period.<sup>157</sup> To the extent that plaintiff's counsel may lawfully seek extensions of the conversion period,<sup>158</sup> the RID may remain in legal "limbo" rather deep into litigation. This uncertainty will require the RID to assume that conversion will occur, since the evidence necessary for conversion is not great, and prepare the same defense which would have been required if the RID had been named as an original defendant.

Frankly, a case could be made for repeal of the RID statute based upon the prior examination of the statute and review of the case law

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147. A motion to terminate RID status is not filed by a party.

148. *Shanklin v. Hutzler*, 294 Ill. App. 3d 659, 666, 691 N.E.2d 7, 12 (1st Dist. 1998).

149. *See Montclair-Bohl v. Janssen Pharm.*, No. 06 C 2166, 2006 WL 2700013 at \*3 (N.D. Ill. Sept. 13, 2006).

150. 735 ILL. COMP. STAT. 5/2-402.

151. Of course if the former RID gave a deposition as RID, it could be argued that another deposition, pursuant to subpoena, would constitute harassment.

152. *See infra*, section III.

153. *Flores v. St. Mary of Nazareth Hosp.*, 149 Ill. App. 3d 371, 376, 502 N.E.2d 1, 4 (1st Dist. 1986).

154. 735 ILL. COMP. STAT. 5/2-402.

155. *See infra*, section VII.

156. *Flores*, 149 Ill. App. 3d at 374, 502 N.E.2d at 3.

157. *Id.*

158. 735 ILL. COMP. STAT. 5/2-402. *See Knapp v. Bulin*, 392 Ill. App. 3d 1018, 1024, 911 N.E.2d 541, 547 (1st Dist. 2009) (recognizing that the current RID statute provides for extensions of the conversion period).

interpreting it. Illinois Supreme Court Rule 224<sup>159</sup> provides a vehicle for pre-lawsuit discovery limited to the identification of defendants,<sup>160</sup> and does not, by its terms, operate to relax the statute of limitations or repose.<sup>161</sup> The RID statute largely benefits the plaintiff who is relieved from a certain degree of pre-suit investigation.

In conclusion, perhaps despite the efforts of the proponents of the RID statute, the statute provides little comfort to the RID. A different result might occur in a state in which its highest court would embrace tort reform, but that does not appear likely in Illinois.<sup>162</sup> The statute is interpreted in a fashion that encourages conversion and seems to provide plenty of time within which conversion may occur. It is simply not RID friendly and does not further the goals of a meaningful code of civil procedure.

#### IX. APPENDIX—SELECTED RESPONDENT IN DISCOVERY CASE LAW

##### A. History of Statute

*Murphy v. Giardina*, 82 Ill.2d 529, 413 N.E.2d 399 (1980).

##### B. RIDs Not Parties

*Delestowicz v. Labinsky*, 288 Ill. App. 3d 637, 681 N.E.2d 1008 (1st Dist. 1997).

*Shanklin v. Hutzler*, 294 Ill. App. 3d 659, 691 N.E.2d 7 (1st Dist. 1997).

*Shanklin v. Hutzler*, 277 Ill. App. 3d 94, 660 N.E.2d 103 (1st Dist. 1995).

##### C. Hospital as Respondent In Discovery

*Perry v. Rush Pres. St. Luke's Med. Ctr.*, 178 Ill. App. 3d 564 (1st Dist. 1988).

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159. ILL. SUP. CT. R. 224 (2011).

160. *Id.* See also *Roth v. St. Elizabeth's Hosp.*, 241 Ill. App. 3d 407, 413, 607 N.E.2d 1356, 1360 (5th Dist. 1993).

161. *Roth*, 241 Ill. App. 3d at 409, 607 N.E.2d at 1358 (stating “the statute of limitations would not expire until May 14, 1993.”).

162. For a history of the tort reform effort and medical negligence reform effort in Illinois, see *Lebron v. Gottlieb Mem'l Hosp.*, 237 Ill.2d 217, 930 N.E.2d 895 (2010). See also *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976); David M. Goldhaber & David J. Grycz, *Three Strikes and You're Out*, 24 CBA RECORD 30 (April 2010).

