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THE PUBLIC INTEREST AND INTIMIDATION SUITS: A NEW APPROACH

Joseph J. Brecher*

I. INTRODUCTION

In the past few years, a growing menace to public interest litigation has emerged. There has been a spate of suits filed against citizens who advocate public interest positions before courts and legislative bodies. In these suits, the relief prayed for is of secondary importance; the goal is to retaliate against public interest spokesman and to discourage them from further activism.

Even though they never result in judgments for plaintiffs, the filing and prosecution of intimidation suits has a severe chilling effect on the defendants. If the current trend continues, there may be a serious diminution in the critical watchdog role played by citizens and citizens' groups in ensuring that the standards and requirements of public interest statutes and regulations are carried out.

This article points out that even though the law favors public interest activism and makes it almost impossible for intimidation plaintiffs to prevail because of the numerous defenses available to public interest litigants, those suits still achieve their intended effect of punishing and silencing their opponents. The reasons why this anomalous situation exists are explored and two changes in the law which will alleviate the problem are suggested. Much of the discussion centers around environmental cases, since the majority of intimidation suits are in this area. 1 The analysis, however, is equally valid for other types of public interest cases as well.

II. THE ROLE OF PUBLIC INTEREST LITIGATION

Over the past three decades, an enormous explosion of public interest litigation has occurred. The California Supreme Court ex-

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1. See, e.g., Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972); Asia Inv. Co. v. Borowski, 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982), both of which are discussed in this article.
plained why in *Serrano v. Priest.*

In the complex society in which we live it frequently occurs that citizens in great numbers and across a broad spectrum have interests in common. These, while of enormous significance to the society as a whole, do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts. Although there are within the executive branch of the government offices and institutions (exemplified by the Attorney General) whose function it is to represent the general public in such matters and to ensure proper enforcement, for various reasons the burden of enforcement is not always adequately carried by those offices and institutions, rendering some sort of private action imperative.

Recognizing this situation, judges and legislators have fashioned a number of techniques designed to aid the process of private enforcement of public rights. First, the courts have greatly relaxed the traditional requirements of standing to sue for public interest litigants. Second, the courts allow injunctions in public interest cases even without a showing of irreparable injury, as is usually required. Furthermore, judges freely grant intervention to public interest groups. Finally, numerous statutes provide for and encourage participation in administrative decision-making.

A. Standing Requirements Relaxed for Public Interest Litigants

The courts have greatly liberalized the standing requirements for public interest plaintiffs. In order to satisfy the standing doctrine, plaintiffs must prove that they have suffered “injury in fact” to an interest “arguably within the zone of interests to be protected or regulated” by the applicable statute or regulation. The traditional method of showing injury in fact is to allege economic harm. The Supreme Court, however, states that aesthetic and environmental interests may also confer standing to sue. Organizations with injured members may seek judicial review on their behalf. Furthermore, the

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3. Id.
quantum of harm which supports a plaintiff’s right to sue need be no more than an “identifiable trifle;” for example, citizens may sue under the Clean Water Act for almost any violation. In addition, when important rights, such as the constitutional protection of freedom of association are involved, a public interest plaintiff has standing to assert the rights of third persons who are not litigants.

Congress has recognized that the bureaucracy is often unwilling or unable to protect the public’s interests. As a result, dozens of statutes designed to protect the public now authorize citizens suits. Under these provisions, citizens may sue to enforce the public policies contained in the statute, without demonstrating any particularized harm. Section 304 of the Clean Air Act is the prototype of the citizen suit provisions. The Senate Report describes the motivation behind this section: “Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.”

An often-quoted opinion interprets this language as a mandate to the courts that: “[C]itizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests . . . Possible jurisdictional barriers to citizens actions, such as amount in controversy and standing requirements, are expressly discarded by the Act.”

Another requirement for standing — that the plaintiff’s injuries

8. Student Pub. Interest Research Group of New Jersey v. Georgia-Pac. Corp., 615 F. Supp. 1419, 1424 (D.N.J. 1985). In this case, the plaintiffs asserted that defendants’ effluent was contributing to the pollution of the Delaware River, which they used for recreation. The defendant alleged that its contribution to the pollution of so large a river was “so small that plaintiffs are not injured thereby.” Id. at 424. The court ruled that the size of an injury is irrelevant on the issue of standing since any violation of an anti-pollution requirement confers standing on those affected by it.

9. Id.


13. Friends of the Earth v. Carey, 535 F.2d 165, 172-73 (2d Cir. 1976), cert. denied, 434 U.S. 902 (1977). Indeed, the goal of citizen participation extends not only to litigation, but into the sphere of negotiations between a polluter and a regulatory agency. If the agency denies such participation, a public interest group is entitled to immediate access to the courts. See Student Pub. Interest Research Group of New Jersey v. Fritzche, Dodge & Olcott, 579 F. Supp. 1528, 1534-35 (D.N.J. 1984).
will be redressed by a favorable decision — is also relaxed in the typical public interest case. For example, in Student Public Interest Research Group of New Jersey v. A.T. & T. Bell Laboratories, the court held that the plaintiffs possessed standing to sue for a past violation of Clean Water Act standards, even though the defendant was no longer discharging pollutants. The court acknowledged that exacting civil penalties against the defendant would not compensate the plaintiff or the public at large for injuries already suffered, but would provide redress in the sense that a recovery would serve as a general deterrent to future violators of the statute.

B. Minimal Showing to Obtain Injunction

Public interest plaintiffs also benefit from a relaxation of the elements needed for an injunction. Normally, injunctions are not granted unless the plaintiff demonstrates irreparable injury. In public interest litigation, however, the courts tend to waive this requirement. For example, the Ninth Circuit ruled that irreparable damages are presumed and an injunction should ordinarily be issued when the defendant has violated the National Environmental Policy Act and the Endangered Species Act.

14. A plaintiff may not rely on the remote possibility that if the court grants relief against the defendant, it would result in plaintiff's achieving his other objective. For example, in Simon v. Eastern Kentucky Welfare Rights Organization, the Court denied standing to indigents who challenged a federal ruling granting non-profit status to hospitals which refused to serve the indigents. 426 U.S. 26 (1976). The plaintiffs claimed that this action would “discourage” those hospitals from providing them with free care. Id. at 42. The Court deemed this supposition to be too "speculative" to confer standing on the plaintiffs. Id.


C. Liberalized Requirements for Public Interest Intervention

The courts usually employ a liberal test in deciding whether to allow a public interest litigant to intervene. For example, a citizens group was granted intervention where its only interest was the stare decisis effect of a judgment in a case of first impression. Similarly, a public interest group has the right to intervene in an action which challenges the legality of a measure it previously supported.

Judges are quite aware that government authorities often favor development, rather than protection of resources for the benefit of the public. For instance, in Sagebrush Rebellion, Inc. v. Watt the plaintiffs, a coalition of conservative developers and ranchers, challenged the creation of a national conservation area in Idaho by former Secretary of the Interior Cecil Andrus, who was replaced in 1980 by James Watt. Because of Mr. Watt's anti-environmental policies, environmentalists believed that he would not enthusiastically defend Mr. Andrus' action, so they sought intervention. The court, in granting their motion, stated:

[T]he intervenor offers a perspective which differs materially from that of the present parties to this litigation. Secretary Andrus is no longer Secretary of the Interior. His successor, Secretary Watt, was previously head of the Mountain States Legal Foundation, the organization which is representing the plaintiff Sagebrush Rebellion in this action. These facts support intervention and also give rise to appellate's sobriquet for the case as Watt v. Watt.

D. Other Policies Favoring Public Participation

In addition to the policies discussed above, many statutes, regulations and cases emphasize the need for agencies to solicit and re-
spond to public comments\(^{28}\) before taking action. This process forces agencies to reconsider ill-advised projects and require additional environmental controls. Also, agencies’ natural reluctance to undertake this process provides public interest litigants with another way of strengthening their litigation techniques. Legislative bodies echo this sentiment in numerous statutes which institutionalize the right of the public to obtain information from the bureaucracy and to have input in the decision-making process.\(^{26}\) Certain agencies are required to provide special assistance to aid the public in dealing with them.\(^{27}\)

Finally, there are numerous statutory provisions for successful public interest litigants to recover attorneys fees. This area is discussed in detail below.\(^{28}\)

III. Built-in Impediments to Public Interest Law

Despite numerous attempts to aid public interest litigants, they still face many obstacles. Those who appropriate public resources for their own use have access to enormous wealth and political power. They hire the best lobbyists, publicists, and attorneys, and these costs are passed along to the general public in the form of price increases and tax deductions. Because corporations exist in perpetuity and their employees are paid substantial salaries, large industries are prepared to persevere in their battles over the long term. Public interest activists, on the other hand, are invariably professionally exhausted after a number of years fighting for their ideals.

