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425-454-4233
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Employment Law Note

October 2023

Washington Supreme Court Rejects the Apex Doctrine

By Jessica Cox, jcox@sbj.law

In its September 14, 2023, unanimous decision in *Stratford v. Umpqua Bank*, the Washington Supreme Court rejected the application of the "apex doctrine" in Washington. The apex doctrine protects certain high-level executives from being subjected to depositions unless the proponent can show that (1) the witness has unique, non-repetitive, firsthand knowledge of the facts at issue in the case, and (2) other less intrusive means of discovery, such as interrogatories and depositions of other employees, have been exhausted without success. The Washington Supreme Court rejected both this specific application and the doctrine more generally.

Background

In *Stratford*, Plaintiffs Heather Stratford and William Geibel Jr. alleged that an Umpqua Bank loan officer wrongfully referred them to a bad builder, leading to delays and cost overruns in their residential construction caused by the builder and the various subcontractors. Having already sued the loan officer and builder, the Plaintiffs filed suit against Umpqua and proceeded to demand to depose its president and CEO, chief people officer, and head of its home lending division (apex officers) before taking a single deposition of anyone else, including that of the allegedly offending loan officer or the builder.

Umpqua moved for a protective order arguing that none of these executives had any personal knowledge about the issues with the specific loan officer, Plaintiffs' loan, or the ultimate termination of the Umpqua loan officer. The trial court denied Umpqua's motion for a protective order, reasoning that: "Washington has some pretty…easy discovery rules, pretty wide discovery…. [H]ow [Plaintiffs' counsel] decides who he thinks is relevant to prove his case is up to him. He doesn't have to ask for a [corporate deposition under CR 30(b)(6)] if he doesn't want to and if he believes that these witnesses … have valid information … on … policies and procedures, hiring, offering."

Umpqua appealed the trial court's decision directly to the Washington Supreme Court, requesting that the Court bring Washington law into alignment with other jurisdictions by explicitly adopting the apex doctrine, which balances parties' need for discovery against the unique vulnerability of high-level executive officers.

Supreme Court Analysis of the Apex Doctrine

The Washington Supreme Court accepted direct review of the issue. In its decision, however, the Court declined to accept Umpqua's application of the apex doctrine. The Court found that no court in Washington has applied the apex doctrine. In making this finding, the Court rejected Umpqua's reliance on two Washington appellate court cases that purportedly adopted the apex doctrine, namely: (1) *Shields v. Morgan Financial*—in which the plaintiff sued her mortgage lender and broker for violations of the Consumer Protection Act and sought to depose the lender's chief financial officer and chief compliance officer; and (2) *Clarke v. State Attorney General Office*—in which a former employee sought deposition of the former attorney general and current governor for a wrongful termination claim.

In *Shields,* Division One of the Washington Court of Appeals affirmed the trial court's issuance of a protective

order when the plaintiff wanted to depose the CFO and CCO of a mortgage company. The Supreme Court in *Stratford* found that *Shields* did not apply the apex doctrine. Instead, the court applied the factors set forth in Civil Rule 26(c) and found good cause to regulate discovery when it was "unreasonably cumulative or duplicative" or "unduly burdensome or expensive, taking into account the needs of the case." While the court in *Shields* noted that the officers had no knowledge of the facts and that the lender had produced a different senior executive to testify, the Supreme Court explained that this was simply an exercise of the trial court's discretion in limiting discovery based on the needs of the case.

Similarly, the Supreme Court found that Division Two of the Washington Court of Appeals in *Clarke* did not adopt the apex doctrine as suggested by Umpqua. Rather, the *Clarke* court affirmed the trial court's decision based on the deferential standard of review, noting that there were better sources for the information sought. The Supreme Court did emphasize that *Clarke* involved a public official—the former Washington Attorney General and current Governor—rather than a corporate official. Thus, the federal cases *Clarke* relied upon that discussed protecting government officials from having to explain their "official actions" did not extend to protecting private corporate officials.

The Court also rejected Umpqua's argument that the apex doctrine was widely adopted across the country. The Court noted that the doctrine has inconsistent application in federal courts and the majority of federal courts do not apply the apex doctrine with the burden on the party seeking discovery and the two-part test for which Umpqua argued. The Court also noted that the application of the apex doctrine in state courts is equally inconsistent—with five states adopting it and seven states rejecting it—and found that its acceptance is waning.

The Court emphasized that application of the apex doctrine was not required under Washington precedent and that the version of the apex doctrine for which Umpqua argued would shift the burden in discovery motions, in contradiction to the Washington Civil Rules.

How Should a Company Protect Itself from Potential Abusive Discovery Tactics?

The Supreme Court in *Stratford* indicated that Civil Rule 26 is already sufficient in addressing the underlying concerns with deposing apex officials. Specifically, CR 26 requires trial courts across the state to issue a protective order when the moving party establishes that "undue burden or expense would be avoided by a protective order without impeding the discovery process." Thus, in light of Stratford, when a high-level executive lacks personal knowledge or would otherwise face an undue burden, the party should move for a protective order and include affidavits with "concrete examples demonstrating the specific facts showing harm" and how the deposition would be "duplicative, burdensome, and harassing."

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