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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Depositions of Organizations Under Rule 30(b)(6)

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Notwithstanding the U.S. Supreme Court's recent decision in *Citizens United v. Federal Election Commission*[1] imbuing corporations with First Amendment rights equal to those enjoyed by natural persons, corporate litigators are well aware that such entities cannot actually "speak" for themselves. The Federal Rules of Civil Procedure provide two ways in which corporations and other business entities can be deposed. First, a party seeking to take the deposition of an organization may proceed under Rule 30(b)(1) by naming a particular person to testify on behalf of the organization, so long as the person named is an officer, director, or managing agent of the organization.[2]

In the alternative, a party may subpoena or notice the deposition of an organization by naming the organization itself pursuant to Rule 30(b)(6). We discuss below a number of recent decisions from the U.S. District Court for the Southern District of New York that illustrate the importance of a properly focused 30(b)(6) notice, the meaningful obligations that receipt of such a notice imposes in terms of designating and adequately preparing the witnesses that will be offered in response, and the consequences that may flow from failing to take those obligations seriously.

Basic Principles

Upon receipt of a 30(b)(6) deposition notice or subpoena, the named organization must designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf.[3] The organization is obligated to produce a witness competent to testify to the matters set out in the deposition notice "known or reasonably available to the entity."[4] Although Rule 30(b)(6) does not require that the witness have personal knowledge on the subject, the witness must be able to convey the information known to the corporation.[5] Accordingly, the organization is responsible for educating its designee as to those matters within the organization's knowledge on the designated 30(b)(6) topics.

Such preparation is of paramount importance, because a witness designated as a 30(b)(6) witness is deemed to be "speaking for the corporation" and his or her testimony will be binding on the entity.[6] Because adequate preparation is critical, a 30(b)(6) notice or subpoena must state with "reasonable particularity" the matters for examination. Where insufficient specificity is provided, a court can strike the notice of deposition or instruct the requesting party to cure the infirmity.[7]

Recent decisions from the Southern District of New York illustrate the importance of a properly focused 30(b)(6) notice.

Particularity and Scope

Questioning at a deposition will not necessarily be limited to matters identified with reasonable particularity in a 30(b)(6) notice, but an organization will only be bound by the testimony of its 30(b)(6) witness to the extent that the testimony is on subjects so identified. As Southern District Magistrate Judge Kevin Nathaniel Fox observed in his 2008 decision in *Eng-Hatcher v. Sprint Nextel Corp.*, "[t]he 'reasonable particularity' with which a party noticing the oral examination of a corporate party must describe the matters of examination, pursuant to [Rule 30(b)(6)], establishes the minimum standard that the designated witness must satisfy when answering questions. Any examination, beyond the matters described in the notice, is governed by Fed.R.Civ.P. 26(b)(1) [which generally dictates the scope of discovery]."[8]

A 2009 decision by Southern District Magistrate Judge James C. Francis IV in *Pentair Water Treatment (OH) Co. v. Continental Insurance Co.*[9] reinforces that a party has wide but not unlimited latitude—coextensive with notions of relevance and privilege generally applicable to discovery under the Federal Rules—in identifying the topics to be covered in a 30(b)(6) deposition. The plaintiffs in that case sought payment from their excess liability insurer after being found partially liable for losses relating to an outbreak of Legionnaires' Disease on a cruise ship. The source of the outbreak was traced to a whirlpool spa filter manufactured and distributed by the plaintiffs. The defendant insurance company declined coverage, asserting that the loss was outside its policy.

