

In *In re Broiler Chicken Antitrust Litigation*, 2020 WL 3469166 (N.D. Ill. June 25, 2020), United States Magistrate Judge Jeffrey T. Gilbert 1) determined that in the wake of the COVID-19 pandemic, depositions would need to be taken by remote means in order to move the case forward and 2) discussed issues that should govern such remote depositions.

In this antitrust class action, the class and direct action plaintiffs sought to take depositions by remote means in accordance with Fed. R. Civ. P. 30(b)(4) amidst the COVID-19 pandemic. Defendants objected to being required to prepare or present their witnesses under the circumstances. Magistrate Judge Gilbert overruled these objections, finding them insufficient to prevent remote depositions given the legitimate reasons for the depositions and the available methods to remedy the possible obstacles. *Id.* at *1–*2.

Defendants raised a host of objections to the proposed remote depositions. They expressed concern for certain defendants who had health issues and might be especially vulnerable to COVID-19. The magistrate judge found that the threat of COVID-19 should inspire the parties to feel even more urgency to memorialize these witnesses' testimony. Furthermore, the remote depositions would allow more flexibility to accommodate the health issues of these individuals.

The defendants also argued that “essential employees” of entities in an industry denominated as essential to national security could not be spared during the pandemic. In addition, defendants claimed that individuals working from home and contending with related distractions should not be deposed at the present time under the present circumstances. The court observed, however, that “it is a rare witness who really wants to make time to be deposed or prepare for a deposition at any time.” *Id.* at *3. The court rejected both these claims, noting that plaintiffs had expressed a willingness to work with defendants on scheduling the depositions.

The defendants also raised concerns related to internet connectivity and the potential that some of the witnesses would be uncomfortable with the technology necessary to conduct remote depositions. Magistrate Judge Gilbert found the defendants had not taken the necessary steps to establish whether these were only notional concerns and had offered no solutions. He noted, for example, the parties could update some deponents' internet services, leaving long-lasting benefits for the deponents. Furthermore, the plaintiffs' protocol would not allow depositions to proceed if any involved individuals were having difficulty hearing or understanding any other participants. The possibility of technological challenges alone was not a reason to prevent the remote depositions from taking place. *Id.* at *2–*4.

As for the concern that the deponents would be unable to use the technology, the magistrate judge noted that the deponents were current or former high-level executives in large companies and would be able to deal with the technology used in a remote deposition. *Id.* at *3. Finally, the defendants argued that because travel was unsafe, they could not prepare witnesses in person, which, they argued, prejudiced their case. The magistrate judge clarified that he was not requiring that defendants not be in the same room as the witness. It was possible that safeguards could allow for in-person preparation if the defendants preferred. Furthermore, to the extent in-person preparation was not possible, remote preparation may be more difficult, but it would not be impossible. The magistrate judge refused to indefinitely stay all depositions pending a cure, vaccine, or herd immunity. “The parties and their counsel are going to have to have to adapt, make some choices, be creative, and compromise.” *Id.* at *5.

“Courts are beginning to recognize that a ‘new normal’ has taken hold throughout the country in the wake of the Covid-19 pandemic that may necessitate the taking of remote depositions unless litigation is going to come to an indefinite halt until there is a cure or a vaccine.” Id. at *5. He indicated that Rule 30(b)(4) requires that leave be liberally granted to hold remote depositions and does not require good cause to do so but instead involves a careful weighing of the proponent’s reasons for seeking a remote deposition and the claims of prejudice and hardship set forth by the opposing party. Id. at *5–*6.

Magistrate Judge Gilbert agreed with the plaintiffs that “these depositions will need to be taken at some point so they should start down that path now.” Id. at *8. The matter had already experienced several delays, including a yearlong stay while the Department of Justice conducted a parallel investigation. Furthermore, the court had already limited the plaintiffs’ ability to take unnecessary depositions by limiting the total number of depositions the plaintiffs could take. Finally, contrary to the defendants’ position, there was no indication from health experts that the situation presented by COVID-19 would be materially different in the coming months. Id. at *7–*8.

Magistrate Judge Gilbert agreed that certain rules should govern the remote depositions. He stated that a protocol agreed by the parties was appropriate and had observations on various issues raised by the parties:

The parties should consider any deponent’s designation as an “essential employee” in responding to the COVID-19 pandemic in deciding whether such person should have an in-person or remote deposition.

A videotape of a deponent to be used at trial does not need to show both the witness and his or her lawyer.

Counsel wanting to use electronic exhibits with a remote witness should provide hard copies of the exhibits (or in the form requested by the witness and counsel) prior to the deposition, with instructions that the exhibits should not be reviewed by the deponent until the deposition starts. The deponent can be asked under oath if the deponent looked at the exhibits prior to the start of the deposition, and if provided in an envelope to the deponent, the envelope can be opened during the deposition on screen.

Plaintiffs and defendants should agree on the remote video deposition platform, with the court resolving any issue left unresolved by the parties.

Remote depositions may have to be conducted over portions of multiple deposition days to accommodate the needs of the deponent and deposition participants with respect to home, child or other responsibilities. Remote depositions may take longer than in-person depositions, and it may be necessary to extend the length of time provided for by the Federal Rules of Civil Procedure in the case of remote depositions and to consider how to account for time lost to technology glitches.

It would be preferable, if possible, to have the witness, the witness’s attorney, and the questioning attorney on the video screen at all times.

There should be no unrecorded or at least unnoted conversations between the witness and witness's counsel while on the record of a remote deposition.

An objection by one aligned party should be deemed an objection by all aligned parties at a remote deposition, a rule that Magistrate Judge Gilbert stated he would consider adopting for in-person depositions as well.

Magistrate Judge Gilbert set a date for a hearing to address the remote deposition protocol.

Taking into account all the circumstances and argument by the parties, Magistrate Judge Gilbert ruled that the plaintiffs could move forward with the requested remote depositions. However, he made clear that this was not “a blanket ruling that the Covid-19 pandemic alone justifies the taking of remote depositions in all cases and under all circumstances.” *Id.* at *8. The court could address fact-specific difficulties as they arose. *Id.* at *9.