

# ***The Never-Ending Story***

## ***Malicious Prosecution in California***

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## ***Malicious Prosecution In California***

### I. OVERVIEW<sup>1</sup>

#### A. RISING INCIDENCE OF RETALIATORY LITIGATION

#### B. MALICIOUS PROSECUTION IS A “DISFAVORED” REMEDY

1. Case law: The malicious prosecution tort has long been recognized as having a chilling effect on ordinary citizens' willingness to bring a dispute to court, and therefore, is a disfavored cause of action. [*Sheldon Appel; Crowley v. Kattelman; Babb v. Superior Court; Jaffe v. Stone; Kendall-Jackson Winery*]

2. “There is a basic and important policy that public access to the courts should be unfettered by threats of retaliatory litigation. Access to the courts would be illusory if plaintiffs were denied counsel of their choice because attorneys feared being held liable as insurers of the quality of their clients' cases. Few attorneys would be willing to prosecute close and difficult matters and virtually none would dare challenge the propriety of established legal doctrines.” 1 Mallen & Smith, *Legal Malpractice* (1996 4<sup>th</sup> Ed.) § 6.9, pp. 416-417.

3. By the same token, one should not read too much into this well worn phrase. *Crowley* contains a cautionary note to the defense mantra “Malicious prosecution is a disfavored tort.” As the Supreme Court noted in *Crowley* (echoing its comments in *Bertero* two decades earlier), “This convenient phrase should not be employed to defeat a legitimate [claim]. We responded to [such an argument] 30 years ago, reasoning, ‘.... We should not be led so astray by the notion of a ‘disfavored’ action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority...’

4. View of judges: Many judges view such actions with antipathy, as much or more as sanctions motions. See *Crowley v. Kattelman*.

5. View of juries: Jurors tend to resolve doubts in favor of free access to the courts, but where a trial Court declares that the prior action lacked probable cause and the evidence shows malicious motive, juries are apt to react harshly, awarding economic and non-economic damages, as well as punitive damages.

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<sup>1</sup> Case authorities are cited in the outline in abbreviated fashion. For full cites, see Appendix, which constitutes of list of all cited authorities. Cites are examples only. Often there are many other relevant cases, not all of which will appear in the Appendix. Please note that any opinions expressed in this article are not applicable to any particular circumstances, and should not be viewed to constitute legal advice. Specific issues or questions should be submitted to individual counsel for analysis and advice.

- II. ANATOMY OF A MALICIOUS PROSECUTION CLAIM
  - A. ELEMENTS OF THE CAUSE OF ACTION [*Sheldon Appel; Bertero v. National General Corp.*; *Robbins v. Blecher*; *BAJI 7.30*]
    - 1. Favorable and final termination: the prior action was commenced by or at the direction of the defendant, and was pursued to a legal termination in his favor.
    - 2. Lack of Probable cause: The action was commenced or continued to be prosecuted without probable cause as to one or more claims.
    - 3. Malice: the action was initiated with malicious intent
    - 4. Damages: the prosecution of the prior action caused economic and/or non-economic damages.
  - B. OTHER REMEDIES FOR ABUSE OF THE LITIGATION PROCESS
    - 1. Abuse of Process
      - a) Elements distinguished
        - (1) The fundamental elements of the tort of abuse of process are:
          - (a) An ulterior purpose;
          - (b) A wilful act in the use of the process not proper in the regular conduct of the proceeding. [*Oren Royal Oaks Venture v. Greenberg Bernhard Weiss & Karma, Inc.*]
        - (2) “The relevant California authorities establish, ....that while a defendant’s act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit—even for an improper purpose—is not a proper basis for an abuse of process action.” [*Id.*]
        - (3) There must be some substantial use or misuse of the judicial process beyond the mere filing of the prior action. [*Pacific Gas and Electric Company v. Bear Stearns & Company; Oren Royal Oaks. Venture v. Greenberg, Bernard, Weiss & Karma ; Bidna v. Rosen; Drasin v. Jacoby & Meyers; Loomis v. Murphy; Warren v. Wasserman, Comden & Casselman; Boyer v. Corondelet Savings & Loan Association; Friedman v. Stadum; Seidner v. 1551 Greenfield Owners Assn.*]
        - (4) For these reasons, efforts to circumvent the favorable termination, finality or probable cause elements of the tort of malicious prosecution, by labeling the claim “abuse of process” are improper.

b) The Litigation Privilege, Civil Code § 47(b)(2), protects the filing of a complaint and a variety of activities relating to the prosecution of litigation that have been the subject of abuse of process claims. [*Merlet v. Rizzo*]

(1) However, the Litigation Privilege does not apply to malicious prosecution. [*Crowley v. Katleman; Pacific Gas and Electric Company v. Bear Stearns & Company; Rubin v. Green; Oren Royal Oaks. Venture v. Greenberg, Bernard, Weiss & Karma; Albertson v. Raboff; Ribas v. Clark; Fremont Compensation Insurance Co. v. Superior Court; Abraham v. Lancaster Community Hospital; Camarena v. Sequoia Insurance Co.*]

(2) Further, it does not preclude the use of privileged communications as evidence to prove malice in a malicious prosecution action. [*Albertson v. Raboff; Block v. Sacramento Clinical Labs, Inc.*]

## 2. Sanctions

a) Availability of sanctions is one reason the Courts have been reluctant to extend the tort of malicious prosecution. [*Downey Venture v. LMI Insurance Co.*] They are not a substitute for malicious prosecution, yet they may be properly invoked to remedy frivolous lawsuits. [*Andrus v. Estrada*]

b) Requirements of Code of Civil Procedure § 128.7

c) Relief limited to monetary sanctions for fees and costs and does not permit tort-type recovery, e.g., emotional distress damages. [*Bidna v. Rosen*]

d) Collateral consequences to the grant or denial of sanctions

(1) Collateral estoppel in favor of defendant on the issue of malice does not arise from denial of motion for sanctions in the prior proceedings, since such motions involve a summary proceeding. [*Wright v. Ripley*]

(2) Admissibility of a sanctions award, whether for frivolous litigation, abusive tactics or discovery sanctions is an open question.

(3) Offset: another open question is whether sanctions awarded and actually paid to the malicious prosecution plaintiff in the prior proceeding should be subject to an offset, but presumably a double recovery will not be permitted.

(4) For attorneys, such sanctions for frivolous actions or abusive litigation tactics are State Bar reportable

under Business & Professions Code § 6086.7(c) (non-discovery sanctions exceeding \$1,000).

3. SLAPP suit Motion to Strike pursuant to Code of Civil Procedure § 425.16

a) See more extensive discussion, *infra*, regarding requirements, the effect of filing such a motion and the effect of granting it.

b) No Court has yet addressed whether the dismissal of an action under this statute constitutes a binding determination that such action lacked probable cause or even whether such constitutes a favorable termination, though it almost certainly would be.

III. QUALIFYING PROCEEDINGS

A. PROCEEDINGS THAT MAY GIVE RISE TO MALICIOUS PROSECUTION CLAIMS

1. Arbitrations

a) *Judicial arbitrations* give rise to the malicious prosecution remedy, just as with a bench or jury trial or a trial pursuant to a private reference. [*Stanley v. Superior Court*]

b) *Stipulated arbitration by parties to pending civil litigation*: absent a provision to the contrary, malicious prosecution is a permissible remedy by a prevailing defendant in such an arbitration, since the process is materially the same as a bench trial or trial by reference. [*Sherman Way Townhomes v. Superior Court*]

c) *Private arbitration* agreements that *expressly* allow for the malicious prosecution remedy are to be honored. [*Law Offices of Ian Herzog v. Law offices of Joseph Fredricks*]

d) However, less clear is whether malicious prosecution may arise from an arbitration that was conducted pursuant to a *pre-dispute*, binding arbitration provision in a private contract, where the agreement does not expressly address the issue one way or the other:

(1) There is conflicting case law on this point [*Compare, Sagonowsky v. More* (absolute bar) *with, Brennan v. Tremco, Inc.* (factual issue depending on the language of the contract and intent of the parties).] A third point of view is seen outside California in *Walford v. Blinder, Robinson & Co., Inc.* (Colo.App. 1990) 793 P.2d 620, 623 (arbitration proceeding arising from bargained for arbitration clause may form basis for a malicious prosecution action). No Court appears to have addressed a third option, i.e., there is an available malicious prosecution remedy but it must also be presented via arbitration.

(2) See also, *Rogers v. Peinado*, where the parties agreed to arbitrate a dispute over a mechanics lien, the court holding “We conclude that when Rogers and Peinado contracted to resolve their disputes by arbitration and made no exception for a subsequent judicial proceeding alleging malicious prosecution, they foreclosed pursuit of a judicial remedy for malicious prosecution against one another. In the absence of a contractual provision to the contrary, the aggrieved party is limited to the contract’s remedy of private arbitration.”

(3) The California Supreme Court is apparently poised to resolve the issue, having granting a hearing in *Brennan* on June 21, 2000.

e) However, even if the *parties* to an arbitration agreement are bound not to pursue malicious prosecution (or alternatively are limited to bringing such claims within the confines of the same or a later arbitration), does that agreement bind or protect, as the case may be, the *prosecuting attorney* in the prior arbitration?

(1) No, according to *Rogers v. Peinado*: “The foundation of the *Sagonowsky* decision is that parties to contractual arbitration have, through their contract, agreed to stay out of court. That foundation is absent with respect to Franck and Gargaro because they were not parties to the contract containing the arbitration clause. They made no promises to Rogers and they were not bound by the arbitration clause. We therefore fail to see how they can raise the arbitration clause as a shield against Rogers’ s claim that they maliciously commenced the counterclaim in the arbitration.”

(2) Note, that in *Saganowsky*, the court dismissed the malicious prosecution case both as to the former plaintiff and counsel, but without actually addressing this issue.

2. Will contests constitute a civil proceeding for which the remedy of malicious prosecution is available, if all other elements are established. [*Crowley v. Katleman, citing MacDonald v. Joslyn, Fairchild v. Adams*]

3. A complaint or cause of action for declaratory relief is treated like any other cause of action that is brought maliciously and without probable cause. [*Camarena v. Sequoia Insurance Co.; Pond v. Insurance Company of North America*]

4. Cross-complaints are treated as a separate action for purposes of a later malicious prosecution action by the prevailing cross-

defendant. [*Bertero v. National General Corp.*; *Sherman Way Townhomes v. Superior Court*; *Bixler v. Goulding*]. The same is true even if the cross-claim is presented in a private arbitration. [*Rogers v. Peinado*, discussed *supra*]

5. Administrative proceedings [*Axline v. Saint John's Hospital and Health Center*; *Nicholson v. Lucas*, both hospital internal review proceedings; and *Hardy v. Vial*; *Nicholson v. Lucas*; *Brody v. Montalbano*]

6. Order to Show Cause proceedings, attendant to pending litigation, may support a later malicious prosecution action [*Chauncey v. Niems*] (dual OSC proceedings in family law court for contempt and modification, though favorable termination was not properly alleged)

7. Other examples are cited in *Merlet v. Rizzo*, discussed below.

## B. PROCEEDINGS THAT CANNOT BE USED AS A SPRINGBOARD FOR MALICIOUS PROSECUTION

1. Groundless defenses (“malicious defense”)

a) There is no authority in California to support such a claim and the California Supreme Court, citing out-of-state authorities, declined to “establish such a tort” in *Bertero v. National General Corp.* (even as it recognized that the filing of a cross-complaint based on the same defensive theories would support a later claim of malicious prosecution). The Supreme Court also declined to permit a malicious prosecution action remedy to a prevailing plaintiff against a defendant’s insurer for mounting a frivolous appeal from a prior judgment against its insured. [*Coleman v. Gulf Insurance Co.*; *Merlet v. Rizzo*]

b) However, the New Hampshire Supreme Court did recognize such a new tort remedy in *Aranson v. Schroeder*, 140 N.H. 359, 671 A. 2d 1023 (1995).

