

Combating Bad-Faith Litigation Tactics With Claims for Abuse of Process

by Matthew Spohn

Most civil litigators will at some time encounter bad-faith litigation tactics. When adversaries barrel past Rule 11 and inflict monetary harm, a claim for abuse of process must be considered. This article examines the tort's boundaries and time limitations to help attorneys properly counsel their clients about their options and the risks of questionable litigation tactics.

Imagine that a civil litigator is representing a developer. The client has purchased a large tract of land from a local landowner, and over the past several years has spent millions of dollars to ready the land for an attractive mixed-use development. Just after a local newspaper runs an article describing the client's negotiations with potential business tenants and optimism at obtaining its final financing from the bank, the client is served with a lawsuit started by the prior landowner. The prior landowner claims she was fraudulently induced into selling the land because the client made various verbal promises about how it would use the land and never intended to follow through on those promises. The prior owner makes a claim for rescission of the land sale and files a notice of *lis pendens* with the county recorder, announcing to all the world that the client's title to the land is in dispute. The client's business tenants learn of the suit and the notice and back out of their deals, and the bank suspends financing. The development is put on hold, costing the client hundreds of thousands of dollars in additional expenses and jeopardizing the millions that already have been invested in the development.

Settlement negotiations begin, but the former landowner will not settle for less than seven figures, which is much more than the land's purchase price. The litigator considers filing a motion to dismiss and seeking sanctions under Rule 11, but realizes she has almost no chance of success, because the landowner has stated a claim and the judge is unlikely to find the suit is completely baseless.

A year later, the practitioner obtains summary judgment for the client and, a year after that, wins the appeal. The client is thrilled and the development has resumed, but now the client wants to recoup all damages resulting from the lawsuit. After doing research,

the practitioner discovers that there might be a claim for abuse of process, because it appears that the landowner was advancing a weak claim and filing a notice of *lis pendens* at a time calculated to cause maximum disruption to the development, while advancing an extortionate settlement demand. However, the statute of limitations ran out while the lawsuit was pending.

In the hope of preventing this scenario, this article discusses the tort of abuse of process and examines the current debate about its First Amendment implications. The article also analyzes the tort's potential applications and important statute of limitations considerations. With this information in mind, Colorado lawyers can fully appreciate this tool for combating bad-faith litigation, and avoid getting on the wrong end of it.

Remedies for Bad-Faith Civil Litigation

As the law stands today, an attorney confronted with any adversary's bad-faith civil litigation tactics has three tools at his or her disposal: (1) Rule 11 and related procedures and sanctions; (2) a tort claim for malicious prosecution; and (3) a tort claim for abuse of process. Each of these options has a different use and application depending on the situation and the goal to be achieved.

Rule 11 and Related Rules and Statutes

When presented with the issue of bad-faith litigation tactics, many practitioners first think of Rule 11 of the Federal or Colorado Rules of Civil Procedure. Each rule contains prohibitions on filing pleadings without a factual or legal basis or with an improper purpose. On motion by a party or on the court's initiative, a litigant and/or an attorney may be sanctioned for violating the rule.¹

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Though sanctions can be compensatory, making the defendant whole for the expenses incurred by the bad-faith conduct,² in practice sanctions usually are limited to an award of attorney fees incurred as a result of the violation; a penalty to be paid to the court; or some non-monetary sanction, such as remedial education.³ Colorado statutory law also allows awards of attorney fees for litigation activity that is “substantially frivolous, substantially groundless, or substantially vexatious.”⁴

These devices are primarily useful to deter bad-faith litigation conduct. If a litigant or attorney nevertheless persists in bad-faith litigation tactics, these devices usually will not provide compensation to the aggrieved party beyond an award of attorney fees.

