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The Apex Doctrine: Protecting Corporate Executives From Abusive Discovery Practices

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Introduction

In the United States of America—where less than two percent of civil cases proceed to trial—the preponderance of litigants' time is spent outside the courtroom during the information-gathering phase known as "discovery". During the discovery process, courts permit extensive pre-trial fact investigation. Specifically, parties may obtain information from opposing litigants or non-parties regarding any "non-privileged matter that is relevant to any party's claim or defense". FED. R. CIV. P. 26 (b)(1); *see also Herbert v. Lando*, 441 US 153, 177 (1979) ("The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment"). Federal and state courts have broadly defined "relevant information" as that which is "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26 (b)(1). [See Endnote 1.]

While the liberality of the American information-gathering process enables litigants to comprehensively prepare for trial, these permissive parameters provide an opportunity for abusive and harassing discovery practices. One such tactic consists of seeking the deposition (i.e., a statement made under oath) of a corporate senior executive when the executive possesses little, if any, relevant knowledge concerning the facts at issue. Plaintiffs often utilise this strategy as a means to abuse or harass the corporate executive, rather than engage in good faith information-gathering for which the discovery process was designed. *See, e.g., Celerity, Inc. v. Ultra Clean Holdings, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007) ("Virtually every court that has addressed deposition notices directed at an official at the highest level or 'apex' of corporate management has observed that such discovery creates a tremendous potential for abuse or harassment").

The proper vehicle for precluding the deposition of a corporate executive is a Motion for Protective Order. Pursuant to the Federal Rules of Civil Procedure, litigants may request that the court enter a so-called "protective order" either requiring or prohibiting the parties from engaging in certain activities (i.e., deposing certain individuals). *See* F. R. Civ. P. 26(c)(1). This Rule provides courts with broad discretionary powers to limit or restrict discovery where the hardship to a party or its employee outweighs the need for the information sought, and permits courts to, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense". *Id*. When utilised to shield a corporate executive from unduly harassing depositions, a protective order can take three forms: (1) the judge may carefully tailor the scope of the deposition topics; (2) the judge may specify the time and place of the deposition; or (3) the judge may bar the deposition entirely. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 282 F.R.D. 259, 269 (N.D. Cal. 2012) (granting Apple's motion to compel the depositions of numerous Samsung executives, but placing strict limitations on the duration of the depositions); *In re Bridgestone/Firestone, Inc., Tires Product Liability Litigation*, 205 F.R.D. 535, 536 (S.D. Ind. 2002) (imposing strict time limits on questioning during corporate representative deposition); *Ray v. BlueHippo Funding, LLC*, 2008 WL 4830747, at *4 (N.D. Cal. Nov. 6, 2008) (limiting the deposition of the defendant corporation's CEO to class certification issues and expressly prohibiting inquiry into issues that support the plaintiff's alter ego theory).

Successfully Precluding the Deposition of a Corporate Executive

Nearly forty years ago, the United States Supreme Court addressed the dueling interests of preserving the broad and liberal treatment typically afforded to the discovery process and protecting corporate defendants from parties seeking harassing and unnecessary corporate executive depositions. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975). In discussing the "prospect of extensive depositions of the defendant's officers", the Court recognised that "the process may produce relevant evidence which is useful in determining the merits of the claim". Id. However, the Court simultaneously emphasised:

> To the extent that [deposing a corporate defendant's executive] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in *terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

Id. Indeed, in striking a balance between the interests of liberal discovery and protecting litigants from abuse and harassment, courts throughout the country have adopted what is known as the Apex Doctrine. *See, e.g., Reif v. CNN*, 248 F.R.D. 448, 451 (E.D. Pa. 2008) (discussing numerous leading Apex Doctrine cases); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995); *Alberto v. Toyota Motor Corp*., 796 N.W.2d 490, 494 (Mich. Ct. App. 2010); *Liberty Mutual Ins. Co. v. Superior Court*, 10 Cal.App.4th 1282, 1287 (Cal. App. 1st Dist. 1992).

