

2023

SB 74 - Amendments Regarding Discovery and Advertising Legal Services

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COMMERCE AND TRADE

General Provisions Governing Discovery and Advertising Legal Services in Untrue, Fraudulent, Deceptive, or Misleading Manner: Amend Section 26 of Article 5 of Chapter 11 of Title 9 and Section 427 of Part 4 of Article 15 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated, Relating to Civil Practice, Commerce and Trade, Courts, State Government, and Torts, respectively, so as to Provide for Definitions; Change and Provide certain Provisions relating to Legal Proceedings and Legal Services; Provide for Protective Orders for certain High-Ranking Members of a Governmental Body or Public or Private Entity; Require the Disclosure of the Nature and Practices of Businesses that Provide Legal Services; Provide for Legislative Findings; Provide for Definitions; Prohibit Misrepresentations in Advertising and Media; Conform a Cross-Reference; Provide for Violations; Prohibit False Advertising related Legal Services; Prohibit Persons Ineligible to Provide Legal Services from Holding Themselves Out as Attorneys; Provide Liability for the Misrepresentation of the Practice of Law; Provide for Designees of State Government Entities for Service of Process for Civil Actions; Provide for Related Matters; Provide for an Effective Date and Applicability; Repeal Conflicting Laws; and for Other Purposes

CODE SECTIONS: O.C.G.A. §§ 9-11-26 (amended), -26.1 (new); 10-1-424.1 (new), -426, -427 (amended); 15-19-55 (amended); 50-21-35 (amended); 51-1-57 (new)

BILL NUMBER: SB 74

ACT NUMBER: 77

GEORGIA LAWS: 2023 Ga. Laws 248

SUMMARY:

The Act accomplishes three goals. First, the Act allows protective orders against the deposition of high-ranking organizational officers when the deposition is requested for the purpose of annoyance, embarrassment, oppression, or undue burden or expense. Officers must show good cause for such protective orders. Good cause may be shown if the officer lacks unique personal knowledge of any relevant matter. Second, the Act prohibits advertisements that misrepresent legal credentials to solicit legal services. The Act makes a violation of the applicable statute a misdemeanor. Third, the Act mandates certain government officers and directors to provide a designee for service of process on their website.

EFFECTIVE DATE:

May 1, 2023

History

A drive through Atlanta on any given highway provides views of the iconic skyline, the beautiful forest in which the city was built, and billboards of attorneys proclaiming their successes in hopes of generating clientele. Such solicitation of legal services has long been a point of contention in legal ethics.¹ Prior to the introduction of Senate Bill (SB) 74, the Eleventh Circuit held that restrictions on lawyers prohibiting any uninvited, in-person solicitation survive First Amendment commercial speech scrutiny.² While most lawyers agree that face-to-face solicitation of business is unethical, many have yet to cease the potentially problematic eye-catching advertising on

1. See Alexander Schwab, *In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3*, 29 YALE L. & POL'Y REV. 603, 606–13 (2011).

2. *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1337 (11th Cir. 1998).

television, radio, and billboards.³ Though making general claims about pricing and practice area are allowed, courts have held conduct such as purposely deceiving viewers about payment arrangements or holding oneself out as a specialist to constitute unethical advertising practices.⁴ Georgia courts have gone so far as to publicly reprimand lawyers who violate the Georgia Rules of Professional Conduct on such advertisements.⁵ Senator Blake Tillery (R-19th) saw a need for legislation that reflected the state common law practice to curb unethical advertising by attorneys.⁶

While Senator Tillery offered language regulating unethical legal advertising, Representative James Burchett (R-176th) worked to pass a House Bill regulating the unethical practice of law.⁷ Specifically, Senator Tillery introduced Georgia's iteration of the apex doctrine, which protects high-level, or "apex," executives from frivolous depositions.⁸ Georgia courts have applied a version of the apex doctrine for years without a state statute to rely on; therefore, the Act simply codifies what was already common practice in the Georgia business community.⁹ Large organizations, such as the United Parcel Service, support the codification of the apex doctrine because it "avoid[s] bogging executives down who don't have personal knowledge of the facts at hand and where they can get relevant

3. See Press Release, American Tort Reform Association, Georgia Lawyers Dump \$10 Million into TV Ads (Jan. 28, 2020), <https://www.atra.org/2020/01/28/georgia-lawyers-dump-10-million-tv-ads/> [<https://perma.cc/6H3S-FGDU>]; David Rothman, *How Lawyers' TV Ads Became a Billion-Dollar Industry*, CBS NEWS (Feb. 13, 2022, 10:16 AM), <https://www.cbsnews.com/news/lawyer-commercials-a-billion-dollar-industry/> [<https://perma.cc/5XBA-ML55>]; Andy Lewis, *Meet the Lawyers Behind Those Ambulance-Chasing Billboards Across L.A.*, L.A. MAG. (Aug. 17, 2021), <https://lamag.com/featured/personal-injury-lawyers-billboards> [<https://perma.cc/P3SZ-ZJB5>].

