

IN PRACTICE

## CIVIL PRACTICE

### Satisfying the Special Grievance Requirement

Malicious-prosecution claims remain viable in New Jersey

BY MICHAEL O. KASSAK AND  
EDWARD M. KOCH

Defendants forced to defend frivolous lawsuits in New Jersey are often deterred from pursuing civil claims for malicious use of process because New Jersey is one of the few states that require plaintiffs to prove a “special grievance” in addition to the typical items of proof.

While New Jersey provides remedies to aggrieved litigants under its frivolous claims statute and Court Rule 1:4-8, the damages recoverable under those theories are limited to attorneys’ fees and costs. In malicious-prosecution-type actions, the damages potentially recoverable include not only litigation costs, but economic and intangible damages. New Jersey’s special grievance requirement is not satisfied where damages are limited to litigation expenses, but instead requires a showing of significant damages to a company’s business or that the initial lawsuit was brought for an improper purpose such as to deter free

*Kassak and Koch are partners at White and Williams. Kassak is chairman of the intellectual property practice group, and Koch is chairman of the appellate practice group. Kassak and Koch represented Gradient in the defense of the Biovail action and the subsequent Gradient malicious prosecution.*

speech rights.

A recent malicious-prosecution claim arising out of a highly publicized New Jersey lawsuit, *Biovail v. Gradient*, provides a useful case study illustrating how the special grievance requirement can be satisfied in an appropriate case.

#### Choice of Law

The threshold issue in any malicious-prosecution action is which state’s law will apply. New Jersey applies the *Restatement (Second) of Conflicts* § 155, which applies the law of the state where the initial suit was brought, *unless* some other state has a more significant relationship to the occurrence and the parties. Aggrieved litigants initially sued in New Jersey, consequently, will typically be forced to satisfy New Jersey’s special grievance requirement.

The general rule can lead to unjust results by providing an incentive for potential plaintiffs to bring questionable lawsuits in New Jersey because a New Jersey malicious-prosecution claim imposes additional hurdles. A better-reasoned approach is to apply the conflict restatement’s exception when the state where the initial suit was brought has little relation to the occurrence or the parties.

There are few cases interpreting the

Restatement exception, but the case of *Continental Cablevision Inc. v. Storer Broadcasting Co.*, 653 F. Supp. 451 (D. Mass. 1986), applies the exception to avoid an unjust result. There, a cable television company filed a defamation action against a competing company in Massachusetts because it was domiciled there, and the competitor filed a counterclaim for defamation and abuse of process. Although the case was filed in Massachusetts, the underlying conduct occurred in Missouri. The court held that despite the plaintiff’s choice of forum of Massachusetts, Missouri law applied to the defendant’s counterclaims arising from that case because a plaintiff’s right to choose the forum in which it wants to bring suit does not allow the party to also control the choice of law to be applied to claims against it.

#### Elements of Proof

In cases where New Jersey law applies to a malicious-use-of-process claim, a plaintiff must prove that: (1) an action was instituted by this defendant against this plaintiff; (2) the action was actuated by malice; (3) there was an absence of probable cause; (4) the action was favorably terminated; and (5) the plaintiff suffered a special grievance. The first four elements are required in

all jurisdictions, but the special grievance requirement is only required in a minority of states, including New Jersey.

To establish a special grievance under New Jersey law, a plaintiff must prove “interference with one’s liberty or property.” *LoBiondo v. Schwartz*, 199 N.J. 62, 95 (N.J. 2009). In *LoBiondo*, the plaintiffs filed suit in response to the defendants’ protest of the plaintiffs’ construction project. The defendants cross-claimed for malicious use of process. The court dismissed the plaintiffs’ claims, finding that the suit was “obviously retaliatory” and designed to chill speech regarding a matter of public concern. As such, the court held that the defendants stated a cause of action for malicious use of process because they alleged that the plaintiffs’ suit interfered with the defendants’ exercise of free speech and freedom to petition, and thus constituted an interference with their liberty sufficient to satisfy the special grievance element. New Jersey courts have thus recognized that a special grievance exists where the consequence of the lawsuit was to not only silence the defendant, but to deter others who might speak out as well.

