17-CV-KKKK

FORD MOTOR COMPANY'S COMMENTS TO THE RULE 30(B)(6) SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES

July 31, 2017

Ford Motor Company ("Ford") appreciates the opportunity to submit its Comments to the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules (the "Subcommittee") in response to its Invitation for Comment on Possible Issues Regarding Rule 30(b)(6).

INTRODUCTION

Ford's comments draw on its extensive litigation experience, which has come both as a plaintiff and as a defendant. The types of lawsuits in which Ford has been involved include product liability, personal injury, employment, class actions, intellectual property, commercial disputes, and consumer claims. Over the past 20 years Ford has tried to verdict more than 1,000 cases.

Ford believes the discovery process should be balanced, fair and efficient. Litigation should seek to achieve a just outcome in a manner that is as speedy and inexpensive as possible. Discovery should involve the purposeful, reasonable and proportional search for information necessary to the claims and defenses in dispute. The legitimacy of discovery breaks down when used not for these purposes, but to run up an opponent's costs. These principles should apply to all forms of discovery, specifically including Rule 30(b)(6) depositions.

Because Ford both brings and defends lawsuits, Ford propounds Rule 30(b)(6) deposition notices and also responds to them. Ford has found that Rule 30(b)(6) depositions, when employed in a focused, reasonable and proportional manner, are an efficient and effective discovery tool. Unfortunately, in actual practice, Rule 30(b)(6) depositions often are not sought to uncover facts or understand the matters at issue, but are instead misused to pursue large numbers of vague or irrelevant topics. Other times, litigants notice Rule 30(b)(6) depositions deliberately to pursue off-topic questioning or to take advantage of the spontaneous nature of depositions to surprise the deponent and capture unprepared, awkward, or confused statements on the record.[1] Such abusive deposition practices fail the goals of Rules 1 and 26 and instead

[1] Ford notes with concern that some submissions to this Subcommittee seemingly tout the use of surprise tactics as a positive aspect of current Rule 30(b)(6) practice. *See, e.g.*, Comments of Jeremey Bordelon, July 18, 2017 ("the element of surprise can be important in discovery practice."); Comments of Michael J. Romano, July 19, 2017 ("While not telegraphing one's discovery strategy may not seem important to those who do not regularly try cases, it does shape the eventual completeness of an opponent's discovery responses."). A corporate representative cannot

amount to strategic bullying intended to disrupt the responding party's business and to cause the responding party to dedicate great resources so as to drive a settlement based on costs of discovery compliance rather than the merits of the parties' positions.

The current structure of Rule 30(b)(6) creates opportunity for such abuses. Case management tools such as Rule 26(f) reports and Rule 16 scheduling conferences generally do not take Rule 30(b)(6) depositions into consideration. This void leaves litigants to address these depositions late in discovery, without court guidance or established boundaries. Moreover, because there are no limits on the number of Rule 30(b)(6) topics a party may designate, some litigants demand testimony on dozens or even hundreds of topics. Rule 30(b)(6) also lacks an established method for objecting or obtaining court direction when disputes arise regarding the propriety of topics sought or positions taken, which undermines the productivity of the meet-and-confer process and leads to uncertainty and inefficiency compared to other discovery mechanisms.

Ford supports reform of Rule 30(b)(6) to address these structural weaknesses and operational flaws. Broadly stated, these reforms should include:

> (1) addressing Rule 30(b)(6) depositions in early case management activities leading to the case discovery plan, including the substance of the topics that will be sought, potential objections to any topics identified, topics that the parties agree will not be sought, the timing or staging of when the deposition will take place, allowing for supplementation as necessary, and limits on the number of deposition topics and the hours dedicated to the deposition;
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> (2) establishing a specific procedure for objecting to a Rule 30(b)(6) deposition notice;
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> (3) allowing a party to respond with a documentary or written submission where that party establishes that no additional relevant information is reasonably available to the company;
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> (4) precluding repetitive discovery where that issue has already undergone thorough exploration, or allocating costs accordingly if such redundant discovery is allowed; and
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> (5) eliminating contention questions in Rule 30(b)(6) depositions.