This economic imbalance provides numerous advantages for resource-users. They are able to fund studies to support their viewpoint and pay experts to testify on their behalf. Dozens of lawyers and paralegals track the agency’s activities and alert their clients to any administrative proposals which affect them. They then seek the


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best advice and prepare testimony as needed. Public relations consultants utilizing the latest graphics and brochures and release the resource users' story to the media and the public at large.

The nature of the political and judicial process, too, works against the public interest sector. The foremost obstacle is inertia. Unless a public interest group convinces a court, an agency, or the Legislature that an abuse must be curbed, it will continue indefinitely. The persuasion process is difficult; it entails establishing a preponderance of the evidence before a judge, pushing a bill through the Legislature, or setting the ponderous bureaucratic wheels in motion.

The litigation process, as well, presents substantial impediments to public interest plaintiffs. First, they are required to exhaust their administrative remedies. Not only must they participate in the preliminary administrative proceedings, they must also make all the arguments they intend to raise in that forum. In most cases, the reviewing court is precluded from hearing any additional evidence; review is strictly confined to the administrative record.

The record presents another formidable barrier. It often encompasses thousands of pages: preparing it constitutes an expensive and time-consuming task. Furthermore, it is sometimes difficult to ascertain precisely what information the record contains. Another prob-

30. Public interest participants must do more than merely state their point of view before the agency in general terms; they must "structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 553 (1978); see also Portland Cement Ass'n v. Ruckelhaus, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied sub. nom., Portland Cement Corp. v. Administrator EPA, 417 U.S. 921 (1974).
31. Association of Data Processing v. Board of Governors, 745 F.2d 677, 684 (D.C. Cir. 1984); Ford Dealers Ass'n v. Department of Motor Vehicles, 32 Cal. 3d 347, 365, 650 P.2d 328, 338, 185 Cal. Rptr. 453, 463 (1982); Bank of Am. v. State Water Res. Control Bd., 42 Cal. App. 3d 198, 207, 116 Cal. Rptr. 770, 775 (1974); Browning-Ferris Indus. of California, Inc. v. City Council of City of San Jose, 181 Cal. App. 3d 852, 861, 226 Cal. Rptr. 575, 580 (1986). It should be noted, however, that this rule applies only to administrative mandamus cases. CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1987). In a traditional mandamus case (CAL. CIV. PROC. CODE § 1085), in which the agency has not held a quasi-judicial hearing, additional evidence may be presented to the trial court. See, e.g., No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 79 n.6, 529 P.2d 66, 73 n.6, 118 Cal. Rptr. 34, 41 n.6 (1974); Merz v. Monterey County Bd. of Supervisors, 147 Cal. App. 3d 933, 937, 195 Cal. Rptr. 370, 372 (1983); Lassen v. City of Alameda, 150 Cal. App. 2d 44, 48, 309 P.2d 520, 522 (1957). Furthermore, this rule does not apply to cases under the National Environmental Policy Act in which the plaintiff claims that an agency unlawfully failed to prepare an Environmental Impact Statement (EIS) or that an EIS was legally inadequate. See Suffolk County v. Secretary of the Interior, 562 F.2d 1368, 1384-85 (2d Cir. 1977).
32. See, e.g., Sierra Club v. Costle, 657 F.2d 298, 352-56 (D.C. Cir. 1981); see also
lem is that an accurate record of the agency's proceedings may not be available to the public interest plaintiff. Administrative officials cannot be questioned concerning their deliberations and the motives behind agency actions.  

After the administrative or legislative process is complete, public interest litigants are required to follow statutory notice procedures as a prerequisite to filing a suit. Also, special, short statutes of limitations apply.

Once public interest litigation is filed, other restrictions must be surmounted. The most daunting is the presumption that legislative or administrative action is lawful. A court will defer to an agency's interpretation of a statute, if reasonable, even if the court itself would prefer an alternative explanation. Similarly, a court may not substitute its judgment for that of an agency in weighing economic, environmental, and other policy factors. Agency action is upheld if any credible evidence in the record supports it: even though the court finds that evidence offered by the public interest litigant is more persuasive.
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Even if there is no dispute that an agency has violated the law, it may be difficult to obtain effective relief. For example, the courts occasionally allow the Environmental Protection Agency to ignore statutory deadlines because it is understaffed and needs to concentrate on more important projects. After a court orders an agency to take specific action, bureaucrats often continue to delay taking the appropriate measures, thus necessitating additional trips to the courthouse.

IV. THE GENESIS OF INTIMIDATION SUITS

Despite these built-in advantages, pro-development forces have added a new weapon to their arsenal in the past few years. They have begun to file counter-suits against public interest litigants for the purpose of punishing them for past challenges to their activities and to dissuade them from future opposition. These intimidation suits take the form of actions for malicious prosecution, abuse of process, intentional interference with prospective economic advantage, libel, slander, conspiracy, or other intentional torts. Usually, the developer asks for huge damages for losses allegedly suffered due to delays or litigation expenses incurred during the previous public interest litigation.

To the author's knowledge, no intimidation suit has ever resulted in a judgment for the plaintiff. Nonetheless, these suits


41. One particularly grievous example is the long-standing effort by the Sierra Club to force the Environmental Protection Agency (EPA) to regulate air pollution from coal strip mines. The Club first petitioned the agency to adopt such regulations in 1979. EPA sat on that request, studying it year after year. Finally, the Club sought judicial assistance and the court of appeals ordered the agency to take action within ninety days. See Sierra Club v. Gorschuch, 715 F.2d 653, 661 n.47 (D.C. Cir. 1983). After EPA ignored this direction, the Club returned to court and obtained an order directing it to issue a proposed rule by October 1984. EPA grudgingly complied, but then refused to take final action. The Sierra Club thus was forced to bring another suit, resulting in a decision that the court had jurisdiction to oversee the process. However, the court of appeals then ruled that EPA had not yet engaged in unreasonable action by delaying final action for three years. Sierra Club v. EPA, 26 Env't Rep. 1465 (D.C. Cir. 1987).

42. See infra text accompanying notes 48, 51, 60.

43. The University of Denver's intimidation lawsuit project has reached the same conclusion. See Pring, Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates, Nat'l L.J., July 22, 1985, at 16.
achieve their objective of silencing citizens opposed to commercial interests. Public interest defendants may be unwilling or unable to vindicate their rights in court for a number of reasons.

First is the risk of financial catastrophe, should they lose. While the probability of an adverse judgment is small, the average public-spirited citizen is unwilling to jeopardize his financial future for the abstract satisfaction of vindicating his principles.

Furthermore, even if the defendant is absolutely convinced he will prevail, the price of victory in time, money, and aggravation is very high. He must submit to the litigation process against his will. Typically, he will experience a very unpleasant deposition session, as well as the inconvenience of delays and uncertainty which invariably accompany litigation.

The defendant must hire an experienced attorney. Because this type of case is often *sui generis*, the attorney must devote many hours to learning the peculiar facts of the case, and taking part in discovery. Then, he or she must prepare and argue a lengthy memorandum on a demurrer, motion for judgment on the pleadings, summary judgment, or other summary proceeding. Thus, the potentially huge exposure and unpleasantness of litigation is enough to scare away all but the most resolute defendant in an intimidation suit.

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V. PLAINTIFFS' OBJECTIVES IN BRINGING INTIMIDATION SUITS; THREE CASES

What prompts commercial interests to bring intimidation suits? An examination of three cases handled recently by the author suggests possible objectives.

44. The author has had several personal conversations with intimidation suit defendants who expressed an unwillingness to participate in any further public interest activities.
45. Typically, plaintiffs in intimidation suits insist on lengthy discovery proceedings and resist efforts to dispose of the case before trial by means of a motion for summary judgment.
46. Intimidation suits rarely reach the trial stage. However, the California Supreme Court has indicated that, under certain circumstances, a plaintiff may be entitled to present evidence concerning a public interest defendant's improper motivation in instituting the original lawsuit. See *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168, 728 P.2d 1202, 1208-09, 232 Cal. Rptr. 567, 574 (1986).
47. It is true that a defendant with a homeowners' or other liability insurance is entitled to free representation by his insurer and, to the extent that the allegations in the complaint may give rise to a conflict of interest, the insurer is obligated to pay for independent counsel chosen by the insured. See *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358, 208 Cal. Rptr. 494 (1984). However, it should be remembered that the typical homeowners' policy excludes coverage for intentional torts.
Sierra Club v. Superior Court was a malicious prosecution case against the Sierra Club filed by Monte and Barbara Reed, owners of a resort hotel in the town of Mendocino. The Sierra Club previously brought a mandate proceeding in superior court against the California Coastal Commission and the Reeds, challenging a permit which allowed the Reeds to expand their hotel. In the previous action, the superior court agreed with the Sierra Club's contention that the Commission used the wrong legal test in granting the permit and therefore remanded the matter to the Coastal Commission for reconsideration. The Commission then re-examined the matter, applied the proper standard, and again granted the permit. At that point, the case was dismissed.

