



The Ongoing Debate Over the Apex Doctrine: New Developments in Georgia and Washington

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Over the last two years, courts and state legislatures have continued to grapple with the so-called “apex doctrine,” which forbids or limits depositions of high-ranking officers to curtail abusive discovery practices. In our last WLF *Legal Opinion Letter*, we discussed the Georgia Supreme Court’s landmark opinion declining to adopt the apex doctrine. *See Gen. Motors, LLC v. Buchanan*, 874 S.E.2d 52, 60 (Ga. 2022). This *Legal Opinion Letter* addresses new developments since *Buchanan*, both in the Georgia General Assembly and in the Washington Supreme Court. As discussed below, these developments add to the ongoing debate regarding the propriety of the apex doctrine—and underscore the reality that an officer cannot assume he or she will be spared the burden of participating in discovery.

Turning first to Georgia, the state legislature took immediate steps in the wake of *Buchanan* to codify the apex doctrine. In Senate Bill 74, signed by Governor Brian Kemp on May 1, 2023, the legislature amended the Georgia Civil Practice Act to include a new section on “Protective orders for certain high-ranking members of a governmental body or public or private entity.” O.C.G.A. § 9-11-26.1. Unlike other formulations of the apex doctrine, the statute does *not* shift the initial burden of proof to the party seeking discovery. Rather, as in the existing rule governing protective orders, O.C.G.A. § 9-11-26(c), the party resisting discovery still bears the burden of establishing that the court should forbid or limit discovery. *Id.* § 9-11-26.1(c). However, the statute expressly acknowledges that “[g]ood cause for a protective order to prevent the deposition of an officer may be shown by proof that such person is an officer and lacks unique personal knowledge of any matter that is relevant to the subject matter involved in the pending action.” *Id.* § 9-11-26.1(b). If that showing is made, the party seeking discovery may challenge it by demonstrating that the “party has exhausted other reasonable means of discovery and such discovery is inadequate” *and* the officer in question “has unique personal knowledge of one or more matters relevant to the subject matter involved in the pending action.” *Id.* § 9-11-26.1(d).

Although not a model of clarity, the statute appears to adopt a similar framework to the one that General Motors advanced in *Buchanan*, in which the party seeking a protective order could meet its initial burden of proof by demonstrating satisfaction of the apex factors. *See* 874 S.E.2d at 64–65 (General Motors “argues that this burden is met when it shows that the deponent is a high-ranking executive, that she has no unique personal knowledge that is properly discoverable, and that the discoverable information is available through other means. . . .”). Although the Georgia Supreme Court rejected that framework as impermissible burden-shifting, the Georgia General Assembly appears to have embraced that dynamic. Indeed, the statute is arguably even more favorable to corporate litigants, since the party resisting discovery only must establish two of the three factors

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General Motors outlined (*i.e.*, it does not have to show that the information is available through other means).

While the new statute thus appears to be a positive development for corporate litigants in Georgia, only time will tell how effective it is in actually limiting apex depositions and reining in trial courts' discretion. Trial courts will retain some discretion to tailor a protective order to "limit the scope of" an executive deposition "rather than prohibiting [it] altogether." O.C.G.A. § 9-11-26.1(e). Further, the language used in the statute raises additional questions about who will qualify to invoke the new protections. The statute defines an "officer" as "a current or former high-ranking officer of an organization with unique and extensive scheduling demands or responsibilities," and an "organization" as "any governmental organization, public or private, that is large and complex." *Id.* § 9-11-26.1(a) (1)-(2). It remains to be seen which officers the courts will deem "high-ranking," what "demands or responsibilities" they will consider "unique and extensive," and which organizations they will deem "large and complex." *See Buchanan*, 874 S.E.2d at 61 (noting lack of clarity surrounding "[w]hether an executive is considered sufficiently 'high-ranking'" to justify applying the apex doctrine).

In contrast to the developments in Georgia, the Washington Supreme Court took a firm stance against the apex doctrine in *Stratford v. Umpqua Bank*, 534 P.3d 1195 (Wash. 2023). The *Stratford* decision arose from an Umpqua Bank loan officer's referral of the plaintiffs to a builder who ultimately abandoned their home construction project. After successfully suing the builder, the plaintiffs sued Umpqua. They sought to depose three Umpqua executives (including Umpqua's CEO) based on their familiarity with, among other things, the company's compliance with its fiduciary duties and hiring policies. In response, Umpqua filed a motion for protective order, arguing that its apex officers had no personal knowledge as to the loan officer or the loan in question. The trial court denied the motion, citing Washington's "easy discovery rules" and Umpqua's failure to prove that the depositions would be unduly burdensome given plaintiffs' willingness to accommodate the executives' schedules and take depositions virtually. *Id.* at 1199.

On appeal, the Washington Supreme Court took up the question of whether the state should adopt the apex doctrine—and answered it with a resounding "no." Citing *Buchanan* (among other opinions), the court "decline[d] to adopt the doctrine because it improperly shifts the burden of proof in violation of our discovery rules and it undermines the right of access to courts." *Id.* at 1197. In reaching this decision, the court found that no Washington court had applied the apex doctrine and held that adopting it would amount to a judicial amendment of the Washington Civil Rules. The court also rejected Umpqua's argument that the apex doctrine has been widely adopted and, instead, detailed the doctrine's inconsistent application among state and federal courts—ranging from outright rejection to express burden-shifting.

While *Stratford* is unhelpful to corporate litigants, it doesn't change the status quo in Washington. The opinion does not foreclose a protective order preventing the deposition of a corporate officer, and it allows courts to consider the traditional "apex factors (personal knowledge and less intrusive means) when ruling on discovery requests for high-level officials." *Id.* at 1201-02. It simply requires a party seeking a protective order to make a specific showing as to why such an order is necessary under the existing rules of civil procedure. Ultimately, making that showing is the best practice in *every* jurisdiction, regardless of whether a state or federal court has adopted some iteration of the apex doctrine. Practitioners seeking to shield corporate officers should proffer robust evidence as to why a deposition would be unduly burdensome, duplicative, and cumulative. And if there is doubt as to whether that showing will be enough, practitioners should consider fallback options for limiting the burden on high-ranking officers, such as negotiating the scope or mode of the deposition.