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## HB 513 - Civil Practice Act: Anti-SLAPP

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## CIVIL PRACTICE

***Civil Practice Act: Amend Article 2 of Chapter 6 of Title 5 of the Official Code of Georgia Annotated, Relating to Appellate Practice, so as to Revise Provisions Regarding Those Judgments and Rulings Deemed Directly Appealable; Amend Article 3 of Chapter 11 of Title 9 of the Official Code of Georgia Annotated, Relating to Pleadings and Motions, so as to Revise Provisions Regarding the Procedure for Claims Asserted Against a Person or Entity Arising from an Act by that Person or Entity Which Could Reasonably Be Construed as an Act in Furtherance of the Right of Free Speech or the Right to Petition Government for a Redress of Grievances; Revise Definitions; Amend Chapter 5 of Title 51 of the Official Code of Georgia Annotated, Relating to Libel and Slander, so as to Revise a Cross-reference; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; And for Other Purposes***

CODE SECTIONS:	O.C.G.A. §§ 5-6-34 (amended), 9-11-11.1 (amended), 51-5-7 (amended)
BILL NUMBER:	HB 513
ACT NUMBER:	420
GEORGIA LAWS:	2016 Ga. Laws 341
SUMMARY:	The Act amends Georgia's anti-SLAPP statute to expand its coverage from protecting the right to petition to also include protecting the right of free speech in connection with an issue of public interest or concern. Claims brought against those involved in such activities shall be subject to a motion to strike, unless the court determines that the nonmoving party has established a probability that the claimant can prevail on the merits. If the moving party succeeds on a motion to strike,

the court will award the party attorney's fees and costs associated with the motion. Any order granting or denying a motion to strike will be immediately appealable.

EFFECTIVE DATE: July 1, 2016

### *History*

In 2000, Georgia Community Support & Solutions, Inc. ("GCSS"), a nonprofit organization that assists adults with disabilities and their families, placed Shirley Berryhill's mentally disabled adult son with an independently contracted caregiver.<sup>1</sup> In 2002, Berryhill began posting complaints about the quality of care GCSS was providing her son on a website for families of adults with disabilities.<sup>2</sup> In her complaints, Berryhill claimed, among other things, that her son had rapidly lost thirty-five to forty pounds, had no clothes and no bed, had been beaten, and had become afraid to speak to family.<sup>3</sup> In 2003, Berryhill voiced her concerns once again in an email sent to about forty people, including one who worked for the Atlanta Journal Constitution, and another who worked for the Georgia Department of Human Resources.<sup>4</sup>

Following this email, the contents of which Berryhill also posted on the website for families of adults with disabilities, GCSS sent Berryhill a letter demanding a retraction and apology.<sup>5</sup> GCSS received neither.<sup>6</sup> In response, the organization filed a defamation and tortious interference with business relationships suit against Berryhill.<sup>7</sup> GCSS's complaint alleged that Berryhill maliciously published false information about the organization and its executive director online.<sup>8</sup> Berryhill countered by stating that she had made the

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1. Ga. Cmty. Support & Sols., Inc. v. Berryhill, 275 Ga. App. 189, 189, 620 S.E.2d 178, 179–80 (2005), *aff'd* 281 Ga. 439, 638 S.E.2d 278 (2006).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 190, 620 S.E.2d at 180.

6. *Id.*

7. Ga. Cmty. Support & Sols., Inc., 275 Ga. App. at 190, 620 S.E.2d at 180.

8. *Id.* at 189, 620 S.E.2d at 179.

statements in good faith and in the hopes that others, particularly the Atlanta Journal Constitution and Georgia Department of Resources, could help investigate her concerns about her son's treatment and "remedy such concerns, if possible."<sup>9</sup> Berryhill filed a motion to dismiss, arguing that her statements fell under the protection of Georgia's current anti-SLAPP statute and that GCSS had failed to comply with the statute's verification requirements.<sup>10</sup>

"SLAPP" stands for "strategic lawsuit against public participation."<sup>11</sup> Plaintiffs most often use SLAPP suits to stifle the speech of adverse parties.<sup>12</sup> Accordingly, *anti*-SLAPP legislation aims to thaw the chilling effects these suits can have on protected free speech.<sup>13</sup> At the time GCSS filed its suit against Berryhill, Georgia's anti-SLAPP statute attempted to achieve this aim by identifying protected speech and requiring potential SLAPP claimants and their attorneys to attest to the validity of their claims by filing a written verification.<sup>14</sup> The verification required claimants to certify under oath that their claims were well grounded in fact and law, did not involve privileged communication, and were not imposed for an improper purpose; namely to suppress a person's right of free speech or petition.<sup>15</sup> If a claimant failed to sufficiently verify the claim, the court would strike the claim.<sup>16</sup> If a claimant verified his claim in violation of the statute, "the court, upon motion or upon its initiative" would impose a sanction, which could include dismissal of the claim or an order to pay the adverse party's legal expenses.<sup>17</sup>

At the time of the Berryhill suit—and until the enactment of HB 513 in 2016—Georgia's anti-SLAPP statute limited protected speech to the following:

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9. *Id.*

10. *Id.* at 191, 620 S.E.2d at 181.