2. Small claims actions. [*Pace v. Hillcrest Motor Co.*; *Black v. Hepner*; *Cooper v. Pirelli Cable Corp.* (the fact that the defendant appealed a judgment in favor of the small claims plaintiff and ultimately prevailed in a trial before a jury does not change the result)]

3. State Bar complaint, including informal investigation by the State Bar in response thereto, not resulting in the issuance of an Order to Show Cause, does not constitute “proceedings” sufficient to give rise to a malicious prosecution remedy on the part of an exonerated attorney. [*Lebbos v. State Bar*; *Chen v. Flemming*; *Stanwyck v. Horne*; *Jacques Interiors v. Petrak*] Moreover, if the State Bar does eventually instigate proceedings against the attorney, it is the superseding act of the agency that commences the proceedings (based on its own independent investigation), not the complaining party. [*Werner v. Hearst Publications*]. The same

is true for BQMA proceedings [*Hogen v. Valley Hospital*] and proceedings under the aegis of the California Board of Psychology and the Board of Behavioral Science Examiners. [*Johnson v. Superior Court*]

4. *Subsidiary procedural actions*, e.g., application for writ of sale following a determination of liability and damages [*Merlet v. Rizzo*], post-judgment discovery [*Twyford v. Twyford*], departmental investigations not resulting in formal proceedings [*Imig v. Ferrar*], motions to disqualify counsel [*Silver v. Gold*], applications to the FCC [*Stolz v. Wong*], applications for Order to Show Cause [*Compare, Lossing v. Superior Court*, so holding, *with Chauncey v. Niems*, which allows malicious prosecution following post-judgment Order to Show Cause proceedings. See discussion below re: Family Law proceedings.]. One court even precluded malicious prosecution arising out of the filing of a petition to determine dischargeability of debt in bankruptcy court, viewing it as defensive in nature [*Idell v. Goodman*], though the better approach may be to preclude such state court remedies based on federal preemption, as was done in *Pauletto v. Reliance Insurance Co.* and *Saks v. Parilla, Hubbard & Militzok* (and cases cited therein), given the existence of sanctions and other remedies provided for under federal bankruptcy laws.<sup>2</sup> “Subsidiary procedural actions or purely defensive actions cannot be the basis for malicious prosecution claims.” [*Merlet v. Rizzo*, citing *Adams v. Superior Court* (holding frivolous motion to reconsider will not support a tort remedy), and distinguishing other cases dealing with, *inter alia*, institution of special insanity proceeding, adversarial administrative proceedings, wrongful pre-trial writs of attachment, recording a lis pendens, judicial arbitrations, petitions for administrative mandate and will contests which the court described as “*ancillary or independent*.”]. Notably, *Merlet* also dismissed an alternative abuse of process claim, based on the Litigation Privilege.

5. To what extent may proceedings in Family Law Court give rise to a malicious prosecution remedy? The historical case law is not consistent, but the clear weight of the contemporaneous authority is to completely preclude this remedy in connection with orders to show cause, motions or any other proceedings in Family Law Court. See extensive and scholarly discussion by the 4<sup>th</sup> District’s Justice Sills in *Bidna v. Rosen*, analyzing *Twyford v. Twyford*; *Chauncey v. Niems*; *Lossing v. Superior Court*, and *Green v. Uccelli*. *Bidna* was followed in 1<sup>st</sup> District in *Begier v. Strom* in the context of child abuse allegations.

6. Frivolous appeals by a losing defendant [*Coleman v. Gulf Insurance Co.*] for which the exclusive remedy is sanctions sought

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<sup>2</sup> Preemption rationale does not apply in malicious prosecution arising out of a federal civil rights suit, despite 42 U.S.C. § 1988 and Rule 11. *Del Rio v. Jetton*.



from the reviewing court under Code of Civil Procedure § 907. The Court also rejected an alternative claim of abuse of process.

7. What if the complaint is filed, but not served? Does that constitute “commencement” for purposes of malicious prosecution? There is no authority on point.

a) See, *Adams v. Superior Court*: “The tort of malicious prosecution requires the initiation of a full-blown action....” (emphasis added).

b) One possible analogy comes from former *Code of Civil Procedure* § 128.5(b)(1): “The mere filing of a complaint without service thereof on an opposing party does not constitute “actions or tactics” for purposes of this section.” This provision does not carry over to Section 128.7.

c) Likewise by analogy, the mere filing of a complaint (even for an improper purpose), is not a proper basis for the related tort of abuse of process. “The relevant California authorities establish, however, that while a defendant’s act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing of a lawsuit—even for an improper purpose is not a proper basis for an abuse of process action.” [*Oren Royal Oaks Venture v. Greenberg, Bernhard Weiss & Karma*]

d) On the other hand, case law dealing with when malicious prosecution occurs for determining which of successive liability insurance policies applies, have settled on the filing date as constituting the occurrence of the tort. [*Harbor Insurance Co. v. Central National Insurance Co.*; *Zurich Insurance Co. v. Peterson*]

e) Presumably because the issue would normally arise where the action was dismissed prior to service, presumably causing no substantial injury that would justify retaliation by way of malicious prosecution.

8. Government entities are not allowed to pursue malicious prosecution claims against citizens, regardless of the nature of the underlying action [*City of Long Beach v. Bozek*], though there is a measure of available relief as to prevailing party attorneys fees where an action is found to be frivolous, Code of Civil Procedure § 1038. [*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center*; *Curtis v. County of Los Angeles*]

#### C. MALICIOUS PROSECUTION OF SEPARATE, INDIVIDUAL CLAIMS

1. Where one or more, but less than all, of the claims in the underlying action lacked probable cause, it is permissible to bring a malicious prosecution action targeting only the untenable claims [*Crowley v. Katleman* (rejecting the argument that multiple “theories” of liability all related to a single “primary right”); *Bertero v.*

*National General Corp.; Albertson v. Raboff; Singleton v. Perry; Mabie v. Hyatt; Friedberg v. Cox*

a) The malicious prosecution defendant “must have a reasonable belief in the validity of each of his theories, i.e., one reasonable ground will not excuse others which are without probable cause.” [*Mabie v. Hyatt*]

b) Both *Singleton* and *Bertero* also adopt a relaxed standard of proof for the plaintiff to show damages associated with defending those individual causes of action that are the subject of the later malicious prosecution action. *Bertero* did the same with respect to the fact that the same issues raised in the offending cross-complaint were raised in the privileged context of affirmative defenses. Though apportionment of defense costs between proper and improper claims and between improper affirmative claims and privileged defenses is relevant, “the burden of proving such an apportionment must rest with the party whose malicious conduct created the problem.” [*Bertero v. National General Corp.*, a tenet seemingly reaffirmed in *Crowley v. Katleman*]

2. Probable cause is one thing, favorable termination is another. [*Crowley v. Katleman*] Whether a defendant must prevail “across the board” as to each and every claim (and, if so, whether each claim must be resolved on the merits), in order to satisfy the separate element of favorable termination, may be debatable.

a) Supreme Court decisions are not dispositive of the issue:

(1) In *Crowley v. Katleman*, the defendant prevailed on all claims, but only targeted some of the claims in the later malicious prosecution action. Thus, the issue was not presented. However, the Court seemed to approve the “across-the-board” approach to favorable termination when, in dictum, it alluded to the “rule” that favorable termination must be as to the “entire action” (citing *Friedberg v. Cox*).

(2) As noted in *Crowley*, the Supreme Court’s earlier decision in *Bertero* involved a case where the victorious cross-complainant prevailed “in the prior action as a whole” (citing to *Jenkins v. Pope*).

(3) Finally, though, in *Albertson v. Raboff* the California Supreme Court permitted a malicious prosecution action to proceed (arising out of a wrongfully recorded lis pendens) despite the fact that the former defendant was held liable on the promissory note that was the heart of the underlying action. As interpreted by the *Friedberg* court (cited below), *Albertson* is “distinguishable in that the wrongful institution of ancillary proceedings, such as

the recordation of a notice of lis pendens, can itself support an action for malicious prosecution even without a showing the antecedent action was terminated favorably to plaintiff.”

b) There are several decisions by the Courts of Appeal which support the notion that the former defendant must prevail on the merits entirely, as to all claims:

(1) In *Friedberg v. Cox*, favorable termination was found lacking in that the attorney defendant was held liable for attorneys fees on a theory of quantum meruit, even as he prevailed on the tort claim of intentional interference with contract and a “joint venture” theory. The court stressed the fact that each of the claims represented a “theory” of liability revolving around a single “primary right”, i.e., the right to be paid fees for legal services performed. In that sense each of the claims was related and not distinct and severable. Note, however, that *Friedberg’s* reliance on the “primary right” theory was later criticized by the Supreme Court in *Crowley*.

(2) *Murdock v. Gerth* was the primary legal support for *Friedberg*. The underlying action involved two different contract claims, as to which the defendant prevailed on one contract and was found liable for only \$200 in damages as to the second contract—the trial Court actually adopting a theory of liability not even advanced by plaintiff. *Murdock* held that for purposes of the element of favorable termination, the “judgment as a whole” had to be examined. It was irrelevant that liability was for an insubstantial sum of money and that the theory of liability seized upon by the trial court was not advanced by the prevailing plaintiff. The suggestion that *Murdock* was impliedly disavowed by the Supreme Court in *Bertero* was rejected by the *Friedberg* court, since *Bertero* involved a case where the malicious prosecution plaintiff had prevailed on all claims in the prior action and the Supreme Court enunciated that its decision did not alter the rule that “there was be a favorable termination of the entire action.” [*Friedberg v. Cox*, quoting from *Bertero*].

(3) In *Dalany v. American Pacific Holding Co.*, plaintiff prevailed as to some but not all cross-claims and later entered into a stipulated settlement where the defendant agreed to pay a discounted sum as claimed in the complaint and to allow judgment to be

entered against it on the cross-complaint. The Court distinguished *Crowley*, since the partial victory, while it might have been relevant to the issue of whether the dismissed claims were founded upon probable cause, did not suffice for the separate element of favorable termination (citing to that portion of *Crowley* cited immediately above).

c) However, in *Paramount General Hospital v. Jay*, the former defendant prevailed on 15 of 17 claims, each of which was bifurcated and tried separately, and combined those 15 claims consumed most of the discovery and trial time. Those two on which the plaintiff prevailed involved equitable relief only. Finding the claims to be “severable”, the court found support in *Albertson v. Raboff* and distinguished both *Friedberg* and *Murdock*, holding that a malicious prosecution action could be maintained on those “severable” claims as to which the former defendant prevailed. See also, *Sierra Club v. Graham* (individual and representative claims deemed “severable”); *Tabaz v. Cal Fed Finance* (defendant prevailed on tort and contract claims, but the court awarded restitution as to a single overpayment. Claims were severable for purpose of favorable termination).

#### IV. THOSE WHO MAY BE LIABLE FOR MALICIOUS PROSECUTION

##### A. LITIGANTS

1. Individuals who prosecuted underlying action as individual parties plaintiff
2. The extent of personal liability of directors and officers of a corporate plaintiff is still unclear. See *Puryear v. Golden Bear Insurance Co.*
3. Agent who “instigates or procures” and is “actively instrumental” in the pursuit of the prior action by the principal. [*Jacques Interiors v. Petrak*] (insurance adjuster’s false and fraudulent report concerning a building fire induced insurer to sue tenant in the building)
4. Nominal defendant who later agreed to be bound as if a plaintiff could be held liable as one involved in maintaining the prior action. [*Paramount General Hospital Co. v. Lee*]
5. BAJI 7.30 references those who are “actively instrumental” in commencing or maintaining the underlying action, which may include those who become later involved in the continued prosecution of the prior action, as “aiders and abettors.” [*Lujan v. Gordon*]

##### B. COUNSEL

1. Original counsel who initiated the action, though colleagues in the same firm who had only passing involvement may not be personally liable. [*Gerard v. Ross*]
2. Successor or later involved counsel who substitute or associate into the underlying action
3. Conspiracy claims may trigger Civil Code §1714.10, but not a straightforward claim for malicious prosecution against an attorney who prosecuted the underlying action. [*Sherman Way Townhomes v. Superior Court; Westamco Investment Co. v. Lee*]

C. THOSE WHO MAY NOT BE TARGETED

1. Witnesses
2. Employees and other agents acting strictly in a representative capacity, regardless of allegations of conspiracy or aiding and abetting [*Brennan v. Tremco*]

