



## AUTOMOTIVE ALERT: MICHIGAN APPELLATE COURT ADOPTS “APEX” RULE TO LIMIT SENIOR EXECUTIVE DEPOSITIONS

A Michigan Court of Appeals just adopted the so-called “apex” deposition rule in *Alberto v. Toyota Motor Corp.* See \_\_\_\_ N.W.2d \_\_\_\_, 2010 WL 3057755 (Mich. Ct. App. Aug. 5, 2010). Toyota Motors Sales, USA, Inc. was granted leave to appeal the trial court’s order that denied its motion for a protective order to quash the deposition of Toyota’s Chairman and Chief Executive Officer and President and Chief Operating Officer in a lawsuit where the plaintiff claimed that a an alleged Toyota acceleration defect caused an accident.

Although the court found that Michigan “has a broad discovery policy that permits the discovery of any matter that is not privileged and that is relevant to the pending case,” Michigan’s rules also place reasonable limits on discovery. The court found that “the application of the apex deposition rule in the public and private corporate context is consistent with Michigan’s broad policy ... and with Michigan’s

court rules, which allow a trial court to control the timing and sequence of discovery for the convenience of the parties and witnesses and in the interests of justice, and to enter protective orders for good cause shown[.]” (Internal citations and quotations omitted). The majority opinion explained that courts have adopted the apex deposition rule recognizing “that the highest positions within a juridical entity rarely have the specialized and specific first-hand knowledge of matters at every level of a complex organization....”

The court explained that while no court has applied the apex deposition rule to hold that a high-ranking officer cannot be deposed under any circumstances, courts apply the rule “to ensure that discovery is conducted in an efficient manner and that other methods of discovery have been attempted before the deposition of an apex officer is conducted.” The court stated:

[T]hose cases adopting the apex deposition rule in the corporate context do not shift the burden of proof, but merely require the party seeking discovery to demonstrate that the proposed deponent has unique personal knowledge of the subject matter of the litigation and that other methods of discovery have not produced the desired information only after the party opposing discovery has moved for a protective order and has made a showing regarding the lack of the proposed deponent's personal knowledge and that other discovery methods could produce the required information. In other words, after the party opposing the deposition demonstrates by affidavit or other testimony that the proposed deponent lacks personal knowledge or unique or superior information relevant to the claims in issue, then the party seeking the deposition of the high-ranking corporate or public official must demonstrate that the relevant information cannot be obtained absent the disputed deposition.

(Emphasis and internal citation omitted.) The court found that the proposed deponents "had only generalized knowledge" of alleged acceleration problems "but had no unique or superior knowledge of or role in designing the subject vehicle or implementing manufacturing or testing processes," and ruled that the trial court abused its discretion by denying the motion for a protective order to quash the depositions.

One appellate judge dissented from the majority opinion, contending that there is no public interest in the management and operation of private corporations and that existing discovery rules provide adequate protection of senior officers. The dissent also pointed to other public statements to support the trial court's decision.

The *Alberto* decision is helpful for in-house legal teams who try to ensure that senior executives are not distracted by unnecessary depositions until other methods of discovery have been exhausted or other conditions are met. Given the dissent's interpretation of certain statements, the case also serves as a reminder that public statements by executives can potentially affect the scope of discovery in subsequent litigation, depending on the specific circumstances and applicable discovery rules.

## LAWYER CONTACTS

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