4. *Falanga*, 150 F.3d at 1346; *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383–84 (1977); *Zauderer v. Off. Disciplinary Couns.*, 471 U.S. 626, 650 (1985).

5. *In re Robbins*, 266 Ga. 681, 683, 469 S.E.2d 191, 193–94 (1996).

6. See Telephone Interview with Rep. James Burchett (R-176th) (May 19, 2023) [hereinafter Burchett Interview] (notes on file with Georgia State University Law Review).

7. See *id.*

8. Christopher M. Tauro & Kip J. Adams, *Use Apex Doctrine to Protect High-Level Corporate Execs from Unnecessary Depositions*, 22 WESTLAW J. PROF. LIABILITY 11, no. 8, 2013, at 1–2.

9. See *Gen. Motors, LLC v. Buchanan*, 313 Ga. 811, 817, 823, 874 S.E.2d 52, 61, 65 (2022) (clarifying that trial courts should apply the apex doctrine, and the party seeking a protective order against deposition bears the burden of showing good cause for the protective order); see also *Watts v. Parr*, No. 1:18-CV-079 (LAG), 2019 WL 13175550, at *2–3 (M.D. Ga. Oct. 24, 2019); *Cuyler v. Kroger Co.*, No. 1:14-CV-1287-WBH-AJB, 2014 WL 12547267, at *6 (N.D. Ga. Oct. 3, 2014).

information from other means.”¹⁰ When Representative Burchett’s original bill failed to pass in the House, the Judiciary Committee added the apex doctrine language to Senator Tillery’s legal advertising language.¹¹ Representative Burchett commented that the legislature aims to consolidate germane bills; thus, the twin goals of the Act—promoting efficient depositions and ethical advertising—meshed seamlessly.¹²

Bill Tracking of SB 74

Consideration and Passage by the Senate

Senator Blake Tillery (R-19th) sponsored SB 74 in the Georgia Senate with Senator Matt Brass (R-28th), Senator Bo Hatchett (R-50th), Senator Mike Dugan (R-30th), Senator Shawn Still (R-48th), Senator Billy Hickman (R-4th), Senator Chuck Payne (R-54th), Senator Frank Ginn (R-47th), Senator Clint Dixon (R-45th), Senator Steve Gooch (R-51st), Senator Colton Moore (R-53rd), Senator Randy Robertson (R-29th), Senator Shelly Echols (R-49th), Senator Russ Goodman (R-8th), Senator Marty Harbin (R-16th), and Senator John F. Kennedy (R-18th) cosponsoring.¹³ The bill entered the Senate hopper on February 1, 2023.¹⁴ The Senate read SB 74 for the first time on February 2, 2023, and referred the bill to the Senate Committee on Judiciary.¹⁵

10. *Georgia Senate Committee Advances Measure to Codify ‘Apex Doctrine’*, THE GA. VIRTUE (Mar. 3, 2023), [https://www.thegeorgiavirtue.com/georgia-legislature/georgia-senate-committee-advances-measure-to-codify-apex-doctrine/#:~:text=Georgia%20Senate%20committee%20advances%20measure%20to%20codify%20%27Apex%20Doctrine%27,-by%20The%20Georgia&text=\(The%20Center%20Square\)%20E2%80%94%20A,of%20the%20issue%20being%20litigated](https://www.thegeorgiavirtue.com/georgia-legislature/georgia-senate-committee-advances-measure-to-codify-apex-doctrine/#:~:text=Georgia%20Senate%20committee%20advances%20measure%20to%20codify%20%27Apex%20Doctrine%27,-by%20The%20Georgia&text=(The%20Center%20Square)%20E2%80%94%20A,of%20the%20issue%20being%20litigated) [https://perma.cc/MZ2V-DDEX].

11. See Burchett Interview, *supra* note 6.

12. *Id.*

13. Georgia General Assembly, SB 74, Bill Tracking [hereinafter SB 74, Bill Tracking], <https://www.legis.ga.gov/legislation/63931> [https://perma.cc/84G6-MF8P].

