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**THE AVAILABILITY OF DISCOVERY IN SPECIAL
APPEARANCE SITUATIONS IN ILLINOIS:
WILL THE COURTS DENY WHAT
THE STATUTES ALLOW?**

The technological advances which have occurred in this country during the nearly two hundred years of its existence have resulted in significant changes in both the structure and manner of conducting business and in the ways in which individuals live their lives. Business is no longer a primarily local enterprise, but has become an interstate, and often an international, undertaking. For the individual, too, state boundaries have become blurred by advances in transportation which have greatly increased his mobility.

Although this change from an intrastate to an interstate society has fostered many improvements, it has also brought changes which have required fundamental adjustments in the judicial system. One adjustment was necessitated by the realization that the increase in interstate activity by businesses and individuals had resulted in a proportionate increase in the probability that citizens (both corporate and individual) of one state would be injured in a judicially cognizable manner by citizens of other states. To cope with this situation in a manner which would allow the injured citizen to obtain redress within the state of his residency, legislatures enacted laws to extend the jurisdiction of their courts to embrace the potential defendant from another state. The theory underlying these laws is that certain acts within the forum state are sufficient to confer that state's jurisdiction over a resident of another state. In Illinois, this theory is embodied in section 17(1) of the Illinois Civil Practice Act, the Illinois Long-Arm Statute, which provides:

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:

- (a) The transaction of any business within this State;
- (b) The commission of a tortious act within this State;
- (c) The ownership, use, or possession of any real estate situated in this State;
- (d) Contracting to insure any person, property or risk located within this State at the time of contracting;
- (e) With respect to actions of divorce and separate maintenance, the maintenance in this State of a matrimonial domicile

at the time the cause of action arose or the commission in this State of any act giving rise to the cause of action.¹

In addition to the long-arm type of jurisdiction, states expanded their jurisdictional ambit by asserting judicial power over defendants who possessed sufficient "minimum contacts" with the state to justify the general assertion of jurisdiction over them as residents of the forum state.²

But the mere assertion of jurisdiction in these situations does not solve the entire problem, for it must also be recognized that there are undoubtedly instances where the defendant will *not* have performed acts sufficient to confer jurisdiction. In these situations it would be unfair to require the defendant to enter a general appearance and to defend the case on the merits. Accordingly, defendants in Illinois actions who contend that they should not be required to submit to the jurisdiction of the court may appear specially for the sole purpose of challenging the court's jurisdiction over their persons.³

During the period that these developments were occurring, important changes in the area of the law pertaining to the ability of a party to discover evidence, or materials which might lead to evidence, were also taking place. The purpose of this article is to explore the general nature of special appearances in Illinois and the availability of discovery in conjunction with such appearances filed by defendants served in long-arm type situations.

GENERAL NATURE OF THE ILLINOIS SPECIAL APPEARANCE

When a suit is commenced against a particular defendant, one of the first tasks of the plaintiff's attorney is to obtain service of process on such defendant in order to bring him within the jurisdiction of the court. When served with summons the prudent defendant, regardless of whether or not he wishes to contest the court's jurisdiction, will enter an appearance either personally or by his attorney. This appearance is the formal proceeding by which the defendant submits himself to the jurisdiction of the court.⁴ But a defendant's appearance, in many jurisdictions including Illinois, may be of two types—general or special. A general appearance is a simple and unqualified or unrestricted submission to the jurisdiction of the court.⁵ In con-

1. ILL. REV. STAT. ch. 110, § 17(1) (1973).

2. See, ILL. REV. STAT. ch. 110, §§ 13.3, 16, 17 (1973); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Lindley v. St. Louis-San Francisco Ry.*, 407 F.2d 639 (7th Cir. 1968).

3. ILL. REV. STAT. ch. 110, § 20 (1973).

4. BLACK'S LAW DICTIONARY (4th ed. 1968).

5. *Louisville & N.R.R. v. Industrial Board of Illinois*, 282 Ill. 136, 141-42, 118 N.E. 483, 485 (1917); *reh. den.* (1918).

trast, a special appearance is a submission to the court's jurisdiction for a specific purpose only, not for all purposes of the suit. This "specific purpose" is to object to the jurisdiction of the court over the person of the defendant.⁶

Special appearances in Illinois are governed by section 20 of the Civil Practice Act.⁷ Subsection (1) prescribes the time, manner and purpose of a special appearance as follows:

(1) Prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.

As explicitly provided in this section, a special appearance *must* be entered prior to filing *any* other pleading or motion; failure to do so will result in the appearance being deemed general.