11. *SLAPP*, BLACK'S LAW DICTIONARY (10th ed. 2014).

12. *Id.*

13. *See, e.g.*, O.C.G.A. § 9-11-11.1(a-b) (2015).

14. O.C.G.A. § 9-11-11.1(b).

15. *Id.*

16. *Id.*

17. *Id.*

Any written or oral statement, writing, or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or any written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.<sup>18</sup>

In essence, the statute narrowed protected speech to statements made in connection with official government proceedings.<sup>19</sup> When a person spoke on an issue not currently under consideration or review through an official proceeding, no anti-SLAPP protections applied.<sup>20</sup> It is this provision that proved determinative in *Georgia Community Support & Solutions, Inc. v. Berryhill*.

The trial court granted Berryhill's motion to dismiss, finding Georgia's anti-SLAPP statute applied to her statements and that GCSS had failed to satisfy the statute's verification requirements imposed by that statute, but the Georgia Court of Appeals reversed this ruling.<sup>21</sup> The appellate court found that Georgia's anti-SLAPP statute did not apply to Berryhill's statements because they had not been made in connection with any official proceedings.<sup>22</sup> Even if Berryhill had hoped that her speech would lead to an official investigation of GCSS and her son's treatment, this aspiration alone failed to bring her statements within the narrow scope of protected speech articulated in the anti-SLAPP statute.<sup>23</sup> In 2006, the Supreme Court of Georgia affirmed the Court of Appeals' decision.<sup>24</sup>

Proponents of HB 513, including its sponsor, Representative Ron Stephens (R-164th), state that citizens who speak out on issues of public concern, like Berryhill, are among the people who will receive protection under an expanded anti-SLAPP statute.<sup>25</sup> However, the

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18. O.C.G.A. § 9-11-11.1(c).

19. *Id.*

20. *See id.*

21. *Ga. Cmty. Support & Sols.*, 275 Ga. App. at 190, 620 S.E.2d at 180.

22. *Id.* at 192, 620 S.E.2d at 181–82.

23. *Id.*

24. *Berryhill v. Ga. Cmty. Support & Sols., Inc.*, 281 Ga. 439, 439, 638 S.E.2d 278, 280 (2006).

25. Video Recording of House Non-Civil Judiciary Committee Meeting, Feb. 24, 2016 at 40 min., 35 sec. (remarks by Rep. Ed Setzler (R-35th)), <http://www.house.ga.gov/Committees/en-US/CommitteeArchives146.aspx> [hereinafter House Committee Video].

true driving force behind HB 513 is the legislature's desire to appeal to Georgia's booming, corporate film industry rather than a civic concern for the free speech rights of "the little guy."<sup>26</sup>

In large part, HB 513 was "brought to you by the film industry," and enjoyed strong support from the American Motion Picture Association.<sup>27</sup> As Peter Canfield, a First Amendment attorney, explained during a House Judiciary Non-Civil Committee meeting, celebrities and the broader film industry often attract lawsuits.<sup>28</sup> Because of this tendency, the film industry desires a legal environment where it can receive an early determination of these cases on the merits without having to incur the high costs of discovery and court proceedings for claims that turn out to be frivolous.<sup>29</sup> In an effort to foster this type of environment, the authors of HB 513 modeled the bill after California's anti-SLAPP statute, perhaps the most expansive anti-SLAPP provision in effect in the United States.<sup>30</sup>

### *Bill Tracking of HB 513*

#### *Consideration and Passage by the House*

Representative Ron Stephens (R-164th) sponsored HB 513 in the House.<sup>31</sup> The House read the bill for the first time on March 2, 2015, and was committed to State Planning and Community Affairs.<sup>32</sup> Speaker David Ralston (R-7th) withdrew the bill from State Planning and Community Affairs and recommitted the bill to the House

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26. House Committee Video, *supra* note 25, at 33 min., 8 sec. (remarks by Rep. Ron Stephens (R-164th)).

27. *Id.*; Interview with Rep. Stacey Evans (D-42nd) (June 29, 2016) (expressing her concerns that because HB 513 was heavily influenced by the film industry it is "not an anti-SLAPP bill," and that "the film industry and big media are [using it as] a way to reduce their fact checking time and costs") [hereinafter Evans Interview].