14. *Id.*

15. State of Georgia Final Composite Status Sheet, SB 74, May 9, 2023.

The Senate Committee on Judiciary favorably reported the bill by substitute on February 28, 2023.¹⁶ The substitute served only to cure a scrivener’s error, adding the word “by” on line 112.¹⁷

The Senate read SB 74 for the second time on March 1, 2023, and for the third time on March 6, 2023.¹⁸ Senator Brian Strickland (R-17th) proposed a floor amendment adding the word “it” to line 17, which the Senate adopted.¹⁹ The Senate adopted the bill by a vote of 54 to 1.²⁰

Consideration and Passage by the House of Representatives

Representative James Burchett (R-176th) sponsored SB 74 in the House of Representatives.²¹ The House read SB 74 for the first time on March 7, 2023, and for the second time on March 8, 2023.²² On March 21, 2023, the House Committee on Judiciary favorably reported SB 74 by substitute.²³

The House Committee on Judiciary’s substitute added substantially to SB 74 by incorporating the apex doctrine.²⁴ The Committee’s version of SB 74 proposed to amend Titles 9, 10, 15, 50, and 51 of the Official Code of Georgia Annotated.²⁵ The amendment to Title 9 added a new Code section, 9-11-26.1, as well as language in Code section 9-11-26 incorporating the new Code section.²⁶ The added language allows high-ranking officers of organizations to seek protective orders that prohibit the taking of their depositions.²⁷ The substitute also defines “good cause” for obtaining such protective orders.²⁸ The amendment to Title 50 amended Code section 50-21-35

16. *Id.*

17. SB 74 (SCS), § 4, p. 5, l. 112, 2023 Ga. Gen. Assemb.

18. State of Georgia Final Composite Status Sheet, SB 74, May 9, 2023.

19. SB 74 (SFA 1), 2023 Ga. Gen. Assemb.

20. Georgia Senate Voting Record, SB 74, #134 (Mar. 6, 2023).

21. SB 74, Bill Tracking, *supra* note 13.

22. State of Georgia Final Composite Status Sheet, SB 74, May 9, 2023.

23. *Id.*

24. *See generally* SB 74 (HCS), 2023 Ga. Gen. Assemb.

25. *Id.*

26. *Id.* § 1-1, p. 2, ll. 21–22.

27. *Id.*

28. *Id.* § 1-2, p. 3, ll. 53–55.

to provide for service of process upon the state in civil suits against it.²⁹

On March 23, 2023, the House read SB 74 for a third time.³⁰ The House passed SB 74 by substitute by a vote of 158 to 5.³¹

Final Passage and the Governor's Signature

On March 27, 2023, SB 74, as amended by the House, returned to the Senate for its final reading.³² Three proposed amendments came forward during the floor debate.³³ Amendment 1 proposed to delete the words “unique and” on line 50; add the word “large” after “any” and after “other” on line 51; replace “private, that is large and complex” with “private” on line 52; delete the quotation at the end of line 67; and insert between lines 67 and 68 language noting that the Code section shall not “prohibit a party . . . from establishing good cause for a protective order” through other means.³⁴ Amendment 1A added language to Amendment 1 clarifying that the bill would become effective upon the Governor’s signature.³⁵ Amendment 1B would clarify a potential scrivener’s error in Amendment 1.³⁶ The Senate adopted Amendment 1A by a vote of 34 to 20.³⁷ Senator Bill Cowsert (R-46th) moved to reconsider the vote on the grounds that Amendment 1A did not clearly identify what item it sought to amend.³⁸ The motion to reconsider failed by a vote of 15 to 40.³⁹ Amendment 1A’s adoption rendered Amendment 1B moot.⁴⁰

29. *Id.* § 3-1, pp. 10–11, ll. 230–48.

30. State of Georgia Final Composite Status Sheet, SB 74, May 9, 2023.

31. Georgia House of Representatives Voting Record, SB 74, #288 (Mar. 23, 2023).

32. State of Georgia Final Composite Status Sheet, SB 74, May 9, 2023.

33. *See* Failed Senate Floor Amendment to SB 74 (AM 36 0959), introduced by Sen. Bill Cowsert (R-46th) and others, Mar. 27, 2023 [hereinafter Failed Amendment 1]; SB 74 (SFA 1A), 2023 Ga. Gen. Assemb.; Failed Senate Floor Amendment to SB 74 (AM 1B), introduced by Sen. Bill Cowsert (R-46th), Mar. 27, 2023 [hereinafter Failed Amendment 1B].

34. Failed Amendment 1, *supra* note 33.

35. SB 74 (SFA 1A), 2023 Ga. Gen. Assemb.

36. Failed Amendment 1B, *supra* note 33.

37. Georgia Senate Voting Record, SB 74, #322 (Mar. 27, 2023).

38. Video Recording of Senate Proceedings at 2 hr., 38 min., 44 sec. (Mar. 27, 2023) [hereinafter Senate Proceedings Video] (remarks by Sen. Bill Cowsert (R-46th)), <https://vimeo.com/812163051?share=copy> [<https://perma.cc/S6UW-CX9Z>].