Generally speaking, the Apex Doctrine requires the party seeking the deposition of the executive to show good cause for doing so by establishing that: (1) the discovery sought from the proposed deponent cannot be obtained from lower level employees or through less burdensome means, such as interrogatories; and (2) the proposed deponent has unique and relevant personal knowledge of the facts involved in the dispute. *In re Continental Airlines, Inc*., 305 S.W.3d 849, 858–59 (Tex. Ct. App. 2010); Alberto, 796 N.W.2d

at 496–97. However, courts throughout the country interpret the Apex Doctrine differently; while many state court jurisdictions have adopted this doctrine, some have explicitly rejected its application, and others have simply yet to address it.

The "strongest" application of the doctrine places the burden of persuasion on the party seeking to depose the apex executive. *Crest Infiniti, II, LP v. Swinton*, 174 P.3d 996, 1003 (Okla. 2007) ("[The doctrine] requires the party seeking the deposition to show good cause that the official has unique or superior personal knowledge of discoverable information"). In jurisdictions that decline to adopt the Apex Doctrine or have yet to address it, a protective order is still a viable form of relief, but the burden of persuasion rests with the party seeking to forestall the deposition. *Thomas v. Int'l Bus. Machs*., 48 F.3d 478, 483 (10th Cir. 1995) (while not explicitly referencing the Apex Doctrine, upholding grant of protective order where a high-ranking corporate officer submitted affidavit disclaiming personal knowledge of facts at issue); *Apple Inc*., 282 F.R.D. at 263 ("a party seeking to prevent [an apex deposition] carries a heavy burden to show why discovery should be denied"). Notably, these jurisdictions still recognise that apex executives are particularly susceptible to harassment and annoyance. *State ex rel Ford Motor Company v. Messina*, 71 S.W.3d 602, 609 (Mo. 2002) (issuing a protective order where "undue burden and expense, annoyance, and oppression outweigh the need for information [that] is available by other means").

Identifying an Apex Deponent

The initial inquiry courts address in applying this doctrine is whether the putative deponent constitutes an "apex deponent". An apex deponent is a high-ranking executive with significant responsibilities that are instrumental to the operation of the corporation, and therefore sits at the top—or 'apex'—of the corporate structure. There is certainly no hard and fast rule dictating whether any corporate officer qualifies as the apex executive of a company. This determination is largely left to the discretion of the court. Notably, courts have found individuals across numerous industries, including chief executive officers, vice presidents, general counsel, and university presidents to be "apex deponents". *See In re Continental Airlines, Inc*., 305 S.W.3d at 859 (CEO); *Groupion, LLC v. Groupon, Inc.,* 2012 WL 359699, at *2 (N.D. Cal. Feb. 2, 2012) (vice president); *Burns v. Bank of Am.*, 2007 WL 1589437, at *3 (S.D.N.Y. June 4, 2007) (general counsel); *Raml v. Creighton Univ.,* 2009 WL 3335929, at *1–3 (D. Neb. Oct. 15, 2009) (university president). Other courts, however, have denied certain officials 'apex' standing after conducting a factual analysis and determining that such a designation was inappropriate. *See, e.g., Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 126 (D. Md. 2009) (CEO who admits to "no longer [being] a busy corporate executive" and who works a limited schedule is not an 'apex' deponent); *Kelly v. Provident Life & Accident Ins. Co.*, 695 F. Supp. 2d 149, 157 (D. Vt. 2010) (accepting plaintiff's argument that "a vice president position is hardly the 'apex' of a company"). At bottom, this inquiry is fact intensive and a litigant attempting to forestall a corporate executive deposition should be prepared to support the contention that its officer qualifies as an apex deponent by citing, for instance, the company's size, the number of employees, and the rank and daily activities of the putative deponent. Notably, these standards apply equally to former and retired executives, although retired employees are unlikely to have as strong of a 'burden' argument as those still employed. *Rodriguez v. SLM Cor.,* 2010 WL 1286989, at *1–2 (D. Conn. Mar. 26, 2010).