Malicious Prosecution

Malicious prosecution traditionally was a tort aimed at malicious criminal prosecution. Although it has been expanded to address civil litigation conduct, it is still limited by its roots. The elements of the tort are: (1) the defendant contributed to bringing a prior action against the plaintiff; (2) the prior action ended in favor of the plaintiff; (3) lack of probable cause for the prosecution; (4) malice; and (5) damages.⁵ The first two elements are self-explanatory. As to the third, lack of probable cause is lack of a good-faith belief that the litigation has a factual or legal basis;⁶ one can lose a lawsuit but still have had probable cause to initiate it. The subjective element of malice sometimes may be inferred from the lack of probable cause, but the reverse can never be true.⁷

Though the tort of malicious prosecution allows the recovery of consequential and punitive damages that are unavailable under Rule 11,⁸ the tort is limited in its scope in two important ways when applied to bad-faith civil litigation conduct. First, the requirement that the prior legal action be factually or legally baseless limits the tort to rare scenarios that also are subject to Rule 11 deterrence and sanctions. Given the muddiness of the facts of a case and the ambiguities of case law, it can be difficult to prove that a prior legal action was completely without merit.

Second, the tort is limited by its requirement that the prior proceeding was terminated in favor of the party asserting malicious prosecution; many legal proceedings are settled or terminated without a clear winner or loser. Thus, litigants faced with conduct potentially qualifying as malicious prosecution are forced to spend the time and funds to bring that litigation to a favorable conclusion before bringing another suit to recoup the damages caused by the prior litigation. Most litigants do not have the resources or the patience for such a battle plan.

Abuse of Process

The tort of abuse of process serves to fill in the gaps left by Rule 11 and malicious prosecution.⁹ The elements are: (1) an ulterior purpose in the use of judicial proceedings; (2) willful actions in the use of process that are not proper in the regular course of a proceeding; and (3) damages.¹⁰ Each of these elements is addressed below, along with an additional element—lacking a basis and brought to harass—that may be required when alleging that the filing of a lawsuit was an abuse of process.

Ulterior Purpose

The ulterior purpose usually is “some form of extortion” or other “coercive goal.”¹¹ In practice, this is not substantially dissimilar

from the improper purpose that is an element of a Rule 11 violation or the malice that is an element of malicious prosecution. However, Colorado courts have not addressed how much of an ulterior purpose is required—whether it must be the primary purpose, or whether it may be one of several purposes.¹²

Improper Use of Process

An ulterior motive alone is not enough to establish liability—the motive must animate some improper use of a lawsuit or legal process “to accomplish a coercive goal [that] is not the intended legal purpose of the process.”¹³ In other words:

[i]f the action is confined to its regular and legitimate function in relation to the cause of action stated in the complaint[,] there is no abuse, even if the plaintiff had an ulterior motive in bringing the action or if he knowingly brought suit on an unfounded claim.¹⁴

Though an improper motive sometimes can be inferred from the improper use of process, the reverse is never true—“an improper use cannot be inferred simply from an improper motive.”¹⁵

For there to be improper use of process, legal process must first be involved. This has rarely been an issue in Colorado cases, but the Colorado Court of Appeals has held that the tortious conduct must have some “contact with a judicial forum,” and that the use of a nonjudicial administrative forum is outside the scope of the tort.¹⁶ Consistent with this framework, as discussed below, courts have affirmed that a lawsuit, *replevin* proceedings, and *lis pendens* procedures all qualify as legal process. Courts in other jurisdictions also have recognized that the procedures for attachment, execution of judgment, garnishment, and subpoenas qualify as legal process.¹⁷

Once it is established that legal process was involved, it must be proved that the process was misused. Colorado courts have recognized several improper uses of process, and those cases help illustrate the varied application of the tort. The seminal case in Colorado concerned an equipment lease where, at its termination, the lessee could purchase the equipment for one dollar.¹⁸ At the end of the lease term, however, the lessor brought a *replevin* action to recover the equipment, with a demand that the lessee pay \$493 for the value of the equipment; that action was abandoned and replaced with another *replevin* action demanding \$2,000. To avoid having its business disrupted with the seizure of the equipment, the lessee paid the lessor \$2,000 in a cash settlement that included a release of the lessor.

