

Handling the Apex Deposition Request

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I. INTRODUCTION

The Apex deposition doctrine has become well-known to corporate counsel and to private practitioners who represent companies in liability litigation. The Apex doctrine generally holds that, before a plaintiff is permitted to depose a defendant company's high-ranking corporate officer (an "Apex" officer), the plaintiff must show that the individual whose deposition is sought actually possesses genuinely relevant knowledge which is not otherwise available through another witness or other less intrusive discovery. A number of states and jurisdictions have considered and adopted this doctrine.¹

Typically, the goal of an Apex deposition request is not primarily to uncover information reasonably calculated to lead to the discovery of admissible evidence. Instead, the goals are to assert pressure in an effort to extort settlement, and to elicit testimony from a high-ranking officer which is not particularly relevant to the matters at issue, but which is potentially prejudicial in large part for the very reason that the deponent lacks specific knowledge regarding the liability claim. In addition, as illustrated during the cross-examination of former

¹ E.g., *Baine v. General Motors Corp.*, 141 F.R.D. 332 (M.D. Ala. 1991); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985); *Evans v. Allstate Insurance Co.*, 216 F.R.D. 515 (N.D. Ok. 2003); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363 (Ct. App. 1992).



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Enron chief Kenneth Lay at his recent Houston trial, corporate executives may not always be disposed to respond judiciously or patiently to abusive and harassing examination by a showboating trial lawyer. Given the lack of relevant knowledge a high-ranking officer is likely to have, the chance that the officer's testimony could be harmful, and the genuine inconvenience and distraction posed by a deposition under such circumstances, companies and their lawyers are eager to prevent Apex depositions from going forward.

Having outlined the relevant context, this article will provide a brief synopsis of the genesis of the Apex doctrine and its application in those jurisdictions in which it is most developed. It will consider as well the strategies for effectively precluding the Apex deposition. With that knowledge, the Apex deposition request can be seized by defense counsel as an opportunity to educate and focus the judge on the real issues in the case, emphasizing the opponent's opportunistic attempt to avoid relevant facts in favor of a high-profile sideshow. An effective response will educate the judge about the actual facts at issue in the litigation, as well as the ability of lesser ranked corporate representatives to provide relevant testimony and discovery information. Such a response should be understood by the court not simply as an attempt to bar an inconvenient deposition, but as a good-faith attempt to accommodate the meaningful flow of relevant discovery. Thus, a well-prepared response to the Apex deposition request will defuse opposing counsel's efforts to develop prejudicial evidence, and may well keep the company's high-ranking officials outside the crosshairs of discovery.



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II.

DEVELOPMENT OF THE APEX DOCTRINE

The Apex doctrine was developed to combat the aggressive use of coercive deposition discovery against corporations by requiring that depositions of their highest-ranking corporate officials should not occur absent a showing of specific, unique knowledge on the part of the targeted deponent, and an initial attempt to obtain relevant, necessary discovery through less intrusive means. *Baine v. General Motors Corp.*² was the pioneering case that analyzed the limits of a plaintiff's right to depose such officials. *Baine* involved allegations that the defendant, General Motors, defectively designed and manufactured automobile seatbelts, resulting in personal injuries to the plaintiffs. When the plaintiffs sought the deposition of a GM vice-president, GM successfully moved for a protective order prohibiting that deposition. In his order, Magistrate Judge John Carroll of the Middle District of Alabama considered four lines of authority:

- (1) FRCP 26(b)(1), which the Judge characterized as “unequivocal” in granting him broad discretion to rule on discovery matters.³

² 141 F.R.D. 332 (M.D. Ala. 1991).

³ *Id.* at 334.

- (2) The opinion of the U.S. District Court of Rhode Island in a lawsuit against Chrysler Corporation. The plaintiff there had noticed the deposition of Lee Iacocca and proposed to examine Mr. Iacocca based on statements made in his autobiography. The court required the plaintiff to propound interrogatories in lieu of a deposition in order to protect Mr. Iacocca, a “‘singularly unique and important individual,’” from “‘unwarranted harassment and abuse.’”⁴
- (3) Examples from other jurisdictions in which courts have held that when a plaintiff sought the deposition testimony of high-level executives or agency administrators, the plaintiff was required to submit preliminary interrogatories prior to deposing lower-level employees in order to establish whether the witness whose deposition was sought had personal and unique knowledge of relevant facts sufficient to justify a deposition.⁵
- (4) *Salter v. Upjohn Corp.*,⁶ deemed to be the “leading case” on the issue by the *Baine* court, confirming that the trial court has broad discretion to restrict the depositions of high-ranking corporate executives and officers.⁷