When the plaintiffs sought to compel the defendant insurer to designate 30(b)(6) witnesses to testify regarding its general underwriting practices and procedures, the defendant objected on the ground that the underwriting of any policies other than the specific policy at issue would be irrelevant. Magistrate Judge Francis found that the defendant "espouse[d] too narrow a view of relevance" because the insurer's defenses implicated its underwriting practices as a whole. He concluded that although "Pentair's requests are far-ranging on their face, and not every aspect of underwriting practice will be relevant[,…] the precise contours of appropriate questioning are best defined in the context of specific inquiries posed during deposition."[10]

The plaintiffs in *Pentair* also sought to compel the designation of a 30(b)(6) witness regarding each of 50 affirmative defenses asserted by defendant. Observing that "[t]aken literally," that notice could require the deposition of trial counsel and that "[a]t the very least, the witness would be expected to repeat what the witness had been told by counsel about the application of facts to the legal theories reflected in [the] Answer," Magistrate Judge Francis denied the motion to compel, without prejudice to plaintiffs recasting their request so as to seek information about facts rather than legal theories.[11]

Impact of Testimony

A 30(b)(6) representative presents the entity's "position" on a specified topic, and will bind the entity on topics designated in the 30(b)(6) notice. But, as Southern District Judge Robert W. Sweet noted in his 2008 decision in *Falchenberg v. New York State Department of Education*,[12] where questioning exceeds the scope of the 30(b)(6) notice, the testimony given in response may well not bind the organizational party.

The plaintiff in *Falchenberg*, a former teacher, alleged that the defendants had discriminated against her by failing to provide accommodations for her dyslexia in the administration of a teaching certification examination. Defendants argued that they were not required to exempt plaintiff from spelling, punctuation, capitalization and paragraphing, because those elements were fundamental to the test.

In opposing summary judgment, plaintiff argued that the testimony of the test administrator's 30(b)(6) witness that she did not know how the mechanics of the writing process were factored into test scores was sufficient to

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establish a material issue of fact regarding the importance of those factors to the test. Judge Sweet rejected this effort to attribute the 30(b)(6) witness' testimony to the defendant, noting that the 30(b)(6) deposition notice had not identified the issue of scoring as a topic. He observed that "'if a party opts to employ the procedures of Rule 30(b)(6)…to depose the representative of a corporation, that party must confine the examination to the matters stated 'with reasonable particularity' which are contained in the Notice of Deposition.'"[13]

Judge Sweet concluded that where the scope of inquiry is exceeded, the deponent's answers do not bind the designating organization, but are treated as those of the deponent alone, and that "'if the [30(b)(6)] deponent does not know the answer to questions outside the scope of the matters described in the notice, then that is the examining party's problem.'"[14]

Failure to Prepare

Courts take seriously the requirement that an entity adequately prepare its 30(b)(6) witnesses. "Producing an unprepared witness is tantamount to a failure to appear,"[15] and will be treated like any other failure to comply with discovery under Rule 37. Thus, in *Spanski Enterprises Inc. v. Telewizja Polska, S.A.*,[16] Judge Gerard E. Lynch of the U.S. Court of Appeals for the Second Circuit (sitting by designation in the Southern District of New York) imposed monetary sanctions on defendant corporation for failure to provide deposition witnesses with sufficient knowledge to fulfill its obligations under Rule 30(b)(6).

The plaintiff had sued to enforce contractual rights to distribute Polish-language television programming produced by the defendant corporation. Plaintiff had twice served Rule 30(b)(6) deposition notices on the defendant, seeking information as to the corporation's "negotiation, understanding, and performance of the [1994] distribution agreement and its later amendments." On both occasions, the defendant designated individuals who had been with the company for a relatively short period of time, had no personal knowledge of the agreement, and had not discussed the topics in question with anyone other than defendant's counsel.

When plaintiff moved for summary judgment, relying in part on the declarations of two of defendant's former employees who were involved in the negotiation and implementation of the distribution agreement, the defendant submitted declarations from two current employees who had been involved in the negotiation and implementation of the distribution agreement, and which contradicted the plaintiff's assertions. The court denied summary judgment on the basis of these conflicting declarations.