V. FAVORABLE AND FINAL TERMINATION

A. REQUIREMENT OF FINALITY

1. Generally, the underlying action must be final in the traditional sense of a “final judgment”, i.e., after the time to appeal has expired or at the conclusion of an appeal. [*Rich v. Siegel; Murdock v. Gerth*]
  - a) See also, C.C.P. §1049 (action is deemed to be pending from the time of commencement until its final determination upon appeal, or until the time for appeal has passed, unless a judgment is sooner satisfied).
  - b) Where “the action as a whole is still pending, as herein, it is of no consequence whether a single cause of action has been determined in appellant’s favor, as an action for malicious prosecution must await a favorable termination of the entire proceeding.” [*Jenkins v. Pope; Friedman v. Stadum*]
  - c) The finality requirement is designed to preclude dueling actions, the potential for inconsistent results, impairing the standing of plaintiff’s counsel in the prior action by creating a conflict derived from the targeting of such counsel with a claim for malicious prosecution. [*Babb v. Superior Court*]
    - (1) Comment: This is not absolutely correct because a prior action that is dismissed absent circumstances of double jeopardy or res judicata, is nonetheless deemed final for malicious prosecution purposes—even if not yet time-barred and, thus, can be revived and function as a defense to a precipitous malicious prosecution action. [*Jaffe v. Stone*]
    - (2) In other words, finality for purposes of malicious prosecution does not require a termination that is preclusive of further litigation. [*Rich v. Siegel; Hurgren v. Union Mutual Life Insurance Co.*]

2. Partial terminations generally do not support final termination:

- a) Pre-trial resolution as to one or more, but not all defendants. Here, so long as there is a judgment or dismissal in favor of one or more defendants and thus it is appealable, the cause of action of for malicious prosecution accrues—though if an appeal is filed, any claim for malicious prosecution must abide the appeal. [*Gibbs v. Haight, Dickson, Brown & Bonestee*]
- b) Pre-trial termination as to one or more, but not all plaintiffs, does not give rise to a claim for malicious prosecution since the party against the “partial summary judgment” order was directed could appeal until a judgment is entered. [*Rich v. Siegel*]
- c) Pre-trial termination, by voluntary dismissal, abandonment or otherwise, as to one or more, but not all claims means that any malicious prosecution action is premature. [*Albertson v. Raboff; Jenkins v. Pope; Boyer v. Corondelet Savings & Loan Association*]
- d) The same is true of pre-trial termination of a cross-complaint, separate from the complaint [*Bob Baker Enterprises, Inc. v. Chrysler Corporation*]
- e) However, in the event of a post-trial appeal of some but not all aspects of the judgment, the disposition of a separate and independent claim which is not appealed from may be considered final for purposes of malicious prosecution. [*Albertson v. Raboff*]

## B. FAVORABLE TERMINATION

### 1. Standard

- a) Favorable termination does not occur merely because the plaintiff has prevailed in the underlying action. [*Lackner v. LaCroix*]
- b) A dismissal on technical grounds or “for any other reason not inconsistent with his guilt, does not constitute a favorable termination.” [*Chauncey v. Niems*]
- c) The termination must be “inconsistent with wrongdoing” to constitute a favorable termination. [*Jaffe v. Stone; Lackner v. LaCroix*]
- d) The termination must reflect on the merits of the underlying action. [*Lackner v. LaCroix; Eells v. Rosenblum; BAJI 7.32*]
- e) The mere fact that the prior action was dismissed “with prejudice” does not satisfy the requirement in the absence of an actual consideration of the merits. [*Zeavin v. Lee*]
- f) Nor should the doctrine of res judicata, which is concerned solely with the need for finality, be confused with a favorable termination which must necessarily reflect on the

malicious prosecution plaintiff's innocence. [*Dalany v. American Pacific Holding Corp.*]

g) A termination by dismissal—short of adjudication of the merits by trial or motion—requires an examination of record to determine the reasons for dismissal. [*Dalany; Eells v. Rosenblum; Oprian v. Goldrich, Kest & Associates; Lumpkin v. Friedman; Kennedy v. Byrum*]

h) A dismissal is favorable when it reflects the opinion of either the trial court or the prosecuting party that the action lacked merit or if pursued would result in a decision in favor of the defendant. The focus is not on the malicious prosecution plaintiff's opinion of his innocence, but on the opinion of the dismissing party who is now the target of the malicious prosecution claim. [*Lackner v. LaCroix; Cantu v. Resolution Trust Corp.; Camarena v. Sequoia Insurance Co.; Stanley v. Superior Court*]

i) If the dismissal is on technical grounds or for procedural reasons, it does not constitute a favorable termination. [*Lackner v. LaCroix*]. See examples below.

j) One looks to the substance of the disposition, not its form. Thus, a party who defends a declaratory relief action and prevails on the substance of the legal issue has prevailed on the merits. It is no answer for the party who instigated the action to say that they succeeded in obtaining the relief sought, a declaration of the parties' rights. [*Camarena v. Sequoia Insurance Co.*]

k) The Second District Court of Appeal explained: "The test is whether or not the termination tends to indicate the innocence of the defendant or simply involves technical, procedural or other reasons that are not inconsistent with the defendant's guilt." [*Eells v. Rosenblum*].

l) A dismissal that does not unambiguously reflect the dismissing party's opinion that the case lacked merit is not a favorable termination. Thus, a "resolution of the underlying litigation that leaves some doubt as to the defendant's innocence or liability is *not* a favorable termination, and bars that party from bringing a malicious prosecution action against the underlying plaintiff." [*Villa v. Cole*]

2. A malicious prosecution action by way of declaratory relief cross-complaint violates this fundamental tenet [*Babb v. Superior Court*]

a) "First there is a certain metaphysical difficulty in permitting a counterclaim for malicious prosecution since theoretically that cause of action does not yet exist...The principle is well established that the cause of action for malicious prosecution first accrues at the conclusion of the

litigation in favor of the party allegedly prosecuted maliciously....” [*Id.*]

b) “Second, the requirements of practical judicial administration dictate the retention of the “favorable termination” rule. It prevents the inconsistent judgments which may result if a malicious prosecution action were permitted to be filed before the conclusion of the principal suit....The “favorable termination” requirement facilitates speedy and orderly trials because the other elements of the cause of action (malice and probable cause) are substantially easier to determine with the records of the underlying action available as evidence...” [*Id.*]

c) “Third, the rule of favorable termination is supported by strong policy considerations. Since malicious prosecution is a cause of action not favored by the law...it would be anomalous to sanction a procedural change which not only would encourage more frequent resort to malicious prosecution actions but would facilitate their use as a dilatory and harassing devices... .the introduction of evidence on the issues of malice and probable cause may prejudice the trier of fact in the plaintiff’s underlying complaint or enhance the possibility of a compromise verdict.” [*Id.*]

d) “Finally, as was the case here, the plaintiff and his attorney may be joined as cross-defendants in the malicious prosecution action. This not only places the attorney in a potentially adverse relation to his client, but may well necessitate the hiring of separate counsel to pursue the original claim...” [*Id.*]

e) The rule in *Babb* is not absolute. If the complaint has been dismissed under circumstances constituting a favorable termination, an amended cross-complaint can serve as a vehicle for pursuing malicious prosecution. [*Loomis v. Murphy*] Ironically, the defendant in *Loomis* filed a cross-complaint for abuse of process which was later determined to be unsustainable since filing a complaint without more is not a basis for abuse of process, but then was granted leave to amend the pleading to add a malicious prosecution claim, which did survive.

3. Favorable termination is normally a question of law based on judicial notice of court records from underlying action. [*Cantu v. Resolution Trust Corp.*]

4. Extrinsic evidence to interpret a judgment or order of dismissal (“going behind”) is not admissible. [*Freidberg v. Cox*]

a) “The criterion... is the decree itself in that action. The court in the action for malicious prosecution will not make a separate investigation and retry each separate allegation



without reference to the result of the previous suit as a whole." [*Id.*]

b) The Supreme Court cited *Freidberg* approvingly in *Crowley v. Katleman*, and confirmed that whether a prior action terminated favorably would be determined from the face of the judgment and approved *Freidberg's* refusal to permit the malicious prosecution plaintiff to go behind the judgment.

c) Malicious prosecution cannot be used as a collateral attack on a judgment, even with allegations that the prior judgment, now final, was procured by fraud, perjury and the like. [*Kachig v. Boothe*]

5. Examples of terminations that do not constitute favorable termination

a) Settlement, stipulated judgment or other consensual or negotiated resolution [*Dalany v. American Pacific Holding Corp.*; *Webb v. Youman*; *Coleman v. Gulf Ins. Group*; *Villa v. Cole*; *Paskle v. Williams*; *Ludwig v. Superior Court*]

(1) In *Dalany v. American Pacific Holding Corp.*, plaintiff, a former corporate officer, director and shareholder, sued a corporate affiliate to collect a loan and was hit with a cross-complaint alleging breach of fiduciary duty. Summary adjudication was granted on some but not all of the claims in the cross-complaint, and plaintiff failed to obtain summary judgment on his own complaint. The case was eventually resolved through a stipulated judgment which was the product of lengthy settlement negotiations, where the resulting amount to be paid was substantially less than the face amount of the loans. As to the cross-complaint, the defendant agreed to allow judgment to be entered against it. The court rejected the argument that settlements by way of dismissal (as exemplified in *Pender* and *Villa*) were different from a settlement by way of stipulated judgment, regardless of the res judicata effect of the judgment.

(2) Dismissal of defendant who benefits from a global settlement but refuses to contribute or sign off:

(a) When the prior suit is dismissed pursuant to a settlement, it is irrelevant that the malicious prosecution plaintiff was not a signatory to the settlement agreement between the other parties.

(b) However, "the dismissal of a party who refuses to participate in a settlement concluded

by other parties does not constitute a favorable termination for the nonsettling party." [*Cantu v. Resolution Trust Corp.* See also, *Oprian v. Goldrich, Kest & Associates*].

(c) In *Haight v. Handweiler*, the malicious prosecution plaintiff had been dismissed as a necessary condition to a settlement with other parties to the prior action, an express finding to that effect being found in the court in that action. The fact that the malicious prosecution plaintiff had not agreed to the settlement and declined to participate was irrelevant since his dismissal was mandated by a settlement with the co-defendants.

(d) In *Villa v. Cole* and *Pender v. Radin*, the same kind of circumstances were revealed in the record below with the same result. In *Villa*, it appeared that the recalcitrant police officer was present in court as the settlement was put on the record, and seemed to acknowledge that defense counsel was representing all defendants in setting forth the terms of the settlement. In *Pender*, there was a settlement agreement that expressly required a dismissal of all defendants, leaving the lack of favorable termination determinable as a matter of law.

(e) In *Fuentes v. Berry*, three police officers sued for malicious prosecution arising out of a prior civil rights suit in federal court charging police brutality, targeting the former plaintiff, her husband and sister, and her attorney. The underlying action targeted the City of Alameda, its police chief and three officers who arrested plaintiff following a traffic incident. At first, the trial court granted summary judgment based on lack of favorable termination, relying on the court record, but was reversed to allow plaintiffs to pursue discovery into the issue of favorable termination. Upon remand and after further discovery, a second motion for summary judgment was granted only to be reversed yet again, the Court of Appeal holding that a jury would have to resolve the issue. Unlike *Villa*, the evidence showed that the officers expressly refused to participate, did not appear in court at the time the case settled,

and it was not clear that their dismissal was mandated by the settlement with the City and the police chief, inasmuch as the officers were separately dismissed without any indication that it was pursuant to a settlement (in contrast to the City's dismissal). In fact, when the trial court admonished that the settlement with the City would have no impact on the rights of the officers to sue for malicious prosecution, plaintiff acknowledged the risk and accepted the settlement.

(3) Post-judgment settlement: this is an open question, but the argument for favorable termination is better if the judgment is left intact, e.g., where the judgment contains injunctive or other non-monetary provisions, separate from damages which, by the settlement, are presumably discharged by discounted payment. In *Dalany*, there was only a non-appealable order granting summary adjudication as to some but not all of the claims in the cross-complaint until the stipulated judgment was entered which then resolved the cross-complaint. For a good discussion generally of stipulated dismissals following a merits adjudication, see *Ogle v. Price, Postel & Parma*<sup>3</sup>.