28. House Committee Video, *supra* note 25, at 38 min., 5 sec. (remarks by Peter Canfield, Attorney).

29. *Id.*

30. *Id.* at 35 min., 15 sec. (remarks by Peter Canfield, Attorney); *U.S. Needs an Anti-SLAPP Law like California's*, L.A. TIMES (Aug. 16, 2015), <http://www.latimes.com/opinion/editorials/la-ed-slapp-20150816-story.html>.

31. Georgia General Assembly, HB 513, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/513>.

32. State of Georgia Final Composite Status Sheet, HB 513, May 5, 2016.

Judiciary Non-Civil Committee.<sup>33</sup> The House read the bill for the second time on March 3, 2015.<sup>34</sup> On February 25, 2016, the House Judiciary Non-Civil Committee amended the bill in part and favorably reported the bill by substitute.<sup>35</sup>

The Committee substitute included most of the introduced bill's text, and merely removed or changed the text of a few subsections.<sup>36</sup> The Committee substitute changed some of the language found in Section 1 of the bill beginning at line thirty-two.<sup>37</sup> The language requiring a nonmoving party to establish that "he or she would be likely to prevail on a motion for summary judgment brought by the moving party pursuant to Code section 9-11-35" was removed.<sup>38</sup> In its place, the Committee substitute stated "an issue of public interest or concern shall be subject to a motion to strike unless the court determines that the nonmoving party has established that there is a probability that the nonmoving party will prevail on the claim."<sup>39</sup>

The Committee substitute also changed the language found under subsection (b.1) of Section 1, related to recovery of attorney's fees and expenses of litigation.<sup>40</sup> Yet, like the changes above, these changes were merely superficial and did not alter the effect of the subsection.<sup>41</sup> The Committee substitute also removed subsection (e), which stated, "an order granting or denying a motion to dismiss or a motion to strike shall be immediately appealable."<sup>42</sup> Finally, the Committee substitute removed some of the language found in Section 3 of the bill so that it stated, "[t]his Act shall become effective on July 1, 2016."<sup>43</sup>

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Compare* HB 513, as introduced, 2015 Ga. Gen. Assemb., *with* HB 513 (HCS), 2016 Ga. Gen. Assemb.

37. *Id.*

38. HB 513, as introduced, 2015 Ga. Gen. Assemb.

39. HB 513 (HCS), § 1, p. 2, ll. 30–33, 2016 Ga. Gen. Assemb.

40. HB 513, as introduced, § 1, pp. 2–3, ll. 61–65, 2015 Ga. Gen. Assemb.

41. *Compare* HB 513, as introduced, § 1, pp. 2–3, ll. 61–65, 2015 Ga. Gen. Assemb., *with* HB 513 (HCS), § 1, pp. 2–3, ll. 61–68, 2016 Ga. Gen. Assemb.

42. *Compare* HB 513, as introduced, § 1, p. 3, ll. 86–87, 2015 Ga. Gen. Assemb., *with* HB 513 (HCS), 2016 Ga. Gen. Assemb.

43. *Compare* HB 513, as introduced, § 3, p. 4, ll. 106–07, 2015 Ga. Gen. Assemb., *with* HB 513 (HCS), § 3, p. 4, l. 106, 2016 Ga. Gen. Assemb.

The House read the bill for the third time on February 29, 2016.<sup>44</sup> Representative Evans (D-42nd) offered a floor amendment that deleted “to revise definitions” on line 5 and replaced lines 17 through 104 of the Committee substitute with alternate text.<sup>45</sup> This amendment sought to remove the requirement that a nonmoving party must establish a probability of prevailing on a claim, which would ultimately remove the requirement that a plaintiff show actual malice in order to defeat a defendant’s motion to strike.<sup>46</sup> Representatives in the House objected to Representative Evans’s floor amendment, and it was not adopted after losing a vote 71 to 98.<sup>47</sup> The House passed the Committee substitute of HB 513 on February 29, 2016, by a vote of 131 to 41.<sup>48</sup>

*Consideration and Passage by the Senate*

Senator Charlie Bethel (R-54th) sponsored HB 513 in the Senate.<sup>49</sup> The Senate first read HB 513 on March 2, 2016.<sup>50</sup> HB 513 was assigned to the Senate Committee on Economic Development and Tourism, which made a number of amendments to the bill.<sup>51</sup>

The Senate Committee added back into the bill language to address how and where anti-SLAPP cases may be appealed.<sup>52</sup> The Committee revised subsection (a) of Code section 5-6-34, relating to judgments and rulings deemed directly appealable, adding “all judgments or orders entered pursuant to [the anti-SLAPP statute]” may be appealed to the Georgia Supreme Court or Court of Appeals.<sup>53</sup>

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44. State of Georgia Final Composite Status Sheet, HB 513, May 5, 2016.

