IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

CIV. NO. B106304

THE DOWNEY VENTURE,

Plaintiff-Appellant

v.

LMI INSURANCE COMPANY,

Defendant-Respondent.

Superior Court Case No. BC 125733
Honorable Ricardo A. Torres, Judge

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT THE DOWNEY VENTURE

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United Policyholders

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Amicus curiae United Policyholders, through their undersigned counsel, hereby submit this Amicus curiae brief in support of The Downey Venture's appeal of the Superior Court decision precluding indemnity coverage for an underlying malicious prosecution claim.

INTEREST OF AMICUS CURIAE

Amicus curiae United Policyholders ("United Policyholders" or "Amicus curiae") is a non-profit corporation dedicated to educating the public about the rights and duties of insurance policyholders in the claims process. United Policyholders' activities include organizing meetings, distributing written materials, and responding to requests for information from individuals, elected officials, and government entities. These activities are limited only to the extent that United Policyholders is primarily supported by donated labor and contributions of services and funds.

Amicus curiae has a vital interest in seeing that the standard form liability insurance policies sold to countless policyholders are interpreted consistently and fairly by insurance companies and the courts. As a public interest organization, United Policyholders seeks to educate the public, including judicial and legislative bodies, on policyholders' insurance rights, and to see those rights consistently enforced. Thus, United Policyholders has a direct and vital interest in the resolution of the issue of the scope of Insurance Code section 533 and Civil Code section 1668 regarding indemnity coverage for malicious prosecution under the personal injury provision of standard-form CGL insurance policies in California.

STATEMENT OF THE CASE

Amicus curiae relies on the Statement of Issues of Plaintiff-Appellant The Downey Venture set forth in Plaintiff-Appellant's Opening Brief. United

Policyholders responds to the issues set forth by the Court in its October 28, 1997 letter.

SUMMARY OF ARGUMENT

Insurance Code section 533 and Civil Code section 1668 do not preclude defense and indemnity coverage for the so-called "intentional" torts, including malicious prosecution at issue herein. These types of "intentional" torts have been the subject of insurance under standard form comprehensive general liability ("CGL") personal injury coverage for decades. The "malice" contemplated by the tort of malicious prosecution does not rise to the level of "wilful act" or "wilful injury" contemplated by the statutes. Furthermore, precluding indemnity coverage for such "intentional" torts will potentially have far-reaching consequences and deprive deserving policyholders of insurance coverage for other torts. Sections 533 and 1668 are appropriately aimed at truly intentional wrongdoing, where there is a preconceived design to inflict a specific injury or harm. The sections should not be applied to preclude indemnity coverage for malicious prosecution claims.

ARGUMENT

I. SECTIONS 533 AND 1668 DO NOT PRECLUDE THE DUTY TO DEFEND INTENTIONAL TORTS, EVEN WHERE INDEMNIFICATION IS PRECLUDED UNDER THESE SECTIONS.

This appeal involves two separate aspects, whether section 533 of the Insurance Code and section 1668 of the Civil Code preclude an insurance company from providing indemnification of intentional torts such as malicious prosecution and whether these sections preclude an insurance company from providing a defense for allegations of intentional torts such as malicious prosecution. In this case, Defendant LMI sold Downey Venture insurance coverage for the defense and indemnification of a wide variety of intentional torts:

1. False arrest, detention or imprisonment;
2. Malicious prosecution;

3. Wrongful entry into, or eviction of a person from, a room, dwelling or permises that the person occupies;

4. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or

5. Oral or written publication of material that violates a person's right of privacy. ...

There is no question that the language of the insurance policy at issue required LMI to defend the malicious prosecution allegations below. However, when Downey Venture presented, for a second time, the malicious prosecution claim to LMI for a defense, LMI issued a reservation of rights letter in which LMI asserted that the coverage it promised Downey Venture was actually precluded under sections 533 and 1668; thus, LMI had no duty to defend the malicious prosecution claim! LMI's reservation of rights was wrongful in this respect. California law is clear that the sections upon which LMI relies do not preclude the provision of a defense for intentional torts, even if those torts are precluded from insurance coverage, i.e. indemnification, under these sections:

> [C]ourts cannot allow legal reasoning to yield to emotionalism when determining the extent of an insurance carrier's defense duty. **It is important to remember that no public policy forbids the defense of claims alleging intentional acts.** As we said in Gray, "the statutes forbid only contracts **which indemnify for 'loss' or 'responsibility' resulting from wilful wrongdoing.** ... [A]s we pointed out in Tomerlin v. Canadian Indemnity Co., (1964) 61 Cal.2d 638, 648 [39 Cal.Rptr. 731, 394 P.2d 571], the statutes 'establish a public policy to prevent insurance coverage from encouragement of wilful tort.' . . . [A] contract to defend an assured upon mere accusation of a wilful tort does not encourage such wilful conduct." (Gray, supra, 65 Cal.2d at pp. 277-278 ...)

Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1087 (1993) (first deletion, bolding and bracket supplied; subsequent deletions and brackets in original).[1] LMI had a clear duty to defend the malicious prosecution action and its reservation of rights was wrongful.

A claim for malicious prosecution can be brought in circumstances where there was good faith in bringing the underlying litigation but where a single

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1. Amicus curiae's research failed to discover any case that specifically interpreted section 533 or 1668 in a malicious prosecution case in the civil context. An early case, Maxon v. Security Ins. Co. of New Haven Conn., had held that section 533 forbids indemnification or defense of a claim of malicious prosecution based upon an unlawful arrest. 214 Cal. App. 2d 603, 617 (1963). Maxon is a case that has been rarely referred to in the thirty-odd years since it was decided.

One curious reference to Maxon appears in Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (1966). In footnote 15, in dicta in a footnote dealing with the insurance company's duty to defend under its policy, the Supreme Court noted:

> [T]he obligation to defend does not mature if the policy was not in force at the time of the alleged occurrence ... or if the nature of the alleged intentional tort compels a finding of intentional wrongdoing such as malicious prosecution. (Maxon v. Security Ins. Co. (1963) 214 Cal.App.2d 603.

Id. at 276 n.15. Importantly, this observation was made before the Court began its discussion of Insurance Code section 533 and Civil Code section 1668. See, Id. at 277. In that discussion, the Supreme Court made it clear that neither section 533 or 1668 preclude insurance coverage for the defense of an intentional tort, where, as here, the insurance policy provides insurance coverage for such defense. Id. at 278 ("[A] contract to defend an assured upon mere accusation of a wilful tort does not encourage ... wilful conduct."). Whatever the Supreme Court's purpose in its dicta discussion of Maxon, it could not have cited it for the proposition that sections 533 or 1668 preclude insurance coverage for the defense of an intentional tort as its subsequent holding was directly contrary to that proposition.

Finally, Maxon is incorrectly decided under Horace Mann, as well as inapposite as it applies to malicious prosecution in a false arrest setting, one fundamentally different than that at issue herein.

count or claim in the underlying claim was unreasonably pleaded. See, Crowley v. Katleman, 8 Cal. 4th 666, 679 (1994).

II. THE MALICE ELEMENT OF THE TORT OF MALICIOUS PROSECUTION DOES NOT EQUATE WITH "WILFUL ACT" OR "WILFUL INJURY" AS THOSE TERMS ARE USED IN SECTIONS 533 AND 1668

The elements necessary for a plaintiff to establish a cause of action for malicious prosecution are that the action in question:

> (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations omitted]: (2) was brought without probable cause [citations omitted]; and (3) was initiated with malice [citations omitted].

Bertero v. National General Corp., 13 Cal. 3d 43, 50 (1974). The intent of sections 533 and 1668 is to preclude insurance coverage for injuries or damages where those injuries are intended by the policyholder. See Melugin v. Zurich Canada, 50 Cal. App. 4th 658, 665 (1996) (section 533 bars coverage only for an alleged act which is inherently harmful, intentional, and willful.). Because the public policy requires actual intent to cause the specific injury or damage, even reckless conduct with a high probability of harm will not result in the preclusion of insurance coverage under sections 533 and 1668. See, Jacobs v. Fire Ins. Exch., 36 Cal. App. 4th 1258, 1269 (1995) ("Section 533 does not bar coverage for injury incurred negligently or recklessly, though the injury may be said to result from a willful act as the term is commonly understood) (citing J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal. 3d at 1023 (1991); Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865 (1978).) As our Supreme Court has clearly stated, "where an act ... was done with conscious disregard of the rights or safety of others, the conduct is not wilful as contemplated by section 533." Peterson v. Superior Court, 31 Cal. 3d 147, 159

(1982) (coverage not precluded for allegations that, by driving drunk and at an excessive rate of speed, the defendant acted with knowledge that probable serious injury to others would result and in conscious disregard of the safley of others); see, also, J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal.3d 1009, 1021 (1991) ("section 533 does not preclude coverage for acts that are negligent or reckless"). In order to succeed under Section 533, "the insurance company must establish that the insured acted with intent to harm or that the insured committed an inherently wrongful act." Interinsurance Exch. v. Flores, 45 Cal. App. 4th 661, 672 (1996) (citing J.C. Penney Cas. Ins. Co. v. M.K., 52 Cal. 3d at pp. 1021-1027). As will be seen below, the malice element of the tort of malicious prosecution is satisfied under cirucumstances where the policyholder's conduct does not even arise to the level of reckless conduct and therefore insurance coverage is not precluded under sections 533 and 1668.

