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# A Crowning Achievement in Protecting High Ranking Officials from Unreasonable Depositions: The Impact of the Crown Central Test

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## **A Crowning Achievement in Protecting High Ranking Officials from Unreasonable Depositions: The Impact of the *Crown Central* Test**

**By Scott A. Mager<sup>1</sup>**

In an increasingly litigious society, the attempt to first set depositions of high-ranking corporate executives, who are often referred to as “apex officials,” has become commonplace. While these executives rarely have personal knowledge of the facts and issues surrounding a given case, broad-stroked claims against parent companies and lax discovery rules seem to serve as a launching pad to harass executives and extort settlements through threats of—and in many cases the actual taking of—depositions from chief executive officers, chief operating officers, chief financial officers, or other apex executives.<sup>2</sup>

While there are appropriate times for the taking of such depositions, more often these corporate officials, who have little time for this kind of intrusive and abusive deposition process, either choose to pay larger settlement amounts or fail to take sufficient steps to protect themselves against this kind of potentially improper discovery. In recent years, courts across the country have sought to articulate the most useful analysis to apply when considering discovery directed to such high ranking officials, with most courts building upon the test and precedent set out in the Texas case of *Crown Central Petroleum Corp. v. Garcia*.<sup>3</sup>

Since “apex” employees frequently are uninvolved in the actions about which a party complains, taking the deposition of a high level employee can be considered harassing and unnecessary, imposing an undue burden on such an employee, who is normally is very busy attending to matters of his or her business.<sup>4</sup> As a result, the standard has developed that such a high ranking person must have “unique personal” knowledge of the facts before his or her deposition is permitted, and there must be no lesser intrusive way to secure such information.<sup>5</sup> We can find helpful guidance in a number of cases discussed below.

### **At the “Apex of the Problem:” Fashioning a Workable Test to Provide an Additional Layer of Protection against Unreasonable Depositions of High Ranking (“Apex”) Officials**

We are all familiar with the liberality in discovery, balanced against the need to avoid over-intrusive discovery or “fishing expeditions.”<sup>6</sup> However, with the technology advances and with high ranking officials taking greater roles in certain aspects of business, the balancing evaluation becomes more difficult where a party is seeking to take the deposition of a high ranking official. It would obviously not be appropriate to allow the deposition of Bill Gates every time there is a lawsuit filed against Microsoft. On the other hand, there are circumstances where the unique and specialized knowledge of the high ranking official(s) may warrant such an inquiry. Judges should be particularly cautious with permitting apex-type depositions, balancing the liberality of discovery rules

against the dangerous precedent of permitting such unfettered “top down” discovery, particularly when less intrusive means may be available to secure that information.

Thus, while there are circumstances where it is appropriate to depose the high ranking officials, a number of federal and state decisions have recognized the real potential for abuse - firing a number of warning shots across the bow of litigants seeking to contort the discovery rules in order to argue their right to automatically first reach the pinnacle of the corporate structure (without first seeking to secure the information elsewhere, where it is often more likely to be found).

One decision that many courts have been looking to is *Crown Central Petroleum Corp. v. Garcia*<sup>7</sup> because the Texas Supreme Court there established a set of workable guidelines that other courts around the country have found usefully balanced. More particularly, the Court in *Crown Central* held that

[w]hen a party seeks to depose a corporate president or other high level corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition . . . [then] the trial court should first determine whether the party seeking the deposition has arguably shown that the official has any unique or *superior personal* knowledge of discoverable information. If the party seeking the deposition cannot show that he 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 means . . .<sup>8</sup>

Thus, the procedure is initiated by filing a Motion for Protective Order in response to a notice or subpoena directed to the c-level official, which then triggers court involvement.<sup>9</sup>

In *In re Alcatel*, the Texas Supreme Court applied the *Crown Central* test in further explaining that

‘If the party seeking the deposition cannot show that the official has any unique or superior knowledge of discoverable information, the trial court should’ not allow the deposition to go forward without a showing, after a good faith effort to obtain the discovery through less intrusive means, ‘(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate.’<sup>10</sup>

The Texas Supreme Court in *In re Alcatel USA* recognized that these guidelines could be read as requiring trial courts to undertake two hearings and issue two orders:<sup>11</sup>

We recognize that these guidelines could be read as requiring trial courts to undertake two hearings and issue two orders: First, a hearing on whether to grant a protective order and, if one is granted, then a second hearing, after less intrusive methods of discovery have been explored, to determine whether the protective order should be dissolved.<sup>12</sup>

“Courts throughout the country have prohibited the deposing of corporate executives who have no direct knowledge of a plaintiff’s claim when other employees with superior knowledge are available to testify.”<sup>13</sup>

The official must fit within the definition of an “apex” official in order to utilize the *Crown Central* progeny of cases permitting additional protections to higher level corporate officials. As one Texas Court aptly explained:

A corporate officer is not exempt from deposition by the “apex” doctrine merely because he is a corporate official. Rather, the doctrine may be invoked only when the deponent has been noticed for deposition because of his corporate position. For example, if the president of a Fortune 500 corporation personally witnesses a fatal car accident, he cannot avoid a deposition sought in connection with a resulting wrongful death action because of his “apex” status.<sup>14</sup>

For example, in *JMIC Life Ins. Co. v. Henry*,<sup>15</sup> the Court found that a life insurer’s vice president was not an apex level executive where it was shown that he was an operational level executive who reviewed all credit insurance claims in excess of \$10,000 and was ultimately responsible for denial of beneficiary’s claim.