Ford believes these recommendations will lead to fewer disagreements between the parties, increase cooperation between the parties, avoid or mitigate against discovery motions, reduce the need for court resolution of disagreements arising during the course of depositions, and result in fewer post-deposition demands for sanctions. And most importantly, reforms such as these are essential to meet the directives of Rule 1.

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possibly speak for the company on the basis of the information known and reasonably available if the noticing party's true intent is to question the witness about topics not identified in the notice.

OVERVIEW OF FORD'S RECENT RULE 30(B)(6) EXPERIENCE

Ford's support for reform arises from its substantial involvement with Rule 30(b)(6) depositions over many years. To provide the Subcommittee with examples of Ford's experiences, Ford collected representative Rule 30(b)(6) deposition notices recently received in civil lawsuits, mainly involving product liability claims. From this sample of 52 notices, Ford shares these observations:

- The collected notices requested testimony from a Ford representative on a total of 1,151 individual topics, counting subparts. The cases in the sample averaged 31 topics requested per lawsuit, with as many as 129 topics sought in a single case.
- In 57% of the cases in the sample, the plaintiffs requested a corporate representative's testimony on 20 or more topics.
- In 24% of the cases in the sample, the plaintiffs designated 40 or more topics.
- In 8% of the cases in the sample, the plaintiffs served multiple Rule 30(b)(6) notices on Ford. In each instance, the combined notices set forth more than 50 total topics, and in two such cases the plaintiffs asked for testimony on more than 110 topics.

Notably, the number of Rule 30(b)(6) topics received in the average Ford product liability lawsuit exceeds the number of interrogatories generally allowed by Rule 33(a). And, of course, preparing a corporate representative to address dozens of topics requires devotion of considerably more resources than simply gathering documents or identifying the factual information that may be responsive to interrogatories. Witness preparation becomes particularly difficult and time-consuming when a notice propounds topics with vague terms or a sweeping scope, encompassing all vehicle lines, decades of products, and ranges of different design and production activities. Examples include topics such as:

- "The processes which Ford utilized (beginning in 1965 and continuing through 1985) in making design choices regarding generally the vehicles it produced and regarding specifically [the vehicle model at issue]. This topic includes, but is not limited to, the policies, procedures, individuals, and corporate divisions involved in the process."[2]
- "Defendant's use of and/or belief in the need for field performance data and/or research."[3]

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[2] Topic 2, Notice of July 30, 2014 in *Hinkemeyer v. Ford Motor Co.* (D.Minn.). This topic spans two decades of Ford's history and is not limited to any particular vehicle. It addresses literally thousands of people and hundreds of products, and the ensuing "processes" that purports to be the focus of this topic would have changed over time. Incorporation of the phrase "[t]his topic includes, but is not limited to" adds even more ambiguity to the scope of this topic.

[3] Topic 21, Notice of Feb. 3, 2017 in *Ruiz v. Ford Motor Co.* (E.D.Tex.). This topic includes no constraints whatsoever on time, vehicle models involved, or product performance at issue. Any use of "field performance data

- "Design, testing, DFMEA, validation, and verification process and release of any and all assembled transmission system(s) (including shift selector, PRNDL, linkages, and transmission) related to inadvertent rearward movement propensity for any Ford vehicle."[4]

Further, many topics received seek testimony on issues that are not germane to the allegations in the case, for example, where they pursue "discovery on discovery" even in the absence of any prior suggestion in the case that discoverable materials are missing or have been improperly withheld, or are aimed squarely at privileged or work product information or matters that will be the subject of expert testimony. This results in a significant detour from exploring the merits of the case and is typically unconstrained in the absence of an established objection procedure. Examples from Ford's sample include:

