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# The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation

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# The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation

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The law in most American jurisdictions has long recognized the torts of malicious prosecution and abuse of process.[1] Civil liability is

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1. Courts recognize a cause of action for wrongful civil proceedings or malicious prosecution if the wrongful proceeding has a "quasi-criminal" character or if it substantially interferes with a person's liberty or damages a person's reputation, such as in insanity, contempt, paternity, or juvenile delinquency proceedings. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 851-52 (4th ed. 1971). [hereinafter cited as PROSSER]. *See also* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 1098 n.1 (6th ed. 1976) [hereinafter cited as PROSSER, WADE & SCHWARTZ]; Note, *Malicious Prosecution as Basis of Recovery for Wrongful Instigation of Civil Commitment Proceedings*, 9 WAKE FOREST L. REV. 115 (1972). In addition, all jurisdictions allow a civil action for malicious prosecution if the plaintiff has been wrongfully arrested or if his property interests have been interfered with, such as in wrongful attachment or involuntary bankruptcy proceedings. PROSSER, *supra*, at 851-52. In the absence of special circumstances similar to the ones just mentioned, a substantial minority of jurisdictions adhere to the "English rule," which refuses to allow an action based upon a groundless civil suit. Bickel v. Mackie, 447 F. Supp. 1376, 1380 (N.D. Iowa 1978); Garcia v. Wall & Ochs, Inc., 256 Pa. Super. 74, 74, 389 A.2d 607, 608, 610 (1978); PROSSER, *supra*, at 850-53; PROSSER, WADE & SCHWARTZ, *supra*, at 1098 n.2; Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1219-21 (1979).

Arguments in favor of the English rule against an action for malicious prosecution in the absence of special damages include: (1) the successful defendant is fully compensated by the award of costs (which is largely true in England because attorneys' fees are considered part of costs); (2) the cause of action may deter parties from asserting honest claims because of a fear of retaliatory litigation; and (3) allowing such action may perpetuate litigation. PROSSER, *supra*, at 851; Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 78 So. 204 (1917). Commentators have disputed these arguments by observing that American jurisdictions do not usually allow attorneys fees as part of recoverable costs. It is inappropriate to follow the English rule on malicious prosecution if the jurisdiction does not follow the English rule on

imposed on the plaintiff who misuses court processes by asserting malicious or abusive claims having no credible basis in fact, law, or equity. The plaintiff's lawyer is also legally liable if he willfully participates in presenting what is known to be a false and malicious claim.[2] Similarly, the rules of professional conduct prohibit the plaintiff's lawyer from asserting unwarranted claims or from taking any action that serves merely to harass or to injure another party.[3]

Civil liability for monetary damages and professional restrictions thus limit what may properly be asserted in a court of law on the plaintiff's side of the adversarial ledger. The law distinguishes the vigorous from the malicious to allow an innocent defendant compensation for the expense and burden of baseless and malicious litigation.[4] The distinction also serves to protect the court system from time-consuming and expensive misuse of its processes[5] and seeks to maintain the integrity of the judicial system by discouraging the use of the courts to perpetrate a wrong.[6]

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attorneys' fees. In addition, it has been argued that the fear of deterring honest litigation or of perpetuating litigation has not been borne out by the experience of jurisdictions which recognize the actions generally. *See* PROSSER, *supra*, at 851. According to the Restatement (Second) of Torts, a growing majority of jurisdictions recognize malicious prosecution without the requirement of special injury. RESTATEMENT (SECOND) OF TORTS § 674, at 438 (1977) [hereinafter cited as RESTATEMENT].

Most American jurisdictions also recognize the tort of abuse of process. *See* RESTATEMENT, *supra*, § 682; PROSSER, *supra*, § 121.

2. *See, e.g.*, Munson v. Linnick, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967); First Nat'l Bank of Mayfield v. Gardner, 376 S.W.2d 311 (Ky. 1964); Hoppe v. Klapperich, 224 Minn. 224, 38 N.W.2d 780 (1949).

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.3 (1983).

4. *See* Bertero v. National Gen. Corp., 13 Cal. 3d 43, 50-51, 529 P.2d 608, 615, 118 Cal. Rptr. 184, 190 (1975):

> The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also to the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by slanderous allegations in the pleadings.

*See also* Norton v. Hines, 42 Cal. App. 3d 917, 922, 123 Cal. Rptr. 237, 240 (1975).

5. *See* Bertero v. National Gen. Corp., 13 Cal. 3d at 51, 529 P.2d at 614, 118 Cal. Rptr. at 190 (quoting Teesdale v. Liebschwager, 42 S.D. 323, 325, 174 N.W. 620, 621 (1919)): "The judicial process is adversely affected by a maliciously persecuted cause not only by the clogging of already crowded dockets, but by the unscrupulous use of the courts by individuals '. . . as instruments with which to maliciously injure their fellow men.' "

6. The judicial integrity policy is reflected in Justice Frankfurter's statement in United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting): "[I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American Law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice?"

Although the bar imposes professional restraints on how lawyers may handle the defense of a civil action,[7] tort law does not impose civil liability on defendants or their lawyers for the malicious assertion of false and baseless defenses. The torts of malicious prosecution and abuse of process are well known. The corresponding tort of malicious defense is unfamiliar, if known at all.

This one-sided development of the law is anomalous. It is well known that defendants, with disturbing frequency, find that it serves their financial advantage or collateral personal motives to deny claims they know are valid and justified.[8] Defendants are no more able to resist the temptations of excess advocacy than plaintiffs. Yet few courts have considered the application of malicious prosecution principles to the bad faith defense of a civil action. In effect the law, while condemning malicious conduct by plaintiffs, tolerates defendant misconduct.

In the absence of an effective remedy to compensate plaintiffs for injuries resulting from defendants' bad faith defensive tactics, a defendant can deny a valid claim from the pleading stage through the appeal with no fear of serious repercussions. Presently, the worst consequence imposed on such a defendant is to require him to pay the amount owed in the first place.[9] In the interim, the defendant has the

7. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1), (2) (1979); MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.3 (1983).

8. *See* Comment, *Controlling the Malicious Defendant*, 2 STAN. L. REV. 184, 185-87 (1949); *see also* Potts v. Imlay, 4 N.J.L. 382, 385 (1816):

> Besides, if we go to the very equity of the thing, which seems to be the ground of argument here taken, the same reasoning which is here used to prove that the defendant ought to have damages upon a false claim, would also prove that the plaintiff ought to have damages upon a false plea. He is put to all the expense of a trial upon such a plea, and yet he can recover nothing therefor but his lawful costs; though surely all experience teaches us that the plea of the defendant is not less frequently false than the claim of the plaintiff.

9. The defendant may have to absorb the expense of his attorneys' fees, but the sting of this possibility is diminished by two factors. First, if the defendant is holding the money, it may be invested pending the outcome of the litigation. $10,000 in a savings certificate at 10% will yield more than $6,000 over five years. $50,000 invested at 10% will yield more than $31,000 over five years. These amounts may be enough to cover the cost of defense with a margin of profit, and it may be a motive in prosecuting a frivolous appeal. *See* Hersch v. Citizens Sav. & Loan Ass'n, 146 Cal. App. 3d 1002, 194 Cal. Rptr. 628 (1983) in which the court assessed $125,000 in damages for the prosecution of a frivolous appeal, stating:

> Defendants' motive in this case is as easy to understand as it is difficult to hide. For nearly five years defendants have had the use of approximately $1 million legally owed by them to plaintiffs. It is common knowledge that a conservative investment during this same period would have earned annual interest greatly in excess of the 7 percent, and later 10 percent, payable upon civil judgments. In this

use of the disputed funds.

The need to litigate baseless defenses unduly burdens the plaintiff. If the plaintiff lacks resources, the money withheld could mean the difference between financial survival and disaster. In such circumstances, the defendant can often use the threat of extended litigation to force an unfair settlement. Moreover, a plaintiff who prosecutes a case to its finish will have additional unrecoverable expenses, such as attorneys' fees.

The absence of a remedy for malicious defense affects more than the immediate parties to a lawsuit. Failure to proscribe such conduct encourages dishonesty and allows abuse and misuse of legal processes. The delay that results from such conduct increases the burden on the judicial system, which is already struggling to accommodate the adjudication of legitimate disputes. The burden is felt directly by those litigants whose legitimate disputes take three to five years to reach trial. Taxpayers are indirectly affected because they provide the principal financial support for the courts.[10]

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> type of market good investment counsel could not ignore the fact that postponement of payment of this judgment was a profitable venture. Given the legal education and investment sophistication of defendants in this case, and their indisposition ever to post the collateral called for in their agreement with plaintiffs, we are compelled to the conclusion that material gain through delay was and is their motive.

*Id.* at 1012, 194 Cal. Rptr. at 633.

Second, the defendant's litigation expenses may not be very significant until the time for final preparation for trial. Thus, if the chief purpose of the delay is to coerce a favorable settlement from the plaintiff, the relatively small attorneys' fees incurred during the four to five year delay may be more than offset by the amount saved through a favorable settlement. *See* Lundergan, Kelly, & Strauss, *Lawyers Bemoan Court Congestion*, CAL. LAW., Oct. 1982, at 27:

> If it's 99 percent sure that my client ought to pay $20,000 in damages but I have a real technical defense," says [a Palo Alto, California] lawyer, "I can keep my client from paying for two years. It will eventually cost him $20,000 plus 10 percent interest (the standard legal rate of interest), whereas during that two years he didn't have to pay 22 percent on borrowing $20,000. I've done my client a great service, but I don't know that I've advanced the cause of justice. When I represent the other side, it infuriates me that there is no incentive for settlement.

10. In a cost study of the Los Angeles Superior Courts for the fiscal year 1980-1981, the following amounts were determined to represent the cost of maintaining a courtroom for a single day: civil—$898, family law—$1,294, probate—$2,979, juvenile—$3,332, and criminal—$3,791. LOS ANGELES SUPERIOR COURT, SUPERIOR COURT COST STUDY FISCAL YEAR 1980-81 (1982). The latter three types of litigation are more expensive from the public standpoint because the cost of legal counsel and additional court personnel are figured in. Even the more modest civil courtroom figure is wasteful, however, if court time is devoted to frivolous disputes. What is ironic, moreover, is that the cost of maintaining the civil courtrooms is borne, in significant part, by the middle class, many of whom would find the expenses of litigation beyond their means. *See infra* note 27.

A tort of malicious defense of a civil action would inhibit such bad faith actions and consequently would serve to relieve courtroom congestion. It is thus curious that majority jurisdictions, which recognize malicious prosecution in the absence of special injury, refuse to recognize the corresponding tort of malicious defense. The scant authority on the issue is divided and usually in the form of dicta[11] suggesting that there may be historical reasons for resistance to such a tort. Such practices and attitudes, however, may be based on conditions that no longer exist. Under current conditions, false and baseless defenses affect the litigants and the court system no less than false and baseless suits and, as a practical matter, may be even more pervasive. Moreover, parity would require comparable treatment for plaintiffs and defendants subjected to malicious litigation practices. Precedent reflects a policy of the law to prohibit or to restrict excesses of advocacy. The common law tradition allows the courts to adapt the law to the exigencies of new circumstances. It would thus be a logical outgrowth of current law and legal principles to approve the tort of malicious defense.

This Article sets out a principled method by which courts may create a tort of malicious defense. The Article first examines the problem of bad faith litigation, concluding that the current situation is undesirable[12] and that existing safeguards are not sufficient.[13] It then discusses current authority on the tort of malicious defense, finding it inconclusive.[14] The Article determines that important public policies weigh in favor of establishing the tort, while traditional policy arguments against the tort are mistaken.[15] The Article finds that there is ample authority for judicial reform of obsolete laws[16] and then sets out the specific elements of the tort of malicious defense.[17] The Article concludes that the creation of the tort of malicious defense is warranted by the current state of our courts, is fully warranted by our judicial traditions, and accordingly should be implemented by the courts.[18]

## The Problem

When the courts were not so congested, delay not so protracted, and legal expense and complexity not so formidable, adversarial excess

11. *See infra* notes 78-101 & accompanying text.
12. *See infra* notes 19-39 & accompanying text.
13. *See infra* notes 40-77 & accompanying text.
14. *See infra* notes 78-101 & accompanying text.
15. *See infra* notes 102-18 & accompanying text.
16. *See infra* notes 119-25 & accompanying text.
17. *See infra* notes 126-74 & accompanying text.
18. *See infra* notes 175-77 & accompanying text.

may have been more tolerable. A wait of six or seven months for a contested trial of probably no more than four or five days, without the intervening burden of heavy discovery, could be justified in the interest of zealous and uninhibited advocacy. The injury to the opposing litigant, to other litigants, and to the court system and the drain on the public purse caused by baseless litigation were not so formidable. The number of lawyers was small enough that pressures from the bench and the bar were still effective, and community pressures on the litigants were not lost because of mobility or metropolitan anonymity. These conditions, however, no longer exist.

The adoption of the Federal Rules of Civil Procedure in the 1930's and of state discovery statutes after World War II brought "free and open" discovery designed to reduce surprise and gamesmanship in civil litigation. But the Rules also brought increased costs and abuses of the process. Court congestion, particularly in major metropolitan areas, has crowded court calendars and pushed the contested trial three to five years into the future.[19] Civil trials have also become more complex and protracted.

Consequently, any judgment for a plaintiff will be recovered only after extended delay and considerable, largely unrecoverable cost.[20] The huge backlog of cases in most jurisdictions[21] allows a defendant to

19. *See* Belli, *The Law's Delays: Reforming Unnecessary Delay in Civil Litigation*, 8 J. LEGIS. 16, 16-17 (1981); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. BAR FOUND. RESEARCH J. 219, 227-29; Lundergan, Kelly, & Strauss, *supra* note 9, at 27; Pressman & Morrow, *The 72,000 Case Overload*, L.A. LAW., Sept. 1981, at 18. For a statistical analysis of delay in both federal and state courts, see Grossman, Kritzer, Bumiller & McDougal, *Measuring the Pace of Civil Litigation in Federal and State Trial Courts*, 65 JUDICATURE 86 (1981). The problem of unnecessary delay caused by dilatory tactics has engendered many proposals aimed at encouraging the early settlement of claims. *See, e.g.*, Cooke, *The Highways and Byways of Dispute Resolution*, 55 ST. JOHN'S L. REV. 611 (1981); Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expenses of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475 (1973). Chief Justice Burger's speech to the 1982 mid-year meeting of the American Bar Association addressed the growing problems of delay and lack of finality which obstruct civil litigation. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982). The Chief Justice emphasized that even when acceptable results are achieved in a civil case, the victory is often a hollow one because of the time elapsed, the expenses incurred, and the emotional stress suffered. *Id.* at 274. Some have suggested an "expedited hearing" where settlements are encouraged prior to a full scale trial. *See* Rosenberg, Rient & Rowe, *Expenses: The Roadblock to Justice*, 20 JUDGES J. 16, 18 (Summer 1981). Although some discovery would be available and the rules of evidence would be applicable, the procedure would be more informal with emphasis on resolving claims at a reasonable cost. *Id.*

20. *See* Adams, *Would We Rather Fight Than Settle? The Litigation Explosion: Two Fundamental Causes*, 51 FLA. B.J. 496 (1977); Comment, *Controlling the Malicious Defendant*, 2 STAN. L. REV. 184, 187-88 (1949).