In the case of *In re Taylor*,<sup>16</sup> the Court was also faced with a claim that the witness was not an “apex” official. There, Taylor asserted that he is not a director, officer or employee of the companies or entities identified in the deposition request except for Vitol Holding BV and Vitol Holding II SA. He further states that, although he is described as the “President” of Vitol, this is an “outward facing title” and he is merely the “public face” of Vitol. However, the Court found that while Taylor sought to downplay his job responsibilities, he is a director of certain Vitol entities and “President” of Vitol – and he therefore qualifies a “high level official” subject to the *Crown Central* analysis (protections).<sup>17</sup>

In *Kelly v. Provident Life and Acc. Ins. Co.*,<sup>18</sup> the District Court in Vermont held that in the insured’s action for breach of contract and tortious bad faith, the insurers were not entitled to a protective order preventing the deposition of the company’s regional vice president of claims. The Court reasoned that the two other superiors of the lead disability benefit specialist who informed insured of company’s decision to discontinue further benefits under her disability insurance policy were no longer at the company, information on how claims such as insured’s were handled by the claims office for which the regional vice president had partial responsibility was potentially relevant to insured’s case, and the vice president position was hardly the “apex” of the company.<sup>19</sup>

The type of entity for which the alleged high ranking official is an officer can be relevant in determining whether the apex protection may be available. For example, at least one case indicated it would not allow the use of the doctrine where the entity is a limited partnership.<sup>20</sup>

**I Cannot “C” Him Having Knowledge (a party’s mere claims that an executive has superior knowledge are not enough)**

The mere claim that a corporate executive possesses knowledge of company policies does not automatically mean that the deposition will be deemed to be proper, as evidenced by the decision in *In re Alcatel, USA, Inc.*<sup>21</sup> In that Texas case, a competitor brought an action against a corporation for theft of trade secrets. The plaintiff sought the depositions of both the present and former chief executive officers. The defendant raised the *Crown Central* guideline by moving for protection and filing corporate affidavits that denied any “unique,” “superior” or “personal” knowledge of relevant facts. The plaintiff offered the typical claim along the lines of “they have knowledge of the policies of the company relevant to this case.” The supreme court, however, reversed and remanded for the entry of an order of protection, agreeing that the testimony of a corporate executive who is claimed to possess knowledge of company policies does not, by itself, satisfy the *Crown Central* test such that he may be deposed.<sup>22</sup>

Courts have also made it rather clear that the testimony that a corporate executive possesses knowledge of company policies does not, without more, satisfy the necessary showing that the executive has unique or superior knowledge of discoverable information.<sup>23</sup>

A similar result was reached in *AMR Corp. v. Enlow*.<sup>24</sup> In *AMR*, an American Airlines passenger had become intoxicated on his flight and later caused a traffic accident with the plaintiff. The plaintiff sued AMR Corp. and American Airlines, and sought to depose Robert Crandall, AMR’s president, chief executive officer, and chairman, as well as American Airlines’ chief executive officer and chairman.

The plaintiff argued that he “wish[ed] to depose Robert Crandall in order to determine where the authority lies within the organization for making those [alcohol service and flight attendant training] policy decisions so that Plaintiff can understand how and why those policy decisions were made and what precisely the policies in place were.”<sup>25</sup> The court of appeals rejected that argument, finding that “[t]his testimony amounts to nothing more than the simple, obvious recognition that the highest-ranking corporate officer of any corporation has the ultimate responsibility for all corporate decisions and falls short of the [*Crown Central*] standard.”<sup>26</sup>

More recently, in *In re Continental Airlines, Inc.*,<sup>27</sup> plaintiffs brought suit against Continental for negligence resulting from an aircraft accident.<sup>28</sup> Larry Kellner, Continental's Chief Executive Officer and Chairman of the Board of Directors, gave a statement and answered questions at a press conference following the accident. On December 22, 2008, Kellner sent a letter to the passengers expressing his concern for the accident. When the defendants refused to permit the deposition of Kellner, they moved to compel his deposition. Kellner responded with a motion for protective order and filed an affidavit indicating he has no knowledge.<sup>29</sup>

The plaintiffs moved to compel Kellner's deposition, arguing that he has unique or superior knowledge of discoverable information as shown by the following: (1) Kellner immediately briefed media members on details of the crash; (2) Kellner stated, on

numerous occasions, he would learn the cause of the crash to prevent future crashes; (3) Kellner sent personal letters to Flight 1404 passengers after the crash; (4) Kellner interviewed the deadheading pilots aboard Flight 1404 and personally awarded commendation plaques to crew and flight members; and (5) Kellner, who serves on the Board of Directors for Air Transport Association of America (“ATA”), an airline industry organization dedicated to ensuring the safety of airline passengers, has superior knowledge as to Continental's implementation of ATA's policies.

