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Los Angeles lawyer Steven R. Yee offers an antidote to malicious prosecution lawsuits

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By Steven R. Yee

The Blame Game

The California Supreme Court will soon decide whether the anti-SLAPP law applies to malicious prosecution claims

As if being sued for legal malpractice and paying the skyrocketing premiums for professional liability insurance were not enough for lawyers to worry about, they also have to be concerned about the threat of being sued for malicious prosecution. When a plaintiff loses an underlying action, the plaintiff's attorney frequently becomes a candidate for defendant in a subsequent malicious prosecution suit.

Malicious prosecution actions have become more commonplace despite the consistent holdings of the California Supreme Court that the tort of malicious prosecution is "disfavored" because of its potential to create an undue chilling effect on a citizen's willingness to report criminal conduct or to bring a civil dispute to court.[1] The supreme court's preferred approach is to adopt "measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself."[2]

Unfortunately, strong case law holdings have not been sufficient to inhibit the filing of malicious prosecution cases. Traditionally, attorneys have opposed malicious prosecution actions by presenting arguments based on the elements of the tort (specifically, the lack of probable cause) and the tort's disfavored status.[3] However, because of the reluctance of trial courts to dismiss cases at the initial pleading stage, defendants have often been forced to litigate malicious prosecution actions at least through a motion for summary judgment. Only then would plaintiffs have to create a triable issue of fact through the use of admissible evidence. As a result, defendants in malicious prosecution actions have often expended substantial resources in time and money defending themselves against meritless actions.

In addition to the costs involved, malicious prosecution actions are troublesome for attorneys for several other reasons. First, the California Evidence Code does not recognize a doctrine that would allow attorneys to waive the attorney-client privilege when defending themselves against lawsuits. This becomes problematic when an attorney is sued for malicious prosecution but the attorney's client in the underlying action is not. In that situation, the sued attor-

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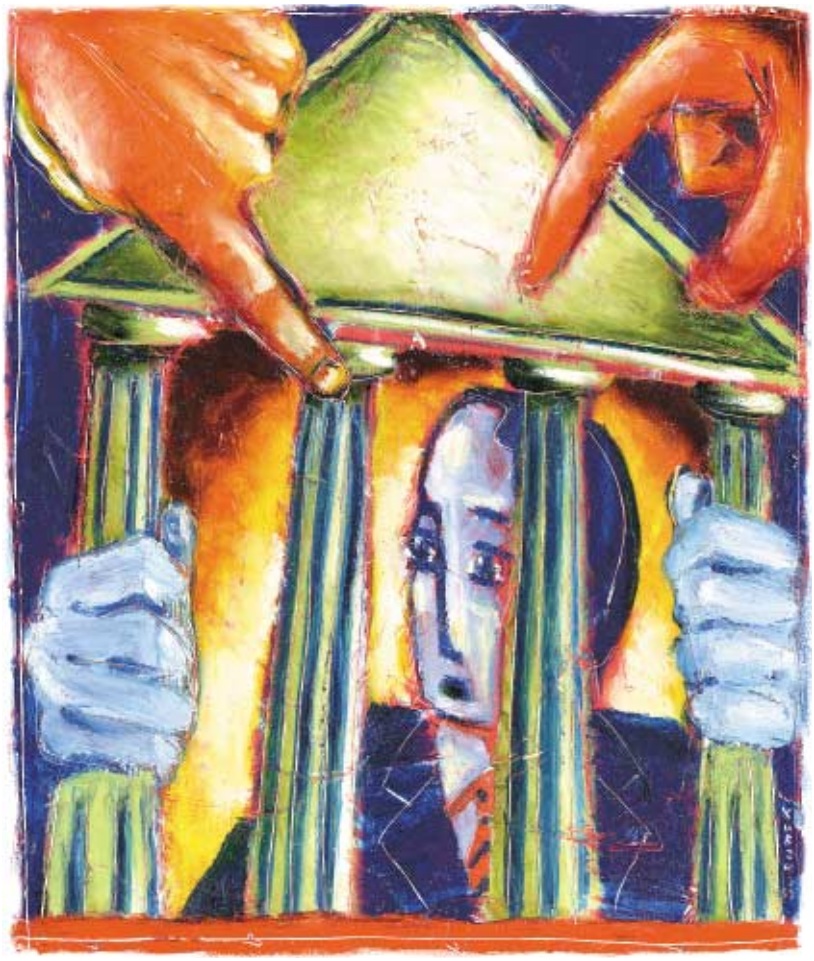
ney cannot unilaterally waive the attorney-client privilege in order to defend himself or herself in the malicious prosecution action—even though that may be the only effective way to mount a defense. This raises the question: How is the sued attorney supposed to present a defense without waiving the attorney-client privilege?