The lessee prevailed, though, in its subsequent action for abuse of process. On appeal, the Colorado Court of Appeals found that the lessor had misused process because it used its *replevin* actions: not as a means to regain the subject equipment, but as a way of forcing [the lessee] to pay a sum not required by the contract between the parties and to agree to release [the lessor] of all liability for its actions.¹⁹

Another case illustrating misuse of process arose from a landowner’s negotiations to sell his land. The defendant, Salstrom, made several offers to buy the land but none was accepted. When the landowner entered into an agreement to sell his land to a third party, Salstrom filed suit, claiming he had a prior agreement with the seller. He filed a notice of *lis pendens* on the property.²⁰ The sale to the third party fell through as a result, and the landowner sued Salstrom for abuse of process. The jury’s verdict in favor of the landowner was affirmed on appeal, because the evidence showed that Salstrom had no prior purchase agreement with the landown-

er, and the notice of *lis pendens* was filed to prevent a sale to another party and to coerce the landowner into accepting Salstrom's prior offers.²¹

Another illustrative case concerned an improper filing of a lawsuit. The case arose from a dispute between the licensor and licensee of software, where the licensor alleged that the licensee was attempting to transfer software to third parties in violation of its license agreement. After settlement negotiations failed, the licensee initiated a declaratory judgment action against the licensor in Oklahoma. The Oklahoma court dismissed the action for lack of personal jurisdiction over the licensor, and the licensor sued the licensee in Colorado alleging, among other things, that the licensee abused process by suing in Oklahoma. The court found for the licensor on its claim for abuse of process and the judgment was affirmed on appeal. The appellate court reasoned that there was sufficient evidence to find that the licensee filed suit in Oklahoma without any valid argument for jurisdiction. This was done not to seek the relief requested in the lawsuit, but rather to require the licensor to spend money litigating in an inconvenient forum and thereby force the licensor to abandon its attempt to enforce its license agreement.²²

In contrast, an ulterior purpose without attendant misuse of process is not sufficient to create liability. For instance, even where a court assumed as true the allegations that neighbors living near a dog kennel had the ulterior motive of removing the kennel from their neighborhood, their noise complaints to animal control officials under a local ordinance resulting in convictions of the offend-

er could not constitute an abuse of process because the neighbors were using the complaint process in the manner in which it was intended—to address actual noise complaints.²³ If the convictions eventually forced the kennel to relocate, that was a legitimate secondary effect of the appropriate use of the noise ordinance.

Other jurisdictions have recognized claims for abuse of process when:

- multiple subpoenas are issued in a manner designed to disrupt the opponent's business²⁴
- one wrongfully seeks to enjoin another from doing something he or she was legally entitled to do²⁵
- one seeks an injunction against a competitor for marketing purposes based on misstatements of facts²⁶
- one has a receiver appointed over a company to coerce a settlement and obtain unauthorized discovery²⁷
- one files a baseless mechanic's lien against a lessor to coerce the lessor into pressuring its lessee to pay a debt owed to the party filing the lien²⁸
- one fraudulently pursues garnishment and ejectment proceedings.²⁹

Some courts have allowed abuse of process claims to proceed based on allegations that discovery procedures were abused in litigation. Arizona and Tennessee appellate courts have allowed such claims to proceed when the alleged improper motives were to increase the opponent's legal fees,³⁰ to harass the opponent or weaken the opponent's resolve to pursue the case,³¹ or to put information in the public domain that would damage the opponent's repu-

tation.³² Such an expansion of the tort may provide the opportunity for abuse, because almost any litigant could potentially allege (but would have difficulty proving) that its opponent is improperly using discovery requests to increase the cost and burden of litigation. When the only claimed damages are increased attorney fees, such a claim would duplicate the civil procedure provisions allowing awards of attorney fees for discovery abuses.³³ However, when a litigant is genuinely using discovery in improper and abusive ways, the tort provides a backstop when the court is unwilling to assert its Rule 11 powers.

