BNA Insights

CIVIL PROCEDURE

DEPOSITION TESTIMONY

Rule 30(b)(6) Testimony: To What Extent Are Corporations Bound?

By Lauren Aguiar and Ryan Gainor

Introduction

Due to somewhat divergent case law, an error or an unprepared witness at a Fed. R. Civ. P. 30(b)(6) deposition could have serious consequences for corporations by preventing them from later presenting a different, or more accurate, theory of their case. A number of courts have addressed whether a corporation may contradict testimony given on its behalf by a Rule 30(b)(6) witness during the summary judgment stage and, if so, how. Another group of cases addresses the implications of Rule 30(b)(6) testimony at trial, where a majority of cases hold that a corporation will be allowed to contradict its earlier testimony. Other courts have prevented companies from advancing a different theory as a sanction for offering an unprepared witness.

Why This Issue Arises

Litigants have the ability to depose an organization under Fed. R. Civ. P. 30(b)(6), and such depositions are meant to bind the company to certain positions.[1] Courts seem to consistently agree, however, that statements made in the 30(b)(6) context do not amount to a judicial admission.[2] Courts disagree about the extent to which a corporation is bound by the testimony given by its 30(b)(6) witness;[3] indeed, a ''marked divide''[4] exists in the case law on this subject.

Lauren Aguiar is a partner at Skadden, Arps, Slate, Meagher & Flom LLP in New York. Ryan Gainor, an associate with the firm, provided assistance with the article.

The Summary Judgment Stage

The 'Hard Line' View:

Some courts have held that a party may not submit an affidavit or other written testimony contrary to the Rule 30(b)(6) testimony if the information could have been known to the corporation at the time of the deposition, or if there is no other explanation for the contradictory testimony.[5] The rationale for this position is that ''[u]nder federal summary judgment procedure, when the sole evidence purporting to create a genuine issue of material fact is an affidavit that contradicts deposition testimony [including 30(b)(6) testimony], the party

[1] *See, e.g.,* 8A Charles A. Wright, et. al., *Federal Practice and Procedure* § 2103 (3d ed. 2010).

[2] Deposition testimony is an evidentiary admission that should be ''submitted to the jury for consideration,'' whereas a judicial admission acts as a ''concession,'' which ''remove[s] the fact from contention.'' *Weiss v. Union Central Life Insurance Co.*, 28 Fed. App'x. 87, 89 (2d Cir. 2002).

[3] Testimony given by a 30(b)(6) deponent binds the corporation, while deposition testimony from individual fact witnesses of that corporation does not. *See, e.g., Cipriani v. Dick's Sporting Goods Inc.*, No. 3:12 CV 910(JBA), 2012 BL 304214, at *2 (D. Conn. Nov. 19, 2012) (testimony of five employees as fact witnesses does not bind corporation).

[4] *Coalition for a Sustainable Delta v. McCamman*, 725 F. Supp. 2d 1162, 1172 (E.D. Cal. 2010).

[5] *Great American Insurance Co. of New York v. Summit Exterior Works LLC*, No. 3:10 CV 1669 (JGM), 2012 BL 34009, at *4 (D. Conn. Feb. 13, 2012) (stating in dicta that a corporation is precluded from introducing an affidavit that contradicts its 30(b)(6) representative if the corporation had ''reasonable access'' to the contrary information at the time of the deposition); *Remediation Products Inc. v. Adventus Americas Inc.*, Civ. No. 3:07-CV-153-RJC-DCK, 2009 BL 258003, at *4 (W.D.N.C. Dec. 1, 2009) (refusing to permit affidavit at summary judgment stage where 30(b)(6) witness was unable to answer questions related to noticed topics).

offering that affidavit must provide an explanation of that conflict.''[6]

While most courts do not expand upon what explanation would suffice, the court in *Hyde v. Stanley Tools* gave examples of three types of permissible explanations, including: 1) not having access to material facts prior to the Rule 30(b)(6) deposition; 2) the differing testimony was based on newly discovered evidence; and 3) the Rule 30(b)(6) witness was confused or made an honest mistake.[7]

Even where the contrary affidavit is submitted by an expert witness on behalf of the corporation, the court may preclude that testimony. For example, in *Hyde*, the corporate designee of Stanley Tools testified that he had examined certain evidence at issue in the case and concluded that the company had manufactured the tool.[8] This testimony was later contradicted by an affidavit and expert report from a Stanley engineer.[9] The district court struck the affidavit and granted summary judgment on the issue of whether Stanley Tools manufactured the tool.[10]

