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Fla. High Court Codifies the 'Apex Doctrine': Discovery Protection for Corporate Decision-Makers

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On Aug. 26, by a majority of 6–1, the Florida Supreme Court adopted, effective immediately, a new Florida Rule of Civil Procedure, codifying a long-recognized protection for high-level government officials and extending that protection, for the first time, to high-level corporate officers. See *In re Amendment to Florida Rule of Civil Procedure 1.280*, No. SC21-929 (Fla. 2021). This development should be a welcome one for companies that are or may in the future be engaged in litigation in Florida's state courts.

What has come to be known as the "apex doctrine" has been recognized in decisional law in Florida for at least 30 years, to protect present and former government department heads from being subject to discovery depositions over objection "unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources."

The underlying rationale is, on the one hand, protection against discovery abuse, and on the other hand, protection of senior government officials from unnecessary diversion from their official duties and the resulting impact on the efficient operation of state government. As applied, the doctrine places the burden on the party seeking to depose the high-ranking government official to demonstrate that all other means of discovery have been exhausted, and the official is uniquely capable of providing relevant information.

Although federal courts around the country have applied the doctrine, for the same reasons, for the protection of present and former high-level corporate officers, most states have not. As pointed out by lone dissenting Justice Jorge Labarga, only four other states have adopted the doctrine (California, Michigan, West Virginia and Texas); and of the 46 states (including Florida) that have not adopted it, at least five have expressly rejected the doctrine (Oklahoma, Missouri, Colorado, Connecticut and North Carolina).

In Florida state courts, however, there was still some historical inconsistency, with the Third District Court of Appeal opining that an insurance company would be irreparably harmed if the president were to be deposed in every insurance dispute merely because his signature appeared on every policy, although the court expressly stated that its holding was not intended as an adoption of the apex doctrine.

The issue of extending the apex doctrine in Florida came before the Supreme Court in 2019, in *Suzuki Motor v. Winckler*, in which the First District Court of Appeal had decided that the trial court did not depart from the essential requirements of the law by granting the plaintiff's application for a letter rogatory to depose Suzuki's chairman and former CEO, relying on Florida's limitation of the apex doctrine to high-ranking government officials. But the appellate court certified to the Supreme Court the question whether, in effect, that doctrine should be extended to senior corporate officers. The Supreme Court granted review. Although the August decision was technically issued as an original proceeding under the Supreme Court's constitutional rulemaking jurisdiction, rather than review on a certified question, *Suzuki* provided "the impetus for [the court's] decision to take up the apex doctrine now."

In its Aug. 26 opinion, the Florida Supreme Court opted formally both to adopt and codify the apex doctrine, and to extend the doctrine to high-ranking corporate officers, concluding that "the efficiency and anti-harassment principles animating that doctrine are equally compelling in the private sphere." While Florida's general discovery rule, in Rule 1.280, already has a provision in subdivision (c) for protective orders to protect deposition targets from "annoyance, embarrassment, oppression, or undue burden or expense," the court enacted a new subdivision (h), titled "apex doctrine," specifically to address protection for a "current or former high-level government or corporate officer."

Under the text of the new rule, the officer seeking to prevent the deposition must move for a protective order, with an affidavit or declaration explaining the officer's lack of "unique, personal knowledge of the issues being litigated." The court is then required to issue an order preventing the deposition, unless the noticing party demonstrates that: it has exhausted other discovery; such discovery was inadequate; and the officer has unique, personal knowledge of discoverable information.

It is clear that the officer's burden goes further than a mere denial of knowledge. The court explains that the officer's burden is to provide a specific explanation of the officer's lack of knowledge sufficient for the court to "evaluate the facial plausibility" of the assertion. It is only then that the burden shifts to the party seeking to take the deposition. Although dissenting Labarga believes that the new rule is unnecessary, because the relief it affords is already available under the general provision for a protective order under subdivision (c), the majority attempts to distinguish the two procedures. The court states that the new subdivision (h) is "an alternative" to subdivision (c), with

the latter subject solely to a “good cause” standard, while the newly enacted subdivision (h) imposes distinct “burdens of production and persuasion.” The court states that the high-level government or corporate deposition target who cannot meet the burden under subdivision (h) can still move under subdivision (c).

In the end, whether this is really a distinction with a difference will remain to be seen. However, the mere adoption of the new rule evidences a recognition that high-level corporate officers are entitled to special protection when appropriate, or at the least that the issue warrants specific scrutiny—something that should come as a positive development to companies finding themselves in discovery proceedings in Florida state courts.

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