Certain acts of the defendant will constitute a waiver of his special appearance. In general, any action taken by a defendant which recognizes the case as in court will amount to a general appearance unless such action is for the sole purpose of objecting to jurisdiction over his person.⁸ Thus, if the party invokes the power of the court for any purpose other than to question the jurisdiction of the court over his person, such as to adjudicate any defense or defenses at bar,⁹ the appearance will be construed to be general even though designated as special.¹⁰

More specifically, a number of actions on the part of a specially appearing defendant have been held by the Illinois courts to amount to a waiver of his special appearance. For example, a motion or stipulation for an extension of time to answer or otherwise plead has constituted a waiver,¹¹ as has the filing of an answer¹² or an oral adoption of a co-defendant's answer.¹³ In addition, the courts have found that a special appearance is waived by the defendant's making a motion for a bill of particu-

6. *Blake v. Union Insurance Exchange*, 317 Ill. App. 199, 46 N.E.2d 141 (1943).

7. ILL. REV. STAT. ch. 110, § 20 (1973).

8. *Greer v. Ludwick*, 100 Ill. App. 2d 27, 241 N.E.2d 4 (1968); *People ex rel. Covington v. Johnson*, 79 Ill. App. 2d 266, 224 N.E.2d 664 (1966); *Spencer v. American United Cab Ass'n*, 59 Ill. App. 2d 165, 208 N.E.2d 118 (1965); *Lord v. Hubert*, 12 Ill. 2d 83, 145 N.E.2d 77 (1957).

9. *Powers v. Powers*, 46 Ill. App. 2d 57, 196 N.E.2d 731 (1964).

10. *Greenberg v. Neiman*, 320 Ill. App. 99, 49 N.E.2d 817 (1943).

11. *Mileris v. Miller*, 107 Ill. App. 2d 222, 245 N.E.2d 787 (1969); *Gerstel Agency, Inc. v. Grusin*, 27 Ill. App. 2d 249, 169 N.E.2d 537 (1960); *Welter v. Bowman Dairy Co.*, 318 Ill. App. 305, 47 N.E.2d 739 (1943).

12. *People v. Gregory*, 5 Ill. App. 2d 374, 125 N.E.2d 300 (1955).

13. *McGuire v. Outdoor Life Pub. Co.*, 311 Ill. App. 267, 35 N.E.2d 817 (1941).

lars¹⁴ or a motion to strike,¹⁵ presenting *any* plea or defense on the merits,¹⁶ and moving to vacate a judgment¹⁷ or for a new trial.¹⁸

AVAILABILITY OF DISCOVERY FOLLOWING A SPECIAL APPEARANCE

The recognition in both federal and state jurisdictions that a strict adversary system was no longer just or desirable within the present concepts and constructs of the judicial system in the United States culminated in the adoption of broad and liberal discovery rules. These rules were designed to speed litigation and to emphasize the merits of the particular case rather than the cleverness of counsel or his superior facilities for investigation. Although Illinois followed the lead of the federal courts in adopting liberal discovery rules, two questions relating to discovery in its modern context still remain unanswered by either the courts or the legislature. First, may a specially appearing

14. *Hotchkiss v. Vanderpoel Co.*, 139 Ill. App. 325 (1908). Bills of Particulars are controlled by section 37 of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 37 (1973).

15. *Koplin v. Saul Lerner Co., Inc.*, 52 Ill. App. 2d 97, 201 N.E.2d 763 (1964). Motions to strike are governed by section 45 of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 45 (1973).

16. *Coleman Financial Corp. v. Schuddekopf*, 89 Ill. App. 2d 150, 232 N.E.2d 104 (1967) (New York garnishee's excursion into merits on hearing of motion to quash—held general appearance); *Loss v. Loss*, 80 Ill. App. 2d 376, 224 N.E.2d 271 (1967) (prior judgment); *Mueller v. Mueller*, 36 Ill. App. 2d 305, 183 N.E.2d 887 (1962) (defense of statute of limitations); *Brignall v. Merkle*, 306 Ill. App. 137, 28 N.E.2d 311 (1940) (affidavits in support of special appearance showing presentation of issues on merits). And see, section 48 of the Civil Practice Act, ILL. REV. STAT. ch. 110, § 48 (1973), concerning motions for involuntary dismissal and which provides in part:

§ 48. (Involuntary dismissal based upon certain defects or defenses.)

(1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(a) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(b) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(c) That there is another action pending between the same parties for the same cause.

(d) That the cause of action is barred by a prior judgment.