#### D. Jurisdiction Over RID

*Coyne v. OSF Healthcare*, 332 Ill. App. 3d 717, 773 N.E.2d 732 (3d Dist. 2002).

#### E. “John Doe” & Fictitious Defendants

*Bogseth v. Emanuel*, 261 Ill. App. 3d 685, 633 N.E.2d 904 (1st Dist. 1994).

*Armour v. Peterson*, 219 Ill. App. 3d 289, 579 N.E.2d 1188 (4th Dist. 1991).

*Gonzales v. Pro Ambulance*, 219 Ill. App. 3d 284, 579 N.E.2d 1184 (4th Dist. 1991).

*Guertin v. Guertin*, 204 Ill. App. 3d 527, 561 N.E.2d 1339 (3d Dist. 1990).

#### F. Non-Medical Negligence Cases

*In re Marriage of Sanfratello*, 393 Ill. App. 3d 641, 913 N.E.2d 1077 (1st Dist. 2009).

*Country Mut. Ins. Co. v. Olsak*, 391 Ill. App. 3d 295, 908 N.E.2d 1091 (1st Dist. 2009).

*Peterson v. Residential Alts. of Ill., Inc.*, 402 Ill. App. 3d 240, 932 N.E.2d 1 (3d Dist. 2010).

#### G. RIDs Not Recognized In Federal Civil Procedure

*Montclair-Bohl v. Janssen Pharm.*, 2006 WL 2700013 (N.D. Ill. 2006).

*Morris v. Health Prof'ls, Ltd.*, 2011 WL 573799 (C.D. Ill. 2011).

*Murphy v. Schering Corp.*, 878 F. Supp. 124 (N.D. Ill. 1995).

*Stull v. YTB Int'l*, 2010 WL 3702424 (S.D. Ill. 2010).

*Ebersohl v. Bechtel Corp.*, 2010 WL 2164451 (S.D. Ill. 2010).

*Lee v. Burlington N.*, 2008 WL 4874052 (N.D. Ill. 2008).

*Sargent v. Cottrell*, 2007 WL 4115811 (S.D. Ill. 2007).

#### H. RID/Citizenship/Diversity Jurisdiction

*Jass v. Prudential Health Care Plan*, 88 F.3d 1482 (7th Cir. 1996).

#### I. Appearance/Answer

*Browning v. Jackson Park Hosp.*, 163 Ill. App. 3d 543, 516 N.E.2d 797 (1st Dist. 1987).

#### J. Time for Naming RID

*Peoples Bank v. Bromenn Healthcare Hosp.*, 388 Ill. App. 3d 1097, 905 N.E.2d 339 (4th Dist. 2009).

#### K. Conversion Of RID To Defendant

*Knapp v. Bulin*, 392 Ill. App. 3d 1018, 911 N.E.2d 541 (1st Dist. 2009).

*Clark v. Brokaw Hosp.*, 126 Ill. App. 3d 779, 467 N.E.2d 652 (4th Dist. 1984).

*Arndt v. Resurrection Hosp.*, 163 Ill. App. 3d 209, 517 N.E.2d 1 (1st Dist. 1987).

*Flores v. St. Mary of Nazareth Hosp.*, 149 Ill. App. 3d 371, 502 N.E.2d 1 (1st Dist. 1986).

*Froehlich v. Sheehan*, 240 Ill. App. 3d 93, 608 N.E.2d 889 (1st Dist. 1993).

*Brown v. Jaimovich*, 365 Ill. App. 3d 329, 847 N.E.2d 870 (1st Dist. 2006).

*Williams v. Medenica*, 275 Ill. App. 3d 269, 655 N.E.2d 1002 (1st Dist. 1995).

*Long v. Mathew*, 336 Ill. App. 3d 595, 783 N.E.2d 1076 (4th Dist. 2003).

*Ingle v. Hos. Sisters Health Sys.*, 141 Ill. App. 3d 1057, 491 N.E.2d 139 (4th Dist. 1986).

*Robinson v. Johnson*, 346 Ill.App.3d 895, 809 N.E.2d 123 (1st Dist. 2004).

#### L. RID and Insurance Company Duty to Defend

*Econ. Fire & Cas. v. Brumfield*, 384 Ill. App. 3d 726, 894 N.E.2d 421 (4th Dist. 2008).