45. Failed House Floor Amendment to HB 513, introduced by Rep. Stacey Evans (D-42nd), Feb. 29, 2016.

46. *Id.*; Video Recording of House Proceedings, Feb. 29, 2016 at 56 mins. (remarks by Rep. Stacey Evans (D-42nd)), <http://www.gpb.org/lawmakers/2016/day-30> [hereinafter House Floor Vote Video].

47. House Floor Vote Video, *supra* note 45. at 1 hr., 3 mins., 32 sec. (remarks by Speaker David Ralston (R-7th)).

48. *Id.* at 1 hr., 4 mins., 27 sec. (remarks by Speaker David Ralston (R-7th)).

49. See Georgia General Assembly, HB 513, Bill Tracking, <http://www.legis.ga.gov/legislation/en-US/Display/20152016/HB/513>

50. State of Georgia Final Composite Status Sheet, HB 513, May 5, 2016.

51. *Id.*; Compare HB 513 (HCS), 2016 Ga. Gen. Assemb., with HB 513 (SCS), 2016 Ga. Gen. Assemb.

52. HB 513 (SCS), § 1, p. 1, ll. 12–45, 2016 Ga. Gen. Assemb.

53. HB 513 (SCS), § 1, p. 2, ln. 45, 2016 Ga. Gen. Assemb.

In Section 2, the Committee also made some revisions to Code section 9-11-11.1.<sup>54</sup> First, under subsection (b)(2), the Committee added language to provide for cases where “the nonmoving party is a public figure plaintiff,” allowing such nonmoving party “discovery on the sole issue of actual malice.”<sup>55</sup> Second, the Committee revised the bill to ensure that entities, as well as persons, have the right of petition or free speech, and included “any other 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” to the list of recognized acts in furtherance of this right.<sup>56</sup> Finally, the Committee updated cross-references to maintain consistency.<sup>57</sup>

The Senate Committee on Economic Development and Tourism favorably reported the bill by substitute on March 11, 2016.<sup>58</sup> The Senate read the bill for the second time on March 14, 2016, and for the third time on March 16, 2016.<sup>59</sup> No Senate floor amendments were introduced, and on March 16, 2016, the Senate passed the Committee substitute of HB 513 without objection by a vote of 50 to 2.<sup>60</sup>

The Senate transmitted the bill to the House on March 22, 2016.<sup>61</sup> The House agreed to the Senate’s version of the bill, as amended, on the same day, by a vote of 117 to 45.<sup>62</sup> The House sent the bill to Governor Nathan Deal (R) on March 29, 2016; the Governor signed the bill into law on April 26, 2016, and the bill became effective on July 1, 2016.<sup>63</sup>

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54. HB 513 (SCS), § 2, pp. 2–5, 2016 Ga. Gen. Assemb.

55. HB 513 (SCS), § 2, p. 3, ll. 88–93, 2016 Ga. Gen. Assemb.

56. HB 513 (SCS), § 2, p. 4, ll. 108–13, 2016 Ga. Gen. Assemb.

57. HB 513 (SCS) § 2, p. 4, ll. 128–29, 2016 Ga. Gen. Assemb.

58. State of Georgia Final Composite Status Sheet, HB 513, May 5, 2016.

59. *Id.*

60. Video Recording of Senate Proceedings, March 16, 2016 at 5 mins., 50 sec. (remarks by LG Casey Cagle), [http://www.gpb.org/lawmakers/2016/day-38.](http://www.gpb.org/lawmakers/2016/day-38;); *id.* at 7 mins., 10 sec. (remarks by LG Cagle).

61. State of Georgia Final Composite Status Sheet, HB 513, May 5, 2016.

62. Georgia House of Representatives Voting Record, HB 513 (Mar. 22, 2016).

63. State of Georgia Final Composite Status Sheet, HB 513, May 5, 2016.

*The Act*

The Act amends the following portions of the Official Code of Georgia Annotated: Article 2 of Chapter 6 of Title 5, relating to appellate practice; Article 3 of Chapter 11 of Title 9, relating to pleadings and motions; and Chapter 5 of Title 51, relating to libel and slander.<sup>64</sup> The overall purpose of the Act is to encourage citizens' participation in matters of public interest by deterring lawsuits brought primarily for the purpose of chilling people's and entities' constitutional rights of petition and free speech.<sup>65</sup>

*Section 1*

Section 1 of the Act revises subsection (a) of Code section 5-6-34, which provides a list of judgments and orders deemed directly appealable.<sup>66</sup> The Act maintains all of the original language of the Code section, and simply adds to the existing list of directly appealable judgments, "all judgments or orders entered pursuant to Code section 9-11-11.1."<sup>67</sup>

*Section 2*

Section 2 of the Act amends Code section 9-11-11.1, which relates to exercising the rights of free speech and petition, legislative findings, verification of claims, definitions, procedure on motions, exception, and legal fees and expenses.<sup>68</sup> Specifically, the Act makes two significant substantive changes to Georgia's anti-SLAPP statute.<sup>69</sup> First, the Act creates a new procedural mechanism for defendants to request an early determination of potential SLAPP suits on the merits.<sup>70</sup> Second, the Act broadens the scope of first

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64. 2016 Ga. Laws 341, §§ 1–5, at 341–44.