39. Georgia Senate Voting Record, SB 74, #323 (Mar. 27, 2023).

40. Failed Amendment 1B, *supra* note 33.

Amendment 1, as amended by Amendment 1A, failed by a vote of 11 to 45.⁴¹ The Senate passed SB 74 as amended by the House Substitute by a vote of 44 to 12.⁴²

The Senate sent SB 74 to Governor Brian Kemp's (R) desk on April 5, 2023.⁴³ Governor Kemp signed the bill into law on May 1, 2023.⁴⁴ The Act went into effect the same day.⁴⁵

The Act

The Act “amend[s] Titles 9, 10, 15, 50, and 51 of the Official Code of Georgia Annotated, relating to civil practice, commerce and trade, courts, state government, and torts, respectively.”⁴⁶ The Act has two overall purposes: (1) “to provide for protective orders for certain high-ranking members of a governmental body or public or private entity;” and (2) to protect Georgia’s citizens “from false or misleading commercial practices relating to the handling of legal matters.”⁴⁷

Part I

Part I of the Act amends Title 9 of the Official Code of Georgia Annotated, which relates to civil practice.⁴⁸

Section 1-1

Section 1-1 of the Act amends subsection (c) of Code section 9-11-26.⁴⁹ This Code section relates to general provisions regarding civil discovery, and subsection (c) relates specifically to the issuance of protective orders.⁵⁰ The Act supplements subsection (c) by adding the language “including, but not limited to, the factors provided in

41. Georgia Senate Voting Record, SB 74, #324 (Mar. 27, 2023).

42. Georgia Senate Voting Record, SB 74, #325 (Mar. 27, 2023).

43. SB 74, Bill Tracking, *supra* note 13.

44. *Id.*

45. SB 74, Bill Tracking, *supra* note 13.

46. 2023 Ga. Laws 248, at 248.

47. *Id.*; 2023 Ga. Laws 248, § 2-1, at 250.

48. 2023 Ga. Laws 248, § 1-1, at 248.

49. *Id.* at 248–49.

50. *See generally* O.C.G.A. § 9-11-26 (2023).

Code [s]ection 9-11-26.1 for the deposition of a high-ranking officer.”⁵¹ This added language qualifies good cause for a protective order, establishing that the factors provided in the new Code section 9-11-26.1 qualify as good cause.⁵²

Section 1-2

Section 1-2 of the Act amends Title 9 of the Official Code of Georgia Annotated by adding a new Code section, section 9-11-26.1, which outlines factors for good cause for a protective order as referenced in Code section 9-11-26.⁵³ Subsection (a) of Code section 9-11-26.1 defines “officer” and “organization” as used in this Code section.⁵⁴ Officer means “a current or former high-ranking officer of an organization with unique and extensive scheduling demands or responsibilities.”⁵⁵ Organization “includes any governmental entity and any other organization, public or private, that is large and complex.”⁵⁶ Subsection (b) of Code section 9-11-26.1 states that good cause for a protective order prohibiting the deposition of an officer is proved by showing: (1) “such person is an officer,” and (2) such person does not have “unique personal knowledge of any matter that is relevant to the subject matter involved in the pending action.”⁵⁷ Subsection (c) of Code section 9-11-26.1 states that “[t]he party or person seeking a protective order has the burden of establishing the factors provided under subsection (b).”⁵⁸ Subsection (d) provides that good cause for a protective order is not shown where the party seeking discovery shows: (1) the party seeking discovery “has exhausted other reasonable means of discovery and such discovery is inadequate,” and (2) the person seeking a protective order has “unique personal knowledge” of a matter relevant to the litigation.⁵⁹ Finally, subsection (e) provides, in short, that where the party or person seeking a

51. 2023 Ga. Laws 248, § 1-1, at 248 (codified at § 9-11-26).

52. *Id.* at 248–49.

53. 2023 Ga. Laws 248, § 1-2, at 249.

54. O.C.G.A. § 9-11-26.1(a) (2023).

55. *Id.*

56. *Id.*

57. *Id.* § 9-11-26.1(b).

58. *Id.* § 9-11-26.1(c).