(4) A voluntary dismissal, given merely in exchange for a waiver of costs, is not a favorable termination. [*Ludwig v. Superior Court; Pender v. Radin*] Under such circumstances, the dismissing plaintiff's motivations for the agreement are irrelevant and the former defendant's claim that it agreed to the exchange as a result of duress was likewise unavailing. [*Id.*]

b) Statute of limitations or laches [*Lackner v. LaCroix; Robbins v. Blecher; Asia Investment Co. v. Borowski*]

(1) Though the Supreme Court in *Lackner* left open the question of whether prosecution of a known-to-be stale claim would support favorable termination, in *Warren v. Wasserman, Comden & Casselman*, the court applied *Lackner* and rejected the malicious prosecution plaintiff's attempt to circumvent the procedural ground for the dismissal by alleging that the defendants had prosecuted the underlying action with the certain knowledge that the statute had run. Notwithstanding the allegation of wrongful subjective

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<sup>3</sup> This opinion was ordered not to be published after the Supreme Court denied review, and is offered only for its useful discussion, including numerous cites.

intent, the court refused to look behind the plain procedural grounds for the dismissal, and affirmed summary judgment for the defendant attorneys.

(2) "[I]f a litigant wants to pursue a malicious prosecution action under those circumstances, he must eschew the procedural defense, forego the easy termination, and obtain a favorable judgment on the merits." [*Id.*]

(3) The above may be a slight overstatement. In *Ray v. First Federal Bank of California*, the malicious prosecution plaintiff, an attorney sued by a bank client for malpractice, had prevailed at the trial court level in the underlying action on a motion for summary judgment which argued two separate and independent grounds, the statute of limitations and lack of a duty owed. The trial court granted the motion, but only on the basis of the statute of limitations. However, on appeal, the reviewing court affirmed on different grounds, finding no duty, thus upholding the alternative, merits-based argument that was eschewed by the trial court. This sufficed to establish probable cause since the underlying action was not final until the Court of Appeal rendered its decision which was, as it turned out, purely merits based.

(4) *Ray* found support in other cases, in one of which the tables were turned and a merits based trial court resolution ultimately did not survive appellate resolution which was not based on the merits. "That favorable termination may depend on appellate proceedings after initial decision in the trial court has been recognized in other cases. For example, in *Oprian v. Goldrich, Kest & Associates* (1990) 220 Cal.App.3d 337, the malicious prosecution plaintiff initially obtained a favorable verdict and judgment in the underlying action, including his cross-complaint. On appeal, however, the court reversed the judgment on the cross-complaint, and also directed dismissal of the complaint, based upon the adverse party's representation that it would not be retried. Even though he had prevailed in the trial court, the plaintiff was held not to have obtained a favorable termination, because the appellate dismissal of the complaint against him had not been on the merits. (*Id.* at pp. 344-345; see also, *Merron v. Title Guarantee & Trust Co.* (1938) 27 Cal.App.2d 119, 121 [appellate

court language disapproving underlying proceeding entitled malicious prosecution plaintiff to proceed on issue of favorable termination].)" [*Id.*]

- c) Statute of frauds or parol evidence [*Hall v. Harker*]
  - d) Lack of jurisdiction, at least where there is an intention to pursue the action in another forum. [*Jaffe v. Stone; Robbins v. Blecher; Eells v. Rosenblum; Minasian v. Sapse; Ferraris v. Levy*]
  - e) Prematurity, for example when there is a pending appeal [*Robbins v. Blecher; Eells v. Robinson; Rich v. Siegel*]
  - f) Mootness [*Robbins v. Blecher*]
  - g) Lack of standing may also not reflect on the merits. [*Sierra Club v. Graham*]
6. Examples of terminations that may give rise to favorable termination
- a) Voluntary dismissal
    - (1) May be deemed an abandonment and thus an implicit concession that the action lacks merit, even if the dismissal is "without prejudice." [*Fuentes v. Berry; Robbins v. Blecher; MacDonald v. Joslyn*]
    - (2) A dismissal to avoid the payment of further attorneys' fees is not on the merits, and simply reflects a practical decision that further litigation will be too expensive to pursue. [*Oprian v. Goldrich, Kest & Associates*] "It would be a sad day indeed if a litigant and his or her attorney could not dismiss an action to avoid further fees and costs, simply because they were fearful such a dismissal would result in a malicious prosecution action." *Id.*
    - (3) Furthermore, a change in the evidence that results in the voluntary dismissal of an untenable claim should not automatically give rise to a malicious prosecution suit. "[I]f the pleading originally advanced a tenable theory but subsequent research or discovery proves it to be untenable, the pleading should be amended to change or delete it." *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57. Arguably, no liability should attach where a party voluntarily drops a claim because the discovery of additional facts renders it untenable. Such amendment would not seem to constitute a favorable termination, and a malicious prosecution claim based on such amendment is arguably inconsistent with public policy.
    - (4) "[T]he law favors the early resolution of disputes, including voluntary dismissal of suits when the plaintiff

becomes convinced he cannot prevail or otherwise chooses to forego the action. This policy would be ill-served by a rule which would virtually compel the plaintiff to continue his litigation in order to place himself in the best posture for defense of a malicious prosecution action." [*Leonardini v. Shell Oil Co.*]

(5) Depending on the circumstances, a voluntary dismissal may reflect ambiguously on the merits or may not reflect a plaintiff's tacit admission that the case lacks merit. Under these circumstances, the issue of favorable termination may be a question of fact. [*Fuentes v. Barry; Haight v. Handweiler; Weaver v. Superior Court; Minasian v. Sapse*]

b) Involuntary dismissals

(1) Dismissal for failure to comply with discovery orders.

(a) Relying on *Zeavin v. Lee* (discussed below), *Pattiz v. Minye* held that dismissal as a discovery sanction, under circumstances of doubt as to the merits of the claims, did not constitute a favorable termination as to plaintiff or her attorney since the refusal of plaintiff's daughter to appear for deposition could not be attributed to plaintiff herself and there was no other evidence of plaintiff's refusal to cooperate with discovery. Thus, the dismissal did not reflect the prevailing defendant's innocence.

(b) *Pattiz* distinguished *Lumpkin v. Friedman* where plaintiff in the underlying action was deprived of the ability to present critical evidence because of the failure to comply with pre-trial deadlines and thus lost at trial. Defendant sued for malicious prosecution and the Court of Appeal later determined that the judgment in the underlying action was based on the merits. "A plaintiff who neglects to produce essential evidence, subpoena necessary witnesses or present evidence in a proper form and thereby suffers a judgment against him cannot be heard to claim that he lost on purely technical grounds."

(2) Dismissal for violating procedural rules, such as mandating plaintiff's personal presence at a mandatory settlement conference. California law is not clear, but see *Wroten v. Lenske*, 114 Or.App. 305, 308 (1992)] and compare, *Nagy v. McBurney*, 120

R.I. 925, 932 (1978) (dismissal for failure to serve of a bill of particulars)

(3) Dismissal based on failure to prosecute [*Fuentes v. Berry*, *Minasian v. Sapse*].

(a) *Minasian* was a pleading case and acknowledged that such a dismissal could result from reasons not reflective of the lack of merit and thus could present a jury question on the issue of favorable termination.

(b) In *Cook v. Farmers Group, Inc.*, a dismissal of a criminal proceeding for undue delay in prosecution was determined to be more in the nature of an abandonment, the court rejecting the statute of limitations analogy. Summary judgment was reversed since there were contradictory inferences from the court record in the criminal proceedings, leaving a triable issue of fact as to favorable termination.

7. Examples of resolutions that do constitute favorable termination

a) Acquittal of a criminal defendant or defense judgment for a civil defendant after trial on the merits

b) Dismissal of criminal charges after a preliminary hearing based on a judicial determination of insufficient evidence, despite the fact that the charges could be revived upon discovery of additional evidence and double jeopardy would not apply. If a malicious prosecution action is then brought, despite revival of the charges, the latter constitutes an affirmative defense to be raised by the malicious prosecution defendant. [*Jaffe v. Stone*]

(1) Presumably, the same would hold true in the civil context, as where the prior action was dismissed without prejudice but capable of being refiled because the statute of limitations had not yet expired.

c) Summary judgment, sustaining of demurrer without leave to amend, or a grant of judgment on the merits, provided such pre-trial rulings are based on the merits. [*Sierra Club Foundation v. Graham*]

d) Successful defense based on Litigation Privilege is a merits based determination. [*Berman v. RCA*]

e) No case has yet determined whether a dismissal pursuant to the SLAPP suit statute qualifies, though it almost certainly will be so held—since there must be an evaluation of the merits at a relatively low threshold.

(1) A court must “determine only if the plaintiff has stated and substantiated a legally sufficient claim” and cannot weigh the evidence presented in the

supporting and opposing affidavits. [*Briggs v. Eden Council for Hope and Opportunity; Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*]

(2) Standard “is much like that used in determining a motion for nonsuit or directed verdict.” [*Wilcox v. Superior Court*]

8. Client concessions or other conduct causing dismissal of underlying action—where not attributable to the attorney—does not lead to a favorable termination as to the attorney

a) Unquestionably, an attorney may be sued and held separately liable for malicious prosecution where there is no probable cause and no tenable basis for pursuing the underlying action. [*Westamco Investment Co. v. Lee; Sherman Way Townhomes v. Superior Court*]

b) However, even if the *plaintiff's* actions cast doubt on the merits of the suit, such inference cannot be imputed to the plaintiff's lawyer. The client is not the agent of the attorney. When the underlying case is dismissed because of the client's conduct, that conduct will not be attributed to the lawyer for purposes of favorable termination. [*Zeavin v. Lee; De La Pena v. Wolfe*]

(1) In *Zeavin*, a malicious prosecution lawsuit was brought against a lawyer who had sued two doctors for medical malpractice. The malpractice case was dismissed with prejudice after the underlying plaintiff refused to cooperate with her lawyer and refused to provide discovery. The malicious prosecution plaintiffs argued that the lawyer's client had abandoned her lawsuit because it lacked merit, and this constituted a favorable termination that would support their claim against the lawyer. However, the Second District Court of Appeal refused to attribute the client's implied concession to the attorney. It distinguished the situation in *Minasian v. Sapse, supra*, where a malicious prosecution claim was permitted to proceed based on the malicious prosecution defendant's own failure to prosecute the underlying action. "That rule should not be extended to make every lawyer who files an action on behalf of a client the insurer of the client's adversary in that action."

(2) "While it may sometimes be proper to hold that a prior action was unfavorably terminated against a party solely because of her conduct in refusing to cooperate or make discovery or by reason of her unilateral abandonment of that action, the attorney is not the insurer of his client's conduct, and the law



wisely places no burden on that party's *attorney* solely by reason of his client's conduct in that regard." [*Id.*]  
(3) In *De La Pena v. Wolfe*, the Second District affirmed the *Zeavin* rule that the client is not the representative of the lawyer for purposes of favorable termination, and noted a further ground for its ruling: any concession by the client that the case lacked merit could not be binding on the attorney in that case because he had not represented the client when the abandonment occurred.

## VI. PROBABLE CAUSE

### A. STANDARD

#### 1. Generally

a) Probable cause is not the same as legal cause. If it were, every plaintiff who loses a case would be liable in a subsequent action for malicious prosecution. [*Lucchesi v. Giannini & Uniack*]

b) Thus, losing the underlying action does not automatically establish the lack of probable cause [*Nicholson v. Lucas; Klein v. Oakland Raiders, Ltd.*] or even give rise to an inference that probable cause was lacking. [*Masterson v. Pig'N Whistle Corporation*]

c) Similarly, an attorney is not an insurer that his client will prevail in the litigation. His only duty is to avoid prosecuting untenable claims. [*Williams v. Coombs*] Put another way, it is not "true charges" that the law seeks to ensure, but merely "legally tenable" claims.

d) The reasonableness of the attorney's research and investigation prior to commencing the prior action is not relevant to probable cause. [*Sheldon Appel*] The duty of care is owed only to the client, not the adversary. However, the failure to conduct a meaningful investigation may be probative on the element of malice.<sup>4</sup>

e) Proof of favorable termination does not create a conflict of interest on the issue of probable cause, nor does proof of the element of malice. [*Nicholson v. Lucas; Leonardini v. Shell Oil*].

2. The Supreme Court in *Sheldon Appel* defined the test for probable cause as follows: "[T]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, *i.e.*, to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable. The resolution of

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<sup>4</sup> In 1995 the California Supreme Court denied review and decertified *Slater v. Durchfort*, 1995 Cal.App. LEXIS 579 which so held in the context of finding that malice had been properly plead based on such an allegation.

that question of law calls for the application of an objective standard to the facts on which the defendant acted."