65. *Id.*

66. 2016 Ga. Laws 341, § 1, at 341–42.

67. O.C.G.A. § 5-6-34(a)(13) (Supp. 2016).

68. 2016 Ga. Laws 341, § 2, at 342–43.

69. Aside from these substantive changes, the Act also replaces the phrase "the right to petition government for a redress of grievances" with simply, the "right of petition" throughout Code section 9-11-11.1. 2016 Ga. Laws 341, § 2, at 342–44.

70. O.C.G.A. § 9-11-11.1(b) (Supp. 2016).

amendment activities protected under the statute to include all speech and conduct occurring “in connection with an issue of public interest or concern.”<sup>71</sup>

The new language of subsection (b)(1) provides that potential SLAPP claims “shall be subject to a motion to strike unless the court determines the nonmoving party has established that there is a probability that the nonmoving party will prevail on the claim.”<sup>72</sup> This means that upon a defendant’s motion to strike, the court will make an early determination of the plaintiff’s potential SLAPP claims on the merits.<sup>73</sup> Subsection (b)(2) outlines what the court should consider in evaluating these claims, and subsection (b)(3) provides that once the court reaches a determination on the merits, “neither that determination nor the fact of such determination shall be admissible in evidence at any later stage of the case.”<sup>74</sup>

The Act also adds subsection (b.1), which requires the court to award attorney’s fees and litigation expenses to the SLAPP defendant on a successful motion to strike.<sup>75</sup> Subsection (b.1) further provides that the court must award attorney’s fees and litigation expenses to the nonmoving party, the SLAPP plaintiff, should the court find that the motion to strike is frivolous or solely filed to cause delay.<sup>76</sup> After the court decides the motion to dismiss or motion to strike, either party can directly appeal the order in accordance with subsection (a) of Code section 5-6-34 as amended by Section 1 of the Act.<sup>77</sup>

In addition to these procedural changes, the Act expands the scope of activities afforded anti-SLAPP protection under Code section 9-11-11.1.<sup>78</sup> Subsection (c) defines the term, “act in furtherance of the person’s or entity’s right of petition or free speech under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public or concern.”<sup>79</sup> The Act adds subsections (c)(3) to Code section 9-11-11.1 to expand the

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71. O.C.G.A. § 9-11-11.1(c).

72. O.C.G.A. § 9-11-11.1(b)(1).

73. *See id.*

74. O.C.G.A. § 9-11-11.1(b)(2)–(3).

75. O.C.G.A. § 9-11-11.1(b.1).

76. *Id.*

77. O.C.G.A. § 9-11-11.1(e); 2016 Ga. Laws 341, § 2, at 344.

78. O.C.G.A. § 9-11-11.1(c).

79. *Id.*

definition of protected acts to include “any written or oral statement or writing or petition made in a place open to the public or in a public forum in connection with an issue of public interest or concern.”<sup>80</sup> Similarly, subsection (c)(4) adds to the definition of protected acts, “any other 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.”<sup>81</sup> These additions effectively extend anti-SLAPP protection to any speech or conduct connected to issues of public concern, regardless of whether those issues are the subject of a government proceeding.<sup>82</sup>

Finally, the Act adds subsection (e) to Code section 9-11-11.1.<sup>83</sup> Subsection (e) provides that Code section 9-11-11.1 “shall not apply to any action brought by the Attorney General or a prosecuting attorney, or a city attorney acting as a prosecutor, to enforce laws aimed at public protection.”<sup>84</sup>

### *Section 3*

Section 3 of the Act revises paragraph (4) of Code section 51-5-7, which provides a list of communications deemed privileged under Georgia’s libel and slander laws.<sup>85</sup> In keeping with changes made throughout Section 2, the Act removes the phrase “the right to petition government for a redress of grievances” and replaces it with a “person’s or entity’s right of petition.”<sup>86</sup>

### *Analysis*

#### *The Expansion of Georgia’s Anti-SLAPP Protections*

Representative Stephens (R-164th), at the behest of Georgia’s growing film industry, introduced the Act to curb frivolous lawsuits designed to stifle free speech by bogging defendants down with

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80. O.C.G.A. § 9-11-11.1(c)(3).