(e) That the action was not commenced within the time limited by law.

(f) That the claim or demand set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(g) That the claim or demand asserted is unenforceable under the provisions of the Statute of Frauds.

(h) That the claim or demand asserted against defendant is unenforceable because of his infancy or other disability.

(i) That the claim or demand asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim or demand.

17. *Stokes v. Kershaw*, 60 Ill. App. 2d 222, 207 N.E.2d 714 (1965); *Milner v. Douglas*, 44 Ill. App. 2d 429, 195 N.E.2d 224 (1963).

18. *Duggan v. Smyser*, 46 Ill. App. 39 (1892).

defendant request, or participate in, discovery without waiver of his special appearance? Second, is discovery available to a plaintiff from a specially appearing defendant?

The Specially Appearing Defendant: Discovery as a Waiver

Despite the obvious value of discovery to a specially appearing defendant, *e.g.*, to discover the nature and scope of materials in the plaintiff's possession upon which plaintiff relies to establish the required jurisdictional contacts, there are certain risks facing the defendant should he choose to request, or participate in, discovery. The plaintiff is voluntarily in court and, by his act of bringing suit, has acknowledged the court's jurisdiction. But the defendant by his special appearance is *challenging* the jurisdiction of the court. As a consequence, he faces the risk of being held to have waived his jurisdictional objections if the court construes his request for discovery as a recognition of its power.

Note must be taken that such a holding will not result in the complete abrogation of an out-of-state defendant's contention that he is not amenable to service of Illinois process under the provisions of the long-arm statute.¹⁹ Subsection (3) of section 20 states:

(3) If the court sustains the objection, an appropriate order shall be entered. *Error in ruling against the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State.*²⁰

As indicated by subsection (3), a party who is held to have waived his special appearance, or whose jurisdictional objections have been overruled by the court, may still assert lack of jurisdiction on appeal, even though he proceeds with the case and defends on the merits. However, the defendant is still met with the not insubstantial burden of time and expense of proceeding to trial in a case in which the court might have found it lacked jurisdiction over the defendant if discovery had been allowed.

This writer submits that a request for, or a participation in, discovery by a specially appearing defendant should not constitute a waiver, particularly where the defendant is careful to limit his discovery to the scope of the jurisdictional issues presented. What support is there for this statement?

Discovery in Illinois is governed by Illinois Supreme Court

19. Note 1 *supra* and accompanying text.

20. ILL. REV. STAT. ch. 110, § 20(3) (1973) (emphasis added).

Rules 201 through 216.²¹ The scope of discovery is described in Rule 201(b)(1) as:

(b) *Scope of Discovery*

(1) Full Disclosure Required. Except as provided in these rules, a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of persons having knowledge of relevant facts.²²

Rule 201(d) states the standards applicable to the time at which discovery may be initiated:

(d) *Time Discovery may be Initiated.* Prior to the time all defendants have *appeared* or are required to *appear*, no deposition or other discovery procedure shall be noticed or otherwise initiated without leave of court granted upon good cause shown.²³

As set out above, Supreme Court Rule 201(b)(1) authorizes full disclosure of "any matter relevant to the subject matter."²⁴ The Committee Comments accompanying this rule, in discussing the use of the language "relevant to the subject matter" rather than "relating to the merits of the matter in litigation,"²⁵ state:

The only other effect the term 'merits' could have would be to prevent discovery of information relating to jurisdiction, a result the Committee thought undesirable. . . .²⁶

Thus, the committee which adopted the language in the present rules clearly contemplated discovery on the jurisdictional aspects of pending litigation. A reasonable inference is that the committee was aware of the fact that such issues were likely to be raised, in many instances, at the appearance stage of litigation when a defendant enters a special appearance.

Supreme Court Rule 201(d) provides that no discovery may be initiated, without order of court, before all defendants have

21. ILL. REV. STAT. ch. 110A, §§ 201-16 (1973). Rule 201(a) specifically describes available methods of discovery:

(a) *Discovery Methods.* Information is obtainable as provided in these rules through any of the following discovery methods: depositions upon oral or written questions, written interrogatories to parties, discovery or inspection of documents or property, and physical and mental examination of persons. . . .

For a thorough discussion of discovery in Illinois and the federal courts, see Johnston, *Discovery in Illinois and Federal Courts*, 2 J. MAR. J. 22 (1968).

22. ILL. REV. STAT. Ch. 110A, § 201(b)(1) (1973).

23. *Id.*, § 201(d) (emphasis added).

