Social Media and Georgia's New Anti-SLAPP Statute

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These days, one of the most effective ways to advertise your business is through social media platforms such as Facebook, Instagram, or Twitter. At virtually no cost, social media allows you to conveniently market your business to a broad audience. But the Internet has its disadvantages, one of which is that other social media users can post critical reviews about your business with seeming impunity. And while your immediate reaction might be to file suit for defamation, doing so may put you at risk of violating a recently amended Georgia law that prohibits "SLAPP" actions.

What is SLAPP?

"SLAPP" stands for "Strategic Lawsuit Against Public Participation." A SLAPP action is a lawsuit most commonly brought by an individual or business that has been the target of criticism in an effort to intimidate and silence the speaker by forcing him or her to spend money defending a lawsuit. The most common claim in a SLAPP lawsuit is defamation, but other causes of action include business torts, conspiracy, and constitutional or civil rights violations. SLAPPs can be effective deterrent against online critics because even a meritless lawsuit can cost a considerable amount of time and money to defend.

Concerned with the implications of such lawsuits on freedom of speech, many states have enacted "anti-SLAPP" laws. Notably, while the First Amendment to the U.S. Constitution confers the freedoms of speech and press—which protect the right of individuals to speak without fear of punishment by the government—anti-SLAPP statutes go one step further by protecting outspoken critics from the misuse of the government's judicial system by private citizens to retaliate for that criticism.

In many states, once a party files a motion to dismiss under an anti-SLAPP statute, all proceedings and discovery are stayed on the plaintiff's claims until the court can resolve the question of whether the lawsuit is a prohibited SLAPP action. Unless the court determines the plaintiff has established that there is a probability it will prevail on its underlying claims, those claims will be stricken and, in some states, the plaintiff will have to pay for the costs and legal fees the defendant incurred while defending the lawsuit.

Georgia's Anti-SLAPP Statute

Georgia's anti-SLAPP statute, codified at O.C.G.A. § 9-11-11.1, was enacted in 1996. Originally, it was limited to SLAPP lawsuits involving statements made during a legislative, executive, or judicial proceeding, or in connection with an issue under review by a governmental body. In some cases, these limitations proved to be troublesome. For instance, the state Supreme Court held that a woman who made statements in online postings and email messages about a healthcare facility's poor treatment of her mentally disabled son could not invoke the anti-SLAPP statute to end a defamation case brought against her because, although her statements were about a matter of public concern, they were not made in connection with an official proceeding or investigation. *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 281 Ga. 439, 638 S.E.2d 278 (Ga. 2006).

This past summer, however, the Georgia legislature significantly broadened the anti-SLAPP statute such that online posts like those in *Berryhill* may very well come within its scope. Leaders in Georgia's entertainment industry, including the Motion Picture Association of America, led the effort to expand and strengthen the statute. Rather than simply prohibiting SLAPP lawsuits based on statements made in government proceedings or investigations, Georgia's revised anti-SLAPP statute now extends its protection to "[a]ny written or oral statement or writing or petition made in a place open to the public or a public forum in connection with an issue of public interest or concern" and "[a]ny . . . conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public concern." Moreover, the revised statute incorporates a provision mandating an award of attorneys' fees to the prevailing party.

While it is too early to predict how Georgia's new anti-SLAPP statute will apply in cases involving social media posts, its new language was borrowed in large part from the California anti-SLAPP statute (California Code of Civil Procedure § 425.16). And courts in California have held that its anti-SLAPP law applies to cases involving online reviews. *E.g., Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 117 Cal. Rptr. 3d 747 (2010).

The takeaway for businesses is this: proceed with caution when considering whether to sue someone in response to an online posting. If you bring a lawsuit against an online critic, be prepared to show that it is not a SLAPP action. If it is, not only will you lose your lawsuit and have to cover your critic's attorneys' fees, but they could very well post about you again—this time, about how you tried, and failed, to suppress their freedom of speech by bringing a frivolous lawsuit.

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