The court of appeals swiftly disposed of the matter on summary judgment, noting that an essential element of a cause of action for malicious prosecution was lacking. The Club was partially successful in the underlying lawsuit, since it established that the Commission applied an improper legal standard in the first permit proceeding. Thus, the court did not even reach the numerous constitutional, statutory and common law defenses presented by the Sierra Club.

Ross Landing Associates v. Kentfield Civic League was an action by a developer for malicious prosecution, abuse of process, interference with economic advantage, and conspiracy. The defendants were the Kentfield Civic League (KCL), a non-profit corporation devoted to neighborhood improvement, Friends of Kentfield (Friends), an ad hoc unincorporated association formed to challenge Ross Landing's development plans, and Barbara Dolan, the organizer of Friends and a member of KCL.

Friends originally challenged a decision by Marin County to permit Ross Landing to construct an office building in Kentfield without preparing an Environmental Impact Report (EIR), pursuant to the California Environmental Quality Act. That suit was

49. The Reeds were represented in their malicious prosecution action by Joseph Gughemetti, an attorney, with a long history of advocating anti-environmentalist causes. In his book The Taking Mr. Gughemetti criticized environmentalists who encouraged "abuse, excess, and bureaucratic bungling." J. GUGHEMETTI & E. D. WHEELER, THE TAKING 44 (1982). Gughemetti further stated that the Coastal Commission's, "actions . . . for the good of the coast actually harmed the environment." Id. at 187.
50. Sierra Club v. Superior Court, 168 Cal. App. 3d 1138, 1144, 214 Cal. Rptr. 744 (1985). Many of these defenses are discussed in the following sections.
52. CAL. PUB. RES. CODE § 21151 (West 1986).
successful; the superior court voided the approval of the office building project and ordered the county to prepare a focused EIR dealing with a few specified issues.\(^5\)

The county issued an EIR on the office building project which KCL deemed inadequate because it failed to discuss the cumulative impacts of the project, as well as air and noise pollution. None of these issues were specified in the judge’s order concerning the focused EIR in the *Friends* suit. KCL also objected to the failure of the EIR to consider the alternative of a smaller office facility. Therefore, KCL sought a writ of mandate in superior court.\(^6\) The case was assigned to the same superior court trial judge who decided the *Friends* case. He ruled that KCL was barred by the doctrines of collateral estoppel and laches from attacking the failure of the focused EIR to discuss any types of environmental impacts which were specified in his order in the *Friends* suit.\(^7\)

However, the court did agree with KCL that the EIR was inadequate because it failed to discuss the alternative of a smaller office building. Accordingly, the issue was remanded to the county. KCL appealed the portion of the judge’s ruling based on collateral estoppel and laches.\(^8\)

Ultimately, Ross Landing abandoned the office construction project and opted instead to build a mini-storage facility, which was approved by the county in December, 1985. KCL then filed another action challenging the new project on the grounds that it violated applicable planning and zoning laws and that the county once again was not in compliance with CEQA.\(^9\)

Meanwhile, Ross Landing filed its tort action against *Friends*, some of its members, KCL and Barbara Dolan. The developer con-

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55. The court held that those doctrines applied, since KCL, as well as *Friends* was "composed of, and represents taxpayers, property owners and residents of Kentfield . . ." The court therefore concluded that KCL was bound by his earlier decision that a focused EIR would suffice. Statement of Decision; Order Granting Limited Writ of Mandate at 1-2, Kentfield Civic League v. County of Marin (No. 11585 Marin County Superior Court) (June 15, 1984) (on file at the Santa Clara Law Review office).


tended that KCL's decision to appeal the trial judge's ruling based on laches and collateral estoppel constituted malicious prosecution and abuse of process, even though that appeal was still pending.

Fearful of the remote possibility of suffering a large judgment, and wishing to avoid the expense and annoyance of a lengthy trial, KCL and its members agreed to drop their challenge to the mini-storage facility in exchange for Ross Landing's dismissal of its tort action. Thus, the developer was able to achieve its objective — construction of the facility without legal impediment. Friends and Barbara Dolan refused to participate in the settlement. Instead, they sought and were granted summary judgment.88

Gensler v. Lambert89 demonstrated another possible motivation for an intimidation suit. In this case, the plaintiffs owned two houses on a single parcel in Berkeley. They applied to the City Council for a lot split in order to sell the houses. At the hearing, the application was opposed by various neighbors, who felt that the plaintiffs' scheme would diminish the already scarce supply of rental housing in the area.

The plaintiffs alleged that six of the neighbors entered into a conspiracy to scare off potential buyers and committed various acts of vandalism, purportedly for the purpose of dissuading the plaintiffs from selling the houses as separate units. Ultimately, the houses were sold at a price which approximated their estimated value. Nonetheless, plaintiffs sought general and exemplary damages in the amount of $1.75 million.

They were distinctly unsuccessful. In order to avoid the expense of a trial, the two defendants represented by the author agreed to settle the issue for the sum of $300.00. The case went to trial against the remaining defendants. Two of them were granted a judgment at the conclusion of plaintiffs' case, pursuant to Civil Procedure Code section 631.8.60 After a five-day trial, the court ruled in favor of the remaining two defendants, finding that there was no credible evidence to support the conspiracy theory or to show that the defendants were linked to the alleged acts of vandalism.61 Furthermore, the

60. CAL. CODE OF CIV. PROC. § 631.8 (West 1987).
In each of these three cases, there was little doubt that the defendants would ultimately prevail. However, they did so only after the expenditure of an extraordinary amount of time and money. And, while the suits were proceeding, the defendants' public interest activities were sharply curtailed because their attention was diverted to the litigation.

VI. DEFENSES TO AN INTIMIDATION SUIT

The main reason why plaintiffs in intimidation suits invariably lose is that a wealth of defenses are available to the defendants. This section discusses two generic constitutional and statutory defenses which are interposed against many different types of intimidation causes of action. Next, specific defenses to a number of torts which are commonly asserted in intimidation suits are examined.

A. The Constitutional Right to Petition

Perhaps the most basic defense to intimidation suits is the constitutional right to petition. The nature of that first amendment protection was thoroughly explicated in Sierra Club v. Butz. In that case, the Sierra Club brought an injunction to stop logging on national forest land which was eligible for wilderness status. The logging company then filed a counter-action, asserting that the Sierra Club "intentionally, willfully and wrongfully, by oral and written representations, by asserting administrative appeals, by filing of the complaint herein and other complaints, and by other acts" interfered with the logging company's contractual right to cut trees in the area. The district court dismissed the logging company's claim because the Sierra Club was protected by the constitutional right to petition the government for a redress of grievances.