24. Note 22 *supra* and accompanying text.

25. The language "relating to the merits of the matter in litigation" was that appearing in FED. R. CIV. P. 26, at the time the present Illinois discovery rules were being drafted.

26. ILL. ANN. STAT. ch. 110A, § 201(b), Commentary at 119 (Smith-Hurd 1969).

appeared or are required to appear.²⁷ It is important to note that neither this rule nor any of the other discovery rules make any distinction as to the *type* of appearance contemplated to satisfy this provision. Thus, it may be concluded that the failure to specify that discovery be initiated only after a *general* appearance would leave ample room for the assertion of the argument that discovery should be allowed, without resulting in a waiver, regardless of whether the appearance of the defendant is designated as general or special.

Further support for the proposition that the defendant should be allowed discovery in these situations is gleaned from a reading of section 20(2) of the Civil Practice Act²⁸ in conjunction with Supreme Court Rules 212(a) (4)²⁹ and 213(f).³⁰ Section 20(2) allows the filing of affidavits in support of a special appearance where "the reasons for objection are not apparent from the papers on file in the case." Rule 212(a) (4) states that discovery depositions may be used for the same purposes as affidavits, and Rule 213(f) provides that answers to interrogatories may be used *in evidence* to the same extent as discovery depositions. Therefore, it follows that a special appearance could be accompanied by a discovery deposition, and possibly by answers to interrogatories,³¹ and still be in compliance with the special appearance section.

Supreme Court Rule 191³² is also relevant to the question under consideration. Subdivision (a) of this rule sets out the requirements to be met by affidavits submitted in support of motions for summary judgment, motions for involuntary dismissal, and special appearances to contest jurisdiction over the person pursuant to section 20(2) of the Civil Practice Act.³³ Subdivision

27. Note 23 *supra* and accompanying text.

28. ILL. REV. STAT. ch. 110, § 20(2) (1973), which provides:

(2) If the reasons for objection are not apparent from the papers on file in the case, the special appearance shall be supported by affidavit setting forth the reasons.

29. ILL. REV. STAT. ch. 110A, § 212(a) (4) (1973), stating that discovery depositions may be used "for any purpose for which an affidavit may be used."

30. *Id.*, § 213(f) which provides: "*Uses of Answers to Interrogatories.* Answers to interrogatories may be used in evidence to the same extent as a discovery deposition."

31. This is a more tenuous proposition due to the "in evidence" language of rule 213(f).

32. ILL. REV. STAT. ch. 110A, § 191 (1973).

33. *Id.*, § 191(a) which provides in full:

(Supreme Court rule 191). Affidavits in Proceedings Under Sections 57, 48, and 20(2) of the Civil Practice Act

(a) Requirements. Affidavits in support of and in opposition to a motion for summary judgment under section 57 of the Civil Practice Act, affidavits submitted in connection with a motion for involuntary dismissal under section 48 of the Civil Practice Act, and affidavits in connection with a special appearance to contest jurisdiction over the person, as provided by section 20(2) of the Civil Practice

(b) provides:

(b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. *The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion.*³⁴

The language of Rule 191 makes it apparent that a defendant who seeks to submit an affidavit of either the plaintiff or his agent or representative, or seeks documents in the possession of the plaintiff in support of his special appearance, and who cannot obtain these materials because of the hostility of the plaintiff or for other causes, may be able to obtain answers to interrogatories, depositions and documents pursuant to the provisions of subsection (b).

The rules applicable to practice in the federal courts may provide additional support for the defendant's position. Although special appearances are no longer required under the Federal Rules of Civil Procedure,³⁵ it is still possible to waive jurisdictional objections by failure to raise them in a timely manner.³⁶ Under the Federal Rules, obtaining continuances, petitioning for removal, and taking depositions *before answering* has been held not to constitute a waiver of the defense of the court's lack of jurisdiction over the person.³⁷ As the Illinois discovery rules are

Act, shall be made on the personal knowledge of the affiants; shall set forth with a particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

34. *Id.*, § 191(b).

35. FED. R. CIV. P. 12(b), which provides in part: "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . ."

36. *Emerson v. National Cylinder Gas Co.*, 131 F. Supp. 299 (D.C. Mass. 1955); *Huber v. Bissell*, 9 F.R. Serv. 2d 12b.23, Case 3 (E.D. Pa. 1965).