21. *See* AMERICAN JUDICATURE SOCIETY, COURT CONGESTION AND DELAY (G. Win-

delay substantially an eventual settlement. A general denial now buys a defendant not months, but years. Instead of a default or summary hearing within 45 to 75 days after filing of the complaint, a plaintiff must in many places wait more than three to five years. In the meantime, the defendant uses the plaintiff's money; restrictions on pre-judgment interest[22] give the defendant, in effect, a low interest or interest-free loan during the course of the litigation.[23]

In contrast, the plaintiff, deprived of the use of the money due, may be under financial pressure to settle. Therefore, he may be forced to accept a less favorable settlement than he could have negotiated or recovered at trial.[24] Moreover, the plaintiff will normally incur additional unrecoverable expenses, such as attorneys' fees, as a result of the

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ters ed. 1971); Rosenberg, *Status, Causes, and Proposed Remedies*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965); H. ZEISEL, H. KALVEN & B. BUCHHOLZ, DELAY IN THE COURT (1959); Belli, *supra* note 19, at 19; Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976); Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 MD. L. REV. 661 (1980); Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323 (1979).

22. Courts have traditionally been reluctant to award pre-judgment interest. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.5, at 165 (1973). In the absence of a statute to the contrary, courts will not award pre-judgment interest on a pecuniary claim which is not liquidated. *See, e.g.*, Textile Workers Union v. Brookside Mills, Inc., 205 Tenn. 394, 326 S.W.2d 671 (1959) (court reversed award of pre-judgment interest on vacation pay because the amount was not certain and was disputed on reasonable grounds). Claims for lost profits or damages resulting from personal injury will not give rise to pre-judgment interest because the interest is said to be unascertainable prior to trial and final judgment. D. DOBBS, *supra*, § 3.5, at 165. *But see* CAL. CIV. CODE § 3291 (West Supp. 1984) (If the defendant in a personal injury action refuses an offer to settle and the plaintiff ultimately obtains a judgment more favorable than the settlement offer, the defendant is liable for interest at the rate of 10% on the judgment from the date of the settlement offer.). In addition, the courts do not award pre-judgment interest in the case of a precise monetary claim if the defendant asserts a defense with respect to the extent or validity of the claims. Inland Drilling Co. v. Davis Oil Co., 183 Neb. 116, 158 N.W.2d 536 (1968); D. DOBBS, *supra*, at 167-68. A bad faith defendant may be able, through perjury, to create the appearance of a defense and thus avoid pre-judgment interest on the amount due.

23. *See* Belli, *supra* note 19, at 22. *Cf.* CAL. CIV. CODE § 3291 (West Supp. 1984) (discussed *supra* note 22).

24. Some attorneys suggest that delays tip the scales of justice in favor of those who must eventually pay money in a suit. "If someone is injured and can only look forward to redress seven or eight years later, that person may be forced to settle for less than he is entitled to," a Los Angeles lawyer points out. Moreover, insurance companies have no incentive to settle a claim when they can delay payment for years in court and collect interest on that money in the meantime. "The worst that can happen is that you're going to lose," a Palo Alto attorney explains. "Why should you settle?"

Lundergan, Kelly & Strauss, *supra* note 9, at 27. *But cf.* Hersh v. Citizens Sav. & Loan Ass'n, 146 Cal. App. 3d 1002, 1012, 194 Cal. Rptr. 628, 633 (1983) (court assessed $125,000 in damages against the defendants for the prosecution of a frivolous appeal).

false defense.[25]

The ability to cause a financially weak plaintiff to incur additional costs in pursuit of a valid claim gives additional leverage to a stronger defendant. As a result, a defendant with the means to litigate has little incentive to settle early.[26] The plaintiff, however, may be under considerable pressure to settle on terms favorable to the defendant.[27] As Mel-

25. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Gray v. Don Miller & Assocs., Inc., 35 Cal. 3d 498, 674 P.2d 253, 198 Cal. Rptr. 551 (1984); Strickland v. Williams, 234 Ga. 752, 218 S.E.2d 8 (1975); Salvador v. Popaa, 56 Hawaii 111, 530 P.2d 7 (1975); Frost v. Cedar County Bd. of Supervisors, 163 N.W.2d 432 (Iowa 1968); Harrison v. Textron, Inc., 367 Mass. 540, 328 N.E.2d 838 (1975). The American rule on attorneys' fees has been repeatedly criticized in the law reviews, *see, e.g.,* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Greenberger, *The Cost of Justice: An American Problem, An English Solution*, 9 VILL. L. REV. 400 (1964); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931); McLaughlin, *The Recovery of Attorneys' Fees: A New Method of Financing Legal Services*, 40 FORD L. REV. 761 (1972), but it has not been rejected by the courts. *See, e.g.,* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). Both Congress and the state legislatures have enacted many statutory exceptions to the American rule. *See infra* note 43. Among the states, only Alaska has adopted a rule of general applicability which treats attorney's fees as costs. ALASKA STAT. § 09.60.010 (1973). *Cf.* OR. REV. STAT. §§ 20.080, .085, .094, .096 (1981) (attorneys' fees allowed in personal injury actions where the amount pleaded or counterclaimed is $3,000 or less; attorneys' fees allowed in inverse condemnation actions; attorneys' fees allowed in certain debt and contract actions); WASH. REV. CODE § 4.84.250 (West Supp. 1984) (attorneys' fees allowed as costs in damage actions of $5,000 or less). Recently, the California legislature codified the federal bad faith rule which allows a court to tax expenses, including attorneys' fees, to a defendant who has litigated in bad faith. CAL. CIV. PROC. CODE § 128.5 (West 1982). The legislative finding in connection with this section is particularly interesting:

> It is the intent of this legislation to broaden the powers of trial courts to manage their calendars and provide for expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized by the interpretation of the law in Baugess v. Paine (1978) 22 Cal. 3d 626.

1981 Cal. Stat., ch. 762, § 2.

26. *See supra* text accompanying notes 20-23; Adams, *supra* note 20, at 497; Brazil, *supra* note 19, at 229.

27. Litigation expenses are substantial enough to make the bringing of certain lawsuits prohibitive. Some have suggested that a case which involves less than $6,000 is not worth pursuing in California because of the expense of litigation. Rosenberg, Rient & Rowe, *supra* note 19, at 17. Claims under $25,000 are subject to the largest proportion of attorneys' fees in relation to the claim. *Id.* Moreover, the expenses incurred directly by the litigants represent only a portion of the total cost of litigation. For example, it costs over $350 per hour to run a federal district court sitting with a jury. Burger, *supra* note 19, at 277. In a cost study of the Los Angeles Superior Courts for the fiscal year 1980-1981, it was determined that it cost $898 per day to run each civil trial courtroom. LOS ANGELES SUPERIOR COURT, *supra* note 10, at 3. For an analysis of the rising costs of litigation and some suggested solutions, see Johnson, *Access to Justice in the United States: The Economic Barriers and Some Promising Solutions*, in 2 ACCESS TO JUSTICE 913, 962 (1978); *see also* Epstein, *Reducing Litigation Costs for Small Cases*, 20 JUDGES J. 9, 10 (Spring 1981): "It is a fearsome thing to contem-

vin Belli has observed: "After a five year delay, the judgment becomes more a reward to a diligent litigant than an award to a deserving victim."[28]

In light of such abuses, the limited number of effective deterrents to malicious defensive conduct is all the more striking. Perjury, whether in the pleadings, during discovery, or at trial, is at the heart of every malicious defense, yet there is no civil remedy for perjury[29] and there is little credible threat of a criminal prosecution.[30] A defendant who thus acts in bad faith for his financial gain or to injure a plaintiff for personal reasons, or who simply believes that this is how the litigation game is played, may use the litigation process for malicious and improper purposes without being held accountable.

Additionally, neither substantive law nor any clear professional limitation on adversarial conduct restrains lawyers from aiding a malicious defendant. If a defendant is not liable for malicious defensive tactics, his lawyer will be *a fortiori* immune. Though one might expect the bar to regulate such conduct not subject to civil liability, the ethical standards governing litigation conduct have been ineffective for a number of reasons. First, practical application of the standards has

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plate a justice system supported by all taxpayers, practical access to which is out of reach for the great majority of people who need its services."

28. After a five-year delay, the judgment becomes more a reward to a diligent litigant than an award to a deserving victim. A worker, who is permanently incapacitated and has a family to support, can hardly afford to wait five years to receive an award. Hospital bills, doctor bills, house payments, food bills, and educational fees must be paid in the interim. If a claimant cannot be "carried" by his lawyer and is ineligible for government relief, he must discount his eventual award to an extent that would be usurious in a commercial transaction.

Belli, *supra* note 19, at 17.

29. *Cf.* Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981) (an attorney who intentionally violated duties imposed by statute proscribing an attorney from seeking to mislead a court or jury by any false statement of law or fact had no liability to the opposing party for damages). *See also* Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

30. *See* Comment, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & CRIMINOLOGY 361, 361 (1974). The President's Commission on Law Enforcement and Administration of Justice concluded that perjury was widespread and that effective measures against it were lacking. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 347 (1968). One commentator has stated: "Few crimes except fornication are more prevalent or carried off with greater impunity." Whitman, *A Proposed Solution to the Problem of Perjury in Our Courts*, 59 DICK. L. REV. 127, 127 (1955). In California, for example, there were 88,291 felony defendants prosecuted in 1972. Of this number, only 53 were charged with perjury. Comment, *supra*, at 361. *See also* Hibschman, *"You Do Solemnly Swear!" or That Perjury Problem*, 24 J. CRIM. L. & CRIMINOLOGY 901 (1934); McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727 (1940); Purrington, *The Frequency of Perjury*, 8 COLUM. L. REV. 67 (1908); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

been subject to considerable disagreement.[31] Second, the disciplinary boards of the bar historically have declined to pursue vigorously proceedings against attorneys for violations of these standards.[32] Therefore, even if state and local bar associations adopt clearer and more stringent rules against attorney participation in client fraud, the rules are unlikely to be enforced through disciplinary hearings if the bar disciplinary boards continue their past practices. Moreover, the disciplinary boards do not hear many cases concerning attorney participation in client fraud because most disciplinary proceedings are initiated by the client. A client who engaged in fraudulent conduct in concert with an attorney is unlikely to report the attorney's conduct. Only infrequently do the other attorneys, or their clients, or the judges report such instances.[33] Finally, attempts by opposing parties to enforce the disciplinary rules through tort litigation have been unsuccessful.[34] Under these circumstances, it is not surprising that many lawyers adopt a "no-holds-barred" approach in defending litigation. In many cases, the lawyers do this primarily out of a sense of obligation to their clients. Other lawyers may simply feel they must do so to meet the competition.

31. *See* J. LIEBERMAN, CRISIS AT THE BAR: THE UNETHICAL ETHICS OF LAWYERS (AND WHAT TO DO ABOUT IT) 161-66 (1978). The responsibility of an attorney for a client's bad faith defense is unclear under the present ABA Code of Professional Responsibility. *See, e.g.,* Wolfram, *supra* note 30, at 819-22. The Model Rules proposed by the Kutak Commission clarify the issue somewhat, but the negative reaction to these proposed rules indicates strong feelings among attorneys in favor of uninhibited advocacy. *See, e.g.,* Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U.L. REV. 79 (1983); Freedman, *Are The Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685 (1981); COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, AMERICAN BAR ASSOCIATION, MATERIALS ON MODEL RULES OF PROFESSIONAL CONDUCT Item 503 (American College of Trial Lawyers), Item 508 (Colorado Bar Association), Item 518 (Florida Bar) (1982). Professor Kramer cites the example of the District of Columbia Bar referendum on the 1969 version of Disciplinary Rule 7-102(B)(1) that required lawyers to "reveal the fraud to the affected person or tribunal." In the referendum, 74% of the District of Columbia Bar members voted to "reject any duty to reveal a client's fraud once a lawyer has called upon the client to rectify the situation." Kramer, *Client's Frauds and Their Lawyers' Obligations: A Study in Professional Irresponsibility*, 67 GEO. L.J. 991, 995 n.24 (1979).

32. *See, e.g.,* Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 634-36 (1978); Comment, *Disbarment in the United States: Who Shall Do the Noisome Work?*, 12 COLUM. J.L. &. SOC. PROBS. 1, 71-72 (1975).

33. *See* Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. BAR FOUND. RESEARCH J. 917, 949, 973; *see also* SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASSOCIATION, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 6 (1970).

34. *See, e.g.,* Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981); Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981); O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

Whatever the reason, such tactics can be devastating to a plaintiff with a valid claim but limited resources.

The following not-so-hypothetical case summaries exemplify the difficulties encountered by a plaintiff confronting a malicious defendant with the inclination and resources to litigate:

*Case 1.*[35] *A* and *B* are partners in a real estate investment company. The partnership owns several apartment buildings as well as a few commercial properties. *A* is primarily in charge of building remodeling and maintenance. *B* is in charge of the financial side and has control of the partnership bank accounts. After a dispute over prospective acquisitions, the partners have a falling out. They agree to terminate the partnership, and *A* asks for an accounting and distribution of his share of the partnership assets. *B* holds up any distribution and delays the preparation of the accounting for several months. When the accounting is finally rendered, *A* objects to several items. First, some offsets against *A*'s account are not adequately explained. Second, *B* has claimed consulting fees in the amount of $12,000, travel expenses in the amount of $6,000, and miscellaneous expenses in the amount of $7,500. *A* strongly suspects that the accounting is fraudulent and that *B* is attempting to cheat him out of some of his fair share of the assets. *A* asks for an explanation, but *B* refuses to cooperate. The disputed items reduce *A*'s share of the assets by approximately $20,000. *A*'s undisputed overall partnership share is several times that amount, but *B* refuses to pay out anything until the accounting dispute is resolved.

*A*'s assets are tied up in the business, and he would experience financial difficulties without the money. He is confident that the disputed offsets and items are false and wants the matter to be resolved as quickly and inexpensively as possible. When he consults a lawyer, however, he is told that it will take years to get a court judgment and that the attorneys' fees will be substantial, particularly if *B* is as obstructive and devious as *A* has made him out to be.

*Case 2.*[36] *C* is an electrician specializing in work on commercial developments. He bids and gets a job on a suburban shopping center project with *D* as the general contractor. *C* works on the job for nine weeks and is nearly finished when *D* terminates him. Although *C*'s work has been adequate and timely, *D* apparently wants to use *C* as an example to the other subcontractors. *D* wishes to develop the image of being tough-minded and even a little ruthless when it comes time to

35. *Cf.* Schmidt Constr., Inc. v. M.J. Hermreck, Inc., No. C 70880 (Super. Ct. Cal., L.A. Cty. 1975).

