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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Discovery Verifications May Bring Corporate Punitive Damages

Law360, New York (August 29, 2013, 1:22 PM ET) -- Litigators defending corporations against punitive damages claims based on employee misconduct should be cautious when permitting employees to execute discovery verifications as an "officer," "director" or "managing agent" because they may be held to have sufficient authority to ratify employee conduct for purposes of imposing punitive damages against the corporate employer.

Under California law, punitive damages may be assessed against a corporate defendant for the acts of a corporate employee only if an "officer, director or managing agent" authorized or ratified the misconduct:

An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

Cal. Civ. Code § 3294(b).

Section 3294(b) is often at issue in cases where a corporate employee or supervisor is alleged to have committed an intentional tort, such as sexual harassment, and the plaintiff seeks to hold the corporation responsible for punitive damages.

The policy rationale behind § 3294(b) is to limit corporate liability to those employees who exercise sufficient authority such that it is fair to bind the corporation based on their knowledge or conduct. As the California Supreme Court explained in White v. Ultramar Inc., 21 Cal.4th 563, 572-73, 576 (1999), the statutory limitation to officers, directors or managing agents ensures that punitive damages are only imposed for conduct committed by the specific "employees who in fact exercise substantial authority over decisions that ultimately determine corporate policy." Therefore, in cases involving § 3294(b), the determination of who is an "officer," "director" or "managing agent" of the corporation can become a critical issue.

Some plaintiffs have argued that the requirements for § 3294(b) can be satisfied when a managerial employee with knowledge of the allegations also verifies discovery responses as an "officer" or "agent" of the company. California Code of Civil Procedure provides that only an "officer" or "agent" may verify

a private corporation's responses to interrogatories, requests for admissions, or requests for production of documents. Cal. Code of Civ. Proc. §§ 2030.250(b), 2031.250(b), 2033.240(b).

Case law suggests that an agent must be one with an ongoing relationship with the organization, but nothing indicates that the agent must also be a "managing agent" as that term is used in the context of § 3294(b). Melendrez v. Superior Court 215 Cal.App.4th 1343, 1351 (2013) (holding that "attorneys are agents who can verify its discovery responses"); Mowry v. Superior Court, 202 Cal.App.2d 229 (1962) (use of the term "agent" should not include a person whose only relationship to entity sued was as an expert witness who was subsequently fired), disapproved of on other grounds by, San Diego Professional Ass'n v. Superior Court of San Diego County, 58 Cal. 2d 194 (1962). There is virtually no case law, however, addressing whether signing a discovery verification page using the term "officer" alone is sufficient to invoke liability as an "officer" under § 3294(b).

The issue did arise in Fotiades v. Hi-Tech Auto Collision Painting Servs. Inc. (Cal. Ct. App. Oct. 17, 2001), an unpublished decision in which the California Court of Appeal found that an employee who had signed a discovery verification page as an "officer" was an "officer" for purposes of § 3294(b). In that case, an employee sued his employer, Hi-Tech Collision Painting Services Inc., after his store manager and assistant manager broke into the store bathroom to take a photo of the employee urinating and later circulated the photo among his fellow employees.

The employee maintained that a more senior manager, Frank Franciscus, had known about the photo and encouraged the misconduct. Franciscus was an operations manager for Hi-Tech's corporate office and was responsible for supervising all store managers. A jury awarded the employee $1 million in compensatory damages and $500,000 in punitive damages against Hi-Tech, which the trial court subsequently reduced to $350,000 and $150,000, respectively.

On appeal, Hi-Tech argued that there was insufficient evidence to support liability for punitive damages under § 3294(b). The court agreed as to the store manager and assistant manager, holding that nothing demonstrated that either of these managers "exercised substantial discretionary authority over corporate policy," as is required by California Supreme Court precedent to deem them "managing agents" under the statute.

The Court of Appeal disagreed, however, as to Franciscus, the operations manager, concluding that he was an "officer" within the meaning of § 3294(b) because "he admitted that he had signed a verification, under penalty of perjury, stating that he was an officer." Franciscus also "admitted that signing the verification meant that he was an officer." Although the court ultimately found that there was not a sufficient evidentiary basis to prove that Franciscus or any other Hi-Tech representative ratified the outrageous conduct, the court did find that Franciscus's representing himself as an "officer" on the discovery verification page was sufficient evidence to invoke the threshold issue of liability under § 3294(b).

The Fotiades court did not elaborate on whether Franciscus had authority to determine Hi-Tech's corporate policy. Nor did it analyze the strong policy behind limiting corporate liability to actions of a select group of corporate persons, as the Supreme Court addressed in White v. Ultramar Inc. Nevertheless, the potential liability that could have resulted in the case is worth noting even if the case cannot be cited for that proposition.

In a recent trial conducted by Greenberg Traurig's Los Angeles office, the plaintiff tried to advance a similar argument after failing to identify or send a trial subpoena for any high-level corporate officer, director or managing agent. Fortunately, the GT trial team, which was led by Mark Kemple and included Ashley Farrell and Adam Siegler from the Los Angeles office, obtained a complete defense verdict, thereby rendering this issue moot. Nevertheless, the case raised an important issue that litigators should bear in mind, particularly given the scarcity of case law on point.

Counsel representing corporate defendants in in matters involving potential liability for misconduct by employees should be cautious in having a corporate representative sign a discovery verification page as an “officer,” “director” or “managing agent” unless the verifying representative in fact holds those precise positions at the corporate level. Counsel should make sure to use the precise title of the verifying representative, such as “Customer Service Supervisor.” Counsel also should take care to distinguish between a “manager” and a “managing agent,” and to specify the nature of his or her corporate function. The same holds true for the use of the term “director,” which is often used in the sense of “director of customer operations” or similar job function, rather than a member of the corporate board of directors.

As a corollary, corporate personnel who verify discovery responses should also be prepared for deposition and trial with regard to the distinctions between their supervisorial or managerial duties and their ability to “exercise substantial authority over decisions that ultimately determine corporate policy.” One distinction that the GT trial team found useful was between “the field” and “corporate headquarters.” Even supervisors who were several levels up in the organization still viewed themselves as “field” supervisors and readily acknowledged that they “executed” corporate policy but did not make it.

In addition, large corporate employers are often the target of multiple lawsuits, in some cases by the same plaintiff or the same plaintiff’s firm. Therefore, admissions in one case that an employee is an “officer” could potentially be used as evidence against the company in another case.

Bottom line: identifying corporate personnel as an “officer,” “director” or “managing agent” for any purpose, including discovery, can have serious consequences in a punitive damages case where corporate ratification of employee misconduct is at issue.

--By Mark D. Kemple, Adrienne J. Lawrence and Adam Siegler, Greenberg Traurig LLP

Mark Kemple is a shareholder, Adrienne Lawrence is an associate and Adam Siegler is of counsel in the firm's Los Angeles office.

Greenberg Traurig was involved in litigation discussed in this article.