Damages

Damages are an essential element of the tort of abuse of process. If a party is lucky enough to have avoided any damages from another's misuse of process with an ulterior purpose—or if the plaintiff cannot prove the damages he or she suffered—there can be no liability.³⁴ Two cases involving equally egregious abuses of the *lis pendens* procedure, but coming to very different conclusions, illustrate this requirement. In one, the plaintiff proved that a potential buyer learned of the *lis pendens* filing and, as a result, backed out of a sale agreement. The plaintiff recovered on his claim.³⁵ In another, there was no evidence of a sale being frustrated by the improper *lis pendens*, no evidence of the costs incurred in removing the *lis pendens*, and no market evidence from which it could be inferred that the property lost value as a result of the *lis pendens*. The plaintiff could not recover.³⁶

Colorado courts have not explicitly addressed what damages are recoverable for abuse of process. However, the Colorado Supreme Court has held that for economic torts—which likely would include abuse of process—a plaintiff may recover those damages that are “the natural and probable result of the injury sustained by virtue of the tortious act,” provided they are proximately caused by the tortious conduct and are reasonably ascertainable.³⁷ Those consequential damages may include attorney fees incurred in defending a prior lawsuit or proceeding that amounted to an abuse of process.³⁸ However, in language that arguably is *dictum*, the Colorado Supreme Court has cautioned that a plaintiff “cannot recover attorney fees incurred in bringing the malicious prosecution or abuse of process action itself.”³⁹ Courts have even allowed recovery of non-economic damages for emotional distress, humiliation, and the like when a claim for abuse of process also supports a valid claim for intentional infliction of emotional distress.⁴⁰ Because abuse of process is an intentional tort, punitive damages are available.⁴¹

Lacking a Basis and Brought to Harass

In some cases, a cause of action for abuse of process may require an additional element—a showing that the challenged legal process was “lacking any reasonable basis in fact or law and brought primarily to harass or to improperly deter another’s legitimate activities.”⁴² However, courts are not in agreement as to precisely which cases require this additional element.

This additional element for an abuse of process claim arose out of the Colorado Supreme Court’s decision in *Protect Our Mountain Environment, Inc. v. District Court (POME)*, where a citizens’ group filed suit to overturn a county board’s rezoning of land for a development. The citizens’ group lost its suit, and the developer initiated a second action, claiming that the citizens’ group’s lawsuit had been an abuse of process.⁴³

On appeal, the Court focused on the citizens’ group’s defense that its lawsuit had been protected by the constitutional right to petition the government, as developed through the federal *Noerr-Pennington* doctrine. The Court agreed with the group, holding that the act of filing a lawsuit is constitutionally protected from claims of abuse of process unless the lawsuit was a “sham” (meaning it was baseless in fact or in law), was brought to harass or to further some other improper objective, and had the capacity to adversely affect the victim’s legal interests.⁴⁴

If confined to this scenario—the filing of a lawsuit challenging governmental activity—the holding of *POME* would not be controversial. Just two years later, though, the Colorado Supreme Court applied its holding to another case where it was alleged that a group abused process by filing a lawsuit challenging the election of the directors of their rural electric cooperative.⁴⁵ Though arguably affecting some public rights, the challenged suit was not as clearly an example of petitioning activity as the one in *POME*. Nevertheless, without discussion, the Court applied its sham requirement to the plaintiff’s abuse of process claim.⁴⁶

Perhaps because of the uncertain limits to *POME*’s holding, Colorado courts began speculating whether it applied to any abuse of process claim, effectively adding a fourth element to the cause of action.⁴⁷ To date, however, Colorado case law does not support that proposition. Currently, it is clear that *POME*’s holding—requiring a showing that the process is a sham devoid of factual or legal basis and brought for an improper purpose—can be applicable only

when the allegedly abused process is “the very filing of a lawsuit.”⁴⁸ Indeed, every reported Colorado case applying the *POME* holding fits this factual scenario.⁴⁹ Therefore, *POME*’s required showing of baselessness and improper purpose does not apply in cases where other processes—filing a notice of *lis pendens*, seeking an injunction, filing a mechanic’s lien, or the like—are involved. The only uncertainty is whether *POME* is limited to cases where the challenged lawsuit relates to public matters rather than a purely private dispute; though some courts have acknowledged scholarship arguing this limitation, no court has squarely addressed it.⁵⁰