- "Ford's investigation, if any, into the injuries sustained by [the plaintiff].[5]
- "Ford's document preservation policies and practices from 2012 through the present, including, but not limited to, Ford's regularly followed document preservation policies and efforts to ensure the preservation of documents potentially relevant to this litigation."[6]
- "The retention, storage, and/or destruction of any documents requested to be provided in this lawsuit, and Defendant's policies from 1930 to the present with regard to retention, storage, and destruction of documents."[7]

FORD'S RECOMMENDATIONS FOR AMENDMENTS

1. Early Court Consideration of Rule 30(b)(6) Needs: Subjects, Staging, and Limits

Ford urges discussion of Rule 30(b)(6) depositions in early case management activities, including in the parties' Rule 26(f)(3) discovery plan and the Rule 26(c)(2) matters for consideration at the initial pretrial conference. Addressing Rule 30(b)(6) depositions during the development of the case's discovery plan, with input and direction from the court, will better establish appropriate expectations and frame the deposition needs of the case and allow the parties to vet their respective positions as to proposed areas of inquiry.

These early case management discussions, with the court's guidance as needed, should examine a number of specific issues pertaining to Rule 30(b)(6) depositions. First, the parties should discuss and identify the topics about which the requesting party is likely to seek

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and/or research" in the history of Ford Motor Company, pertaining to any model car or truck, for any purpose, would be at issue in a deposition on this topic.

[4] Topic 10, Notice of July 15, 2015 in *Wood v. Ford Motor Co.* (M.D.Fla.). All vehicles include transmission systems, so this topic applied to any vehicle model produced by Ford, at any point in the history of the company. The processes listed describe virtually every activity undertaken, from conception to completion, in developing a transmission system.

[5] Topic 1, Notice of July 15, 2016 in *Wood v Ford, et al* (M.D. Fla.).

[6] Topic 24, Notice of July 19, 2016 in *In re Ford Fusion and C-Max Fuel Economy Litigation.* (S.D.N.Y.).

[7] Topic 1, Notice of Apr. 26, 2016 in *Waite v.All Acquisition Corp. et al.* (S.D.Fla.).

testimony. Rule 30(b)(6) depositions require substantial advanced notice because the responding entity must select an individual to testify, identify and gather responsive information reasonably available to the company, and prepare the witness with this available corporate knowledge. To underscore, for most such depositions there is no ready-made witness set to testify—there is only an employee with some specific knowledge and experience that makes him or her the best candidate, but who has large areas of learning that must occur prior to the deposition to grasp the full span of available corporate knowledge. The burden and pressure on the employee witness is an important consideration that Ford urges the Subcommittee to keep "top of mind" in determining rules.

Early discussion of topics will also reduce delay and allow for more expedient preparation and cooperation, exploration of the necessary level of detail for a topic to meet the "reasonable particularity" standard, and opportunity for the parties to confer about whether other discovery mechanisms might provide the requested information more efficiently.[8] This process should also include the allowance for supplementation of 30(b)(6) testimony as necessary, because the facts and theories of the case often change throughout the lifecycle of the case and may cause the testimony to become stale or incomplete in light of later case developments.

Next, parties should be required to discuss the staging and timing of corporate representative depositions within the discovery period. Ford often receives no Rule 30(b)(6) deposition notices until shortly before the discovery deadline, resulting in a last-minute flurry of activity and sometimes disruption of the court's scheduling order. Rule 30(b)(6) depositions undertaken to learn certain core facts, obtain descriptions of key events, or identify individuals who participated in significant activities presumably should be conducted early within the discovery period. Rule 30(b)(6) depositions conducted later in the litigation lifecycle should focus on central disputes and issues not addressed by other discovery, rather than fundamental fact-finding.