Many of the cases that have limited an organization's ability to contradict deposition testimony rely on *Rainey v. American Forest and Paper Association.* In that case, the defendant offered an affidavit providing new evidence and statements contrary to its Rule 30(b)(6) testimony about a key issue in the case.[11] The court reasoned that, ''[b]y commissioning the designee as the voice of the corporation, the Rule obligates a corporate party 'to prepare its designee to be able to give binding answers' in its behalf.''[12] Therefore, ''[u]nless it can prove that the information was not known or was inaccessible, a corporation cannot later proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition.''[13]

The same reasoning that leads to striking affidavits extends to the use of deposition testimony that contradicts the corporation's 30(b)(6) testimony. In *Imperial Trading Co. v. Travelers Property Casualty Company of America,* the plaintiff was precluded from introducing the deposition testimony of the corporation's president to rebut the deposition testimony of its Rule 30(b)(6) witness.[14]

A More Flexible View in Practice:

At the summary judgment stage, other courts, under certain circumstances, have allowed affidavits, as well as documents produced in the litigation, to contradict a corporation's Rule 30(b)(6) testimony with little or no concern for whether the party had an explanation for the change in position.[15] The strongest statement in this regard is from the U.S. Court of Appeals for the Seventh Circuit in *A.I. Credit Corp. v. Legion Insurance Co.*, which allowed a district court to rely on evidence from a witness despite it being contrary to a statement made by the corporation's 30(b)(6) deponent.[16] There, the plaintiff's 30(b)(6) witness testified in his deposition that he never spoke to one of the defendants. The defendant argued that the plaintiff could not rely on the contrary testimony of another witness. The Seventh Circuit reasoned that, ''[o]ne sentence of the Rule provides, 'The persons so designated shall testify as to matters known or reasonably available to the organization.' In the light of that sentence, [defendant] apparently construes the Rule as absolutely binding a corporate party to its designee's recollection unless the corporation shows that contrary information was not known to it or was inaccessible. Nothing in the advisory committee notes indicates that the Rule goes so far.''[17] The court then expressly disagreed with *Rainey*, finding that other opinions permitting contrary evidence expressed the better view.[18]

Other courts also have permitted corporations to contradict the testimony of their 30(b)(6) witnesses at the summary judgment stage. One court reasoned that to entirely preclude, on summary judgment, an affidavit that explains or contradicts a corporation's position at a Rule 30(b)(6) deposition ''stretches the applicable law too far'' and would make that testimony akin to a judicial admission.[19] Similarly, another court held that if a statement were not actually *contrary*, but simply reflected a lack of knowledge by the witness, precluding further evidence would be a ''draconian measure.''[20]

In *State Farm Mutual Automobile Insurance Co. v. New Horizont Inc.*, the court concluded that courts may consider other evidence.[21] In *State Farm*, the plaintiff's 30(b)(6) designee testified that he was unable to provide any information with respect to various deposition topics.[22] The defendant moved for summary judgment, arguing that the plaintiff should be precluded from introducing evidence contrary to that Rule 30(b)(6) testimony.[23] The district court summarized the defendant's request this way: ''Defendants ask the Court to disregard *all* evidence contradicting Bowles's testimony, re-

[6] *Texas Technical Institute Inc. v. Silicon Valley Inc.*, No. Civ.A. H-04-3349, 2006 BL 152464, at *6 (S.D. Tex. Jan. 31, 2006).

[7] *Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000).

[8] *Id.* at 992.

[9] *Id.*

[10] *Id.* at 993.

[11] *Rainey v. American Forest & Paper Association*, 26 F. Supp. 2d 82, 92-94 (D.D.C. 1998).

[12] *Id.* at 94. (citations omitted).

[13] *Id.*

[14] *Imperial Trading Co. v. Travelers Property Casualty Company of America.*, C.A. No. 06-4262, 2009 BL 186843, at *10 (E.D. La. July 24, 2009).

[15] *See, e.g., Trunnell v. Advance Stores Co.*, No. 1:11cv38-SPM/GRJ, 2012 BL 55738, at *2-3 (N.D. Fla. Feb. 28, 2012) (showing circumstances under which questioning was confusing to such a degree that an affidavit contrary to 30(b)(6) testimony was permitted); *State Farm Mutual Automobile Insurance Co. v. New Horizont Inc.*, 250 F.R.D. 203, 212-214 (E.D. Pa. 2008) (holding that corporation could point to thousands of documents that show a genuine issue of fact despite these documents contradicting 30(b)(6) testimony).

[16] *A.I. Credit Corp. v. Legion Insurance Co.*, 265 F.3d 630, 637 (7th Cir. 2001).

[17] *Id.* (citations omitted).

[18] *Id.* The Seventh Circuit relied on *Industrial Hard Chrome Ltd. v. Hetran Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000), and *United States v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996) to reach this conclusion.