Comparison to Rule 11 and Malicious Prosecution

The tort of abuse of process serves an important role in Colorado law. First, it reaches beyond the bounds of Rule 11 and malicious prosecution by targeting litigation conduct that may have some basis in fact or law but constitutes a misuse of the available legal process. Second, the tort allows a party to take action without waiting until the underlying process or litigation has terminated; the cause of action is ripe as soon as the process is abused and the damages are cognizable. Thus, bad-faith litigation tactics may be combated in the same action by a counterclaim or in another parallel action, allowing both parties’ grievances to be addressed and adjudicated in a more timely manner.

The torts of abuse of process and malicious prosecution shade into each other somewhat when the allegedly abused process is the filing of the lawsuit. In that instance, a party bringing a claim for abuse of process or malicious prosecution must prove that the law-

suit was baseless, at least if the claim involves public rather than purely private matters. Nevertheless, the Colorado Supreme Court has declined to follow New Mexico’s lead in combining the torts of malicious prosecution and abuse of process⁵¹ and abuse of process still is available, with the important advantage that the prior lawsuit need not be terminated favorably before the claim can be asserted. In that instance and especially when other process is abused, the tort of abuse of process “serves an important role by filling the gap previously left open by malicious prosecution.”⁵²

Defenses

Claims for abuse of process are primarily defended with the allegation that the elements of the tort have not been satisfied. However, two affirmative defenses—the statute of limitations and the litigation privilege—also are available.

Statute of Limitations

The statute of limitations for abuse of process claims is two years.⁵³ Colorado courts have not specifically addressed when a cause of action for abuse of process accrues, but causes of action for analogous torts of negligence, breach of fiduciary duty, and legal malpractice accrue when a plaintiff learns facts that would put a reasonable person on notice of the general nature of the damage and that the damage was caused by the wrongful conduct of the defendant.⁵⁴ A review of case law from other states indicates a general trend of finding that the statute of limitations for abuse of

process runs “from the termination of the acts [that] constitute the abuse complained of, and not from the completion of the action [from] which the process issued.”⁵⁵ Given the life of most litigation matters, this means that parties who are the victims of abuse of process cannot normally wait until the termination of the proceeding from which the process issued to file suit. By that time, the two-year limitations period may have expired.

This dynamic can create issues for litigants and their attorneys, because a counterclaim or new suit for abuse of process may not be a desired tactic while a lawsuit is pending, the outcome of that lawsuit is not yet known, and the new claim may increase the cost of an already costly lawsuit. If a claim for abuse of process is not raised during the lawsuit, though, it may no longer be available after its completion.

Litigation Privilege

A party facing an abuse of process claim also may assert a defense of “litigation privilege.” This privilege is based on the general rule that “communications made in the course of judicial proceedings . . . are absolutely privileged if they bear a reasonable relationship to the subject of inquiry.”⁵⁶ Though previously applicable only in defamation or libel suits, the Colorado Court of Appeals has expanded the privilege to apply to all tort liability based on the communication.⁵⁷

No Colorado court has had occasion to analyze how the litigation privilege applies to claims for abuse of process. In *Westfield*

Development Company v. Rifle Investment Associates, the Colorado Supreme Court approached the issue when it analyzed whether the filing of a notice of *lis pendens* invoked the litigation privilege for purposes of tort claims for intentional interference with a contract, but declined to address whether the filing of the notice could constitute an abuse of process because it had not been briefed.⁵⁸

Until Colorado courts definitively address the issue, it may be reasonable to conclude that the litigation privilege should have only limited applicability to claims for abuse of process, because the tort is predicated on litigation conduct, rather than statements made in litigation.⁵⁹ Though some courts in other jurisdictions have purported to apply the litigation privilege to claims of abuse of process,⁶⁰ courts have noted that, in most cases, its application was unnecessary because the allegations failed to state a claim for abuse of process in the first instance.⁶¹

As an evidentiary matter, several courts have held that when a party seeks to introduce into evidence statements by an opposing party or his or her attorney to show the requisite ulterior purpose for an abuse of process claim, those statements are not excluded from evidence under the litigation privilege.⁶² These courts reason that the litigation privilege is meant to shield litigants from lawsuits alleging that their words themselves are injurious, but not to shield litigants from statements that reflect an improper purpose or acknowledge a misuse of process.⁶³ Colorado courts have not considered such issues.