New Jersey courts have also found that plaintiffs who sustained severe and permanent economic damages as a result of a lawsuit established a special grievance. In *Giri v. Rutgers Cas. Ins. Co.*, 273 N.J. Super. 340 (App. Div. 1994), the plaintiff sued for malicious use of process, alleging that an unfounded lawsuit by the defendant caused him to lose his malpractice insurance and forced him to temporarily close his practice. The court found that because the plaintiff was temporarily put out of business, the damages from the malicious lawsuit were “beyond the routine ‘damages’ in the usual malpractice suit” and thus constituted a special grievance.

Based on *LoBiondo* and *Giri*, a malicious-prosecution plaintiff can satisfy New Jersey’s special grievance requirement by establishing either that the initial lawsuit was brought to chill its First Amendment or other important rights or

that the initial lawsuit caused severe economic damages.

#### ***Gradient and Biovail***

A recent malicious-prosecution lawsuit brought in Arizona, *Gradient Analytics v. Biovail Corporation*, No. CV-10-0335-PHX-FJM, (the *Gradient* action), provides a useful illustration of the interpretation of New Jersey’s special grievance requirement. The *Gradient* action arose out of Biovail Corporation’s 2006 New Jersey lawsuit, *Biovail v. Gradient*, Docket No. ESX-L-1583-06 (the *Biovail* action), against a number of defendants, including Gradient Analytics Inc. (Gradient) and its principals. Gradient is an independent research firm that analyzes publicly traded companies for its subscribers.

The plaintiffs in the *Biovail* action alleged a conspiracy in violation of the New Jersey civil RICO statute, claiming that Gradient engaged in a conspiracy with a well-known hedge fund and others to target certain publicly traded companies and drive down the price of their stock. Biovail further alleged that Gradient allowed their subscribers to ghostwrite their reports, and sent the reports to them prior to releasing them, enabling short sale of the stock (i.e., taking a financial position wagering that the price will go down) and deriving profits when the release of the negative reports allegedly caused the stock prices to go down.

When the *Biovail* action was filed, Biovail secured the lead story on “60 Minutes,” where the conspiracy claims were repeated. Soon after the *Biovail* action was filed, however, the SEC, Ontario’s Security Commission and the Department of Justice filed actions against Biovail for much of the same conduct Gradient had exposed in its allegedly fraudulent reports. Biovail subsequently paid millions of dollars to resolve those actions but refused to dismiss the *Biovail* action. In August 2009, the New Jersey Superior Court granted Gradient’s mo-

tion to dismiss the *Biovail* action.

Gradient brought a subsequent malicious-prosecution claim against Biovail in federal court in Arizona, alleging that the *Biovail* action had been brought for an improper purpose. Gradient’s complaint included a claim for economic damages for the substantial damage to its business caused by the *Biovail* action and subsequent publicity. Biovail moved to dismiss, arguing that New Jersey law applied and that Gradient’s complaint failed to satisfy New Jersey’s special grievance requirement. Gradient challenged the application of New Jersey law, claiming that it had successfully argued that it was not even subject to personal jurisdiction in New Jersey. Gradient also argued that even if New Jersey law applied, it was able to establish a special grievance under both *LoBiondo* and *Giri*.

In analyzing the special grievance issue, the court concluded that New Jersey law applied and that the *Gradient* complaint stated a cause of action for special grievance. It held that based on the allegations in the complaint, Gradient raised serious concerns about malfeasance by a major publicly traded company, and Biovail sought to silence Gradient’s legitimate criticism through the *Biovail* action. The court also concluded that the *Gradient* action alleged an economic special grievance, thus rejecting the interpretation of *Giri* as requiring that plaintiffs must have ceased all operations for some period of time in order to make a claim for an economic special grievance. The court instead interpreted *Giri* as requiring that the plaintiff show harm beyond routine damages in the defense of a frivolous lawsuit and that the economic damages in the *Gradient* action could easily exceed those alleged in *Giri*.

In summary, aggrieved litigants who suffer substantial economic damages or whose free speech rights are deterred as a result of a frivolous lawsuit should not be discouraged from seeking redress in New Jersey courts, because it is likely that such a claim will survive despite New Jersey’s special grievance requirement. ■