

Florida Supreme Court Adopts and Codifies Apex Doctrine

August 26, 2021

In a somewhat surprising move, the Florida Supreme Court has just issued an opinion, on its own motion, “to codify the apex doctrine and to extend its protections to the private sphere.” *See In re Amendment to Florida Rule of Civil Procedure 1.280, No. SC21-929 (Aug. 26, 2021)*. Justice Muñiz authored the majority opinion, while Justice Labarga dissented. The issue initially came to the court on a certified question from the First District Court of Appeal but, after initially granting the petition to review the lower court’s decision, the court exercised its “discretion to discharge jurisdiction in the case.” Thus, the court wrote, it was now “[u]nconstrained by the limited scope of certiorari review” and, proceeding as a “rules case,” it was free to “determine whether to adopt the apex doctrine in the corporate context.” Florida appellate courts, “as a common law gloss on our rules of civil procedure,” have traditionally applied the apex doctrine to protect high-ranking government officials from the risk of abusive discovery. The Supreme Court, however, believed that “the efficiency and anti-harassment principles animating that doctrine are equally compelling in the private sphere” but stressed that the doctrine “in no way creates a blanket prohibition on the taking of a deposition of a high-ranking corporate official.” Instead, the “point of the apex doctrine is to balance the competing goals of limiting potential discovery abuse and ensuring litigants’ access to necessary information.” The majority opinion explained some aspects of the rule. First, it applies to a “current or former high-level government or corporate officer.” The court declined to define what a “high-level” officer is, and noted that when a person’s “high-level” status “is disputed, the burden is on the person or party resisting the deposition to persuade the court that this requirement is satisfied.” The court did provide some guidance, however, as to how courts are to interpret that term. The court also explained that whether the person claiming the protections of the rule is a government or corporate official, an “affidavit or declaration is essential to the proper functioning of the rule in both contexts,” and so it “made the requirement explicit in the rule.” The court emphasized “the rule’s requirement that the officer ‘explain’ that he or she lacks unique, personal knowledge of the issues being litigated. Bald assertions of ignorance will not do.” As to the shifting burden on litigants, the court explained:

[T]he person or party resisting a deposition has two burdens: a burden to persuade the court that the would-be deponent meets the high-level officer requirement, and a burden to produce an affidavit or declaration explaining the official’s lack of unique, personal knowledge of the issues being litigated. If the resisting person or party satisfies those burdens, and the deposition-seeker

still wants to depose the high-level officer, the deposition-seeker bears the burden to persuade the court that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. Finally, the court explained that the new rule “stands on its own” and is “an alternative to rule 1.280(c) for use in the limited context of depositions of high-level government and corporate officers.” Thus, the new rule is not governed by the “good cause” standard of rule 1.280(c), and “it imposes burdens of production and persuasion that are distinct from the burdens at play in rule 1.280(c). Government and corporate officers who cannot meet the new rule’s requirements, or who choose not to try to, remain free to seek relief under rule 1.280(c).” Accordingly, the court added the following language to rule 1.280, governing general discovery:

(h) Apex Doctrine. A current or former high-level government or corporate officer may seek an order preventing the officer from being subject to a deposition. The motion, whether by a party or by the person of whom the deposition is sought, must be accompanied by an affidavit or declaration of the officer explaining that the officer lacks unique, personal knowledge of the issues being litigated. If the officer meets this burden of production, the court shall issue an order preventing the deposition, unless the party seeking the deposition demonstrates that it has exhausted other discovery, that such discovery is inadequate, and that the officer has unique, personal knowledge of discoverable information. The court may vacate or modify the order if, after additional discovery, the party seeking the deposition can meet its burden of persuasion under this rule. The burden to persuade the court that the officer is high-level for purposes of this rule lies with the person or party opposing the deposition.

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