Conclusion

On the one hand, the tort of abuse of process is a valuable tool for combating bad-faith litigation tactics in appropriate circumstances. Litigation and its attendant enforcement procedures have incredible power to inflict thousands or millions of dollars in costs on an innocent party. When there is an indication that the power of the courts was misused to cause such harm, the careful attorney representing the victim should assess whether there is a cause of action for abuse of process or one of its kin. Given the short statute of limitations, prompt action may be required to preserve the victim's rights. An attorney can quickly go from hero to scapegoat after successfully defending a bad-faith case if he or she then is forced to advise the client that the cause of action to recoup damages is now time-barred.

On the other hand, the ever-expanding scope of the tort highlights the need for great care in the use of legal process. An action, such as filing a notice of *lis pendens*, filing for an injunction, executing on a judgment, or appointing a receiver, could avoid a Rule 11 motion but, if used improperly, could subject both the attorney and client to liability for abuse of process. Good litigators frequently speak in terms of leverage in lawsuits, but all lawyers must ensure that such leverage is obtained only through the legitimate use of process. Given the stakes, when the process is likely to cloud title or stop work, for example, attorneys should be doubly careful to ensure the validity and propriety of the legal process they employ.

Notes

1. F.R.C.P. 1(c); C.R.C.P. 1(a).
2. See, e.g., *Schmidt Constr. Co. v. Becker-Johnson Corp.*, 817 P.2d 625, 628 (Colo.App. 1991) (awarding aggrieved party the increase in its professional liability premium incurred as a result of the opponent's Rule 11 violation, because rule allows compensation for expenses incurred as a result of the violation). But see Wright and Miller, 5A *Federal Practice & Procedure: Civil 3d* § 1336.3 (2008) (explaining types of sanctions awarded under F.R.C.P. but noting that the rule makes it clear that deterrence, not compensation, is its primary purpose).
3. See Wright and Miller, *supra* note 2 at § 1336.3.
4. CRS § 13-17-102.
5. See *Montgomery Ward & Co. v. Pherson*, 272 P.2d 643, 646 (Colo. 1954).
6. See *Konas v. Red Owl Stores, Inc.*, 404 P.2d 546, 548-49 (Colo. 1965).
7. See *id.* at 547-48.
8. See, e.g., *Exchange Nat'l Bank of Colo. Springs v. Cullum*, 161 P.2d 336, 338 (Colo. 1945).
9. This is illustrated with federal courts' holdings that the procedures available under F.R.C.P. 11 do not preempt state-law causes of action for abuse of process or similar torts, because they serve different purposes and provide different relief. See, e.g., *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 392-93 (3d Cir. 2002). In a similar vein, the Colorado Court of Appeals has held there is no tort cause of action for violation of C.R.C.P. 11; that rule is simply a remedial tool available to the court. *Henry v. Kemp*, 829 P.2d 505, 506-07 (Colo.App. 1992).
10. *Hewitt v. Rice*, 154 P.3d 408, 414 (Colo. 2007). See Lentz, 20 *Causes of Action* 223 (2008) (general discussion of the tort).