Also, the court should establish a limit on the number of topics to be explored in Rule 30(b)(6) testimony. Although the discovery needs of every case will vary, only truly exceptional cases warrant more than a total of ten Rule 30(b)(6) topics. Establishing a presumptive limit of ten Rule 30(b)(6) topics and seven total hours of deposition time, caps that the court may alter if justified by good cause and the needs of the case, will bring Rule 30(b)(6) depositions in line with the general limitation on other depositions under Rule 30(a) and with the logic exercised

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[8] Some real-world examples of Rule 30(b)(6) topics that Ford could address thoroughly but more efficiently with a written response or targeted production of documents are:

- "The location of the Ford manufacturing facilities in which the 2011-2015 Ford Explorers were built." (Topic 14, Notice of Oct. 1, 2015, *Sanchez-Knutson v. Ford Motor Co.* (S.D.Fla.)).
- "The original sale of the subject vehicle." (Topic 61, Notice of July 2, 2015, *Chung v. Ford Motor Co.* (D.Haw.)).
- "Whether the [specified] recall already was underway by the time Plaintiffs filed their Complaint." (Topic 9, Notice of Apr. 3, 2015, *McDonald v. Ford Motor Co.* (N.D.Cal.)).

with other discovery mechanisms such as Rule 33 interrogatories, namely that reasonable numerical limits impose discipline in discovery and focus parties' attention on the issues central to the claims and defenses.

For current practice to change, Ford believes it will be necessary to add a specific directive for Rule 30(b)(6) discussion into the rules. Ford has sought to address Rule 30(b)(6) depositions during scheduling conferences, but generally courts respond by deferring the issue until deposition notices are served and disputes arise. If the rules do not require discussion of Rule 30(b)(6) depositions, many courts may not address the procedure in case management conferences and the parties will not engage in a serious dialogue.

Ford believes that these steps will improve Rule 30(b)(6) practice, but case management discussions alone will not adequately remedy the problems and abuses that currently occur in Rule 30(b)(6) practice. To make the procedure properly functional, Ford urges that the additional steps outlined below also be taken.

2. A Specified Objection Procedure

Rule 30(b)(6) currently does not specify how a responding party should raise objections to topics set forth in a deposition notice. Rule 30(b)(6) practice cries out for a clearly described objection process.

A party responding to an objectionable Rule 30(b)(6) deposition notice should not have to guess about the proper procedure for challenging the propriety of a topic, and should not face the prospect of sanctions for raising an objection in good faith. The lack of direction regarding Rule 30(b)(6) objections creates a procedural ambiguity that deepens disagreements between parties and has even led some courts to close themselves off to addressing objections until after the deposition has concluded.[9] Other discovery mechanisms that direct a corporate entity to scour its resources, such as Rule 34 requests for production or Rule 45 subpoenas, establish official procedures for objecting to such requests. Adopting a similar objection procedure for Rule 30(b)(6) deposition notices would end the current confusion (and motion practice) regarding the proper dispute-resolution procedure, reduce contentiousness, and enhance consistency across the federal courts.

Certain aspects of Rule 30(b)(6) depositions make an established objection procedure particularly important for the rule to function fairly. Unique to Rule 30(b)(6) is the mandate that a propounding party "describe with reasonable particularity the matters for examination." The failure of a noticing party to meet this requirement puts the responding party in the impossible position of having to prepare a witness to testify about responsive "information known or reasonably available to the organization" but with only an opaque notion of the questions that will be asked.[10] Examples drawn from Ford's recent notices show that topics noticed are

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[9] *See, e.g.*, note 20, *infra*.

[10] *See Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000)(citations omitted):

> An overbroad Rule 30(b)(6) notice subjects the noticed party to an impossible task. To avoid liability, the noticed party must designate persons knowledgeable in the areas of inquiry listed in the notice. Where, as here, the defendant cannot

sometimes astoundingly vague, seeking even to discuss theoretical concepts not tied to any vehicle model, time frame, product development activity, or component performance. Some specific instances include:

- "Ford's safety philosophy for its customers."[11]
- "What Ford considers to be the purpose of providing restraints for occupants involved in motor vehicle accidents."[12]
- "Discuss crashworthiness[.]"[13]

Although Ford can engage in the meet-and-confer process to seek a more concrete understanding of what the noticing party wants to address, Ford finds that propounding parties often do not want to focus the issues. When such astonishingly vague topics are designated and pursued, Ford can only guess at what will actually arise during the deposition.