36. *Cf.* Schober v. Aquarius Dev. Co., No. C 59312 (Super. Ct. Cal., L.A. Cty. 1974).

pay off the subcontractors. *D* asserts, without foundation, that the termination was for cause. *D* disclaims any further liability to *C*, saying that the amount then due *C* for his work was offset by the amount which *D* has to spend in order to finish the electrical work. *C* files a mechanics lien against the property. The lien is subsequently bonded off before the project is turned over to the owners. *C* has no choice but to bring suit. If *D* chooses to conduct a vigorous defense, however, the time and expense consumed in proving the speciousness of *D*'s case will never be recouped, and *C* may have to wait years for his compensation.

*Case 3.* *E* is a computer sales representative for *F* Corporation. The sales reps are paid a monthly salary and receive a bonus every six months based on performance during the preceding six month period. *E* expects a large bonus. *F* Corporation is having difficulty with its inventory controls and suspects theft by employees. Because he is hard-driving and efficient, *E* is not well liked by his fellow employees, several of whom honestly but mistakenly suspect *E* of stealing and report their suspicions to management. Through the industry grapevine, management also learns that *E* has been approached by a competitor and offered a more attractive position and salary. *F* Corporation management becomes concerned not only about the thefts but also about possible disclosure of trade secrets. *F* Corporation hires an outside detective agency to investigate, which turns up potentially incriminating evidence against *E*. *E* is thereupon brought to a darkened conference room at *F* Corporation headquarters and interrogated against his will and under threat of criminal prosecution for five hours. Stunned and cowed, *E* allows the investigators to search his personal residence, from which they seize computer parts worth several thousand dollars under the belief that they are company property. In fact, the property taken from his home is owned by *E*, as evidenced by bills of sale.

*E* quits his employment with *F* Corporation and asks for his bonus, vacation pay, and vested profit-sharing benefits. He also asks for the return of his property and a statement clearing him of any wrongdoing. *F* Corporation, though aware that its investigation has proved no wrongdoing on *E*'s part, nevertheless refuses to pay *E* his bonus or profit sharing benefits, and delays paying his vacation pay and returning his property. *F* Corporation also refuses to make any statement exonerating *E* of wrongdoing, although the fact of his interrogation and the charges against him were widely circulated throughout the company and local industry. Ultimately, *F* Corporation refuses to do more than return his property and to make a partial payment of his vacation pay. On technical pretexts, *F* Corporation refuses to pay *E* his bonus

and profit-sharing benefits. *E* thereupon consults a lawyer and brings suit. The *F* Corporation managers, however, stonewall the lawsuit for fear of embarassment, although they are aware that *E* was innocent.

*Case 4.*[37] *H* is a surgeon with a successful practice. His annual income exceeds $200,000 per year. *W* sues *H* for a divorce and seeks an equitable property settlement. When *W*'s attorney attempts to subpoena the financial records from *H*'s practice, *H*'s attorney interposes numerous objections that have no legal basis. During depositions, *H* is very uncooperative and refuses to disclose several properties and ventures in which he has invested. He is usually late with payment of temporary support, often not paying until a contempt hearing is set. *H* knows that most of his delay tactics will not succeed in the long run, but he hopes that he can wear down *W* both emotionally and financially. *H*'s tactics require *W* to be adamant at every turn or to forego some of her rights to preserve her dignity and emotional well-being.

In the foregoing cases, defendants *B*, *D*, *F*, and *H* are wrong and either know it or soon find out. The practicalities, however, are that it suits their financial interests and collateral purposes to deny these claims. They have the money and are in control. The only recourse for plaintiffs *A*, *C*, *E*, and *W*, if redress is to be had at all, is the courts. If the defendants follow the familiar course of a general denial, obstruction of discovery, and no settlement or redress until near or after trial, then whatever compensation is obtained may be too little and too late.

Each of the prospective plaintiffs in the foregoing cases must ultimately deal with this problem. In the event of a suit, relief will be between three and five years away in most jurisdictions.[38] Prospective unrecoverable attorneys' fees, at current hourly rates for competent representation, and court costs, not all recoverable, can be expected to exceed $10,000.[39] Plaintiff's costs could be much higher if the defendant engages in delaying tactics. In the end, the relief afforded by the law will not compensate for the loss. The legal process increases the

37. *Cf.* Wolf v. Wolf, 26 A.D.2d 529, 271 N.Y.S.2d 155 (1966).

38. *See supra* note 19.

39. *See, e.g.*, Rosenberg, Rient & Rowe, *supra* note 19, at 17:

> There also is evidence that the problem is most acute when a litigant with a worthy cause is not entitled to legal aid, but must face legal expenses out of proportion to the amount at stake. Cases involving sums in the range of $1,000 to $25,000 are the hardest hit. When ordinary damage cases of that size are litigated to a conclusion, the lawyers' fees on both sides soon devour a substantial fraction of the disputed amount.

*See also* Epstein, *supra* note 27, at 10.

injury by delay, the accompanying emotional distress, and the further drain on the injured party's financial resources.

## Existing Safeguards

Courts have adopted several methods of dealing with the problem of malicious defense tactics, although they have not yet recognized a tort of malicious defense. Statutory and common law remedies inhibit certain cases of malicious defense. Nonetheless, these safeguards are insufficient to correct the situation.

### Attorney's Fees

As a general rule, in American courts a plaintiff will not be awarded attorney's fees in the absence of a contractual agreement or some statutory authority.[40] The American rule is often defended on the ground that assertion of potentially just claims and defenses should not be deterred by the possibility of having to pay the other party's attorneys' fees.[41] The imposition of attorneys' fees, it is argued, would operate as a penalty upon the exercise of a privilege of citizenship and may have an especially discouraging impact upon the poor.[42] The American attorneys' fees rule, however, may also tend to discourage the assertion of meritorious claims by placing on the plaintiff the full cost of the vindication of his rights.[43] Some courts therefore have made exceptions to the general rule when justice and equity have required it.

40. *See supra* note 24.

41. *See, e.g.,* Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Young v. Redman, 55 Cal. App. 3d 827, 835-36, 128 Cal. Rptr. 86, 91 (1976).

42. *See* Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); Conte v. Flota Merchante del Estado, 277 F.2d 664, 672 (2d Cir. 1970).

43. If the cost of litigation is high relative to the possible recovery of damages, a party may decline to prosecute or defend a lawsuit, even if he believes he is in the right. It is not uncommon for a lawyer to advise a client that a rightful claim is not worth pursuing because it would cost as much or more to prosecute the case than could possibly be recovered. *See supra* note 39. The increasing tendency to make statutory exceptions to the American rule to encourage the prosecution of meritorious claims implicitly reflects the failure of the American rule to maintain open access to the courts. *See, e.g.,* 15 U.S.C. § 57a(h)(1) (1982) (FTC rulemaking proceedings concerning unfair and deceptive practices); *id.* § 1918(a) (civil action by owner or passenger suffering damages due to violation of federal automobile bumper standards); *id.* § 1640(a)(3) (violation of consumer credit cost disclosure provisions); *id.* § 1681n(3) (civil liability of consumer credit reporting agencies).

Nonetheless, it would be inappropriate to adopt the English rule, in which attorneys' fees are awarded to the prevailing party, in lieu of the American rule. For arguments in favor of adopting the English rule, see, e.g., Bishop, *Let's Adopt the English Fees Awards System,* 4 CAL. LAW. 10 (Feb. 1984); Greenberger, *supra* note 25; Kuenzel, *supra* note 25. This solution goes too far in the other direction and may indeed serve to deter the assertion of meritorious claims or defenses. For an excellent discussion of this problem, see Mallor,

**The Federal Equitable Rule and Rule 11 of the Federal Rules of Civil Procedure**

For at least fifty years, the federal courts have recognized an important exception to the general rule that each party must bear his own attorneys' fees.[44] This exception allows recovery of attorneys' fees when the action or defense is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons. The federal equitable rule does not alter the general rule in a bona fide dispute; it operates only when one party has litigated without a credible supporting ground.[45]

The amendment of Rule 11 of the Federal Rules of Civil Procedure provides another basis on which federal courts can impose liability for bad faith defenses. Rule 11 now provides that if an attorney or party signs a pleading, motion, or other paper, the signature certifies the good faith and truthfulness of the document.[46] In the event a viola-

*Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613 (1983). *See also* Ehrenzweig, *supra* note 25.

44. *See, e.g.*, Hall v. Cole, 412 U.S. 1, 5 (1973); Vaughan v. Atkinson, 369 U.S. 527, 530 (1962); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963); Rolax v. Atlantic Coast Line Ry. Co., 186 F.2d 473, 481 (4th Cir. 1951); Cleveland v. Second Nat'l Bank & Trust Co., 149 F.2d 466, 469 (6th Cir. 1945); Guardian Trust Co. v. Kansas City S. Ry. Co., 28 F.2d 233, 240-46 (8th Cir. 1928); *see also* 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE 54.77[2] (2d ed. 1983); Mallor, *supra* note 43, at 630-52.

45. The case of Vaughan v. Atkinson, 369 U.S. 527 (1962), provides an example of the kind of case meant to be covered by the equitable rule. The Court stated:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting it nor denying it. *As a result of that recalcitrance, libellant was forced to hire a lawyer to go to court and get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case for damages suffered for failure to pay maintenance than this one.*

369 U.S. at 530-31 (emphasis added).

46. The Rule provides, in pertinent part, as follows:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FED. R. CIV. P. 11; Hall, *New Rules Amendments Are Far Reaching*, 69 A.B.A. J. 1, 640 (1983). *See also* Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743, 754-67 (1980) (commentary on Rule 11 before its recent amendment).

tion of the rule occurs, the court, on its own motion or the motion of a party, may impose sanctions. That penalty may include liability for reasonable expenses incurred because of the bad faith filing, including reasonable attorneys' fees.

Although the power of the trial judge to impose sanctions for bad faith defenses may provide some relief for the innocent plaintiff, it is not a sufficient substitute for the tort proposed here. First, the Rule granting this power addresses the problem on an ad hoc basis. If the judge decides for reasons of efficiency not to impose sanctions, the injured party is left with no remedy. Second, because the trial judge empowered to impose sanctions also hears the main case on which the malicious defense tort is based, vigorous presentation of a good faith defense may be inhibited. A separate action would allow a neutral tribunal to decide the issue without imposing additional responsibilities on a trial judge already burdened with the speedy and equitable resolution of the underlying action. Finally, the federal equitable rule and Rule 11 are remedies available only in federal court.[47]

**The California Malicious Cross-Complaint Rule**

Despite the courts' general acceptance of extreme adversarial conduct in civil actions, the tort of malicious prosecution imposes some restrictions on defensive conduct by allowing recovery for a cross-complaint filed for malicious purposes. For example, the California Supreme Court held in *Bertero v. National General Corp.*[48] that the filing and prosecution of a fabricated cross-complaint would support a malicious prosecution action for compensatory and punitive damages. The court rejected the defendants' argument that the cross-complaint was simply part of a vigorous defense.[49] Noting that the defendants

47. CAL. CIV. PROC. CODE § 128.5 (West 1982) provides for similar controls over bad faith litigation:

> (a) Every trial court shall have the power to order a party or the party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of tactics or actions not based on good faith which are frivolous or which cause unnecessary delay. Frivolous actions or delaying tactics include, but are not limited to, making or opposing motions without good faith.
>
> (b) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

California has a similar rule with respect to frivolous appeals. CAL. CIV. PROC. CODE § 907 (West 1980).

48. 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975).

49. *Id.* at 52-53, 529 P.2d at 615, 118 Cal. Rptr. at 191.

could conduct a vigorous defense without resorting to the filing of a malicious and fabricated action, the court concluded:

> Public policy . . . does not limit the right to seek redress for the malicious abuse of the judicial process; such abuse cannot be sanctioned either in the assertion of affirmative claims in initiating proceedings or in the affirmative assertion of such claims after the initiation of proceedings.[50]

The court did not distinguish between the harm suffered by an original defendant in a maliciously prosecuted action and the harm suffered by a cross-defendant in a groundless cross-complaint. The injury and expense to the individual and the harm to the judicial system are the same in both instances.[51] The innocent cross-defendant was entitled to recover damages for attorneys' fees in defending the prior action and damages for emotional distress and impairment of business reputation proximately caused by the action.[52]

The malicious cross-complaint rule is nonetheless inadequate to meet the problems created by malicious defense tactics. By its nature, the rule applies only to the affirmative assertion of bad faith counterclaims. It would thus not apply to strictly defensive tactics such as oppressive discovery and other delaying tactics. In addition, the rule applies only in California and, at most, a few other states.[53]

**The Abuse of Process Cases**

The policy against the wrongful use of civil proceedings is also reflected in the tort of abuse of process. This cause of action is appropriate if a legitimate lawsuit has been "perverted to accomplish an ulterior purpose for which it was not designed."[54] Abuse of process cases will arise, for example, in debt collection proceedings when the under-

50. *Id.* at 53, 529 P.2d at 616, 118 Cal. Rptr. at 192.

51. The harm to society and to the individual cross-defendant caused by the filing of a cross-pleading without probable cause and with malice is substantially similar to that occasioned by the filing of a complaint or other initial pleading known to be false or meritless. The malicious cross-plaintiff, like the malicious plaintiff, uses the judicial process as a vehicle for harassing or vexing his adversary or as a means of coercing the settlement of a collateral matter. The cross-defendant, like the defendant in an original cause maliciously prosecuted, is compelled to expend attorney's fees in defending against the false charge and may suffer the same mental or emotional distress and possible loss of reputation and standing in the community. *Id.* at 51, 529 P.2d at 614, 118 Cal. Rptr. at 190.

52. *Id.* at 59, 529 P.2d at 620, 118 Cal. Rptr. at 196.

53. *See* Merrit-Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F. Supp. 17, 20 (E.D. Tenn. 1972); Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932); Kolka v. Jones, 6 N.D. 461, 71 N.W. 558 (1897).

54. PROSSER, *supra* note 1, at 856. *See also* Note, *supra* note 46, at 751-52.

lying obligation is valid but the means used to collect the debt are wrongful,[55] or when the litigation process has been used wrongfully to secure payment of a just obligation.[56] The tort recognizes that the adversary system itself can promote injustice if one side has superior knowledge of the system and harbors the inclination to bend the rules.

The tort of abuse of process is intended to limit wrongful adversarial conduct by clients and their attorneys.[57] This limit is consistent with the public policy favoring open access to courts and zealous representation.[58] Nonetheless, the purview of the tort, which is restricted to cases involving misuse of valid judicial processes, is too narrow to encompass the broad range of injuries caused by malicious actions by defendants.

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55. See Czap v. Credit Bureau, 7 Cal. App. 3d 1, 86 Cal. Rptr. 417 (1970), in which the California Court of Appeal found a cause of action for abuse of process where the defendant collection agency had threatened the plaintiff with garnishment of her wages, though the collection agency knew her wages were exempt by law from garnishment. The defendant had also attempted to coerce payment of the debt by jeopardizing the plaintiff's employment. This conduct justified an action by the plaintiff for abuse of process.

56. See Barquis v. Merchants Collection Ass'n, 7 Cal. 3d 94, 496 P.2d 817, 101 Cal. Rptr. 745 (1972), in which the plaintiffs alleged that the defendant collection agency had knowingly filed debt collection actions in the improper county for the sole purpose of making defense of the action more difficult. The supreme court held the allegation, if established at trial, would show a "mass 'abuse of process' " and found injunctive relief to be appropriate. *Id.* at 103, 496 P.2d at 823, 101 Cal. Rptr. at 751.

