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**Insights**

# GEORGIA SUPREME COURT FINDS "APEX DOCTRINE" FACTORS ARE ENTITLED TO CONSIDERATION

Jun 13, 2022

The Supreme Court of Georgia recently issued a decision on whether the Apex Doctrine—a theory under which high-ranking corporate executives and government officials may not be compelled to sit for depositions if they lack any unique personal knowledge—applies in Georgia. While the Supreme Court refused to adopt the Apex Doctrine *per se*, the court did offer guidance on the factors trial courts should consider when ruling on a motion for a protective order for such depositions.

This decision, *General Motors, LLC v. Buchanan,* No. S21G1147, 2022 WL 1750716 (Ga. June 1, 2022), issued on June 1, 2022, provides multiple significant guideposts for litigants and non-parties engaged in discovery in Georgia.

The Supreme Court's examination of the Apex Doctrine was a matter of first impression and is particularly noteworthy. While the Supreme Court did not adopt the Apex Doctrine in Georgia as that doctrine has been formulated elsewhere, the court held that certain factors must be considered in determining whether "good cause" exists for a protective order, including:

- the executive's high rank;
- the executive's lack of unique personal knowledge of relevant facts; and
- the availability of information from other sources.

**Protective Orders:**

Georgia's Civil Practice Act provides mechanisms for litigants and third parties to seek relief from discovery demands. These mechanisms include moving for a protective order under O.C.G.A. § 9-11-26(c). Under this provision, a trial court may, upon a showing of "good cause" by the moving party, "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including limiting or otherwise prohibiting the requested discovery.

**The Apex Doctrine:**

The Apex Doctrine is a legal principle followed by multiple states and federal courts nationwide. The doctrine provides a set of non-exhaustive factors to be used in determining whether "good cause" exists to prohibit or limit the deposition of a high-ranking corporate executive and government officials who lack unique, personal knowledge of facts relevant to the litigation.

Although case law varies slightly around the country, there is a general consensus on the four non-exhaustive factors trial courts should consider when parties dispute the propriety of a corporate or government official's deposition:

- whether the deponent is a sufficiently high-ranking executive considering his/her role and responsibilities within the organization;
- the extent to which the facts sought to be discovered in the deposition are properly discoverable;
- whether the executive has unique personal knowledge of relevant facts; and
- whether there are alternative means, including written discovery or depositions of other witnesses, by which the same facts may be discovered.

***General Motors v. Buchanan*** **Decision**:

The trial court and Georgia Court of Appeals had particularly rejected the suggestion that executives and high-ranking officials should enjoy any special protection from depositions.

The Georgia Supreme Court granted certiorari to consider: (1) "what factors should be considered by a trial court in ruling on a motion for a protective order . . . that seeks to prevent the deposition of a high-ranking [corporate] officer"; and (2) "the appropriate burden of proof as to those factors."

In reversing the Court of Appeals' decision to uphold the trial court's order denying the motion for protective order, the court first emphasized "the overarching dictates" of Section 9-11-26(c), which permits protective orders only when "one or more of the statutorily enumerated harms [is] established through a specific demonstration of fact . . . ." The Supreme Court held that the burden to establish these harms falls solely upon the moving party and not the party seeking the deposition.

The Supreme Court held that a party may raise certain Apex factors in support of a motion for protective order, and if properly presented by the movant, the trial court must consider those factors in assessing whether one of the enumerated harms has been shown. Stated another way, trial courts must consider these factors in determining whether "good cause" exists for the protective order. The factors include:

- the executive's high rank;

- the executive's lack of unique personal knowledge of relevant facts; and
- the availability of information from other sources.

Further, the Supreme Court rejected the trial court's holding that the moving party must show "evidence of bad faith or purpose of harassment" on the part of the party seeking discovery in order to obtain a protective order. The Supreme Court found this interpretation of the Civil Practice Act to have no basis in the text of Section 9-11-26(c) and overruled a number of cases that had suggested as much.

**Potential Impact on Future Litigation**:

The *Buchannan* decision has significant impacts for the business community litigating in state courts around Georgia. Aside from the guidance this decision provides for the factors to be considered in moving for a protective order to shield corporate executives from depositions, the opinion offers other noteworthy findings:

- The Supreme Court reiterated that the scope of discovery under the Civil Practice Act and Georgia's state court rules is broader than that provided by the federal rules.
- The Supreme Court confirmed that the trial court has broad discretion in deciding whether to grant a protective order, but this discretion "requires the trial court to actually consider the evidence and arguments presented" in exercising that discretion.
- The Supreme Court found that a motion may still be denied within the trial court's discretion even when the proposed deponent "has no unique personal knowledge, and the discoverable information is available through other means." The Supreme Court determined the opposite is also true. "[T]he absence of factors commonly associated with the [A]pex [D]octrine does not mean that a protective order for a high-ranking official's deposition cannot be granted if other factors presented show good cause for such a conclusion . . . ."

The Supreme Court's full opinion is available here.

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