The Court in *Continental* granted the protective order, finding Plaintiffs in negligence suit arising from airline accident failed<sup>30</sup> to show that (aside from the airline's chief executive officer's (CEO) public statements), he had any unique or superior knowledge of discoverable information, as required to support motion to compel his deposition. The court found that the CEO stated that information he gave at press conference was provided to him by other airline employees, that he did not discuss with “deadheading” pilots what occurred before, during, and after accident, and that he had not received information about cause of accident in executive briefs.<sup>31</sup>

These holdings are consistent with others across the country. For example, in *Evans v. Allstate Ins. Co.*, policyholders brought an action in Oklahoma District Court against an insurance company, stemming from allegedly improper denial of fire loss claims, and sought to depose the company's senior corporate officers. The policyholders’ argued that they were entitled to depose the officials based, among other reasons, upon their theory that the pervasive practice of inadequate supervision over claims adjusters existed within company. Granting protection, the Court found that the officers had no unique personal knowledge of claims at issue, and that the policyholders had already taken depositions of all adjusters and supervisors involved in handling their claims, and they had alternative sources of additional information regarding their theory.<sup>32</sup>

The Michigan Courts equally “protect individuals at the ‘apex’ of a corporate hierarchy from deposition when such individuals lack personal knowledge regarding the litigation, or when the requested information could be garnered from equally or more knowledgeable subordinates.”<sup>33</sup> The Court reasoned that the apex doctrine recognizes the unique and important position of chief executive officers and the potential for harassment and abuse inherent on subjecting them to discovery burdens in the absence of a showing that the individual possesses relevant evidence which is not readily obtainable from other sources.<sup>34</sup>

In *Liberty Mut. Ins. Co. v. Superior Court*,<sup>35</sup> the California Court concluded that “it amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods.”<sup>36</sup>

In *Community Federal Savings & Loan Ass’n v. Federal Home Loan Bank Board*,<sup>37</sup> the District Court in Washington, D.C. similarly required a demonstration that the potential deponent had “unique personal knowledge” of the matter in issue, noting that

“the unique personal knowledge must be truly unique” and that (in any event) the deposition would not be allowed if the information could be obtained through interrogatories, the deposition of a designated spokesperson, or the deposition of other lower level employees.<sup>38</sup>

In *M.A. Porazzi Co. v. The Mormaclark*,<sup>39</sup> the plaintiff sought to take the deposition of the respondent’s vice president and other high-ranking officials. The respondent objected to any examination other than that of the lower level general claims agent, asserting that the vice president had no personal knowledge of the allegations and that deposing him would be unreasonable, particularly because the records and data from which he would testify were otherwise available through other methods. The court in New York quashed the deposition, holding that subordinate employees with equal or greater knowledge must first be deposed and that the vice-president could not be deposed if he could contribute nothing new to the information provided by the alternate deponents.<sup>40</sup>

In *Salter v. Upjohn Co.*,<sup>41</sup> a case out of the (federal) Fifth Circuit Court of Appeals, the court likewise prohibited a plaintiff in a wrongful death action against a corporate drug manufacturer from taking a corporate president’s deposition before deposing other knowledgeable corporate employees.<sup>42</sup>

In *Thomas v. IBM*,<sup>43</sup> the Court in Oklahoma refused to allow the deposition of an apex official who has no knowledge about the individual employment case.

In contrast, however, courts are clear that the apex doctrine may not be allowed to be utilized as a blanket shield against the taking of depositions of high-ranking officials who do have specific and direct knowledge of the relevant facts.

For example, in *Minter v. Wells Fargo Bank, N.A.*,<sup>44</sup> the District Court in Maryland was faced with a case brought by consumers, individually to challenge the bona fide nature of an entity allegedly originating their mortgage loans and to ascertain whether the entity was a sham entity that another lender had created in an attempt to circumvent restrictions on payment of referral fees to real estate broker.<sup>45</sup> The plaintiffs sought to take the deposition of the CEO and Chairman of the brokerage. The court allowed the deposition, finding that there was evidence that the CEO might have specialized or unique knowledge about the specific facts of the case, stating that “[CEO] Mr. Foster is not an executive whose only connection with the matter is the fact that he is *the* CEO of the defendant, the top official, where the buck stops on all corporate matters regardless of level of factual involvement or knowledge. Rather, he is alleged to be a highly involved, and highly interested party and the public record appears to substantiate that view.”<sup>46</sup>

In *Folwell v. Hernandez*,<sup>47</sup> the case involved a negligence suit arising out of pedestrian death caused by corporate trainee employed by Costa Rican subsidiary of American parent-corporation. There, the Middle District Court in North Carolina allowed the deposition of the corporate officer of the American parent company, despite corporation's objection that deposition would be a burdensome “Apex” deposition. The Court was clear, however, deposition would be limited to topics on which officer had

unique personal knowledge, such as the location of the trainee's supervisor at time that service was attempted on him, and the degree of control exercised by parent corporation over the Costa Rican subsidiary.

