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**DEPOSITIONS OF SENIOR OFFICERS  
by Ted Babbitt**

In some states, a Court created rule of procedure known as the “apex doctrine” provides that a party may not take the deposition of a senior corporate officer unless the deposing party can show that that officer has special knowledge of the facts at issue and that all other less burdensome avenues of obtaining the necessary information have been attempted. In the recent case of Citigroup v. Holtsberg, Case No. 4D05-1389 (Fla. 4<sup>th</sup> DCA, Dec. 21, 2005), the District Court, in a per curiam opinion, set forth the ground rules for taking those depositions.

In that case, which was a variant on a securities fraud case, the plaintiff sought to take Sanford I. Weill, Citigroup’s former chief executive officer and the present Chairman of its Board, and Charles O. Prince, Citigroup’s current CEOs’, depositions. The defendants moved for a protective order, invoking the apex doctrine and contending that Department of Agriculture and Consumer Services v. Broward County, 810 So. 2d 1056 (Fla. 1<sup>st</sup> DCA 2002), adopted that doctrine in Florida. In that case, the First District held that the head of a government agency should not be subjected to deposition over objection until the deposing party had exhausted other reasonable methods of obtaining discovery.

The defendants also relied upon Horne v. School Board of Miami-Dade County, 901 So. 2d 238 (Fla. 1<sup>st</sup> DCA 2005) in which the former Commissioner of Education’s deposition was sought. In both cases, either present or former state department heads were involved. The First District relied, at least in part, in its

decisions on the assumption that if government officials were subjected to these kinds of depositions, it could lead to discouraging people from accepting positions as public servants.

In Citigroup, supra, the Fourth District held that the consideration of discouraging people from accepting public positions did not apply to corporate heads. The Court further pointed out that even in states such as Texas which have adopted the so-called apex doctrine, motions seeking to invoke that doctrine are required to be accompanied by the corporate official's affidavit denying any personal knowledge of relevant facts. In the Florida Bar Journal, Adam M. Moskowitz, "Deposing 'Apex' Officials in Florida: Shooting Straight for the Top," 72 Florida Bar Journal 10 (Dec. 1998), Mr. Moskowitz concludes that before a motion for protective order can be filed on the basis of this doctrine, an affidavit alleging lack of knowledge must also be filed.

The Fourth District concluded that Florida has not adopted the apex doctrine and that only the Supreme Court could adopt such a doctrine because it would arguably conflict with the liberal discovery rules of Florida.

Florida's discovery rules do not contain a requirement that a party must show that a high level officer has unique or superior knowledge before the officer can be deposed. Fla. R. Civ. P. 1.280(b)(1) (allowing a party to discover any matter that is not privileged and is relevant to the subject matter of the pending action or appears reasonably calculated to lead to the discovery of admissible evidence).

The Fourth District drew a distinction between the above-cited Department of Agriculture and Horne cases because they do arise in a governmental context

where there are policy considerations involving discouraging people from seeking public office. The Court further concluded that even if the apex doctrine were held by the Supreme Court to apply in Florida, the defendants would have to file an affidavit showing that the company officials had no knowledge of any relevant facts and that the burden would be on the defendants to establish that before a protective order could be issued. In this particular case since the corporation's involvement in what was alleged to be a fraudulent scheme was at issue, the Court concluded that that could only be established through persons who could testify to that corporation's intent. Those persons most likely would be the senior officers, the very persons sought to be deposed. Quoting from the above-cited Florida Bar Journal article, the Court concluded:

“[C]ourts should not hesitate to deny protection if it appears that the apex official has personal knowledge of the relevant claims at issue or if the motivations behind corporate actions are at issue.” Moskowitz, *supra* note 1, at 12.

In Florida, the Rules of Procedure provide that any person may be subjected to deposition without prior leave of court. This case stands for the proposition that the “apex doctrine” does not prohibit the taking of a corporate officer or director in Florida and that the burden of establishing lack of relevant knowledge rests with the proposed deponent.

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