Plaintiff subsequently sought sanctions pursuant to Rule 37 against defendant for its failure to produce knowledgeable 30(b)(6) deponents. Judge Lynch noted that Rule 30(b)(6) requires an organization to produce "someone familiar with [the noticed] subject, who is able 'to give complete, knowledgeable and binding answers' on its behalf" and that a failure to comply with these requirements is grounds for sanctions if the inadequacies are egregious.[17]

The organization can discharge its duty by producing (i) a representative with personal knowledge of the noticed topics or (ii) a representative who informs himself through inquiry of other corporate agents with knowledge. In this instance, Judge Lynch found that the witnesses' lack of knowledge was egregious, particularly in light of the fact that the defendant was able to produce declarations from current, knowledgeable employees when it suited the defendant's purposes.

The defendant argued that its failure to comply was excused by the fact that plaintiff knew of the existence of the other employees, but did not seek to depose them. Judge Lynch rejected this argument, finding that plaintiff was not seeking sanctions for the defendant's failure to produce those specific employees, but for their failure to produce any witness with knowledge of the distribution agreement. Judge Lynch imposed monetary sanctions on the defendant, ordering it to pay expenses and attorney's fees incurred by plaintiff in connection with the depositions of the 30(b)(6) witnesses, a portion of its summary judgment motion, and the preparation of its sanction motion.[18]

Preclusion

Failure to comply with the requirements of Rule 30(b)(6) also may result in preclusion, or even an affirmative finding against the noncompliant party, particularly if there is a general pattern of evasive or uncooperative discovery compliance, as was the case in *Lucky Brand Dungarees Inc. v. Ally Apparel Resources, LLC*.[19] In connection with defendants' counterclaims against them, plaintiffs submitted, and later recanted, inaccurate interrogatory responses and repeatedly failed to produce documents relevant to their compliance with an earlier settlement agreement between the parties prohibiting plaintiffs' use of the term "GET LUCKY." Additionally, plaintiffs had designated a witness who "was largely ignorant" of the issues set forth in a 30(b)(6) notice seeking testimony on plaintiffs' compliance with that agreement.

A party who approaches designating and preparing its 30(b)(6) witnesses in too cavalier a fashion may find itself bound by an uninformed and ill-prepared witness, or even subject to sanctions.

Southern District Magistrate Judge Michael H. Dolinger found that monetary sanctions alone were insufficient, and that the plaintiffs' discovery misconduct in this case justified the "harsh remedy" of preclusion—a remedy that he recognized should only be imposed where "noncompliance is a result of 'willfulness, bad faith, fault or gross negligence rather than inability to comply or mere oversight.'"[20]

The plaintiffs' proffer of a single witness who was "largely ignorant of the history of plaintiffs' obligations under the 2003 agreement [and who] had failed to make the necessary inquiries to prepare for such a deposition," was among the derelictions cited by Judge Dolinger. He specifically rejected as a "non-starter" plaintiffs' suggestion that discovery be reopened so they could produce witnesses related to defendants' counterclaims, holding that "there was no earthly reason why plaintiffs… could not have utilized one or several well-prepared Rule 30(b)(6) witnesses to testify" during the original or supplemental discovery periods. He concluded that "[t]o invite defendants to, in effect, interview all [plaintiffs'] employees who had disparate knowledge of some of the pertinent facts would simply retrace plaintiffs' earlier violations of their obligations under Rule 30(b)(6)."[21] In addition to monetary sanctions, Magistrate Judge Dolinger found that defendants were entitled to substantive issue preclusion relating to plaintiffs' violation of the settlement agreement.

Conclusion

These cases highlight the importance of careful preparation both in drafting 30(b)(6) notices and in responding to them. A 30(b)(6) deposition will only be as effective as the deposition notice is focused. For the recipient, a 30(b)(6) notice carries with it substantial obligations to designate and prepare appropriate witness(es)—obligations the recipient ignores at its peril. A party who approaches designating and preparing its 30(b)(6) witnesses in too cavalier a fashion may find itself bound by an uninformed and ill-prepared witness, or even subject to sanctions.