Judge Carroll in *Baine* ultimately held that while the GM vice-president whose deposition was sought did not enjoy the “celebrity status” of former Chrysler chairman Lee Iacocca, his responsibilities to GM were of “similar proportions.” Thus, requiring him to submit to deposition raised the likelihood of unnecessary duplication, inconvenience and personal undue burden.⁸

Relying on the *Baine* approach, the Tenth Circuit Court of Appeals in an age discrimination case held that the plaintiff could not depose IBM’s chairman where the chairman had no knowledge of the facts at issue and where the plaintiff failed to depose other IBM personnel who were more closely related to those facts.⁹ A similar rationale was employed by the Southern District of Indiana in the recent Bridgestone/Firestone litigation, in which the judge thought to allow Apex depositions of the Bridgestone/Firestone defendants, but

⁴ *Id.* (citing *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364 (D.R.I. 1985)).

⁵ *Id.* at 334-35 (citing *Community Federal Sav. & Loan Ass’n v. FHLLB*, 96 F.R.D. 619 (D.D.C. 1983); *M.A. Porazzi Co. v. The Mormaclark*, 16 F.R.D. 383 (S.D.N.Y. 1951); *Colonial Capital Co. v. General Motors*, 29 F.R.D. 514 (D.Conn. 1961)).

⁶ 593 F.2d 649 (5th Cir. 1979).

⁷ *Baine*, 141 F.R.D. at 335.

⁸ *Id.* at 335.

⁹ *Thomas v. Int’l Bus. Machines*, 48 F.3d 478 (10th Cir. 1995).

placed strict limitations on the scope, timing and duration of those depositions. The judge noted: “high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.”¹⁰

The Texas Supreme Court in *Garcia* and the California Court of Appeals in *Liberty Mutual* specifically adopted a two-part hurdle to be cleared by a plaintiff who sought to obtain the deposition of a high-ranking corporate official. First, such a plaintiff specifically must show good cause that the potential deponent has unique or superior personal knowledge of discoverable information. Second, the plaintiff must show that “less intrusive methods of discovery are somehow unsatisfactory, insufficient or inadequate.”¹¹ Even if the plaintiff makes such a showing, however, the court would retain the discretion to restrict the duration, scope and location of the deposition.¹² To date, federal courts have stopped short of specifically imposing such an initial burden across the board on any plaintiff requesting an Apex deposition.

III.

EFFECTIVE RESPONSES TO THE APEX DEPOSITION NOTICE

A. *The Example*

Consider the example of an Apex deposition request in the context of defending a large, publicly-held, multi-state corporation which provides several types of health care and related services. The case involves allegations of personal injury and death as a result of insufficient care provided at a health care facility owned and operated by a wholly-owned subsidiary of the publicly-held company. The plaintiff serves a notice for the deposition of the company’s CEO pursuant to Federal Rule 30(a)(1).¹³ While crucial to its financial operation, this CEO’s position with the company is distantly removed from both the day-to-day provision of hands-on health care and the development of policies and procedures governing the services provided by caregivers. In short, this individual has no meaningful

¹⁰ *In re Bridgestone/Firestone, Inc. Tires Products Liab. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002). *See also* *Evans v. Allstate Ins. Co.*, 216 F.R.D. 515 (N.D. Ok. 2003) (prohibiting plaintiff from deposing chairman/CEO and senior vice-president of Allstate Insurance Company based on their lack of relevant knowledge and the availability of relevant discovery from less intrusive sources); *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363 (Ct. App. 1992).

¹¹ *Garcia*, 904 S.W.2d at 128; *see also Liberty Mut.*, 13 Cal. Rptr. 2d at 367.

¹² *Garcia*, 904 S.W. 2d at 128.

¹³ References to rules herein correspond to the Federal Rules of Civil Procedure. While the enactment of Rule 30 in many states corresponds to the federal rule, the terms and provisions may vary slightly from jurisdiction to jurisdiction.

knowledge regarding the particular case of malpractice or the compensatory damage issues in any given death or injury case.

As implied by the earlier discussion, the plaintiff's goal in serving the Rule 30(a)(1) notice is not to obtain discovery on those issues. Instead there is likely a two-part goal: (1) to inflame the jury by injecting a profit motive into the health care services provided by the company's subsidiaries; and (2) to generate pressure for settlement of the case, which now appears on the officer's radar by virtue of the deposition notice. While reasonable people understand that the CEO of a publicly-held company is necessarily concerned with the financial success of the company and its subsidiaries, this simple acknowledgment plays readily into the "profits over people" charge typically levied against corporate defendants in injury and death cases. Moreover, the prospect of a time-consuming deposition of a senior corporate official understandably might encourage the company's legal department to resolve the case by some means in lieu of the deposition. The savvy trial lawyer who serves the deposition notice typically knows and is prepared to exploit all of these dynamics.