An action for malicious prosecution will succeed where the party "witholds from counsel facts he knew or **should have known would defeat a cause of action otherwise appearing from the information supplied....**" Bertero v. National General Corp., 13 Cal. 3d 43, 53-54 (1974) (citations omitted) (emphasis added). In Bertero, the Supreme Court permitted a malicious prosecution action to proceed where the defendant had "proceed[ed] on counts and theories which they know or should know are groundless." 13 Cal. 3d at 57. Malice "may range anywhere from open hostility to indifference." Grindle v. Lorbeer, 196 Cal. App. 3d 1461, 1465 (1987) (citations omitted). The California Supreme Court's handling of the malice requirement reveals that it may encompass liability that is premised upon lack of reasonability, rather than on the litigant's subjective intent to injure the underlying defendant. "The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant has acted in initiating the prior action, and past cases establish that the

defendant's motivation is a question of fact to be determined by the jury." Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 874 (1989) (citations omitted). In contrast, the element of probable cause is a matter of law to be determined by the court. Id., 47 Cal. 3d at 875 (citations omitted). Importantly, as will be seen, the resolution of the probable cause element is not dependent upon the subjective knowledge or intent of the litigant. Instead, the court applies objective criteria to determine whether the bringing of underlying action was "objectively reaonable." Id., 47 Cal. 3d at 878. If the institution of the underlying action fails to meet this "objectively reasonable" standard, then the litigant will be found to have lacked probable cause, regardless of its subjective knowledge and intent in asserting the court of action. Id.

In Sheldon Appel, the Supreme Court took pains to point out that the litigant's subjective belief that its cause of action is legally sufficient is irrelevant to the objective determination of the probable cause element. Id. at 879. Where the underlying facts known by the litigant do not objectively support a cause of action, lack of probable cause will be found even if the litigant or its counsel "subjectively believed that the ... claim was legally tenable." Id. at 881 (citations omitted).[2] Indeed, for the purposes of malicious prosecution, a lack of probable cause can be found even where the allegations of the cause of action survive a summary judgment motion. See Crowley, 8 Cal. 4th at 675 n.5. Once it is found that the defendant did not have probable cause under an objective standard, the jury can infer "malice" from the lack of probable cause. See, e.g., Crowley, (citing Leonardini v. Shell Oil Co., 216 Cal. App. 3d 547, 567 (1989). Thus, although the

2. The litigant's subjective belief that its claim was not legally tenable is not relevant to the determination of the probable cause element. It may be relevant to the determination of the malice element. Sheldon Appel, 47 Cal. 3d at 881-82. Similarly, the failure to perform adequate legal or factual research is not relevant to the probable cause element, but may be relevant to the malice element. Id. at 883.

"malice" element facially involves "the subjective intent or purpose with which the defendant has acted in initiating the prior action," 47 Cal. 3d at 874, it is well-established that the jury can establish that the existence of that subjective intent based upon nothing more than the fact that the cause of action was objectively without probable cause. This is true even though the defendant may have had a subjective, although incorrect belief, that its action was brought in good faith. Thus, in reality, liability for malicious prosecution can flow from nothing more than the fact that the defendant, regardless of actual motive, understanding, or intent, brought an action that was objectively legally insufficient.[3] Although the

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3. In this regard, the policy reasons behind the requirement that the probable cause element is normally a matter of law for the judge, not jury, to decide are instructive. As our Supreme Court has noted:

> The question whether, on a given set of facts, there was probable cause to institute an action requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors....

Sheldon Appel, 47 Cal.3d at 875. In most cases, one may presume that this sensitive evaluation of legal principles and precedents is also beyond the lay litigant as well. Because proof of lack of probable cause can support the inference of malice, the jury can find malice by inferring it from a lack of probable cause, the existence or non-existence of which is "generally beyond the ken of lay jurors...." Id. Furthermore, a "sensitive evaluation of legal principles and precedents" is, in most instances, also beyond the ken of the defendant, which relies upon its lawyer to determine whether or not there is probable cause. Thus, the "malice" element of the tort of malicious prosecution, is not identical to the intent to commit a "wilful injury".