Components of a Successful Motion for Protective Order

Corporate executives are particularly vulnerable to abusive discovery practices in the form of apex depositions. *See, e.g., Mulvey v. Chrysler Corp*., 106 F.R.D. 364, 366 (D.R.I. 1985) (recognising that a corporate executive is a "singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has the right to be protected, and the courts have a duty to recognise his vulnerability"). This vulnerability stems from the fact that these apex depositions serve no real information-gathering purpose, as high level executives are unlikely to possess any personal knowledge concerning the material issues being litigated. *See, e.g., Alberto,* 796 N.W.2d at 496–97. Indeed, the information sought by the noticing party is often more easily obtained through alternative discovery methods. Additionally, because a high-ranking executive plays an essential role in the functioning of a company, requiring him to sit for a deposition at the whim of opposing counsel would impose serious burdens both on the deponent, and the corporation.

In recognising this heightened opportunity for abuse and harassment, courts have tailored their protective order analysis to mirror the associated risks posed to corporate executives. Accordingly, when evaluating whether to issue a protective order, courts predominantly analyse three factors: (1) the unique knowledge possessed by the putative deponent; (2) the burden imposed on the deponent; and (3) alternative, superior sources for the information sought. A litigant seeking to preclude the deposition of his client's high-ranking official should therefore address each of these factors in his motion for protective order.

Unique or Personal Knowledge

To succeed on a motion for protective order prohibiting the deposition of a high-ranking executive, the corporate defendant must clearly articulate the putative deponent's lack of unique or superior knowledge of discoverable information. If this standard is not met, the motion for protective order will necessarily fail. *See Six West Retail Acquisition v. Sony Theater Management Corp*., 203 F.R.D. 98, 102 (S.D.N.Y. 2001) ("Unless it can be demonstrated that a corporate official has some unique knowledge of the issues in the case, it may be appropriate to preclude a redundant deposition of this highly-placed executive while allowing other witnesses with the same knowledge to be questioned") (internal quotations and citations omitted); *Community Fed. Sav. & Loan Ass'n v. FHLBB*, 96 F.R.D. 619, 621–22 (D.D.C. 1983) (holding that personal knowledge is not 'unique' if the same information can be obtained through interrogatories, deposition of the corporate spokesperson, or deposition testimony of other individuals); *Echostar Satellite, LLC v. Splash Media Partners, L.P.*, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009) ("the party seek[ing] to depose a high level executive removed from the daily subjects of the matter in the litigation [. . .] must first demonstrate that the proposed deponent has unique personal knowledge of the matters at issue").

In *In re Continental Airlines, Inc.*, the Texas Court of Appeals applied the Apex Doctrine to set aside the trial court's order compelling the deposition of the CEO of Continental Airlines based on his lack of personal knowledge. 305 S.W.3d at 859. The plaintiffs argued that Continental's CEO had discoverable information about the cause of an accident because he made public statements about the accident, wrote a personal letter to each passenger, interviewed the pilots and flight crew following the incident, and had knowledge of Continental's implementation of safety policies. *Id*. at 851. The court, however, held that the CEO

lacked unique or superior knowledge concerning the cause of the accident and based its ruling on the fact that the CEO's knowledge concerning the accident derived from other, more knowledgeable individuals within the company. *Id*. at 858.

In *Alberto v. Toyota Motor Corp*., the Michigan Court of Appeals applied the Apex Doctrine to protect Toyota's Chairman and CEO and President and COO from harassing, burdensome depositions in a wrongful death case involving the sudden, unintended acceleration of a Toyota automobile. 796 N.W.2d 490, 496–97. While the Toyota executives had a generalised knowledge of the alleged acceleration problems of the model vehicle, the court found they lacked unique or superior knowledge of the vehicle itself. Id. at 497. Specifically, they played no role in the design, testing, or manufacturing of the Toyota Camry at issue. *Id.* In so holding, the court emphasised that an apex executive "often has no particularized or specialized knowledge of the day-to-day operations or the particular factual situations that lead to litigation, and has far-reaching and comprehensive employment duties that require a significant time commitment". *Id*. at 496. Accordingly, the Alberto court found that the trial court abused its discretion by denying the defendant's motion for a protective order to quash the depositions of these Toyota executives. *Id.*

Protection from Unreasonable Annoyance, Oppression, and Undue Burden

As discussed, the rationale for barring apex depositions "is that high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore require some measure of protection from the courts". *In re Bridgestone/Firestone, Inc*., 205 F.R.D. at 536. Accordingly, a party hoping to preclude an apex deposition should emphasise the unduly burdensome and oppressive nature of the deposition in a motion for protective order.

