

# RESPONDENTS IN DISCOVERY: A BENEFICENT STATUTE WITH TRAPS FOR THE UNWARY

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## I. INTRODUCTION

First enacted as Section 21.1 of the Civil Practice Act thirty-five years ago,<sup>1</sup> the Illinois Respondents in Discovery Statute (Statute) has had an interesting past. However, a variety of factors have converged to thwart its beneficent purposes and have created hidden dangers for the unwary who rely upon it. This article will explain the Statute and its history, and will attempt to shed light on the hidden dangers the Statute poses.

## II. STATUTORY HISTORY

As originally enacted, the Statute applied only to medical malpractice actions.<sup>2</sup> The impetus for the provision, and for its limited application, was

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1. Pub. Act 79-1434, § 8 (codified as amended at 735 ILL. COMP. STAT. 5/2-402 (2010)). *See also* ILL. REV. STAT. (1977), ch. 110, § 21.1; *Whitley v. Lutheran Hosp.*, 392 N.E.2d 729, 731 (Ill. App. Ct. 1979).

2. As originally enacted, the provision stated:

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discovery may upon his own motion be made a defendant in the action, in which case the provisions of this Section are no longer applicable to that person.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

the hope that fewer health care providers would be made “defendants,” a moniker thought to contribute to rising malpractice insurance premiums.<sup>3</sup> However, in 1989 the legislature expanded the Statute’s application to all civil actions.<sup>4</sup> At the same time, it amended the Statute so that entities

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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.

Pub. Act 79-1434, § 8. See also ILL. REV. STAT. (1977), ch. 110, § 21.1. As to the legislative intent of the original Statute, see 79th Gen. Assemb., H. Proceedings, June 10, 1976, at 32-36; 79th Gen. Assemb., H. Proceedings, June 11, 1976, at 27, 98-99. See generally Joseph N. Rathnau, *The Illinois Medical Malpractice Acts: Response to Crisis*, 65 ILL. B.J. 716 (1977).

3. See 79th Gen'l Assembly, House Proceedings, June 10, 1976, at 32-36. See also Bogseth v. Emanuel, 633 N.E.2d 904, 908 (Ill. App. Ct. 1994), *aff'd*, 655 N.E.2d 888, 892 (Ill. 1995); Robinson v. Johnson, 809 N.E.2d 123, 129 (Ill. App. Ct. 2004); Perry v. Rush-Presb.-St. Luke's Med. Ctr., 533 N.E.2d 437, 439 (Ill. App. Ct. 1988); Flores v. St. Mary of Nazareth Hosp., 502 N.E.2d 1, 3 (Ill. App. Ct. 1986); Arndt v. Resurrection Hosp., 517 N.E.2d 1, 4 (Ill. App. Ct. 1987); Coyne v. OSF Healthcare Sys., 773 N.E.2d 732, 734 (Ill. App. Ct. 2002); Ingle v. Hosp. Sisters Health Sys., 491 N.E.2d 139, 142 (Ill. App. Ct. 1986); Clark v. Brokaw Hosp., 467 N.E.2d 652, 655 (Ill. App. Ct. 1984); Lewis v. Dillon, 816 N.E.2d 715, 721 (Ill. App. Ct. 2004); Roe v. Little Co. of Mary Hosp., 815 F.Supp. 244, 246 (N.D. Ill. 1992); 4 ILL. PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 29.6 (1st ed.); 22 ILL. PRACTICE: THE LAW OF MED. PRACTICE IN ILL. § 24:5 (3d ed.); Bradley C. Nahrstadt and John E. Newton, *Understanding the Illinois Respondent in Discovery Statute*, 18 DCBA BRIEF 10 (May 2006); Cf. Moomaw v. Mentor H/S, Inc., 731 N.E.2d 816, 822 (Ill. App. Ct. 2000).

4. Pub. Act 86-483, effective September 1, 1989, amended the provision as follows:  
 Sec. 2-402. ~~Medical malpractice~~ Respondents in discovery. The plaintiff in any *civil* action based on an allegation of negligence in the performance of health care services 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.

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.

See also Williams v. Medenica, 655 N.E.2d 1002, 1003 (Ill. App. Ct. 1995); Montclair-Bohl v. Janssen Pharmaceutica, Inc., No. 06 C 2166, 2006 WL 2700013, \*2 (N.D. Ill. 2006); Nahrstadt and Newton, *supra* note 3, at 11. As to the legislative intent for these amendments (then known

could be respondents in discovery (RIDs), in effect overruling case law limiting the original Statute to individuals.<sup>5</sup> It appears the legislature took those steps out of concern that the original Statute could be attacked as unconstitutional.<sup>6</sup>

The Civil Justice Reform Amendments of 1995 (Public Act 89-7) then attempted to amend the provision to prohibit the use of fictitious defendants and to prohibit extensions of the six-month conversion deadline except when the RID had failed or refused to comply with timely filed discovery.<sup>7</sup> However, in 1997 the Illinois Supreme Court declared Pub. Act 89-7 unconstitutional in its entirety.<sup>8</sup> The effect was to reinstate the version of

as House Bill 251), *see* 86th Gen. Assemb., H. Proceedings, June 26, 1989, at 73-75; 86th Gen. Assemb., S. Proceedings, June 19, 1989, at 60-61.

5. *See supra* note 4. *See also* Evans v. Bachman, 398 N.E.2d 114, 117-18 (Ill. App. Ct. 1979). *But see* Perry, 533 N.E.2d at 439.

6. *See* Mary P. Tobin, Note, *Respondents in Discovery: A Pre-Suit Answer to the Medical Malpractice Crisis?*, 11 LOY. U. CHI. L.J. 833, 846-56 (1980). Although the analysis focused principally on due process and equal protection challenges, an even greater concern (at least in retrospect) was the original Statute's vulnerability to a "special legislation" challenge under ILL. CONST., art. IV, § 13 (1970). *See, e.g.*, Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1069-78 (Ill. 1997). *But see* Lebron v. Gottlieb Mem. Hosp., 930 N.E.2d 895 (Ill. 2010).

7. Pub. Act 89-7, § 15 sought to amend the Statute 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. *Fictitious defendants may not be named in a complaint in order to designate respondents in discovery.*

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.

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. *No extensions of this 6 month period shall be permitted unless the plaintiff can show a failure or refusal on the part of the respondent to comply with timely filed discovery.*

*This amendatory Act of 1995 applies to causes of action filed on or after its effective date.*

*See generally* Jill Adams, *Survey of Illinois Law: Civil Procedure*, 20 S. ILL. U. L.J. 697, 717-18 (1996).

8. *Taylor Mach. Works*, 689 N.E.2d 1057. *See generally* Michael J. Polelle, *Best v. Taylor Machine Works: A Resounding "No" to the Tort Reform Act*, 86 ILL. B.J. 130 (1998).

Section 2-402 that existed prior to Public Act 89-7's amendments.<sup>9</sup> The court's focus when rejecting Pub. Act 89-7 was on other "tort reforms" contained therein, but the court held that the provisions found substantively unconstitutional could not be severed from the remainder of Pub. Act 89-7, so the remainder was also declared invalid. With respect to the provisions not found substantively unconstitutional, the court said the General Assembly was "free to reenact whatever provisions it deems desirable or appropriate."<sup>10</sup> However, reamendment to prohibit use of fictitious defendants had been made unnecessary by an Illinois Supreme Court decision accomplishing the same effect.<sup>11</sup>

Thereafter, effective January 1, 2006, Pub. Act 94-582 Section 5 amended the Statute to read in pertinent part as follows:

§ 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.

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

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9. *Hudson v. City of Chicago*, 889 N.E.2d 210, 214 n. 1 (Ill. 2008); *Unzicker v. Kraft Food Ingredients Corp.*, 783 N.E.2d 1024, 1029 n. 1 (Ill. 2003); *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 887 N.E.2d 569, 572 n. 2 (Ill. App. Ct. 2008). *Cf. Jackson v. Victory Mem. Hosp.*, 900 N.E.2d 309, 314 (Ill. App. Ct. 2008); *Jain v. Johnson*, 922 N.E.2d 1188, 1190 n. 1 (Ill. App. Ct. 2010).

10. *Taylor Mach. Works*, 689 N.E.2d at 1106.

11. *Bogseth v. Emanuel*, 655 N.E.2d 888, 891-92 (Ill. 1995).

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.