Furthermore, the process in which a legally insufficient cause of action becomes asserted is fundamentally different from the traditional wrongful injury cases, such as where the actor intentionally sets a wrongful fire or intentionally shoots someone else. These are acts which, in most cases, it is hard to say that there was no intent to commit harm. When the arsonist sets a fire, he or she knows that the fire will cause damage or injury. When someone points a loaded gun at someone and intentionally pulls a trigger, he or she knows that that person or someone else in the near vicinity will be injured.

Liability for malicious prosecution is much more complex. When the malicious prosecution defendant brings the underlying litigation, typically all that the defedant knows is some, but not necessarily all, of the pertinent facts. The defendant relies upon

(continued...)

cases state that "the malice element is directly concerned with the subjective mental state of the defendant in instituting the prior action," Sheldon Appel, 47 Cal. 3d at 878, the jury can find malice from the simple fact that the defendant's cause of action was objectively, not subjectively, legally insufficient. Indeed, the defendant's belief of the legal merits of the claim is not relevant to the probable cause issue. Id. at 47 Cal. 3d at 879. As our Supreme Court has stated with respect to the probable cause determination, "[t]he question is not whether [the defendant] thought the facts to constitute probable cause, buth whether the court thinks they did." Sheldon Appel, 47 Cal. 3d at 881 (quoting Director General v. Kastenbaum, 263 U.S. 25, 27-28 (1923).

Given these sets of circumstances, it is clear that the public policy behind sections 533 and 1668, avoiding the encouragement of intentional wrongdoing, see Sheldon Appel, at 873, is not well-suited to malicious prosecution suits. Certainly, depriving litigants of insurance coverage for malicious prosecution claims is unlikely to disuade litigants from filing such claims were the liability for

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3.(...continued)
a lawyer to draft the pleading. The average defendant is not trained in the law and would not know whether the facts support a viable cause of action, what the required elements of a particular cause of action are, or whether the causes of action set forth in a complaint are viable in light if the facts. The average defendant may intentionally withhold some pertinent facts because the defendant finds them embarssing, and may not understand that those facts are dispositive on the merits of bringing a particular cause of action. In short, the "intent" of one that is potentially liable for bringing an improper cause of action is qualitatively and functionally different than that of persons liable for the typical intentional tort. The cause and effect that the law presumes everyone understands and from which the intent to cause injury is typically established (pulling the trigger, lighting the match and setting fire to something, aiming the car at someone) is typically absent in a malicious prosecution setting.

such claims is premised upon objective evaluations of the law that the average litigant is unaware.[4]

For all of these reasons, sections 533 and 1668 do not preclude insurance coverage for intentional torts such as malicious prosecution.

III. HOLDING THAT THE SO-CALLED "INTENTIONAL TORTS" ARE PRECLUDED BY SECTIONS 533 AND 1668 WILL RESULT IN DEPRIVATION OF INSURANCE COVERAGE FOR NUMEROUS COMMON OCCURRENCES

For over thirty years, the insurance industry has been selling California policyholders liability insurance providing for the defense and indemnification of the so-called "intentional torts" of "false arrest, detention or imprisonment;" "malicious prosecution;" "wrongful entry or eviction;" "slander or liable;" and "violation of a person's right of privacy." The insurance policy language containing this basic protection has been contained in literally millions of insurance policies sold to California individuals, public entities, and businesses. There is not a single shred of evidence that the existence of insurance for these intentional torts has promoted their commission. Thus, the public policy concerns behind sections 533 and 1668 would not be promoted by the per se exclusion of insurance coverage merely because of the so-called "intentional nature" of these torts.

On the other hand, preclusion of insurance coverage for these torts will have a significant negative impact on California taxpayers, public entities, and businesses. Every year tens of thousands of people are arrested or prosecuted in California, some falsely. If insurance coverage is defeated simply by the allegation

4. Unlike persons that commit assault with a deadly weapon or arson, few potential litigants are likely to be aware of the tort of malicious prosecution and are even less likely to understand under what circumstances they can be potentially held liable for such a tort.

that the arrest was knowlingly false or the prosecution was brought with malice, local government entities--and ultimately the taxpayers--will have to bear the often heavy financial burden.

Similarly, if the media cannot obtain insurance coverage against libel and slander, it is easy to see that the freedom of the press will be chilled, particularly at the local level. Similarly, tens of thousands of small landlords depend upon their insurance coverage to protect them from litigation, not uncommon, from wrongful entry or eviction. If LMI's proferred interpretation of sections 533 and 1688, these landlords will be deprived of the financial security that they justifiably thought that they would receive in return for their premium dollars. Indeed, is it not strange that after collecting insurance premiums for this insurance coverage for decades in California and across the country, members of the insurance industry now seek to avoid paying out otherwise valid insurance claims on the theory that the insurance coverage that they sold actually encourage wrongdoing?

