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Feature Article

William G. Beatty
Johnson & Bell, Ltd., Chicago

Second District Ruling Gives Plaintiffs a "Second Bite at the Apple" as to Dismissed Defendants

In an opinion released in March of this year, the Illinois Appellate Court, Second District, issued a ruling that gives plaintiffs the proverbial "second bite at the apple" as to previously-dismissed defendants.

Prinova Solutions, LLC v. Process Technology Corp., Ltd., 2018 IL App (2d) 170666 answered in the affirmative the following certified question:

> Can the respondent in discovery statute, 735 ILCS 5/2-402 operate in reverse, such that after a defendant has already been dismissed from the lawsuit, without prejudice [the dismissed defendant can then] be converted into a respondent in discovery, and thereafter be converted to a defendant again?

Prinova Solutions, 2018 IL App (2d) 170666, ¶ 1.

Defendant John Witterschein, d/b/a Process Technologies, LLC was named as a defendant in a case involving alleged defects in certain food blending and processing equipment that the plaintiff had purchased. Allegations of breach of contract and breach of warranty were asserted in the complaint. *Id.* ¶ 3. The defendant moved to dismiss, claiming that the contract that the plaintiff claimed to have been breached was actually entered into between the plaintiff and a similarly-named, but different company, Process Technology Corporation Ltd. of Hong Kong. On this basis, the defendant was dismissed from the case, albeit without prejudice. *Id.* ¶ 4.

Plaintiff then filed an amended complaint naming the Hong Kong company as a defendant, but further naming the dismissed defendant as a respondent in discovery, pursuant to 735 ILCS 5/2-402. The dismissed defendant objected, claiming that his company could not be named as a respondent in discovery due to its previous dismissal from the case. *Id.* ¶ 5. The trial court denied the dismissed defendant's amended motion to dismiss, based primarily upon the existence of a 2016 first district opinion entitled *Westwood Construction Group, Inc. v. IRUS Properties, LLC*, 2016 IL App (1st) 142490.

The *Westwood Construction* opinion had allowed a plaintiff to name a dismissed defendant as a respondent in discovery, similarly to what the plaintiff in the *Prinova Solutions* case did. The *Westwood Construction* case from the first district, coupled with the absence of any second district precedents on the issue, prompted the court in *Prinova Solutions* to deny the former defendant's motion to dismiss, but grant Witterschein's motion for leave to file an interlocutory appeal under Illinois Supreme Court Rule 308, due to the presence of "a question of law as to which there is substantial ground for [a] difference of opinion" regarding Witterschein's company being named as a respondent in discovery following its earlier dismissal without prejudice from the case. *Prinova Solutions*, 2018 IL App (2d) 170666, ¶¶ 7-8. The second district granted the former defendant's application for leave to pursue the permissive interlocutory appeal. *Id.* ¶ 8.

735 ILCS 5/2-402 allows a plaintiff to designate as a "respondent in discovery" individuals or entities believed by the plaintiff to possess information about who should be named as additional defendants in a case, and allows discovery to be conducted against such individuals or entities so designated in the same manner as defendants are required to respond to discovery. If evidence demonstrates probable cause to do so, a respondent in discovery may be joined as a defendant within six months after having been named as a respondent in discovery, even if the statute of limitations has expired as to that individual or entity during the aforementioned six-month period. *Prinova Solutions*, 2018 IL App (2d) 170666, ¶ 12.

While providing a means by which a respondent in discovery can be converted to a defendant, 735 ILCS 5/2-402 does not, however, expressly address the question of whether a defendant can be converted into a respondent in discovery following the dismissal of that defendant without prejudice, thereby creating the potential that the former defendant, now a respondent in discovery, could once again be named as a defendant in the case if the evidence so justified.

As mentioned, the second district found authority for such a reverse conversion in the first district's *Westwood Construction* decision, which allowed just such a move, *i.e.* the conversion of a former defendant to a respondent in discovery, with the reviewing court finding nothing in the plain language of section 2-402 to prevent such a procedural move. The only limitation to such a gambit, according to the first district, is that the plaintiff believed that the designated person or entities possessed "information essential to the determination of who should properly be named as additional defendants . . . ." *Id.* ¶ 15, citing *Westwood Construction*, 2016 IL App (1st) 142490, ¶ 17.