[ . . . ]

This amendatory Act of the 94th General Assembly applies to causes of action pending on or after its effective date.<sup>12</sup>

Such remains the Statute's current form.<sup>13</sup>

### III. REVIEW OF THE CASE LAW

#### A. Nature of the Statute

The Statute has been termed a “special statutory cause of action,”<sup>14</sup> which requires the plaintiff to “scrupulously observe all the requirements mandated in the statute.”<sup>15</sup> At least one decision exists treating the Statute as substantive law.<sup>16</sup> However, the Statute is codified in the Code of Civil Procedure,<sup>17</sup> and when the issue most frequently arises (cases removed to federal court), the weight of authority treats the Statute as procedural.<sup>18</sup>

Until the Statute has been invoked, the procedure of Section 2-402 is entirely optional. The plaintiff may skip it and make the potential RID a defendant at the outset,<sup>19</sup> or the plaintiff may fail to join the person to the

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12. As to the legislative intent of these amendments (then known as Senate Bill 1893), see 94th Gen. Assemb., S. Proceedings, April 15, 2005, at 124; 94th Gen. Assemb., H. Proceedings, May 26, 2005, at 87; 94th Gen. Assemb., S. Proceedings, April 13, 2005, at 100-01.

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

14. *Robinson v. Johnson*, 809 N.E.2d 123, 130 (Ill. App. Ct. 2004); *Hugley v. Alcaraz*, 494 N.E.2d 706, 710 (Ill. App. Ct. 1986). See also *Knapp v. Bulun*, 911 N.E.2d 541, 547 (Ill. App. Ct. 2009); *Coyne v. OSF Healthcare Sys.*, 773 N.E.2d 732, 734 (Ill. App. Ct. 2002); *Roe v. Little Co. of Mary Hosp.*, 815 F.Supp. 244, 247 (N.D. Ill. 1992).

15. *Robinson*, 809 N.E.2d at 130. See also *Roe*, 815 F.Supp. at 247; *Allen v. Thorek Hosp.*, 656 N.E.2d 227, 234 (Ill. App. Ct. 1995); *Knapp*, 911 N.E.2d at 547-48; *In re Marriage of Sanfratello*, 913 N.E.2d 1077, 1092 (Ill. App. Ct. 2009).

16. *Moomaw v. Mentor H/S, Inc.*, 731 N.E.2d 816, 820-23 (Ill. App. Ct. 2000).

17. 735 ILL. COMP. STAT. 5 (2010).

18. See *infra* Part II(I). See also *Hugley*, 494 N.E.2d at 710 (Statute creates a “procedural right”).

19. *Clark v. Brokaw Hosp.*, 467 N.E.2d 652, 655 (Ill. App. Ct. 1984); *Flores v. St. Mary of Nazareth Hosp.*, 502 N.E.2d 1, 3 (Ill. App. Ct. 1986); *Torley v. Foster G. McGaw Hosp.*, 452 N.E.2d 7, 9-

case in any capacity and proceed by way of non-party discovery demands.<sup>20</sup> However, once Section 2-402 is invoked, the plaintiff may not avoid its burdens and limitations by simply dismissing the first action and filing a new one with the former RID as a defendant, where the statute of limitations has run in the interim.<sup>21</sup>

## B. Invoking the Statute

The Statute does not attempt to create an action for discovery where no cause of action for recovery is brought. Accordingly, while the Statute is aimed at reversing the practice of plaintiffs naming “everybody in sight” as defendants,<sup>22</sup> it does require at least one party be named as a defendant.<sup>23</sup> The requirement that at least one actual defendant exists appears intended to prevent objections that the legislature was extending judicial authority where there was no justiciable matter.<sup>24</sup> The actual-defendant requirement may not be circumvented by use of a fictitious person.<sup>25</sup>

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- 10 (Ill. App. Ct. 1983); *Arndt v. Resurrection Hosp.*, 517 N.E.2d 1, 4 (Ill. App. Ct. 1987); *Roe*, 815 F.Supp. at 248. See also 4 ILL. PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 29.6 (1st ed.).
20. See generally ILL. S. CT. R. 202, 204, 210, 214 para. 3, 224; 10 ILL. PRAC.: CIVIL DISCOVERY §§ 4:20 *et seq.* (2d ed.). Cf. *Stull v. YTB Int’l, Inc.*, No. 10-600-GPM, 2010 WL 3702424, \*5 (S.D. Ill. 2010).
21. *Hugley*, 494 N.E.2d at 710. See also *Anderson v. Intengan*, 548 N.E.2d 479, 480-81, 482 (Ill. App. Ct. 1989). As to circumstances when the limitations period has not run, see *infra* Part II(H).
22. See 79th Gen. Assemb., H. Proceedings, June 10, 1976, at 33. See also *Lewis v. Dillon*, 816 N.E.2d 715, 721 (Ill. App. 2004); *Robinson v. Johnson*, 809 N.E.2d 123, 129 (Ill. App. Ct. 2004); *Coyne v. OSF Healthcare Sys.*, 773 N.E.2d 732, 734 (Ill. App. 2002); *Moomaw v. Mentor H/S, Inc.*, 731 N.E.2d 816, 822 (Ill. App. Ct. 2000); *Moscardini v. Neurosurg, S.C.*, 645 N.E.2d 1377, 1381 (Ill. App. Ct. 1995); *Gonzales v. Pro Ambulance Serv.*, 579 N.E.2d 1184, 1187 (Ill. App. Ct. 1991); *Arndt*, 517 N.E.2d at 4; *Flores*, 502 N.E.2d at 3; *Ingle v. Hosp. Sisters Health Sys.*, 491 N.E.2d 139, 142 (Ill. App. Ct. 1986); *Clark*, 467 N.E.2d at 655; *Roe*, 815 F.Supp. at 246; 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002). See generally *Tobin*, *supra* note 6, at 838-39.
23. *Bogseth v. Emanuel*, 655 N.E.2d 888, 891-92 (Ill. 1995); *Gonzales*, 579 N.E.2d at 1187; *Armour v. Petersen*, 579 N.E.2d 1188, 1189 (Ill. App. Ct. 1991); *Jacobs v. Abbott Labs.*, 572 N.E.2d 1231, 1233 (Ill. App. Ct. 1991); *Roe*, 815 F.Supp. at 246; *Jenkins v. Nat’l R.R. Passenger Corp.*, No. 07 C 3427, 2008 WL 68685, \*\*5-6 (N.D. Ill. 2008). See also *Guertin v. Guertin*, 561 N.E.2d 1339, 1342 (Ill. App. Ct. 1990); *Shutes v. Fowler*, 584 N.E.2d 920, 922 (Ill. App. Ct. 1991); 10 ILL. PRACTICE: CIVIL DISCOVERY §§ 1:3, 1:57 (2d ed.); 22 ILL. PRAC.: THE LAW OF MED. PRACTICE IN ILL. § 24:5 (3d ed.); 2 NICHOLS ILL. CIVIL PRACTICE § 30:13 (2002); 3 NICHOLS ILL. CIV. PRACTICE § 44:17 (2002); 8 NICHOLS ILL. CIVIL PRACTICE § 143:19 (2007); *Nahrstadt and Newton*, *supra* note 3, at 14-15. *But see Whitley v. Lutheran Hosp.*, 392 N.E.2d 729, 732 n.1 (Ill. App. Ct. 1979).
24. Compare *Bogseth*, 655 N.E.2d at 891-92 and *Shutes*, 584 N.E.2d at 922-23. See generally ILL. CONST., art. 6, § 9 (1970). However, discovery before filing suit may now be accomplished through ILL. S. CT. R. 224, and the no-justiciable-matter argument has been rejected in that context. *Shutes*, 584 N.E.2d at 923. See also 24 ILL. JURISPRUDENCE: CIVIL PROCEDURE § 8:18 (2001); *Stone v. Paddock Pubs., Inc.*, 961 N.E.2d 380 (Ill. App. Ct. 2011). *But see infra* notes 134-39 and accompanying text.
25. *Bogseth*, 655 N.E.2d at 891-92; 29 ILL. LAW AND PRACTICE: PARTIES § 10 (2000); 2 NICHOLS ILL. CIVIL PRACTICE § 30:55 (2002); 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002). See also *Jill Adams, Survey of Illinois Law: Civil Procedure*, 20 S. ILL. U. L.J. 697, 717-18 (1996).

Proper service of summons and complaint is a prerequisite to receiving the benefits of the Statute, including the extended period for making the RID a defendant.<sup>26</sup> Jurisdiction over the RID may be acquired on a long-arm basis.<sup>27</sup> Former issues regarding the form of process applicable against the RID<sup>28</sup> have been clarified by express provisions in the current Statute.<sup>29</sup>

Once the RID suit is filed, the plaintiff should proceed promptly with service of process and the complaint upon the RID. This is so because the deadline for converting the RID to a defendant runs from the date of filing, not the date of service,<sup>30</sup> and because a subsequent suit may be barred if there is not diligence in the attempt to serve the RID in the first suit.<sup>31</sup> It appears that diligent attempts to serve process and complaint upon the RID are sufficient to allow a second suit,<sup>32</sup> thwarting designs RIDs may have to hide for six months and “run out the clock.”