In the case of *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*,<sup>48</sup> the Southern District Court in Illinois found that the Magistrate judge's order compelling deposition of chairman of board of automobile manufacturer was warranted in the products liability class action against automobile manufacturer and tire manufacturer. The evidence showed that the Chairman of the Board referred to his personal knowledge of and involvement in matters relevant to class action, including tire recall, automobile safety issues, and automobile manufacturer's response to those issues, and that chairman's knowledge was relevant for purposes of hundreds of pending claims involved in class action, and where the order gave due deference to chairman's need to be protected from abusive deposition tactics.<sup>49</sup>

In *Six West Retail Acquisition Inc. v. Sony Theatre Mgmt. Corp.*,<sup>50</sup> the Southern District Court in the Southern District of New York compelled the deposition of chief executive officer of Sony Corporation when plaintiff "presented sufficient evidence to infer that CEO had some unique knowledge on several issues related to its claims."<sup>51</sup>

In *Google v. Am. Blind & Wallpaper Factory, Inc.*,<sup>52</sup> the District Court in California allowed the deposition of the corporate founder only after learning from 30(b)(6) witnesses that he may have relevant first hand information.<sup>53</sup>

In *Tulip Computers Intern., B.V. v. Dell Computer Corp.*,<sup>54</sup> the Court in Delaware allowed the deposition of CEO of Dell with some limitations against unlimited delving in its deposition of defendant's chief executive officer (CEO) into defendant's method and its strategy of developing technology internally versus using other's technology. The Court limited the inquiry to exploring with CEO the extent of his involvement and his knowledge regarding defendant's method and strategy of developing the technology that was in issue in the case.

In *Morales v. E.D. Etnyre & Co.*,<sup>55</sup> the District Court in New Mexico held that the plaintiffs in a personal injury action brought against manufacturer of black topper road machine were entitled to conduct a limited deposition of manufacturer's chief executive officer (CEO), where it was possible that CEO had personal knowledge regarding the manufacturer's policies, authorization or ratification of actions of manufacturer's director of engineering, and manufacturer's record keeping.

In the case of *In re Taylor*,<sup>56</sup> the Court found that the wife established that the high-level corporate official had unique or superior knowledge of personal information about the valuation of the stock of the corporation sufficient to justify his deposition and satisfy the *Crown Central* standard. The Court found that despite the official's assertion that three other officials had superior knowledge than did he, when depositions were taken, the other three showed an inferior knowledge on the financial performance of the

corporation and stated that shareholders relied solely on official at issue for this information.<sup>57</sup>

*In In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation*,<sup>58</sup> the District Court in Georgia found that the president and the chief executive officer (CEO) for the seller of a product designed to treat stress urinary incontinence each had sufficient first-hand knowledge of discoverable information regarding the product to warrant their depositions, where they gave testimony in California state case suggesting that they had direct knowledge of seller's decisions regarding the marketing and sales of the product, and the seller's actions related to the Food and Drug Administration's (FDA) regulation and approval of the product.<sup>59</sup>

Additionally noteworthy, District Courts in California reminded executives that “[a] claimed lack of knowledge, by itself, is insufficient to preclude a deposition.<sup>60</sup> “Moreover, the fact that the apex witness has a busy schedule is simply not a basis for foreclosing otherwise proper discovery.”<sup>61</sup>

Few courts (other than Kansas and Missouri)<sup>62</sup> have declined to apply the specific test first enunciated in *Crown* in determining whether to allow the deposition of a high ranking official. Those courts still engage in their own analysis to determine whether the deposition would be appropriate. Florida has conflicting cases on the issue.<sup>63</sup>

### **Less is More: The Duty to First Attempt Less Intrusive Discovery**

Courts also require specific and directed attempts at less intrusive discovery. It also appears clear that that the party seeking the deposition of a corporate president or other high level corporate official must first attempt to obtain discovery through less obtrusive means – and this showing is not perfunctorily met by any showing that the party employed less-intrusive discovery methods. Rather, the test is met by a showing that the discovering party made a reasonable effort to obtain discovery through less-intrusive methods; merely completing some less-intrusive discovery does not trigger an automatic right to depose the apex official.<sup>64</sup>

For example, in *Gautheier v. Union Pacific Railroad Co., et al.*,<sup>65</sup> the Court found that the deposition of corporate executives was appropriate where the Plaintiff had outlined their specific reasons for seeking the testimony of the executives at issue and offered the categories of information and specific areas of questioning the Plaintiffs sought. The Court further found that the Plaintiffs met the burden of demonstrating why the executive's knowledge was relevant to their allegations of gross negligence. On that ground, the Court declined to issue a protective order.<sup>66</sup>

Nonetheless, in *Union Pacific*, the Court quashed the depositions of the high ranking executives. The Court reasoned that the Plaintiff should first depose corporate representatives under Federal Rule of Civil Procedure 30(b)(6) before being able to acquire the testimony of the individual officers. The Court found that the information that the Plaintiffs sought regarded a formal policy of the Defendant organization. The Court

found that the Plaintiffs had not previously noticed a Rule 30(b)(6) deposition and demonstrated that such a deposition would not supply the information sought.<sup>67</sup>

In the more recent case of *In re Continental*, Continental asserted that while the plaintiffs have deposed some crew members and other field personnel, they have not noticed the depositions of Continental's corporate representative, other individuals present in any meetings where CEO Kellner received information about the accident, other employees who are more directly involved in supporting the ongoing NTSB investigation, or those employees described by Kellner in his affidavit as having responsibility in the particular areas of inquiry.<sup>68</sup>

The Court held that “[m]erely completing some less-intrusive discovery does not trigger an automatic right to depose the apex official.” The court found that the plaintiffs had not shown that less intrusive methods are inadequate to obtain the information they are seeking.<sup>69</sup>

In *Mulvey v. Chrysler Corp.*,<sup>70</sup> the District Court in Rhode Island required the use of written interrogatories before scheduling the deposition of Chrysler Chairman Lee Iacocca, is instructive as to the reasons for other forms of discovery.

