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Respondent in Discovery: How to Deal with this Unusual Illinois Procedure for Targeting Defendants in Litigation

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Illinois has a procedure for identifying and pursuing defendants that is unusual (if not unique) among the states. See Illinois Respondent in Discovery Statute, 735 ILCS 5/2-402. On its face, the Statute is relatively straightforward. It permits a tolling of the limitations period for a plaintiff to conduct broad discovery of a person designated as a "respondent in discovery" ("RID") in order to identify a potential additional defendant. Upon a showing of "probable cause," the Statute provides a mechanism to convert the RID to a defendant in litigation. That said, the Statute leaves many questions unanswered, and zealous litigators may find themselves hamstrung by the Statute's procedural limitations. Understanding the Statute and its implications is the first step to providing sound strategic guidance to clients.

Considerations at the Threshold of Naming a RID

While a RID is not a party in the lawsuit, the process does require that a complaint naming at least one defendant in addition to any RID must have been filed. The plaintiff is then required to serve a summons upon any RID named in the complaint in a form that substantially follows the template provided in the Statute.

Once served with the summons, the RID should examine the allegations to determine whether the RID is timely named. The RID must be named within the applicable limitation period. This factor often comes into play when a complaint was timely filed against a defendant and later amended to name an RID. If in the interim, the statute of limitations has expired, the RID will have been designated too late, and the RID should move to terminate its status as an RID. See Peoples Bank v. Bromenn Healthcare Hosp., 388 Ill. App. 3d 1097, 1101-02 (4th Dist. 2009).

Voluntary Conversion to "Defendant" as a Matter of Right

The RID is not a party to the lawsuit, and it may not file motions to dismiss or issue discovery. See Knapp v. Bulin, 392 Ill. App. 3d 1018, 1024 (1st Dist. 2009); Shanklin v. Hutzler, 294 Ill. App. 3d 659, 665-66 (1st Dist. 1997). Although most persons seek to avoid involvement in litigation, there are circumstances where a designated RID may find it more beneficial to be a defendant. Depending on the nature of the complaint, the parties, the anticipated costs of discovery, and client knowledge of the RID's actions with respect to the issues in the complaint, a designated RID may find it more efficient to be named as a defendant in order to leverage the broader options available to a party. Being named as a defendant might also provide the additional benefit of triggering an insurers duty to defend or cover defense costs. Cf. Econ. Fire & Cas. Co. v. Brumfield, 384 Ill. App. 3d 726, 730-31 (4th Dist. 2008)

(insurer's duty to defend was not triggered for an RID policyholder because being designated as an RID did not constitute a claim under the policy).

Discovery Considerations

Discovery served on a RID will proceed in much the same manner as for other parties – although a RID should be especially wary that the plaintiff is using the Statute in lieu of naming any real defendants. Thus, a RID should ensure that all named defendants have appeared before discovery has been issued. See Sup. Ct. R. 201(d).

The RID will find little guidance from the courts regarding the scope of permissible discovery that a plaintiff may obtain from the RID. The Statute allows plaintiffs to discover "information essential to the determination of who should properly be named as additional defendants in the action." 735 ILCS 5/2-402. However, this language does little to protect an RID from an overeager plaintiff seeking to advance their case ahead of fixing the parties. To minimize the costs of discovery at this stage, and in light of an RID's inability to bring motions before the court, a RID may wish to seek an agreement with plaintiff's counsel regarding the scope of discovery. See Marc D. Ginsberg, Survey of Illinois Law: At Long Last, A Long Look at Respondents in Discovery, 35 S. Ill. U. L. J. 703 at 715-16 (2011). Since the Statute only expressly requires a RID to respond to discovery by the plaintiff – without reference to a RID or defendant's ability to participate in or take their own discovery – agreements between RIDs and the parties may significantly resolve these questions and prevent duplicative discovery as the case progresses.

Converting the RID to a Defendant

After six months from the designation of an RID – assuming no extensions have been granted pursuant to the Statute – the plaintiff must either move to convert the RID to a defendant or allow the RID to terminate its status. To convert, the plaintiff must move the court clearly indicating its intent to convert and request a hearing. See Knapp, 392 Ill. App. 3d at 1028-29; Browning v. Jackson Park Hospital, 163 Ill. App. 3d 543, 548 (1st Dist. 1987). The court must then conduct an evidentiary hearing to determine whether the evidence demonstrates probable cause to name the RID – conversion may not occur absent a hearing. Id. A recently converted RID may successfully challenge the conversion process if both the statute of limitations and deadline to convert have passed. See Knapp, 392 Ill. App. 3d at 1029-31.

Agreements and communication with plaintiff's counsel can largely mitigate potential pitfalls without court intervention and also minimize the cost and time involved. We would encourage all parties to maintain collegial and effective communications during the time when an RID is named and discovery is taken, with the goal of converting a party to a defendant only if there is truly a solid factual and legal basis to do so.