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ABA Litigation Section

TOP STORY

Existing in Tension: Courts Grapple with the Apex Doctrine

By Andrea L. McDonald – February 12, 2024

Another state supreme court has rejected the apex deposition doctrine, joining the growing jurisdictional split on the discovery tool. The debated doctrine shields certain high-level executives from being subjected to depositions. Across the country, courts have varied widely in their treatment of the doctrine, cautiously balancing protection from abusive litigation with open access to justice. While ABA Litigation Section leaders disagree in some respects, they advise practitioners in all jurisdictions to use the principles of the doctrine to position themselves for success.

Placing the Burden in Discovery

In *Stratford v. Umpqua Bank*, the borrowers brought an action against their bank alleging negligent misrepresentation and negligent hiring, among other claims, and they sought to depose three high-level bank executives. The trial court rejected the bank's arguments that the apex doctrine shielded its executives from deposition and denied its motion for a protective order. On appeal, the Washington Supreme Court considered whether the state had or would adopt the apex doctrine and ultimately joined several states in rejecting it.

The apex doctrine has taken various forms across jurisdictions. Ultimately, it seeks to prevent abusive discovery tactics and harassment by shielding high-ranking officials, those at the "apex" of a corporate structure, from deposition. In *Stratford*, the bank advanced an iteration of the doctrine that required parties seeking "apex depositions" to first show that the witness has a unique, non-repetitive, firsthand knowledge of the facts at issue and that other less intrusive means of discovery have been pursued unsuccessfully. The court noted that this shifts the burden from the party resisting discovery to the party seeking it, placing the doctrine in tension with broad rights to discovery. This conflict with the civil rules led the court to reject the doctrine.

The bank claimed that the apex doctrine is almost universally accepted in the federal system. The court disagreed. Surveying case law on the issue, it found considerable variation. For example, some courts developed burden-shifting schemes while others required proponents of the doctrine to establish good cause. The court observed that five states had recently adopted

the doctrine, but seven others had rejected it. Accordingly, the court concluded that "the apex doctrine is not widely followed; its application is inconsistent and its acceptance is waning."

A Right to Discovery or a Right to Harass?

Throughout its opinion, the *Stratford* court emphasized the tension between the apex doctrine and the right to discovery. The court began by explaining that "[t]he right to discovery is an integral part of the right to access the courts embedded in our constitution." Adoption of the doctrine, the court determined, compromised this right.

Litigation Section leaders disagree on whether the court's concern is persuasive. "Even in jurisdictions with the apex doctrine, I have never seen a litigant improperly shielded against legitimate discovery of its senior people," comments John B. Strasburger, Houston, TX, cochair of the Litigation Section's Commercial & Business Litigation Committee. "If the apex doctrine is properly applied, the parties in discovery get what they should get."

But even if the apex doctrine does not prevent discovery, it might make it more difficult to obtain. "The doctrine does unfairly shift the burden to the party with lesser knowledge to establish the facts necessary to obtain an 'apex' deposition," observes Rudy R. Perrino, Los Angeles, CA, cochair of the Section's Corporate Counsel Committee. "While I often rely on the apex doctrine, I can't necessarily disagree with the court's analysis and conclusion."

Nonetheless, Section Leaders see value in the doctrine. "The apex doctrine is an effective tool for limiting wasteful discovery that is of little or no value," concludes Strasburger. "Because apex depositions are extremely expensive and disruptive, parties seeking them know that it can be a big leverage point in creating value in an otherwise low value case," he notes. "Parties should not be allowed to conduct fishing expeditions with high ranking officials. While parties have an absolute right to discovery, there should be some requirement to show that the 'apex' deponent has or should have knowledge of material facts," observes Perrino.

It's Here to Stay

Despite the *Stratford* court's warning, it is unclear whether the apex doctrine is going anywhere anytime soon. "My hope is that the doctrine evolves into something that can continue to be used with less criticism than it has received," notes Perrino. Referencing Federal Rule 26(c), Strasburger adds that, "there should always be a balancing of the cost and benefit of discovery."

'"Practitioners shouldn't forget to look at those arguments even if they are in a jurisdiction without the apex doctrine. If you are seeking to apply the apex doctrine to protect your witness, arm yourself with the law and, more importantly, with the facts and arguments that support its application," advises Perrino. "But if you are seeking an apex deposition, you need legitimate reasons to lay the groundwork justifying your need to depose the executive," counsels Strasburger. "Whether operating under the apex doctrine or not, whether seeking discovery or trying to avoid it, a party should be ready to show why it is entitled to discovery, or why it should be shielded from it."

Andrea L. McDonald is a contributing editor for Litigation News.

Related Resources

- Fed. R. Civ. P., Rule 26.
- Andrew Smith, "The Apex Doctrine is Helpful Even Where it is Not Formally Adopted," *Pretrial Prac. & Disc.* (Mar. 9, 2023).
- Mark A. Behrens & Christopher E. Appel, *Florida Supreme Court Leads on Apex Doctrine*, 51 *The Brief* 2 (2022).
- Joseph v. Schaeffer, *The Apex Deposition: Practice Tips and Standards*, *Pretrial Prac. & Disc.* (Apr. 29, 2018).