11. *Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo.App. 2006), quoting *Palmer v. Tandem Mgmt. Servs., Inc.*, 505 N.W.2d 813, 817 (Iowa 1993).
12. *Restatement (Second) of Torts* § 682 (1977) (taking the position that the ulterior purpose must be the primary, and not incidental, purpose).
13. *James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo.App. 1994).
14. *Id.*, quoting *Institute for Professional Dev. v. Regis College*, 536 F.Supp. 632, 635 (D.Colo. 1982).
15. *Id.* at 374.
16. *See Moore v. Western Forge Corp.*, 192 P.3d 427, 438-39 (Colo.App. 2007), cert. denied 2008 WL 4801524 (Sept. 22, 2008) (alleged abuse of procedures in workers' compensation administrative proceeding is outside the scope of the tort of abuse of process).
17. Prosser and Keeton, *Torts* § 121 (5th ed., 1984).
18. *Aztec Sound Corp. v. Western States Leasing Co.*, 510 P.2d 897, 898 (Colo.App. 1973).
19. *Id.* at 899.
20. *Salstrom v. Starke*, 670 P.2d 809, 810-11 (Colo.App. 1983).
21. *Id.* at 811.
22. *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 201-2 (Colo.App. 1998).
23. *Walker*, supra note 11 at 394-95. Note that the defendants in this case also would have an argument that there was no "process" abused because no courts or court processes were involved in their complaints to animal control. *See Moore*, supra note 16 at 438-39. However, this argument was not addressed in the published appeal.
24. *See Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assoc., Inc.*, 343 N.E.2d 278, 283 (N.Y. 1975).
25. *See Sygma Photo News, Inc. v. Globe Int'l, Inc.*, 616 F.Supp. 1153, 1159 (S.D.N.Y. 1985).
26. *See Datacomm Interface, Inc. v. Computerworld, Inc.*, 489 N.E.2d 185, 195 (Mass. 1986).
27. *See Clausen v. Carstens*, 730 P.2d 604, 608-09 (Or.App. 1986).
28. *See Display Fixtures Co. v. R.L. Hatcher, Inc.*, 438 N.E.2d 26, 31 (Ind.App. 1982).
29. *See Farm Country Homes, Inc. v. Rigsby*, 404 So.2d 573, 576 (Ala. 1981).
30. *See Nienstedt v. Wetzels*, 651 P.2d 876, 882 (Ariz.App. 1982).
31. *See Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 402 (Tenn. 2002).
32. *See Younger v. Solomon*, 113 Cal.Rptr. 113, 119 (Cal.App. 1974). However, other cases present more compelling arguments for abuse of the discovery process. *See, e.g., Hopper v. Drysdale*, 524 F.Supp. 1039, 1042 (D.Mont. 1981) (defendant abused process by noticing a deposition for the purpose of having the deponent arrested at the deposition on an outstanding contempt order in another proceeding).
33. *See* C.R.C.P. 37; F.R.C.P. 37.
34. *See Johnson v. Benson*, 725 P.2d 21, 26 (Colo.App. 1986).
35. *See Salstrom*, supra note 20 at 811.
36. *See Johnson*, supra note 34 at 26.
37. *Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 871 (Colo. 2002).
38. *See Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 203 (Colo.App. 1998) (trial court found that defendant's separate lawsuit initiated in Oklahoma constituted an abuse of process, and the Court of Appeals affirmed the trial court's finding that plaintiff "suffered damages in having to defend the Oklahoma suit").
39. *Technical Computer Servs., Inc. v. Buckley*, 844 P.2d 1249, 1256 (Colo.App. 1992). *Cf. Johnson v. Benson*, 725 P.2d 21, 26 (Colo.App. 1986) (claim for abuse of process properly dismissed when there was no evidence of costs incurred in fighting improper process or consequential damages caused by improper process).
40. *See Palmer v. Diaz*, 214 P.3d 546, 553 (Colo.App. 2009) (affirming award of non-economic damages caused by retaliatory lawsuit that supported claims for both abuse of process and outrageous conduct).