The plaintiff in *Mulvey*, who was seeking damages for personal injuries for the allegedly defective design of a 1975 Dodge van, sought to depose Iacocca early in the litigation. The plaintiff claimed that Iacocca had made certain damaging statements in his biography that were allegedly relevant to the defendant's liability.

The defendant in *Mulvey* countered with a claim of Iacocca's lack of knowledge relevant to this specific claim. In resolving the dispute in favor of Iacocca, the court explained that while Iacocca's “generalized damaging statements concerning Chrysler's former practices . . . warrant[ed] refining through discovery inquiry,”<sup>71</sup> this could certainly be first attempted through other means, such as written interrogatories. Noting that persons in high positions, such as Iacocca, “can easily be subjected to unwarranted harassment and abuse,”<sup>72</sup> the court permitted the plaintiff to direct interrogatories to Iacocca as a first measure, leaving open the possibility that he could be deposed at a later time if the interrogatory answers were inadequate. The court explained that presuming proper proof that a lack of knowledge exists, such as an affidavit from the apex executive, there seems little problem with a rule that would at least require a party to seek less intrusive means (e.g., interrogatories, depositions of lower level, more knowledgeable employees) before subjecting these executives to rather invasive depositions.<sup>73</sup>

In *Colonial Capital Co. v. General Motors*,<sup>74</sup> the District Court in Connecticut found that where a proposed deponent, among other things, lacked personal knowledge of subject matter of lawsuit, the moving party was first required to propound interrogatories and then, only after these proved insufficient, could party request to take deposition.<sup>75</sup>

In *Baine v. General Motors Corp.*,<sup>76</sup> the Middle District Court in Alabama held it improper to depose vice president when no evidence indicated that the necessary information could not be obtained by deposing other lower level corporate employees.<sup>77</sup>

In *Travelers Rental Co. v. Ford Motor Co.*,<sup>78</sup> the District Court in Massachusetts disallowed the depositions of four apex executives until after the depositions of lower level employees provided incomplete information.<sup>79</sup>

In *First National Mortgage Co. v. Federal Realty Investment Trust*,<sup>80</sup> the District Court in the Northern District of California allowed the depositions of high-level executives after depositions of lower-level employees suggested that they might have at least some relevant personal knowledge.<sup>81</sup>

In contrast, the Court in *In re Taylor*,<sup>82</sup> Court found it appropriate to depose the corporate official, after three depositions of other officials showed that that they had inferior knowledge and that the high-level corporate official had unique or superior knowledge of personal information about the valuation of the stock of the corporation.<sup>83</sup>

### **You Can Now See (“C”) the *Crowning Achievement in Protecting High Level Officials from Unreasonable Depositions***

Virtually every court that has addressed this subject has noted that deposing officials at the highest level of corporate management creates a tremendous potential for abuse and harassment. While it is important to permit liberal discovery, courts should be ever-vigilant to be wary of attempts to first depose apex officials, particularly 1) if they have no specialized or unique knowledge; 2) where lower level personnel have equal knowledge; or 3) where other less intrusive means of discovery otherwise exist.

The standard enunciated in *Crown Central* effectively balances the rights of a plaintiff to liberal discovery with the rights of senior executives to be free from unlimited depositions. Court believe that this balance installs a fair system of prevention against theatrical “leapfrogging” to the apex of the corporate hierarchy, by simply requiring the party seeking information from high-ranking officials to first utilize less intrusive techniques, such as interrogatories, requests for admissions, or deposing lower level employees.

If the party cannot arguably demonstrate that unique or superior knowledge, the trial court must enter a protective order and require the party seeking the deposition to attempt to obtain the discovery through other methods.<sup>84</sup> The discovering party may thereafter depose the apex official if, after making a good faith effort to obtain the discovery through less intrusive means, that party demonstrates that (1) there is a reasonable indication that the official’s deposition is calculated to lead to the discovery of admissible evidence, and (2) the less intrusive methods are unsatisfactory, insufficient, or inadequate.<sup>85</sup> Thus, while apex officials should be free from unnecessary intrusion through direct attempts to first depose them, where such apex officials have unique or

specialized knowledge, and where less intrusive attempts at securing discovery are unsuccessful, these high ranking individuals should stand ready to be deposed.

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<sup>2</sup> *In re Welding Fume Products Liability Litigation*, Not Reported in F.Supp.2d, 2010 WL 1433434, \*1 (N.D. Ohio 2010), quoting *Celerity v. Ultra Clean Holding, Inc.*, 2007 WL 205067 at \*3 (N.D. Cal. 2007) (“deposition notices directed at an official at the highest level or ‘apex’ of corporate management [carry] a tremendous potential for abuse or harassment”).