59. *Id.* § 9-11-26.1(d).

protective order for an officer shows that the “officer lacks unique personal knowledge of some, but fewer than all, matters relevant to the subject matter involved in the pending action, the court may limit the scope of the deposition accordingly, rather than prohibiting altogether the deposition of the officer.”⁶⁰

Part II

Part II of the Act amends Titles 10, 15, and 51 of the Official Code of Georgia Annotated, relating to commerce and trade, courts, and torts, respectively.⁶¹

Section 2-1

Section 2-1 of the Act details the legislative findings that support the purpose of Part II of the Act.⁶² These include findings that commercial speech is entitled to First Amendment protection so far as it concerns lawful activity and is not misleading, and that the state should ensure that Georgians have their constitutional rights protected and appropriately vindicated when violated.⁶³ Further, the findings recognize that the government has a substantial interest in protecting Georgians from false or misleading commercial practices for legal services and that such practices are particularly damaging to older Georgians.⁶⁴ Finally, the Act states that “[a] ban on commercial speech falsely claiming to handle legal matters before [Georgia and federal courts] is necessary to directly advance the government’s interest in protecting Georgians from false or misleading business advertising and solicitations that offer to protect or vindicate constitutional rights of Georgians.”⁶⁵

60. O.C.G.A. § 9-11-26.1(e) (2023).

61. *See generally* 2023 Ga. Laws 248.

62. 2023 Ga. Laws 248, § 2-1, at 250.

63. *Id.*

64. *Id.*

65. *Id.*

Section 2-2

Section 2-2 of the Act amends Title 10 of the Code by adding a new Code section, section 10-1-424.1, which relates to limitations on advertisements for legal services.⁶⁶ Subsection (a) of this new Code section defines certain terms.⁶⁷ A “[d]uly licensed attorney at law” is “a person authorized to provide legal services” in Georgia.⁶⁸ “Legal services” are acts listed in Code section 15-19-50 and in subsection (a) of Code section 15-19-51.⁶⁹ “Media” is “any publication” or “manner or means of public outreach.”⁷⁰ To “solicit” means to take actions “directly or indirectly to perform or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto.”⁷¹

Subsection (b) of Code section 10-1-424.1 outlines which acts are unlawful in the solicitation of the provision of legal services.⁷² First, the Code section prohibits a “person, firm, association, or corporation” from “[m]isrepresenting the true nature of its business by use of the words ‘legal services,’ ‘practice of law,’ ‘law firm,’ ‘attorney,’ ‘attorney at law,’ ‘lawyer,’ or equivalent terms” which give the impression that the individual or entity is entitled to practice law or furnish legal advice, services, or counsel.⁷³ Next, the Code section prohibits representing oneself as providing legal services unless such person is a “duly licensed attorney at law.”⁷⁴ Third, the Code section prohibits “[r]epresenting that any person featured in media for legal services is admitted to the Georgia bar or may offer legal services in this state when such person in such media is not a duly licensed attorney at law.”⁷⁵ Finally, the Code section prohibits

66. 2023 Ga. Laws 248, § 2-2, at 250 (codified at O.C.G.A. § 10-1-424.1 (2023)).

67. § 10-1-424.1(a).

68. *Id.*

69. *Id.* Code sections 15-9-50 and 15-9-51 provide the following examples: “representing litigants in court and preparing pleadings,” giving legal advice, holding oneself out to the public as a person entitled to practice law, or assuming the title of “lawyer,” “attorney,” or “attorney at law.” O.C.G.A. §§ 15-19-50, -51 (2022).

70. § 10-1-424.1(a).

71. *Id.*

72. *Id.* § 10-1-424.1(b).

73. *Id.*

74. *Id.*

75. *Id.*

“[o]therwise failing to disclose or otherwise provide qualifying language that accurately reflects the legal services, abilities, practice areas, scope of work, success rate, claim or case management and oversight, or fees of a person.”⁷⁶

Section 2-3

Section 2-3 of the Act revises Code section 10-1-426, which relates to the penalty for violations of Code sections 10-1-424 and 10-1-425.⁷⁷ Section 2-3 changes “Sections” to “Section,” adds Code section 10-1-424.1 to the list of sections where a violation thereof is a misdemeanor, changes the word “and” to “or” between the Code sections listed, and adds the phrase “online or” to advertisements to which section 10-1-426 applies.⁷⁸

Section 2-4

Section 2-4 of the Act amends Code section 10-1-427 by adding a new subsection (a) and removing repetitive language from what is now subsection (b).⁷⁹ Subsection (a) provides for various definitions.⁸⁰ First, subsection (a) defines “[d]uly licensed attorney at law,” “[l]egal services,” and “[m]edia” as defined in Section 2-2.⁸¹ Subsection (a) then broadly defines a “[m]isleading statement” as “any communication that is untrue, fraudulent, or deceptive, and is known, or . . . should be known to be untrue, fraudulent, or deceptive.”⁸² This includes, but is not limited to, communications that: “[c]ontain a material misrepresentation of fact or law”; “[o]mit a fact or law resulting in the information conveyed being a material misrepresentation or unsubstantiated”; or “[f]alsely portray individuals as clients.”⁸³

76. O.C.G.A. § 10-1-424.1(b) (2023).

77. 2023 Ga. Laws 248, § 2-3, at 251.