In *State ex rel Ford Motor Company v. Messina*, the plaintiffs sued Ford for defective design and manufacture, failure to warn and instruct of the dangers, and sale of the 1987 Ford Bronco II vehicle. 71 S.W.3d at 607–09. The plaintiffs noticed the depositions of four top-level Ford executives. In response, Ford moved for a protective order to forestall their apex employees from having to be deposed. Id. at 606. After granting Ford's petition for writ of prohibition, the Supreme Court of Missouri expressly declined to adopt the Apex Doctrine. *Id*. at 607. Cognisant of the threat of gamesmanship, however, the *Messina* court noted that "an opposing litigant may not use the threat of a burdensome deposition as a bargaining chip or annoying tactic". *Id*. at 606 (citing *Fogelbach v. Director of Revenue*, 731 S.W.2d 512, 513 (Mo. Ct. App. 1987)). The court held that Ford showed good cause for the issuance of a protective order prohibiting the deposition of two of its executives. *Id*. at 605. The court based its decision on the plaintiffs' failure to seek the requested information through less intrusive means, the limited value of the information sought, and significant annoyance, oppression, undue burden and expense the deposition would impose on Ford and its high-level executives. *Id*. at 607–09.

The burden imposed on corporate executives is of greater significance when foreign defendants are involved, as they must abandon their jobs and families, interrupt their busy schedules, and travel great distances when their depositions are noticed in the forum where the case is venued. *See General Star Indem. Co. v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238, 240 (Fla. Ct. App. 2011) (quashing orders compelling deposition because "[t]he job of the president of the company is to manage the company, not to fly around the United States participating in depositions about [issues] of which the president has no personal knowledge"). Federal law and its state equivalents generally require, however, that witness depositions be taken where the deponent is domiciled. *See Six West*, 203 F.R.D. at 107 (internal citations omitted); *see also Yaskawa Elec. Corp. v. Kollmorgen Corp.*, 201 F.R.D. 443, 444 (N.D. Ill. 2001) (the usual rule "in federal litigation is that in the absence of special circumstances, a party seeking discovery must go where the desired witnesses are normally located") (internal citations omitted). This presumption is overcome only by "showing that factors of cost, convenience, and litigation efficiency militate in favor of holding the deposition outside of the witness' district". *Six West*, 203 F.R.D. at 107 (internal citations omitted). Accordingly, in drafting a motion for protective order in response to an apex deposition notice, defense counsel should be mindful of the general rule protecting foreign corporate executives from having to disrupt their lives and travel to the United States for their depositions.

Alternative and Superior Methods of Discovery

Rather than noticing the deposition of a named high-ranking corporate official, a plaintiff is likely to obtain more valuable information by instead utilising alternative and less burdensome means of discovery. For instance, a party seeking particular documents or answers to specific questions may serve opposing counsel with written interrogatories, requests for production, or requests for admission. FED. R. CIV. P. 33, 34, and 36. This written discovery process leads to the exchange of beneficial and meaningful information, as the responding party is required to diligently search its records and draft substantive responses. Alternatively, the Federal Rules permit a party to notice the deposition of a corporate entity's testifying representative. FED. R. CIV. P. 30(b)(6). The corporate defendant is then obligated to designate and produce for deposition an employee most knowledgeable concerning the information sought. *Id.* Due to the fact that the corporation's own legal department is undoubtedly in a better position to ascertain which of its employees is most knowledgeable concerning the relevant issues, the Rule 30(b)(6) deposition process certainly yields more beneficial and probative discovery than the opponent's arbitrary choice of a high-ranking named corporate executive to depose.

Not surprisingly, courts have expressed a willingness to permit depositions of apex executives when less burdensome methods of discovery have proved ineffective. *In re BP Prod. N. Am., Inc*., 244 S.W.3d 840, 842 n.2 (Tex. 2007) (citing I*n re Alcatel USA, Inc*., 11 S.W.3d 173, 176 (Tex. 2000)). It is therefore imperative that defense counsel provide good faith responses to written discovery and ensure that lower-level employees designated pursuant to Rule 30(b)(6) possess sufficient knowledge of the issues. Failure to do so serves only to bolster opposing counsel's purported need to depose the high-ranking executive.