Quoting Thomas v. Collins, the court stated:

[The right to petition] is a basic freedom in a participatory government, closely related to freedom of speech and press; together

62. Id. at 6.
63. The first amendment prohibits Congress from making any law "prohibiting . . . the right of the people . . . to petition the Government for a redress of grievances. U.S. Const. amend. I.
64. 349 F. Supp. 934 (N.D. Cal. 1972).
65. Id. at 935-36.
66. 323 U.S. 516, 530 (1945).
these are the 'indispensable democratic freedoms' that cannot be abridged if the government is to continue to reflect desires of the people. Thus, this court cannot be too careful in assuring that its acts do not infringe this right.\textsuperscript{67}

The court discussed a line of Supreme Court cases beginning with \textit{New York Times Co. v. Sullivan}\textsuperscript{68} which held that the rights of free press and speech constitute a defense to common law torts such as defamation and invasion of privacy. Such civil actions must be limited to the same extent that a state would be limited in imposing criminal sanctions, because "fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute."\textsuperscript{69} As long as the speech or writing "is a genuine attempt to communicate with others concerning matters of 'public or general interest,'" there can be no civil liability.\textsuperscript{70}

The court then articulated the "sham" standard for judging potential infringements on the right to petition. Analogizing to the holding in \textit{Eastern Railroad Presidents' Conference v. Noerr Motor Freight},\textsuperscript{71} the court ruled that the right to petition protected the defendants, even if they were guilty of actual malice. Liability exists only if their petition was a sham: they knew that the statements were false or spoke with a reckless disregard as to whether they were true or false.\textsuperscript{72} Petitioning the government constitutes a sham only if the primary motive is "not to obtain governmental action, but to otherwise injure the plaintiff."\textsuperscript{73}

The California Supreme Court also recognizes the importance of the right to petition. In \textit{City of Long Beach v. Bozek}\textsuperscript{74} the court indicated that the right to petition applied to judicial actions, as well as petitions to the legislative or executive branches. The court went further than the federal cases, by holding that the constitutional protection applied, even if the plaintiff demonstrates actual malice. This term was defined as: "knowledge of the falsity of the allegations

\textsuperscript{67} Butz, 349 F. Supp. at 936.
\textsuperscript{68} 376 U.S. 254 (1964).
\textsuperscript{69} Butz, 349 F. Supp. at 937.
\textsuperscript{70} Id.
\textsuperscript{71} 365 U.S. 127 (1961).
\textsuperscript{72} Id. at 138-41. The same rationale applies to court cases, as well as legislative lobbying. \textit{See} California Motor Transp. Co. v. Trucking Unltd, 404 U.S. 508 (1972).
\textsuperscript{73} Butz, 349 F. Supp. at 939. The "sham" standard has also been adopted by the California Supreme Court in \textit{Blank v. Kirwan}, 39 Cal. 3d 311, 321-22, 703 P.2d 58, 64, 216 Cal. Rptr. 718, 724 (1985). \textit{See} Havoco of America, Ltd. v. Hallowbow, 709 F.2d 643 (7th Cir. 1983) (right to petition protected defendants in securities fraud suit, even if their petitioning activity adversely affected plaintiff's business).
\textsuperscript{74} 31 Cal. 3d 527, 533-34, 645 P.2d 137, 140, 183 Cal. Rptr. 86, 89-90 (1982).
made in the complaint or with reckless disregard for their truth or falsity." Thus, the court concluded, the right to petition afforded an absolute privilege. Anything less would result in "a severe chilling effect . . . on the legitimate exercise of the right to express beliefs freely when those beliefs appear to be derogatory of the governing authorities."

In Matossian v. Fahmie, an applicant for a liquor license sued competitors who protested his application. He claimed they were conspiring to prevent competition. The court of appeals ruled that the trial court properly granted a demurrer and summary judgment because the constitutional issue involved was a question of law, not fact. It noted that neither the defendants' allegedly improper motivation nor their lack of success in the previous proceeding defeated the constitutional protection they enjoyed.

The United States Supreme Court, while acknowledging the pre-eminent position of the right to petition, recently rejected the California view concerning absolute immunity. In McDonald v. Smith, the Court held that the right to petition afforded only a qualified privilege against a libel action. If the defendant acted with actual malice, defined as "knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand," the plaintiff could succeed. The Court concluded that the petition clause did not merit any higher status than the other first amendment freedoms — speech, publication, and assembly — none of which afforded an absolute privilege.

Thus, it appears that defendants in intimidation suits in federal

75. Id. at 534, 645 P.2d at 140, 183 Cal. Rptr. at 90.
76. Id. at 535, 645 P.2d at 141, 183 Cal. Rptr. at 90. Recognition of this chilling effect prompted a court of appeals to refuse to grant the plaintiff the opportunity to file a third amended complaint for slander, when earlier efforts to state a cause of action had been tossed out by the court. The court in Maple Properties v. Harris, noted:

While we might be disposed to grant an additional leave to amend in a usual tort case, we are mindful that the present case seeks to inhibit fundamental First Amendment rights. Where such precious rights are involved, 'speedy resolution of cases . . . is desirable' to avoid a chilling effect upon the exercise of free speech.

78. Id. at 136-37, 161 Cal. Rptr. at 535-37. See also Smith v. Silvey, in which the court held that the right to petition protected a protestor, no matter how "exasperating" his behavior is to his adversary. 149 Cal. App. 3d 400, 406, 197 Cal. Rptr. 15, 19 (1983).
80. Id. at 485 (quoting Dellinger v. Belk, 34 N.C. App. 488, 490, 238 S.E.2d 788, 789 (1977)).
81. Id.
courts find it much more difficult to obtain summary judgment than in state courts. This is so because it is relatively simple for a plaintiff to establish a putative factual controversy concerning the public interest defendant's prior motivation. Such a conflict vitiates summary judgment and pushes the case on toward trial.83

B. Civil Code Section 47(2)

California statutory law provides a protection analogous to the constitutional right to petition. California Civil Code section 47(2)84 establishes a privilege for any publication or broadcast made during a legislative or judicial proceeding or any other proceeding authorized by law.

In Pettitt v. Levy85 the court summarized the "public policy supporting the privilege. . . ."86 The court quoted from a previous opinion:

Underlying the recognition of this privilege is the important public policy of affording the utmost freedom of access to the courts. [Citations.] The privilege is accorded not only to parties but to witnesses, even where their testimony is allegedly perjured and malicious. [Citations.] "The resulting lack of any really effective civil remedy against perjurers is simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say."

The privilege is an absolute one because it protects publications made with actual malice or with the intent to do harm.87

Numerous cases recognize the importance of allowing members of the public the absolute right to communicate with government bodies. As the court noted in King v. Borges,88 the privilege extends not only to official statements made before an agency, but to any communication which "is designed to prompt action by that agency. . . ."89 "There must be an open channel of communication

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84. 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (1972).

85. Id. at 488, 104 Cal. Rptr. at 652.

86. Id. (quoting in part Kachig v. Boothe, 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393, 403 (1971)).


88. Id. at 34, 104 Cal. Rptr. 417.
In addition to defamation, (with the exception of actions for malicious prosecution), section 47(2) applies to all other actions, including intentional interference with contractual relations and abuse of process.

Any written or oral statement that is required or permitted by law in the course of litigation is also protected by Civil Code section 47(2). The protection is not limited to oral or written evidence, briefs, or affidavits. "If the publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches."

The courts are emphatic in stating that the privilege of Civil Code section 47(2) is virtually absolute, even if malice is demonstrated. Even the most vicious types of utterance are protected, if made in the context of litigation. For example, in *Izzi v. Rellas* one attorney accused another of extortion in connection with his demands for agreeing to vacate a default judgment. The court, however, pointed out that settlements are favored by the law and are protected by the privilege. The court repeated the well-established rule that any doubt concerning the applicability of the protection of section 47(2) is resolved in favor of the privilege.

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94. *Id.* at 254, 163 Cal. Rptr. 689 (1980).

95. *Id.* at 262-63, 163 Cal. Rptr. at 693-95. In addition, the publication need not even be pertinent or relevant in a technical sense; it need only have some connection or a relation to the proceedings. *Id.* at 264-65, 163 Cal. Rptr. at 693-95. *See Brody*, 87 Cal. App. 3d at 734, 151 Cal. Rptr. at 212-13; *Costa v. Superior Court*, 157 Cal. App. 3d 673, 677, 204 Cal. Rptr. 1, 3 (1984). There was a similar holding in an environmental context in *Borowski*, 133 Cal. App. 3d 832, 184 Cal. Rptr. 317 (1982). In that case, an attorney threatened to bring a lawsuit under the California Environmental Quality Act in order to coerce a settlement in another case. The court ruled that the privilege of Civil Code section 47(2) precluded the use of that threat as a means of showing ulterior motivation in a later abuse of process action. In
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The policy in favor of the privilege is so strong that it is even applied in situations where the defendants were guilty of moral turpitude. For example, in Pettit\(^{96}\) the defendants were protected by section 47(2), even though they submitted an admittedly forged building permit application in a scheme to deprive the plaintiff of a building variance to which he would otherwise have been entitled.

In short, the protections afforded by the constitutional right to petition and the privilege of Civil Code section 47(2) immunize most public interest activities, including testimony before political and administrative bodies and litigation. Those provisions ordinarily provide generic defenses to most intimidation suits. In addition, numerous defenses are available to the specific causes of action usually relied upon by plaintiffs in intimidation suits.

VII. DEFENSES TO PARTICULAR ACTIONS

A. A Paradigm Case: Asia Investment Co. v. Borowski

The following sections, discuss a number of specific defenses available against the five causes of action most favored by plaintiffs in intimidation suits — malicious prosecution, abuse of process, interference with economic advantage, defamation, and conspiracy. As an introduction, a recent case which formed a paradigm for the classic intimidation suit — Borowski,\(^{97}\) is examined.