57. For example, in Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1949), the Minnesota Supreme Court held that an attorney could be liable for abuse of process and quoted from an earlier Wisconsin case:

> An attorney at law is an officer of the court. The nature of his obligations is both public and private. His public duty consists in his obligation to aid the administration of justice; his private duty, to faithfully, honestly, and conscientiously represent the interests of his client. In every case that comes to him in his professional capacity, he must determine wherein lies his obligations to the public and his obligations to his client, and to discharge this duty properly requires the exercise of a keen discrimination, and wherever the duties to his client conflict with those he owes to the public as an officer of the court in the administration of justice, the former must yield to the latter. He therefore occupies what may be termed a quasi judicial office.

*Id.* at 240-41, 28 N.W.2d at 791 (quoting Langen v. Borkowski, 188 Wisc. 277, 301, 206 N.W. 181, 190 (1925)).

58. As pointed out by the New York Court of Appeals:

> While it is true that public policy mandates free access to the courts for redress of wrongs . . . and our adversarial system cannot function without zealous advocacy, it is also true that legal procedure must be utilized in a manner consonant with the purpose for which that procedure was designed. Where process is manipulated to achieve some collateral advantage, whether it be denominated extortion, blackmail or retribution, the tort of abuse of process will be available to the injured party.

Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635, 643 (1975) (citations omitted).

**Bad Faith Insurance Cases**

It is well established that the adversary model of litigation is not fully applicable to the processing and adjudication of insurance claims.[59] Defendant insurance companies may not insist that an insured has no claim until the matter is settled in a court of law.

For example, in *Fletcher v. Western National Life Insurance Co.*,[60] a California court upheld liability of an insurance company for its bad faith conduct during the negotiation of a claim. *Fletcher* involved a claim for payments on a disability insurance policy. The defendant insurance company sought to minimize its liability first by limiting the claim, then by denying the claim altogether and threatening a claim of its own. In addition, the defendant demonstrated its knowledge that the economic need of the claimant gave it leverage in settlement negotiations. The appellate court affirmed the jury's award of compensatory and punitive damages, noting that "[s]ettlement implies the existence of a good faith dispute, and there is no public policy in favor of an attempt to coerce settlement of a non-existent dispute by outrageous means."[61]

Although the bad faith insurance cases are sometimes characterized as reflecting the unique circumstances of the insurance industry,[62] the court's observation that "there is no public policy in favor of an attempt to coerce settlement of a non-existent dispute by outrageous means"[63] is an important principle of general applicability. Nonetheless, though the insurance cases can give guidance to the development of a tort of malicious defense, their applicability only to the relationship between an insurer and its insured prevents them from providing the broad protection needed in the area of malicious defense.

**The Bad Faith Business Tort**

The policy that an insurance company may not conduct a no-

59. *See, e.g.*, Thomas v. Allstate Ins. Co., 443 F.2d 1123 (6th Cir. 1971); Coppage v. Fireman's Fund Ins. Co. 379 F.2d 621 (6th Cir. 1967); Transport Ins. Co. v. Michigan Mut. Liab. Ins. Co., 340 F. Supp. 670 (E.D. Mich. 1972); Safeway Moving & Storage Corp. v. Aetna Ins. Co., 317 F. Supp. 238 (E.D. Va. 1970); Greenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 271 N.W.2d 368 (1978).

60. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

61. *Id.* at 396, 89 Cal. Rptr. at 89-90.

62. *See, e.g.*, Iron Mountain Sec. Storage v. American Specialty Foods, Inc., 457 F. Supp. 1158, 1166-68 (E.D. Pa. 1978); Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev., Inc., 66 Cal. App. 3d 101, 135 n.8, 135 Cal. Rptr. 802, 822 n.8 (1977); Farris v. Fidelity & Guar. Co., 284 Or. 453, 463, 587 P.2d 1015, 1020 (1978).

63. 10 Cal. App. 3d at 396, 89 Cal. Rptr. at 89-90.

holds-barred defense against a claimant generally has been restricted to the insurance area. However, because the bad faith insurance tort is grounded on the covenant of good faith and fair dealing which is implied in *every* contract, the question of extending the tort beyond the insurance area has been raised frequently.[64] Recently, the California Supreme Court held that a party to a commercial contract could be liable in tort for a bad faith breach. In *Seaman's Direct Buying Service v. Standard Oil Co.*,[65] the defendant, Standard Oil, entered into an agreement in 1972 with Seaman's, a closely held corporation composed of three shareholders, to provide Seaman's with marine fuel as required. Subsequent to the agreement the fuel market changed from a buyer's market to a seller's market. Standard consequently adopted a "no new business" policy and sought to deny its obligation to provide fuel to Seaman's.[66] Standard's efforts to avoid its contractual obligation included an appeal of an order by the federal government to provide fuel. The appeal was ultimately unsuccessful, and Standard was ordered to fulfill supply obligations "upon the filing of a court decree that a valid contract existed under state law."[67] Seaman's asked Standard to stipulate to the existence of a valid contract in order to avoid the problem and delay of litigating what they both knew to be the case. The Standard representative, however, laughed at the Seaman's request and said, "See you in court."[68] By 1975, Seaman's had discontinued operations. Soon thereafter, it brought suit against Standard Oil for breach of contract, fraud, breach of the implied covenant of good faith and fair dealing, and interference with an advantageous business relationship. Experiencing the usual delays, the case was finally tried in 1979[69] and the jury returned a verdict for the plaintiff, awarding both compensatory damages and punitive damages.[70]

64. *See* Diamond, *The Tort of Bad Faith Breach of Contract: When, If At All, Should It Be Extended Beyond Insurance Transactions?*, 64 MARQ. L. REV. 425 (1981); Louderback & Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F.L. REV. 187 (1982).

65. 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

66. *Id.* at 760-62, 686 P.2d at 1161-62, 206 Cal. Rptr. at 357-58.

67. *Id.* at 762, 686 P.2d at 1162, 206 Cal. Rptr. at 358.

68. *Id.*

69. Seaman's Direct Buying Serv. v. Standard Oil Co., No. 57371 (Super Ct. Cal., Humboldt County, judgment entered Nov. 20, 1979).

70. On the breach of contract count, the jury awarded compensatory damages of $397,050. For the breach of the covenant of good faith and fair dealing, the jury awarded $397,050 in compensatory damages and $11,058,810 in punitive damages. On the count for intentional interference with an advantageous relationship, the jury awarded $1,588,200 in compensatory damages and $11,058,810 in punitive damages. 36 Cal. 3d at 762, 686 P.2d at 1162, 206 Cal. Rptr. at 358.

The California Supreme Court, while acknowledging that the covenant of good faith and fair dealing was implied in all contracts, nevertheless was reluctant to recognize a *tort* remedy for its breach in cases outside the insurance area. "When we move from such special relationships to consideration of the tort remedy in the context of the ordinary commercial contract, we move into largely uncharted and potentially dangerous waters."[71] As a consequence, the court sought, and found, a narrower ground for its decision. Without deciding whether breach of the covenant of good faith and fair dealing will give rise to tort remedies in the ordinary commercial context, the court recognized an action for bad faith breach of contract when the defendant "in bad faith and without probable cause" denies the existence of the contract.[72] In justification of this holding, the court used language that is relevant to the problem of bad faith defenses in general:

> It has been held that a party to a contract may be subject to tort liability, including punitive damages, if he coerces the other party to pay more than is due under the contract terms through the threat of a lawsuit made "without probable cause and with no belief in the existence of the cause of action.". . . *There is little difference, in principle, between a contracting party obtaining excess payment in such a manner, and a contracting party seeking to avoid all liability on a meritorious contract claim by adopting a "stonewall" position ("see you in court") without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of a contract.*[73]

This demonstrates the court's awareness that the problem of bad faith defenses, or "stonewalling," cannot be resolved through traditional contract remedies. Its reluctance, however, to fashion a broader remedy to deal with this problem probably indicates the court's belief that the term "good faith and fair dealing" raises more questions than it resolves. "Good faith and fair dealing" arises from the substantive law of contracts and thus, at best, touches only indirectly the more widespread phenomenon of bad faith litigation.[74] While the *Seaman's* decision is a welcome recognition of the problem, its limited holding cannot

71. *Id.* at 769, 686 P.2d at 1166-67, 206 Cal. Rptr. at 362-63.

72. *Id.*

73. *Id.* (quoting Adams v. Crater Well Drilling, Inc., 276 Or. 789, 794, 556 P.2d 679, 681 (1976)) (emphasis added).

74. In a concurring opinion, Chief Justice Bird carefully limited the scope of the tort for breach of the covenant of good faith and fair dealing. Chief Justice Bird argued that the court should have based its holding on the implied covenant, but only when the breaching party denies the existence of the contract in bad faith. *Id.* at 777-80, 686 P.2d at 1172-74, 206 Cal. Rptr. at 368-70. The parties to a contract may expect the other side to breach and pay damages for such breach, but not to deny the existence of the contract in order to escape damages altogether. As such, Chief Justice Bird's approach would not apply in many bad faith defense situations.

be, nor was it intended to be, a sufficient safeguard against malicious defenses.

**The Prima Facie Tort**

The Restatement (Second) of Torts provides another possible remedy for injuries of the sort at issue here. Section 870 of the Restatement describes a general principle for analysis of intentional conduct that causes harm even though the conduct may not be thought to fit readily into a generally recognized category of tort liability:

> One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.[75]

This is known as the prima facie tort or the innominate tort.[76]

The commentary to the section separates the analysis into four parts: (1) the nature and the seriousness of the harm to the injured party; (2) the nature and the significance of the interests promoted by the actor's conduct; (3) the character of the means used by the actor; and (4) the actor's motive.[77] The analysis will clearly apply to a situation in which a plaintiff has been injured by the malicious tactics of the defendant.

The Restatement's provision for innominate torts impliedly recog-

75. RESTATEMENT, *supra* note 1, § 870.

76. For a discussion of the prima facie tort doctrine, see Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U. L. REV. 563 (1959); Forkosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465 (1957). The recent decision in Porter v. Crawford & Co., 611 S.W.2d 265 (Mo. Ct. App. 1981) contains an excellent discussion of the prima facie tort doctrine. In that case, the court recognized a claim for the intentional stopping payment of a check given in settlement of an insurance claim. Noting the need for tort doctrine to develop as conditions in society change, the court stated:

> It is clear that modern scholarship considers that there exists a residue of tort liability which has not been explicated in specific forms of tort action and which is available for the courts to develop as common law tort actions as the needs of society require such a development . . . . The emerging products liability recovery theories and the relatively recent development of theories in the recovery of damages for intentional infliction of emotional distress are demonstrative of the willingness of the courts to draw upon traditional concepts of tort liability and impose liability in new forms and under new factual situations.

611 S.W.2d at 268 (citations omitted). *See also* Aikens v. Wisconsin, 195 U.S. 194 (1904); Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 343 N.E.2d 278, 380 N.Y.S.2d 635 (1975); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E.2d 401 (1946); Cullen v. Dickenson, 33 S.D. 27, 144 N.W. 656 (1913); Reuter, *Physician Countersuits, A Catch-22*, 14 U.S.F.L. REV. 203, 213-17 (1980).

77. RESTATEMENT, *supra* note 1, § 870 .

nizes the need for development in the law to be guided by principle, not solely by precedent. The tort furthers the policy that one who intentionally injures another without justification should be held accountable for the ensuing harm. The present circumstances of litigation, with the increased costs and delay, also warrant application of this general principle to the tort of malicious defense.

As it exists, however, the innominate tort fails to provide a sure remedy for abusive litigation conduct by defendants. Although the elements of the tort adapt to the circumstances of a malicious defense, their flexibility derives in part from their generality. Although the prima facie tort thus provides general guidelines for the courts in resolving unusual legal problems, malicious defensive tactics occur so frequently that a more precise and specific remedy is needed.

## The Status of Existing Authority

Jurisdictions have been split on the advisability of creating a tort of malicious defense. Many jurisdictions have discussed the tort only in dicta.[78] Some of these courts have impliedly recognized the validity of the tort,[79] while others have seemed to deny its validity.[80] In certain minority jurisdictions, which limit the tort of malicious prosecution, the courts have clearly denied the existence of an action for malicious defense.[81] But the tort has been explicitly denied in only one majority jurisdiction, in a decision based on clearly erroneous logic.[82] To date, no court has provided a disciplined, principled argument against the tort of malicious defense.

For example, in *Eastin v. Bank of Stockton*,[83] the California Supreme Court commented on the tort of malicious defense in the course of recognizing a cause of action for malicious prosecution. While conceding that the tort of malicious defense would not be barred

78. *See, e.g.*, Ritter v. Ritter, 381 Ill. 549, 556-57, 46 N.E.2d 41, 45 (1943); Kolka v. Jones, 6 N.D. 461, 469-70, 71 N.W. 558, 561 (1897).

79. *See* Kolka v. Jones, 6 N.D. 461, 469-70, 71 N.W. 558, 561 (1897); Cisson v. Pickens Sav. & Loan, 258 S.C. 37, 43, 186 S.E.2d 822, 825 (1972). *Cf.* Hoyt v. Macon, 2 Colo. 113, 120 (1873). *See generally* Annot., 65 A.L.R.3d 901 (1975).

80. *See, e.g.*, Bertero v. National Gen. Corp., 13 Cal. 3d 43, 52-53, 529 P.2d 608, 615, 118 Cal. Rptr. 184, 191 (1974); Eastin v. Bank of Stockton, 66 Cal. 123, 127, 4 P. 1106, 1109-10 (1884).

81. *See, e.g.*, Ritter v. Ritter, 381 Ill. 549, 556, 46 N.E.2d 41, 44 (1943); Wetmore v. Mellinger, 64 Iowa 741, 744, 18 N.W. 870, 871 (1884); Johnson v. Walker-Smith Co., 47 N.M. 310, 312, 142 P.2d 546, 548 (1943); Abbott v. Thorne, 34 Wash. 692, 696, 76 P. 302, 303-04 (1904); *see also supra* note 1.

82. Baxter v. Brown, 83 Kan. 302, 111 P. 430 (1910).

83. 66 Cal. 123, 4 P. 1106 (1884).

due to contrary English precedents[84] or because of concern for multiplicity of litigation,[85] the court stated in dictum that a defendant's right to tender a vigorous defense outweighed the reasons for recognizing the tort.[86] Despite the age and questionable logic of the *Eastin* decision, recent cases have indicated that it remains good law.[87] Nonetheless, it is clear that the tort of malicious defense has not been considered on the merits in California.[88]

In minority jurisdictions, which require arrest or special injury for an action for malicious prosecution,[89] courts customarily have declined to recognize the tort of malicious defense.[90] For example, in *Ritter v. Ritter*,[91] the Illinois Supreme Court denied recovery for expenses proximately caused by the defendant's wrongful defense.[92] The court reasoned that because the defendant would not have had a malicious prosecution action based solely on overzealous advocacy, the plaintiff should not be given a remedy: "Equal justice forbids treating one party to a suit more generously than the other."[93] Thus, the basis for the rejection was to retain parity between plaintiffs and defendants.