3. In defining the nature of probable cause, the *Sheldon Appel* Court rejected the suggestion in earlier cases such as *Williams v. Coombs*, *Weaver v. Superior Court* and *Tool Research & Engineering Corp. v. Henigson* that probable cause be measured by "whether a prudent attorney, after such investigation of the facts and research of the law as the circumstances reasonably warrant, would have considered the action to be tenable on the theory advanced." See *Downey Venture v. LMI Insurance Co.*

4. Instead, the high court adopted a more liberal test taken from its pronouncement in the leading sanctions case, *In re Marriage of Flaherty*, which held that an appeal would be found frivolous only if "any reasonable attorney would agree that the appeal is totally and completely without merit." See also, *Roberts v. Sentry Insurance Co.*

a) The Court explained: "[W]e believe that the less stringent *Flaherty* standard more appropriately reflects the important public policy of avoiding the chilling of novel or debatable legal claims."

b) Therefore, it modified the *Flaherty* standard and announced the new test for probable cause in malicious prosecution cases: "whether any reasonable attorney would have thought the claim tenable." Thus, the Supreme Court shifted the focus to the objective tenability and away from the adequacy of the prosecuting attorney's performance and his subjective belief in the merits of the cause. To do anything else, the high court concluded, would effectively put the issue of probable cause in the hands of a jury. [*Downey Venture v. LMI Insurance Co.*]

(1) Tenability means "defensible" or "capable of being maintained against argument or objection." (See *Webster's Third New International Dictionary* (1979). The implication of the Supreme Court's use of the word in *Sheldon Appel*, is that lack of probable cause should not be found where reasonable minds could differ.

(2) In other words, to establish that the underlying lawsuit was instituted without probable cause, the plaintiff in the malicious prosecution suit must prove that based on the facts known to the lawyers when they filed the lawsuit, no reasonable attorney would have thought that the claims in the action were tenable. [*Sheldon Appel*; *Copenbarger v. International Ins. Co.*; *Leonardini v. Shell Oil Co.*]

5. Probable cause must exist as to *each claim*. See discussion, *supra*, re *Singleton-Hyatt* line of cases.
6. Probable cause must exist as to *each element* of a cause of action, including damages and causation. [*Sangster v. Paetkau*; *Wiley v. County of San Diego*]
7. Probable cause is also required as to *each separate party* against whom a claim is made. [*Arcaro v. Silva and Silva Enterprises Corp.*; *Puryear v. Golden Bear Insurance Co.*]
  - a) Whatever the probable cause for prosecuting a claim against insurance brokerage firm, there was no basis to proceed individually against officer and shareholder (either as alter ego or based on personal wrongdoing), especially when the former plaintiff had the benefit of conducting discovery, first, and then joining the individual as a fictitious defendant under Code of Civil Procedure § 474, if the supporting evidence later developed. Under these circumstances it could not be credibly argued that the former plaintiff faced a dilemma of “prosecute or perish.” The court rejected a lesser standard for probable cause set forth in Restatement 2<sup>nd</sup> of Torts §§ 662, 675) [*Puryear v. Golden Bear Insurance Co.*]
  - b) Similarly, a creditor faced with plausible evidence that a guarantee had been forged, was wrong to prosecute claim against guarantor without first investigating. [*Arcaro v. Silva and Silva Enterprises Corp.*]
8. Lack of probable cause may stem either from the lack of a *factual* foundation or the lack of a *legal* basis. [*Sierra Club v. Graham*; *Sangster v. Paetkau*; *Arcaro v. Silva and Silva Enterprises Corp.*; *Puryear v. Golden Bear Insurance Co.*; *Leonardini v. Shell Oil Co.*] The approach to probable cause differs considerably depending on whether the case balanced on a factual or legal fulcrum.
  - a) In *Puryear*, the Court stated its willing to sanction probable cause despite the lack of critical facts in hand at the commencement of the action, so long as the defendant possessed “information reasonably warranting an inference that there is such evidence.”
  - b) In *Arcaro*, by contrast, a collection agency was put on notice prior to bringing a collection action that the person identified as the guarantor claimed his signature was a forgery. Faced with that denial, together with information including the identity of the suspected forger and establishing the suspect’s motive and access to the document, the collection agency could not reasonably rely on the fact that information on the documents pertaining to the guarantor was accurate. The burden of submitting the

questioned documents to an expert rested with the collection agency, not the alleged guarantor. Likewise, it was not the would be defendant's obligation to offer a pre-forgery handwriting exemplar. It was not enough to "hope for a Perry Mason-style denouement at trial."

c) Nor does a prosecuting attorney gain immunity from malicious prosecution by couching allegations as supported by "information and belief." [*Mabie v. Hyatt*] Rather than suing first, asking questions later, litigants and their counsel should resort to pursuing tenable claims, pursuing discovery and later seeking leave to amend the complaint to add new claims justified by evidence gather during discovery. [*Id.*]

d) *Leonardini* carefully analyzes the "factual/legal dichotomy", pointing out that the legal element must be judged by the "fairly debatable" standard, which gives recognition to the right of attorneys and litigants to advance new and untested claims or arguments and to advocate in an uncertain legal climate. See also, *Mabie v. Hyatt* (applicable law was in a "state of flux").

9. Despite the *Sheldon Appel* court's reformulation of the probable cause standard in objective terms, prior Supreme Court pronouncements [*e.g.*, *Bertero v. National General Corp.*] concerning a *subjective* dimension of probable cause remain valid, as the unanimous *Sheldon Appel* decision recognized. No probable cause exists where the prosecuting parties know that the factual basis for the action is false. That issue is for a jury to determine. This is to be distinguished from the prosecuting parties' subjective belief in the *legal* tenability of the claim, according to *Sheldon Appel*. That belief—and the prosecuting parties' motivations—go to the issue of malice.

10. However, "if the court determines that there was probable cause to institute the prior action, the malicious prosecution action fails, whether or not there is evidence that the prior suit was maliciously motivated." [*Sheldon Appel*]

11. In judging probable cause, the trial court should construe the former plaintiff's pleadings in the underlying action liberally. By the same token, however, liability for malicious prosecution cannot be avoided by "pointing to some undisclosed and unlitigated, but tenable claim for relief." [*Leonardini v. Shell Oil Co.*] Thus, for example, where the underlying action sought injunctive relief only—and such was not tenably assertable—it is no defense that a claim for damages must have been properly asserted. [*Id.*]

## B. WHO DECIDES WHETHER PROBABLE CAUSE WAS ABSENT?

1. Where the facts relating to probable cause are not in dispute, the existence of probable cause is a question of law for the trial Court to decide, not the jury. This was the second change in the

law stemming from the Supreme Court's ground breaking decision in *Sheldon Appel*.

a) Thus, it is often strategically wise and effective for a defendant to test the issue of probable cause by early motion for summary judgment, and in some instances at the demurrer stage, where the evidence can be derived from the Court records from the prior proceedings, e.g., where the prior action resolved by motion or trial, leaving an evidentiary record that can be gauged by the court in the later malicious prosecution action. [*Bixler v. Goulding*] Just because there are disputed facts relevant to the merits of the underlying action does not preclude summary judgment, so long as those facts not in dispute do independently establish probable cause. [*Sangster v. Paetkau*]

b) This also means that typically, once the evidence has been presented, the parties argue probable cause to the judge, and depending on the court's ruling, then proceed to argue malice and damages to the jury.

c) Under these circumstances, the issue of probable cause is reviewed *de novo* on appeal. [*Arcaro v. Silva and Silva Enterprises Corp.*, citing *Sierra Club v. Graham*]

2. If the facts upon which the defendant acted in bringing the prior action are in dispute, they must be decided by a jury before the court can determine the issue of probable cause. [*Sheldon Appel*; *Downey Venture v. LMI Insurance Co.*; *Sosinsky v. Grant*; *Leonardini v. Shell Oil Co.*; *Masterson v. Pig'N Whistle Corporation*].

a) "In analyzing the issue of probable cause ..., the trial Court must consider both the *factual circumstances* established by the evidence and the *legal theory* upon which relief is sought.... Evidentiary disputes and factual questions may require resolution before the trial court applies the objective standard to the issue of probable cause. For example, there may be factual issues concerning the *information known to the defendant when it brought the underlying action*. Thus, the malicious prosecution plaintiff may claim that the defendant was aware of information that established the lack of truth in the factual allegations of the prior complaint. In such circumstances, the jury must resolve the threshold question of the defendant's prior knowledge...." [*Sangster v. Paetkau*] (emphasis added)

b) "A determination of probable cause is an issue of law to be made by a Court once any underlying factual issues are resolved. [cite omitted]. There must be a predicate inquiry, however, to identify facts known to or reasonably discoverable by the instigator of the prior action which are

relevant to whether there was a good faith basis for the filing of the action. That inquiry may raise triable issues of fact which must be resolved before a Court may determine whether the filing of the underlying action was objectively reasonable. [cites omitted]." [*Landaker v. Warner Bros., Inc.*]

c) However, the only relevant factual issue is which facts were known to the defendant when he filed the prior action-- not whether they were true or their particular significance. Thus, "[w]hen there are no disputed questions of fact about [the defendant's] preparation and knowledge prior to the institution of the proceeding giving rise to the malicious prosecution claim," the probable cause issue is properly determined by the trial court. [*Nicholson v. Lucas*].

d) If the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause and the defendant is entitled to prevail. [*Sheldon Appel*].

e) It thus appears that the jury's province is limited to deciding whether the facts asserted as the basis for probable cause were known to the defendant at the time the action was commenced or whether the facts were true or known to the prosecuting party to be untrue. [*Sosinsky v. Grant*]

3. Expert witness testimony is not permitted on the issue of probable cause [*Sheldon Appel*]

a) Whether expert testimony might be relevant to either malice, reliance on advice of counsel, punitive damages or affirmative defenses is an open question. [*Monia v. Parnas*<sup>5</sup>]

b) Such testimony has been sanctioned on the issue of favorable termination, where the former plaintiff dismissed three days before a critical preliminary injunction hearing, in the face of a dismissal demand by defense counsel who was later called to give what appears to have been a mix of fact and opinion testimony. [*Leonardini v. Shell Oil Co.*] The same court declined to decide if an independent expert (a retired judge) properly gave opinion testimony supportive of "malice" for punitive damage purposes, since there had been no timely objection and thus the issue was waived. [*Id.*]

4. Prior settlement offers in the underlying action by the prevailing defendant are irrelevant to whether probable cause existed, as it does not reflect upon the merits of the case (there may be many non-merits based factors that account for settlement offers), much less the state of mind of the prosecuting party; indeed, such

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<sup>5</sup> 1991 Cal. App. LEXIS 154. This case was ordered not to be published and therefore cannot be cited as precedent. The court provides a persuasive rationale for permitting expert testimony on the issue of malice, comparing it to insurance bad faith suits.

evidence is not discoverable in a subsequent malicious prosecution action. [*Covell v. Superior Court*]

5. Typically the element of probable cause is challenged by way of pretrial motions

a) Demurrer, where trial or other evidentiary record exists as to which judicial notice may be taken.

b) Summary judgment, where extrinsic evidence is necessary. [*Tool Research & Engineering Corp v. Henigson*]

### C. RULINGS IN UNDERLYING OR RELATED ACTIONS WHICH MAY CONSTITUTE A FINDING OF PROBABLE CAUSE

1. Denial of motion for summary judgment in the underlying action is tantamount to a finding of probable cause [*Roberts v. Sentry Life Insurance Co.*]<sup>6</sup>

2. There is no case applying a denial of a nonsuit motion but, since the standard is essentially identical to a summary judgment motion, it is likely that denial of a nonsuit would also be deemed the equivalent of a probable cause determination. Indeed, in the prior action giving rise to *Hufstedler, Kaus & Ettinger v. Superior Court*, the trial Court denied summary judgment, nonsuit and directed verdict motions which the *Hufstedler* Court suggested in dictum were “tantamount to a judicial declaration” of probable cause (but whether individually or collectively is not clear).

3. Where a jury verdict in favor of the plaintiff in the underlying action is later reversed, the verdict itself constitutes a finding of probable cause [*Cowles v. Carter*] See also, *Crowley v. Katleman* which refers in passing to the “rule” that probable cause is established conclusively by “interim adverse judgment” that is overturned by motion or later appeal (not citing *Cowles*, but citing *Bealmear v. Southern California Edison* and *Fairchild v. Adams*), in rejecting the argument that denial of a motion for summary judgment on all but one ground constituted a probable cause finding (citing *Lucchesi v. Giannini & Uniack*).