In this case, Borowski conducted some real estate business with Wong, the General Partner of Asia Investment. They also litigated ownership of a house located on a tract which Wong wished to develop. Borowski filed a suit under the California Environmental Quality Act (CEQA) to stop the development. During the CEQA litigation, Borowski’s counsel suggested that Wong should settle the house case, because the loss of the CEQA action “would blow Asia’s whole subdivision.”\(^{98}\) The trial court dismissed the CEQA action because of laches. Four days after that decision, Wong filed a com-

\(^{96}\) See Oren, 42 Cal. 3d at 1168, 728 P.2d at 1211, 232 Cal. Rptr. at 576.
\(^{98}\) 133 Cal. App. 3d 832, 842, 184 Cal. Rptr. 317, 324 (1982).
\(^{99}\) Id. at 842, 184 Cal. Rptr. at 324.
plaint for malicious prosecution, intentional interference with prospective business advantage, and abuse of process.

The trial court granted Borowski's motion for summary judgment on the cause of action for malicious prosecution. It stated the rule that in order to establish a prima facie case, a plaintiff must plead and prove that the prior judicial proceeding terminated in his favor. The court noted that a favorable termination is one that indicates "the innocence of the accused. . . ." If, on the other hand, the dismissal is "on technical grounds, for procedural reasons, or for any other reason not inconsistent with . . . guilt, it does not constitute a favorable termination."100

The court of appeals noted that the dismissal of the CEQA case on the basis of laches "did not reflect in any way on the merits of the petition."101 It acknowledged that Asia Investment successfully demonstrated to the trial court in the CEQA action all of the elements necessary to set up a defense of laches. Nevertheless, none of those elements demonstrated whether or not the city had complied with the requirements of CEQA.102

But, Asia argued, the laches decision did reflect the equitable merits of the underlying action. The court discounted this argument:

Even if this were so, such a reflection does not necessarily control the legal issues. For all that appears from the record, the Borowskis may have been correct in their allegations of CEQA violations, but as stated before, the trial court never reached those issues. The dismissal of the petition was for a reason not inconsistent with the 'guilt' of Asia or the city, and for that reason did not constitute a 'favorable termination' for purposes of a malicious prosecution action.103

Next, the court of appeals concluded that the trial court did not err in refusing to allow Asia to file an amended complaint alleging intentional interference with prospective business advantage, because no cause of action was or could be stated. The court found "Asia is unable to assert any business relationship with which there had been a tortious interference."104

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99. *Id.* at 837, 184 Cal. Rptr. at 321 (quoting Babb v. Superior Court, 3 Cal. 3d 841, 845, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 180 (1971)).
100. *Id.* at 837-38, 184 Cal. Rptr. at 321 (quoting Minasian v. Sapse, 80 Cal. App. 3d 823, 826, 145 Cal. Rptr. 829, 831 (1978)).
101. *Id.* at 838, 184 Cal. Rptr. at 321.
102. *Id.* at 839, 184 Cal. Rptr. at 321-22.
103. *Id.* at 839, 184 Cal. Rptr. at 322.
104. *Id.* at 840, 184 Cal. Rptr. at 323.
Finally, the court held that there was no cause of action for abuse of process, either. One essential element of such a cause of action is that the defendant must have an ulterior motive in using the process and must have used it in a wrongful manner. Merely carrying out the process to its authorized conclusion, even with malicious intentions, is not actionable.\(^{108}\)

Asia Investment sought to supply such an ulterior motive by pointing out that counsel for the Borowskis threatened off the record to use the CEQA case to coerce a settlement in the house case. The court's reply was succinct: "Perhaps so, but it was also a privileged statement."\(^{106}\) The court continued: "The privilege attaches even though the publication was made outside a courtroom, as many portions of a 'judicial proceeding' occur outside of open court."\(^{107}\)

Furthermore, the court noted, the statement at issue, even though it contained a threatening inference, bore a clear relation to the house case and the CEQA action and, as such, it was a settlement proposal.\(^{108}\) Thus, the court concluded:

> Even considering the settlement proposal was made in a manner which might be considered a veiled 'threat' we recognize this type of language is part of the adversary system, and, as such, is to be anticipated in the course of 'heated battle' between adverse parties to proceedings considered to be within the context of 'judicial proceedings'.\(^{108}\)

In the following sections, other defenses which are available to some of the most common intimidation causes of action are discussed.

**B. Malicious Prosecution**

Courts frequently state that actions for malicious prosecution

\(^{105}\) Id. at 842, 184 Cal. Rptr. at 324.

\(^{106}\) Id.

\(^{107}\) Id.

\(^{108}\) The court alluded to the point that "there is an element of coercion present in every lawsuit." Borowski, 133 Cal. App. 3d at 843 n.7, 184 Cal. Rptr. at 324 n.7.

\(^{109}\) Id. at 843, 184 Cal. Rptr. at 325. As pointed out above, the California Supreme Court has questioned the exclusion of settlement proposals as evidence of malice pursuant to civil code section 47(2). Oren, 42 Cal. 3d at 1168, 728 P.2d at 1209, 232 Cal. Rptr. at 574. But the same opinion also furnishes an additional defense to a cause of action for abuse of process. The court pointed out that "the mere filing or maintenance of a lawsuit — even for an improper purpose — is not a proper basis for an abuse of process action." Id. at 1169, 728 P.2d at 1209, 232 Cal. Rptr. at 574 (The court intimated that such an allegation may give rise to a cause of action for malicious prosecution). Id. at 1169-70, 728 P.2d at 1210, 232 Cal. Rptr. at 575-76.
A plaintiff in a malicious prosecution suit must make three showings concerning the prior action:

1. It was commenced by or at the direction of the defendant and was pursued to a favorable termination;
2. It was brought without probable cause;
3. It was initiated with malice.\textsuperscript{111}

Each of these three elements is strictly construed against the plaintiff. First, as noted above, the favorable termination requirement is satisfied only by a decision on the merits. Dismissal on technical grounds such as collateral estoppel or laches is insufficient. Furthermore, if the defendant prevailed on even one of numerous causes of action in the prior suit, a cause of action for malicious prosecution will not lie. This is true even if the defendant ultimately lost on that single issue upon remand.\textsuperscript{112}

Defendants in malicious prosecution actions have probable cause to bring suit if they have consulted a lawyer in good faith, have disclosed all of the facts to him or her, have been advised by the lawyer that a valid cause of action exists, and have honestly acted upon the advice of counsel.\textsuperscript{118} Reliance on the advice of an attorney incontrovertibly establishes probable cause, no matter how erroneous that advice may be.\textsuperscript{114}

In Tool Research & Engineering Corp. v. Henigson,\textsuperscript{118} for example, plaintiffs argued that attorneys are required to weigh the evidence for and against clients and to proceed with representation only if they are convinced that the trier of fact would accept the evidence in favor of the cause represented. The court rejected this contention, stating that an attorney is not a guarantor to his client’s adversary that his client will prevail. An attorney need only have a reasonable

\textsuperscript{110} As the court of appeals noted:

\begin{quote}
[T]he bare allegation of want of probable cause contained in the complaint is not a sufficient allegation . . . Averments of conspiracy and of the knowledge of the falsity of the charge and the sprinkling of the complaint with vituperative epithets such as, 'wickedly, and with studied care and protracted deliberation' are not allegations of fraud.
\end{quote}


\textsuperscript{111} \textit{Oren}, 42 Cal. 3d at 1169, 728 P.2d at 1209, 232 Cal. Rptr. at 575.


\textsuperscript{115} 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).
and honest belief that the client has a tenable claim.

Defendants in a malicious prosecution action are exonerated if they acted reasonably on the basis of the facts which were actually known to them at the time they instituted the suit. Malice within the context of a malicious prosecution action exists when the proceedings are instituted "primarily for an improper purpose." The California Supreme Court recognizes four principal situations in which an improper purpose may be presumed:

1. The plaintiff does not believe his claim may be held valid;
2. The proceedings are instituted primarily because of hostility or ill will;
3. The proceedings are initiated solely for the purpose of depriving the defendant of the beneficial use of his property;
4. The proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claims.