Rule 30(b)(6) depositions are also subject to Rule 26(b)(1) proportionality considerations. Yet Ford routinely receives requests for depositions on topics that are vast in scope and have essentially no limits regarding time span, vehicle models at issue, or other constraints to focus the deposition:

- "Testimony and documents evidencing or relating to reports, meeting minutes, memoranda presentations and studies prepared by, for, or which involve the Automotive Safety Subcommittee and which discuss or otherwise refer to

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identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.

[11] Topic 6, Notice of October 20, 2015 in *Georg v. Ford Motor Co.* (M.D. Fla.). "[S]afety philosophy" is not a term of art and gives Ford no context for questions that might arise. It could relate to the design standards for any vehicle, or sub-system of a vehicle, at any time in the century-plus history of Ford. Or it could address notions completely divorced from vehicle design, such as warnings and instructions, driver training, or engineering research. Standing alone, "safety philosophy" does not provide sufficient definition to allow for a meaningful discussion.
[12] Topic 1, Notice of Oct. 30, 2015 in *Sexelman v. Ford Motor Co. et al.* (S.D.Tex.). "[R]estraints" can include a wide range of vehicle systems, including the various components that comprise the seat belts, airbags that deploy in different crash modes, and potentially trim pieces and vehicle structures. Each of these components and systems serves a different role in managing crash energy and protecting the occupant. The composition of each system may vary with vehicle model, occupant seating position, and year of production. In addition, some aspects of restraint systems are highly regulated and subject to detailed specifications regarding performance and equipment in Federal Motor Vehicle Safety Standards promulgated by the Department of Transportation. All of these considerations bear on a restraint's "purpose." Alternatively, if the simple inquiry is the purpose of seatbelts in general, that is likely not a subject necessitating 30(b)(6) testimony as this is common knowledge.
[13] Topic 47, Notice of April 13, 2017 in *Ruiz v. Ford Motor Co.* (E.D.Tex.). "Crashworthiness" describes the broad concept of how a vehicle and/or individual components of the vehicle perform in a crash. Numerous and different vehicle performance characteristics fall under the crashworthiness banner, and could include fuel system integrity, seat belt or airbag performance, energy management in impacts, and a host of others. Given the broad "crashworthiness" umbrella, this term could implicate countless components or systems in a vehicle. Also, advances in technology make the historical context of crashworthiness a factor in discussing crashworthiness. Invoking the term "crashworthiness" does not suffice to frame the issues to be addressed.

front seatbelt systems, corporate product performance objectives for front seatbelt or crashworthiness data." [14]

- "Ford's historical knowledge of safety belt buckle performance in rollovers."[15]
- "Performance specifications (and the design thereof) for your vehicles and any friction products used in your vehicles (such as but not limited to braking systems), including your involvement of any kind in such design specification and the history of all documents concerning same."[16]

Expansive topics like these would require Ford to investigate and prepare to address factual matters well beyond the central issues in dispute, which involves a particular vehicle or program. Such topics should face objections to ensure conformity to the allowed scope of discovery.

Rule 26(b)(1) also constrains Rule 30(b)(6) depositions to "matter[s] relevant to any party's claim or defense," but Ford often receives notices for irrelevant topics, including on "discovery on discovery" demanding testimony about Ford's document collection and records retention procedures. These subjects appear in Rule 30(b)(6) notices even when no dispute has arisen in the case contesting the sufficiency of production; in other words, they are intended to create traps and shift the focus of the litigation away from assessment of the merits onto discovery procedures and the possibility of sanctions. Some examples of such topics from Ford's sample include:

- "Ford Motor Company's document retention policies[.]"[17]
- "The systems, process and purpose for the creation, duplication and/or storage of the documents and/or electronically stored data related to the topics set forth herein[.]"[18]
- "The person or persons most knowledgeable to identify[,] discuss and describe Ford Motor Company's document collections."[19]

The lack of a recognized Rule 30(b)(6) objection procedure leaves responding parties adrift when confronting problematic deposition topics like those set out above. Certainly the

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[14] Topic 26, Notice of May 1, 2016 in *Easterling v. Ford Motor Co.* (N.D. Ala.). This topic provides no specificity on time frame, vehicle model or even vehicle type (e.g., car or truck), or crash mode. Further, as discussed in note 13, supra, "crashworthiness" is an incredibly broad topic that may encompass a broad range of vehicle systems and performance attributes.

