



DEFENDING AGAINST TIME-BARRED PROFESSIONAL LIABILITY CLAIMS: WHEN A DEFENDANT MAY SUE A PLAINTIFF FOR MALICIOUS PROSECUTION

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Successfully defeating a Professional Liability lawsuit through an early pretrial motion, either because the statute of limitations expired before the complaint was filed or else a required Notice to Sue¹ was not timely served, is always a preferred litigation strategy for the defense. But does a successful resolution also entitle the defendant to sue the original plaintiff for malicious prosecution?

The answer is: it depends. Under some circumstances, a defendant-turned-plaintiff may sue the party who filed the original lawsuit, as well as the original plaintiff's attorney. In some cases, the defendant-turned-plaintiff may even recoup punitive damages, but under limited circumstances.

An attorney representing the original plaintiff may be immune from liability if there was probable cause for filing the untimely complaint. After conducting a thorough factual investigation and legal research as the circumstances reasonably warrant, the attorney might have considered the action to be tenable on the theory advanced. However, an example of an incomplete investigation is recounted in *Williams v. Coombs*,² where a patient's daughter sued a physician for wrongful death after he allegedly failed to recognize that her mother was a suicide risk and she hung herself while under a protective 72-hour hold. The physician won at trial, and then sued both the plaintiff and her attorney for malicious prosecution and intentional infliction of emotional distress. The Court found that the attorney lacked probable cause to file the wrongful death suit because he had not reviewed the medical chart thoroughly and had consulted a medical expert solely during an informal chat on the golf course.

A lawsuit which is time-barred is not legally tenable, so if the statute of limitations expired before the complaint was filed, there is no probable cause for filing the lawsuit.³ That is a clearer example where the defendant may have sufficient legal cause to sue the untimely plaintiff for malicious prosecution.

However, if the original case was defended due to a successful statute of limitations argument, this may present a problem for a defendant-turned-plaintiff. For a malicious prosecution action to prevail, there must have been a favorable termination of the underlying lawsuit on the merits.⁴ Defending the underlying case based on a statute of limitations argument is not a favorable termination for the purposes of a malicious prosecution suit because it does not reflect upon the merits of the underlying case.⁵ But there may be an exception when "defendants prosecuted the underlying action for medical malpractice knowing the term of the applicable statute of limitations had run."⁶ Some California courts have interpreted this

¹ For example, California Code of Civil Procedure § 364 mandates that a plaintiff may not sue a health care provider for professional negligence unless the defendant has been given at least 90 days' prior notice of the intent to sue.

² *Williams v. Coombs*, 179 Cal.App.3d 626 (1986).

³ *Sheldon Appel Co. v. Albert & Olier*, 47 Cal.3d 863, 885 (1989); *Klein v. Oakland Raiders, Ltd.* 211 Cal.App.3d 67, 74-75 (1989).

⁴ *Sheldon Appel Co. v. Albert & Olier*, supra, 47 Cal.3d at 871; *Bertero v. National General Corp.* 13 Cal.3d 43, 50 (1974).

⁵ *Lackner v. LaCroix*, 25 Cal.3d 747, 752 (1979).

⁶ *Id.*, 25 Cal.3d 747, footnote 3, emphasis added.

exception to apply only to the probable cause element and suggest that if a plaintiff wants to bring a malicious prosecution suit, he must “eschew the procedural defense . . . and obtain a favorable judgment on the merits.”⁷

If the defendant who prevails in the underlying action has suffered stress due to defending the underlying suit, or injury to his reputation or practice, or both, he likely will not have a problem proving damages,⁸ and may pray for punitive damages if he has a reasonable belief that the filing of the underlying Complaint was malicious. While the existence of malice needed to satisfy the elements of malicious prosecution may be inferred from a lack of probable cause,⁹ malice-in-fact must be shown for the purposes of alleging and proving a claim for punitive damages.¹⁰

If the above circumstances exist, the defendant must act quickly in order to sue the original plaintiff. A cause of action for malicious prosecution accrues upon favorable termination of the underlying action¹¹ and the statute of limitations for suing the improper plaintiff will terminate within one year of that date.¹²

CAVEAT: THE FOREGOING DOES NOT CONSTITUTE LEGAL ADVICE. PLEASE CONSULT AN ATTORNEY FOR INDIVIDUAL ADVICE REGARDING INDIVIDUAL SITUATIONS.

⁷ *Warren v. Wasserman, Comden & Casselman*, 220 Cal.App.3d 1297, 1303 (1990), ellipses added.

⁸ *Harbor Ins. Co. v. Central National Ins. Co.*, 165 Cal.App.3d 1029, 1036 (1985); *Bertero v. National General Corp.*, 13 Cal.3d 43 at 51.

⁹ *Bertero v. National General Corp.*, 13 Cal.3d 43.

¹⁰ *Id.*, 13 Cal. 3d at 65.

¹¹ *Harbor Ins. Co. v. Central National Ins. Co.*, 165 Cal.App.3d 1029 at 1037.

¹² *Goehring v. Wright*, 858 F. Supp. 989 (N.D. Cal. 1994); *Feld v. Western Land & Development Co.*, 2 Cal.App.4th 1328 (1992).