37. *Blank v. Bitker*, 135 F.2d 962 (7th Cir. 1943); *Bartner v. Debaisse*, 20 F.R.D. 355 (E.D.N.Y. 1957); *Rockwell v. United States Fid. & Guar. Co.*, 137 F. Supp. 317 (M.D. Pa. 1955). For a discussion of the use of

patterned to a large degree after the Federal Rules,³⁸ the assertion that a defendant in an Illinois court should be able to obtain discovery in support of a special appearance, notwithstanding the fact that Illinois retains the distinction between general and special appearances, is clearly reasonable.

The statutory materials discussed above indicate that an extremely plausible argument may be made in support of the allowance of discovery to a specially appearing defendant without such constituting a waiver. However, the only Illinois case found discussing this point casts some doubt on an affirmative conclusion. *Lovell v. Hastings*³⁹ involved an action to recover damages for injuries suffered as a result of a 1967 automobile collision.⁴⁰ Suit was filed in June, 1968, and substituted service was obtained on defendant in February, 1971. Subsequently the defendant filed a special appearance objecting to the form of affidavit used to obtain service and moved to quash.⁴¹ The defect in the affidavit was corrected by interlineation, and no further action was taken with respect to the defendant's motion.

In June, 1971, interrogatories were filed and served on the defendant, to which sworn answers were filed. In July, 1971, both parties participated in the taking of the discovery depositions of the respective parties in the office of the plaintiff's attorney.⁴² Two days after the taking of these depositions, the defendant filed a motion to dismiss for failure to exercise due diligence in obtaining service and for failure to state a cause of action. The trial court ordered dismissal for failure to exercise due diligence and plaintiffs appealed.⁴³

The plaintiffs contended on appeal that

by appearing generally and defending [the] action, including full and voluntary participation in pre-trial discovery procedures, defendant waived any objection he may have had with respect to service of process.⁴⁴

Reversing the trial court's order dismissing the action, the Appellate Court for the Fifth District held:

[T]he delay from March 11, 1971 to July 14, 1971 in filing the

discovery in this context in the federal courts see Comment, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 VA. L. REV. 533 (1973).

38. The federal discovery rules are found at Rules 26-37, FED. R. CIV. P. 26-37. For a listing of states which have substantially adopted the federal rules for use in their state courts see AM. JUR. 2d DESK BOOK, Doc. No. 128 (1962, Supp. 1974).

39. 11 Ill. App. 3d 221, 296 N.E.2d 608 (1973) (hereinafter referred to as *Lovell*).

40. *Id.* at 222, 296 N.E.2d at 609.

41. *Id.* at 223, 296 N.E.2d at 609.

42. *Id.* at 223, 296 N.E.2d at 610.

43. *Id.*

44. *Id.* at 222, 296 N.E.2d at 609.

motion coupled with the participation in the case . . . constitutes a waiver of the [jurisdictional] objection.⁴⁵

Although *Lovell* may be noted as an indication of the court's reluctance to allow discovery to a specially appearing defendant, the case is certainly not dispositive of the question. First, there is no indication that the defendant limited discovery to the jurisdictional issues present. Second, and more importantly, the *Lovell* court held that delay "coupled with" participation constituted a waiver.⁴⁶ This is quite different from holding that *participation alone* would have the same effect.

Considering the decisions of other states, the Oklahoma case of *Ada Dairy Products Co., Inc. v. Superior Court, Seminole County*⁴⁷ is relevant to the availability of discovery to a specially appearing defendant. Coody, a resident of Seminole County, had been injured on the premises of the plaintiff corporation which were located in another county. The plaintiff's president, a practicing attorney, appeared in court in Seminole County as an attorney and was served with summons by a deputy sheriff.⁴⁸ Prior to filing an answer to the summons, the plaintiff served notice and took the deposition of Coody⁴⁹ pursuant to an Oklahoma statute allowing depositions to be taken at any time after the service of summons.⁵⁰ On the answer day, plaintiff filed a special plea and denial of jurisdiction.⁵¹ The court, in holding that the noticing and taking of the deposition did not amount to a general appearance, stated:

It is inconceivable that defendant be deprived of the right to challenge the court's jurisdiction and the exercise by it of judicial force not granted by law, when the record discloses the taking of the depositions was for the very purpose of establishing that want of jurisdiction.⁵²

45. *Id.* at 223, 296 N.E.2d at 610 (emphasis added).

46. *Id.*

47. 258 P.2d 939 (1953) (hereinafter referred to as *Ada*).

48. *Id.* at 940.

49. *Id.* at 940-41.

50. 12 O.S. § 434 (1951).

51. 258 P.2d at 941. This was in essence a denial of proper venue as the facts showed that the plaintiff's principal place of business was in another county and that none of the officers resided in Seminole County.