This reasoning, however, would not bar malicious defense actions

84. *Id.* at 126, 4 P. at 1109.

85. *Id.* at 127, 4 P. at 1109.

86. *Id.* at 127, 4 P. at 1109-10. The *Eastin* court cited no authority in support of the proposition that a defendant has a legal right to tender a defense no matter how groundless. The court did not expressly consider the case for the tort of malicious defense, but relied on an article that focused on malicious prosecution. Lawson, *The Action for the Malicious Prosecution Of A Civil Suit*, 21 AM. L. REG. 281, 370 (1882). The article, however, did not expressly consider the question of malicious defense and cited no judicial authority in support of its theory.

87. *See, e.g.*, Bertero v. National Gen. Corp., 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1974). There the court was faced with the question whether the filing of a groundless cross-complaint would support an action for malicious prosecution. The *Bertero* court, citing the *Eastin* dictum, seemed to limit the scope of the *Eastin* case by stating that it stands only for the proposition that the right of a defendant, involuntarily haled into court, to conduct a vigorous defense must be protected. The court refused, however, to establish the tort of malicious defense. *Id.* at 52-53, 529 P.2d at 615, 118 Cal. Rptr. at 191 ("We do not propose to establish [the tort of malicious defense] by our holding here."). As in *Eastin*, the focus of the supreme court's analysis was on malicious prosecution, through the filing of a cross-complaint.

88. Before *Bertero*, *Eastin* was the only California case to mention the possibility. Neither case actually examined the issue.

89. *See supra* note 1.

90. *See, e.g.*, Ritter v. Ritter, 381 Ill. 549, 556, 46 N.E.2d 41, 44 (1943); Wetmore v. Mellinger, 64 Iowa 741, 744, 18 N.W. 870, 871 (1884); Johnson v. Walker-Smith Co., 47 N.M. 310, 312, 142 P.2d 546, 548 (1943); Wolf v. Wolf, 26 A.D.2d 529, 271 N.Y.S.2d 155 (1966); Abbot v. Thorne, 34 Wash. 692, 696, 76 P. 302, 303-04 (1904).

91. 381 Ill. 549, 46 N.E.2d 41 (1943).

92. *Id.* at 556, 46 N.E.2d at 45.

93. *Id.*

in the majority of American jurisdictions, which do not restrict malicious prosecution to cases involving special injury.[94] Conversely, parity should require that if defendants may avail themselves of the tort of malicious prosecution, plaintiffs should be accorded a remedy for bad faith opposition to their claims.

In only one case has a court in an American majority malicious prosecution jurisdiction expressly held against the tort of malicious defense. In that case, *Baxter v. Brown*,[95] the prior action involved a suit on a note and mortgage in which the defendant denied allegations of the complaint known to be true for the purpose of causing the plaintiff to incur significant expenses in proving his case. The Kansas Supreme Court considered whether the defendant could be held legally responsible for the baseless defense and concluded that he could not:

> Indeed, it has been said that self-defense is the first law of nature, and one who physically assaults another cannot recover damages of the other for physical injuries inflicted so long as the other simply acts on the defensive and does no more than is necessary to repel the attack; even if the assailant be killed in the affray, if the assailed does nothing more than is reasonably necessary under the circumstances to defend his own life, he is not responsible either civilly or criminally.[96]

This odd language seems to suggest that our legal system has not fully shaken off the vestiges of trial by battle. The opinion was devoid of any reason for declining to recognize the tort besides the lack of precedent. The case is thus of questionable value for an inquiry into the policies behind the tort of malicious defense.

Other jurisdictions, however, have impliedly recognized the tort. In *Cisson v. Pickens Savings & Loan Association*,[97] the parties had been involved in a prior lawsuit in which the savings and loan association had intervened as a defendant in an action by Cisson to foreclose on a mechanic's lien. Cisson was successful in that case and brought a second action against the savings and loan association, charging it, *inter alia*, with abuse of process and malicious prosecution. The South Carolina Supreme Court noted that the malicious prosecution action was based on an alleged wrongful intervention and defense, not wrongful instigation of a judicial proceeding. In dictum, however, the court indicated that the action could be "predicated on the interposition of a de-

94. *See supra* note 1.

95. 83 Kan. 302, 111 P. 430 (1910).

96. *Id.* at 305, 111 P. at 431. It is significant in assessing the strength of the *Baxter* precedent that the court noted this issue had not been discussed in the plaintiff's brief, nor had any authority been cited to support a recovery on this basis. *Id.* at 304, 111 P. at 430.

97. 258 S.C. 37, 186 S.E.2d 822 (1972).

fense by a defendant, where the other conditions of an action for malicious prosecution are met."[98] The court nonetheless affirmed the judgment against Cisson on the merits.

Thus, while existing case law at first blush seems to be opposed to the tort of malicious defense, closer analysis reveals no inconsistency between the tort and the law in the majority of American jurisdictions. Outside minority jurisdictions, only one court has explicitly ruled against the tort, but the rationale of the decision is clearly faulty.[99] Other courts in majority jurisdictions have either skirted the issue[100] or seemed to accept the tort.[101] The majority of American jurisdictions thus clearly are free of controlling precedent precluding recognition of the tort of malicious defense.

## The Policies Favoring and Disfavoring the Tort of Malicious Defense

Lacking clear precedent on the question, a court considering whether to recognize a cause of action for malicious defense must carefully weigh the policies in support of and in opposition to the tort. Our judicial system permits certain fetters on advocacy to preserve judicial integrity and efficiency.[102] The judicial system often restrains bad faith conduct on the part of litigants.[103] On the other hand, our system recognizes a defendant's right to conduct a vigorous defense.[104] This concern is enhanced by the notion that a person being haled into court is not there of his own free will and must therefore be accorded certain additional protections. Judicial efficiency may also weigh against creation of such a cause of action. On balance, however, the seriousness of the concerns favoring the tort of malicious defense overcome the significant but less compelling reasons for denying the tort.

### The Policies in Favor of the Tort of Malicious Defense

The policies supporting the recognition of a tort of malicious defense are threefold: (1) deterrence of bad faith conduct; (2) maintenance of the integrity of the judicial process; and (3) preservation of judicial economy. The primary reason for the creation of the tort of

98. *Id.* at 43, 186 S.E.2d at 825.
99. *See supra* note 96 & accompanying text.
100. *See supra* notes 86-87 & accompanying text.
101. *See supra* notes 97-98 & accompanying text.
102. *See infra* note 105 & accompanying text.
103. *See supra* notes 44-77 & accompanying text.
104. *See infra* notes 107-11 & accompanying text.

malicious defense is to deter bad faith conduct on the part of defendants. If a defendant knows he cannot be held liable for the expenses a plaintiff incurs contesting a frivolous defense, there is little to inhibit such conduct. The ability to impose unrecoverable expenses on the other side can be a significant power. In the event the opportunity arises to force a settlement by threatening prolonged litigation, the temptation to resort to bad faith measures may become irresistible. If, however, the defendant may be held liable for damages proximately caused by the bad faith defense, the advantage of such tactics is greatly diminished. By removing the incentive for bad faith conduct, the tort of malicious defense would tend to limit the use of such practices by even the most vigorous adversaries.

It is a well established principle that courts will not permit themselves to become agents for the commission of recognized wrongs.[105] If a defendant may use the judicial process to delay, diminish, or even defeat a valid claim, then the court has in effect become a partner in the abuse. The essential policy question is whether there is any adversarial conduct which will not be tolerated by the courts. The court should not, by default, acquiesce in conduct which is designed to perpetrate fraud or injustice. If such conduct goes unchecked, public confidence in the law and the legal profession will be undermined. By granting a plaintiff a remedy for injury due to a defendant's bad faith litigation, the tort of malicious defense ensures that the court will not remain a silent partner in such oppressive conduct.

Recognition of malicious defense will also aid the courts in dealing with the problem of congestion and delay. This problem has become self-perpetuating because the delay itself imparts the motive for the defendant to misuse the court processes. Allowing a defendant to require the plaintiff to prove a case against wholly unjustified opposition also increases the cost of litigation not only to the parties but also to the public, which pays most of the cost of the court system.[106]

**Arguments Against Recognition of the Tort of Malicious Defense**

Three policy considerations weigh against establishing the tort: (1) the defendant's right to conduct a vigorous defense; (2) the fact that the defendant does not initiate the action, but rather has been haled into

105. This is what was troubling about the judicial enforcement of racially restrictive covenants. The resort to the judicial process for enforcement of these covenants meant that the court could not be neutral. *See* Shelley v. Kraemer, 334 U.S. 1 (1948); *see also supra* note 6.

106. *See supra* note 10.

court; and (3) preservation of judicial economy. The strongest argument against the recognition of the tort of malicious defense is the defendant's right to an untrammeled defense. That principle is clearly expressed in dictum from a case rejecting the tort of malicious prosecution in the absence of special injury:

> When disputes reach the litigious stage, usually some malice is present on both sides. Friendly tort suits are not common . . . . Some margin of safety in asserting rights, though they turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained. Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them.[107]

Other cases have applied the same principle to defendants.[108]

It is necessary to provide some breathing space for advocacy so that rights do not go unasserted for fear of liability. The margin of safety on the defense side, however, has been too broad. It allows defendants to have their day in court but, ironically, tends to restrict overall access to the judicial process.[109] As a consequence, the courts' ability to mete out justice is impaired, and individual rights become more difficult to assert. The theoretical rights of a defendant inclined to exploit the legal system when he has no credible defense must yield to general concerns for judicial economy and the rights of those with valid disputes needing adjudication.

Moreover, to argue that access to the courts militates against a malicious defense tort would also counsel against recognition of the tort of

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107. Melvin v. Pence, 130 F.2d 423, 426 (D.C. Cir. 1942). *See also* Peckham v. Union Fin. Co., 48 F.2d 1016, 1017-18 (D.C. Cir. 1931); Ammerman v. Newman, 384 A.2d 637, 641 (D.C. 1978); Wetmore v. Mellinger, 64 Iowa 741, 744, 18 N.W. 870, 871 (1884); O'Toole v. Franklin, 279 Or. 513, 420, 569 P.2d 561, 565 (1977). It is for this reason that malicious prosecution is said to be not a favored action. *See* Babb v. Superior Ct., 3 Cal. 3d 841, 847, 479 P.2d 379, 382, 92 Cal. Rptr. 179, 182 (1971). This observation, however, may be overstated, as indicated by the court in Griswold v. Horne, 19 Ariz. 56, 59-60, 165 P. 318, 319 (1917):

> It is frequently said that actions for malicious prosecution have never been favored in law. The idea may, perhaps, be better expressed by saying that such actions are guarded and their principles strictly adhered to. When this is done and the proper elements to support the action have been presented it will be readily upheld. The reasons for this must at once be obvious. The purpose of the law is to protect individuals in their just rights.

*See also supra* note 58; Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d, 278, 283, 380 N.Y.S.2d 635, 643 (1975).

108. *See* Young v. Redman, 55 Cal. App. 3d 827, 835-36, 128 Cal. Rptr. 86, 91 (1976); Mashon v. Haddock, 190 Cal. App. 2d 151, 180-81, 11 Cal. Rptr. 865, 881 (1961); Ritter v. Ritter, 381 Ill. 549, 556-57, 46 N.E.2d 41, 44 (1943); Baxter v. Brown, 83 Kan. 302, 305, 111 P. 430, 431 (1910).

109. *See supra* note 19 & accompanying text.

malicious prosecution. Equity demands that malicious plaintiffs and defendants be treated the same. "Equal justice forbids treating one party to a suit more generously than the other."[110] It makes no sense that a plaintiff should be denied access to the courts to recover for malicious defensive tactics in a jurisdiction where a defendant's right to recover for the same kind of injury is generally accepted.

The threat of inhibiting the assertion of an apparently unmeritorious defense that later proves to be meritorious may be a persuasive argument against adoption of a malicious defense tort. In such circumstances, a defendant's rights might be denied from fear of the danger of asserting them. Neither party to a suit should be deterred by the threat of monetary damages from asserting its position in a forceful and even aggressive manner.[111]

The tort of malicious defense may also be argued to have an adverse effect on the attorney/client relationship. Adoption of a malicious prosecution or malicious defense tort necessarily requires the attorney to adjudicate, at least to some extent, the claim or defense. On its face, this situation does not conform to the traditional adversarial model, for the attorney is placed in the posture of having to prejudge the merits of the case.

This, however, is not an unfamiliar role. Attorneys traditionally have screened matters before accepting a case. It has never been the practice of attorneys to accept every matter that comes through the office door. An attorney screens prospective litigation for credibility, if not in the interest of the judicial process, then at least in his own interests or those of his clients. In particular, this is the case with plaintiffs' attorneys, who, before bringing suit, must ascertain the validity of a claim, to avoid the possibility of a malicious prosecution action.

Nevertheless, the courts traditionally have accorded more defer-

110. Ritter v. Ritter, 381 Ill. 549, 556, 45 N.E. 2d 41, 45 (1943) (denying recovery for malicious defense in a minority jurisdiction, requiring special injury for recovery for malicious prosecution).

111. *See, e.g.,* Fleischman Corp. v. Maier Brewing, 386 U.S. 714, 718 (1967); Young v. Redman, 55 Cal. App. 3d 827, 835-36, 128 Cal. Rptr. 86, 91 (1976); Mashon v. Haddock, 190 Cal. App. 2d 151, 180-81, 11 Cal. Rptr. 865, 881 (1961). *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975). Implicit in the defense of unrestricted advocacy may be the view that there is no objective standard to ascertain truth. For example, Jethro Lieberman quotes Monroe Freeman as saying (albeit in hyperbole): "There's no such thing as a frivolous position." J. LIEBERMAN, CRISIS AT THE BAR: THE UNETHICAL ETHICS OF LAWYERS (AND WHAT TO DO ABOUT IT) 161 (1978). This suggests that any tactic which furthers the interest of a client may be used in litigation. It may be questioned, however, whether this serves the interests of justice in the particular case or the interests of the legal system generally. *Id.* at 161-66.

ence to defendants than to plaintiffs with respect to the range of permissible litigation conduct. In *Eastin v. Bank of Stockton*,[112] the California Supreme Court distinguished between the position of the plaintiff and that of the defendant with regard to malicious tactics:

> The plaintiff sets the law in motion; if he does so groundlessly and maliciously, he is the cause of the defendant's damage. But the defendant stands only on his legal rights—the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.[113]

It is misleading, however, to characterize a defendant as involuntarily haled into court in a case involving malicious defense. A defendant who, in bad faith, forces a plaintiff to prove the validity of an obligation or debt that the parties know to be legitimate has in effect precipitated the litigation by the unjustified refusal to pay.[114] To say that the plaintiff has initiated the litigation is like blaming the victim for causing the accident.

