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Georgia Supreme Court Declines to Adopt Apex Doctrine But Offers Some Protection to High-Ranking Executives

by Paul Alessio Mezzina and Billie Pritchard

The Georgia Supreme Court recently issued a landmark opinion addressing factors Georgia courts must consider when assessing motions to forbid or limit depositions of high-ranking corporate officials. *General Motors, LLC v. Buchanan*, No. S21G1147, 2022 WL 1750716 (Ga. June 1, 2022). While the court declined to adopt the so-called "apex doctrine," it nonetheless held that trial courts must consider the factors underlying that doctrine when a party raises them. The decision merits careful attention from corporations appearing in Georgia courts, and it bears lessons for parties litigating similar issues elsewhere.

The *Buchanan* decision arose from a product-liability suit in which the plaintiff alleged that a defect in a GM vehicle caused his wife's fatal car accident. The plaintiff sought to depose GM's CEO, Mary Barra, based on her general knowledge of company policies and her public statements about GM's commitment to safety. In response, GM filed a motion for a protective order to prevent the deposition. GM's brought the motion under OCGA § 9-11-26(c), which provides that "for good cause shown," a trial court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

GM urged the trial court to apply the apex doctrine, a framework that many courts use when evaluating requests to depose high-ranking corporate officers and government officials. Courts applying the apex doctrine typically emphasize four factors: (1) whether the deponent is "sufficiently high-ranking," (2) whether she has knowledge relevant to the case, (3) whether that knowledge is "personal and unique or superior" to that of other employees, and (4) whether the information sought is available through "less intrusive means." 2022 WL 1750716, at *4–6. Consistent with that framework, GM argued that Ms. Barra had no unique or superior personal knowledge concerning the alleged defect, and the plaintiff could obtain the information sought by deposing lower-level employees.

The trial court denied GM's motion, ruling that Georgia law did not incorporate the apex doctrine. The court of appeals granted GM's application for interlocutory review and affirmed. The appellate court held that the apex doctrine was contrary to Georgia's liberal discovery rules and that, while a trial court exercising discretion under those rules was free to consider the apex factors, it was not required to do so. In a concurring opinion, Presiding Judge Dillard voiced concern about the potential for discovery abuses to negatively impact business in the state. Still, he declared that only the legislature or the state supreme court could adopt the apex doctrine.

The Georgia Supreme Court granted GM's petition for certiorari. In an 8-0 opinion authored by Justice Charles J. Bethel, the court declined to adopt the apex doctrine. While acknowledging that "many cases from other jurisdictions" apply some version of the apex doctrine, the court held that the doctrine is inconsistent with Georgia law insofar as it "shifts the burden to the party seeking discovery" and "restricts the trial court's discretion by placing a thumb on the scale" in favor of corporate executives. *Id.* at *7. The court thus held

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that OCGA § 9-11-26(c), not any separate framework, must govern the "good cause" analysis.

Nonetheless, the court did not entirely reject the concerns underlying the apex doctrine. Instead, it held that in weighing good cause, trial courts *must* consider the traditional apex factors—including the deponent's "scheduling demands or responsibilities and lack of relevant or unique personal knowledge that is not available from other sources"—if raised and supported by the party seeking a protective order. *Id.* at *8. It also held that trial courts should consider "decisions applying those factors," *id.*, suggesting that apex-doctrine case law from other jurisdictions may be cited as persuasive authority. Because the trial court's order did not indicate that it considered the substantive merits of GM's arguments based on the apex factors, the Supreme Court directed the court of appeals to vacate the trial court's order and remand the case for reconsideration.

The *Buchanan* opinion contains mixed news for corporate litigants in Georgia, as it both rejects the apex doctrine and affirms the relevance of the factors that courts applying the doctrine typically consider. The opinion emphasizes the "wide discretion" of trial courts. *Id.* at *4. But by holding that trial courts must give meaningful consideration to the apex factors, *Buchanan* also suggests it could be an abuse of discretion for a court to deny protection in a case where the party resisting discovery makes a strong showing on those factors and the party seeking discovery fails to rebut that showing. *Cf. State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607–09 (Mo. 2002) (declining to adopt apex doctrine, but holding that trial court abused its discretion by not issuing protective order against depositions of certain top-level officers). This was essentially the position taken by the Georgia Attorney General, who argued as an *amicus* in *Buchanan* that whether or not the court adopted the "apex doctrine," generally applicable discovery rules would preclude unnecessary depositions of high-ranking corporate officers. It remains to be seen how much weight Georgia trial courts will give these considerations and how rigorously appellate courts will review those orders.

Regardless, *Buchanan* underscores that a party resisting a deposition of a high-ranking executive in Georgia should not rely on generalized assertions about the executive's knowledge or responsibilities. Rather, the party should provide as much specific factual support as possible to show that deposing the executive would present an undue burden. This may include detailing the witness's schedule and responsibilities, explaining how preparing and appearing for the deposition would interfere with those responsibilities, and spelling out why the same or better information is available from other witnesses. *See* 2022 WL 1750716 at *7 (a protective order must be justified "through a specific demonstration of fact, as opposed to stereotyped and conclusory statements"). Indeed, making this kind of detailed factual showing is a best practice even in jurisdictions that apply the apex doctrine. The party may also wish to consider proposing alternatives short of barring the deposition, such as limiting its length or scope, requiring it to be conducted remotely or in a convenient location, or ordering the depositions of lower-ranking employees to proceed first.

Finally, practitioners may look to the *Buchanan* decision as a model for urging courts in other jurisdictions to give meaningful consideration to the concerns motivating the apex doctrine, even if those courts are unwilling to formally adopt the doctrine. While courts have disagreed about the need for a special framework to regulate depositions of high-ranking executives, nearly every court that has addressed the subject has recognized that such depositions involve tremendous potential for harassment and abuse. *Buchanan* raises the prospect that trial courts may be able to accommodate those concerns even without the formal structures of the apex doctrine. If that hope proves unfounded, legislative action may be required so that apex depositions are not used to coerce settlement of meritless cases.

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