PRODUCT LIABILITY

Protecting against "Apex" Depositions

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The myriad duties and responsibilities of corporate executives to manage and direct the day-to-day operations of companies make their involvement in litigation unduly burdensome to them and their organizations. This rationale underlies the "apex doctrine" adopted by many courts throughout the country, which imposes a high threshold showing on a party seeking to take the deposition of a high-level executive. When representing a corporation in civil litigation, it is important to understand this doctrine and how to prevent another party from obtaining a deposition that would substantially disrupt and impede your client's business.

The Apex Doctrine and its Rationale

Courts that have adopted the apex doctrine will preclude the deposition of a high-level executive, typically through the issuance of a protective order, upon a showing of one of the following: "(1) the executive has no unique personal knowledge of the matter in dispute; (2) the information sought can be obtained from another witness; (3) the information can be obtained through an alternative discovery method; or (4) severe hardship on the deponent." *EchoStar Satellite LLC v. Splash Media Partners, L.P.*, 2009 WL 1328226, at *2 (D. Colo. May 11, 2009); *see also Wal-Mart Stores, Inc. v. Vidalakis*, 2007 WL 4591569, at *1 (W.D. Ark. Dec. 28, 2007) (applying only a two-prong test and examining whether the executive has unique personal knowledge of the facts at issue *and* less burdensome means of obtaining the information sought have been exhausted). While some courts impose the burden on the party seeking to prevent the deposition to show why the deposition should not go forward, in the context of an apex deposition courts typically impose the burden, in the first instance, on the party seeking the discovery. *Compare id.* ("Generally, the executive seeking to avoid being deposed must demonstrate by evidence that he [or she] has no unique personal knowledge.") *with Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995) ("If the party seeking the [apex] deposition cannot show that the official has any unique or superior personal knowledge of discoverable information, the trial court should grant the motion for protective order and first require the party seeking the deposition to attempt to obtain the discovery through less intrusive methods.").

The apex doctrine was adopted pursuant to the language of Federal Rule of Civil Procedure 26(c), which permits a court, "for good cause, [to] issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Given that language, "[v]irtually every court that has addressed [apex] deposition notices . . . has observed that such discovery creates a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007). Arguably the most high-profile attempt to obtain an apex deposition, and the case that first articulated the apex doctrine, involved plaintiffs who were injured by an alleged defect in a 1975 Dodge Van and sought to take the deposition of then-Chairman of the Chrysler Corporation, Lee Iacocca. *See Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985). The *Mulvey* court acknowledged that Mr. Iacocca was "a singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse" and therefore the court had "a duty to recognize" the need to protect high-level executives from that potential harassment and abuse. *Id.* at 366.

Courts' concern for potential harassment and abuse is beyond the deposition's inconvenience, as many attorneys will seek these depositions not because they believe they will yield information beneficial to the case, but often as leverage against the other party. An executive's sworn testimony could potentially have wide-ranging, and unpredictable, ramifications for the company well beyond the specific case in which he or she is testifying. This is why it is important for counsel to understand how to shield your clients from having to produce a high-level executive for deposition.

Unique Personal Knowledge and Requirement of "Less Intrusive" Discovery

Whether the executive has "unique personal knowledge" of the matters at issue in the lawsuit is the primary inquiry in determining if an apex deposition may proceed. *See Baine v. General Motors Corp.*, 141 F.R.D. 332, 334–36 (M.D. Ala. 1991) (granting protective order and explaining that "the legal authority is fairly unequivocal" against the deposition of high-level corporate executive unless the executive has unique knowledge); *Celerity, Inc.*, 2007 WL 205067, at *4 (stating that an executive's unique personal knowledge of the relevant issues "is an essential component of the standard for an apex deposition").

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In combination with the unique personal knowledge assessment, courts typically perform a searching inquiry into the nature of the

information sought and whether the party seeking the apex deposition has exhausted less intrusive discovery methods, such as interrogatories, Rule 30(b)(6) deposition(s), or depositions of other individuals with direct knowledge of relevant information. *See Baine*, 141 F.R.D. at 334–36; *see also Mulvey*, 106 F.R.D. at 366 (denying the plaintiffs' request to depose Mr. Iacocca at that time, but permitting the plaintiffs to seek the information through written interrogatories to Mr. Iacocca); *Celerity, Inc.*, 2007 WL 205067, at *4 (holding that the information known to the executive must be "unavailable from less intrusive discovery, including interrogatories and the depositions of lower-level employees"). Courts have also sought to guard against concerns of "half-hearted" discovery efforts designed to provide a pretext for the deposition of high-level executives. *See Celerity, Inc.*, 2007 WL 205067, at *3 (holding that party seeking depositions "must make a good faith effort to extract the information it seeks from interrogatories and depositions of lower-level . . . employees").

Guarding against an Apex Deposition

Protecting your client from having to produce a high-level executive for a deposition begins long before a deposition notice is served. Throughout discovery, it requires full disclosure of relevant, non-privileged information available to the company. Courts considering whether an apex deposition should proceed will determine whether the information has been, or can be, obtained from another source. If a court determines that the company or its witnesses have been obstreperous, it is more likely to allow an apex deposition.

To avoid an order compelling the apex deposition, and possibly avoid the other party even attempting to take seek the deposition, it is critically important that the company's witnesses, particularly its 30(b)(6) designee(s), be thoroughly prepared. Under Federal Rule of Civil Procedure 30(b)(6), and state analogs, a witness designated to testify on behalf of a company is obligated to testify not only to the witness's personal knowledge, but to those matters "known *or reasonably available* to the organization." This requires counsel to marshal the knowledge gained throughout the course of the litigation to assure the designated witness has spoken with every individual who may have pertinent knowledge relating to the case and that he or she has reviewed every document potentially relevant to the topics on which that person has been designated to testify.

A well-prepared 30(b)(6) witness should obviate the need, or even the desire, for the other party to seek an apex deposition. However, if the other party still seeks to depose high-level executive, you will be in a strong position to move for a protective order demonstrating that company witnesses already have provided all the information the other side could need.

Conclusion

The deposition of a high-level executive can be a substantial and unwelcome burden on a company. To protect your client in litigation, it is important to understand the apex doctrine and how to take steps to avoid an order compelling your client to produce a high-level executive for a deposition.