4. One exception to this “rule” would be if the malicious prosecution plaintiff could prove that the initial victory at the trial court level was the result of perjury or other obstruction of justice. [*Hydranautics v. Filmtec Corporation*]. This applies only where such a judgment was eventually overturned. If it becomes final, perjury will not revive it through the vehicle of a malicious prosecution action. [*Kachig v. Boothe*]

5. In a criminal case, where a defendant is bound over for trial after a preliminary hearing and the defendant is eventually

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<sup>6</sup> *Roberts* distinguished the contrary authority of *Lucchesi v. Giannini & Uniack* since it was decided based on the pre-*Sheldon Appel* standard for probable cause which included subjective good faith. The court also held in the alternative that the record in connection with the motion for summary judgment supported an independent determination in favor of probable cause.

acquitted after trial, probable cause is established for purposes of a later malicious prosecution action. [*Ross v. O'Brien*]

6. On the other hand, in a case of first impression, *Landaker v. Warner Bros.* refused to find probable cause based on the evidentiary showing made in connection with a *later* attachment hearing in the underlying action where the standard for issuance of the writ was “probable validity.” First, “the facts which were made known to the commissioner at the hearing may not have been all of the facts which were known to or reasonably discoverable by [defendant] *before it initiated the prior action...*” “The declarations from the prior action... were in conflict and, furthermore, did not address the extent of [defendant’s] pre-filing investigation.... There being a predicate factual conflict, the Court in the present action could not rule as a matter of law whether [defendant] had probable cause...” [*Id.*] (emphasis added) Second, the procedures associated with attachment orders “in common with other provisional remedies” were such that they are not given determinative effect even in that same action and should not be given conclusive effect on probable cause in a later filed malicious prosecution action. Third, the attachment order only dealt with some, not all of the claims prosecuted in the underlying action.

7. In *Hydranautics v. Filmtec*, a prior determination of the Federal Circuit that the failed patent infringement claim was not “objectively baseless” did not constitute a binding determination of probable cause because there was no indication that the court had considered the issue of whether the patent sought to be enforced had been originally obtained by fraud upon the Patent & Trademark Office or whether the reversed judgment in favor of the patent holder had been obtained by perjured testimony.

8. Another possible ruling that could supply probable cause would be the granting of a motion under Civil Code § 3295 permitting discovery into a defendant’s financial condition in a case where punitive damages are sought. No case has yet addressed the issue.

9. The same is true in the event that a plaintiff obtains an order pursuant to Civil Code § 1714.10 permitting the filing of an action charging an attorney with conspiring with a client or a plaintiff satisfies the burdens imposed by the SLAPP suit motion to strike procedure under Code of Civil Procedure § 425.16.

#### D. AT WHAT POINT MUST PROBABLE CAUSE EXIST?

1. Probable cause can be “lost”:

a) Continued prosecution of the a lawsuit once it becomes evidently untenable is open to challenge by malicious prosecution. [*Pacific Gas & Electric v. Bear Stearns; Lujan v. Gordon; Arcaro v. Silva and Silva Enterprises Corp. Leonardini v. Shell Oil Company*]



b) "There can be no doubt that the continuation of a malicious prosecution action beyond the initial act of instigation may inflict additional damage upon the victim...as the Supreme Court noted in *Ray Wong v. Earle C. Anthony, Inc.* [cite omitted]... 'The term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination...' [*Lujan v. Gordon*]

2. But can probable cause be later discovered? Though probable cause is normally determined by the defendants' knowledge at the commencement of the underlying action (and certainly probable cause must exist every step of the way), where the case is eventually tried, one court has held that probable cause may be *determined* by reference to the evidentiary record from the trial, essentially by-passing the date of commencement inquiry [*Hufstedler, Kaus & Ettinger v. Superior Court*]

a) The traditional rule that the existence of probable cause is judged solely on the basis of the facts known to the malicious prosecution defendant when it filed the prior lawsuit was rejected in *Hufstedler, Kaus & Ettinger v. Superior Court* where the court of appeal considered evidence of the malicious prosecution plaintiff's actions learned during the course of discovery in the underlying lawsuit, and the fact that all of his motions had been denied by the prior court, to reach its conclusion that the attorneys had probable cause to prosecute the suit.

b) The *Hufstedler* court explained its approach as follows: "[W]here, as here, the record in the underlying action was fully developed, a court can and should decide the question of probable cause by reference to the undisputed facts contained in that record, and where, as here, undisputed evidence establishes an objectively reasonable basis for instituting the underlying action, a 'dispute' about what the attorney knew or did not know at the time she filed the underlying action is irrelevant."

c) Whether *Hufstedler* will survive as a viable standard is open to doubt. Despite approving language in dictum in other cases, *see, e.g., Downy Venture v. LMI Ins. Co.*, *Hufstedler* remains controversial. It was criticized by some commentators, and the Fifth District Court of Appeal expressly modified a recent opinion to delete a statement that the objective evaluation of legal tenability could be based on "subsequent events in the litigation." [*Kendall-Jackson Winery*]

d) The *Hufstedler* holding received a boost in another recent decision by the Second District Court of Appeal which

suggested that evidence discovered after the underlying action was filed may furnish a defense to a subsequent malicious prosecution lawsuit. [*Roberts v. Sentry Life Insurance*]

(1) the court held that the denial of a motion for summary judgment in the prior action "normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit."

(2) Denial of summary judgment is a reliable indicator of probable cause, the court reasoned, because summary judgment motions usually are heard only after full discovery develops the evidence relevant to the claim, and the judge denying the motion is impartial and "thus, likely will agree with some hypothetical `reasonable lawyers.'" *Id.* at 383-384.

(3) Thus, without acknowledging the controversial implications of its conclusion, the court assumed that evidence developed during discovery is relevant and admissible in determining the existence of probable cause. It also assumed that the trial court's denial of summary judgment indicates probable cause to sue, a debatable assumption given the myriad reasons such motions may be denied, and ignored that even an impartial trial judge may be reversed on a writ by the court of appeal.

(4) Certainly, this decision exemplifies the kind of antipathy to malicious prosecution claims that is often exhibited by the judiciary.

e) Likewise unclear is whether the *Hufstедler* approach can be used in other instances, e.g., where the underlying action was disposed of by way of motion for summary judgment. Arguably the exception created by the *Hufstедler* Court is expressly limited to situations where, as the court itself stated, the underlying action had a "fully developed" and "complete" record as a result of a trial on the merits. It should be noted, however, that in the prior action giving rise to *Hufstедler*, the trial Court denied summary judgment, nonsuit and directed verdict motions which the Court of Appeal suggested in dictum were "tantamount to a judicial declaration" of probable cause.

## VII. MALICE

### A. STANDARD

1. The third element of the malicious prosecution cause of action, malice, essentially the chief element of the tort [*Maxon v. Security Insurance Co.*], goes to the malicious prosecution defendant's intent in initiating the prior action. [*Sheldon Appel*]

2. The test is *legal* malice, not actual hostility or ill will toward the plaintiff, although the latter also may be present. It is sufficient if it appears that the prior action was instituted in bad faith to vex, annoy, or wrong the adverse party. [*Albertson v. Raboff*; *Sierra Club Foundation v. Graham*; *Weber v. Leuschner*; *BAJI 7.34*].
3. Malice may range from open hostility to indifference. [*Bertero v. National General Corp.*; *Grindle v. Lorbeer*]
4. Malice is present when proceedings are instituted primarily for an improper purpose. [*Downey Venture v. LMI Insurance Co.*] However, the motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purposes. [*Id.*, citing 5 Witkin, *Summary of California Law* (9<sup>th</sup> Ed. 1988), Torts §§ 429, 450 at pp. 511, 534]
5. Malice may be proved directly or indirectly, that is, inferred from the circumstances. [*Weber v. Leuschner*] Examples may include declarations of prejudice, ill will or malicious motive [*Jackson v. Beckham*] or simply a lack of good faith [*Bulkley v. Klein*]
6. An improper purpose may include: "(1) the person initiating [the suit] does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim." [*Albertson v. Raboff*].
7. Malice requires that the former plaintiff have instituted the prior proceedings with the intent of targeting the former defendant's interests, as opposed to those of another. [*Camarena v. Sequoia Insurance Co.*; *Hogen v. Valley Hospital*]
8. Malice is almost invariably a question of fact to be determined by the trier of fact [*Axline v. Saint John's Hospital and Health Center*; *Northrup v. Baker*] and is not normally suitable for resolution by way of a summary judgment.

#### B. NO INFERENCE FROM LACK OF PROBABLE CAUSE

1. Prior law sanctioned such an inference, where probable cause had a subjective element. [*Singleton v. Singleton*; *Williams v. Coombs*; *Runo v. Williams*; *Grove v. Purity Stores, Ltd.*; *Jensen v. Leonard*; *Pond v. Insurance Company of North America*; *Weber v. Leuschner*; *Masterson v. Pig'N Whistle Corp.*]. This was logical given the then prevailing "reasonable belief" standard enunciated by an earlier Supreme Court in *Albertson v. Raboff*. [*Downey Venture v. LMI Insurance Co.*]
2. Since *Sheldon Appel's* adoption of an *objective* probable cause standard, such an inference is no longer viable [*Downey Venture v. LMI Ins. Co.*; *Sangster v. Paetkau*; *Leonardini v. Shell Oil*]

a) In *Downey Venture*, the appellate court followed the logic of the *Sheldon Appel* decision and expressly rejected the legitimacy of inferring malice from an absence of probable cause, stating “The conclusion that probable cause is absent logically tells the trier of fact nothing about the defendant’s subjective state of mind.” *Sangster* followed suit.

b) Note: Cases such as *Sierra Club v. Graham* suggest that the lack of probable cause can be established either *objectively* (lack of objective tenability based on facts known) or *subjectively* (knowledge of the defendant that facts essential to the existence of probable cause are in fact untrue). It appears that proof that the defendant knew that the foundational facts were false—thus demonstrating the lack of probable cause—should indeed give rise to an inference of malice, using the same rationale as pre-existed *Sheldon Appel*. See *Downey Venture v. LMI Insurance Co.*; *Monia v. Parnas*<sup>7</sup> (noting this is an open issue).

3. Even without the legal sanction of an inference of malice stemming from the lack of probable cause, that does not mean that the trial court’s prior determination of a lack of probable cause is irrelevant to the jury’s task of determining whether the conduct of the defendants was actuated by malice. Thus, arguably the jury can be instructed that it is a “factor” that may be taken into account—without elevating it to the level of a legally sanctioned inference. [*Downey Venture v. LMI Insurance Co.*]

#### C. PROVING MALICE: MAKING A CASE AGAINST CLIENTS AND/OR THEIR COUNSEL

1. Evidence of malice on the part of *litigants*

- a) Conduct and motivations prior to underlying action
- b) Conduct during underlying action
- c) Subsequent conduct

2. Evidence of malice on the part of *litigation counsel*

- a) The malice must be personal to the attorney defendant and cannot be derived or imputed from the former client’s hostility. [*Tool Research & Engineering Corp. v. Henigson*] On the other hand, proof that the attorney knew of the client’s malicious motivation is a relevant factor in assessing his own state of mind. [*Id.*; *Tresemmer v. Barke*]
- b) According to one noted author: “The malice required to support a malicious prosecution action against an attorney differs from that normally required in other torts. The components of malice by an attorney are technically complex and often misunderstood. The common law definition of malice by an attorney has two requirements: (1)

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<sup>7</sup> This case was ordered not to be published and therefore cannot be cited as precedent. See footnote 5.

the attorney must know there is no probable cause for prosecution; and (2) either the attorney acted with an improper motive or the attorney knew that the client was motivated by malice. The malice must be directed at the claimant, not another.” Mallen & Smith, 1 *Legal Malpractice* §6.20, pp. 454-55 (4<sup>th</sup> Ed. 1996) [citing *Chancey v. Niems* and *Cantu v. Resolution Trust Corp.*]

