
Litigating the Malicious Prosecution Case

By Jeffrey Lewis

Two Goals for the Program

- ❖ Teach Strategies to Succeed in Litigation of these Claims
- ❖ Avoid Being Sued for Malicious Prosecution

Overview

- ❖ Elements of the Tort
- ❖ Preliminary Review of Case
- ❖ Interplay of the Tort, anti-SLAPP motions and SLAPPback suits
- ❖ Persons Liable
- ❖ Five Frequent Defenses
- ❖ Other Issues

Elements of the Tort

The classical definition of the tort has three elements:

The elements of the claim are that a prior action (1) was commenced by or at the direction of the defendant and was pursued to **a legal termination in his, plaintiff's favor**; (2) was brought without **probable cause**; and (3) was initiated with **malice**.

[Brennan v. Tremco Inc.](#) (2001) 25 Cal.4th 310, 313

Three Classic Elements (Plus Two More)

1. Favorable Termination
2. Lack of Probable Cause
3. Malice
4. *Qualifying Prior Action*
5. *Damages*

What is a Favorable Termination?

To determine whether a party has received a **favorable termination**, we consider the judgment as a whole in the prior action... Victory following **a trial on the merits is not required**. Rather, the termination must reflect the **merits of the action** and the **plaintiff's innocence** of the misconduct alleged in the lawsuit.

Siebel v. Mittlesteadt (2007) 41 Cal.4th 735,

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Terminations on the Merits

- ❖ Favorable **jury verdict**.
 - ❖ Clearly on the merits and is a “favorable termination.”
- ❖ A dismissal obtained by application of the **parol evidence rule**.
 - ❖ Is considered substantive because it necessarily affects the merits of the prior action. ([Casa Herrera, Inc. v. Beydoun](#) (2004) 32 Cal.4th 336, 345).
- ❖ A dismissal for **failure to prosecute**.
 - ❖ Is, under most circumstances, substantive. Reflects prior plaintiff's doubt in the merits of the prior action. ([Minasian v. Sapse](#) (1978) 80 Cal.App.3d 823, 828).
- ❖ A prior action that terminates following **judicial arbitration**.
 - ❖ Is considered substantive. ([Stanley v. Superior Court](#) (1982) 130 Cal.App.3d 460, 465).
- ❖ A prior action that terminates in **contractual arbitration**.
 - ❖ Not substantive. ([Brennan v. Tremco Inc.](#) (2001) 25 Cal.4th 310, 317).

Terminations Not on the Merits

- ❖ laches;
- ❖ lack of jurisdiction;
- ❖ lack of standing;
- ❖ mootness;
- ❖ res judicata;
- ❖ ripeness;
- ❖ settlement;
- ❖ statute of limitations;

All not on the merits and therefore insufficient for purposes of malicious prosecution.
([JSJ Ltd. Partnership v. Mehrban](#) (2012) 205 Cal.App.4th 1512, 1525).

Terminating Discovery Sanctions

- ❖ Some situations require a closer, fact based evaluation to decide whether the prior victory was favorable.
 - ❖ [Zeavin v. Lee](#) (1982) 136 Cal.App.3d 766, 773, a case that ended due to terminating discovery sanctions, would not be deemed a “favorable” termination for purposes of a later malicious prosecution action against the prior plaintiff’s attorney. The prior plaintiff had not cooperated with discovery and that could not be attributed to the attorney.
 - ❖ However, where the failure to respond to discovery results in terminating sanctions and appears to be an acknowledgement by prior plaintiff that prior claims lack merit, the courts will recognize such a termination as favorable. [Ross v. Kish](#) (2006) 145 Cal.App.4th 188, 201.

Which Prior Actions Qualify?

- A special insanity proceeding ([Sutherland v. Palme](#) (1949) 93 Cal.App.2d 307, 312-13);
- A cross-complaint in a prior action ([Bertero v. National General Corp.](#) (1974) 13 Cal.3d 43, 52);
- A will contest in connection with probate proceedings ([MacDonald v. Joslyn](#) (1969) 275 Cal.App.2d 282, 289);
- Administrative board or agency proceedings. ([Hardy v. Vial](#) (1957) 48 Cal.2d 577, 580–581; [Nicholson v. Lucas](#) (1994) 21 Cal.App.4th 1657, 1664);
- Judicial arbitration ([Stanley v. Superior Court](#) (1982) 130 Cal.App.3d 460, 465);
and
- Petition for administrative mandate ([Sierra Club v. Superior Court](#) (1985) 168 Cal.App.3d 1138).