1. __S.Ct.__, 2010 WL 183856 (Jan. 12, 2010).

2. See Fed. R. Civ. P. 32(a)(3) (providing that an adverse party may use for any purpose the deposition of a party or the party's officer, director, or managing agent); Fed. R. Civ. P. 37(d) (providing for sanctions against an organizational party for failing to ensure the appearance of an officer, director, or managing agent).

3. The Rule requires that a subpoena served on a nonparty organization specifically advise the organization of its duty to designate an individual to testify on behalf of the organization.

4. *Sabre v. First Dominion Capital, LLC*, 2001 WL 1590544, at *1 (SDNY Dec. 12, 2001) (Pitman, M.J.).

5. *Gucci America Inc. v. Exclusive Imports Int'l*, 2002 WL 1870293, at *8 (SDNY Aug. 13, 2002) (Casey, J.).

6. *Sea Trade Co. v. FleetBoston Financial Corp.*, 2008 WL 4129620, at *21 (SDNY Sept. 4, 2008) (Keenan, J.) (noting the binding nature of 30(b)(6) testimony) (quoting *A&E Prods. Group, L.P. v. Mainetti USA Inc.*, 2004 WL 345841 (SDNY Feb. 24, 2004) (Patterson, J.)).

7. See *Ng v. HSBC Mortgage Corp.*, 2008 WL 5274272 (EDNY Dec. 18, 2008) (Pohorelsky, M.J).

8. 2008 WL 4104015, at *4 (SDNY Aug. 28, 2008) (citations omitted).

9. 2009 WL 3817600 (SDNY Nov. 16, 2009).

10. Id. at *4.

11. Id. at *2.

12. 642 F.Supp.2d 156 (SDNY 2008), aff'd, 338 Fed. Appx. 11 (2d Cir. 2009), cert. denied, __S.Ct.__, (Jan. 11, 2010).

13. Id. at 164 (quoting *Paparelli v. Prudential Ins. Co. of Am.*, 108 FRD 727, 730 (D.Mass. 1985)).

14. Id. (quoting *Detoy v. City & County of San Francisco*, 196 FRD 362, 367 (N.D.Cal. 2000); *King v. Pratt & Whitney*, 161 FRD 475, 476 (S.D.Fla. 1995), aff'd, 213 F.3d 646 (11th Cir. 2000)).

15. *Kyoei Fire & Marine Ins. Co. v. M/V Maritime Antalya*, 248 FRD 126, 152 (SDNY 2007) (Preska, J.) (quoting *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 FRD 135, 151 (SDNY 1997) (Francis, M.J.)).

16. 2009 WL 3270794 (SDNY Oct. 13, 2009).

17. 2009 WL 3270794, at *2 (quoting *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 268 (2d Cir. 1999); *Kyoei Fire & Marine Ins. Co.*, 248 FRD at 152).

18. Id. at *4-5. Compare *Rahman v. Smith & Wollensky Restaurant Group Inc.*, 2009 WL 773344, at *2 (SDNY March 18, 2009) (Francis, M.J.) (rejecting request for sanctions because, although "the defendants surely could have done a more thorough job selecting and preparing their corporate designees…each designee exhibited specific knowledge of key issues identified by the plaintiff's notice" sufficient to avoid a finding of egregiousness); *Crawford v. Franklin Credit Management Corp.*, 261 FRD 34 (SDNY 2009) (Maas, M.J.) (although defendant had provided a "poorly prepared" 30(b)(6) witness, gaps in her knowledge were not so "egregious" as to warrant sanctions, particularly where plaintiff made no good faith attempt to seek additional Rule 30(b)(6) testimony).

19. 2009 WL 72982 (SDNY Jan. 8, 2009).

20. Id. at *7 (quoting *Handwerker v. AT&T Corp.*, 211 FRD 203, 209 (SDNY 2002) (Marrero, J.)).

21. Id. at *10.