- c) Conduct prior to instituting the underlying action
  - (1) Ignoring contrary evidence or arguments offered by the target in an effort to dissuade counsel from bringing the prior action
- d) Conduct of the underlying action
  - (1) Letters and other communications, *See, e.g., Bertero v. National General Corp.* where counsel wrote a letter admitting he had advanced a weak point in a brief he submitted to the Court, “not because of any high hopes of now winning it, but because I wanted to show the Appellate Court what a bastard Bertero was...”
- e) Interactions with opposing litigant(s) and counsel

## VIII. DEFENSES AND OTHER DEFENSIVE STRATEGIES

### A. MOTION TO STRIKE AS SLAPP SUIT

1. Governing statute: Code of Civil Procedure § 425.16
2. Effect of the *filing* a motion to strike: all discovery proceedings are stayed pending ruling on the motion. [§425.16(g)]
3. Effect of *granting* motion
  - a) Action or claim is dismissed (stricken)
  - b) Moving defendant is awarded prevailing party attorneys fees and costs [§425.16(c); *Lafayette Morehouse, Inc. v. Chronicle Pub. Co*]
4. Standard for determining application of the statute in the first instance
  - a) Legislative purpose is to encourage citizen participation in matters of public significance and to prevent the chilling effect of abuses of the litigation process [§425.16(a)]
  - b) “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech... in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” [§425.16(b)] (emphasis added)
  - c) Although there was some early discussion by the Courts of Appeal as to the nature and extent of what constituted a “public issue” [e.g., *Linsco/Private Ledger, Inc. v. Investors Arbitration Services*; *Zhao v. Wong*, both now overruled], the

recent amendment to the statute and the California Supreme Court's pronouncement in *Briggs v. Eden Council for Hope and Opportunity*, make it clear that if a statement is made in connection with an official proceeding, it is deemed to be within the purview of the statute, and there is no separate "public issue" requirement.

d) The classic SLAPP suit usually involve claims of defamation, various business torts (such as interference with economic advantage), nuisance and intentional infliction of emotional distress. [E.g. *Wollersheim v. Church of Scientology*; *Wilcox v. Superior Court*] The Legislature, however, did not limit application of the provisions of Section 425.16 to such actions and seemingly recognized that all kinds of claims could achieve the improper objective of a SLAPP suit, that is to interfere with and burden the defendant's exercise of his or her rights. [*Wollersheim v. Church of Scientology*]

5. Standard for determining probability of success

a) A plaintiff is not required to prove its claim at this stage of the proceedings, but only to make a prima facie showing that there is a probability it will prevail. [*Wollersheim v. Church of Scientology*]

b) A court must "determine only if the plaintiff has stated and substantiated a legally sufficient claim" and cannot weigh the evidence presented in the supporting and opposing affidavits. [*Briggs v. Eden Council for Hope and Opportunity*; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*]

c) Standard "is much like that used in determining a motion for nonsuit or directed verdict." [*Wilcox v. Superior Court*]

d) Once the party moving to strike the complaint makes the threshold showing that the alleged actionable conduct is subject to the provisions of Section 425.16, the burden shifts to the responding plaintiff to establish a probability of prevailing at trial. [*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*]

6. Case law involving malicious prosecution claims is sparse at this stage. One example is *Ludwig v. Superior Court* (trial court erred in denying motion to strike).

a) No court has yet addressed the flip side, i.e., if the former plaintiff meets the standard and the trial court denies the motion to strike, does that constitute a finding a probable cause for purposes of a later malicious prosecution action?

b) Nor has any court determined whether a dismissal pursuant to the SLAPP statute constitutes a favorable termination.

## B. STATUTE OF LIMITATIONS

1. Governing statute: Code of Civil Procedure § 340(3) (one year)
2. The statute is triggered upon final termination of the underlying action, i.e., upon entry of judgment. [*Feld v. Western Land & Development Co.*; *Scannell v. County of Riverside*]
3. Thus, the statute of limitations clock starts to tick upon entry of judgment, but the statute is then tolled or suspended upon filing of notice of appeal, and remains so until the appeal is finally resolved. [*Bob Baker Enterprises, Inc. v. Chrysler Corporation*; *Feld v. Western Land & Development Company*; *Gibbs v. Haight, Dickson, Brown & Bonesteel*; *Bellows v. Aliquot Associates, Inc.*; *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.*; *Soble v. Kaufman*]
4. As to when an appeal is final for purposes of causing the statute of limitations clock to resume running, one court focused upon the date of the denial of petition for hearing by the California Supreme Court [*Gibbs v. Haight, Dickson, Brown & Bonesteel*] whereas two other courts favored a rule that the malicious prosecution cause of action is reactivated upon entry on the record of the issuance of the remittitur. [*Bellows v. Aliquot Associates, Inc.*; *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.*] However, if review is sought before the California Supreme Court after issuance of a remittitur, the statute of limitations continues in suspense. [*Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.*]
5. Where an order of dismissal as to a cross-complaint was appealable, notwithstanding the pendency of the complaint, such that upon entry of a judgment as to the cross-complaint, the claim of malicious prosecution accrued. [*Bob Baker Enterprises, Inc. v. Chrysler Corporation*]

## C. RELIANCE ON ADVICE OF COUNSEL

1. Reliance on advice of counsel, in good faith and after full disclosure of the facts, is a time honored affirmative defense to a malicious prosecution action. [*Mabie v. Hyatt*; *Sosinsky v. Grant*; *Pond v. Insurance Company of North America*; *Kennedy v. Byrum*; *Brinkley v. Appleby*; *DeRosa v. Transamerica Title Insurance Co.*; *Lucchesi v. Giannini & Uniack*; *Masterson v. Pig'N Whistle Corp.*]
2. Elements
  - a) Client obtains and actually relies on legal advice that the prior action was tenable
  - b) Good faith
  - c) Full disclosure of the facts to counsel
    - (1) Note: in some instances this factor is irrelevant because the advising attorney already has the information, or indeed, personal knowledge of the relevant factual foundation for probable cause [*Melrich Builders, Inc. v. Superior Court*] or is delegated by the client to obtain the information by

way of an attorney-conducted investigation. [*DeRosa v. Transamerica Title Insurance Co.*]

(2) Where counsel lacks such knowledge, it is not enough for the client to simply open up its books and records, “unleashing [counsel] on a hunting expedition.” Rather, specific disclosures must be made by the client in seeking counsel’s advice. [*Bertero v. National General Corp.*]

3. Reliance on advice of counsel is a complete defense, even if probable cause was otherwise lacking. [*Brinkley v. Appleby; Pond v. Insurance Co. of North America*]

a) Indeed, in assessing the defense, it is irrelevant whether the attorney’s analysis or advice is correct or not.

(1) “There can be no imputation to a client of his attorney’s misconceived legal analysis so as to void the client’s good faith reliance on his counsel’s advice.” [*Brinkley v. Appleby*]

(2) “If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client’s claim upon the court.” [*Murdock v. Gerth*].

(3) “Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win...” [*Sheldon Appel*].

(4) “It is the attorney’s reasonable and honest belief that his client has a tenable claim that is the attorney’s probable cause for representation...and not the attorney’s conviction that his client must prevail. The attorney is not an insurer to his client’s adversary that his client will win in litigation. Rather, he has a duty to represent his client zealously... [seeking] any lawful objective through legally permissive means...” [*Tool Research & Engineering Corp. v. Henigson*]

b) Note: as indicated by the cases cited below in connection with whether it truly an affirmative defense, the courts have exhibited some confusion in acknowledging the distinction between probable cause and reliance on advice of counsel. *Brinkley*, as one example, envisioned reliance on advice of counsel as establishing the client’s probable cause.

c) Indeed, this defense should be regarded as separate from the element of malice, as well.

(1) That is, no matter whether the overriding motivation for bringing the action is ill will, if the former plaintiff initiated the action only after consulting counsel and acting in good faith reliance on the



attorney's advice, after making full disclosure, the existence of malice is irrelevant.

(2) Compare, *Paskle v. Williams* (“...the motive, even if malicious, of defendants is unimportant if legal ground existed upon which to predicate the suit...”)

4. Must reliance on counsel be affirmatively plead as an affirmative defense in the answer?

a) Some cases suggest that reliance on advice of counsel need not be plead as an affirmative defense since it also defeats either of two elements of the tort, malice and lack of probable cause. [*State Farm Mutual Auto, Insurance Co. v. Superior Court; Albertson v. Raboff; Mabie v. Hyatt; Masterson v. Pig’N Whistle Corp.; Walker v. Jensen*]

b) However, others cases appear to treat reliance on advice of counsel as an affirmative defense which must be pleaded in the answer, though such admonitions usually appear by way of dictum. [*Bertero v. National General Corp.*]

c) In all events, the former client, turned defendant in the malicious prosecution action, has the burden of proof. [*Id.*; *Masterson v. Pig’N Whistle Corp.*]

d) Typically, the defense can be raised by amending the answer to assert reliance on advice of counsel as an affirmative defense early in the litigation, i.e., before a trial date is set or plaintiff's deposition is taken—indeed, often the malicious prosecution plaintiff welcomes the defendant's decision to raise the issue precisely because it opens up confidential communications with former counsel, without which it is far more difficult to make a case for malice against the attorney defendant. [see below].

5. One consequence of raising such a defense is to waive the attorney-client privilege to the extent such communications are placed at issue. [*Transamerica Title Insurance Co. v. Superior Court*]

a) Accordingly, the timing of the raising of the issue is of strategic concern. Where the case may be disposed of by way of challenge to favorable termination or lack of probable cause, it may be preferable to demur or move for summary judgment on these issues, first, before taking a step which opens confidential communications to scrutiny.

b) The malicious prosecution plaintiff may wish to be proactive on the issue by serving discovery designed to ferret out whether the claim of reliance on advice of counsel is to be raised, moving to force an election if the initial response is evasive.

#### D. UNCLEAN HANDS

1. Unclean hands has long been available as an affirmative defense to an action for malicious prosecution. Two cases in which summary judgment was upheld based on an unclean hands defense are *DeRosa v. Transamerica Title Ins. Co.*; *Pond v. Insurance Co. of North America*. The standard is whether the malicious prosecution plaintiff has “engaged in any *unconscientious* conduct directly related to the transaction or matter before the court.” [*DeRosa*] (emphasis added, reflecting the court’s determination that it was not necessary to prove fraudulent intent on the part of plaintiff).

2. However, in a new development, this defense has been expanded to take into account actions before and during underlying action

a) In *Kendall-Jackson Winery*, the Court adopted an alternative basis for considering evidence of the malicious prosecution plaintiff's alleged bad acts, even if they were not known to the defendant when it filed the underlying lawsuit. In doing so, it reminded observers that other defenses to the tort exist, i.e. unclean hands.

b) Significantly, the Court rejected a narrow interpretation of the doctrine: “[A]ny evidence of plaintiff's unclean hands in relation to the transaction before the court or which affects the equitable relations between the litigants in the matter before the court should be available to enable the court to effect a fair result in the litigation. The equitable principles underlying the doctrine militate against limiting the unclean hands defense in a malicious prosecution claim to misconduct that bears on the defendant's decision to file the prior action.”

3. Words of caution:

a) Pursuit of this defense at trial could be hazardous because, if rejected by the jury, the attack itself may be viewed as evidence of malice.

b) It is also possible, that attacking conduct pre-dating the filing of the underlying action may be precluded by collateral estoppel. In *DeRosa v. Transamerica Title Insurance Co.* the court declined to address the issue because it had not been raised in the trial Court.

#### E. PRIVILEGES AND IMMUNITY

1. Government entities and public employees acting within the course of their employment are immune from malicious prosecution suit under Government Code § 821.6 [*Tur v. City of Los Angeles*]

2. Civil Code § 43.8 provides civil immunity for a person who communicates information “intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing or veterinary arts.” [*Johnson v. Superior Court*]

## F. EVIDENTIARY PRIVILEGES FROM UNDERLYING ACTION

1. Attorney-client privilege
  - a) Client is the holder
  - b) Defending based on reliance on advice of counsel causes a waiver
  - c) Absent client waiver, whether the attorney defendant can reveal confidences based on “self-defense” privilege remains an open question in California.
  - d) No adverse comment is permitted on exercise of the attorney-client privilege at trial. Evidence Code § 913.
2. Work product privilege
  - a) Attorney is the holder and may assert the privilege in a later malicious prosecution action, despite alleging probable cause as an affirmative defense—since, in reality, it is not a defense but rather part of plaintiff’s case in chief as to which plaintiff has the burden of proof. Also, the fact that the attorney defendants answered their client’s cross-complaint for malpractice did not effect a waiver.