Which Prior Actions Do Not Qualify?

- ❖ Small claims court proceedings ([*Pace v. Hillcrest Motor Co.*](#) (1980) 101 Cal.App.3d 476, 479);
- ❖ Subsidiary procedural actions within a lawsuit, such as filing an application for a restraining order or for lien. ([*Lossing v. Superior Court*](#) (1989) 207 Cal.App.3d 635, 639; [*Adams v. Superior Court*](#) (1992) 2 Cal.App.4th 521, 528);
- ❖ Requests for admissions ([*Twyford v. Twyford*](#) (1976) 63 Cal.App.3d 916, 922);
- ❖ Motion for writ of sale. ([*Merlet v. Rizzo*](#) (1998) 64 Cal.App.4th 53, 63);
- ❖ A defendant's filing of a notice of appeal. ([*Coleman v. Gulf Ins. Group*](#) (1986) 41 Cal.3d 782, 794);
- ❖ Family law motions or OSC's. ([*Bidna v. Rosen*](#) (1993) 19 Cal.App.4th 27, 37);

Which Prior Actions Do Not Qualify?

- ❖ Contractual arbitrations. ([*Brennan v. Tremco Inc.*](#) (2001) 25 Cal.4th 310, 314);
- ❖ A departmental investigation of a police officer where no formal proceedings occurred. ([*Imig v. Ferrer*](#) (1977) 70 Cal.App.3d 48, 59);
- ❖ A California State Bar investigation that terminates at the investigatory stage without leading to proceedings before body that had power to act adversely affecting legally protected interests. ([*Lebbos v. State Bar*](#) (1985) 165 Cal.App.3d 656, 671); and
- ❖ An attorney's complaint to state bar association where complaint does not result in initiation of any proceedings. ([*Chen v. Fleming*](#) (1983) 147 Cal.App.3d 36, 41).

Lack of Probable Cause

“Reasonable Attorney” Test

- ❖ The test is whether any reasonable attorney would have thought the claim tenable. ([Sheldon Appel Co. v. Albert & Oliker](#) (1989) 47 Cal.3d 863, 886).
- ❖ The question of “probable cause” is an issue for the court not a jury, to decide unless facts known to attorney are disputed. ([Sheldon Appel](#), at p. 875).
- ❖ “Probable cause” is evaluated under an objective standard. The attorney’s subjective intent is irrelevant to probable cause determination. ([Sheldon Appel](#), at p. 881).
- ❖ Expert testimony is inadmissible on the issue of the existence of probable cause. ([Sheldon Appel](#) at p. 881).
- ❖ Probable cause must be independently established as to each separate claim. ([Crowley v. Katleman](#) (1994) 8 Cal.4th 666, 679; [Videotape Plus, Inc. v. Lyons](#) (2001) 89 Cal.App.4th 156, 161).
- ❖ Often decided at the outset of case by way of demurrer or anti-SLAPP motion.

Lack of Probable Cause

Formulations of Probable Cause (Positive)

- A claim is **legally tenable** if it is supported by existing authority or the reasonable extension of that authority. ([*Sheldon Appel Co. v. Albert & Oliker*](#), *supra*, 47 Cal.3d at p. 886; see also [*Arcaro v. Silva and Silva Enterprises Corp.*](#) (1999) 77 Cal.App.4th 152, 156-57).
- A claim is **factually tenable** if there is evidence sufficient to prevail in the action or at least information reasonably warranting an inference that there is such evidence. ([*Arcaro v. Silva and Silva Enterprises Corp.*](#), at pp. 156-57; [*Puyear v. Golden Bear. Ins. Co.*](#) (1998) 66 Cal.App.4th 1188, 1197.)

