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Author's Note: Following the publication of this article, the Court of Appeal granted rehearing.

Malicious prosecution claims just got easier

By Timothy D. Reuben

Malicious prosecution is an extremely disfavored tort — but it just got a little stronger, thanks to the weakening of the interim adverse judgment rule by Division 3 of the 2nd District Court of Appeal in *Parrish v. Latham & Watkins*, 2014 DJDAR 11944 (Aug. 27, 2014), in which the 2nd District reversed the superior court, reinstating a malicious prosecution claim against Latham & Watkins LLP for bringing a trade secret claim in bad faith. The appellate court ruled against Latham despite the fact its lawyers had successfully defended a summary judgment motion on the merits in the underlying case. How could this be?

The original suit involved a dispute between two competitors over the manufacture of and technical knowhow regarding microbolometers, devices used to detect infrared radiation, useful for such things as night vision and thermal imaging. The plaintiffs had worked for Latham's client but left to form a competing company, and Latham sued the plaintiffs for stealing its client's business plan. However, the plaintiffs provided conclusive evidence that their business plan had existed before they even began working for Latham's client, so Latham responded by changing its theory, arguing that plaintiffs could not pursue their business plan without stealing their client's trade secrets in the future, because nobody could develop the necessary technology otherwise. Interestingly, Latham obtained two experts to so testify to the effect that no third party "has the requisite technology and capability to produce" the products necessary for the business plan. Latham based its new claims on the "inevitable disclosure" doctrine — that it was inevitable that plaintiffs would steal its client's trade secrets.

The experts' declarations allowed Latham to survive summary judgment; but at trial, the experts were discredited. It turns out their declarations were based only on publicly available information; however, not surprisingly, there were privately available sources of the necessary technology. After a bench trial, the judge who had denied summary judgment found that the claim had been brought in bad faith and awarded $1.6 million in fees to the plaintiffs, which was affirmed on appeal. One basis for the decision was that the theory of "inevitable disclosure" was "not supported by California law." Another was that the suit was brought "primarily for the anticompetitive motive of preventing [the plaintiffs] from attempting to create a new business in competition" with Latham's client.

The plaintiffs then sued for malicious prosecution, and Latham promptly filed a motion to strike the complaint under the anti-SLAPP statute. Of course, many cases have held that the first prong of the anti-SLAPP statute analysis is met by a malicious prosecution suit, so the issue under the second prong was whether plaintiffs could make a prima facie case. Latham argued they could not, first because the plaintiffs had failed to file the malicious prosecution action within the one-year statute of limitations under Code of Civil Procedure Section 340.6, and secondly, because Latham had won a summary judgment motion so that, pursuant to the "interim adverse judgment rule," Latham had probable cause as a matter of law. The trial judge struck the suit based on the statute of limitations.

Perhaps it was just bad luck, but the plaintiffs' appeal was ruled on by the division that had in the interim decided *Roger Cleveland Golf Co. v. Krane & Smith*, 214 Cal. App. 4th 660 (2014), which despite contrary authority, had concluded (much to the disadvantage of lawyers) that the two-year statute of limitations under CCP Section 335.1 should apply to malicious prosecution, even when suing lawyers. So Latham had to concede under Division 3's lawyer-unfriendly precedent that the plaintiffs had complied with the statute, and the division reaffirmed its own recent ruling. Thus, Latham was forced to rely on the interim adverse judgment rule — and this was obviously the wrong panel for that argument.

In rejecting the assertion that Latham should not be liable based on winning a summary judgment motion, the panel first referenced the trial court's bad faith finding in its attorney fee award, but then went on to cite evidence of Latham's conduct as somehow providing evidence of lack of probable cause: (1) that Latham initially disregarded plaintiffs' claim that they had previously created the plan; (2) when Latham was confronted with evidence that the plan had in fact been created previously, Latham "completely changed the theory" of its case; (3) that Latham should have known that the inevitable disclosure doctrine was not viable in California; (4) that Latham's experts only considered publicly available technology; and (5) that Latham's client's president gave testimony "indicating" he had no factual knowledge to assert the claim and "implying" that the lawsuit was a "preemptive strike."

But wait a second — how do these facts support a lack of probable cause or bad faith by Latham? That Latham did not believe plaintiffs initial claim that their business plan had been created before they worked for Latham's client is certainly understandable — after working for Latham's client for two years, the plaintiffs quit and immediately formed a competing business. It certainly appears on its face that it's unlikely a business plan was created prior to this time period. When ultimately provided with evidence that the claim was in fact true, Latham abandoned that argument and changed its theory. Wasn't that the right thing to do? What is wrong or unusual about a lawyer changing a theory as evidence is produced, something that happens all the time?

Then there is a claim that Latham should not have argued in favor of California adopting the inevitable disclosure doctrine. But Latham did not make that up; other states have adopted it, and there is a scholarly debate about the inconsistency among states and that a uniform standard should exist on this doctrine throughout the country. Aren't lawyers allowed to argue for a change or expansion of the law? Isn't that how law has historically developed?

And while Latham's experts looked only to public information, they did not represent anything false or inaccurate — rather, competent experts were discredited when the limited extent of their research and opinions was revealed. But why can't Latham rely on these actual experts? Latham is no expert on technology for microbolometers. Finally, that a competitor sues another as a so-called "preemptive strike" (or that its president lacks personal knowledge of facts) is not any particular surprise nor does it provide any reasonable inference about either probable cause or that competitor's lawyer's state of mind. A business certainly has the right to seek to enjoin unfair competition and to protect its own intellectual property. And why is Latham's client's motive attributable to Latham? A lawyer's motive is to pursue what it perceives as its client's colorable legal claims and get paid, not to stifle competition.

The net result is that there has been an unnecessary and unwise weakening of the interim adverse judgment rule, which provides that winning a summary judgment motion protects against the disfavored tort of malicious prosecution. The Parrish opinion posits an exception to that rule: the subsequent ruling exception. Adopting a ruling from *Slaney v. Ranger Ins. Co.*, 115 Cal. App. 4th 306 (2004), the opinion finds that even when a summary judgment is won (thereby implying probable cause), if there is a contrary result that finds an element of bad faith or as in Slaney, malice, the interim adverse judgment rule no longer applies.

This ruling to create a new exception is a step in the wrong direction, and there is little benefit to it. There is substantial law that malicious prosecution is disfavored — as it should be. Now not one but two decisions have made it easier to sue lawyers for malicious prosecution: Extending the statute of limitations for these actions and creating a gaping hole in one significant protection against such suits. It is not uncommon that a summary judgment ruling goes in one direction and then based on full evidence, plus witness credibility, plus whatever, the trial goes in a different direction, even with a finding of malice or bad faith. But if a summary judgment is won on the merits earlier in the action, based on what was available at the time (and absent fraud or perjury), there is a clear inference of probable cause which should prevent a malicious prosecution charge. The interim adverse judgment rule should not have been weakened as it was here, putting attorneys at risk and making malicious prosecution a more viable claim.

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