78. *Id.* (codified at O.C.G.A. § 10-1-426 (2023)).

79. 2023 Ga. Laws 248, § 2-4, at 251–53 (codified at O.C.G.A. § 10-1-427 (2023)).

80. § 10-1-427(a).

81. *Id.*; see *supra* Section 2-2.

82. § 10-1-427(a).

83. *Id.* § 10-1-427(a)(4).

What is now subsection (b) is revised to exclude repetitive, definitional language.⁸⁴

Section 2-5

Section 2-5 of the Act revises Code section 15-19-55, which relates to the prohibition of certain solicitation, by adding the language “or legal employment.”⁸⁵ This addition, in context, states that a person, corporation, or association cannot solicit legal employment on behalf of any legal professional if such person, corporation, or association would not be authorized to engage in such legal employment.⁸⁶

Section 2-6

Section 2-6 of the Act amends Title 51 of the Code by adding a new Code section, section 51-1-57.⁸⁷ This new Code section establishes tort liability for the violation of section 10-1-424.1 or 10-1-427.⁸⁸

Part III

Part III of the Act amends Code section 50-21-35 by adding substantial language to that section.⁸⁹ That Code section now includes that “[a] chief executive officer of a state government entity shall provide a designee or designees for service of process” and outlines the parameters of such designation.⁹⁰ The Code section also states that “[t]he director of the Risk Management Division of the Department of Administrative Services shall provide a designee for service of process” with the same parameters listed in subsection (a).⁹¹ Next, the amended section 50-21-35 provides that designees for service of

84. *See id.* § 10-1-427(b).

85. 2023 Ga. Laws 248, § 2-5, at 253 (codified at O.C.G.A. § 15-19-55 (2023)).

86. *See* § 15-19-55.

87. 2023 Ga. Laws 248, § 2-6, at 253 (codified at O.C.G.A. § 51-1-57 (2023)).

88. § 51-1-57.

89. *See* 2023 Ga. Laws 248, § 3-1, at 254 (codified at O.C.G.A. § 50-21-35 (2023)).

90. § 50-21-35(a).

91. *Id.* § 50-21-35(b).

process shall be present at their respective office address at least three business days each week between 9:00 a.m. and 5:00 p.m.⁹² Finally, the amended Code section creates subsection (d), including the language “[e]xcept as otherwise provided in subsection (f) of this Code section, in,” and creates subsections (e) and (f) using preexisting language in the section.⁹³

Part IV

Part IV of the Act provides that the Act shall become effective upon approval by the Governor or upon its becoming law without such approval.⁹⁴ Part IV also provides that Part II shall only apply to contracts entered into on and after the effective date, but any preexisting contract that violates Part II shall be void.⁹⁵ Part IV further provides that Part III shall only apply to causes of action occurring on or after July 1, 2023.⁹⁶ Finally, Part IV declares that all laws and parts of laws in conflict with the Act are repealed.⁹⁷

Analysis

The Apex Doctrine

Before final passage of the Act, Senator Bill Cowser (R-46th) expressed concerns regarding the apex doctrine language protecting plaintiffs far beyond what previous iterations of the bill recognized.⁹⁸ The Senate Regulated Industries and Utilities Committee agreed to add Representative James Burchett’s (R-176th) apex doctrine language into SB 74, even though the language tilted more heavily in favor of the plaintiff’s bar than the original apex doctrine in SB 200,

92. *Id.* § 50-21-35(c).

93. *Id.* § 50-21-35(d)-(f).

94. 2023 Ga. Laws 248, § 4-1, at 255.

95. *Id.*

96. *Id.*

97. *Id.*

98. See Failed Amendment 1, *supra* note 33; SB 200, as introduced, § 1, pp. 2–3, ll. 37–58, 2023 Ga. Gen. Assemb.

which died on the table on Crossover Day.⁹⁹ Senator Cowsert, as Committee Chairperson, identified two words that Cowsert believed needed to be removed for Georgia to remain a business-friendly state.¹⁰⁰ Those two words were “unique” in the schedule requirement and “complex” in the organization requirement.¹⁰¹ In the House substitute version, Senator Cowsert explained that officials must demonstrate they have a *unique* schedule and are an official in a large, *complex* organization to obtain a protective order.¹⁰² Alternatively, the Committee amendment proposed that officials should not need to have a unique calendar or be in charge of a complex corporation.¹⁰³ According to Senator Cowsert, having a busy schedule as the head of a large corporation should be enough to obtain a protective order.¹⁰⁴