52. *Id.* at 942. The Oklahoma discovery statute was amended subsequent to this case to specifically provide for depositions in cases of challenges to jurisdiction and venue. Section 434 now provides:

§ 434. When depositions may be taken—Challenges Any person named in the caption in an action may commence taking testimony by deposition at any time after service of summons is effected on any of the defendants or, in any event, after ten (10) days following issuance of summons for service upon any person or persons named as defendants in the caption. Upon motion, with or without notice, as the court may direct, and for good cause shown, the court may shorten such time. A challenge to the validity of service, the jurisdiction of the court, the venue of the action, or a demurrer to the the sufficiency of the petition shall not prevent a party from taking

A more recent Oklahoma decision, *Avery v. Nelson*,⁵³ explained the holding in *Ada* as follows:

[Respondent in *Ada* contended] that, by serving notice to take depositions, and taking depositions, . . . the company entered a general appearance, thus vesting the court with jurisdiction As we view it, . . . since, under the deposition statutes cited, the defendant did not have to get the court's permission to take depositions, it had not entered a general appearance in the case by serving notice and taking depositions as authorized by statute.⁵⁴

Analogous reasoning to that present in these Oklahoma cases is applicable to the situation in Illinois. Not only are the statutes similar in that no court permission is needed (once the Illinois defendant has "appeared") in order to initiate discovery, but the possibility that discovery will disclose a lack of jurisdiction would seem a particularly compelling rationale for allowing discovery to the specially appearing defendant—especially when one considers the monetary and temporal savings which would likely attend such allowance.

There are also decisions from other states which offer assistance in determining whether a request for discovery by the defendant should result in a waiver of his special appearance. A Virginia court has held that a non-resident defendant does not appear generally by obtaining permission of the court to take depositions *in his home state*,⁵⁵ and it has been held in Florida, Missouri and Wisconsin that the defendant's participation in the taking of depositions *in his home state* does not amount to a waiver.⁵⁶ Thus, the courts recognize that participation in discovery in other than the forum state will not amount to a general appearance. There would appear to be no compelling reason for a different result simply because the process is performed in the forum state. Additionally, the courts acknowledge the value of

testimony by deposition, and the taking of a deposition or the appearance and participation in the taking of a deposition shall not waive any pending motion, demurrer or other objection.

12 O.S. § 434 (1969) (emphasis added).

53. 455 P.2d 75 (1969).

54. *Id.* at 79-80.

55. *Abel v. Smith*, 151 Va. 568, 144 S.E. 616 (1928). The court in *Abel* noted that the hearing in the trial court was strictly limited to the special appearance issues.

56. *Akers v. Salzman*, 181 So. 2d 5 (Fla. 1965); *Detmer, Bruner & Mason v. New York Cent. R. Co.*, 80 S.W.2d 222 (Mo. 1935); *State ex rel. Cronkhite v. Belden*, 193 Wis. 145, 211 N.W. 916 (1927). In *Detmer*, the Missouri court noted, as had the Oklahoma court in *Ada*, note 52 *supra* and accompanying text, that the taking of the deposition might develop the very facts which prove the jurisdictional objection. 80 S.W.2d at 226. See also, *Donnelley v. Thorne*, 144 Ind. App. 468, 51 N.E.2d 873 (1943) and *Ramsey v. Rule*, 98 Ind. App. 205, 188 N.E. 792 (1934), holding that a deposition submitted solely in support of a special appearance did not constitute a waiver. Indiana has substantially adopted the federal rules subsequent to these decisions.

discovery to the specially appearing defendant in possibly disclosing the very facts upon which the jurisdictional objection will prevail. There would appear to be valid justification for allowing discovery of this nature, especially where limited to the jurisdictional questions involved.⁵⁷

Therefore, a viable argument may be made in support of the allowance of discovery procedures to a specially appearing defendant in Illinois, with neither request nor participation being construed as a waiver.

*Discovery by the Plaintiff
From a Specially Appearing Defendant*

When a defendant enters a special appearance, the availability of discovery to the plaintiff may be equally as valuable to him as it would be to the defendant. For example, discovery would assist the plaintiff in establishing the requisite minimum contacts of the out-of-state defendant with the forum state, or in rebutting the arguments put forth by the defendant in support of his special appearance.