Moreover, malicious prosecution suits against attorneys are especially dangerous because unlike legal malpractice actions, there is no right to indemnity—a fact that a surprising number of attorneys do not know.[4] Indemnity coverage is precluded because Insurance Code Section 533 bars indemnity for "willful acts" of an insured.[5] Thus, although professional liability insurance can cover defense costs in a malicious prosecution action, it cannot indemnify the attorney for damages. This places the sued attorney at great risk.



Finally, malicious prosecution actions are particularly vexing for lawyers because they often trigger a legal malpractice action. In this scenario, when plaintiffs in unsuccessful underlying actions are named as defendants in a subsequent malicious prosecution action, they often sue their attorneys for advising them to pursue the underlying action.

A New Weapon

Fortunately, a new weapon has emerged that may allow attorneys to combat malicious prosecution actions far more effectively. This weapon, which may ultimately curtail the filing of malicious prosecution actions altogether, is Section 425.16 of the Code of Civil Procedure, otherwise known as California's Anti-Strategic Lawsuit against Public Participation (SLAPP) statute. Through the use of the anti-SLAPP statute, trial courts can finally put some muscle behind the well-settled proposition that malicious prosecution actions are disfavored. The anti-SLAPP statute enables defendants to force a trial judge to determine if the plaintiff can establish a reasonable probability of prevailing on each element of each cause of action through the use of admissible evidence and to move to have malicious prosecution actions dismissed at the initial pleading stage of the litigation.[6]

The filing of an anti-SLAPP special motion to strike also triggers an automatic stay on discovery so that the defendant will not have to incur the attendant costs if the malicious prosecution action is determined to be meritless.[7] A stay of discovery also means that the plaintiff must have admissible evidence in hand that proves the required elements of a malicious prosecution case: 1) the underlying action at issue ended favorably for the plaintiff, 2) the underlying action was initiated and maintained without probable cause, and 3) the underlying action was brought with malice. Plaintiffs, accordingly, will not be allowed to conduct fishing expeditions when a special motion to strike is pending.

The reach of the anti-SLAPP statute is limited. It was enacted to allow a trial court to "dismiss at an early stage non-meritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue."[8] The anti-SLAPP statute thus requires the trial court to undertake a two-step process when determining whether an anti-SLAPP motion meets these statutory requirements.

First, the court must decide whether the defendant has made a threshold prima facie showing that the defendant's acts of which plaintiff complains were taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. The California Supreme Court has, however, recently held that a defendant invoking the anti-SLAPP statute does not have to prove that the party filing the SLAPP suit had the actual intention to chill the defendant's exercise of these constitutional rights.[9]

If the court finds that the defendant has made the requisite showing, the second step shifts the burden to the plaintiff to establish a reasonable probability of prevailing on the merits by making a prima facie showing of facts that would, if proved, support a judgment in the plaintiff's favor.[10] The court may also consider the defendant's opposing evidence, but only to determine if it defeats the plaintiff's showing as a matter of law.[11] The court does not weigh the evidence or make credibility determinations.[12] In assessing the probability the plaintiff will prevail, the court considers only evidence that would be admissible at trial.[13]

In other words, the anti-SLAPP statute operates like a "summary judgment in reverse"—with the burden on plaintiffs to demonstrate under oath a "reasonable probability of success."[14] This is quite a burden for a plaintiff pursuing a malicious prosecution action. How, for example, does one prove malice without the benefit of any discovery?

Until recently, it was very much an open question whether the anti-SLAPP statute actually applies to malicious prosecution actions. Given its general language, the anti-SLAPP statute has typically been used in actions involving First Amendment issues such as libel, slander, and defamation. Although arguments existed favoring the application of the anti-SLAPP statute to malicious prosecution actions, many trial judges consistently ruled that the anti-SLAPP statute did not apply to these suits. Creative lawyers nevertheless persevered, utilizing the broad language that the California Supreme Court used in decisions like *Briggs* v. *Eden Council for Hope and Opportunity* to argue that the anti-SLAPP statute did apply to malicious prosecution actions. In

Briggs, the supreme court stated:

> Thus, plainly read, Section 425.16 encompasses any cause of action against a person arising from any statement or writing made in, or in connection with an issue under consideration or review by an official proceeding or body.[15]

The supreme court continued, "As pertinent here 'the constitutional right to petition…includes the basic act of filing litigation or otherwise seeking administrative action.'"[16]

Using this language in *Briggs*, a court of appeal held in 2001—for the first time—that Code of Civil Procedure Section 425.16 applies specifically to malicious prosecution actions. In *Chavez* v. *Mendoza*,[17] the appellate court held:

> It is well established that filing a lawsuit is an exercise of a party's constitutional right of petition….[F]urther, the filing of a judicial complaint satisfies the "in connection with a public issue" component of Section 425.16, subdivision (b) (1) because it pertains to an official proceeding.[18]

Importantly, a defendant making a special motion to strike pursuant to the anti-SLAPP statute does not have to prove first that the activity is constitutionally protected as a matter of law. The moving party merely has to make a prima facie showing that the action arises from constitutionally protected activity.[19] The *Chavez* court held that "under the statutory scheme, a Court must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary."[20] The *Chavez* court also pointed out that this analysis is "consistent with the disfavored nature of the malicious prosecution tort, and the view that such claims are too frequently used as a dilatory and harassing device…."[21] In so many words, the *Chavez* court was instructing trial court judges that they have the tools to stop the increase in frivolous malicious prosecution actions.

The Burden of Proof

Because of the *Chavez* decision and court of appeal decisions following it, malicious prosecution actions will be much more difficult to maintain past the initial pleading stage. Only when the plaintiff can prove a reasonable probability of prevailing on the merits at the outset of the case (without any discovery) will the suit survive. This burden is particularly difficult to meet in the context of malicious prosecution actions. In other actions, plaintiffs are more likely to have the necessary admissible evidence at the outset to oppose a special motion to strike made pursuant to the anti-SLAPP statute. For example, in a defamation action, a plaintiff can oppose a special motion to strike with proof of the defamatory statement (by copy of the written statement or by declaration of the witness who heard the defamatory statement) and a declaration from the plaintiff attesting that the statement is false.

The Anti-SLAPP Statute

Code Civil Procedure Section 425.16, commonly known as California's anti-SLAPP statute, reads as follows:

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)(1) 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 under the United States or California Constitution 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.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination.

(c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be noticed for hearing not more than 30 days after service unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) On or before January 1, 1998, the Judicial Council shall report to the Legislature on the frequency and outcome of special motions made pursuant to this section, and on any matters pertinent to the purposes of this section.

(j) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(k)(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.**—S.R.Y.**

More importantly, the plaintiff in this action would not need evidence from the sued party.

However, in a malicious prosecution action, it is much more difficult for a plaintiff to prove malice by the sued attorney at the initial pleading stage. Without any discovery, it will be very difficult for a malicious prosecution plaintiff to dispute a declaration from the sued attorney that states that the sued attorney did not know the plaintiff before initiating the underlying action, that no settlement demands were made in the underlying action, and that the sued attorney had no ill will or malice toward the plaintiff.

It is still difficult at this time to tell whether the anti-SLAPP statute will strike a mortal blow against malicious prosecution claims. Pursuant to Code of Civil Procedure Section 425.16(k)(1), the Judicial Council is required to keep detailed records of anti-SLAPP motions and their disposition. The party who files a special motion to strike and the party who opposes the motion are both required to notify the Judicial Council of their action, and the Judicial Council is supposed to receive a conformed copy of order granting or denying a motion brought pursuant to the anti-SLAPP statute.[22] However, a review of the information provided by the Judicial Council is not revealing. According to Judicial Council statistics, a total of 275 anti-SLAPP motions have been filed in Los Angeles County since the inception of the statute. Of those, 18 were granted, 14 were denied, and 243 were listed as "disposition not reached." These statistics suggest that attorneys are simply not notifying the Judicial Council of the results after special motions to strike are filed.[23]

Of the special motions to strike granted in Los Angeles and Orange Counties, the majority involved traditional anti-SLAPP actions like defamation. Thus, the effect on trial courts of the anti-SLAPP appellate decisions involving malicious prosecution remains to be seen. That effect will obviously be magnified when the California Supreme Court rules explicitly on whether the anti-SLAPP statute applies to malicious prosecution actions, an issue that is now pending before the court.[24]

In addition, another wrinkle on the use of the anti-SLAPP statute to defend against malicious prosecution actions has emerged. But this twist is directed not at attorney-defendants but at those attorneys representing plaintiffs in malicious prosecution actions. The anti-SLAPP statute provides that a prevailing defendant on a special motion to strike "shall" recover "his or her attorney's fees and costs."[25] Thus, if a plaintiff's attorney fails to inform a potential malicious prosecution client that the client may be liable for attorney's fees if the defendant prevails through the anti-SLAPP statute, the plaintiff's attorney

could be exposed to a legal malpractice action.

Claims of this nature against attorneys representing malicious prosecution plaintiffs have recently been made. It is surely disconcerting for a plaintiff who brings a malicious prosecution action to wind up paying the defendant-attorney after the plaintiff has prevailed in the underlying action. An attorney who brings a malicious prosecution action now arguably has a duty to inform the client of the anti-SLAPP statute prior to bringing the action. Placing this additional burden on plaintiffs and their attorneys is another way in which applying the anti-SLAPP statute to malicious prosecution actions will serve the strong public policy disfavoring these lawsuits.