While service under the RID statute subjects the RID to the court’s *in personam* jurisdiction,<sup>33</sup> being named as a RID asserts no substantive claim,<sup>34</sup> and the RID is not a party.<sup>35</sup> In the medical malpractice context, where there are conditions that must be met in filing the substantive claim,<sup>36</sup> they must be met when, or shortly after, the RID is converted to a

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*Bogseth* incorrectly presumed the validity of Pub. Act 89-7’s amendments. *See generally supra* notes 7-11 and accompanying text.

26. *Allen v. Thorek Hosp.*, 656 N.E.2d 227, 233 (Ill. App. Ct. 1995); *Knapp v. Bulun*, 911 N.E.2d 541, 547-48 (Ill. App. Ct. 2009). *Cf.* 2 NICHOLS ILL. CIVIL PRACTICE § 30.7 (2002); 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002); 8 NICHOLS ILL. CIVIL PRACTICE § 143:19 (2007).
27. *Coyne*, 773 N.E.2d at 735. *See generally* 735 ILL. COMP. STAT. 5/2-209 (2010).
28. *See, e.g., Whitley*, 392 N.E.2d at 732-33.
29. At the ellipses in the text at page 339 *supra*, the current Statute sets forth in full the correct form of process to be used for RIDs.
30. 735 ILL. COMP. STAT. 5/2-402 para. 6 (2010); *Allen*, 656 N.E.2d at 231; *Knapp*, 911 N.E.2d at 548; *Robinson v. Johnson*, 809 N.E.2d 123, 129 (Ill. App. Ct. 2004); 10 ILL. PRACTICE: CIVIL DISCOVERY § 1:57 (2d ed.); 3 NICHOLS ILL. CIVIL PRACTICE § 44:18 (2002); *Nahrstadt and Newton, supra* note 3, at 11.
31. *Anderson v. Intengan*, 548 N.E.2d 479, 481-82 (Ill. App. Ct. 1989). *Cf. Allen*, 656 N.E.2d at 234-35.
32. *See Anderson*, 548 N.E.2d 479. *But see Allen*, 656 N.E.2d at 234; *Knapp*, 911 N.E.2d at 553.
33. *Whitley*, 392 N.E.2d at 732-33; *Coyne v. OSF Healthcare Sys.*, 773 N.E.2d 732, 734-35 (Ill. App. Ct. 2002); *Allen*, 656 N.E.2d at 233; *Anderson*, 548 N.E.2d at 481; *Roe v. Little Co. of Mary Hosp.*, 815 F.Supp. 241, 244 (N.D. Ill. 1992); *Nahrstadt and Newton, supra* note 3, at 18.
34. *See Engel v. St. Mary’s Hosp. of Decatur*, 555 N.E.2d 810, 811 (Ill. App. Ct. 1990); *Murphy v. Aton*, 657 N.E.2d 1209, 1211 (Ill. App. Ct. 1995).
35. *Engel*, 555 N.E.2d at 811; *Ford v. Mannesmann Dematic Corp.*, No. 00 C 1226, 2000 WL 1469371, \*1 n.1, \*4 (N.D. Ill. 2000); *Delestowicz v. Labinsky*, 681 N.E.2d 1008, 1009 (Ill. App. Ct. 1997); *Allen*, 656 N.E.2d at 233; *Westmeyer v. Flynn*, 889 N.E.2d 671, 674 n. 2 (Ill. App. Ct. 2008); *Shanklin v. Hutzler*, 691 N.E.2d 7, 12 (Ill. App. Ct. 1998); *Engel*, 555 N.E.2d at 811; *Jenkins v. Nat’l R.R. Passenger Corp.*, No. 07 C 3427, 2008 WL 68685, \*5 (N.D. Ill. 2008); *Leach v. Conoco Phillips Co.*, No. 08-cv-0143-MJR-CJP, 2008 WL 3200835, \*1 (S.D. Ill. 2008); *Sargent v. Cassens Corp.*, No. 06-cv-1042-MJR, 2007 WL 1673289, \*1 n. 1 (S.D. Ill. 2007); 24 ILL. JUR.: CIVIL PROCEDURE § 8:18 (2001).
36. *See* 735 ILL. COMP. STAT. 5/2-622 (2010).

defendant.<sup>37</sup> The conditions may not be imposed as a prerequisite to naming the RID.<sup>38</sup>

Because the complaint asserts no substantive claim against the RID, the RID need not file an answer.<sup>39</sup> Indeed, it has been said the RID need not even file an appearance, because the RID's sole duty is to respond to discovery.<sup>40</sup> Moreover, the RID may not even move to dismiss the complaint on statute of limitations grounds.<sup>41</sup>

### C. Statute of Limitations Issues

Naming a person as a RID within the otherwise applicable statute of limitations period is sufficient for making that person a defendant outside the limitations period, but within the period, which Section 2-402 allows.<sup>42</sup> The deadline of Section 2-402 may extend, but not shorten, the limitation deadline,<sup>43</sup> but Section 2-402 cannot be used to breathe life into a claim that is already barred when the RID suit is filed.<sup>44</sup> When the RID has not been converted to a defendant in the RID suit, the plaintiff may not avoid the statute of limitations by taking a voluntary dismissal under Section 2-1009

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37. *See Delestowicz v. Labinsky*, 681 N.E.2d 1008, 1009-10 (Ill. App. Ct. 1997); *Jackson-Baker v. Immesoete*, 787 N.E.2d 874, 879 (Ill. App. Ct. 2003).

38. *Coley v. St. Bernard's Hosp.*, 667 N.E.2d 493, 498-99 (Ill. App. Ct. 1996).

39. *Browning v. Jackson Park Hosp.*, 516 N.E.2d 797, 800 (Ill. App. Ct. 1987).

40. *Browning*, 516 N.E.2d at 800; *Allen*, 656 N.E.2d at 233.

41. *See Shanklin v. Hutzler*, 691 N.E.2d 7, 12 (Ill. App. Ct. 1998); *Jenkins v. Nat'l R.R. Passenger Corp.*, No. 07 C 3427, 2008 WL 68685, \*6 (N.D. Ill. 2008). This proposition seems illogical until one recalls that the RID's duty to make discovery is not limited to the question of his own culpability. The period of such discovery is quite limited, and the RID who is unwilling to wait out the discovery period can move to be converted to a defendant under 735 ILL. COMP. STAT. 5/2-402 para. 3 (2010), assert the limitations defense upon being so converted, and be faced with discovery as a non-party even if dismissal is granted.

42. 735 ILL. COMP. STAT. 5/2-402 para. 6 (2010); *Robinson v. Johnson*, 809 N.E.2d 123, 129 (Ill. App. Ct. 2004); *Allen*, 656 N.E.2d at 231; *Flores v. St. Mary of Nazareth Hosp.*, 502 N.E.2d 1, 3 (Ill. App. Ct. 1986); *Roe v. Little Co. of Mary Hosp.*, 815 F.Supp. 244, 246 (N.D. Ill. 1992); *Jenkins*, 2008 WL at \*5; 22 ILL. PRACTICE: THE LAW OF MED. PRACTICE IN ILL. § 24:5 (3d ed.); 24 ILL. JURISPRUDENCE: CIVIL PROCEDURE § 8:18 (2001); Edward J. Kionka, *Things To Do (or Not) To Address The Medical Malpractice Insurance Problem*, 26 N. ILL. U. L. REV. 469, 481 (2006); *Nahrstadt and Newton*, *supra* note 3; *Tobin*, *supra* note 6, at 845-46. *Cf. Peoples Bank v. BroMenn Healthcare Hosps.*, 905 N.E.2d 339, 343 (Ill. App. Ct. 2009); *Canterbery v. Petrovich*, No. 07-CV-0584-MJR, 2008 WL 63263, \*3 (S.D. Ill. 2008).

43. *Allen*, 656 N.E.2d at 231; *Flores*, 502 N.E.2d 1; *Arndt v. Resurrection Hosp.*, 517 N.E.2d 1, 4 (Ill. App. Ct. 1987); *Roe*, 815 F.Supp. at 246; 3 NICHOLS ILL. CIVIL PRACTICE § 44:18 (2002); *Nahrstadt and Newton*, *supra* note 3, at 14. *Cf. Maldonado v. Creative Woodworking Concepts, Inc.*, 694 N.E.2d 1021 (Ill. App. Ct. 1998) (failure to convert within six-month period disregarded upon finding that four-year statute applied); *Engel v. St. Mary's Hosp. of Decatur*, 555 N.E.2d 810, 812 (Ill. App. Ct. 1990) (disregarding passage of six-month deadline where, according to complaint, statute had not yet run).

