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PERSPECTIVE

## GUEST COLUMN

# California Supreme Court Review: September 2022

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Recent California Supreme Court decisions shift the landscape for SLAPP (Strategic Lawsuit Against Public Participation) lawsuits and anti-SLAPP motions to strike. This article explores those new contours and, in a follow-up to last month's article, addresses a forthcoming opinion regarding waiver of arbitration rights.

#### Increased Consumer Protection and Anti-SLAPP Motions

In *Serova v. Sony Music Entertainment*, 297 Cal. Rptr. 3d 253 (2022), a consumer sued Sony for alleged misrepresentations in the marketing of an expressive work, Michael Jackson's posthumous 2010 album, Michael. Sony moved to strike pursuant to the anti-SLAPP statute, "which calls for early dismissal of meritless lawsuits if they arise from a defendant's acts in furtherance of free speech rights in connection with a public issue." *Id.* at 257. The Court determined that the marketing constituted commercial speech and was, thus, not protected by the state's anti-SLAPP statute. The Court established several important principles in denying Sony's anti-SLAPP motion. First, the Court emphasized that companies cannot avoid "commercial status" in advertising merely by "link[ing] a product" to free speech discussions. *Id.* at 273. Second, the Court held that an advertiser's lack of personal knowledge or difficulty in verifying the falsity of promotional statements does not "[d]



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ecommercialize" its speech. *Id.* at 270-71. And finally, the Court established that a "contested portion of an anti-SLAPP motion should be denied solely based on a plaintiff's showing merit" to its claim, even if the speech in question is protected by statute. *Id.* at 261.

The Serova decision is particularly important to companies working in the entertainment and music industries. Companies that market expressive works should avoid relying on anti-SLAPP to protect promotional claims and should be mindful that false or misleading claims, even absent personal knowledge of such, will not bar liability. In addition, companies should not underestimate the importance of the Court's

finding that an anti-SLAPP motion should be denied solely based on a plaintiff's showing of merit. This greatly weakens the efficacy of anti-SLAPP motions as a shield to consumer claims.

Relatedly, *Serova* dovetails with the California Supreme Court's decision in *Geiser v. Kuhns*, S26-2032 (513 P.3d (August 29, 2022)), which broadens the utility of anti-SLAPP motions as an offensive weapon for consumers. In *Geiser*, two customers of a real estate developer (and their supporters) demonstrated in front of his home to complain about allegedly unlawful conduct; two days later the real estate agent sued them for civil harassment. The demonstrators sought to use the anti-SLAPP

statute to dismiss the case. The *Geiser* Court held that demonstrations adequately fell under the anti-SLAPP statute's catchall provision and thus constituted "speech in connection with a public issue." *Geiser*, S262032 at 23. The Court not only clarified the two-step inquiry to determine when the catchall applies, it also explicitly noted that "only when an expressive activity, viewed in context, cannot reasonably be understood as implicating a public issue does an anti-SLAPP motion fail at [the] first step." *Id.* at 19. In other words, a movant's dispute can be private and still implicate a public issue, so long as it can be understood by an objective, reasonable observer as doing so. That means that os-

tensibly “private” disputes might now be seen as implicating a public issue and subject to an anti-SLAPP motion.

The net result of *Serova* and *Geiser* is a clear message favoring consumers in the context of anti-SLAPP motions, both when the consumer is the movant and non-movant. The strategic implications of these decisions are manifold; but parties should expect stronger headwinds when filing anti-SLAPP motions given the reduced protections for advertising of expressive works and the lowered bar for consumers seeking to defeat them. Simultaneously, entities should not be comforted by prior precedent that illuminated the meaning of a matter of public interest, and instead plan to address the objective reasonableness of a movant’s characterization of the dispute as one of public import.

#### **Likely Changes to California’s Waiver of Right to Compel Arbitration**

Echoing our last article exploring the conscionability of certain provisions in arbitration agreements, the Court’s upcoming decision in *Quach v. California Commerce Club, Inc.*, S275121, will likely have important implications for litigants

seeking to compel arbitration. The Court will consider whether the established test for determining if a party has waived its right to compel arbitration remains good law in the face of the United States Supreme Court’s decision in *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708 (2022).

California’s current multi-factor analysis of whether to grant a motion to compel arbitration assesses, in part, the prejudice suffered by a non-movant when there has been delay in asserting an arbitration right. *See, e.g., Quach v. California Com. Club, Inc.*, 78 Cal.

App. 5th 470, 477 (2022) (noting that prejudice is critical in waiver determinations and finding no prejudice based solely on mere participation in litigation). But the Morgan Court explicitly determined that courts are “wrong to condition a waiver of the right to arbitrate on a showing of prejudice.” 142 S.Ct. at 1713. With this clear conflict between California law and the U.S. Supreme Court’s ruling, the California Supreme Court must now determine whether the prejudice factor should still be part of the analysis used by California state courts

faced with a motion to compel arbitration.

While the U.S. Supreme Court’s decision in *Morgan* specifically addresses federal law, the California Supreme Court may adopt a similar rule vis-à-vis state law. In that event, parties will need to be increasingly diligent in timely asserting arbitration rights as there will be a lower bar in asserting a waiver. And should California adopt the Morgan approach, businesses would also be wise in revisiting their standard arbitration clauses and consider incorporating specific waiver conditions.

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