[15] Topic 21, Notice of July 5, 2016 in *Brennan v. Ford Motor Co.* (D.N.M.). With no limitation on time, vehicle model or seat belt buckle model, this topic asks for every bit of information that Ford has received over a decades about the performance of seat belt buckles in any vehicle – whether its own or those made by competitors – in any rollover crash or any test that involves rollover crash conditions.

[16] Topic 10, Notice of Oct. 28, 2016 in *Fish v. Ford Motor Co. et al.* (D. Md.). This compound request sweeps together into one topic a request to discuss both the design and the performance aspects of the braking components for all Ford vehicles ever produced, of which there are hundreds. In addition, the topic seeks to explore the division of labor between Ford and component suppliers in determining those designs and performance characteristics and seeks testimony about any documents related to these issues that ever existed.

[17] Topic 3, Notice of Aug. 26, 2015 in *Lewis v. Ford Motor Co.* (E.D.Va.).

[18] Topic 2, Notice of Apr. 26, 2017 in *Silverhorse Racing, LLC. v. Ford Motor Co.* (M.D.Fla.).

[19] Topic 32, Notice of Dec. 13, 2016 in *Bolt v. Ford Motor Co.* (N.D.Ala).

meet-and-confer process remains available, but cooperation and compromise will not always yield a solution to disputes. To the contrary, Ford has observed that the lack of an established Rule 30(b)(6) objection process makes the meet-and-confer process less productive, as the party propounding a disputed topic seems to feel less concerned about possible court intervention.

If the meet-and-confer process does not resolve the dispute, a party with objections to a Rule 30(b)(6) notice faces a number of unpalatable options. Forcing the propounding party to bring a motion to compel, if unsuccessful, may result in an award of attorney's fees. Another possibility, a Rule 26(c) motion for protective order prior to the deposition, carries a very high burden of persuasion and some courts will not even consider such a motion in advance of a Rule 30(b)(6) deposition.[20] Alternatively, a responding party may proceed with the deposition and assert objections to individual questions posed to the witness at that time. Doing so may necessitate telephone calls to the court to obtain rulings in the middle of the deposition, certainly not a smooth or efficient process. And the uncertainty of an on-the-spot ruling creates the specter of sanctions if the objection is overruled and the witness must be re-deposed in the future because he or she did not prepare to provide an answer.[21]

3. Safe Harbor for Topics Seeking Knowledge Contained Only in Documents

A corporation should not be required to present a witness to testify if it establishes that it has no responsive information on a designated topic other than documents. For example, Ford often faces deposition topics seeking information so old that no person still employed with the company has any personal knowledge or prior participation with the issues. Rule 30(b)(6) in its current form nonetheless mandates that a party must prepare an individual who knows nothing about the topic to testify regarding any corporate knowledge that may be derived from documents retained from the era or transcripts of testimony from previous proceedings. Even flawless witness preparation adds no value when the preparation comes exclusively from reading the same old documents that the propounding party can read itself. Some instances of recent topics that Ford addressed include:

- "The efforts Ford made, at any time between 1965 and 1980, to influence the United States government and/or any of its branches and/or any of its regulatory bodies with regard to safety regulations generally and the rear impact requirements of FMVSS 301 in particular."[22]
- "The identity of manufacturers of genuine Ford replacement parts from January 1, 1955 – 1979, including brake assemblies and all component parts

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[20] *See, e.g., Salzbach v. Hartford Ins. Co.*, No. 8:12-CV-01645-T-MAP, 2013 WL 12098763, at *2 (M.D. Fla. Apr. 19, 2013) ("a protective order is not the appropriate remedy for deciding relevancy of a topic before a 30(b)(6) deposition."); *New World Network Ltd. v. M/V Norwegian Sea*, No. 05-22916-CIV, 2007 WL 1068124, at *4 (S.D.Fla. Apr. 6, 2007)("the proper operation of [Rule 30(b)(6)] does not require, and indeed does not justify, a process of objection and Court intervention prior to the schedule[d] deposition.").