Lack of Probable Cause

Formulations of Lack of Probable Cause (Negative)

- A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.”
([Cheong Yu Yee v. Cheung](#) (2013) 220 Cal.App.4th 184).

Establishing Probable Cause

Establishing Conclusive Presumption of “Probable Cause” through Prior Rulings on the Merits

- ❖ Denial of a defense motion for non suit followed by a plaintiff's jury verdict will establish probable cause even if the prior verdict is reversed on appeal. ([Cowles v. Carter](#) (1981) 115 Cal.App.3d 350, 356).
- ❖ Denial of a defense summary judgment will also establish that the prior action had probable cause. ([Roberts v. Sentry Life Insurance](#) (1999) 76 Cal.App.4th 375, 384).
- ❖ Grant of preliminary injunction. ([Paiva v. Nichols](#) (2008) 168 Cal.App.4th 1007, 1022)
- ❖ By contrast, a plaintiff in the first action who survives an anti-SLAPP motion **may not** rely on that to establish probable cause.

Malice

- ❖ Unlike probable cause which is evaluated using an objective standard and is a question of law for the court, malice is a **question of fact** that uses a **subjective standard**.
- ❖ Since parties rarely admit an improper motive, malice is usually proven by **circumstantial evidence** and inferences drawn from the evidence. *Silas v. Arden* (2012) 213 Cal.App.4th 75, 90.

Preliminary Review of Case

Three Key Questions to Ask

- ❖ What motions were filed in the prior action bearing on the merits?
- ❖ Is there evidence to support (or withstand) an anti-SLAPP motion within 60 days of filing?
- ❖ Are there viable sources to satisfy a judgment?

Motions Filed in the Prior Action

Motions reflecting a weighing of the merits filed in the prior action can be a bar to a later malicious prosecution action.

- ❖ **Summary Judgment.** A prior plaintiff who withstands a defense motion for summary judgment is immune from malicious prosecution liability absent narrow exceptions (i.e., fraud). (*Videotape Plus, Inc. v. Lyons* (2001) 89 Cal.App.4th 156, 161).
- ❖ **Injunction.** A prior plaintiff who prevails on a motion for preliminary injunction is immune from malicious prosecution liability absent narrow exceptions (i.e., fraud). (*Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357-58).

Interplay of Tort, Anti-SLAPP and SLAPPback law

Terminology:

- ❖ **SLAPP**: Strategic Lawsuit Against Public Participation. A meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.
- ❖ **SLAPPback**: Malicious prosecution arising from the dismissal of a SLAPP suit.
- ❖ **Anti-SLAPP motion**: special motion to strike pursuant to Code of Civil Procedure section 425.16.

Anti-SLAPP Motion

If you file a malicious prosecution action, be prepared to defend against an anti-SLAPP motion in response. Note:

- ❖ Normally, a court ruling on an anti-SLAPP motion determines first whether the lawsuit arises from constitutionally protected activity before shifting the burden on the plaintiff to prove a probability of prevailing.
- ❖ Because by their nature all malicious prosecution actions arise from exercising petition rights, the burden of proof on an anti-SLAPP normally shifts to the plaintiff to prove a probability of prevailing.
- ❖ Filing of the anti-SLAPP motion stays discovery.
- ❖ A plaintiff who loses the anti-SLAPP motion is liable for attorney's fees of moving party.

Anti-SLAPP vs. SLAPPback

Following a successful anti-SLAPP motion, the former defendant may file a malicious prosecution action (SLAPPback). The SLAPPback may also be subject to an anti-SLAPP motion with the following differences:

- ❖ Right of immediate appeal not available for SLAPPback.
- ❖ Attorney's Fees not automatic for defendant who wins SLAPPback.
- ❖ Motion to strike may be filed within 120 days of service (rather than 60).

Persons Liable

- ❖ Persons who urge, procure or otherwise are actively instrumental in the filing of the lawsuit may be sued for malicious prosecution along with the actual prior plaintiff. (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 25 fn. 26).
- ❖ Even if initial counsel had probable cause to file a lawsuit, successor counsel may be liable for malicious prosecution if they **continued** the prosecution without probable cause. (*Zamos v. Stroud* (2004) 32 Cal. 4th 958, 970).
- ❖ A trustee may be sued for a prior action brought in trustee's representative capacity. The trustee, not the trust, is the real party in interest with respect to litigation over trust property. (*Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, 1102-1103).
- ❖ Associate counsel who appears on the pleadings and is on the case service list may not avoid malicious prosecution liability by claiming ignorance about allegations made by lead counsel. (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1117).