81. O.C.G.A. § 9-11-11.1(c)(4).

82. 2016 Ga. Laws 341, § 2, at 343.

83. 2016 Ga. Laws 341, § 2, at 344.

84. O.C.G.A. § 9-11-11.1(e).

85. 2016 Ga. Laws 341, § 2, at 344.

86. *Id.*

costly litigation.<sup>87</sup> The Act attempts to achieve this goal by significantly expanding the scope of claims qualifying for anti-SLAPP protection and placing an increased burden on SLAPP plaintiffs to provide support for their claims.

Prior to the Act, Code section 9-11-11.1 limited the definition of protectable acts to speech or petition made either during a government proceeding or in connection with an issue under consideration in a government proceeding.<sup>88</sup> For example, if a citizen raised a general concern about a predatory payday loan business, unconnected to an ongoing official proceeding, her complaint would fall outside the statute's definition of protected speech. On the other hand, if a citizen asserted the same complaint in a statement expressing support for a bill that imposed new restrictions on payday lenders, her statement would qualify for anti-SLAPP protection. The Act eliminates this inconsistency by applying anti-SLAPP protection to almost any claim arising out of speech or conduct connected to an issue of public concern, regardless of whether those issues are the subject of a government proceeding.<sup>89</sup>

The Act also creates a brand new procedural mechanism for defendants to challenge SLAPP claims. Prior to the Act, Georgia guarded against SLAPP suits by requiring plaintiffs to file a written verification certifying that their claims were well supported in fact and law and not filed for an improper purpose, such as suppressing free speech.<sup>90</sup> The Act eliminates the verification requirement and replaces it with a procedure that requires plaintiffs to demonstrate, rather than certify, that their claims are meritorious.<sup>91</sup> This places an increased burden on plaintiffs to prove the validity of their claims early in litigation, even without the benefit of extensive discovery.<sup>92</sup> Representative Evans, the Act's most vocal critic, believes this increased burden may result in the new law being abused.<sup>93</sup> There is,

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87. House Committee Video, *supra* note 25, at 33 min., 8 sec. (remarks by Rep. Ron Stephens (R-164th)).

88. 2016 Ga. Laws 341, § 2, at 342–44.

89. *Id.*

90. *Id.*

91. *Id.*

92. *See* 2016 Ga. Laws 341, § 2, at 342–44.

93. *See* Evans Interview, *supra* note 27.

however, no data showing systematic abuse of anti-SLAPP statutes at either the trial or appellate levels.<sup>94</sup>

*Applying Georgia's Anti-SLAPP Provisions in Federal Courts*

The federal circuits take divided positions on whether Georgia's, or other states', anti-SLAPP provisions apply to claims asserted in federal courts.<sup>95</sup> The issue creating the divide is uncertainty over whether anti-SLAPP provisions are substantive or procedural in nature.<sup>96</sup> As a general rule, federal courts sitting in diversity jurisdiction must apply state substantive law to resolve state law claims, but need not apply state laws that are merely procedural.<sup>97</sup> When a procedural state law conflicts with the Federal Rules of Civil Procedure, the federal rules control.<sup>98</sup> Anti-SLAPP provisions create an interesting case because these laws “create procedural means to accomplish substantive policy objectives.”<sup>99</sup>

Prior to passing HB 513, the Eleventh Circuit held that Georgia's anti-SLAPP law could not be applied in federal court because it was procedural in nature and its verification requirements conflicted with Rule 11 of the Federal Rules of Civil Procedure.<sup>100</sup> Rule 11 states that “a pleading need not be verified or accompanied by an affidavit.”<sup>101</sup> HB 513 eliminated the verification requirements from Georgia's anti-SLAPP law, thus reopening the possibility that it could apply in federal court. However, the applicability of Georgia's new provisions to federal cases is not guaranteed. Georgia's revised anti-SLAPP provision, specifically its creation of a special motion to

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94. See Felix Shafir & Jeremy B. Rosen, *California's Anti-SLAPP Law is Not Systematically Abused*, LAW360 (June 30, 2016), <http://www.law360.com/articles/812761/california-s-anti-slapp-law-is-not-systematically-abused>.

95. Hamp Watson, *An Erie Split: Anti-Slapp Laws, Rule 12, and Rule 56*, SUNDAY SPLITS (Sept. 25, 2013), <http://sundaysplits.com/2016/09/25/an-erie-split-anti-slapp-laws-rule-12-and-rule-56/>; Roni A. Elias, *Applying Anti-SLAPP Laws in Diversity Cases: How to Protect the Substantive Public Interest in State Procedural Rules*, 41 T. MARSHALL L. REV. 215, 215–16 (2016).

96. Watson, *supra* note 95.

97. *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965).