Senator Cowsert further contended that requiring the official to show they have a unique schedule and a complex business renders the bill useless because no official would be able to meet such a rigorous standard.¹⁰⁵ The Georgia Chamber of Commerce wrote a letter in support of the amendment, demonstrating the importance of these two words that raise the bar for deposition protective orders.¹⁰⁶ Senator Cowsert referenced Georgia’s designation as a “judicial hellhole” for businesses, not because they cannot generate revenue but because the legal scheme is disadvantageous for businesses.¹⁰⁷

Senator Blake Tillery (R-19th) disagreed with Senator Cowsert’s characterization of the legal scheme in Georgia, stating that Governor Brian Kemp (R) and the Georgia General Assembly have created a legal scheme that allows businesses to flourish.¹⁰⁸ In asking the Senate to oppose Senator Cowsert’s amendment, Senator Tillery

99. Senate Proceedings Video, *supra* note 38, at 2 hr., 1 min., 30 sec. (remarks by Sen. Bill Cowsert (R-46th)); SB 200, as introduced, § 1, pp. 2–3, ll. 37–58, 2023 Ga. Gen. Assemb.

100. Senate Proceedings Video, *supra* note 38, at 2 hr., 2 min., 23 sec.

101. *Id.* at 2 hr., 6 min., 16 sec.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 2 hr., 35 min., 35 sec.

106. Senate Proceedings Video, *supra* note 38 at 2 hr., 9 min., 25 sec.

107. *Id.* at 2 hr., 19 min., 45 sec.; Press Release, Am. Tort Reform Ass’n, Nuclear Verdicts Explode in No. 1 Judicial Hellhole Georgia (Dec. 6, 2022), <https://www.atra.org/2022/12/06/nuclear-verdicts-obliterate-state-economies-in-judicial-hellholes/> [<https://perma.cc/93ZR-8ZLS>].

108. Senate Proceedings Video, *supra* note 38 at 2 hr., 27 min., 40 sec. (remarks by Sen. Blake Tillery R-19th)).

reminded the members that they were within the last thirty-six hours of the annual session, and the bill may not pass if sent to the House with Senator Cowsert's amendment attached.¹⁰⁹ The amendment ultimately did not pass.¹¹⁰

The fact that the Act passed without Amendment 1 might reflect the overall desire to codify apex doctrine language despite the cost of further protecting Georgia business officials. The failure of Amendment 1 opens the conversation about the legal scheme for businesses in Georgia. Because the Senate was running out of time to further amend the Act, Amendment 1's failure does not necessarily indicate that members were satisfied with the state of the Act. It is possible that many legislators, especially the attorneys in the room, are not satisfied with the legal scheme for businesses in Georgia.

Further, Senator Nan Orrock (D-36th) expressed concern that the bill "tilts the playing field" toward defendants because plaintiffs' attorneys may not know that the head of an organization holds vital information.¹¹¹ Senator Cowsert swiftly dismissed the concern by explaining that 30(b)(6) depositions exist as an alternative, where plaintiffs' lawyers can ask the corporation to designate an official who has knowledge of the information they seek.¹¹² Senator Orrock ultimately voted to pass the Act, seemingly satisfied that plaintiffs have other avenues of obtaining answers to their crucial questions.¹¹³ It remains to be seen whether plaintiffs' attorneys will be satisfied despite their newly restricted access to corporation heads.

Comparison to Other Apex Laws in the Eleventh District

Several states across the country have adopted the apex doctrine, either through common law or statutory schemes.¹¹⁴ Florida courts

109. *Id.*

110. Georgia Senate Voting Record, SB 74, #324 (Mar. 27, 2023).

111. Senate Proceedings Video, *supra* note 38, at 2 hr., 16 min., 40 sec. (remarks by Sen. Nan Orrock (D-36th)).

112. *Id.* at 2 hr., 17 min., 23 sec. (remarks by Sen. Bill Cowsert (R-46th)).

113. See Georgia Senate Voting Record, SB 74, #325 (Mar. 27, 2023).

114. Lionel Lavenue, Joseph Myles & Maram Al-Shaer, *The Apex Doctrine and Depositions of High-Level Executives: The Divide Among Circuit Courts*, REUTERS, <https://www.reuters.com/legal/legalindustry/apex-doctrine-depositions-high-level-executives-divide-among-circuit-courts-2023-03-14/> [https://perma.cc/M82L-G5vN] (Mar. 14, 2023, 1:29 PM).

had a long-standing tradition of applying the doctrine to government officials, and the legislature extended the rule to corporate contexts in 2021.¹¹⁵ While the state legislature extended the rule, the Florida Supreme Court commented that “‘by virtue of their position,’ apex officials ‘are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts.’”¹¹⁶ Florida Rule of Civil Procedure 1.280(h) contains burden-shifting language similar to that of the Act, which grants an official their protection order unless the party seeking discovery shows it has exhausted all other options.¹¹⁷