[19] *Cuff v. Trans States Holdings Inc.*, 816 F. Supp. 2d 556, 559 (N.D. Ill. 2011).

[20] *Diamond Triumph Auto Glass Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 722 n.17 (M.D. Pa. 2006).

[21] *State Farm Mutual Automobile Insurance Co. v. New Horizont Inc.*, 250 F.R.D. 203, 212-214 (E.D. Pa. 2008).

[22] *Id.* at 209-10.

[23] *Id. at* 212-214.

LW ISSN 0148-8139

gardless of when acquired, how weighty, and how meritorious the explanation of why it was not offered earlier.''[24] The court held that applying 30(b)(6) in this way would ''elevate'' the rule ''into an irrebuttable judicial admission'' and was inappropriate.[25] Rather, the court held that, ''[a]t best'' the unprepared 30(b)(6) witness shifted the burden to the plaintiff to articulate specific facts showing a genuine issue for trial.[26] The plaintiff satisfied this burden by pointing to thousands of pages of documents identified in its answers to interrogatories, establishing that there was in fact a genuine issue for trial.[27] The court did, however, impose monetary sanctions and require the plaintiff's designee to appear for a second 30(b)(6) deposition.[28]

30(b)(6) Testimony at Trial

A Corporation May Contradict Its 30(b)(6) Testimony, But the New Testimony Is Subject to Impeachment

A majority of courts—including the two circuit courts to have addressed the issue—hold that a corporation may contradict its 30(b)(6) testimony at trial, but that new testimony is subject to impeachment.[29]

The court's opinion in *R&B Appliance Parts v. Amama Co.* provides an example of this approach.[30] There, the corporate representative contradicted his Rule 30(b)(6) testimony at trial, and the opposing party argued that the corporation was strictly bound by the earlier deposition testimony.[31] The Eighth Circuit flatly rejected this view: ''Although Amana is certainly bound by Mr. Schnack's testimony, it is no more bound than any witness is by his or her prior deposition testimony.''[32] The Court reasoned:

> A witness is free to testify differently from the way he or she testified in a deposition, albeit at the risk of having his or her credibility impeached by introduction of the deposition. R & B seems to think that Amana is estopped from denying the truth of Mr. Schnack's deposition testimony. Even though we have not defined with precision when a party is estopped by a prior assertion advanced in litigation, we recognize that the purpose of such an estoppel is to protect ''the integrity of the judicial process.'' No threat to the integrity of the judicial process has been posed in this case, and Amana was thus free to assert at trial that the Distribution Agreement had not been terminated.[33]

This same thinking is reflected in recent decisions from district courts throughout the United States. Put simply, ''testimony furnished by a Rule 30(b)(6) witness does not preclude the introduction of other evidence that relates to the designee's testimony, inconsistent or not.''[34] The party offering the testimony is bound, in that it now faces impeachment through the statements it made at its Rule 30(b)(6) deposition.[35] This approach is consistent with the Federal Rules of Civil Procedure, which encourage parties to revise and update information throughout the discovery process.[36] It is similarly consistent with the Federal Rules of Evidence; like any other witness providing testimony, the corporation may be impeached, and since a party may impeach its own witness, the corporation can elicit testimony that impeaches itself.[37] The corporation ''will pay the price, if any, at trial for inconsistencies in the testimony of its 30(b)(6) witnesses.''[38]

In *Radian Asset Assurance Inc. v. College of Christian Brothers of New Mexico*, the district court expressly addressed whether the proper approach would be precluding contrary testimony at trial.[39] After examining authority on both sides, the court held that the ''weight of authority'' and ''wiser'' approach was to treat testimony under Rule 30(b)(6) no differently than any other testimony—meaning it could be contradicted at trial.[40]

Great American Insurance Company of New York v. Summit Exterior Works LLC, however, represents an expansive view of preclusion in the Rule 30(b)(6) context.[41] There, an expert witness was to provide testimony contrary to that of the corporation's 30(b)(6) witness.[42] While the court acknowledged that under Second Circuit precedent, deposition testimony operates as an evidentiary admission and not a judicial admission, it examined whether it should apply a strict or liberal construction of Rule 30(b)(6).[43] Ultimately, the court decided that the stricter construction was warranted, primarily because the corporation was a ''mom and pop'' operation and, thus, there was no one in a better position to bind it than one of its principals.[44]

A Corporation May Not Contradict Its 30(b)(6) Testimony In Situations Where Its Witness Was Unprepared

If a corporate party does not adequately prepare its 30(b)(6) deponent, it may be prevented at trial from presenting contrary evidence as a sanction.[45]