Those statutory provisions relied upon in support of the allowance of discovery to the defendant are equally applicable to the case of the plaintiff. Supreme Court Rule 201(d),⁵⁸ concerning the time for initiating discovery, makes no distinction as to the type of appearance entered. Moreover, since a plaintiff met with a special appearance supported by affidavits will commonly submit counteraffidavits, the use of depositions and answers to interrogatories for the same purpose could be allowed under section 20(2) of the Civil Practice Act and Supreme Court Rules 191(b), 212(a)(4), and 213(f).⁵⁹

Despite the lack of an Illinois case which is dispositive of this question, the problem was discussed in a recent Illinois appellate court case, *Koplin v. Saul Lerner Co., Inc.*⁶⁰ The case involved a *qui tam* action based upon allegations that the defendants had sold put and call options in Illinois in violation of a statute prohibiting such sales.⁶¹ The defendants appeared specially and objected to the court's jurisdiction by arguing that they had not transacted business within the state.⁶² The only issue before the court was whether the defendant had sufficient

57. Notes 52, 56 *supra* and accompanying text.

58. Note 23 *supra* and accompanying text.

59. Notes 32-34, 29, 30 *supra* and accompanying text.

60. 52 Ill. App. 2d 97, 201 N.E.2d 763 (1964) (hereinafter referred to as *Koplin*).

61. *Id.* at 99, 201 N.E.2d at 765. The statutes in question were ILL. REV. STAT. ch. 38, § 328 (1959) and ILL. REV. STAT. ch. 38, § 28-1(a)(4) (1961).

62. 52 Ill. App. 2d at 99, 201 N.E.2d at 765.

minimum contacts with the forum state; however, the complaint was deficient in failing to allege such contacts.⁶³ The plaintiff requested *full*⁶⁴ discovery to enable him to supply the deficiencies⁶⁵ which consisted of the following omissions: failure to specify sales by the defendants; failure to enumerate purchases by specific Illinois residents; and, failure to allege dates, places and amounts of losses attributable to sales in Illinois.⁶⁶ In respect to the plaintiff's request for discovery, the court stated:

Instead of showing such a definite act, the plaintiff wanted the trial court to infer from the vague allegations and the general conclusions of his complaint that there were such acts, that Illinois residents had dealt with the defendants and had suffered losses. What he actually wanted was something it would have been unjust to grant. He asked the court to exercise jurisdiction over the defendants in order to determine whether any dealings took place; *in other words, he asked the court to exercise in personam jurisdiction in a case where, until the jurisdiction was exercised, there were not sufficient facts before the court to determine whether or not jurisdiction existed.*

The trial court was not willing to do this and we are not willing to order it to do so. In our opinion the requisite minimum contacts have not been shown. *We believe that it would be offensive to traditional concepts of fair play and substantial justice to compel the defendants, who are not residents of this state, to appear in our courts and to furnish information possibly against their own interest, before it even becomes clear whether our courts have jurisdiction over them or that the plaintiff has a cause of action against them.*⁶⁷

Although the statements of the *Koplin* court on this point are obviously *dicta*, support is found for the court's reasoning in the Wisconsin case of *Stroup v. Career Academy, Inc.*⁶⁸ The defendants in *Stroup* were served pursuant to the Wisconsin Long-Arm Statute⁶⁹ and appeared specially. Plaintiff had sought discovery in aid of pleading as allowed by the Wisconsin statutes.⁷⁰ The court held that the jurisdictional issue must be

63. *Id.* at 100, 201 N.E.2d at 765.

64. It must be noted that the court did not deal with the availability of discovery if the request had been limited to the jurisdictional issues, although it may be inferred from the reasoning of the court that its decision would be no different.

65. 52 Ill. App. 2d at 101, 201 N.E.2d at 766.

66. *Id.* at 100, 201 N.E.2d at 765-66.

67. *Id.* at 106-07, 201 N.E.2d at 768 (emphasis added).

68. 38 Wis. 2d 284, 156 N.W.2d 358 (1968).

69. WIS. STATS. Section 262.05 (1959).

70. 38 Wis. 2d at 286, 156 N.W.2d at 359. Discovery in aid of pleading is found at W.S.A. 887.12 (1966) governing scope and use of discovery. Subsection (6) states:

(6) Discovery Needed to Plead. If discovery is sought of an adverse party to enable the plaintiff to frame a complaint, the notice of taking the examination shall be accompanied by the affidavit of himself, his attorney or agent, stating the general nature and object of the action or proceeding; that discovery is sought to enable him to plead, and the subjects upon which information is desired; and the exami-

decided *first* in a case of this sort since the court must have jurisdiction over the person of the defendant before discovery may be allowed.⁷¹