41. *See* CRS § 13-21-102(1)(a).
42. *See Protect Our Mountain Env't, Inc. v. District Court (POME)*, 677 P.2d 1361, 1367, 1369 (Colo. 1984).
43. *Id.* at 1363-64.
44. *Id.* at 1369.
45. *Concerned Members of Intermountain Rural Electric Ass'n v. District Court*, 713 P.2d 923, 924 (Colo. 1986).
46. *Id.*
47. *See James H. Moore & Assocs. Realty, Inc.*, supra note 13 at 373 (stating that other court of appeals' decisions suggest "that this fourth element [of the process being a 'sham'] must be established in any abuse of process claim") (emphasis in original).
48. *Yadon v. Lowry*, 126 P.3d 332, 337 (Colo.App. 2005).
49. *See, e.g., id.*; *Lauren Corp.*, supra note 38 at 202; *Henry v. Kemp*, 829 P.2d 505, 506 (Colo.App. 1992); *Technical Computer Servs., Inc. v. Buckley*, 844 P.2d 1249, 1251-52 (Colo. 1992). The only exception has been the Tenth Circuit Court of Appeals, which has arguably expanded *POME*'s scope by applying it in a suit alleging that the initiation of involuntary commitment proceedings was an abuse of process. *Scott v. Hern*, 216 F.3d 897, 915 (10th Cir. 2000). Also, it is worth noting that the Tenth Circuit Court of Appeals and the Colorado Court of Appeals recently addressed claims for abuse of process based on the filing of civil suits or counterclaims in purely private civil matters, and have not required an extra showing of baselessness or harassing motivation. *See Hertz v. Luzenac Group*, 576 F.3d 1103, 1117 (10th Cir. 2009); *Palmer*, supra note 40 at 550-51.
50. *See Yadon*, supra note 48 at 337, citing Getzoff, "Dazed and Confused in Colorado: The Relationship Among Malicious Prosecution, Abuse of Process, and the Noerr-Pennington Doctrine," 67 *U. Colo. L.Rev.* 675, 676, 700 (1996).
51. *Id.*
52. *Id.*, quoting Getzoff, supra note 50 at 686.
53. CRS § 13-80-102(1)(a) (applying two-year statute of limitations to actions for "malicious abuse of process").
54. *See Colburn v. Kopit*, 59 P.3d 295, 296-97 (Colo.App. 2002); *Torrez v. Edwards*, 107 P.3d 1110, 1113 (Colo.App. 2004).
55. *Hyde Constr. Co. v. Koebring Co.*, 321 F.Supp. 1193, 1207 (S.D.Miss. 1969) (collecting authority). Note that Colorado courts have declined to adopt the "continuing violation" doctrine for tort statutes of limitations, whereby a cause of action for a continuing wrong does not accrue until it terminates completely. *See, e.g., Harmon v. Fred S. James & Co. of Colorado, Inc.*, 899 P.2d 258, 262 (Colo.App. 1994).
56. *MacLarty v. Whiteford*, 496 P.2d 1071, 1072 (Colo.App. 1972).
57. *See Buckhannon v. U.S. West Communications, Inc.*, 928 P.2d 1331, 1335 (Colo.App. 1996).
58. *Westfield Dev. Co. v. Rifle Investment Assocs.*, 786 P.2d 1112, 1116-18 and n.2 (Colo. 1990). The Court acknowledged its prior holding that the filing of a notice of *lis pendens* could be actionable as malicious prosecution. *Id.* at 1118, citing *Johnston v. Deidesheimer*, 232 P. 1113, 1114 (Colo. 1925).
59. *See Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 728 P.2d 1202, 1208 (Cal. 1986).
60. *See, e.g., Abraham v. Lancaster Community Hosp.*, 266 Cal.Rptr. 360, 377-78 (Cal.App. 1990).
61. *See id.* at 378; *Oren Royal Oaks Venture*, supra note 59 at 1208.
62. *See Oren Royal Oaks Venture*, supra note 58 at 1208; *Baglini v. Lauletta*, 717 A.2d 449, 455 (N.J.Super.Ct. Law Div. 1998) (collecting authority).
63. *See Baglini*, supra note 62 at 455. ■



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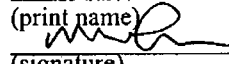
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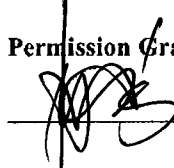
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