

Proposal 09-04 (PR 0169)
Amends Supreme Court Rule 212(a)(5) and creates new Committee Comment
Offered by the IJC Committee on Discovery Procedures

Rule 212. Use of Depositions

(a) Purposes for Which Discovery Depositions May Be Used. Discovery depositions taken under the provisions of this rule may be used only:

(1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;

(2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;

(3) if otherwise admissible as an exception to the hearsay rule;

(4) for any purpose for which an affidavit may be used; or

(5) upon reasonable notice to all parties, as evidence at trial or hearing against a party who appeared at the deposition or was given proper notice thereof, if the court finds that the deponent is ~~neither not~~ a controlled expert witness ~~nor a party~~, the deponent's evidence deposition has not been taken, and the deponent is unable to attend or testify because of death or infirmity, and if the court, based on its sound discretion, further finds such evidence at trial or hearing will do substantial justice between or among the parties.

(b) Use of Evidence Depositions. The evidence deposition of a physician or surgeon may be introduced in evidence at trial on the motion of either party regardless of the availability of the deponent, without prejudice to the right of either party to subpoena or otherwise call the physician or surgeon for attendance at trial. All or any part of other evidence depositions may be used for any purpose for which a discovery deposition may be used, and may be used by any party for any purpose if the court finds that at the time of the trial:

(1) the deponent is dead or unable to attend or testify because of age, sickness, infirmity or imprisonment;

(2) the deponent is out of the county, unless it appears that the absence was procured by the party offering the deposition, provided, that a party who is not a resident of this State may introduce his own deposition if he is absent from the county; or

(3) the party offering the deposition has exercised reasonable diligence but has been unable to procure the attendance of the deponent by subpoena; or finds, upon notice and motion in advance of trial, that exceptional circumstances exist which make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally in open court, to

allow the deposition to be used.

(c) Partial Use. If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used.

(d) Use After Substitution, Dismissal, or Remandment. Substitution of parties does not affect the right to use depositions previously taken. If any action in any court of this or any other jurisdiction of the United States is dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, or if any action is remanded by a court of the United States to a court of this State, all depositions lawfully taken and duly filed in the former action, or before remandment, may be used as if taken in the later action, or after remandment.

Committee Comments

Paragraph (a)

The Committee was prompted to examine this issue by the reported decision in *Berry v. American Standard, Inc.*, 382 Ill.App.3d 895 (5th Dist. 2008). In *Berry*, the plaintiff sued 47 defendants for damages arising out of the plaintiff's exposure to asbestos. Plaintiff was diagnosed with terminal mesothelioma in September 2003, with a life expectancy of between eight and 18 months. In January 2004, plaintiff's counsel served a notice of the plaintiff's evidence deposition for February 24, 2004. The defendants objected to plaintiff's evidence deposition proceeding prior to his discovery deposition. The discovery deposition commenced on March 22, 2004, and, after various motions by the defendants to allow additional days to complete the deposition, ultimately concluded on July 28, 2004. Shortly after the completion of his discovery deposition, the plaintiff was hospitalized and thereafter died on August 23, 2004. Defendants' subsequent motion to bar the use of the videotaped discovery deposition was allowed pursuant to Rule 212(a)(5) and because without the plaintiff's testimony, his estate could not prevail at trial, defendants' motions for summary judgment were granted. The ruling was affirmed on appeal.

The Committee believes that a trial court should have the discretion under Rule 212(a)(5) to permit the use of a party's discovery deposition at trial. The current version of the Rule is absolute in its prohibition against the use of a party's discovery deposition at trial. It appears, however, that there may be rare, but compelling circumstances under which a party's discovery deposition should be permitted to be used. In the Committee's view, *Berry* presents such circumstances. Given that in most cases, counsel will have the opportunity to preserve a party's testimony via an evidence deposition, it is expected that the circumstances that would justify use of a discovery deposition would be extremely limited.