<sup>3</sup> 904 S.W.2d 125 (Tex. 1995).

<sup>4</sup> *Jones Co. Homes, LLC v. Laborers Intern. Union of North America*, Slip Copy, 2010 WL 5439747, \*2 (E.D. Mich. 2010), citing to *HCP Laguna Creek CA, LP v. Sunrise Sr. Living Management, Inc.*, 2010 WL 890874, \*4 (M.D. Tenn. 2010) (unpublished).

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., *City of Miami v. Fla. Pub. Serv. Comm’n*, 226 So. 2d 217 (Fla. 1969).

<sup>7</sup> 904 S.W.2d 125 (Tex. 1995).

<sup>8</sup> *Id.* at 128 (emphasis added). See also *Raml v. Creighton University*, Slip Copy, 2009 WL 3335929, \*3 (D. Neb. 2009), citing to 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2037 (2d. 2009) (internal citations omitted) (“A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge, but a different result is sometimes reached when the proposed deponent is a busy government official, or a very high corporate officer unlikely to have personal familiarity with the facts of the case.”); 10 FED. PROC., L.ED. § 26:197 (2005) (“If the deponent is a high-ranking executive without unique personal knowledge of matters at issue, the court will grant a protective order to prevent such an important individual from being subjected to discovery abuse.”); *In re Welding Fume Products Liability Litigation*, Not Reported in F.Supp.2d, 2010 WL 1433434, \*1 (N.D. Ohio 2010), quoting *Celerity v. Ultra Clean Holding, Inc.*, 2007 WL 205067 at \*3 (N.D. Cal. 2007) (“deposition notices directed at an official at the highest level or ‘apex’ of corporate management [carry] a tremendous potential for abuse or harassment”). See also *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal.Rptr. 363, 365 (Cal. Ct. App. 1992) (“We conclude it amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer's personal knowledge of the case and absent exhaustion of less intrusive discovery methods.”); *In re Alcatel, USA, Inc.*, 11 S.W.3d 173, 174 (Tex. 2000) (trial court abused its discretion in overruling

motion to quash depositions of two high-level executives because no evidence showed that executives possessed unique or superior personal knowledge and no attempt was made to obtain the information through less intrusive means); *Jones Co. Homes, LLC v. Laborers Intern. Union of North America*, Slip Copy, 2010 WL 5439747 \*2 (E.D.Mich. 2010) and numerous cases cited in that opinion (applying the apex test, and noting the importance of protecting high ranking officials from discovery burdens particularly in the absence of a showing that the individual possesses relevant evidence which is not readily obtainable from other sources). *Accord Manual for Complex Litigation, Fourth*, § 22.84 at 438, 439 (FJC 2004) (referring to mass tort litigation) (“ [l]imiting repetitive depositions of some witnesses promotes efficiency, as does using videotaped depositions for witnesses likely to testify more than once,” such as “significant decision makers, defendants, or experts.”).

<sup>9</sup> See also *In re Continental Airlines, Inc.*, 305 S.W.3d 849, 852 (Tex.App-Houston [14<sup>th</sup> Dist.] 2010) (A party initiates the *Crown Central* guidelines by moving for protection and filing the corporate official's affidavit denying any knowledge of relevant facts) (citing to *In re Alcatel USA, Inc.*, 11 S.W.3d 173, 175 (Tex. 2000) (orig. proceeding)); *Sells v. Drott*, --- S.W.3d ----, 2010 WL 4890716 (Tex.App.-Tyler 2010) (not yet released for publication) (citing to *Crown*, 904 S.W.2d at 128)) (“When a plaintiff seeks to depose an official at the highest level of corporate management, that official may move for a protective order to prohibit the deposition, supported by his affidavit.”); *In re Texas Genco, LP*, 169 S.W.3d 764 (Tex. App.-Waco 2005) (a corporation may seek to shield the official from the deposition by filing a motion for protection supported by the official's affidavit denying knowledge of any relevant facts).

<sup>10</sup> *Id.* at 176 (quoting *Crown Cent. Petroleum Corp.*, 904 S.W.2d at 128).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Roman v. Cumberland Ins. Group*, 2007 WL 4893479 (E.D.Pa. 2007). See also *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 126 (D.Md. 2009) (“the apex deposition rule is intended to protect busy, high-level executives who lack unique or personal knowledge”).

<sup>14</sup> *Simon v. Bridewell*, 950 S.W.2d 439, 442 (Tex.App.-Waco 1997).

<sup>15</sup> 2005 WL 3555704 (Fla. App. Dec. 30, 2005).

<sup>16</sup> --- S.W.3d ----, 2009 WL 2568375 (Tex.App.-Hous. [14 Dist.] 2009).

<sup>17</sup> *Id.* at \*3.

<sup>18</sup> 695 F.Supp.2d 149 (D. Vt. 2010).

<sup>19</sup> *Id.* at 156-57.

<sup>20</sup> *Simon v. Bridewell*, 950 S.W.2d 439, 443 (Tex.App.-Waco 1997) (“Relators have cited no cases where the apex doctrine has been extended to general partners in a limited partnership. Although we do not preclude the possibility that the doctrine might be so extended under appropriate facts, the facts presented in this case do not warrant such an extension.”)