[21] *See, e.g., Direct Gen. Ins. Co. v. Indian Harbor Ins. Co.*, No. 14-20050-CIV-Cooke/Torres, 2015 WL 12745536, at *2 (S.D.Fla. Jan. 29, 2015)("To the extent that the corporation's witnesses are not properly prepared on a relevant designated topic, Rule 37 sanctions would ordinarily follow.").

[22] Topic 3, Notice of Aug. 7, 2014 in *Hinkemeyer v. Ford Motor Co.* (D. Minn.).

thereof, clutch assembles and all component parts thereof, and automotive gaskets for automobiles and trucks."[23]

- "For each model year between 1950 and 1979 that Ford branded motor vehicles were sold, the identity, by year, of the brake specification(s) for each of your models by model and trim line, and the identity of all documents concerning same."[24]
- "Ford's knowledge and understanding (beginning in 1965 and continuing through 1995) of design features utilized in motor vehicles other than Ford Pintos which can affect fuel system integrity and/or the incidence of fuel fed fires."[25]

Where a party cannot present a witness with independent knowledge of a particular topic and documents contain all the information the party possesses about the issue, oral testimony of the corporate representative adds nothing that production of the documents does not provide. Preparation and presentation of a live witness only imposes unnecessary costs, burden and business disruption on the company. Further, it places the witness into an impossible situation – with no independent knowledge of the issues on which to draw, that person has no basis for reconciling perceived inconsistent positions that may appear in documents or for clarifying gaps in the record. Responding to the Rule 30(b)(6) request in writing and providing responsive documents where appropriate does not represent a failure to engage with the discovery process, as some courts have suggested. This practice should be allowed and the response treated like any other discovery in the case, including being subjected to discussion by experts and other witnesses.

The language proposed by Lawyers for Civil Justice offers a workable, efficient solution to this situation:

> An organization receiving a Rule 30(b)(6) deposition notice may respond to the notice, or individual topics contained therein, by providing a written response in lieu of presenting a witness if the responding entity certifies that the written response provides the responsive information reasonably available to the organization and no further information would be provided at a deposition. The written response may include a production of documents, tangible materials or electronically stored information.

Lawyers for Civil Justice Comments, July 7, 2017, at 9. Ford encourages the Subcommittee to adopt this proposed language.

4. Repetitive Discovery of the Same Issue

[23] Topic 28, Notice of Aug 26, 2015 in *Lewis v. Ford Motor Co.* (E.D.Va.).
[24] Topic 2, Notice of Oct. 28, 2016 in *Fish v. Ford Motor Co. et al.* (D. Md.).
[25] Topic 22, Notice of Aug. 7, 2014 in *Hinkemeyer v. Ford Motor Co.* (D. Minn.).

Once a party has undertaken the burden and expense to provide compliant Rule 30(b)(6) testimony on an issue, the product of that effort should represent a presumptively sufficient response to requests in other cases for testimony on the same topic. Ford, however, often sees essentially identical Rule 30(b)(6) topics propounded again and again, especially in copycat or pattern litigation. Requiring redundant Rule 30(b)(6) testimony in multiple cases serves no purpose except to increase the cost to the responding party and provide an opportunity for grandstanding by a questioning attorney.

In a situation in which a party propounds a Rule 30(b)(6) notice seeking testimony on a topic previously addressed in a different lawsuit, the responding party should be allowed to meet the Rule 30(b)(6) notice by producing the previous transcript and stipulating that it may be treated as if taken in the subject lawsuit. This represents a far more efficient procedure than repeating the same deposition, and is consistent with both Rule 1 and Rule 26's tenets of proportionality. If, after receiving this option, the propounding party insists on proceeding with another deposition to plow the same ground, a presumption should arise that the propounding party must cover the costs incurred by the producing party in conducting the redundant deposition. Alternatively, the propounding party could identify new areas of inquiry or aspects of the topic not previously addressed and proceed on those narrowed issues.