98. *Id.* at 473; *Burke v. Smith*, 252 F.3d 1260, 1265 (11th Cir. 2001).

99. Elias, *supra* note 95, at 215.

100. PRACTICALLAW, *State Anti-SLAPP Statute Does Not Apply in Federal Court: Eleventh Circuit* (Jul. 14, 2014), <http://us.practicallaw.com/5-574-4446?q=&qp=&qo=&qe=>.

101. FED. R. CIV. P. 11(a).

strike, creates potential conflicts with Federal Rules 8, 12, and 56.<sup>102</sup> Neither the substantive or procedural nature of anti-SLAPP provisions, nor the narrower issue of whether functions like special motions to strike conflict with the Federal Rules have reached the Supreme Court.<sup>103</sup>

### *Evaluating the Strength of HB 513*

The Public Participation Project (“PPP”) is a non-profit organization focused on passing federal anti-SLAPP legislation.<sup>104</sup> PPP also works with groups seeking to pass anti-SLAPP legislation at the state level.<sup>105</sup> One of its projects includes documenting states’ anti-SLAPP laws and related judicial decisions.<sup>106</sup> As of the organization’s 2015 updates, twenty-eight states have some form of an anti-SLAPP statute.<sup>107</sup> However, the scope of these statutes and the procedures used to combat the chilling effects of SLAPP suits vary widely.<sup>108</sup> Of the states with some form of anti-SLAPP statute, a majority limit anti-SLAPP protection to statements made in connection with government proceedings or with the purpose of encouraging government action.<sup>109</sup> Roughly a third go as far as the Act in expanding protection to any speech or conduct addressing an issue of public concern, regardless of whether the action has a direct connection to government action or review.<sup>110</sup>

The expansive language in the Act closely mirrors that found in California Code of Civil Procedure Section 425.16.<sup>111</sup> In addition to borrowing the broad definition of a protectable “act in furtherance of a person’s right of petition or free speech under the United States or

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102. 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE Fed. § 4509 (3d ed. 2016). See e.g., U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 972 (9th Cir. 1999).

103. See Watson, *supra* note 95.

104. About, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/about/staff/> (last visited Jun. 26, 2016).

105. *Id.*

106. State Anti-SLAPP Laws, PUBLIC PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection/> (last visited Jun. 26, 2016).

107. *Id.*

108. See generally *id.*

109. *Id.*

110. *Id.*

111. Compare O.C.G.A. § 9-11-11.1 (Supp. 2016), with Cal. Civ. Proc. Code. § 425.16 (2016).

California Constitution in connection with a public issue,” from the California Code, the Georgia Act also adopts California’s procedural enforcement mechanisms: early determination of potential SLAPP claims on the merits via a motion to strike, and a fee shifting provision awarding attorney’s fees and costs to the prevailing party.<sup>112</sup>

California’s anti-SLAPP statute is often cited as one of the strongest in the nation.<sup>113</sup> Thus, by adopting the most substantive provisions of California’s statute nearly word for word, the Act stands to put Georgia’s anti-SLAPP statute in the same echelon. In fact, the Act may actually result in Georgia having an even stronger anti-SLAPP provision than California by omitting some of the limitations imposed by other sections of the California Code of Civil Procedure.<sup>114</sup> Most notably, California passed Senate Bill 515, codified as Cal. Civ. Proc. Code. Section 425.17, in 2003, in an effort to roll back some of the anti-SLAPP provisions of Cal. Civ. Proc. Code. Section 425.16.<sup>115</sup> Section 425.17 explicitly responds to what the California Legislature described as the “disturbing abuse” of Section 425.16’s anti-SLAPP provisions.<sup>116</sup> Specifically, the California legislature wanted to curb use of the anti-SLAPP statute against public-interest plaintiffs.<sup>117</sup> The statute addresses the problem by excepting some public interest actions, and certain actions arising from commercial speech or conduct from Section 425.16’s protections.<sup>118</sup> Georgia’s Act contains no similar limitations.<sup>119</sup>

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112. Cal. Civ. Proc. Code. § 425.16(b)-(c).

113. *U.S. Needs an Anti-SLAPP Law like California’s*, L.A. TIMES (Aug. 16, 2015), <http://www.latimes.com/opinion/editorials/la-ed-slapp-20150816-story.html>.

114. *Compare* O.C.G.A. § 9-11-11.1, *with* Cal. Civ. Proc. Code. § 425.16 *and* Cal. Civ. Proc. Code. § 425.17 (2016).

115. Jonathan Segel, *Anti-SLAPP Law Make Benefit for Glorious Entertainment Industry of America: Borat, Reality Bites, and the Construction of an Anti-SLAPP Fence Around the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 639, 652 (2009).