Plaintiffs in malicious prosecution actions encounter difficulties in establishing actual malice. Many of the techniques they typically attempt to use for this purpose are unlawful. For example, they may attempt to show that a particular public interest group has repeatedly tried to stop other projects in the past. This type of evidence is barred by case law and Evidence Code section 1101(a). Furthermore, the plaintiff may not show malice by relying on statements and actions which occur after the case is filed. Often, plaintiffs in malicious prosecution actions file declarations stating that they are familiar with the improper tactics of the defendant and believe that the prior action was motivated by ill will. This kind of statement is also not cognizable by the court.

117. Albertson, 46 Cal. 2d at 383, 295 P.2d at 411.
118. Id.
119. See Larson v. Larsen which states: "It is a fundamental rule of evidence that you cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances. Such evidence is simply not relevant. . . ." 72 Cal. App. 169, 172, 236 P. 979, 981 (1925).
120. CAL. EVID. CODE § 1101(a) (West 1987).
A second tort invoked in intimidation suits is abuse of process. The essence of this tort is the use of legal process "to accomplish a purpose for which it is not designed." Two elements must be established: first, an ulterior purpose; and second, "a willful act in the use of the process not proper in the regular conduct of the proceeding." 

Carrying out the legal process to its authorized conclusion, even with bad intentions, is not sufficient to establish a cause of action for abuse of process. Instead, the plaintiff must demonstrate that the defendant used the process as a form of coercion "to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion. . . ." The court in Younger v. Solomon reiterated this idea, stating that "mere vexation or harassment are not recognized as objectives sufficient to give rise to the tort." 

Plaintiffs in an abuse of process action must show that the collateral advantage supposedly obtained by the defendant in the prior suit was substantial. Twyford v. Twyford is illustrative. In that divorce case, the wife filed a request for admission which suggested that the husband forged her signature on a check. The court ruled that no abuse of process existed since "any collateral advantage gained from suggesting that husband forged a signature and cashed the joint income tax refund check, if it exists at all, is de minimus. . . . The possibility of a prosecution for forgery in a normal marital case is virtually non existent."

Thus, in the typical intimidation suit, the plaintiff is unable to show that the public interest defendant sought a collateral advantage in the prior suit. This is so because the interests the defendant attempts to advance belong to the public at large; they are not for personal gain. Furthermore, the objective of stopping a development project is not collateral in a public interest lawsuit; it is the principal remedy sought.

124. Id. at 232, 317 P.2d at 626-27.
125. Id. at 232-33, 317 P.2d at 627.
127. Id. at 297, 113 Cal. Rptr. at 118.
129. Id. at 923-24, 134 Cal. Rptr. at 149.
D. Defamation

Another tort often asserted in intimidation suits is defamation. The courts are reluctant to sustain a defamation cause of action in the typical public interest case because of the danger of impinging on the first amendment right of free speech. Thus, they distinguish between statements of fact, which may be libelous, and statements of opinion, which enjoy absolute constitutional protection. The question of whether an allegedly defamatory statement constitutes fact or opinion is one of law. Although the distinction may be difficult:

[W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

On this basis, the courts have determined that many harsh accusations are not actionable. These include statements that a developer entered into a corrupt relationship with a city councilman; allegations that a city councilman engaged in “chicanery and machinations” and that his conduct was “recalcitrant” and merited “in-

130. As the California Supreme Court noted in Gregory v. McDonnell Douglas Corp.: An essential element of libel . . . is that the publication in question must contain a false statement of fact . . . . This requirement . . . is constitutionally based. The reason for the rule, well stated by the high court, is that 'under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'

131. Id. at 601. See also Okun v. Superior Court, 29 Cal. 3d 442, 450, 629 P.2d 1369, 1374, 175 Cal. Rptr. 157, 162, cert. denied sub nom., Maple Properties v. Superior Court, 454 U.S. 1099 (1981). However, if an allegedly libelous remark “could have been understood by the average reader in either sense, the issue must be left to the jury’s determination.” Good Gov’t Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 682, 586 P.2d 572, 576, 150 Cal. Rptr. 258, 262 (1978). But even in this situation, the California Supreme Court adopts a very strict test to meet the requirement of actual malice set forth in New York Times Co. v. Sullivan. 376 U.S. 254 (1964). The jury must also find that the ambiguous words:

[Were] reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory impact to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact.

132. Gregory, 17 Cal. 3d at 601, 552 P.2d at 428, 131 Cal. Rptr. at 644.

133. Okun, 29 Cal. 3d at 459, 629 P.2d at 1379, 175 Cal. Rptr. at 167.
famy," and another that a city manager was supposedly not "dedicated to efficiently and honestly administer the affairs of the city."

Two general guidelines on the fact/opinion dichotomy are helpful to public interest defendants. First, "statements occurring in the course of a public debate are usually accorded the status of an opinion." Second, "almost all, if not all, statements concerning the effect or application of an initiative can only be the opinion of the interpreter, and the voting public is generally aware of this." Presumably, the same guideline applies to the effect or application of any statute, ordinance, or rule.

Another first amendment protection afforded to public interest defamation defendants was noted by the California Supreme Court in Okun v. Superior Court. There, the court extended the "leeway for criticism of an individual who voluntarily injects himself or herself into public controversy and so becomes a 'public figure'" to include a developer who seeks a permit from a public body.

In Okun, the court sustained demurrers to all the causes of action except the last, which alleged a conspiracy to commit slander. On remand, the plaintiff unsuccessfully attempted to amend its cause of action for conspiracy and slander. The court of appeals refused leave to allow the plaintiff yet another attempt to state a good cause of action, noting that expeditious resolution of cases is warranted.

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134. Good Gov't, 22 Cal. 3d at 678, 586 P.2d at 574, 150 Cal. Rptr. at 260.
141. 29 Cal. 3d at 460, 629 P.2d at 1380, 175 Cal. Rptr. at 168. Justice Mosk wrote a spirited partial dissent from this ruling on behalf of three justices, arguing that the case should not be further prolonged:

[T]here comes a time when the finality of litigation is almost as important as the decision therein. In the preservation of the free exercise of speech, writing and the political function, the early termination of this lawsuit is highly desirable. We should discourage attempts to recover through the judicial process what has been lost in the political process.

Id. at 461, 629 P.2d at 1381, 175 Cal. Rptr. at 169.
when first amendment rights are in danger of being chilled.\textsuperscript{142}

E. Conspiracy

Plaintiffs in intimidation suits usually include a cause of action for civil conspiracy. It is not a serious problem because its only significance is to make all defendants joint tortfeasors.\textsuperscript{143} A cause of action for civil conspiracy does not survive if there are no other viable causes of action based on other torts.\textsuperscript{144} It should also be noted that an allegation of civil conspiracy does not defeat the privilege of Civil Code section 47(2).\textsuperscript{145}

VIII. Remedies for Intimidation Defendants are Inadequate

As discussed in the previous section, although the defendant in an intimidation suit is almost certain to prevail, the cost is apt to be high. Unfortunately, under the present state of the law, there is little to deter developers from bringing such suits. A brief review of the possible counter-measures now available to public interest groups illustrates this difficult situation.

A. Counter-suit for Malicious Prosecution

At first glance it appears that public interest litigants, after triumphing in an intimidation suit, could then sue developers for malicious prosecution. There are, however, serious practical and legal obstacles connected with this course of action. The most blatant problem is that it means yet another round of litigation, with its attendant anxieties. The potential public-interest litigant must provide resources to pay an attorney to bring such a suit or to find one willing to take on a lengthy, bitter fight on a contingency basis. Few lawyers are eager to accept such a challenge in view of the extreme difficulty involved in winning a malicious prosecution case.

It is true that the first amendment constitutional defense is not available to the developer, since filing an intimidation suit does not constitute petitioning a government agency. It is also true that the developer might find it hard to establish probable cause based on


\textsuperscript{143} See 4 \textit{Witkin \textbf{SUMMARY OF CALIFORNIA LAW, TORTS} \$ 31 (8th ed. 1973).}

\textsuperscript{144} Okun, 29 Cal. 3d at 454, 629 P.2d at 1376, 175 Cal. Rptr. at 164.

\textsuperscript{145} Pettitt, 28 Cal. App. 3d at 489-90, 104 Cal. Rptr. at 653.
advice of counsel since the defendant in a malicious prosecution action always has the burden of proving this defense. The developer may also have difficulty satisfying the requirement that "advice of counsel must be sought in good faith and not as a mere cloak to protect one against a suit for malicious prosecution or to refute the theory of malice." Furthermore, in order to establish such a defense, the developer would have to waive the attorney-client privilege, thus subjecting his good faith to close scrutiny.