44. *Peoples Bank v. BroMenn Healthcare Hosps.*, 905 N.E.2d 339, 343 (Ill. App. Ct. 2009). *See also Blonder v. Watts*, 520 N.E.2d 75, 76 (Ill. App. Ct. 1988).



of the Illinois Code of Civil Procedure and re-filing under Section 13-217 of that Code.<sup>45</sup>

#### D. Extending the Six-Month Deadline

Because the six-month deadline is stated in the Statute, that deadline is treated as a condition of the right itself and strictly applied.<sup>46</sup> Arguments for tolling or extending the period have generally been rejected, particularly under earlier versions of the Statute.<sup>47</sup> However, if a motion to convert is made within the period decreed by Section 2-402, the court may still rule after that period.<sup>48</sup>

The deadlines imposed by Section 2-402 cannot be extended or avoided by resorting to ILL. S. CT. R. 183,<sup>49</sup> 735 ILCS 5/2-1007,<sup>50</sup> or 735

45. *Hugley v. Alcaraz*, 494 N.E.2d 706 (Ill. App. Ct. 1986); 3 NICHOLS ILL. CIVIL PRACTICE § 44:18 (2002). 735 ILL. COMP. STAT. 5/2-1009 (2010) (providing for voluntary dismissals without prejudice). 735 ILL. COMP. STAT. 5/13-217 (2010) (providing, *inter alia*, that in such instance the plaintiff may file again “within one year or within the remaining period of limitation”).

46. *See Hugley*, 494 N.E.2d at 710; *Robinson*, 809 N.E.2d at 130-31. *Cf.* *Knapp v. Bulun*, 911 N.E.2d 541, 547 (Ill. App. Ct. 2009). *See generally supra* notes 14-15 and accompanying text. *See also* 10 ILL. PRACTICE: CIVIL DISCOVERY § 1:57 (2d ed.) (six-month period is “strictly enforced”).

47. *See Murphy v. Giardina*, 397 N.E.2d 845, 847 (Ill. App. Ct. 1979), *aff’d*, 413 N.E.2d 399, 401 (Ill. 1980); *Roe*, 815 F.Supp. at 248. Note that the current version of the Statute expressly provides for more liberal grounds for extension than formerly was the case, but it seems likely that a request not fitting within one of the stated current grounds properly would be denied. *See supra* Part I; *see also infra* notes 53-65 and accompanying text.

48. *Clark v. Brokaw Hosp.*, 467 N.E.2d 652, 655 (Ill. App. Ct. 1984). *See Froehlich v. Sheehan*, 608 N.E.2d 889, 893 (Ill. App. Ct. 1993); *Roe*, 815 F.Supp. at 247; *Nahrstadt and Newton*, *supra* note 3, at 12-14. *See also Robinson*, 809 N.E.2d 123, 130-31 (collecting additional cases).

49. *Robinson* 809 N.E.2d at 131-32. *Cf. Roe*, 815 F.Supp. at 247-48; *Anderson v. Intengan*, 548 N.E.2d 479, 482-83 (Ill. App. Ct. 1989). ILL. S. CT. R. 183 provides: “The court, for good cause shown on motion after notice to the opposite party, may extend the time for filing any pleading or the doing of any act which is required by the rules to be done within a limited period, either before or after the expiration of the time.” However, as a result of the 2006 amendments, Pub. Act 94-582, the Statute itself now contains a “good cause” clause. *See* 735 ILL. COMP. STAT. 5/2-402 para. 6 (2010). Assuming “good cause” under § 2-402 has the same meaning as under Rule 183, it would appear that the principal difference is that Rule 183 permits good cause to be shown *after* the deadline has passed while § 2-402 likely does not. *See generally infra* Part II(E).

50. *Robinson*, 809 N.E.2d at 134. 735 ILL. COMP. STAT. 5/2-1007 (2010) provides in pertinent part: § 2-1007. Extension of time and continuances. On good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment.

The circumstances, terms and conditions under which continuances may be granted, the time and manner in which application therefor shall be made, and the effect thereof, shall be according to rules. . . .

Assuming “good cause” has the same meaning in both § 2-402 and § 2-1007, it would appear that the “discretion” and “just terms” clauses of § 2-1007 would call for more liberal treatment than § 2-402 permits. *See generally infra* Part II(E).

ILCS 5/2-616(a).<sup>51</sup> Also, the statutory deadline is not tolled by the filing or the granting of a defective motion to convert.<sup>52</sup>

However, the current Statute contains express provisions on extensions not included, or included differently, in prior versions.<sup>53</sup> Specifically, the current Statute provides:

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>54</sup>

The provision for extensions in the case of RID non-cooperation softens a provision attempted to be included in more emphatic terms by Pub. Act 89-7.<sup>55</sup> The provision also appears to reverse a portion of an opinion suggesting that under the former version of the Statute, a court lacked authority to extend the statutory period "even for good cause" in the form of RID recalcitrance.<sup>56</sup> The provision concerning "good cause" extensions was new in 2006 and is explored more fully below.<sup>57</sup>

#### E. The "Good Cause" Issue

As shown above, Section 2-402 currently permits an extension of up to ninety days for "good cause" other than the RID's noncooperation. Although this provision has been part of the Statute for more than five years, it has provoked no reported case law.<sup>58</sup> However, case law under other provisions indicates that the requirement must be taken seriously.

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51. See *Murphy*, 397 N.E.2d at 847-48, *aff'd*, 413 N.E.2d 399 (Ill. 1980). 735 ILL. COMP. STAT. 5/2-616(a) (2010) provides in pertinent part: "At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant . . . ." The "just and reasonable terms" clause of § 2-616(a) has been applied far more liberally than the "good cause" clause of § 2-402. See, e.g., 30 ILL. LAW AND PRACTICE: PARTIES § 52 (2010); 3 ILL. PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 26.1 (2d ed.). See *infra* note 93 and accompanying text.

52. *Knapp v. Bulun*, 911 N.E.2d 541, 551 (Ill. App. Ct. 2009), *citing* *Browning v. Jackson Park Hosp.*, 516 N.E.2d 797 (Ill. App. Ct. 1987).

53. See *supra* Part I.

54. 735 ILL. COMP. STAT. 5/2-402 para. 6. See *generally* 22 ILL. PRACTICE: THE LAW OF MED. PRACTICE IN ILLINOIS § 24:5 (3d ed.).

55. See *supra* note 7.

56. *Robinson v. Johnson*, 809 N.E.2d 123, 134 (Ill. App. Ct. 2004).

57. See *infra* Part II(E).

58. However, while not addressing the provision, *Knapp v. Bulun*, 911 N.E.2d at 541, 548-49 (Ill. App. Ct. 2009), appears implicitly to hold that defective reliance on the "mailbox rule" will not constitute good cause.

Specifically, in the context of ILL. S. CT. R. 183, the Illinois Supreme Court has made clear that the “good cause” burden is on the movant, and mere absence of harm or prejudice to the respondent is insufficient.<sup>59</sup> Indeed, the court has made clear that the “good cause” issue focuses on why the movant has missed (or cannot make) the deadline, and unrelated conduct is irrelevant.<sup>60</sup> The movant must show “clear, objective reasons why it was unable to meet the original deadline and why an extension of time should be granted.”<sup>61</sup> However, the court has also allowed mistakes, inadvertence, and attorney neglect to be a part of the “good cause” equation,<sup>62</sup> and the Statute itself suggests that withdrawal of the plaintiff’s attorney may constitute good cause.<sup>63</sup>

Since the legislative record is silent on what would constitute “good cause” under Section 2-402,<sup>64</sup> there would appear to be little ground for employing a substantively different rule for RID conversions.<sup>65</sup>

Procedurally, however, some differences may be noted. First, ILL. S. CT. R. 183 expressly permits a “good cause” showing either before or after the deadline has passed,<sup>66</sup> but nothing in Section 2-402 seems to contemplate any retroactive decision.<sup>67</sup> Second, because without

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59. *Bright v. Dicke*, 652 N.E.2d 275, 277 (Ill. 1995); *Vision Point of Sale, Inc. v. Haas*, 875 N.E.2d 1065, 1073, 1075, 1078 (Ill. 2007).

60. *Vision Point of Sale, Inc.*, 875 N.E.2d at 1075, 1078. *See also In re Marriage of Holthaus*, 899 N.E.2d 355, 360 (Ill. App. Ct. 2008).