The Motion must be Supported with a Factually-Sound Affidavit

The single-most important piece of the motion for protective order is the affidavit (i.e., a sworn written statement) of the putative apex deponent wherein the executive disclaims unique or superior knowledge of the facts giving rise to the litigation. Without such an affidavit, the Motion for Protective Order will likely fail. For example, the Supreme Court of Oklahoma declined to issue a protective order where the petitioners' motion for protective order contained only generalised statements that the putative deponents had little unique or personal knowledge about the controversy. *Crest Infiniti*, 174 P.3d at 1004. The court emphasised that such blanket statements are insufficient to satisfy the burden of persuasion for the issuance of an order proscribing discovery. Id. Other courts have reached similar conclusions. *See Iris Corp. Berhad v. U.S.*, 84 Fed.Cl. 489, 494 (2008) (blanket statements regarding burden of travelling from Malaysia to the United States

was insufficient to show good cause for issuance of a protective order); *Wal-Mart Stores, Inc. v. Vidalakis*, 2007 WL 4591569, at *5 (W.D. Ark. Dec. 28, 2007) (finding that defendant Wal-Mart "has not supported its Motion for Protective Order with any affidavits which explains why the requested information cannot be reasonably obtained [from the putative deponents]").

To be effective, the affidavit must establish a number of facts. First, the affidavit must expressly state that the putative apex deponent lacks personal or unique knowledge of the facts at issue in the litigation. As discussed, high-ranking executives generally lack unique or superior knowledge of the facts giving rise to the litigation. Therefore, the affidavit of the putative apex deponent should describe the executive's responsibilities within the defendant corporation and clearly establish he or she has no personal knowledge of, or involvement with, the activities or decisions that allegedly led to the plaintiff's injury.

Second, the affidavit must clearly illustrate the burden that the corporate executive would suffer if he were forced to sit for a deposition—often in a distant location from where he resides—concerning topics of which he has no unique or personally knowledge. However, courts have frowned upon corporate executive affidavits that merely contain conclusive assertions regarding the burdensome nature of the deposition. *See, e.g., Johnson v. Jung*, 242 F.R.D. 481, 486 (N.D. Ill. 2007) ("[c]onclusory statements of hardship are not sufficient to carry this burden."). Instead, the affidavit should describe, in detail, the daily activities of the apex deponent and explain how requiring the executive to take time off work to prepare for and sit for a deposition on topics of which he has no knowledge would personally and professionally burden the executive and his corporation. The inclusion of a detailed, thorough affidavit—executed by the apex executive—can make the difference between a motion that fails to pass muster and one that persuades the court to grant a motion for protective order.

Conclusion

Noticing the deposition of an apex executive often is a purposeful scheme advanced by litigants aiming to harass and burden their opponents rather than gain probative discovery. In applying the Apex Doctrine, courts must balance the liberal broad rules governing discovery against the need to protect parties from abusive and oppressive litigation tactics. However, given American courts' liberal treatment of the discovery rules, courts tend to err on the side of permitting an apex deposition to go forward unless a clear and persuasive showing is made that the deposition would be a waste of time, burdensome and oppressive to those who do *not* possess the information sought. Thus, a carefully articulated response by defense counsel, in the form of a Motion for Protective Order, is necessary to forestall the use of an apex deposition as an implicit bargaining chip at the negotiating table. Courts are accorded wide latitude in limiting or expanding the scope of discovery. Accordingly, a well-argued motion with ample factual support should convince the court that alternate discovery methods will simultaneously yield the discovery desired by opposing counsel and shield apex executives from unduly burdensome and oppressive depositions covering topics of which they lack unique or superior knowledge.

Endnote

1 The vast majority of states have modeled their procedural rules after the Federal Rules of Civil Procedure. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Procedure*, 61 WASH. L. REV. 1367 (1986); Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 n.1 (1994).

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