B. *The Goal is to Streamline, Not to Limit*

The formal pleading in response to a notice of deposition is a Motion to Quash and/or a Motion for Protective Order seeking a judicial determination that prevents the deposition from going forward. However, many courts look askance at such prophylactic discovery motions. The effect of the broad Rule 26 discovery scope (permitting discovery into any matter, not privileged, which is relevant to the subject matter of the lawsuit), coupled with the oft-noted expectation that attorneys make every effort to resolve discovery disputes informally without intervention by the courts, often produces judges who are reluctant to place any restrictions on discovery. Defense counsel can expect to find some trial judges who are hostile to the concept of precluding a deposition of the company CEO, particularly in jurisdictions where there is little precedent regarding the Apex doctrine.

Under such circumstances, defense counsel's response to the Apex request should not focus initially on the scope of the CEO's responsibility, his or her importance, or the demands on the corporate officer's time that make a deposition inconvenient. From the company's perspective and the perspective of the CEO, these may indeed be the primary concerns. A trial judge, however, may take offense at those concerns when balanced against the opponent's demand for a routine deposition – leaving defense counsel with little or no expectation of any relief.

The more effective approach is to demonstrate that opposition to the Apex deposition is not an attempt to *limit* the plaintiff's discovery into relevant matter, but instead is an attempt to *streamline* discovery so that it is more efficient and effective. Because the Apex deposition notice of a corporate officer may be little more than an attempt to harass the defendant in order to gain some perceived tactical advantage, the response must include a discussion of the proper scope of discovery, consistent with the factual and legal contentions asserted in the case. Accordingly, the goal of the response in opposition to the Apex notice is twofold: first, to show that genuinely relevant discovery can be provided without obstruction; that it is being readily provided; and that it will continue to be provided; and second, to identify

legitimate reasons for limiting an open-ended deposition of a high-ranking corporate official that are beneficial to all parties. Those reasons include the Apex official's lack of relevant knowledge; the superior knowledge of lower-ranking employees; and the resulting unwarranted expense and burden to the Apex official and the company which must prepare, pay for, and undertake an unproductive deposition. Ideally, as a practical matter, this approach will shift the burden to the plaintiff to show some reason for specifically requiring the deposition of the CEO, rather than obtaining information through written discovery, eyewitnesses, and corporate representatives designated under Rule 30(b)(6).

C. Contrasting the 30(a)(1) Deposition with the 30(b)(6) Deposition

Apex depositions are noticed under Federal Rule 30(a)(1). A Rule 30(a)(1) deposition typically is an open-ended affair governed only by the strictures of Rule 26, which permits discovery into any non-privileged matter that is relevant to the pending action. Under Federal Rule 30(a)(1), a plaintiff simply names the witness whose deposition is sought, without defining the goals or scope of the deposition. By contrast, Rule 30(b)(6) provides a mechanism for obtaining testimony on designated issues from an appropriately-authorized corporate representative. Under Rule 30(b)(6), a plaintiff is required to tip his or her hand by designating specific topics deemed relevant for testimony from a corporate representative. The defendant correspondingly is obligated to produce a witness or witnesses whose testimony can conclusively bind the corporation on the designated topics. The Rule 30(b)(6) process allows defense counsel to maintain a substantial level of control over the evidentiary presentation by retaining the option to select the appropriate representatives, and by preparing them thoroughly for deposition — an opportunity not always available with an executive officer.

Accordingly, in response to the plaintiff's Rule 30(a)(1) notice for the CEO's deposition, defense counsel may respond appropriately that if plaintiff truly seeks "corporate testimony" regarding relevant issues, he should serve a Rule 30(b)(6) notice on the defendant company. Indeed, as previously noted, a preliminary 30(b)(6) deposition in some jurisdictions essentially serves as a prerequisite for taking an Apex deposition where the Apex official does not possess specific knowledge regarding the claims in the lawsuit.¹⁴

Advancing Rule 30(b)(6) in lieu of an Apex deposition raises concerns of its own, however. While identifying an appropriately knowledgeable agent and investing that agent with authority to bind the company on topics designated by the plaintiff may be nominally "less intrusive" than an Apex deposition, it is still a noteworthy undertaking. Rule 30(b)(6) notices can be extensive and may require the designation of multiple representatives. Thus, the risks of inconsistent testimony and insufficient preparation ultimately are impossible to eliminate entirely. Defense counsel who has successfully postponed an Apex deposition can

¹⁴ *E.g.*, *Crown Cent. Petroleum Corp. v. Garcia*, 904 S.W.2d 125 (Tex. 1995); *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363 (Ct. App. 1992).

expect a swift re-notice of the CEO's deposition if the company's 30(b)(6) representatives were insufficiently prepared on a topic about which the CEO might be expected to have some knowledge.