61. *Vision Point of Sale, Inc.*, 875 N.E.2d at 1075. *See also Parkway B&T Co. v. Meseljevic*, 940 N.E.2d 215, 221 (Ill. App. Ct. 2010).

62. *Vision Point of Sale, Inc.*, 875 N.E.2d at 1078. *See generally Jeffrey A. Parness, Attorney Mistakes, Client Losses: New Visions After Vision Point*, 95 ILL. B.J. 664 (2007).

63. The Statute is at best ambiguous on how attorney withdrawal should be handled. On the one hand, its listing in a clause separated from “good cause” by the disjunctive “or” suggests attorney withdrawal is a ground for extension without a showing as to cause. *See supra* note 54 and accompanying text. On the other hand, the phrase “for good cause,” which precedes both of those disjunctive clauses, suggests that attorney withdrawal also requires a good-cause showing, suggesting that some attorney withdrawals might not meet the statutory standard. Assuming the latter construction holds, the Statute and the legislative record are silent as to what factors are to influence the decision. Likely a withdrawal early in the six-month period followed by a prompt substitution of counsel may not be adequate grounds for an extension, whereas if original counsel leaves plaintiff in the lurch shortly before the deadline, the court may be more sympathetic. But does the “good cause” inquiry permit the court (and the adversary) to look at the cause of the withdrawal? Suppose counsel is withdrawing because the client insists on presentation of a conversion motion which counsel believes would violate ILL. S. CT. R. 137, or because the client has simply refused to pay counsel’s fee. May the client gain a “good cause” extension by his own misdeeds? So far as is apparent, neither case law nor the legislative history gives any hint of an answer to such questions.

64. *See* 94th Gen. Assemb., H. Proceedings, May 26, 2005, at 87; S. Proceedings, Apr. 15, 2005, at 124; S. Proceedings, Apr. 13, 2005, at 100-01.

65. *Cf. Parness, supra* note 62, at 665.

66. *See supra* note 49. *See also Parkway B.&T. Co. v. Meseljevic*, 940 N.E.2d 215, 222 (Ill. App. Ct. 2010).

67. *See supra* note 49; *see also supra* notes 54-55 and accompanying text.

conversion the passage of the statutory deadline becomes a substantive defense to the RID's prospective liability in the underlying action,<sup>68</sup> relief from the deadline can virtually always be said to involve prejudice to the RID. And third, because Rule 183 applies only to deadlines established by the Supreme Court Rules, its more liberal terms are not directly applicable to the RID conversion deadline.<sup>69</sup>

#### F. Converting RIDs to Defendants

The act of changing the RID into a defendant may be taken only on the motion of a party and by leave of court.<sup>70</sup> This principle has been construed to reject arguments that formal conversion has been waived by the RID.<sup>71</sup> The motion to convert must be filed with the clerk of court during the statutory period,<sup>72</sup> but the hearing thereon may occur after the period has passed.<sup>73</sup> The motion must either (1) indicate on its face that the purpose is to convert the RID(s) into defendant(s) or (2) be accompanied by an amended pleading that does so.<sup>74</sup> The motion need not be accompanied by the evidence to be introduced at the hearing.<sup>75</sup>

At the hearing on the motion, evidence must be presented that shows the existence of probable cause for naming the RID as a defendant.<sup>76</sup> The evidence considered need not be limited to that adduced during the RID

68. See *supra* Parts II(A) and II(C).

69. See *supra* note 49; *Robinson v. Johnson*, 809 N.E.2d 123, 132 (Ill. App. Ct. 2004).

70. *Medjesky v. Cole*, 659 N.E.2d 47, 49 (Ill. App. Ct. 1996); *Torley v. Foster G. McGaw Hosp.*, 452 N.E.2d 7, 9-10 (Ill. App. Ct. 1983); *Roe v. Little Co. of Mary Hosp.*, 815 F.Supp. 244, 246-47 (N.D. Ill. 1992). See also *Clark v. Brokaw Hosp.*, 467 N.E.2d 652, 654-56 (Ill. App. Ct. 1984); 10 ILL. PRACTICE: CIVIL DISCOVERY § 1:57 (2d ed.); 3 NICHOLS ILL. CIVIL PRACTICE § 44:18 (2002 rev.).

71. *In re Marriage of Sanfratello*, 913 N.E.2d 1077, 1093 (Ill. App. Ct. 2009). See also *Nahrstadt and Newton*, *supra* note 3, at 15. Cf. *Browning v. Jackson Park Hosp.*, 516 N.E.2d 797, 800 (Ill. App. Ct. 1987) (no waiver without notice of the motion); *id.* at 800 (no waiver through presentation of limitations motion). But see *Jenkins v. Nat'l R.R. Passenger Corp.*, No. 07-C-3427, 2008 WL 68685 (N.D. Ill. 2008) (involving estoppel argument); *Moomaw v. Mentor H/S, Inc.*, 731 N.E.2d 816, 822-23 (Ill. App. Ct. 2000) (invoking forfeiture).

72. See *Knapp v. Bulun*, 911 N.E.2d 541, 548-51 (Ill. App. Ct. 2009); 4 ILL. PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 29.6 (1989).

73. See *supra* note 48 and accompanying text.

74. *Clark*, 467 N.E.2d at 655; *Froehlich v. Sheehan*, 608 N.E.2d 889, 893-94 (Ill. App. Ct. 1993). See also *In re Marriage of Sanfratello*, 913 N.E.2d at 1092; 3 NICHOLS ILL. CIVIL PRACTICE § 44:18 (2002 rev.).

75. *Shanklin v. Hutzler*, 691 N.E.2d 7, 12 (Ill. App. Ct. 1998); *Coley v. St. Bernard's Hosp.*, 667 N.E.2d 493, 498 (Ill. App. Ct. 1996).

76. *Torley v. Foster G. McGaw Hosp.*, 452 N.E.2d 7, 9-10 (Ill. App. Ct. 1983); *Browning*, 516 N.E.2d at 799-01; *Roe v. Little Co. of Mary Hosp.*, 815 F.Supp. 244, 247 (N.D. Ill. 1992). See also *Medjesky v. Cole*, 659 N.E.2d 47, 49 (Ill. App. Ct. 1996); *Shanklin*, 691 N.E.2d at 12-13; 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002 rev.).

proceedings.<sup>77</sup> Indeed, the plaintiff is not required to conduct any discovery during the RID period in order to convert the RID to a defendant with otherwise-obtained evidence.<sup>78</sup>

Leave to convert may not be granted by way of “routine motion,”<sup>79</sup> and the burden is on the plaintiff to request a hearing.<sup>80</sup> It has been said that the RID need not be given notice of this hearing.<sup>81</sup> Absent proper conversion pursuant to Section 2-402, the court has no basis to impose a judgment on the merits against the RID.<sup>82</sup>

Because the conversion deadline is not tolled by the making, *and even granting*, of an insufficient conversion motion,<sup>83</sup> plaintiffs should not “hold back” in making their conversion showing in the hope of surprising defendants with inculpatory evidence later.

The RID who recognizes he is probably going to be made a defendant, and who wishes to proceed to merits issues without delay, may himself move to be converted to a defendant,<sup>84</sup> in which case most of the requirements for plaintiff-filed conversion motions likely do not apply, as the Statute appears to grant such an option to convert as an unqualified right.<sup>85</sup>

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77. *Torley*, 452 N.E.2d at 9-10.

78. *Long v. Mathew*, 783 N.E.2d 1076, 1081-83 (Ill. App. Ct. 2003) (citing *Torley*, 452 N.E.2d at 9. *See also* 22 ILL. PRACTICE: THE LAW OF MED. PRACTICE IN ILL. § 24:5 (3d ed.). *But see* *Allen v. Thorek Hosp.*, 656 N.E.2d 227, 233 (Ill. App. Ct. 1995).

79. *Browning*, 516 N.E.2d at 801; *Froehlich*, 608 N.E.2d at 895-96. The principle refers to the practice in certain divisions of the Circuit Court of Cook County of placing certain kinds of motions on a “routine motion” call for granting by the court without hearing. *See also In re Marriage of Sanfratello*, 913 N.E.2d at 1092; *Nahrstadt and Newton*, *supra* note 3, at 15-16.

80. *Browning*, 516 N.E.2d at 801; *Froehlich*, 608 N.E.2d at 895-96. *See also In re Marriage of Sanfratello*, 913 N.E.2d at 1092.

