



Five Pitfalls of Malicious Prosecution Litigation

By Jeffrey Lewis and David A. Robinson

Malicious Prosecution is a tricky area of the law in California. To prevail, the former defendant must prove that the prior action terminated in her favor; was brought without probable cause; and was initiated with malice. Sheldon Appel Co. v. Albert & Olikier, 47 Cal. 3d 863, 871-72 (1989). Before accepting a new case, there are (at least) five unique considerations in a malicious prosecution that should be evaluated.

First, what dispositive motions were filed in the underlying action. For example, a potential malicious prosecution defendant who (as a plaintiff) survived summary judgment or an anti-SLAPP motion by proving the merits of the prior action may usually not thereafter be sued for malicious prosecution because surviving such motions ordinarily (i.e., in the absence of fraud or perjury) establishes the plaintiff's probable cause as a matter of law. Videotape Plus, Inc. v. Lyons, 89 Cal. App. 4th 156, 161, 107 (2001)[holding that a plaintiff who survives summary judgment ordinarily may not thereafter be sued for malicious prosecution as to the causes of action that were the subject of the unsuccessful summary judgment]; Wilson v. Parker Covert & Chidester, 28 Cal. 4th 811 (2002) [holding that a denial of an Anti-SLAPP motion to strike based on the merits of plaintiff's claims precludes a later claim for malicious prosecution]; Similarly, a successful motion to obtain an injunction may likewise establish that the prior plaintiff had probable cause as a matter of law. Fleishman v. Superior Court, 102 Cal. App. 4th 350, 357-58 (2002). Hence, a careful review of the dispositive motions filed in the prior action must be done as part of any evaluation of a malicious prosecution action.

Second, is the proposed malicious prosecution action based upon the theory that the prior action lacked probable cause from the inception of the prior action or after the prior action was filed? The former is the classic theory while the latter has recently been ruled by at least one court to be insufficient to

establish probable cause. Put differently, California courts will not always impose malicious prosecution liability on the theory that a prior plaintiff had probable cause at the filing of the prior lawsuit but "lost" probable cause along the way due to the discovery of evidence negating defendants' liability. Vanzant v. DaimlerChrysler Corporation, 96 Cal. App. 4th 1283, 1290 (2002); Swat-Fame, Inc. v. Goldstein, 101 Cal. App. 4th 613, 627-28 (2002). However, this is a point of disagreement within the Second District Court of Appeal. A recent case, Zamos v. Stroud, No. B160484 (July 1, 2003), expressly disagreed with the Vanzant ruling holding. In Zamos v. Stroud, No. B160484 (July 1, 2003), Division Five of the Second District held: "an attorney may be liable for malicious prosecution if the attorney continues to prosecute a lawsuit after discovery of facts showing that the lawsuit has no merit."

Third, is there a viable source to satisfy a judgment aside from insurance proceeds? Malicious prosecution is an intentional tort. Although insurance companies may agree to defend their insureds against a malicious prosecution action, there is no duty to indemnify its insured from such a judgment. Indeed any insurance policy that purports to do so is contrary to public policy and unenforceable. Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478, 507-09 (1998). Hence, an evaluation of potential sources to satisfy a judgment should not count on any insurance contribution (aside from a nuisance value to avoid the cost of defending the action.)

Fourth, was the favorable termination of the prior action one that truly demonstrated an absence of liability on behalf of the former defendant? A termination by virtue of discovery sanctions or other procedural grounds that do not reflect the former defendants' freedom from liability in the prior action do not qualify as "favorable terminations" for purposes of malicious prosecution. Zeavin v. Lee, 136 Cal. App. 3d 766 (1982); Pattiz v. Minye, 61 Cal. App.

4th 822 (1998); and De la Pena v. Wolfe, 177 Cal. App. 3d 481 (1986).

Fifth, can you establish damages and lack of probable cause as to *each* separate cause of action from the prior action? It is well-established that a former defendant must establish probable cause as to each separate cause of action asserted against him. Videotape Plus, Inc. v. Lyons, 89 Cal. App. 4th 156, 161, 107 (2001); Crowley v. Katleman, 8 Cal. 4th 666 (1994). Some prior plaintiffs may argue that the prior defendants' damages (i.e., attorneys' fees and emotional distress) should be apportioned among the frivolous and non-frivolous causes of action. There is authority for the proposition that where such claims are intertwined, the burden of such an apportionment should rest on the former plaintiff and not the former defendant. Crowley v. Katleman, 8 Cal. 4th 666, 690 (1994).

Further Information

This is a publication of ECG and should not be construed as legal advice on any specific facts or circumstances. The contents are for general informational purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of ECG, to be given or withheld at its discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship.

Readers are urged to consult their regular contacts at ECG or the principal author of this publication, Jeffrey Lewis (telephone: 949 833 8550); e-mail: jlewis@enterprisecounsel.com), concerning their own situations or any specific legal questions they may have.



Innovative Counsel.
Winning Strategies.™