Five Frequent Defenses

- ❖ Advice of Counsel
- ❖ Statute of Limitations
- ❖ Unclean Hands
- ❖ Litigation Privilege*
- ❖ Disfavored Status*

Advice of Counsel

- ❖ Absolute Defense
- ❖ Reliance upon the advice of counsel, in good faith and after full disclosure of the facts, customarily establishes probable cause. ([*Pond v. Insurance Co. of North America*](#) (1984) 151 Cal.App.3d 280, 288).
- ❖ Not available if the client knew that there was no probable cause to file suit. ([*George F. Hillenbrand, Inc. v. Insurance Co. of North America*](#) (2002) 104 Cal.App.4th 784, 814).
- ❖ Not an affirmative defense
 - ❖ Negates probable cause
 - ❖ Need not be pled

State Farm Mut. Auto. Ins. Co. v. Superior Court
(1991) 228 Cal.App.3d 721, 725-26

Advice of Counsel

- ❖ Client may be found to have waived the attorney client privilege regarding the advice received. ([Chiron Corp. v. Genentech, Inc.](#) (E.D. Cal. 2001) 179 F.Supp.2d 1182, 1186).
- ❖ Be prepared at the least to litigate the question of whether the privilege applies.
- ❖ Ethical issue for an attorney who attempts to simultaneously represents the attorney in the prior action and the client in the prior action.
 - ❖ Conflict Disclosures and Waiver at a Minimum.
 - ❖ Avoid this Simultaneous Representation.
 - ❖ Whether to assert or withhold advice of counsel presents an actual conflict of interest.
 - ❖ Client may have claim for malpractice or indemnity against prior lawyer.

Statute of Limitations

Two possible statutes of limitations for malicious prosecution actions.

- ❖ Claims against **non-attorneys** are governed by the **two year statute** of Code of Civil Procedure section 340.6(a). (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 197).
- ❖ Claims against **attorneys** may be subject to a **one year statute of limitations**. ([*Vafi v. McCloskey*](#) (2011) 193 Cal.App.4th 874, 880; [*Cheong Yu Yee v. Cheung*](#) (2013) 220 Cal.App.4th 184)

Statute of Limitations

If the prior plaintiff (now defendant) appeals, the statute of limitations is tolled pending resolution of the appeal:

- ❖ Entry of Judgment: Starts the Statute
- ❖ Appeal of Judgment: Tolls the Statute
- ❖ Pending Resolution of the Appeal, action can be abated but not dismissed
- ❖ When the appellate court remands the matter back to the trial court following the appeal, the statute begins to run again.

([*Feld v. Western Land & Development Co.*](#) (1992) 2 Cal.App.4th 1328, 1334).

Unclean Hands

- ❖ Unclean hands is an affirmative defense to a malicious prosecution action.
- ❖ Requires relationship between the claimed misconduct by the plaintiff and the plaintiff's claimed injuries.
- ❖ The misconduct “need not be a crime or an actionable tort.”
- ❖ “Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine.”

([*Kendall-Jackson Winery, Ltd. v. Superior Court*](#) (1999) 76 Cal.App.4th 970, 974).

Litigation Privilege

The litigation privilege set forth in Civil Code section 47, subdivision (b) does not apply to a malicious prosecution action.

([*McClintock v. West*](#) (2013) 219 Cal.App.4th 540)

The “Disfavored” Tort

In 1989, the Supreme Court in *Sheldon Appel Co.* declared the tort “disfavored.”

In the years since 1989, the California Supreme Court has since clarified that “disfavored” status, however, may not be used to “defeat a legitimate cause of action” or “invent new limitations on the substantive right...” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 966; *Siebel v. Middlesteadt* (2007) 41 Cal.4th 735, 740).