Additionally, it is possible to assert a cause of action against the developer's attorney, as well as his client. To succeed, the plaintiff must show that "a prudent attorney, after such investigation of the facts and research of the law as the circumstances reasonably warrant, would have considered the action to be tenable on the theory advanced." But when all factors are considered, malicious prosecution suits are very hard to win and the trauma of having to go through yet another lawsuit is likely to dishearten all but the most fervent seekers of justice.

B. Attorneys Fees

One potentially powerful means of securing recompense to the public interest defendant in an intimidation suit is to require the losing plaintiff to pay his opponent's attorneys fees. Under the traditional American rule, the prevailing party in litigation is not entitled to collect his attorneys fees from the loser. Gradually, in conjunction with the rise of public interest litigation, the courts carved out an exception for cases in which the plaintiff served the common good by acting as a private attorney general. The California Supreme Court explained that the doctrine:

[R]ests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions and that, without some mechanism authorizing the award of attorneys fees, private actions to enforce such important policies will as a practical matter frequently be infeasible.\(^{162}\)

The federal system rejects the common-law basis for fee awards; fees are granted only when they are specifically authorized by statute.\(^{163}\) The Supreme Court notes that at least seventeen such federal statutes exist.\(^{164}\) In California, the “private attorney general” theory is now codified in Civil Procedure Code section 1021.5,\(^{165}\) although the common-law power of courts to award attorneys fees still exists.

The moving party’s eligibility for an award under section 1021.5 is determined by three factors: (1) whether important rights are vindicated; (2) whether the general public or a large class of persons benefited; and (3) whether the necessity and financial burden of private enforcement make an award appropriate.\(^{166}\) Defendants in an intimidation suit may meet the requirements of the statute with respect to the first two showings, since the courts allow fee awards against private parties, as well as governmental entities, when the claimant vindicates important public policies.\(^{167}\) Furthermore, under certain circumstances, fees are awarded to defendants, as well as plaintiffs.\(^{168}\)

The third prong of this test, however, presents a formidable obstacle. The party seeking fees must show that “the cost of the claimant’s legal victory transcends his personal interest. . . .” and his burden is “out of proportion to his individual stake in the matter.”\(^{169}\) A defendant in an intimidation suit would encounter difficulties in

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152. Woodland, 23 Cal. 3d at 933, 593 P.2d at 208, 154 Cal. Rptr. at 511.
153. Alyeska, 421 U.S. at 262.
155. CAL. CIV. PROC. CODE § 1021.5 (West 1986); see also Folsom v. Butte County Ass’n of Gov’ts, 32 Cal. 3d 668, 682, 652 P.2d 437, 447, 186 Cal. Rptr. 589, 599 (1982).
156. One additional statutory requirement, that “such fees should not in the interest of justice be paid out of the recovery, if any,” is largely inapplicable to public interest litigation, in which the plaintiff usually seeks injunctive or declaratory relief, rather than money damages. CAL. CIV. PROC. CODE § 1021.5 (West 1986).
159. Inyo County v. City of Los Angeles, 78 Cal. App. 3d 82, 89, 144 Cal. Rptr. 71, 76 (1978).
meeting this requirement. Rather, the plaintiff could argue that the defendant, faced with the possibility of a large adverse judgment, would be litigating to serve "pressing needs of his own" and "any public value derived from the result obtained was . . . wholly coincidental to the attainment of [his] personal goals."  

Two environmental cases illustrate the general problem surrounding the third part of the statutory test. In Schwartz v. City of Rosemead, the plaintiff succeeded in halting the construction of a large co-generation plant next to his property because of a failure to comply with CEQA. He then sought attorneys fees under Civil Procedure Code section 1021.5. The court denied the application for two reasons. First, the plaintiff also filed a cause of action for private nuisance, thus demonstrating that his primary motive was to protect his own land, rather than the public interest. Second, the plaintiff sought $22,000 in fees, but previously stated that construction of the plant would diminish his property's value by $100,000. Thus, his attorneys fees clearly did not "transcend his personal interests."  

In Beach Colony II v. California Coastal Commission, the plaintiff, a partnership formed to develop a beachfront tract, successfully challenged a ruling by the California Coastal Commission. The Commission determined that the partnership would have to transfer a portion of its property to the public in exchange for a permit to restore the land to its original contours, after avulsive wave action swept away a portion of the tract. The court noted that the plaintiff's victory saved it $300,000 in off-site improvement costs. Thus, the court observed, "[t]he public benefit from the lawsuit was wholly coincidental to Colony II's profit-making goals." The plaintiffs' strong economic interest in the suit violated the policy of section 1021.5.  

Of course, these cases did not deal with fees for defendants, who are not trying to gain from litigation. The only decision applying Civil Procedure Code section 1021.5 to a claim for fees by defendants so far is San Luis Obispo County v. Abalone Alliance. In this case, members of several environmental groups attempted to
halt construction of the Diablo Canyon nuclear power plant by blocking access roads to workers. Several pro-nuclear groups sued the environmental organizations and three of their members, alleging that the increased costs to the utility occasioned by the blockade would be passed on to them in the form of higher rates. The county of San Luis Obispo sued to collect police costs incurred during the blockade. The court of appeals quickly disposed of the case on the merits, noting that public agencies may not sue for police costs.168 The court also stated that the plaintiffs improperly sought to recover for damages to a third party—the utility—and, in any event, lacked standing.169

The defendants then moved for fees under section 1021.5. The court held that the statute did not preclude an award of fees to defendants if the necessary showings were demonstrated.170 It upheld as reasonable the trial court’s finding that the defendants conferred a significant benefit on a large class of people by helping to preserve the fundamental right to protest.171

The key question was whether the defendants satisfied the financial burden requirement. The court found that they did:

Similarly, the motivation for defending this lawsuit cannot reasonably be attributed exclusively to a desire by defendants to protect their own pocketbooks. This is not a garden variety damage suit. Just a few weeks after filing suit, plaintiffs moved for a preliminary injunction to prevent defendant Abalone Alliance from planning or conducting any future blockades of Diablo Canyon. If respondents had been interested solely in avoiding pecuniary loss, they could readily have agreed to an injunction. Instead, by vigorously resisting appellants’ motion, they indicated their goals were not merely financial.

The file shows that defendants are anti-nuclear and environmental activists concerned with a political goal—'the termination of the Diablo Canyon facility as a nuclear power plant.' Since defendants’ goal in litigating this suit transcends personal self-interests, the ‘financial burden’ criterion is met.172

Is the Abalone Alliance decision a useful precedent for other intimidation suits? Possibly, but the unique circumstances present in that case may serve to distinguish it from most other situations,

168. Id. at 858-59, 223 Cal. Rptr. at 851.
169. Id. at 862-64, 223 Cal. Rptr. at 853-54.
170. Id. at 869, 223 Cal. Rptr. at 858.
171. Id. at 867, 223 Cal. Rptr. at 857.
172. Id. at 868-69, 223 Cal. Rptr. at 857-58.
which are not so highly politicized. In the meantime, under the present state of the law, it is unwise for intimidation defendants to rely too heavily on extracting their fees from plaintiffs.

C. Sanctions

Both federal and state law authorize sanctions against parties and their attorneys for abusive tactics. California's Civil Procedure Code section 128.5(a) permits a court to award expenses, including attorneys fees, for actions which are frivolous or intended solely to cause unnecessary delay. Civil Procedure Code section 907 provides an analogous remedy for frivolous appeals. Federal Rules of Civil Procedure Rule 11 gives a judge similar powers to award sanctions against attorneys.

The California Supreme Court construes the sanctions power strictly. In In re Marriage of Flaherty the court indicated that sanctions are proper only when a case or appeal "is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment— or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." Despite the existence of this strict standard, the California courts awarded sanctions in a number of situations.

One recent case shows how sanctions are effectively used in the context of a retaliation suit. In Vaccaro v. Stephens, plaintiff was

174. Defined as "totally and completely without merit or for the sole purpose of harassing an opposing party." Id.
175. CAL. CODE CIV. PROC. § 907 (West 1980).
176. FED. R. CIV. P. 11.
177. 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982).
178. Id. at 650, 646 P.2d at 187, 183 Cal. Rptr. at 516.
179. See, e.g., Maple Properties v. Harris, 158 Cal. App. 3d 997, 205 Cal. Rptr. 532 (1984) (sanctions against attorneys who filed a second appeal on issues which had previously been considered and rejected in an earlier appeal); M.E. Gray Co. v. Gray, 163 Cal. App. 3d 1025, 210 Cal. Rptr. 285 (1985) (sanctions against law firm which filed a motion to dismiss for failure to prosecute after court had granted its motion to continue the trial; additional sanctions awarded for frivolous appeal); Karwasky v. Zachay, 146 Cal. App. 3d 679, 194 Cal. Rptr. 292 (1983) (sanctions against law firm for bringing motion without presenting any evidence or authorities); Hummel v. First Nat'l Bank, 191 Cal. App. 3d 489, 236 Cal. Rptr. 449 (1987) (sanctions against party and law firm for filing an appeal which rehashed issues raised on prior appeal, attempted to seek review of a non-appealable order, included a voluminous, irrelevant record, and ignored the existence of the only evidence in the record on the subject, which disproved appellant's case).
a passenger on a transcontinental airline flight. She attempted to use the bathroom in the first class section when defendant, a first class passenger, yelled at her, shoved her away from the bathroom, and used the facilities before her. Plaintiff later sued for assault and battery, slander, intentional infliction of emotional distress, and negligence.