The best approach when using Rule 30(b)(6) as a shield against Apex depositions is to prepare the client from the outset to identify and produce witnesses who are qualified and well-prepared on 30(b)(6) topics that are likely to be noticed. An attorney advancing 30(b)(6) as a less intrusive discovery method should have a working knowledge of the general scope of a 30(b)(6) deposition, and should already have in mind the appropriate corporate representatives who would speak to those issues. In other words, an attorney combating the Apex deposition should be prepared to do more than just stand in the gap to obstruct discovery from going forward; instead, the attorney should seize the opportunity to apprise the court of the legitimate issues and inform the court that there are knowledgeable witnesses standing ready to provide genuinely relevant information. Only then is it likely that a trial judge will listen to assertions regarding the undue burden a deposition placed upon a CEO.

D. Impact of Written Discovery Responses

Truly experienced and skilled trial lawyers will have explored all issues with written discovery. Written discovery requests regarding corporate structure, budgeting, profit and loss and financial information, operations, personnel, policies and procedures, and anything else germane to the CEO's responsibility are likely to have been propounded well before, or at least simultaneously with, the Apex notice. Assuming the defendant company has met those requests with a full and fair response, it is well positioned to assert that further discovery on such topics in the form of a CEO deposition is far removed from the facts at issue and unnecessarily duplicative.

IV.

PITFALLS: THE RISK OF DOING EVERYTHING RIGHT ONLY TO LOSE

A. The Plaintiff May Co-opt the 30(b)(6) Issue

In response to the defendant corporation's motion for protective order, the plaintiff may concede that there is only a limited scope of knowledge the party wishes to explore with the company official. This fallback approach is an attempt to co-opt the use of Rule 30(b)(6) as a shield. If the plaintiff concedes, for example, that it intends only to question the CEO on financial issues such as operational budget approval processes and top-level corporate structure, it may be difficult to convince the court to preclude the deposition entirely in favor of a 30(b)(6) deposition, which essentially is controlled by the defendant. Accordingly, the court may agree to permit a deposition on the limited scope proposed by the plaintiff. While this result may not be deemed a win by the company or the officer, it does provide some of the protection offered by the Apex doctrine: it limits the level of intrusion on the deponent and focuses on those issues that the court deems appropriate for discovery. Similarly, as in *In re Bridgestone/Firestone*, discussed previously, some courts may allow Apex depositions to proceed but only under strict guidelines designed in advance to offer protection from

harassment. This result also provides notice to the company and its lawyers of the matters to be explored and an opportunity for appropriate preparation.

B. The Company May Fall Victim to Bad Results in Prior Discovery

The plaintiff also may defeat opposition to the CEO's deposition by demonstrating that a corporate representative previously offered by the company as prepared to bind the company on certain issues in fact has insufficient or incomplete knowledge. This situation is frustrating for litigation counsel who is defending a company with operations in many states. As a practical matter, counsel there cannot reasonably anticipate that a plaintiff's successful cross-examination of a deposition witness in a collateral matter in another jurisdiction may be used to damage that witness's credibility in the instant case. The Apex doctrine itself makes clear, however, that insufficient discovery from lower level executives may expose higher-ranking officials to deposition. This result underscores the importance of ensuring that a 30(b)(6) witness genuinely does possess adequate knowledge of the designated topics and that the witness is prepared to defend the viability of that knowledge.

V.
CONCLUSION

The Apex doctrine was not developed to prevent discovery into genuinely relevant matters. As such, defense and corporate counsel must appreciate that the Apex doctrine offers no roadblock protecting the highest corporate officers from deposition, especially where high level officers have actual knowledge of facts relevant to the case. As in most litigation matters, the trial court retains broad discretion under the Apex doctrine, and a good knowledge of the judge's temperament and expectations is indispensable in laying the groundwork for effective implementation of the doctrine. Moreover, the efficacy of the rule is maximized when it is presented to the courts as a vehicle for making discovery more meaningful and less unnecessarily onerous. This approach will serve the dual purposes of protecting the integrity and limiting the scope of the relevant evidence, while keeping corporate officers and directors from regularly occupying the witness chair.

FUTURE MEETINGS

2007

ANNUAL 2007

Sunday, July 22 – Sunday, July 29

Sun Valley Resort

Sun Valley, Idaho

WINTER 2008

Sunday, February 24 – Sunday, March 2

Westin Our Lucaya

Grand Bahama Island, Bahamas

ANNUAL 2008

Sunday, July 27 – Sunday, August 3

Fairmont Banff Springs

Banff, Alberta

2008