Ultimately, the relative positions of the parties are irrelevant to the issue of what constitutes permissible adversary conduct. Neither plaintiff nor defendant should be immunized against responsibility for outrageous actions. Moreover, a vigorous defense can be distinguished from a malicious defense.[115] A defendant may require the plaintiff to prove a prima facie case. This is required in most jurisdictions even if the defendant does not appear.[116] It is quite another thing, however,

112. 66 Cal. 123, 4 P. 1106 (1884).

113. *Id.* at 127, 4 P. at 1109-10 (quoting Lawson, *The Action of the Malicious Prosecution of a Civil Suit*, 21 AM. LAW REG. 281, 370 (1882)).

114. Consider the hypothetical cases described *supra*, text accompanying notes 35-37. In case 1, one partner is unable to get his share of the partnership assets and is presented with a spurious accounting by the other partner. The electrician in case 2 has performed his work, but has been terminated from the job and denied payment for the work. The computer sales representative in case 3 is entitled to his bonus and vested profit sharing benefits as well as damages for false imprisonment. Faced with the defendants' refusal to pay the obligation, the plaintiffs in these three cases have no choice but to resort to the courts to enforce their rights. The plaintiff in case 4 chooses to bring the divorce action, but the defendant's decision to obstruct and prolong the litigation with the bad faith defense has significantly expanded the scope of the controversy. The defendants will also incur litigation expenses, but these expenses may be outweighed by the added leverage to force a favorable settlement. Under such circumstances, the defendant is not in any meaningful sense involuntarily haled into court.

115. Bertero v. National Gen. Corp., 13 Cal. 3d 43, 52-53, 529 P.2d 608, 615, 118 Cal. Rptr. 184, 191 (1974). *See also* Levinson, *Bertero v. National General Corporation: Drawing the Line Between an Aggressive Defense and a Malicious Prosecution*, 4 HASTINGS CONST. L.Q. 739 (1977).

116. *See, e.g.*, CAL. CODE CIV. PROC. § 585 (West 1976) (requires a hearing in all actions other than contract). A number of jurisdictions have established, by judicial decision, that a

for the defendant to defend affirmatively without any credible basis or to attempt to create such a basis for defense through false pleadings or perjured testimony. For the latter, the law should offer no protection.

Finally, the argument which historically has characterized the opposition to a tort of malicious prosecution, that such a tort would lead to a multiplicity of lawsuits, has not been born out by experience. As early as *Eastin*, that contention was dismissed by the California Supreme Court, which noted that such suits are inhibited by the high burden of proof.[117] Malicious prosecution actions have not clogged the courts or led to unending litigation.[118]

**Developing a New Tort**

The judicial system has always adopted measures to deal with the misuse of its processes. In the absence of sufficient remedies, courts have fashioned remedies using the principles of established law. The state of the current law is such that the tort of malicious defense could be recognized as the logical consequence of established legal principles discouraging the prosecution and defense of claims without legitimate basis.

Besides the tort of malicious prosecution, courts have allowed civil damages for the wrongful use of judicial processes.[119] In addition, the federal courts have long utilized their equitable powers to award attor-

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defaulting defendant is entitled to notice and a hearing to assess the amount of damages owing to the plaintiff. *See, e.g.*, Hensley v. Brown, 617 S.W.2d 867 (Ark. Ct. App. 1981); Bonner v. American Fin. Mktg. Corp., 181 Conn. 57, 434 A.2d 323 (1980); Ramey v. Hewitt, 188 A.2d 350 (D.C. 1963); Higbee v. Ambassador Taxi, Inc., 369 Mass. 967, 341 N.E.2d 258 (1976); Annot., 15 A.L.R.3d 586 (1967).

117. *Eastin*, 66 Cal. at 127, 4 P. at 1109.

118. PROSSER, *supra* note 1, at 853. "As for practical results, the testimonies of the judges in other jurisdictions concur to the effect that this rule has brought to the courts no crowd of rashly importunate litigants." Peerson v. Ashcraft Cotton Mills, 201 Ala. 348, 349, 78 So. 204, 205 (1917). A more current assessment is found in Note, *Promoting Recovery by Claimants in Iowa Malicious Prosecution Actions*, 64 IOWA L. REV. 408, 418 (1979): "[I]n jurisdictions in which proof of a special injury is not necessary, the judicial system has suffered from 'no crowd of rashly importunate litigants' and there has been no resultant flood of interminable litigation." *See also* 75 HARV. L. REV. 629, 630 (1962): "The scarcity of malicious prosecution suits in jurisdictions that do not require special harm suggests that the requirement plays no significant role in maintaining free access to the courts and that its abandonment would not lead 'to a flood of litigation.' "; 28 S. CAL. L. REV. 427, 428 (1955):

> [T]hose jurisdictions which do not insist on a showing of special injuries have not been deluged with litigation. The fear of a multiplicity of suits has not been realized because the suitor who has sustained the burden of one action will not assume the expense of a second suit unless he has a strong guaranty that he can convince a jury that the original action was instituted maliciously and without probable cause.

119. *See supra* notes 54-58 & accompanying text.

neys' fees to plaintiffs when the defendants have litigated in bad faith.[120] Moreover, it is already well recognized that certain defendants may not use every available strategy or technique in negotiation and litigation in order to avoid liability. Insurance companies[121] and fiduciaries[122] may be held liable for breaching their duty of good faith[123]

120. *See supra* notes 44-47 & accompanying text.

121. *See supra* notes 59-63 & accompanying text.

122. The adversary model of litigation has not gained full acceptance in the area of fiduciary litigation. A trustee does not have the right to "slam the door" on a beneficiary and deny performance of fiduciary obligations until presented with a court order. This means the trustee must, among other things, maintain adequate records, 2 A. SCOTT, SCOTT ON TRUSTS § 172 (3d ed. 1967), make periodic accountings, *id.*, and provide information upon the reasonable request by the beneficiary. *Id.* § 173. In other words, there is an obligation to provide free discovery.

The performance of obligations under fiduciary principles has been applied to others as well. Executors, *In re* Denman Estate, 94 Cal. App. 3d 289, 156 Cal. Rptr. 341 (1979); Morris v. Mull, 110 Ohio St. 623, 144 N.E. 436 (1924); Estate of Van Epps, 40 Wis. 2d 139, 161 N.W.2d 278 (1968), administrators, Harper v. Betts, 177 Ark. 977, 8 S.W.2d 464 (1928); *In re* Burke's Estate, 198 Cal. 163, 244 P. 340 (1926); Kaufman v. Kaufman, 292 Ky. 351, 166 S.E.2d 860 (1942), joint venturers, Sime v. Malouf, 95 Cal. App. 2d 82, 97, 212 P.2d 946, 955 (1949); Eubank v. Richardson, 353 S.W.2d 367 (Ky. 1962); Hayes v. Muller, 245 La. 356, 158 So. 2d 191 (1963), and partners, Lanx v. Freed, 53 Cal. 2d 512, 348 P.2d 873, 2 Cal. Rptr. 265 (1960); Prince v. Sonnesyn, 222 Minn. 528, 25 N.W.2d 468 (1946); Van Hooser v. Keenon, 271 S.W.2d 270 (Ky. 1954); Hsu Ying Li v. Tang, 87 Wash. 2d 796, 557 P.2d 342 (1976), are also governed by fiduciary principles. This greatly influences the nature of the relationship. A duty to cooperate, for example, in the resolution of joint venture and partnership transactions is implicit in the fiduciary duty not to take unfair advantage of the other party. Nelson v. Abraham, 29 Cal. 2d 745, 751, 177 P.2d 931, 934 (1947). Fiduciary obligations are continuing obligations. The fact that persons disagree or even resort to litigation does not relieve the fiduciary from performance of the requisite duties. Sime v. Malouf, 95 Cal. App. 2d 82, 97, 212 P.2d 946, 955 (1949). As a consequence, fiduciary litigation does not proceed on a strictly adversarial basis. *But cf.* Gray v. Don Miller & Assocs., Inc., 35 Cal. 3d 498, 674 P.2d 253, 198 Cal. Rptr. 551 (1984) (court declined to adopt a fiduciary exception to the American rule on attorneys' fees).

123. The principles developed in the insurance cases have potential for greater applicability because of the covenant of good faith and fair dealing which is implied in every contract. *See* Seaman's Direct Buying Serv. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984); Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 658, 328 P.2d 198, 200 (1958); Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 771, 128 P.2d 665, 677 (1942); Milstein v. Security Pac. Nat'l Bank, 27 Cal. App. 3d 482, 486, 103 Cal. Rptr. 16, 18 (1972); *see also* U.C.C. § 1-203 (1982). The nature of the covenant was stated by the California Supreme Court in Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 771, 128 P.2d 665, 677 (1942):

> In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing.

The covenant has usually been applied in the insurance context, *see, e.g.,* Crisci v. Security Ins. Co., 66 Cal. 2d 425, 430, 426 P.2d 173, 177, 58 Cal. Rptr. 13, 17 (1967), or the fiduciary context, *see, e.g.,* Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 771, 128 P.2d 665, 677 (1942) (joint venture); Nelson v. Abraham, 29 Cal. 2d 745, 750-51, 177 P.2d

during the negotiation, settlement, or litigation of valid claims.

As early as 1897, in *Kolka v. Jones*,[124] one court considered and accepted the principle that though malicious defense had not yet been recognized in the law, such a remedy would be appropriate under the right circumstances:

> It is not safe to infer that because no one has thought of seeking indemnity for the injury he has sustained by reason of the interposition, by the defendant from unjustifiable motives, of a false defense or a spurious counterclaim, therefore no remedy will in such a case be allowed by the law. On the contrary, we are strongly of the opinion that, if a defendant should force upon the plaintiff the litigation of an alleged counterclaim known by defendant to be without foundation, he would be liable for the damages caused thereby,—the liability to be enforced in a suit in the nature of an action for malicious prosecution.[125]

The case in favor of recognizing malicious defense is thus based upon considerations of circumstance and principle. The plaintiff is faced with the unenviable choices of settling for less than what is rightfully due or foregoing the use of that lesser amount in order to pursue collection of the full amount, albeit after paying attorneys' fees and waiting several years. The action for malicious defense is also needed to protect the integrity of the judicial process, to deal with dishonest and unethical behavior, and to discourage misuse and abuse of limited judicial resources. The action is also well within precepts and principles already well established in the law. It is necessary, however, to analyze these considerations in some detail in order to construct the elements of the tort as well as the necessary restrictions on its applicability.

## The Elements of the Malicious Defense Tort

A cause of action for malicious defense would apply the principles of the established tort of malicious prosecution. It would allow application of similar rules and precepts to the defendant's side of the adversarial ledger. Some distinctions calling for differences in application

931, 934 (1947) (partnership). Recent California cases, however, have extended its application to wrongful termination of employment cases. *See* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 327-28, 171 Cal. Rptr. 917, 925-26 (1981); Cleary v. American Airlines, 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722, 728 (1980); Wagner v. Benson, 101 Cal. App. 3d 27, 33, 161 Cal. Rptr. 516, 520 (1980). *See generally* Diamond, *supra* note 64; Louderback & Jurika, *supra* note 64; Miller and Estes, *Recent Judicial Limitations on the Right to Discharge: A California Trilogy*, 16 U.C.D. L. REV. 65 (1982).

124. 6 N.D. 461, 71 N.W. 558 (1897).

125. *Id.* at 469-70, 71 N.W. at 561 (dictum).

will be required, but the framework for the analysis of the malicious defense tort is already in place.

The elements of a cause of action for malicious prosecution have been summarized as follows:

(1) the initiation, continuation, or procurement of a judicial, administrative or disciplinary proceeding;

(2) by or at the insistence of the defendant as the plaintiff or initiating party in the previous proceedings;

(3) favorable termination of the previous proceedings;

(4) lack of probable cause;

(5) malice; and

(6) injuries or damages sustained.[126]

These elements will serve as the model for discussion of the elements of malicious defense.

**Initiation, Continuation or Procurement of Proceedings**

"Initiation" means to set the machinery of the law in motion to enforce a claim or counterclaim.[127] In malicious prosecution, the filing of an action or the filing of a cross-complaint or counterclaim will satisfy this element.[128] The rule also applies to procuring the initiation of proceedings or to continuing a proceeding[129] properly begun.[130]

Although the malicious defendant does not in the superficial sense

126. The Restatement (Second) of Torts § 674 (1979) sets forth the elements as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and,
>
> (b) except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

*See also* Mills County State Bank v. Roure, 291 N.W.2d 1, 3 (Iowa 1980); Ellman v. McCarty, 70 A.D.2d 150, 420 N.Y.S.2d 237 (1972); PROSSER, WADE & SCHWARTZ, *supra* note 1, at 1099; PROSSER, *supra* note 1, at 853-56. It should be noted that the specific elements required may depend upon the extent to which a jurisdiction recognizes malicious prosecution in the absence of special injury. *See supra* note 1.

127. RESTATEMENT, *supra* note 1, § 674 comment a.

128. *Id. See also* Bertero v. National Gen. Corp., 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975); Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932).

129. Initiation of a "proceeding" can include administrative proceedings, *see* RESTATEMENT, *supra* note 1, § 680, and disciplinary or disbarment proceedings. *See* Donovan v. Barnes, 274 Or. 701, 548 P.2d 980 (1976) (student disciplinary proceedings); Kaufman v. A. H. Robins Co., 223 Tenn. 515, 448 S.W.2d 400 (1969) (state board of pharmacy proceedings); Lackey v. Metropolitan Life Ins. Co., 30 Tenn. App. 390, 206 S.W.2d 806 (1947) (disbarment proceeding). *But see* Stone v. Rosen, 348 So. 2d 387 (Fla. Dist. Ct. App. 1977)

"initiate" the action, his role in the litigation is not less culpable than the malicious plaintiff's. The action is usually precipitated by the defendant's unjustified refusal to pay a just obligation. The action is continued at the discretion of the defendant who employs one or more of the standard defensive tactics: A general or specific denial of the allegations of the complaint; the filing of a counterclaim or cross-complaint; the assertion of false defenses which raise questions of fact and are designed to defeat a motion for summary judgment;[131] the filing of motions for the purpose of delay;[132] and failure to cooperate in the discovery process through repeated objections to interrogatories, refusals to answer questions at depositions, perjured testimony, and destruction of records.[133] The use of any of these tactics should satisfy the require-

(complaint initiating disbarment proceeding is absolutely privileged as against a malicious prosecution lawsuit).

130. Security Underground Storage, Inc. v. Anderson, 347 F.2d 964 (10th Cir. 1965) (defendant, while acting as plaintiff's attorney, assisted another in maliciously bringing suit against plaintiff); Laney v. Glidden Co., 239 Ala. 396, 194 So. 849 (1940) (defendants, after being informed of a mistake in the naming of parties to the prior suit, continued the action maliciously and without probable cause); RESTATEMENT, *supra* note 1, § 674 comments b, c.

131. The purpose of summary judgment is to alleviate the need for trial on factual issues when there is no legitimate dispute. As Justice Cardozo wrote: "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine or substantial, so that only the latter may subject a suitor to the burden of a trial." Richard v. Credit Suisse, 242 N.Y. 346, 350, 152 N.E. 110, 111 (1926). Thus, it would appear that summary judgment will be useful to the plaintiff confronted with a bad faith defense. As one court stated:

> The defendant must show that he has a bona fide defense to the action, one which he may be able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. This he must show by affidavits or other proof. He cannot shelter himself behind general or specific denials, or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false and sham, but interposed in good faith and not for delay.