As to SLAPPback actions, the legislature and courts have declared the tort “favored.” (*Hutton v. Hafif* (2007) 150 Cal.App.4th 527, 548).

Collateral Source Rule

- Attorney named as a defendant in prior lawsuit.
- Attorney's defense is paid for by malpractice insurance policy.
- Attorney prevails and then files a malicious prosecution action.

May attorney claim as damages, the attorney's fees that his insurance company paid for?

Yes.

Silas v. Arden (2012) 213 Cal.App.4th 75, 92-93

Recoverable Damages

- ❖ Reasonable Attorney's Fees and Costs from Prior Action
- ❖ Loss of Income
- ❖ Emotional Distress
- ❖ Reputation Damage

Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 50.

Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp. (2003) 114 Cal. App. 4th 906, 912.

- ❖ Punitive damages are recoverable if jury separately determines “malice” for purposes of Civil Code section 3294.

Singleton v. Singleton (1945) 68 Cal.App.2d 681, 704.

Insurance Issues

- When attorney is sued for malicious prosecution, the action may be tendered to malpractice carrier.
 - Carrier may have a duty to defend.
 - No duty to indemnify
- (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal. App. 4th 478, 507-09.)
- If you represent the client who was previously a plaintiff and is now a defendant, consider tendering a claim to the insurance company for the prior attorney.

Motions for Summary Judgment

- ❖ Malice is usually a triable issue of fact. *Masterson v. Pig'n Whistle Corp.*, (1958) 161 Cal. App. 2d 323, 339.
- ❖ Probable cause is a question of law for court (unless facts known to attorney are disputed). *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal. 3d 863, 875.
- ❖ Favorable Termination is a question of law. *Sierra Club Foundation v. Graham* (1999) 72 Cal. App. 4th 1135, 1149.

Plaintiff's Motions in Limine

- ❖ Motion to preclude defense counsel from mentioning that malicious prosecution is a “disfavored tort” in front of jury.
- ❖ Motion to preclude defense from asserting advice of counsel defense where attorney client privilege was asserted during discovery.
- ❖ Motion to exclude expert testimony on issue of probable cause.

Jury Instructions: Probable Cause

- ❖ Beware of decisions concerning jury instructions that predate *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal. 3d 863, 875.
- ❖ Early decisions improperly blur the role of jury and court in determining probable cause.

Jury Instructions: Damages

Where a former defendant is alleging malicious prosecution as to less than all of the claims alleged in the prior action, and where such claims are intertwined, the **burden of apportionment of damages should rest on the former plaintiff** and not the former defendant.

Crowley v. Katleman (1994) 8 Cal. 4th 666, 690.

Jury Instructions: Advice of Counsel

Court may properly instruct jury that client had duty to disclose to counsel all facts actually known **as well as facts that client should have known, including facts known to client's agents.**

Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 842.

Jury Instructions: Malice

- ❖ The definition of the word 'malice' for purposes of malicious prosecution is different from the definition of the word 'malice' as used for punitive damages purposes. Each definition of 'malice' should be used only for the purposes for which its use is defined by the court.
- ❖ This means that you should not use the definition of 'malice' as it was defined for malicious prosecution purposes in determining any issue on the question of punitive damages or vice versa.

Sierra Club Foundation v. Graham (1999) 72 Cal. App. 4th 1135, 1158-59.

Abuse of Process Contrasted

Malicious prosecution and abuse of process are distinct. The former concerns a meritless lawsuit (and all the damage it inflicted). The latter concerns the misuse of the tools the law affords litigants once they are in a lawsuit (regardless of whether there was probable cause to commence that lawsuit in the first place).

([Bidna v. Rosen](#) (1993) 19 Cal.App.4th 27, 40).

Two key differences in the torts:

- ❖ In abuse of process case, the prior defendant need not prove a favorable termination. ([Spellens v. Spellens](#) (1957) 49 Cal.2d 210, 232).
- ❖ Filing a lawsuit alone – even with an improper purposes is not a proper basis for an abuse of process action. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) [42 Cal.3d 1157](#), 1169).

(*Sierra Club Foundation v. Graham* (1999) 72 Cal. App. 4th 1135, 1158-59).

Questions

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