<sup>21</sup> 11 S.W.3d 173 (Tex. 2000).

<sup>22</sup> *Id.* at 176.

<sup>23</sup> *In re Continental Airlines, Inc.*, 305 S.W.3d 849, 852 (Tex.App-Houston [14<sup>th</sup> Dist.] 2010). See also *In re El Paso Healthcare Sys.*, 969 S.W.2d 68, 74 (Tex. App.-El Paso

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1998, no writ) (“A generalized claim that a corporate president has ultimate responsibility for all corporate decisions or has knowledge of corporate policy is insufficient to establish that the corporate president has unique or superior personal knowledge of discoverable information.”).

<sup>24</sup> 926 S.W.2d 640 (Tex. App.-Fort Worth 1996, no writ).

<sup>25</sup> *Id.* at 643.

<sup>26</sup> *Id.* at 644.

<sup>27</sup> 305 S.W.3d 849, 852 (Tex.App-Houston [14<sup>th</sup> Dist.] 2010).

<sup>28</sup> *Id.* at 850.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 851.

<sup>31</sup> *Id.* at 858.

<sup>32</sup> *Evans v. Allstate Ins. Co.*, 216 F.R.D. 515 (N.D.Okla. 2003).

<sup>33</sup> *See Jones Co. Homes, LLC v. Laborers Intern. Union of North America*, Slip Copy, 2010 WL 5439747 \*2 (E.D.Mich. 2010). *See also Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6<sup>th</sup> Cir.1989); *Lewelling v. Farmer’s Ins. of Columbus, Inc.* 879 F.2d 212, 218 (6<sup>th</sup> Cir. 1989).

<sup>34</sup> *See cases cited in footnote 36 and Devlin v. Chemed Corp.*, 2005 WL 2313859 \*2 (E.D.Mich. 2005) (unpublished).

<sup>35</sup> 13 Cal.Rptr. 363 (Cal. Ct. App. 1992).

<sup>36</sup> *Id.* at 363.

<sup>37</sup> 96 F.R.D. 619 (D.D.C. 1983).

<sup>38</sup> *Id.* at 621–22. *See also In re Daisy Manufacturing Company*, 17 S.W.3d 654, 659 (Tex. 2000) (orig. proceeding) (per curiam) (explaining that even if Daisy Manufacturing’s CEO were deposed, he had little first-hand information about areas of inquiry).

<sup>39</sup> 16 F.R.D. 383 (S.D.N.Y. 1951).

<sup>40</sup> *Id.*

<sup>41</sup> 593 F.2d 649 (5<sup>th</sup> Cir. 1979).

<sup>42</sup> *Id.* at 651.

<sup>43</sup> 48 F.3d 478 (10<sup>th</sup> Cir.1995).

<sup>44</sup> 258 F.R.D. 118 (D.Md. 2009).

<sup>45</sup> *Id.* at 126.

<sup>46</sup> *Id.* at 127.

<sup>47</sup> *Folwell v. Hernandez*, 210 F.R.D. 169 (M.D.N.C. 2002).

<sup>48</sup> 205 F.R.D. 535 (S.D. Ill. 2002).

<sup>49</sup> *Id.* at 536.

<sup>50</sup> 203 F.R.D. 98 (S.D.N.Y. 2001).

<sup>51</sup> *Id.* at 102–06 (S.D.N.Y. 2001).

<sup>52</sup> 2006 WL 2578277 (N.D.Cal.2006).

<sup>53</sup> *Id.* at \*3.

<sup>54</sup> 210 F.R.D. 100 (D.Del. 2002).

<sup>55</sup> 229 F.R.D. 661 (D.N.M 2005).

<sup>56</sup> --- S.W.3d ----, 2009 WL 2568375 (Tex.App.-Hous. [14 Dist.] 2009).

<sup>57</sup> *Id.* at \*4.

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<sup>58</sup> Slip Copy, 2009 WL 4730321 (M.D.Ga. 2009).

<sup>59</sup> *Id.* at \* 1-2.

<sup>60</sup> *Websidestory, Inc. v. Netratings, Inc.*, 2007 WL 1120567, \*2 (S.D.Cal. 2007).

<sup>61</sup> *Id.* See also *Medimmune, LLC v. PDL Biopharma, Inc.*, Slip Copy, 2010 WL 2640473, \*1 (N.D.Cal. 2010).

<sup>62</sup> See, e.g., *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602 (Mo. 2002) (declining to adopt the apex executive deposition protection rule) and *Van Den Eng v. Coleman Co., Inc.*, 2005 WL 3776352 (D. Kan. 2005) (stating that the propriety of such depositions should be measured by typical protective order grounds, and not mandating the use of any “Apex” rule that would require the nonmoving party to show (1) the executive has unique or special knowledge of the facts at issue and (2) the seeking party has exhausted other less burdensome avenues for obtaining the information sought), with *Thomas v. Int’l Business Machines*, 48 F. 3d 478, 483 (10th Cir. 1995) (issuing protective order to relieve chairman of the board of directors).