Dwan v. Massarene, 199 A.D. 872, 880, 192 N.Y.S. 577, 582-83 (1922). There is a problem, however, when the defendant creates the appearance of a triable issue of fact by lying. By denying what the defendant knows to be true or by creating an affirmative defense through a perjured answer or affidavit, the defendant may be able to survive a summary judgment motion and thereby continue the bad faith defense through the trial.

132. *See* Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 FORDHAM L. REV. 1069 (1976).

133. *See* Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. BAR FOUND. RESEARCH J. 787, 824-59.

> [I]t would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency and effectiveness (for information distribution) of civil discovery. Evasion infects every kind of litigation and frustrates lawyers in every kind of practice. With the possible exception of the role of the courts, no aspect of the discovery process stands in greater need of extensive critical scrutiny . . . . The term "evasion" also refers to more direct forms of resistance to disclosure, for example, refusing to respond in any way to discovery probes or intention-

ment of an "action" by the defendant, taken without a credible basis.

**By or at the Insistence of the Defendant**

The requirement that the proceedings be initiated, continued, or procured by the defendant is straightforward. It requires a factual determination of the responsibility for the malicious action. In this regard, the role of the attorney becomes important. In malicious prosecution, the question may arise whether the plaintiff who filed the groundless lawsuit may have a defense based upon advice of counsel.[134] The attorney's liability for initiating baseless and malicious litigation is more difficult to establish.

An attorney is not liable for initiating a wrongful civil action if he had probable cause for filing the action.[135] Furthermore, even if the attorney knew there was no probable cause, there is no liability in the absence of malice.[136] An attorney is not required to prejudge the validity of the client's claim and may rely on statements and information provided by the client.[137] If, however, the attorney knows the action is unfounded and files it for an improper purpose, such as harassment of the innocent party, then the attorney may be held liable along with the client.[138] This allows the attorney to maintain the role of counselor and

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ally withholding some evidence that is clearly sought and discoverable (both variations on the "stonewalling" theme). The words of one perhaps atypically cynical or at least blunt lawyer capture the spirit of the problem: "The purpose of discovery," he declared, "is to give as little as possible so [your opponents] will have to come back and back and maybe will go away or give up."

*Id.* at 829.

134. The issue of the client's responsibility for acting on advice of counsel is best treated under the element of probable cause. *See infra* text accompanying notes 146-54.

135. RESTATEMENT, *supra* note 1, § 674 comment d. *See also id.* § 675. *See, e.g.,* Bird v. Rothman, 128 Ariz. 599, 602, 627 P.2d 1097, 1101 (1981); Central Florida Mach. Co. v. Williams, 400 So. 2d 30, 31 (Fla. Dist. Ct. App. 1981); Wong v. Tabor, 422 N.E.2d 1279, 1285-89 (Ind. Ct. App. 1981); Junot v. Lee, 372 So. 2d 707, 710 (La. Ct. App. 1979); Perry v. Sulier, 92 Mich. 72, 75, 52 N.W. 801, 801 (1892); Hoppe v. Klapperich, 224 Minn. 224, 241-42, 28 N.W.2d 780, 792 (1947); Kallman v. Burke, 47 A.D.2d 515, 516, 363 N.Y.S.2d 588, 589 (1975).

136. RESTATEMENT, *supra* note 1, § 674 comment d. *See, e.g.,* Berlin v. Nathan, 64 Ill. App. 3d 940, 948-49, 381 N.E.2d 1367, 1372-73 (1978); Kallman v. Burke, 47 A.D.2d 515, 516, 363 N.Y.S.2d 588, 589 (1975).

137. Maechtlen v. Clapp, 121 Kan. 777, 781, 250 P. 303, 304 (1926); Peck v. Chouteau, 91 Mo. 138, 151-52, 3 S.W. 577, 581 (1887). Normally, the remedy for bringing an unfounded action on behalf of a client will be a disciplinary proceeding with the bar, not a private cause of action for damages. *See* Lyddon v. Shaw, 56 Ill. App. 3d 815, 823, 372 N.E.2d 685, 691 (1978); Brody v. Ruby, 267 N.W.2d 902, 907-08 (Iowa 1978). *Cf.* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-26 (1979).

138. *See, e.g.,* Munson v. Linick, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967); First Nat'l Bank v. Gardner, 376 S.W.2d 311 (Ky. 1964); Hoppe v. Klapperich, 224 Minn. 224, 28

advocate; when the attorney becomes an active participant in the wrongful proceeding, then liability should attach.

In the event of malicious defense, the attorney should have the same protection and the same exposure. The lawyer may advise the defendant concerning the defensive tactics available. The lawyer must not be put in the position of adjudicating the client's case. However, as in the case of advising a plaintiff of the potential liability for prosecuting a malicious action, the attorney should advise the defendant of possible liability for interposing a malicious defense. When the lawyer goes beyond the role of counselor and intentionally initiates defensive action that harasses the plaintiff and that the attorney knows or should know is without a credible basis, then the attorney, no less than the client, should be liable.

**Favorable Termination of the Prior Proceeding**

The favorable termination element in malicious prosecution may be satisfied in one of three ways: (1) a decision favorable to defendant by the court or competent tribunal; (2) withdrawal of the proceedings by the person who initiated them; or (3) dismissal of the proceeding because of the failure to prosecute.[139] Final disposition of any appeal is necessary to satisfy the termination requirement.[140] Termination of an action by compromise or settlement is not sufficient to support a malicious prosecution action.[141]

Despite arguments that a defendant should be allowed to counterclaim for malicious prosecution in the main proceeding,[142] most juris-

N.W.2d 780 (1949). This liability includes situations where the civil proceeding is continued without probable cause and for an improper purpose. RESTATEMENT, *supra* note 1, § 674 comment d.

139. RESTATEMENT, *supra* note 1, § 674 comment i.

140. *Id. See* Albertson v. Raboff, 46 Cal. 2d 375, 295 P.2d 405 (1956) (malicious prosecution action not premature because time for appeal of portion of judgment denying lien on plaintiff's property had run out even though the action was filed while an appeal from another portion of the judgment was still pending). *Cf.* Merron v. Title Guar. & Trust Co., 27 Cal. App. 2d 119, 121, 80 P.2d 740, 742 (1938) (the statute of limitations does not commence running until the judgment becomes final on appeal).

141. PROSSER, *supra* note 1, at 854.

142. *See* Note, *Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?*, 26 CASE W. RES. 653, 684 (1976); Note, *supra* note 1, at 1232-37. The State of Washington enacted a statute in 1977 which allows a counterclaim for malicious prosecution. The statute provides, "In any action for damages, whether based on tort or contract or otherwise, a claim or counterclaim for damages may be litigated in the principal action for malicious prosecution . . . ." WASH. REV. CODE § 4.24.350 (Supp. 1977). For a critical analysis of the statute, see Note, *Malicious Prosecution Counterclaims Now Available in the Principal Action—Implicit Abandonment of the Doctrine of Strict Limitation—Wash. Rev. Code § 4.24.350 (Supp. 1977)*, 53 WASH. L. REV. 805 (1978).

dictions have retained the favorable termination requirement.[143] The principal reasons for maintaining the requirement are to avoid inconsistent verdicts[144] and to avoid prejudice to the plaintiff's case by the introduction of evidence of plaintiff's intent.[145] The requirement also keeps the issues in the lawsuit clear. Although the favorable termination requirement potentially increases the number of lawsuits, a defendant actually may be less likely to make the claim after the passion of the lawsuit has subsided.

An action for malicious defense should also require a favorable termination of the prior action. To allow an action for malicious defense in the main action would unduly complicate the issues. It might also prejudice the defendant's case and possibly create serious conflicts of interest during the litigation between the defendant and his attorney. There is the additional possibility that a plaintiff would otherwise as a matter of course include a count in the complaint for malicious defense.

One serious problem arises in applying the favorable termination rule in the context of malicious defense. It appears that in the case of a settlement, the rule would allow certain malicious defendants to avoid the restraints of the tort. If an action for malicious defense is not permitted in the event the lawsuit is settled, the malicious defendant can make an unjust settlement with impunity. On the other hand, to treat the settlement and release of all claims as not binding on the plaintiff for malicious defense purposes would create more problems than it would solve. If the release is not binding, the courts would be further burdened by those who felt they did not get as favorable a settlement as

143. *See* Babb v. Superior Ct., 3 Cal. 3d 841, 847, 479 P.2d 379, 382, 92 Cal Rptr. 179, 182 (1971) (lower court erred in attempting to proceed with cross-complaint filed before the original action had terminated); Berlin v. Nathan, 64 Ill. App. 3d 940, 947, 381 N.E.2d 1367, 1372 (1978) (no action could lie in the absence of a favorable termination of the original proceeding); *see also* Birnbaum, *Physicians Counterattack: Liability of Lawyers from Instituting Unjustified Medical Malpractice Actions*, 45 FORDHAM L. REV. 1003, 1026 (1977); Reuter, *supra* note 76, at 206-07.

144. The requirement of favorable termination eliminates the possibility that the defendant could lose the main proceeding and yet win the malicious prosecution action. Babb v. Superior Ct., 3 Cal. 3d 841, 847, 479 P.2d 379, 382, 92 Cal. Rptr. 179, 182 (1971).

145. *Id. See* Birnbaum, *supra* note 143, at 1027:

> Moreover, if counterclaims for malicious prosecution were permitted to be asserted in the original action, a plaintiff could suffer substantial prejudice by the introduction of proof of lack of probable cause and malice in the original proceeding. Finally, if an attorney was joined as a defendant in the malicious prosecution action before the termination of the original proceeding, the attorney would be placed in a potentially adverse position to his client and separate counsel would have to be retained at additional expense to the plaintiff to prosecute the original action.

they had wished. If malicious defense is recognized, however, the value of the plaintiff's forebearance to sue will be reflected in an increased settlement offer. Thus, though a particular plaintiff may not receive an adequate settlement, settlements in general should be increased overall.

**Lack of Probable Cause**

Probable cause to defeat a malicious prosecution claim is supplied by the reasonable belief that the action brought had a reasonable chance of succeeding before a judge or jury. Thus, probable cause is an objective test.[146] The plaintiff's belief must have some basis in fact, and its support in law or equity must be honestly debatable.[147] Advice of counsel that there is a reasonable chance the claim will be upheld is usually enough to establish probable cause.[148] If the advice is given by an attorney who is personally interested in the outcome of the case, however, the reasonableness of the plaintiff's reliance may be questioned.[149] Probable cause is also satisfied if the plaintiff obtains a

146. *See, e.g.,* Ray v. City Bank & Trust Co., 358 F. Supp. 630, 638 (S.D. Ohio 1973); Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 335, 326 P.2d 918, 926 (1958).

147. RESTATEMENT, *supra* note 1, § 675; PROSSER, *supra* note 1, at 854. The Restatement sets out the test for probable cause as a reasonable belief in the existence of facts upon which a claim is based, and either a reasonable belief that applicable law will support a claim under these facts, or a reasonable belief in the same in reliance upon advice of counsel, sought in good faith, and with full disclosure of the relevant facts. RESTATEMENT, *supra* note 1, § 675.

148. RESTATEMENT, *supra* note 1, § 675. *See* Brinkley v. Appleby, 276 Cal. App. 2d 244, 80 Cal. Rptr. 734, 736 (1969); Terminal Grain Corp. v. Freeman, 270 N.W.2d 806, 809 (S.D. 1978).

149. RESTATEMENT, *supra* note 1, § 675 comment h:

> Civil proceedings are not infrequently brought by an attorney who is personally interested in the outcome of the case because of a contingent-fee arrangement. Although the interest of the attorney in his fee in the case is merely that of any lawyer in being paid for his services and does not make his motive in bringing the action an improper one (see § 674, Comment d), the fact that his fee will depend upon the bringing of the action is a factor to be considered in determining whether the client reasonably believes that his advice is disinterested. If the contingent-fee arrangement is made before the facts are submitted to him or if he has solicited the case and the contingent fee, the circumstances may indicate to a reasonable man in the client's position that he is dealing with one whose advice is not disinterested and so cannot reasonably be trusted. On the other hand, they may still indicate the honesty and disinterested character of the advice. The question is one of fact, but since it is one of probable cause it is to be determined by the court rather than the jury. (See § 681B). When, however, the initiative is taken by the client and he consults the attorney without prearrangement for the fee, the fact that after the advice is given the case is entrusted to the attorney on a contingent basis, is no indication that the advice is not disinterested.

*See* Munson v. Linnick, 255 Cal. App. 2d 589, 63 Cal. Rptr. 340 (1967). *Cf.* Tool Research

favorable judgment in the action, unless obtained by fraud, even though the judgment is later reversed on appeal.[150]

The cause of action for malicious defense should use the same objective standard for probable cause. If the defendant believes that the denial or defense has some basis in fact and that, if proven, such denial or defense is supported by legal or equitable argument, and such belief is objectively reasonable, then probable cause exists for the defendant's action. The assertion of bona fide defenses must be protected, even if the defendant is mistaken in his judgment. Such a "margin of safety"[151] is necessary in the litigation of disputes. Thus, a legitimate dispute as to the existence or amount of the claim implies probable cause for the defensive actions.[152]

Such protection should be denied for those defendants who lie.[153] If the defendant files a verified answer to a complaint denying what the defendant knows to be true, or asserts a defense that the defendant knows or should know has no credible basis, or attempts to make the plaintiff's task of proving the claim more difficult by lying or destroying records in the pre-trial stages, then lack of probable cause has been established. Also, if the defendant has within his or her means the ability to ascertain the validity and amount of plaintiff's claim, then lack of knowledge will not constitute probable cause.[154] The advice of defense counsel will protect the defendant who cannot be expected to know the legal sufficiency of certain defenses, but will not protect the defendant who intentionally lies or fails to disclose relevant facts to the attorney.

& Eng'g Corp. v. Henigson, 46 Cal. App. 3d 675, 685, 120 Cal. Rptr. 291, 298 (1975) (the fact that counsel received a $50,000 fee in connection with the prior action was not sufficient to show improper motive absent proof that the fee was not reasonable).

150. PROSSER, *supra* note 1, at 855.

151. Melvin v. Pence, 130 F.2d 423, 426 (D.C. Cir.1942).

152. A defendant may have probable cause to question the amount of the plaintiff's claim even though there is no probable cause to deny liability altogether. The wrongful denial of liability should give rise to an action for malicious defense to the extent that damages relating to the wrongful denial, not to the valid questioning of the amount, can be ascertained. These cases will often occur in the personal injury area, where the liability of the defendant is beyond dispute, but where the amount of damages is subject to a reasonable difference of opinion.

153. *Cf.* Hazard, *The Lawyer's Obligation To Be Trustworthy When Dealing With Opposing Parties*, 33 S.C.L. REV. 181 (1981); Lawry, *Lying, Confidentiality, and the Adversary System of Justice*, 1977 UTAH L. REV. 653, 657-62; White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiations*, 1980 AM. BAR FOUND. RESEARCH J. 926.