Decades of experience has demonstrated that provision of insurance coverage for the so-called intentional torts has caused no ills to society. Preclusion of such insurance will, however, remove the financial protection of insurance that society has come to expect, indeed relies upon to function properly, for a large class of common torts.

Furthermore, precluding insurance coverage for malicious prosecution will have the pernicious potential for civil litigation defendants to use the malicious prosecution suit as an affirmative weapon. As the Supreme Court has recognized, "[t]he elements of malicious prosecution, though difficult to prove, are easily alleged. City of Long Beach v. Bozek, 31 Cal. 3d 527, 535 (1982)." Malicious prosecution suits themselves hold much potential for abuse:

> Allowing cities to sue for malicious prosecution against unsuccessful former plaintiffs would provide the

> municipalities with a sharp tool for retaliation against those who pursue legal action against them. Indeed, it is not unlikely that even good faith claimants would forego suit in order to avoid the possibility of having to defend against a subsequent malicious prosecution action should their action against the city prove unsuccessful.

City of Long Beach, 31 Cal. 3d at 535-36.

Indeed, in his dissent in Crowley, Justice Arabian pointed out that the Supreme Court's precedent of allowing a malicious prosecution action to proceed where there was lack of probable cause to bring even a single count of a multiple cause of action complaint is inconsistent with the modern practice of pleading every alternative theory available:

> A wealthy businessman, with a net worth estimated at $10 million, dies. Instead of leaving his estate--or any part of it--to his wife, as might be expected, his will directs that the entire fortune go to his lawyer, a man who happens to be his neighbor and, we are told, best friend. Can any sensible person doubt that, whatever the testator's intent, these facts are a compelling blueprint for a will contest? And if the circumstances suggest that the aggrieved widow is likely to file a lawsuit attacking the validity of the will, is it any surprise that here conscientious lawyers will feel bound to allege every alternative theory supporting the claim that there was wrongdoing behind the testamentary disposition of the her husband's millions?
>
> I take these propositions to be self-evident. Yet the majority would permit the beneficiary of this most peculiar will to sue the widow and her lawyers for tort damages if any one of the several theories alleged in her will contest petition is rejected as lacking probable cause. I cannot join in a holding that not only perpuates dubious law for no better reason than it exists, but is blind to realities of contemporary

> litigation practice that should impel the court to the opposite result.
>
> * * *
>
> A malicious prosecution suit imposes substantial litigation costs on both the litigants and the courts---not the least because malice is such a highly factual issue that it often precludes summary disposition.

Crowley, 8 Cal. 4th at 696 (Arabian, J., dissenting).

In short, the relaxed standard of Bertero's alternate theory rule substantially increases the potential for retaliatory malicious prosecution suits brought by successful, but now disgruntled, defendants. The knowledge that the targets of their wrath may have to bear the financial brunt of defending such litigation will only increase the likelihood that retaliatory malicious prosecution lawsuits will be filed.

Public policy is better served if sections 533 and 1668 are confined to truly intentional wrongdoing, where the actor acts with a preconceived design to inflict a specific resultant harm, such as in intentional battery, fraud or arson. In contrast, where so-called "intentional" torts like malicious prosecution, defamation, and wrongful eviction are involved, public policy is better served if insurance coverage remains available, as it traditionally has been.

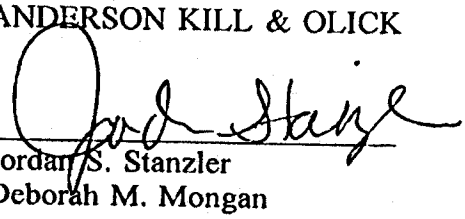
CONCLUSION

Section 533 of the Insurance Code and section 1668 of the Civil Code should not preclude insurance coverage for the defense and indemnification of malicious prosecution claims. Insurance coverage should only be excluded in those

limited circumstances where the policyholder acted with a preconceived design to accomplish the injury or harm.

Dated: December 30, 1997

ANDERSON KILL & OLICK



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is One Sansome Street, Suite 1020, San Francisco, California 94104.

On December 31, 1997, I served the foregoing document described as BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT THE DOWNEY VENTURE on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I caused such envelope to be deposited in the mail at San Francisco, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the Firm's practice of collecting and processing correspondence for mailing with the United States Postal Service. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business.

Executed on December 31, 1997, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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