Note: as a result of later amendments, work product cannot be withheld from a client in a malpractice action. Code of Civil Procedure § 2018(f).
  - b) To what extent does withholding of work product impact the ability to defend based on:
    - (1) Existence of probable cause
    - (2) Lack of malice
  - c) Arguably, comment on the exercise of this privilege may be permitted notwithstanding Section 913 since it is not among the privileges recognized in the Evidence Code. Rather, the work product privilege is embedded in the Code of Civil Procedure.

## IX. DAMAGES

### A. COMPENSATORY DAMAGES

1. Economic [*Bertero v. National General Corp.*; *Babb v. Superior Court*]
  - a) Attorneys fees and costs
    - (1) Where some or all of the defense costs from the underlying action were absorbed by the prevailing defendant’s insurer, such insurance constitutes a “collateral source,” and those costs are still recoverable as damages; the role such insurance played is irrelevant and should be presented to the jury in the malicious prosecution case. *See generally, Kardly v. State Farm Mutual Automobile Insurance Co.*
  - b) Lost earnings or profits

2. Non-economic [*Bertero v. National General Corp.*; *Babb v. Superior Court*]

a) Emotional distress and bodily injury

(1) A person wrongfully accused and put through the rigors of litigation, especially if the underlying action went to trial, may be expected to have suffered emotional distress—and thus the claim is frequently asserted.

(2) Though emotional distress damages were not mentioned specifically in the seven reported appellate decisions reviewing plaintiff's jury verdicts (discussed below), a review of jury verdict reports reflects that emotional distress damages are frequently awarded.

(a) A sampling of 31 plaintiffs verdicts during the 1990's were examined (source: Lexis), of which 25 cases involved one or more *individual* plaintiffs, thus creating the potential for an emotional distress recovery.

(b) Focusing on those verdicts where compensatory damages exceeded \$100,000, there were 16 such cases—of which 13 included a verdict component of emotional distress, clearly a high frequency

(c) Of the 13, 5 cases arose from criminal proceedings.

(d) Of those eight verdicts arising out of a prior civil case where there was an overall compensatory damage award exceeding \$100,000 and included emotional distress damages, the following should be noted;

(i) The highest award of emotional distress damages was \$500,000, the next highest, \$200,000, and the lowest was \$15,000.

(ii) Including cases involving multiple individual plaintiffs, these eight verdicts generated seven (7) emotional distress awards exceeding \$100,000.

(iii) Focusing on cases where there was a single, individual plaintiff, the lowest award was \$115,000 and the average was \$229,000.

(e) Punitive damages were awarded in each of the eight civil cases meeting the above criteria, the highest being \$14 million, the lowest, \$100,000, and the average was \$3.147 million.

Eliminating the highest and lowest punitive damage awards, the average was reduced to \$1.846 million.

(i) It should be noted that in five of the eight cases, the plaintiff had been dragged through a full trial in the underlying action, no doubt a big factor in determining the amount of emotional distress damages. Two other cases involving voluntary dismissals on the virtual eve of trial.

(ii) The ratios of punitive damages to emotional distress damages was quite high, ranging from a low of 3:1 to a high of 70:1, with the second highest ratio being 8:1.

(f) Lawyers were held liable for emotional distress damages in 3 of the eight cases.

(g) Geographically, the verdicts were dispersed across the state: half from Northern California (two in Sacramento, and one each in Contra Costa and San Mateo counties), and half from Southern California, of which three were tried in Los Angeles Superior Court (two downtown and one in Santa Monica) and one in San Diego.

b) Damage to reputation, social standing and credit

## B. PUNITIVE DAMAGES

1. The standard for “malice” for purposes of recovering punitive damages is different, since this element must be proved by clear and convincing evidence (Civil Code § 3294(a)) and though it has a distinct definition (§ 3294(c)(1)) (“conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights... of others.”), it is consistent with the legal definition of malice for purposes of malicious prosecution liability. [*Downey Venture v. LMI Insurance Co.*] Still, it is appropriate for the trial court to admonish to consider the separate definitions. *See, e.g., Sierra Club v. Graham.*

2. Almost invariably and despite the different legal standard and the higher level of proof required, a jury which finds liability for malicious prosecution awards punitive damages

a) Of seven reported appellate decisions involving review of jury verdicts in favor of malicious prosecution plaintiffs since 1974, punitive damages were awarded in each case

(1) *Sierra Club Foundation v. Graham*

- (2) *Monia v. Parnas Corporation*
- (3) *Farajpour v. USC*
- (4) *Sheldon Appel*
- (5) *Bertero v. National General Corp.*
- (6) *Klein v. Oakland Raiders*
- (7) *Gerard v. Ross*

b) The ratio of punitives to compensatory damages in a majority of the seven reported appellate cases ranged from 1:1 (2 cases) to 3:1 (2 cases) (and one in the mid-range of 2:1), with the two highest ratios being 4:1 and 10:1, both reversed on appeal.

c) In fact, four of the seven verdicts were overturned, with one of them reversed as to the punitive award itself. In *Gerard v. Ross*, a law firm with a \$100,000 net worth was hit with \$100,000 in punitives, reduced to \$1,000 by the Court of Appeal).

d) The highest *affirmed* punitive damage award was \$2 million, against an individual defendant with a \$90 million net worth (*Sierra Club v. Graham*). This represented a 3:1 ratio. By contrast, the largest award of punitive damages, albeit reversed on probable cause grounds, was \$5 million in *Klein v. Oakland Raiders*, an award that represented only a 1:1 ratio to compensatories. Likewise, the highest ratio, 10:1, in *Sheldon Appel*, was also reversed on probable cause grounds.

e) Lawyers were defendants in only two of the seven reported appellate cases (*Sheldon Appel*; *Gerard*), both of which were reversed.

3. A review of reported jury verdicts during the past decade also confirms that punitive damages are a highly likely result in any plaintiff's verdict, with ratios comparable to those reflected in the reported appellate decisions.

## X. SHIFTING AND SHARING LIABILITY, LOSS AND EXPENSE

### A. EQUITABLE INDEMNITY AND CONTRIBUTION

1. No joint and several liability for *non-economic damages* in light of Proposition 51 (Civil Code § 1431.2) ("based on principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint..."). In this connection, a defendant's proportionate share of liability is measured by reference to the degrees of culpability of all those at fault, whether named as defendants or not. [*Da Fonte v. Up-Right, Inc.*]

2. As to *economic damages*, the law remains unclear whether equitable indemnity or contribution is permissible, given that malicious prosecution is a willful act. See C.C.P. § 875(d) ("There

shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.")

a) There are no cases addressing the issue in the context of malicious prosecution.

b) There are few cases that have interpreted Section 875(d). See *Martinez v. De Los Rios* and *Bartneck v. Dunkin*, though at least one Court has distinguished the statutory right of contribution from the judicially fashioned doctrine of equitable indemnity. [*Baird v. Jones*]

c) The Supreme Court has not yet spoken on the broader issue of the application of equitable apportionment principles, as first enunciated in *American Motorcycle Association v. Superior Court*, to intentional torts, including those where malice is an element.

d) The Courts of Appeal in California have split on the broader issue. Compare, *Allen v. Sundean* (no right of equitable indemnity) with, *Baird v. Jones* (indemnity permitted where there was a marked difference in the relative culpability of two defendants held jointly liable for fraud and other intentional wrongdoing).

3. In the context of a settlement and claims for equitable indemnity, these are limited to economic damages only, which requires allocation of settlement payments as between the two forms of damages. [*Union Pacific Corp. v. Wenger*]

4. Punitive damages are, by definition, awarded on an individual basis, i.e., there is no joint and several liability, but because they are definitionally awarded for wilful acts, they may not be the subject of prior contractual indemnification or insurance. [*Butcher v. Truck Insurance Exchange*]

#### B. CONTRACTUAL INDEMNITY

1. It is unusual that a claim for indemnity arising out of malicious prosecution will be based on a contract.

2. In any event, there is serious doubt whether contractual indemnity is available, in light of Civil Code § 1668 ("All contracts which have their object, directly or indirectly, to exempt anyone from responsibility for his own... willful injury to the person or property of another... are against the policy of the law.")

#### C. CLIENT MALPRACTICE CLAIMS AGAINST FORMER COUNSEL AS A METHOD OF SHIFTING OR SHARING LOSS

1. Cross-complaints for malpractice (the functional equivalent of equitable indemnity) against a malicious prosecution defendant's former counsel are rare, no doubt because of the importance of putting up a united front and obtaining the cooperation of former counsel, whether as a co-defendant or not. In *Mabie v. Hyatt*, the former client filed a cross-complaint, but the issue was not addressed.

2. Malpractice claims arising out of a verdict against a former client are of doubtful validity, since proximate cause, including reliance on the lawyer's advice, would seem to be precluded by collateral estoppel, stemming from a jury's verdict that the former client's conduct in the underlying action was actuated by malice. This would be particularly true if the client raised reliance on advice of counsel and the defense was rejected by the jury.

#### D. INSURANCE

1. Potentially available coverages for lawyers and litigants targeted in malicious prosecution actions include:

a) Personal coverages which contain "personal injury" coverage (which traditionally includes malicious prosecution, among other intentional torts enumerated in the policy definition)—subject to "business pursuits" and similar exclusions:

- (1) Homeowners
- (2) Personal Umbrellas

b) Business policies which contain "personal injury" coverage or otherwise specifically cover malicious prosecution claims:

- (1) Commercial General Liability
- (2) Directors & Officers Liability

c) Professional liability or other errors and omissions coverages

2. When must a threatened malicious prosecution claim be reported to an insurer?

a) When is a threat a "claim"? Written demand for money or the filing of a suit, without service, constitute a claim under most policies.

b) During the course of a one year, claims made policy, reporting of a potential claim is voluntary, most policies requiring a report "as soon as practicable."

3. Duty to defend

a) If the policy "specifically and expressly" extends coverage to malicious prosecution, there is a duty to defend. [*Downey Venture v. LMI Insurance Co.*; *Butcher v. Truck Insurance Exchange*]. However, absent an express grant of coverage, no duty to defend would exist under traditional "occurrence" coverage for bodily injury and property damage. [*Id.*; *State Farm Fire & Casualty Co. v. Drasin*]

b) Invariably the carrier will defend under reservation of rights, disclaiming any indemnity obligation (see below), which may trigger the right to independent, so-called *Cumis* counsel, under Civil Code § 2860. However, even absent a reservation of rights, the carrier cannot create coverage for a



willful act by silence. [*Downey Venture v. LMI Insurance Co.*]

4. Duty to indemnify

a) By definition, however malicious prosecution is a “willful act”, under Insurance Code § 533. Accordingly, it is against public policy for an insurer to pay a judgment on behalf of one who is held personally liable for the tort, regardless of the apparent promise of coverage contained in the policy.

[*Downey Venture v. LMI Insurance Co.*; *Butcher v. Truck Insurance Exchange*; *Maxon v. Security Insurance Co.*; *State Farm Fire & Casualty Co. v. Drasin*; *City Products Corp. v. Globe Indemnity Co.*; *California Casualty Management Co. v. Martoccio*]

b) Moreover, a defending insurer which settles such an action may seek reimbursement from the insured, without offset for defense costs saved by virtue of the settlement, at least where the right of recoupment is expressly reserved.

[*Downey Venture v. LMI Insurance Co.*]

c) However, it is not against public policy and express malicious prosecution coverage will protect an “innocent” insured whose liability for malicious prosecution is strictly vicarious, e.g., employer held liable for the act of an employee or partners in a law firm who were not personally involved in prosecuting the underlying action. [*Id.*]

d) There may also be coverage for policies issued to California insureds where the underlying action took place in another jurisdiction that does not hold to California’s point of view on the availability of coverage for this tort or employ more relaxed standard for proving malicious prosecution. [*Id.*]

e) Whether a carrier will pay a settlement, and the extent to which a carrier is willing to contribute, varies among insurers and typically turns on the specific circumstances of a case.

f) Relevant factors include:

(1) Costs of defense;

(2) Likelihood that the underlying action was properly prosecuted;

(3) Presence of “innocent” insureds;

(4) The amount for which the case can be settled; and

(5) The ability to seek reimbursement from one or more insureds for sums paid in settlement.