81. *Medjesky v. Cole*, 659 N.E.2d 47, 49 (Ill. App. Ct. 1996). *See* Brad A. Elward, *Survey of Illinois Law: Civil Procedure*, 21 S. ILL. U. L.J. 691, 703 (1997); 24 ILL. JURISPRUDENCE: CIVIL PROCEDURE § 8:18 (2001); 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002 rev.); *Nahrstadt and Newton*, *supra* note 3, at 20. *But see Browning*, 516 N.E.2d at 800 (no waiver of potential objections without notice of the motion).

82. *In re Marriage of Sanfratello*, 913 N.E.2d at 1093; *Murphy v. Aton*, 657 N.E.2d 1209, 1211 (Ill. App. Ct. 1995).

83. *See supra* note 52 and accompanying text.

84. 735 ILL. COMP. STAT. 5/2-402 para. 3 (2010); *Flores v. St. Mary of Nazareth Hosp.*, 502 N.E.2d 1, 4 (Ill. App. Ct. 1986); *Ingle v. Hosp. Sisters Health Sys.*, 491 N.E.2d 139, 140 (Ill. App. Ct. 1986); 4 ILL. PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 29.6 (1989).

85. 735 ILL. COMP. STAT. 5/2-402 para. 3 (2010). *See also* 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002 rev.).

### G. The “Probable Cause” Standard

Establishing probable cause depends on the nature and complexity of the case.<sup>86</sup> In the tort context, the evidence necessary to establish the requisite probable cause need only be such as would lead a person of ordinary caution and prudence to believe or entertain an honest and strong suspicion that his injury was the proximate result of the tortious conduct of the RID.<sup>87</sup> The evidence need not rise to the level of a high degree of likelihood of success on the merits or the evidence sufficient to defeat summary judgment.<sup>88</sup> Indeed, the plaintiff need not even make out a *prima facie* case.<sup>89</sup> “Evidence” is interpreted broadly and both hearsay and unsigned or unsworn documents may be considered.<sup>90</sup> In the medical malpractice context, “probable cause” does not require compliance with Section 2-622 of the Code of Civil Procedure,<sup>91</sup> and the materials required by that section may be submitted within ninety days after conversion.<sup>92</sup>

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86. *Medjesky*, 659 N.E.2d at 49. See also Brad A. Elward, *Survey of Illinois Law: Civil Procedure*, 21 S. ILL. U. L.J. 691, 703 (1997) (medical malpractice cases are held to higher standards than other cases).
87. *Coley v. St. Bernard’s Hosp.*, 667 N.E.2d 493, 497 (Ill. App. Ct. 1996); *Williams v. Medenica*, 655 N.E.2d 1002, 1004 (Ill. App. Ct. 1995). See also *McGee v. Heimburger*, 678 N.E.2d 364, 367-69 (Ill. App. Ct. 1997); *Jackson-Baker v. Immesoete*, 787 N.E.2d 874, 877 (Ill. App. Ct. 2003); *Medjesky*, 659 N.E.2d at 49; *Ingle*, 491 N.E.2d at 142-43; *Moscardini v. Neurosurg, S.C.*, 645 N.E.2d 1377, 1382 (Ill. App. Ct. 1995); 4 ILL. PRACTICE: CIVIL PROCEDURE BEFORE TRIAL § 29.6 (1989); 10 ILL. PRACTICE: CIVIL DISCOVERY § 1:57 (2d ed.); 24 ILL. JURISPRUDENCE: CIVIL PROCEDURE § 8:18 (2001); 2 NICHOLS ILL. CIVIL PRACTICE § 30:55 (2002 rev.); 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002 rev.); Elward, *supra* note 86, at 702-03; Nahrstadt and Newton, *supra* note 3, at 16.
88. *Jackson-Baker*, 787 N.E.2d at 877-78; *Coley*, 667 N.E.2d at 497; *Williams*, 655 N.E.2d at 1004. See also *Ingle*, 491 N.E.2d at 144; *McGee*, 678 N.E.2d at 367-68; 10 ILL. PRACTICE: CIVIL DISCOVERY § 1:57 (2d ed.); 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002 rev.).
89. *Jackson-Baker*, 787 N.E.2d at 877-78; *Williams*, 655 N.E.2d at 1004; *Ingle*, 491 N.E.2d at 144; Nahrstadt and Newton, *supra* note 3, at 16. See also *Stone v. Paddock Pubs., Inc.*, 961 N.E.2d 380, (Ill. App. Ct. 2011) (concurring opinion arguing for lower “probable cause” standard in case arising under ILL. S. CT. R. 224).
90. *Coley*, 667 N.E.2d at 497-98; *Jackson-Baker*, 787 N.E.2d at 878; *Moscardini*, 645 N.E.2d at 1381-83; *Williams*, 655 N.E.2d at 1004-05. See also Elward, *supra* note 86, at 703; 10 ILL. PRACTICE: CIVIL DISCOVERY § 1:57 (2d ed.); Nahrstadt and Newton, *supra* note 3, at 16. Cf. *Moomaw v. Mentor H/S, Inc.*, 731 N.E.2d 816, 822-23 (Ill. App. Ct. 2000). But see *Froehlich v. Sheehan*, 608 N.E.2d 889, 896 (Ill. App. Ct. 1993).
91. *Jackson-Baker*, 787 N.E.2d at 878-79; 22 ILL. PRACTICE: THE LAW OF MED. PRACTICE IN ILL. § 24:5 (3d ed.). See generally 735 ILL. COMP. STAT. 5/2-622 (2010).
92. See 735 ILL. COMP. STAT. 5/2-622(a) para. 2 (2010). See also *supra* notes 35-37 and accompanying text.

## H. Discarding Use of the Statute

Whether a plaintiff, having once invoked the Statute, may then discard the Statute and seek leave to sue the former RID in a separate suit or by amendment in the instant suit is an issue that turns upon whether the statute of limitations has passed during the pendency of the RID suit.<sup>93</sup> Surprisingly, institution of a RID case does not toll the statute of limitations if it otherwise would run by the time the plaintiff would discard the RID designation and proceed under the liberal provisions for joinder of defendants or file a separate new suit.<sup>94</sup>

Equally clear is that the discovery period of Section 2-402 does not foreshorten the limitation period.<sup>95</sup> Accordingly, the plaintiff who has received, or foresees, an adverse probable-cause determination may seek leave to amend or may dismiss and file with the former RID as a defendant, provided he may do so in good conscience under ILL. S. CT. R. 137.<sup>96</sup> This is allowed because the courts have found that the right to sue directly is not lost by the filing of the RID complaint provided the statute of limitations has not run.<sup>97</sup> In the view of these courts, the conversion option is merely a way of stretching the statute of limitations. Where the limitations period need not be stretched, neither the right to sue in a separate action nor the right to liberal joinder in the initial action is lost.<sup>98</sup>

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93. One initially might think that in RID cases an amendment made under 735 ILL. COMP. STAT. 5/2-616 (2010), should avoid the statute of limitations under subsections 2-616(b) or 2-616(d) thereof. However, it seems clear that such an amendment could not avoid the statute. The RID complaint asserts no claim against the RID to which to relate back and the amendment would not correct a misnomer. *See generally supra* note 34 and accompanying text.

94. *See supra* notes 45, 51 and accompanying text.

95. *See supra* note 43 accompanying text.

96. *See generally infra* note 123. It might be argued that in making one a RID plaintiff implicitly admits he lacks sufficient evidence to name the RID as a defendant outright, but the Statute does not condition its application on such circumstances and case law holding that plaintiff need not conduct discovery against the RID and is not limited to evidence so adduced, *see supra* notes 77-78 and accompanying text, is inconsistent with such an argument. To be sure, it strikes an unbiased observer as unfair for the RID Statute to be used to obtain six months of unilateral discovery, *see infra* note 120, from an entity plaintiff knows he is going to sue anyway, but the remedy which the Statute provides for such situation is the unfettered right of the RID to convert himself and then to proceed with appropriate defensive steps. *See supra* notes 84-85 and accompanying text.

97. *Engle v. St. Mary's Hosp. of Decatur*, 555 N.E.2d 810, 812 (Ill. App. Ct. 1990); *Flores v. St. Mary of Nazareth Hosp.*, 502 N.E.2d 1, 3-4 (Ill. App. Ct. 1986); *Arndt v. Resurrection Hosp.*, 517 N.E.2d 1, 4 (Ill. App. Ct. 1987); *Murphy v. Aton*, 657 N.E.2d 1209, 1211 (Ill. App. Ct. 1995). As to federal courts, *see infra* note 109 and accompanying text.

98. *Cf.* 3 NICHOLS ILL. CIVIL PRACTICE § 44:18 (2002 rev.). However, a plaintiff who has received an adverse probable-cause decision from a given judge obviously may need to think seriously about avoiding that decision by an amendment or a separate action, particularly where the amended complaint or new suit will proceed before the same judge.