5. Prohibiting Contention Questions

The Subcommittee's Invitation for Comments asks whether contention questions should be forbidden in Rule 30(b)(6) depositions. Ford supports prohibiting that practice absent agreement by the parties. Ford observed in its sample of Rule 30(b)(6) deposition notices that contention questions addressing the company's affirmatives defenses or assessment of the claims constituted the single most commonly-raised topic. Some variant of the broad defense contention question appeared in many of the cases in Ford's sample.

- "The factual basis for all affirmative defenses asserted by the Defendant in this case, including any claims for apportionment of fault."[26]
- "Defendant's affirmative defenses."[27]
- "All facts that support each of Your affirmative defenses."[28]
- "Facts related to any of [Plaintiff's] claims or your defenses at issue in this action."[29]
- "Alteration [and] Misuse of the 2001 Ford Expedition that is the subject of this lawsuit. Comparative negligence by the vehicle owner or operator(s)."[30]

Rule 30(b)(6) topics seeking to explore legal theories or evaluate the application of facts to specific claims and defenses are particularly unsuitable for discussion during corporate

[26] Topic 24, Notice of Apr. 26, 2016 in *Waite v. Ford Motor Co.* (S.D.Fla.).
[27] Topic 11, Notice of Feb. 22, 2016 in *Bear River Mut. Ins. Co. v. Ford Motor Co.* (D. Utah).
[28] Topic 32, Notice of May 14, 2015 in *In Re MyFord Touch Consumer Litigation* (N.D.Cal.).
[29] Topic 7, Notice of Nov. 22, 2016 in *Moultrie v. Ford Motor Co.* (Bankr. N.D.Ala.).
[30] Topics 12 - 14, Notice of Mar. 20, 2017 in *Universal N. Amer. Ins. Co. v. Ford Motor Co.* (E.D.Cal.).

representative depositions. Describing the basis for a legal position typically necessitates input from the party's attorney on the precise elements involved and consideration of a range of evidence bearing on those requirements. Often those legal positions change over the lifespan of a lawsuit and do not become finalized until after the conclusion of discovery. And because the full panoply of material supporting claims or defenses may come from a spectrum of external sources, including expert witnesses from multiple disciplines, investigators, and eyewitnesses as well as corporate personnel, channeling all of the information describing the bases for claims or defenses through a representative witness at deposition presents a situation ripe for confusion and miscommunication. Depositions require immediate responses to spontaneous questions, without the benefit of attorney input or the opportunity to review the full range of evidence available. Contention questions posed during Rule 30(b)(6) depositions rarely produce useful discovery and instead amount to little more than gamesmanship seeking to generate awkward moments on videotape or rhetorical flourishes.

Other forms of discovery or pretrial disclosure provide better pathways for articulating the bases for claims and defenses. Interrogatory answers at the close of discovery allow for considered compilation of the pertinent evidence along with input on the legal aspects of the issues. Expert witnesses may assemble evidence from a range of sources and distill that information into technical conclusions. Also, statements inserted into a final pretrial order will summarize a party's positions.

CONCLUSION

Ford appreciates the Subcommittee's interest in examining Rule 30(b)(6) practice and considering whether the procedure should evolve since it was last substantively addressed in 1970. The revisions discussed above would, in Ford's view, further the aim of achieving a speedy, fair and efficient process. Ford thanks the Subcommittee for the opportunity to contribute its comments to the review process. Please do not hesitate to contact Ford should the Subcommittee have any questions regarding this comment letter or should Ford be able to provide further information or assistance.

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Beth A Rose
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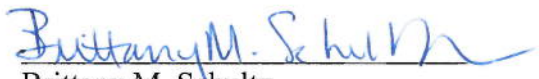

Brittany M. Schultz
Counsel