In California, malicious prosecution actions have long been disfavored. Before the application of Code of Civil Procedure Section 425.16 to these actions, however, malicious prosecution defendants were forced to engage in expensive and time-consuming litigation. By applying the anti-SLAPP statute to malicious prosecution actions, the courts have kept in mind the disfavored status of malicious prosecution actions. Accordingly, a special motion to strike pursuant to California's anti-SLAPP statute can be used as a very powerful tool on behalf of malicious prosecution defendants. ■

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[1] Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863 (1989); *see also* Wilson v. Parker, Covert & Chidester, 28 Cal. 4th 811 (2002).

[2] Sheldon Appel Co., 47 Cal. 3d at 873.

[3] To properly state a cause of action for malicious prosecution, a plaintiff must plead and prove three essential elements: 1) the underlying action was commenced by or at the direction of the defendant and was pursued to a legal termination in favor of the plaintiff in the malicious prosecution action and against the defendant, 2) the underlying action was brought without probable cause, and 3) the underlying action was initiated with malice. Downey Venture v. LMI Ins. Co., 66 Cal. App. 4th 478, 494 (1998) (citing Bertero v. National Gen. Corp., 13 Cal. 3d 43, 50 (1974)).

[4] Downey Venture, 66 Cal. App. 4th 478.

[5] *Id.* at 503.

[6] CODE CIV. PROC. §425.16(b) (1).

[7] CODE CIV. PROC. §425.16(g).

[8] Kashian v. Harriman, 98 Cal. App. 4th 892, 905 (2002) (citing Sipple v. Foundation for Nat. Progress, 71 Cal. App. 4th 226, 235 (1999)).

[9] Equilon Enter., LLC v. Consumer Cause, Inc., 29 Cal. 4th 53 (2002).

[10] Chavez v. Mendoza, 94 Cal. App. 4th 1083, 1087 (2001) (citing Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1414 (2001)).

[11] Lafayette Moorehouse, Inc. v. Chronicle Publ'g Co., 37 Cal. App. 4th 855, 867 (1995).

[12] Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 654 (1996); Wilcox v. Superior Court, 27 Cal. App. 4th 809, 827-28 (1994).

[13] Church of Scientology, 42 Cal. App. 4th at 654-55.

[14] College Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 718-19 (1994).

[15] Briggs v. Eden Council for Hope and Opportunity, 19 Cal. 4th 1106, 1113 (1999).

[16] *Id.* at 1115 (citing Dove Audio v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 784 (1996)).

[17] Chavez v. Mendoza, 94 Cal. App. 4th 1083 (2001).

[18] *Id.* at 1087. *See also* Stroock & Stroock & Lavan v. Tendler, 102 Cal. App. 4th 318 (2002) (holding that plaintiff's malicious prosecution action arising from defendant's filing of the underlying malpractice suit against plaintiff was on its face constitutionally protected petitioning activity) *and* Jarrow Formulas, Inc. v. La Marche, 97 Cal. App. 4th 1 (2002), *rev. granted* (holding that malicious prosecution complaint directed at a defendant because she filed a cross-complaint falls within a person's right of petition) *and* White v. Lieberman, 2d Civil No. B147327, WL 31421097 (Cal. Ct. App. Oct. 29, 2002 (in accord with *Chavez*).

[19] Stroock & Stroock & Lavan, 102 Cal. App. 4th 318.

[20] Chavez, 94 Cal. App. 4th at 1089.

[21] *Id.*

[22] CODE CIV. PROC. §425.16(k).

[23] The statistics are available on the Judicial Council Web site *at* http://www.courtinfo.ca.gov/reference/sl.

[24] Jarrow Formulas, Inc. v. La Marche, 97 Cal. App. 4th 1 (2002), *rev. granted*. The supreme court initially indicated that it would defer consideration of this case until disposition of several other anti-SLAPP statute-related cases (including *Equilon Enterprises* v. *Consumer Cause, Inc.*, 29 Cal. 4th 53 (2002)), all of which were decided on Aug. 29, 2002. In deciding these cases, the supreme court cited *Chavez* v. *Mendoza*, 94 Cal. App. 4th, 1083 (2001), in a manner that would appear to indicate approval of that decision. This suggests that the court will approve the appellate court's ruling in *Jarrow* that the anti-SLAPP statute applies to malicious prosecution cases. The supreme court only recently ordered briefing in *Jarrow* and has not yet scheduled oral argument, so a ruling is not expected soon.

[25] CODE CIV. PROC. §425.16(c).