116. Cal. Civ. Proc. Code. § 425.16(a).

117. Cal. Civ. Proc. Code. § 425.17(b).

118. Cal. Civ. Proc. Code. § 425.17(b)-(c).

119. *See generally* O.C.G.A. § 9-11-11.1 (Supp. 2016); *see also* Evans Interview, *supra* note 27.

*Constitutional Considerations*

The Act creates potential First Amendment, Seventh Amendment, and Fourteenth Amendment issues.<sup>120</sup> First, the Act may be construed as limiting plaintiffs' rights of petition by denying them an opportunity to fully pursue claims involving speech protected by the anti-SLAPP provisions.<sup>121</sup> The Act does not directly address this concern, but the same limitations have been challenged in the California courts.<sup>122</sup>

In *Bernardo v. Planned Parenthood Federation of America*, a SLAPP plaintiff asserted that "section 425.16 violate[d] her First Amendment rights to petition and access the courts because it impose[d] a penalty and 'liability for fees' without requiring a showing that the suit is objectively frivolous."<sup>123</sup> The California Appellate court rejected the argument and reasoned that "[t]he right to petition is not absolute, providing little or no protection for baseless litigation."<sup>124</sup>

The California Courts have also dealt with due process and equal protection concerns arising out of the state's anti-SLAPP statute.<sup>125</sup> In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, a SLAPP plaintiff argued that California's anti-SLAPP statute limited its access to the judicial system, thus violating equal protection.<sup>126</sup> The plaintiff further asserted "the combined effect of the [statute's] discovery stay and 30-day [motion to strike] hearing requirement violated its due process rights because it was unable to defend adequately the motion to strike."<sup>127</sup> Addressing the Due Process arguments, the court reasoned that the anti-SLAPP statute's discovery stay did not violate a plaintiff's due process rights because it did not preclude the court from ordering additional discovery before hearing a motion to strike if it deemed such discovery

120. See O.C.G.A. § 9-11-11.1; see also Evans Interview, *supra* note 27.

121. See O.C.G.A. § 9-11-11.1(b).

122. See, e.g., *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322 (Cal. App. 4th Dist. 2004).

123. *Bernardo*, 115 Cal. App. 4th at 360.

124. *Id.* at 358 (quoting *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 64 (2002)).

125. See *Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855 (Cal. App. 1st Dist. 1995).

126. *Id.* at 865.

127. *Id.* at 865-67.

necessary.<sup>128</sup> Courts in Georgia retain similar discretion regarding discovery under the Act.<sup>129</sup> The Act's discovery stay and thirty-day hearing requirements, although default procedures, are not mandatory.<sup>130</sup> Subsection (d) of Code section 9-11-11.1 provides that "[t]he court, on noticed motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted."<sup>131</sup>

The *Lafayette* court further held that the anti-SLAPP procedures did not violate equal protection rights because the statute's early determination procedures were "rationally related" to the California Legislature's valid government interests: encouraging public participation in matters of public significance and discouraging suits seeking to chill the valid exercise of First Amendment rights.<sup>132</sup> Georgia applies the same "rational basis" standard to equal protection claims involving state statutes, making a similar result possible if the Act faced an equal protection challenge in the future.<sup>133</sup>

Despite the existence of several California decisions upholding the constitutionality of anti-SLAPP legislation, not all courts have reached the same conclusions. Most notably, the Washington Supreme Court recently deemed its state's anti-SLAPP statute as unconstitutional because it required trial judges to adjudicate factual questions without a trial, thus violating the plaintiff's right to a jury trial under the state constitution.<sup>134</sup>

Georgia Courts will likely have to deal with similar issues in the future. In particular, courts, litigators, and the General Assembly alike, should all look out for the types of abuse warned about by Representative Evans and already addressed by the California legislature. To avoid such abuse, the General Assembly may need to consider mirroring California's law once again, and except certain types of public-interest actions from the burdensome anti-SLAPP

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128. *Id.* at 868.

129. O.C.G.A. § 9-11-11.1(d) (Supp. 2016)

130. *Id.*

131. *Id.*

132. *Lafayette Morehouse, Inc.*, 37 Cal. App. 4th at 865.

133. See *Henry v. State*, 263 Ga. 417, 418, 434 S.E.2d 469, 471 (1993) ("[S]tatutory classifications are presumed valid and will survive an equal protection challenge if the classification bears a rational relationship to a legitimate government interest.").

134. *Davis v. Cox*, 351 P.3d 862, 864 (Wash. 2015).

procedure. In addition, Courts can help the Act to function effectively by using the discretion regarding discovery and hearings that the Act affords. By exercising discretion, rather than indiscriminately applying the Act's default procedures, courts can help to ensure that the free speech rights of defendants, especially powerful business defendants, do not receive protection by wrongfully limiting the constitutional rights of plaintiffs.

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