<sup>63</sup> Compare the state appellate court case of *Citigroup, Inc. v. Holtsberg*, 2005 WL 3479328 (Fla. 4th Dist. Ct. App. 2005) (stating that, as an appellate court, it had no authority to adopt the apex doctrine and distinguished other Florida cases involving government officials utilizing the doctrine), with the federal court decisions in *Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 426277, \*2 (S.D.Fla. 2009) (noting that the “[d]efendant ha[d] failed to satisfy his burden of showing that it [wa]s necessary to compel the deposition of [plaintiff’s] chairman.”). “A protective order precluding the deposition of a high-ranking executive officer will be granted where the officer possesses no unique knowledge regarding the underlying facts of the action and files a declaration stating his or her lack of knowledge.” *McMahon v. Presidential Airways, Inc.*, No. 6:05-cv-1002-Orl-28JGG, 2006 WL 5359797, at \* 2 (M.D.Fla. 2006), *Carnival Corporation v. Rolls-Royce PLC*, Not Reported in F.Supp.2d, 2010 WL 1644959 (S.D.Fla. 2010) and *Chick-Fil-A, Inc. v. CFT Dev., LLC*, No. 5:07-cv-501-Oc-10GRJ, 2009 WL 928226 (M.D.Fla. 2009) (“Under the apex rule, the party seeking the deposition must show that the executive has ‘unique or superior knowledge of discoverable information’ that cannot be obtained by other means.”).

<sup>64</sup> *In re Continental Airlines, Inc.*, 305 S.W.3d 849, 858-59 (Tex.App-Houston [14<sup>th</sup> Dist.] 2010).

<sup>65</sup> 208 WL 2467016 (E.D. Tex. 2008).

<sup>66</sup> *Id.* at \* 3.

<sup>67</sup> *Id.* at \* 4. *Accord Turner v. Novartis Pharmaceuticals*, Slip Copy, 2010 WL 5055828 (E.D.La. 2010) (noting that it could not locate a Fifth Circuit case that adopted the “apex” rule under the circumstances of that particular case, but nonetheless entering a protective order against depositions of the president and general counsel on relevance grounds)

<sup>68</sup> *Id.* at 859.

<sup>69</sup> *Id.*

<sup>70</sup> 106 F.R.D 364 (D.R.I. 1985).

<sup>71</sup> *Id.* at 366.

<sup>72</sup> *Id.*

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<sup>73</sup> See *First Fidelity Bancorporation v. Nat'l Union Fire Ins. Co.*, 1992 WL 46881 at \*4 (E.D. Pa. 1992) (same); *Thomas v. Int'l Business Machines*, 48 F. 3d 478, 483 (10th Cir. 1995) (issuing protective order to relieve chairman of the board of directors); *Lewelling v. Farmers Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) (granting protective order to bar plaintiffs from deposing their employer's chief executive officer, who lacked knowledge about any pertinent facts).

<sup>74</sup> 29 F.R.D. 514 (D. Conn. 1961).

<sup>75</sup> *Id.* at 518.

<sup>76</sup> 141 F.R.D. 332 (M.D. Ala. 1991).

<sup>77</sup> *Id.* at 335.

<sup>78</sup> 116 F.R.D. 140 (D. Mass. 1987).

<sup>79</sup> *Id.* at 141–42.

<sup>80</sup> 2007 WL 417548 (N.D.Cal. 2007).

<sup>81</sup> *Id.* at \*2.

<sup>82</sup> --- S.W.3d ----, 2009 WL 2568375 (Tex.App.-Hous. [14 Dist.] 2009).

<sup>83</sup> *Id.* at \*4. See also *Unishippers Global Logistics, LLC v. DHL Exp. (USA), Inc.*, Slip Copy, 2010 WL 135321 (D.Utah 2010) (allowing the deposition because the senior executive might have unique knowledge relevant to the case); See also *Raml v. Creighton University*, Slip Copy, 2009 WL 3335929, \*3 (D.Neb. 2009) (similar).

<sup>84</sup> *In re Daisy Mfg. Co., Inc.*, 17 S.W.3d 654, 656–57 (Tex. 2000); *Crown Central Petroleum Corp. v. Garcia*, 904 S.W.2d 125, 128 (Tex. 1995). See also *Liberty Mut. Ins. Co. v. Superior Court*, 13 Cal. Rptr. 2d 363 (Cal. App. 1 Dist. 1992) (“We conclude it amounts to an abuse of discretion to withhold a protective order when a plaintiff seeks to depose a corporate president, or corporate officer at the apex of the corporate hierarchy, absent a reasonable indication of the officer’s personal knowledge of the case and absent exhaustion of less intrusive discovery methods.”)

<sup>85</sup> See *Crown Central, In re Alcatel*. See also *In re Daisy Mfg.*, 17 S.W.3d 656–57; *Crown Central*, 904 S.W.2d at 128. However, it should be noted that even where a grant of protection is initially granted, it does not foreclose the party from making the appropriate less intrusive attempts and then returning to request such depositions. See, e.g., *Simon v. Bridewell*, 950 S.W.2d 439, 443 (Tex.App.-Waco 1997) (“The party seeking discovery can return to the court after attempting other avenues of discovery and seek to have the order overturned.”).