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If You Sue Facebook, What's the Likelihood You'll Be Allowed to Depose Mark Zuckerberg?

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Companies are no strangers to litigation. In California, it is a cost of doing business. Unfortunately, it is not uncommon for litigants to try to gain leverage in a dispute with a corporate party by attempting to depose its high-level executives to harass and embarrass them, and force the company into a quick and aberrant settlement. The strategy employed by a litigant may go like this: (1) put pressure on a company by noticing the deposition of an officer or director, (2) make clear the intent to delve not only into the high-level executive's alleged wrongdoing, but also other points of potential embarrassment, and (3) the company will capitulate and pay a significant settlement to avoid the pain of the deposition. Some refer to this (and similar tactics) as judicial extortion. What, then, can a company and its counsel do to prevent an abusive deposition of a high-level executive?

California federal and state courts apply the "apex" doctrine to protect high-level executives, also referred to as apex executives, from harassing depositions. In considering whether to allow the deposition of a high-level executive, courts focus on two primary factors: (1) whether the high level executive has unique first-hand, non-repetitive knowledge of facts at issue in the case, and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 282 F.R.D. 259, 263 (N.D.Cal. 2012); *Mutual Ins. Co. v. Superior Court*, 10 Cal.App.4th 1282, 1289 (1992).

Courts understand that where an opportunity exists to game the system and harass a party it will likely be exploited, and, thus, are careful to protect against it. This was observed in one of the first cases to apply the "apex" doctrine. In 1985, a class of plaintiffs sued for personal injuries from an alleged defective design in the fuel system of the 1975 Dodge van. Plaintiffs' counsel noticed the deposition of Lee Iacocca, then Chairman of the Board of Chrysler Corporation, claiming that statements Iacoccoa made in his recently published biography demonstrated that he had knowledge relevant to Chrysler's alleged liability and the plaintiffs should be allowed to depose him to explore such knowledge. The court granted Iacoccoa's motion for protective order preventing his deposition, noting: "the fact remains [Iacoccoa] is a singularly unique and important individual who can be easily subjected to unwarranted harassment and abuse. He has a right to be protected, and the courts have a duty to recognize his vulnerability." Mulvey v. Chrsyler Corp., 106 F.R.D. 364, 366 (D.R.I. 1985).

Some chairman and officers are obvious "apex" executives – such as Iacoccoa or, say, the late Steve Jobs. *See Affinity Labs of Texas v. Apple, Inc.*, 2011 U.S. Dist. LEXIS 53649 (N.D. Cal. 2011) (court denied plaintiff's attempt to depose Steve Jobs). However, most high level executives are not celebrities. They are not regularly quoted and their companies are not featured in the media. Yet, these less recognizable high-level executives responsible for running smaller to mid-size businesses are just as important to their companies as their high-profile counterparts, and equally vulnerable to harassment. Unfortunately, there is no clear definition of who qualifies for protection as an "apex" executive. Some factors that have been considered are job duties and the potential for business disruption, where the executive falls within the company's executive hierarchy (e.g., how many people report to the executive), and the likelihood of harassment.

The most important factor considered by courts in applying the "apex" doctrine is whether the high-level executive has personal knowledge of relevant facts. Equally important is whether the information can be obtained through other less burdensome means, such as from a lower level executive or employee. When a CEO or other high-level executive lacks such personal knowledge, courts are inclined to deny their depositions.

However, the "apex" doctrine exists in tension with the otherwise broad allowance for discovery in litigation. *Apple Inc., supra.,* 282 F.R.D. at 263. Although a deposition notice directed at a high-level executive with no personal knowledge of the facts involved should result in the issuance of a protective order denying that executive's deposition – courts are likely to allow some manner of discovery. In the case involving Apple, the court simply denied the deposition of Steve Jobs outright. But, in the matter involving Chrysler, although the court denied the deposition of Iacoccoa it allowed plaintiffs to propound written interrogatories to him. This is a less intrusive means of discovery of a high-level executive courts have allowed. *See, e.g., Retail Brand Alliance, Inc. v. Factory Mut. Ins. Co.*, 2008 WL 622810, at *6 (SD NY 2008). Likewise, rather than completely deny the deposition of a high-level executive, a court may limit the length or scope of the deposition to avoid harassment or undue burden. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 282 F.R.D. 259, 265-67 (ND CA 2012) (allowing depositions of high-level officers, but limiting them to 2-3 hours each); *Scott v. Chipotle Mexican Grill, Inc.*, 306 F.R.D. 120, 124 (SD NY 2015) (limiting apex depositions to 4 hours).

From the outset of litigation or potential litigation, a company's counsel must be mindful that higher-level executives are vulnerable to a deposition – particularly as a form of abuse and to gain leverage. Counsel should investigate alternative means for providing an opposing party with potentially relevant information that a high-level executive may possess, and develop a record early on establishing the limits of the high-level executive's involvement, if any, and that such executive has no unique, personal knowledge of the relevant facts. It is important to utilize the "apex" doctrine to protect against harassment of high-level executives.

For more information on this subject, please contact Jacob Gonzales directly at 949.760.0204 or jgonzales@weintraub.com.

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