---

[24] *Id. at* 213.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id at* 219. This case should also illustrate the caution that practitioners must use in this area of the law. The court, while denying summary judgment, warned the plaintiff that it could be prevented at trial from presenting evidence contrary to its 30(b)(6) testimony in the future as a sanction.
[29] *AstenJohnson Inc. v. Columbia Casualty Co.*, 562 F.3d 213, 229 n.9 (3d Cir. 2009); *R&B Appliance Parts Inc. v. Amana Co.*, 258 F.3d 783, 786-87 (8th Cir. 2001); *Dow Corning Corp. v. Weather Shield Manufacturing Inc.*, No. 09-10429, 2011 BL 339129, at *4-5 (E.D. Mich. Sept. 29, 2011).
[30] *R&B Appliance*, 258 F.3d at 786-87.
[31] *Id.*
[32] *Id.*
[33] *Id.* (citations omitted).
[34] *Dow Corning Corp.*, 2011 BL 339129, at *5. *See also Taylor*, 166 F.R.D. at 362 n.6 (holding that if statement of corporate representative is altered it may be explored through cross-examination.)
[35] *Dow Corning Corp.*, 2011 BL 339129, at *5.
[36] *Id.*
[37] *Radian Asset Assurance Inc. v. College of Christian Brothers of New Mexico*, No. CIV 09-0885 JB/DJS, 2010 BL 275442, at *4 (D.N.M. Nov. 15, 2010).
[38] *Id.*
[39] *Id.* at *3.
[40] *Id.* at *4.
[41] *Great American Insurance Company of New York v. Summit Exterior Works LLC*, No. 3:10 CV 1669 (JGM), 2012 BL 34009, at *4 (D. Conn. Feb. 13, 2012).
[42] *Id.* at *2.
[43] *Id.* at *4.
[44] *Id.* at *5.
[45] *See, e.g., Kyoei Fire & Marine Insurance Co. v. M/V Maritime Antalya*, 248 F.R.D. 126, 152-53 (S.D.N.Y. 2007) (imposing a sanction precluding party from providing evidence on one issue as a sanction for not providing a prepared witness for a 30(b)(6) deposition that was tantamount to nonappearance); *Ierardi v. Lorillard Inc.*, Civ. A. No. 90-7049 (E.D. Pa.

Adrian Shipholding Inc. v. Lawndale Group S.A., a recent opinion from a magistrate judge within the U.S. District Court for the Southern District of New York, provides an example of the framework in which testimony from a corporation may be excluded under Fed. R. Civ. P. 37.[46] In that case, the defendant repeatedly failed to fully comply with document requests and initially did not produce its Rule 30(b)(6) witness to testify on the issue of personal jurisdiction.[47] When the defendant finally produced a Rule 30(b)(6) witness, that witness testified that he did not have knowledge sufficient to testify on various topics.[48] Plaintiffs moved for sanctions pursuant to Rule 37.[49] In analyzing this request, the court noted that if a party fails to comply with a court order to produce a witness under Rule 30(b)(6) it may be precluded from presenting contrary evidence or the facts as stated by the opposing side may be accepted as true.[50] The court reasoned that, ''[t]hese sanctions are particularly appropriate here inasmuch as Lawndale disobeyed the Court's order to supply a competent 30(b)(6) witness, thus completely hamstringing plaintiffs in their efforts to counter Lawndale's claims of lack of personal jurisdiction.''[51] Therefore, the court ultimately held that a sanction establishing the defendant's personal jurisdiction was ''just.''[52]

A case from the District of Connecticut is one of a significant number to have adopted this approach and precluded a change in trial testimony as a sanction for providing an unprepared 30(b)(6) witness.[53] There, while refusing to strike an affidavit because the issue had become moot, the district court noted that the corporate defendant would be precluded from presenting a set of facts inconsistent with its Rule 30(b)(6) testimony. ''The court does recognize that [defendant] did not provide a well-prepared witness for its 30(b)(6) witness and this witness will be bound by his deposition at trial and will not be allowed to enlarge his testimony at trial regarding information he professed not to know during his deposition.''[54]

Aug. 13, 1991) (''If the designee testifies that [defendant] does not know the answer to plaintiffs' questions, [defendant] will not be allowed effectively to change its answer by introducing evidence during trial'').

[46] *Adrian Shipholding Inc. v. Lawndale Group S.A.*, No. 08 Civ. 11124(HB)(GWG), 2012 BL 343132 (S.D.N.Y. Jan. 13, 2012).

[47] *Id* at *1-5.

[48] *Id.* at *5.

[49] *Id.* at *6.

[50] *Id*.

[51] *Id.*

[52] *Id.* at *8.

[53] *Newport Electronics Inc. v. Newport Corp.*, 157 F. Supp. 2d 202, 213 (D. Conn. 2001).

[54] *Id.*

  LW ISSN 0148-8139