The defendant counter-sued for wrongful arrest and added a counter-claim for trespass. Before trial, the court granted plaintiff's motion to dismiss the trespass claim, ruling that the counter-claim was frivolous because it was not made in good faith or based on existing law. The court awarded sanctions of almost $5,000 against defendant's lawyers.\(^{181}\)

Thus, the availability of sanctions offers some possibility of deterrence for the most ludicrous intimidation suits. However, the strict requirements imposed by the courts before sanctions are granted mean that they are rarely available. Furthermore, the typical sanction award is a relatively minimal amount and is usually imposed against an attorney, rather than his client. Thus, a determined developer is not likely to be discouraged from filing a retaliation suit by the remote possibility of sanctions. A more effective remedy is required.

IX. Two Suggested Changes to Discourage Intimidation Suits

As previously discussed, defendants in intimidation suits possess no truly effective means to retaliate against developer-plaintiffs who attempt to punish them or frighten them away from further public-spirited activity. Under the present state of the law, such a defendant is forced to pay his or her own attorney and, for all practical purposes, does not have a viable means of seeking retribution. This problem could be remedied if the current law were changed to accommodate the victims of intimidation suits. Two such changes might prove useful.

A. Permit Immediate Cross-claim for Malicious Prosecution

A counter-suit for malicious prosecution is not an attractive remedy, since it requires the institution and maintenance of a new round of litigation. This is so because in \textit{Babb v. Superior Court},\(^{182}\)

\footnotesize
\(^{181}\) Id.
\(^{182}\) 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971).
the California Supreme Court ruled that a defendant cannot prosecute a cross-complaint or counter-claim for malicious prosecution until the first or main action is terminated. In Babb, the doctor-defendant in a medical malpractice suit sought to file a cross-complaint. The declaration stated that if he should prevail, the case was instituted and prosecuted maliciously and thus, he should be awarded costs and fees.

The court cited three reasons why the cross-complaint for malicious prosecution was disallowed. First, there was the "metaphysical difficulty" that the cause of action does not exist until the previous suit is terminated. "Were we to entertain a cross-action for malicious prosecution, we would create the incongruous situation of such an action being filed long before the statute of limitations begins to run."\(^{183}\)

Second, the court found that considerations of "practical judicial administration" worked against the cross-claim. There might be inconsistent judgments, since the declaratory relief causes of action are tried by a judge, while the jury decides the malpractice suit. Furthermore, requiring termination of the underlying suit could eliminate unnecessary litigation, since the defendant would not file a malicious prosecution suit if he lost the main case. Also, the favorable termination requirement facilitates a speedy and orderly trial, because the other elements of malicious prosecution (malice and lack of probable cause) "are substantially easier to determine with the record of the underlying action available as evidence."\(^{184}\)

Finally, the court cited strong policy considerations which dictated against allowing a cross-complaint for malicious prosecution. It noted that the law disfavors this type of action. Furthermore, evidence on the issues of malice and probable cause might prejudice the trier of fact against the plaintiff's underlying complaint. In addition, the attorney for the plaintiff might be joined as a cross-defendant in the malicious prosecution action, which could place him in a position adverse to his client and might also necessitate the client's hiring separate counsel to pursue the original claim.

Much of this reasoning is inapplicable or is overcome by other policy considerations in an intimidation suit. First, the "metaphysical difficulty" of allowing a cause of action for malicious prosecution before the statute of limitations begins to run is not so acute in the public interest field. Typically, environmental and other public inter-
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Most cases are cast in the form of actions for injunction to prevent unlawful activity before it has even commenced. And, of course, the purpose of a statute of limitations is to provide repose, and to prevent the assertion of stale claims. Those objectives are served by allowing malicious prosecution cases to be decided at the same time as the underlying case. The cross-defendant would know immediately that he was subject to suit; the evidence would be as fresh as possible, since it would be gathered in the course of a single lawsuit. Thus, the incongruity of allowing a cross-action for malicious prosecution is not really so great. In any event, bifurcating the trial, with the cross-claim tried only after the successful conclusion of the primary case, eliminates the statute of limitations objection, since the statute begins to run as soon as the plaintiff loses.

Second, the problems of “practical judicial administration” cited by the Babb opinion do not pose an insuperable barrier. The danger of inconsistent judgments is eliminated if the underlying claim and the cross-claim are decided before the same trier of fact. Furthermore, a convincing argument exists that dealing with the malicious prosecution claim as a cross-complaint actually reduces the amount of litigation necessary, since only one case, rather than two, would need to be filed. This, in turn, means that discovery, preliminary motions, etc. take place only once, rather than in two different pieces of litigation. Also, bifurcating the trial, as suggested above, allows the judge to prevent the jury from hearing any potentially prejudicial evidence until the main case is concluded.

Finally, the strong policy considerations which govern the normal case simply do not apply to a cross-complaint for malicious prosecution in an intimidation suit. In that situation, public policy weighs in favor of encouraging the activities of the defendant, while discouraging the intimidation plaintiff.

In short, the traditional reasons assigned to the courts’ refusal to countenance a cross-complaint for malicious prosecution are inapplicable to intimidation suits. Therefore, such cross-complaints should be permitted where the plaintiff complains about public-interest activities of the defendant. A court could determine whether the defendant, in fact, acted in the public interest by applying a test based on the factors set forth in California’s Code of Civil Procedure section 1021.5, described above. That is, if the defendant: (1) was

185. 3 WITKIN, CALIFORNIA PROCEDURE, Actions, § 309 (3d ed. 1985).
186. Indeed, in Babb v. Superior Court, the court concedes this point. 3 Cal. 3d 841, 847 n.3, 479 P.2d 379, 382 n.3, 92 Cal. Rptr. 179, 182 n.3 (1971).
187. CAL. CODE CIV. PROC. § 1021.5 (West 1980)
trying to effectuate an important right affecting the public interest which; (2) would confer a significant benefit on the general public or a large class of persons; and if (3) the necessity and financial burden of private enforcement were such that the public-interest party would be entitled to fees if he prevailed, then the public-interest defendant would be allowed to file a cross-claim for malicious prosecution.

B. Authorize Attorneys Fees Under Civil Procedure Code Section 1021.5

As noted above, fees are typically awarded under section 1021.5 only to plaintiffs, with the Abalone Alliance case standing as the one exception.\(^{188}\) Judges are unaccustomed to the concept of granting fees to defendants who perform a public service. Accordingly, the statute should be amended so as to provide specific authorization to allow courts to award fees to public interest defendants.

In addition, in determining whether private enforcement is necessary and financially burdensome, thus compelling a financial reward, courts should discount the potential economic loss to defendants as a reason to deny fees. Instead, they should focus on whether the defendant sought to advance the public's, rather than his own private interest, in the underlying action. If so, and if the defendant's prior activities met the other criteria of section 1021.5, then defendants should be entitled to fees if they prevail in an intimidation suit.

X. CONCLUSION

Intimidation suits are a classic example of an abuse of the judicial system. By means of unjustified litigation, resource-users seek to squelch the guardians of the public interest, who already operate at a huge disadvantage due to the harsh economic and political realities of our system. The present system does nothing to discourage this tactic. Win or lose, the plaintiff in an intimidation suit achieves his objective. If society wishes to continue to reap the benefits of the watchdog activities of public-interest groups, it must provide them with protection against unwarranted litigation.

The reforms advocated in this article would cause potential users of intimidation tactics to hesitate before employing them. If they knew that the same trier of fact that rejected their activities could express its disapproval by means of a large judgment on a

counter-claim, they might reconsider their choice to institute litigation. Furthermore, if they also risked paying the defendants’ legal fees as well as their own, an additional note of caution will be added. The public will be well served by the imposition of these restraints.