## I. Applicability in Federal Courts

Section 2-402 has no application in suits originally filed in federal courts, because federal procedure would then control, which has no comparable provision.<sup>99</sup> Cases of removal present greater challenges. The citizenship of the RID is irrelevant for purposes of determining whether there is diversity jurisdiction.<sup>100</sup> Moreover, the RID, not being a defendant,<sup>101</sup> may not remove and need not consent to a removal.<sup>102</sup> The state court's authority to enter orders with respect to the RID terminates upon removal,<sup>103</sup> and the removal does not toll the conversion deadline stated in the Statute.<sup>104</sup> Caselaw suggests that the bar effects of the Section 2-402 deadline will be enforced by the federal court,<sup>105</sup> but there are also decisions simply treating the RID designation as surplusage.<sup>106</sup> The Illinois Appellate Court has implied that a federal court in a removed case should treat Section 2-402 as substantive and proceed to a conversion decision as if the case were pending in state court.<sup>107</sup> However, there is ample federal authority to the contrary.<sup>108</sup> Under the latter view, the plaintiff in a removal case may move to add the RID as a defendant by amendment and "the Court [will] consider that motion under the same liberal standard it would

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99. FED. R. CIV. P. 1, 17-25; *Murphy v. Schering Corp.*, 878 F.Supp. 124, 126 (N.D. Ill. 1995). *Cf. Montclair-Bohl v. Janssen Pharmaceutica, Inc.*, No. 06-C-2166, 2006 WL 2700013, \*\*1-2 (N.D. Ill. 2006). *But see Moomaw v. Mentor H/S, Inc.*, 731 N.E.2d 816, 820-22 (Ill. App. Ct. 2000); Nahrstadt and Newton, *supra* note 3, at 20.
100. *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1485 n. 3 (7th Cir. 1996); *Tokarz v. Texaco Pipeline, Inc.*, 856 F.Supp. 403, 403 n. 1 (N.D. Ill. 1993); *Murphy*, 878 F.Supp. at 126; *Wisniewski v. City of Chicago*, No. 98-C-7682, 1998 WL 895746, \*1 n.1 (N.D. Ill. 1998); *Ford v. Mannesmann Dematic Corp.*, No. 00-C-1226, 2000 WL 1469371, \*4 (N.D. Ill. 2000); *Del Angel v. Heidelberg Eastern, Inc.* No. 01-C-8144, 2002 WL 88359, \*2 (N.D. Ill. 2002); *Sargent v. Cassens Corp.*, No. 06-cv-1042-MJR, 2007 WL 1673289, \*1 n.1 (S.D. Ill. 2007). *See generally* 28 U.S.C. § 1332 (2006). *But see Ebersohl v. Bechtel Corp.*, No. 09-cv-1029-GPM, 2010 WL 785973, \*\*3-4 (S.D. Ill. 2010).
101. *See supra* note 35. *See also Murphy*, 657 N.E.2d at 1211; *Leach v. Conoco Phillips Co.*, No. 08-cv-0143-MJR-CJP, 2008 WL 3200835, \*3 (S.D. Ill. 2008); *Montclair-Bohl*, 2006 WL at \*2; 3 NICHOLS ILL. CIVIL PRACTICE § 44:17 (2002 rev.).
102. *Montclair-Bohl*, 2006 WL at \*2; *Sargent*, 2007 at \*1 n.1; *Tokarz*, 860 F.Supp. at 564 n.3.
103. *Roe v. Little Co. of Mary Hosp.*, 815 F.Supp. 244, 247 (N.D. Ill. 1992). *Cf. Canterbury v. Petrovich*, No. 07-CV-0584-MJR, 2008 WL 63263, \*3 (S.D. Ill. 2008).
104. *Cf. Roe*, 815 F.Supp. at 248-49. *See also Moomaw*, 731 N.E.2d at 821.
105. *Roe*, 815 F.Supp. at 247. *Cf. Ebersohl*, 2010 WL at \*1 n.1; *Leach*, 2008 WL at \*\*4-5.
106. *See Murphy v. Schering Corp.*, 878 F.Supp. 124, 126 (N.D. Ill. 1995). *Cf. Leach*, 2008 WL at \*5; *Stull v. YTB Int'l, Inc.*, No. 10-cv-600-GPM, 2010 WL 3702424, \*3 (S.D. Ill. 2010); *Canterbury*, 2008 WL at \*3. *See also infra* note 110 and accompanying text.
107. *Moomaw*, 731 N.E.2d at 820-23.
108. *Lee v. Burlington N.S.F.R.R. Co.*, No. 07-cv-5829, 2008 WL 4874052, \*\*2-3 (N.D. Ill. 2008); *Montclair-Bohl v. Janssen Pharmaceutica, Inc.*, No. 06 C 2166, 2006 WL 2700013, \*\*2-4 (N.D. Ill. 2006); *Sargent v. Cottrell, Inc.*, No. 06-cv-1042-MJR, 2007 WL 4115811, \*\*2-3 (S.D. Ill. 2007). *See also Canterbury*, 2008 WL at \*3 (conversion of RID to defendant "could not have [been] achieved in federal court").



apply to any motion for leave to amend,” the former status as RID being irrelevant.<sup>109</sup>

In federal courts, many believe the RID procedure fails to meet U.S. constitutional justiciability standards.<sup>110</sup>

#### J. Appellate Review of the Conversion Decision

A trial court’s ruling on a motion to add a RID as a defendant is entitled to deference in circumstances in which the court has heard testimony and resolved conflicting evidence, and a reviewing court will not overturn the trial court’s ruling unless it is against the manifest weight of the evidence.<sup>111</sup> Alternatively, the standard of review on the denial of a Section 2-402 conversion is abuse of discretion.<sup>112</sup>

However, where (1) the facts are undisputed, (2) the credibility of witnesses is not an issue, and (3) in-court testimony has not been presented, a question of law is presented and a reviewing court may consider the question *de novo*.<sup>113</sup>

### IV. ANALYSIS AND COMMENT

When one recalls its stated purpose to control medical malpractice insurance premiums,<sup>114</sup> the RID Statute must be judged, at most, a qualified success. Medical insurance premiums have continued to rise and make medical practice in some specialties uneconomic in some parts of the State.<sup>115</sup> So, to the extent one sees any success, it must be principally based on how much worse things might be without the Statute. True, the intent of the Statute focused not just on general malpractice premium rates, but also on reactionary rate-raising following practitioners’ reporting of their having been sued, and that is a different issue.<sup>116</sup> However, inasmuch as prudent

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109. *Sargent*, 2007 WL at \*2. *Cf. Roe*, 815 F.Supp. at 248.

110. *Ebersohl*, 2010 WL at \*1 n.1; *Morris v. Health Professionals, Ltd.*, No. 10-01227, 2011 WL 573799, \*9 (C.D. Ill. 2011); *Stull*, 2010 WL at \*3 n.2. *See generally* U.S. CONST. art. 3, § 2, cl. 1. *See also infra* notes 130-33 and accompanying text.

111. *McGee v. Heimbürger*, 678 N.E.2d 364, 368 (Ill. App. Ct. 1997); *Jackson-Baker v. Immesoete*, 787 N.E.2d 874, 877 (Ill. App. Ct. 2003). *But see* *Ingle v. Hosp. Sisters Health System*, 491 N.E.2d 139, 144 (Ill. App. Ct. 1986) (deference “goes not to the question of liability but as to the reasonableness of plaintiff’s proceeding further against the [RIDs] and subjecting them to the fact-finding process”).

112. *Long v. Mathew*, 783 N.E.2d 1076, 1080 (Ill. App. Ct. 2003); *Froehlich v. Sheehan*, 608 N.E.2d 889, 896 (Ill. App. Ct. 1993).

113. *McGee*, 678 N.E.2d at 368; *Jackson-Baker*, 787 N.E.2d at 877.

114. *See supra* note 3 and accompanying text.

115. *See, e.g.*, Pub. Act 94-677 § 101. Notwithstanding those legislative findings, Pub. Act 94-677 was held unconstitutional in *Lebron v. Gottlieb Mem. Hosp.*, 930 N.E.2d 895 (Ill. 2010).

