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MED-MAL MATTERS

FILLING THE EMPTY CHAIR

Procedural tool for sole proximate cause defense claims

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Conduct a survey of attorneys' worst nightmares and they'll say handling an empty chair defense is one of their top worries.

Empty chair defense, or sole proximate cause, is generally an indication that the party being sued is not prepared. Also, once the statute of limitations expires, it becomes a convenient scapegoat to allow jurors to shift the blame. It could lead the jury to believe the parties have already settled and compensated the plaintiff.

The best way to avoid this defense and protect the plaintiff's interests is to sue every person, corporation or other entity that could be responsible and sort it out later. In medical malpractice cases this approach can lead to physicians, nurses and other health care providers to receive the scarlet letter "D" when served with a complaint naming them as a defendant by lawyers properly protecting their clients' interests but lacking any meaningful pre-suit discovery.

The Illinois legislature, recognizing the effect of the problem, if not its true cause, created a unique procedural tool to allow attorneys to protect their clients' interests without naming every health care provider in the records. Using 735 ILCS 5/2-402 allows a plaintiff to name as a "respondent in discovery" any individual or entity believed to have information relevant to the determination of who should be named as additional defendants.

According to the Illinois Supreme Court, the purpose of Sec. 2-402 is to provide plaintiffs' attorneys with a means of filing medmal suits "…without naming everyone in sight as a defendant, for it was believed that the label 'defendant' in a medical malpractice suit contributed to the spiraling costs of medical malpractice insurance." *Bogseth v. Emanuel,* 166 Ill. 2d 507 (1995). Though the reason that medical liability premiums may spiral has more to do with financial market swings and the amount of money liability carriers make from investing premium dollars, the legislature created a tool to reconcile the conflict between "naming everyone in sight" to avoid an empty chair defense and sparing health care providers the stigma of being named as a defendant unless it is truly necessary.

Naming a person or entity as a respondent extends the statute of limitations for at least 6 months and allows the plaintiff to seek broad discovery from that respondent. Upon a showing of probable cause, the statute provides a mechanism to convert the respondent to a defendant.

In enacting Sec. 2-402, the legislature intended to provide plaintiffs with an opportunity to avoid the overuse of the scarlet "D" without fear of missing a defendant. *Cleeton v. SIU Healthcare, Inc.,* 2023 IL 128651. In exchange for restraint in naming defendants, the legislature created the right to demand robust discovery from a respondent at the outset of a lawsuit by stating that "[p]ersons 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…"

Section 2-402 provides a powerful tool to discover the truth and promote judicial economy. Substantive depositions early in the lawsuit help crystallize the issues and identify strengths and weaknesses, in addition to clarifying the identities of the appropriate defendants and their relationships. Though the deposition of a respondent does not necessarily prevent a later deposition, in practice, few respondents are re-deposed, especially if they are not converted. Where the parties and the motion judge move expeditiously, a significant portion of Rule 213(f)(1) and (2) depositions can be completed during a period in which most other cases are not even at issue.

The scope of discovery for a respondent in discovery is the exact same scope for a defendant. The Illinois Appellate Court has repeatedly held that respondents must be treated in the same manner as named defendants because section 2-402 subjects them to the same procedural and discovery rules and safeguards, as defendants. *Coyne v. OSF Healthcare Sys.,* 332 Ill. App. 3d 717, 719 (3d Dist. 2002).

Attorneys for respondents, who often also represent named defendants (including hospitals, setting up an ethical minefield of real or apparent conflicts of interest), increasingly try to limit discovery, claiming that the scope is limited to identities or employment status of those involved or any number of other specious objections. As the appellate court held in *Coyne*, however, a respondent in discovery is required to respond to discovery by the plaintiff in the same manner as defendants. To find otherwise would penalize the plaintiff for filing pleadings that the legislature intended to encourage when it enacted section 2-402.

It truly is a win-win procedural tool in helping to obtain complete justice for all. CL

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