Further, Alabama applies the apex doctrine as a common law tradition.¹¹⁸ The Alabama Supreme Court acknowledged that although the court has never expressly adopted the apex doctrine, state courts have allowed depositions of high-ranking officials based on criteria similar to the apex rule.¹¹⁹ The court stated that “in a case in which a party seeks to depose a high-ranking corporate officer who has little to no personal knowledge of the subject matter, the apex rule might entitle the officer to a protective order.”¹²⁰ Georgia now joins Florida as a codified apex doctrine state, but it remains to be seen whether Alabama will do so as well.

Restrictions on Advertising

As Senator Tillery pointed out in discussion of the Act, the First Amendment gives Georgians latitude in the “puffery” they may choose to portray.¹²¹ For example, it is constitutional for a car

115. Matthew J. Meyer, *What Apex Doctrine? Florida Appellate Court Explains That Doctrine Applies Only to Government Executives*, ANSA ASUNCAO (Sept. 5, 2019), <https://www.ansalaw.com/what-apex-doctrine-florida-appellate-court-explains-that-doctrine-applies-only-to-government-executives/> [<https://perma.cc/J6SJ-TPJ2>]; FLA. R. CIV. P. 1.280(h).

116. *In re Amend. to Fla. Rule Civ. Proc. 1.280*, 324 So. 3d 459, 461 (Fla. 2021) (quoting *Brown v. Branch Banking & Trust Co.*, No. 13-81192-CIV, 2014 WL 235455, at *2 (S.D. Fla. Jan. 22, 2014)).

117. FLA. R. CIV. P. 1.280(h).

118. *See Beeman v. Protective Life Corp.*, No. 2:17-cv-01234-JEO, 2020 WL 13656058, at *6 (N.D. Ala. May 28, 2020).

119. *Ex parte Willimon*, 299 So. 3d 934, 939 (Ala. 2020).

120. *Id.*; *see generally Ex parte Cmty. Health Sys. Pro. Servs. Corp.*, 72 So. 3d 595 (Ala. 2011).

121. Video Recording of Senate Committee Meeting at 21 min., 40 sec. (Feb. 27, 2023) (remarks by Sen. Blake Tillery (R-19th)), <https://vimeo.com/showcase/8821960/video/802843547> [<https://perma.cc/SQ9A-4A7T>].

salesman to say, “this is the best car ever.”¹²² However, Senator Tillery explained, “when puffery rises to the level of falsity, it can also create a distorted reality.”¹²³ In Senator Tillery’s opinion, this has occurred in Georgia and “has distorted the public’s view of what civil justice ought to look like.”¹²⁴

Numerous Georgia personal injury lawyers have coined terms and phrases, securing their place as household names and garnering business along the way.¹²⁵ But, these showy ads featuring flattering photos and sometimes cheesy slogans are not made illegal by the Act.¹²⁶ While legal ethicists may have notes about the sanctity of the profession and the reputations of lawyers that employ such tactics, the Act does not prohibit the mere use of catchy phrases and flashy signs. The Act only makes false or fraudulent advertisements illegal.¹²⁷ There is no evidence pointing to exactly how many false or fraudulent advertisements currently exist on Georgia highways, airwaves, and Internet sites. Most advertisements seen by Georgians are merely kitschy or gaudy at their worst, rather than unethical. Because a flashy ad is not necessarily a violation of the Act, the number of attorneys who are impacted by Part II remains unknown.

Conclusion

The Act will ensure a more efficient and ethical practice of law across multiple areas of the legal industry. Representative James Burchett’s (R-176th) codification of the apex doctrine into Georgia law aims to protect Georgia businesses from unnecessary slowdowns due to litigation. Senator Blake Tillery’s (R-19th) regulation of fraudulent advertising aims to protect Georgia consumers from the unethical practice of law. Each facet of the Act will impact plaintiff

122. *Id.*

123. *Id.*

124. *Id.*

125. See Robert J. Fleming, *Personal Injury Law Firm Slogans or Mantras?*, ATLANTA INJ. LAW. BLOG (July 29, 2019) <https://www.atlantainjurylawyersblog.com/personal-injury-law-firm-slogans-or-mantras/> [<https://perma.cc/PF8A-8CH2>] (providing an extensive list of memorable slogans seen on Georgia’s billboards and television screens).

126. See generally 2023 Ga. Laws 248, § 2-4, at 251–52.

127. *Id.*

and defense attorneys in Georgia differently, but similarly aims to raise the moral standard for the state's attorneys.

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