116. *See* 79th Gen. Assemb., H. Proceedings, June 10, 1976, at 35.

practitioners give their carriers notice of their being named as RIDs, even that objective is doubtful.<sup>117</sup>

If one accepts a less clearly stated, but implicit, purpose, *i.e.*, to encourage the legal profession to act more responsibly, the Statute has been considerably more successful, although responsibility is driven largely by the requirements of Section 2-622 in medical malpractice cases. Indeed, despite having been expanded to all civil actions twenty-two years ago,<sup>118</sup> the bulk of the reported litigation has remained in the medical malpractice context.<sup>119</sup>

The success of the Statute, however, does not come without costs. First, the Statute results in prolonged discovery, because during its period, discovery is purely unilateral<sup>120</sup> and focuses only on “who should properly be named as additional defendants in the action.”<sup>121</sup> Second, it encourages duplicative discovery, because the plaintiff who properly focuses discovery during the RID period will often need to come back for additional information later. Third, it encourages attorneys who would otherwise responsibly not name “everybody in sight” as defendants<sup>122</sup> to name them as RIDs. Implicitly, there is no basis-in-fact certification with a RID designation as there is in making someone an actual defendant,<sup>123</sup> and since

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117. *Id.*

118. *See supra* note 4 and accompanying text.

119. The vast majority of reported appellate decisions under § 2-402 have involved medical malpractice, liberally interpreted, but several have not. *See In re Marriage of Sanfratello*, 913 N.E.2d 1077 (Ill. App. Ct. 2009); *Maldonado v. Creative Woodworking Concepts*, 694 N.E.2d 1021 (Ill. App. Ct. 1998); *Westmeyer v. Flynn*, 889 N.E.2d 671 (Ill. App. Ct. 2008); *Medjesky v. Cole*, 659 N.E.2d 47 (Ill. App. Ct. 1996); *McGee v. Heimburger*, 678 N.E.2d 364 (Ill. App. Ct. 1997). In addition, a significant number of decisions in the federal trial courts have not involved medical malpractice. *See Leach v. Conoco Phillips Co.*, No. 08-cv-0143-MJR-CJP, 2008 WL 3200835 (S.D. Ill. 2008); *Ford v. Mannesmann Dematic Corp.*, No. 00 C 1226, 2000 WL 1469371 (N.D. Ill. 2000); *Tokarz v. Texaco Pipeline Inc.*, 856 F.Supp. 403 (N.D. Ill. 1993); *Wisniewski v. City of Chicago*, No. 98 C 7682, 1998 WL 895746 (N.D. Ill. 1998); *Lee v. Burlington N.S.F.R.R. Co.*, No. 07 cv 5829, 2008 WL 4874052 (N.D. Ill. 2008); *Del Angel v. Heidelberg Eastern, Inc.* No. 01 C 8144, 2002 WL 88359 (N.D. Ill. 2002); *Stull v. YTB Int'l, Inc.*, No. 10-600-GPM, 2010 WL 3702424 (S.D. Ill. 2010); *Sargent v. Cottrell, Inc.*, No. 06-cv-1042-MJR, 2007 WL 4115811 (S.D. Ill. 2007); *Sargent v. Cassens Corp.*, No. 06-cv-1042-MJR, 2007 WL 1673289 (S.D. Ill. 2007); *Jenkins v. Nat'l R.R. Passenger Corp.*, No. 07 C 3427, 2008 WL 68685 (N.D. Ill. 2008); *Ebersohl v. Bechtel Corp.*, No. 09-1029-GPM, 2010 WL 785973 (S.D. Ill. 2010).

120. *See Knapp v. Bulun*, 911 N.E.2d 541, 547 (Ill. App. Ct. 2009); *Froehlich v. Sheehan*, 608 N.E.2d 889, 897-98 (Ill. App. Ct. 1993); *Robinson v. Johnson*, 809 N.E.2d 123, 132 (Ill. App. Ct. 2004). *But see Zangara v. Advocate Christ Med. Ctr.*, 951 N.E.2d 1143, 1150 (Ill. App. Ct. 2011) (stating in dicta that “defendants, were they not named in the complaints, could be hailed into court as respondents in discovery without limitation on the scope of discovery”).

121. 735 ILL. COMP. STAT. 5/2-402 para. 1 (2010).

122. *See supra* note 22.

123. *See ILL. S. CT. R. 137* para. 1 (Signature of attorney to a pleading “constitutes a certificate by him that . . . to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact”). *See also Tobin, supra* note 6, at 837 nn. 23-24.

the legislature has made the RID option available, it may be professional negligence not to use it. Some have suggested that, to the extent the Statute makes it more certain that medical personnel will be joined to litigation in *some* capacity, another cost is that it increases the practice of defensive medicine.<sup>124</sup> Further, some suggest that by making it easier to join RIDs to litigation with the implicit threat of being made defendants, the Statute increases “forced settlements” to avoid conversion.<sup>125</sup>

Additional costs may be found in the traps the Statute sets for the unwary. Set in the Code of Civil Procedure, where all provisions are to be “liberally construed, to the end that controversies may be speedily and finally determined *according to the substantive rights of the parties*”,<sup>126</sup> the Statute on its face gives little hint of the strictness which may be applied once it is invoked, nor of the extent to which it conflicts with and supersedes the ordinarily liberal joinder and amendment provisions of the Code.<sup>127</sup> A plaintiff is implicitly encouraged to allow the original statute of limitations deadline to pass, believing the extension period of Section 2-402 will save him. Yet if he fails to act with utmost dispatch upon invoking the Statute, or if he encounters a judge with differing ideas as to what constitutes “probable cause,” he may be trapped.

In this regard, one aspect the drafters almost certainly did not contemplate is the extent to which the Statute lacks teeth for dealing with the recalcitrant RID. Because, by definition, the complaint asserts no claim against the RID,<sup>128</sup> the specters of default judgments, striking of pleadings, and preclusion orders are far less serious motivators for compliance than when the person or entity is an actual party.<sup>129</sup> Courts are left with threatening the imposition of legal fees and contempt charges as motivators to enforce discovery against RIDs. Given that the cost of full disclosure may be a substantial verdict, prospective defendants have a significant incentive to engage in gamesmanship, which may allow the six months to pass without full disclosure.

The traps for the unwary plaintiff’s lawyer are increased in any case where there may be grounds for federal court jurisdiction.<sup>130</sup> In such a case the plaintiff may find his six-month discovery period interrupted by removal,<sup>131</sup> which presents a choice of proceeding with discovery in the

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124. See Tobin, *supra* note 6, at 840.

125. *Id.* at 841-42.

126. 735 ILL. COMP. STAT. 5/1-106 (2010) (emphasis added).

127. See 735 ILL. COMP. STAT. 5/2-405, 5/2-406, 5/2-407, 5/2-616 (2010).

128. See *supra* note 34 and accompanying text.

129. See *Robinson v. Johnson*, 809 N.E.2d 123, 133-34 (Ill. App. Ct. 2004). *But see* Tobin, *supra* note 6, at 860-61 (1980).

130. See generally 28 U.S.C. §§ 1331, 1332 (2006).

131. See generally 28 U.S.C. §§ 1441 *et seq.* (2006); See *supra* Part II(I).

federal forum or seeking remand on the priority basis that remand requires.<sup>132</sup> If he attempts the former, he may find that the court will disregard the RID procedure,<sup>133</sup> all while the statute of limitation may have run for filing of a case against the RIDs directly.

Looming in the background are implications of the federal decisions suggesting that the RID procedure does not provide a case or controversy under the federal constitution.<sup>134</sup> Theoretically, case or controversy is only a limitation on the federal judiciary<sup>135</sup> and does not necessarily bar the liberal approach to “justiciable matter” under the state constitution.<sup>136</sup> However, members of the current Supreme Court are so attached to the case or controversy doctrine<sup>137</sup> that one wonders whether they might not find disregard of it by state courts to be invalid either under the concept of due process of law<sup>138</sup> or under the federal guarantee of a republican form of government.<sup>139</sup>

## V. CONCLUSION

Although it has had limited effect in controlling malpractice insurance rates, the Statute serves a beneficent purpose in permitting plaintiffs to avoid making charges against prospective defendants before the plaintiff knows whether those charges should in fact be made. However, the Statute is considerably more complex than its simple form suggests, and counsel considering its use are well advised to consider its complexities seriously at the outset. I hope this article contributes to that process.

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132. See 28 U.S.C. § 1447(c) (2006).

133. See *supra* notes 108, 110 and accompanying text.

134. See *supra* note 110 and accompanying text.

135. See U.S. CONST. art. 3, § 2.

136. See, e.g., *Shutes v. Fowler*, 584 N.E.2d 920, 923 (Ill. App. Ct. 1991).

137. See, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-13 (2006); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-78 (2000). See also *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 298-15 (2008) (four justices dissenting on “case or controversy” grounds).

138. U.S. CONST. amend. XIV, § 1, cl. 2.

139. U.S. CONST. art. 4, § 4.