Although described as a "clearly unconventional pleading sequence," *Westwood Construction*, 2016 IL App (1st) 142490, ¶ 18, nothing in Section 2-402 precludes any such reverse conversion.

A dissenting opinion in the *Westwood Construction* case argued that section 2-402's exception for entities "other than the named defendants" as being candidates for designation as respondents in discovery meant that neither the remaining defendants, nor former defendants who had obtained dismissals without prejudice, could be named as respondents in discovery, and that the process contemplated by section 2-402 was meant to be a linear one, rather than a circular procedure. The dissent argued that allowing the plaintiff to use section 2-402 "backward" from the way the legislature had intended, would only serve as a means for plaintiffs to keep a dismissed defendant "on the hook" for potential future exposure to liability and damages. *Prinova Solutions*, 2018 IL App (2d) 170666, ¶ 16, citing *Westwood Construction*, 2016 IL App (1st) 142490 (Hyman, P.J., dissenting).

Along with those arguments, the dismissed defendant in the *Prinova Solutions* case also contended that to allow the plaintiff to conduct discovery against a dismissed defendant, under the guise of that former defendant thereafter being a respondent in discovery, would allow the plaintiff to attempt, after a dismissal, to discover a cause of action against a party, rather than to determine who might have committed an already-known wrong. *Id.* ¶ 17. Further, Witterschein argued that allowing discovery against a defendant following its dismissal was in derogation of common law, and contrary to the express or implied purposes of the respondent in discovery statute. *Id.* ¶ 18. Such potential circular conversion from dismissed defendant to a respondent in discovery, and potentially back to a defendant who could possibly be dismissed again, has the potential for harassment and undue litigation expense, according to the dismissed defendant, Witterschein. *Id.* ¶ 20.

The second district's unanimous opinion in the *Prinova Solutions* case rejected all of the dismissed defendant's procedural and substantive objections to its designation as a respondent in discovery in the plaintiff's amended complaint. The appellate court noted that while the respondent in discovery rules were initially intended to allow plaintiffs in medical malpractice actions to conduct discovery against individuals or other entities without imposing what other courts have

characterized as "the stigma, costs and burdens" of being named as defendants to litigation (*see Bogseth v. Emanuel*, 166 Ill. 2d 507, 515 (1995)), an examination of section 2-402 clearly shows that the respondent in discovery rules are not limited to medical malpractice cases, but instead apply "in any civil action." *Prinova Solutions*, 2018 IL App (2d) 17066, ¶ 23; 735 ILCS 5/2-402.

Further, the second district stated that "[i]f the legislature had intended to limit respondents in discovery to parties who had never been named as defendants, it could have done so." *Prinova Solutions*, 2018 IL App (2d) 170666, ¶ 27, citing *Westwood Construction*, 2016 IL App (1st) 142490, ¶ 17.

Agreeing with the first district's analysis in the *Westwood Construction* case, the second district concluded that "nothing in section 2-402's plain language precludes a party who was previously named as a defendant and dismissed without prejudice from being named as a respondent in discovery in an amended complaint." *Prinova* Solutions, 2018 IL App (2d) 170666, ¶ 26.

The combined effect of the *Prinova Solutions* case and the *Westwood Construction* case, besides making it clear that section 2-402 has application well beyond medical malpractice cases, clearly diminishes the value of a dismissal without prejudice, and demonstrates that such a dismissed defendant has at least the potential for continuing litigation costs and possible exposure to future liability and damages. A dismissal without prejudice has never meant "game over," but now, more than ever, such a dismissal opens up new avenues of concern for defendants in civil cases.

About the Author

William G. Beatty is an equity shareholder at the Chicago law firm of *Johnson & Bell, Ltd.* where he has practiced for more than three decades. He is a member of the State Bars of Illinois, Arizona and Colorado, as well as the bars of numerous federal courts. Mr. Beatty received his J.D., with honors, from the Chicago-Kent College of Law and is presently pursuing an LL.M. degree in Medical Law and Ethics from the University of London.

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