154. *Cf.* Auer v. Dressel, 306 N.Y. 427, 118 N.E.2d 590 (1954) (corporation president's defense that he had no knowledge as to the sufficiency of shareholders' request for a special meeting was frivolous because the corporation had a shareholders list and could determine whether a sufficient number of shareholders had signed the request).

### Malice

In contrast to probable cause, which is an objective measure of the reasonableness of a plaintiff's likelihood of success, malice measures the subjective aspect of plaintiff's intent. The element of malice has been variously defined as ill will,[155] lack of belief in any possible success or reckless disregard of the propriety of the action,[156] or an ulterior purpose other than securing a proper adjudication of the claim.[157] The Restatement commentary lists a number of situations in which malice may be shown.[158] In the most common instance, a plaintiff brings a civil proceeding, knowing the proceeding is not meritorious. A good faith effort for modification or reversal of existing law, however, is not malicious.[159] Although malice is a subjective evaluation, it may be implied from the lack of probable cause.[160] Conversely, if probable cause exists, the motive for bringing the action is irrelevant.[161] When proceedings are commenced to deprive a person of the beneficial use of property, malice may be shown. Filing a lis pendens notice to cloud

155. *See* Griswold v. Horne, 19 Ariz. 56, 70, 165 P. 318, 323 (1917) (evil motive); Southwestern Ry. Co. v. Mitchell, 80 Ga. 438, 442, 5 S.E. 490, 491 (1888) ("any act willfully and purposely to the prejudice and injury of another, which is unlawful, is against that person, malicious"); Park v. Security Bank & Trust Co., 512 P.2d 113, 119 (Okla. 1973) ("ill will or hatred"); Yelk v. Seefeldt, 35 Wis. 2d 271, 278, 151 N.W.2d 4, 8 (1967) ("hostile or vindictive motive").

156. *See* Robinson v. Goudchaux's, 309 So. 2d 287, 290 (La. 1975) ("where there is a want of probable cause resulting from wanton and reckless disregard of the rights of the party sued, evincing utter absence of that caution and inquiry a man should employ before filing suit on any account against his customer, malice will be inferred"); Nyer v. Carter, 367 A.2d 1375, 1378 (Me. 1977) ("malice may be inferred from gross and culpable negligence in omitting to make suitable inquiries before instituting the suit"); Hugee v. Pennsylvania Ry. Co., 376 Pa. 286, 291, 101 A.2d 740, 743 (1954) (malice "may consist of defendant's reckless and oppressive disregard of plaintiff's rights").

157. *See* Suchey v. Stiles, 155 Colo. 363, 366, 394 P.2d 739, 741 (1964) (malice "is any motive other than a desire to bring an offender to justice"); Yelk v. Seefeldt, 35 Wis. 2d 271, 278, 151 N.W.2d 4, 8 (1967) ("primary purpose was other than the social one of having a determination of the state of plaintiff's mental health"); RESTATEMENT, *supra* note 1, § 676.

158. RESTATEMENT, *supra* note 1, § 676 comment c. For a general discussion of the malice requirement, see Fridman, *Malice in the Law of Torts*, 21 MOD. L. REV. 484 (1958).

159. *See* FED. R. CIV. P. 11; MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983). For example, it was not malicious for the plaintiff in Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) to seek a reversal of the long standing rule barring all recovery for a tort claim to a contributorily negligent plaintiff.

160. Stewart v. Sonneborn, 98 U.S. 187, 193 (1878); Cole v. Neaf, 334 F.2d 326, 329 (8th Cir. 1964); Southwestern Ry. Co. v. Mitchell, 80 Ga. 438, 442, 5 S.E. 490, 491 (1888); Thompson v. General Fin. Co., 205 Kan. 76, 468 P.2d 269, 286 (1970); Crouter v. United Adjusters, Inc., 266 Or. 6, 9-10, 510 P.2d 1328, 1330 (1973); Nagy v. McBurney, 120 R.I. 925, 929-30, 392 A.2d 365, 367 (1978).

161. RESTATEMENT, *supra* note 1, § 676 comment a. *See generally* Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Yelk v. Seefeldt, 35 Wis. 2d 271, 151 N.W.2d 4 (1967).

title to real property is an example.[162] Finally, malice may be shown by the filing of a groundless counterclaim or cross-complaint for the purpose of applying more pressure on the plaintiff in litigation.[163]

In malicious defense, malice will be shown by the defendant's intentional disregard of the plaintiff's claim through a deliberate denial or an assertion of spurious defenses and objections which the defendant knows, or should know, lack any merit. Malice may be implied from the lack of probable cause or from the refusal to comply with clear legal obligations. In the latter instance, malice should be implied if a defendant refuses to comply with a clearly recognized duty, for example, to render a partnership accounting or to preserve partnership books and records.[164]

**Injury or Damages as a Result of the Previous Proceedings**

Unless damages are in the nature of defamation, such as the filing of an involuntary bankruptcy, or insanity or paternity proceedings, the plaintiff in a malicious prosecution action must prove actual damages.[165] Damages will include the loss from the dispossession or interference with the use of property, damages to reputation, expenses incurred in connection with the litigation, specific pecuniary losses resulting from the proceedings, and emotional distress caused by the proceedings.[166] Punitive damages are also potentially recoverable.[167]

The damages caused by a malicious defendant are much the same. The plaintiff must incur the added expense of hiring an attorney to negotiate the claim, bring the action, take the discovery, prepare for trial, and try the case, if the defendant chooses to hold out.[168] In many

162. Albertson v. Raboff, 46 Cal. 2d 375, 382, 295 P.2d 405, 411 (1956).

163. Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F. Supp. 17 (E.D. Tenn. 1972); Bertero v. National Gen. Corp., 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975); Slee v. Simpson, 91 Colo. 461, 15 P.2d 1084 (1932).

164. *See* Wilson v. Moline, 229 Minn. 164, 38 N.W.2d 201 (1949); Few v. Few, 239 S.C. 321, 122 S.E.2d 829 (1961); Simich v. Culjack, 27 Wash. 2d 403, 178 P.2d 336 (1947).

165. PROSSER, *supra* note 1, at 855.

166. RESTATEMENT, *supra* note 1, § 681. *See* Boland v. Ballaine, 266 F. 22 (9th Cir. 1920) (actual damages from loss of sale due to cloud on title of property); Weismann v. Middleton, 390 A.2d 996 (D.C. 1978) (attorney's fees and compensatory damages); Rich v. Rogers, 250 Mass. 587, 146 N.E. 246 (1925) (any financial loss resulting directly from the prosecution); Koch v. Segler, 331 S.W.2d 126 (Mo. Ct. App. 1960) (mental anxiety and suffering); Annot., 37 A.L.R. 656 (1925) (injury to reputation).

167. RESTATEMENT, *supra* note 1, § 681A(f). *See* Wasman v. Middleton, 390 A.2d 996, 999 (D.C. 1978); Commercial Credit Corp. v. Ensley, 148 Ind. App. 151, 152, 264 N.E.2d 80, 81 (1970); Nelson v. Miller, 227 Kan. 271, 282-83, 607 P.2d 438, 447 (1980).

168. *See supra* notes 9, 27; Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L. REV. 613, 616 (1983).

instances, the major portion is the damage to the financial standing of the person or business. It takes a persistent plaintiff to forego the use of a portion of the claim in order to recover the full amount rightfully due.[169] The damage to a business would include lost profits and additional expenses incurred in financing the business due to the failure of the defendant to pay the money owed. Emotional distress, no less real for the innocent plaintiff than for the innocent defendant, is not easily susceptible of proof. Recovery of compensatory damages should in most cases be limited to monetary losses, except when proof of emotional distress is convincing. Evidence of intentional infliction of emotional distress or other oppressive conduct may also be relevant in arguing for punitive damages.[170] As in malicious prosecution, the injured party must bear the burden of proof on these elements.[171] The burden of proof ensures that the action does not deter the good faith assertion of claims. If the plaintiff in a malicious defense action can meet this burden, no policy reason bars a recovery.

**Summary of Elements of the New Tort**

The foregoing analysis indicates that the elements of the malicious defense tort can parallel those of the established tort of malicious prosecution. Use of the elements of malicious prosecution as a guide would minimize the hazards of the expansion of tort law into a new area. Development would be guided by the experience of courts, which have dealt with the problems of malice, probable cause, favorable termination, and damages for over one hundred years. The elements of the malicious defense tort would accordingly track the elements of malicious prosecution as set forth in the Restatement (Second) of Torts[172] and would be as follows:

> One who takes an active part in the initiation, continuation, or procurement of the defense of a civil proceeding is subject to liability for all harm proximately caused, including reasonable attorneys' fees, if
> (a) he or she acts without probable cause, *i.e.*, without any credible basis in fact and such action is not warranted by existing law or established equitable principles or a good faith argument for the extension, modification, or reversal of existing law,
> (b) with knowledge or notice of the lack of merit in such actions,

169. *See supra* note 28.

170. *See, e.g.*, Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 404, 89 Cal. Rptr. 78, 95-96 (1970).

171. RESTATEMENT, *supra* note 1, § 681A. *See, e.g.*, Ford Ins. & Real Estate Co. v. Thrasher, 45 Ala. App. 592, 595, 234 So. 2d 590, 592 (1970); McGranahan v. Dahar, 119 N.H. 758, 769, 408 A.2d 121, 128 (1979).

172. *See supra* note 126.

(c) primarily for a purpose other than that of securing the proper adjudication of the claim and defense thereto, such as to harass, annoy or injure, or to cause unnecessary delay or needless increase in the cost of litigation,
(d) the previous proceedings are terminated in favor of the party bringing the malicious defense action, and
(e) injury or damage is sustained.

To allay fears that the action might discourage honest or meritorious defenses, the plaintiff would be required to bear the burden of proof on the elements. Access to courts for the resolution of legitimate disputes must not be hindered. Nevertheless, the benefits of dispute resolution through the adversarial process must not obscure recognition of the significant damage to both the judicial system and the innocent parties which can result from malicious assertion of false and baseless defenses.

## Application of the Elements

The elements of the tort of malicious defense provide guidance for courts in resolving disputes involving allegations of malicious defense. A line must be drawn between the vigorous and good faith assertion of defenses that may turn out to be wrong and the malicious and baseless assertion of defenses which are clearly wrong. Though drawing the line may be difficult, it is here that the analytical tools of malicious prosecution are particularly useful. The focus of inquiry must be probable cause and malice. From the attorney's standpoint, one should ask: "Is there any legitimate basis to support what my client and I would like to do in defending this case?"

To avoid liability for malicious defense, a defendant must have probable cause to believe the tendered defense is legitimate. Probable cause must exist to defend on each issue, not just some probable cause to defend generally. To use an example from one of the hypotheticals at the beginning of this Article,[173] the partner who decides to conduct a vigorous defense in the partnership accounting case must have probable cause to defend on each issue on which he chooses to enter a denial. If, for example, twenty items in the accounting are not legitimately in dispute and five items are, the defendant may not deny the legitimacy of all twenty-five items. He must admit those items that are not legitimately in dispute and may defend on those items for which probable cause exists to disagree with the plaintiff. Similarly, if a plaintiff says that the defendant owes $100,000 and the defendant

173. *See supra* note 35 & accompanying text.

knows he or she owes at least $85,000, the defendant may not deny owing the entire amount, but may only litigate as to the disputed $15,000.

In addition to probable cause, the element of malice will be useful in drawing the line between a vigorous defense and a malicious defense. The defense tendered in good faith, without intent to harm or to injure the plaintiff, will not be a malicious defense. The element of malice helps to focus on the motive guiding the decision to defend. If the husband in the divorce example[174] seeks to injure the wife or to successfully litigate support, custody, and property issues by wearing her down financially and emotionally with his delaying tactics, then malice is present. It is important to remember, particularly in the divorce context, that malice alone will not be actionable. It is malice coupled with lack of probable cause which distinguishes the malicious defense from the vigorous defense.

The analytical tools of probable cause and malice should guide a court in assessing whether a defense has been vigorous or malicious. The judicial process of drawing the line between the vigorous and the malicious may have an inhibiting effect on the assertion of at least some meritorious defenses. The benefit of the assertion of such defenses, however, must be weighed against the burdens imposed by permitting assertion of all possible defenses, including those which are malicious and without credible basis. Thus viewed, the benefits of unrestricted defense advocacy pale in the light of the injustice to the parties, the cost and delay to all litigants, and the burden imposed on the court system.

## Conclusion

The function of the courts is to facilitate the resolution of disputes, if possible by settlement, or, failing that, by adjudicating them justly. By failing to condemn malicious defenses, the courts acquiesce in the use of their processes for purposes wholly unrelated to their function. Legal procedure should not be manipulated solely to achieve some collateral purpose.[175] If a legitimate dispute exists, the fact that some collateral purpose may also be served is nevertheless justified by the courts' discharge of their primary dispute-resolving function. If no colorably legitimate dispute exists, however, the use of the court processes

174. *See supra* note 37 & accompanying text.

175. Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 404, 343 N.E.2d 278, 283, 380 N.Y.S.2d 635, 643 (1975).

for collateral advantage or to avenge some personal affront serves no legitimate purpose. "There is no public policy in favor of an attempt to coerce settlement of a non-existent dispute by outrageous means."[176]

The unarticulated reluctance of the judicial system to recognize a tort of malicious defense remains. This reluctance may stem from the practices, conditions, and circumstances of the times in which the desirability of recognizing the tort of malicious prosecution was being debated. With a few exceptions, malicious defense was mentioned only tangentially in the arguments. The cases, however devoid of express statement of the reasons, nevertheless make clear the judicial disfavor of a malicious defense tort. But practices, conditions, and circumstances have changed.

The justification of uninhibited litigation on grounds of open access to the courts and court processes has proven to be a significant cause of court congestion. The overtaxing of judicial resources, caused in part by unfettered advocacy, has resulted in restricted access for all litigants. Moreover, the rejection of an action for malicous defense means that no wrongful defense, however baseless, malicious, or fraudulent, is actionable. The law is thus confirmed as a game in which anything goes. Cynicism and mistrust of the legal profession are the natural consequences.

A tort of malicious defense of a civil action should now be recognized. Assertion of a defense, which the defendant knows or should know is without credible basis, for the purpose of delay and the advantages that may go with it should be actionable. Under such circumstances, culpability and injury are clear. There is no longer any justification for tolerating this wrong without a remedy.[177] Civil litigation has become too slow, too time-consuming, and too expensive.

A malicious defense tort is well within established precepts and principles. The framework for its controlled development is already in place. It is now clear that the law is responding to criticism from within and without the profession by limiting the abuses of excessive advocacy. Public confidence and the integrity of the legal system are at stake. Limits are necessary; the law should no longer tolerate by acquiescence what is plainly wrong. A tort of malicious defense in civil litigation should be recognized.

176. Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 396, 89 Cal. Rptr. 78, 89-90 (1970).

177. As one court commented as early as 1897, "the continued denial of a remedy for what was once not a serious, but which has finally become a grievous, wrong, can no longer be maintained." Kolka v. Jones, 6 N.D. 461, 469, 71 N.W. 558, 561 (1897).