As the discussion in the *Koplin* decision pertaining to the question under consideration was *dicta*, and since the *Stroup* decision is at most persuasive authority on this point in Illinois, this author submits that the plaintiff should be allowed discovery in these situations. First, the *Koplin* court failed to indicate what decision would be forthcoming in the event a plaintiff *has* alleged in his complaint the requisite jurisdictional contacts and a sufficient cause of action against the defendant. Second, although the *Koplin* decision noted that the specially appearing defendant might in some way be harmed by allowing discovery to the plaintiff at this stage of the proceeding, any possible abuses of the privilege could easily be policed within the scope of the discovery rules as they now stand. Rule 201(c)(1) permits a court to issue protective orders "denying, limiting, conditioning or regulating discovery."⁷² Therefore, any discovery initiated against a specially appearing defendant could be expressly limited to the jurisdictional issues. Third, analysis of the applicable statutes amply demonstrates that the statutes will allow discovery to the plaintiff in this situation.⁷³ Finally, if both parties are allowed discovery after a defendant enters a special appearance, it would be beneficial to their respective interests. The plaintiff would benefit from discovery, assuming that he has alleged the requisite jurisdictional contacts and a sufficient cause of action in his complaint against the defendant, by obtaining the necessary documents or other materials upon which his allegations rely. Likewise, discovery would enable the defendant to more effectively attack the plaintiff's allegations upon which jurisdiction or the cause of action is premised.

In light of the foregoing discussion, at least in cases where the plaintiff has made sufficient jurisdictional allegations, a plausible and effective argument can be made for the position that the plaintiff should be allowed discovery, limited to the jurisdictional questions presented, against a specially appearing defendant.

CONCLUSION

At the present time it is doubtful that either the plaintiff

nation relative thereto shall be permitted unless the court or presiding judge thereof shall, before the examination is begun, further limit the subjects to which it shall extend, which may be done on one day's notice.

71. 38 Wis. 2d at 290, 156 N.W.2d at 361.

72. ILL. REV. STAT. ch. 110A, § 201(c)(1) (1973).

73. Notes 58-59 *supra* and accompanying text.

or the defendant in a case where a special appearance is filed will be allowed to obtain discovery in Illinois. Discovery by the plaintiff will be precluded by the rationale expressed in *Koplin*;⁷⁴ namely, that it would be unjust for the court to exercise jurisdiction over the defendant to compel him to submit to examination prior to the time at which it is determined that jurisdiction exists. In light of the strict adherence of the Illinois courts to the principle of special appearances being *solely* for the purpose of challenging the jurisdiction of the court over the person of the defendant, a request for, or participation in, discovery by a specially appearing defendant will in all probability be held to amount to a waiver.

Consequently, the problem remains. Discovery is obviously desirable in many controversies in which the defendant files a special appearance. By denying its use to the plaintiff in such cases, the courts frustrate the full realization of the purposes for which long-arm statutes were adopted. If the citizens of a state are to be fully accorded the convenience and privilege of having injuries which were caused within the forum state by out-of-state defendants adjudicated in the courts of the citizen's home state, justice requires that discovery be available to affirmatively establish that the alleged minimum contacts or jurisdictional acts do indeed exist. From the standpoint of the defendant, justice would also seem to require that one who contests jurisdiction over his person be allowed discovery, without waiver of jurisdictional objections, to enable such defendant to properly rebut the plaintiff's jurisdictional allegations.

Two alternatives for the solution of this problem present themselves. First, the issue can be presented to and resolved by the courts. However, this alternative, as demonstrated by *Lovell and Koplin*,⁷⁵ is far from certain. Even if the courts were to recognize the usefulness of discovery in these situations, it is less than likely that the desired result would be forthcoming. The plaintiff who requests discovery from a specially appearing defendant will find his efforts frustrated by the "traditional concepts of fair play and substantial justice" reasoning of the *Koplin* court.⁷⁶ The specially appearing defendant, too, will find his request of little avail by reason of the Illinois courts' strict adherence to the concept of special appearances being *solely* for the purpose of challenging the court's jurisdiction over the person of the defendant.

The second alternative, legislative action, is therefore the

74. Note 23 *supra*.

75. Notes 23 and 39 *supra*.

76. Note 67 *supra* and accompanying text.

more desirable. Only through legislative recognition of the usefulness of discovery in special appearance situations, from the standpoint of both parties and the orderly administration of justice, can such procedures clearly be made available.⁷⁷

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⁷⁷. See note 52 *supra*. The emphasized portion of section 434 of the Oklahoma Statutes would serve as an appropriate model for the Illinois legislature to follow.