1981

Countersuits Against Attorneys: A Preface

David Owen
University of South Carolina - Columbia, dowen@law.sc.edu

COUNTERSUITS AGAINST ATTORNEYS—A PREFACE

DAVID G. OWEN*

A growing phenomenon and annoyance for lawyers is the increasing incidence of countersuits brought against them for illegally filing frivolous claims. The special project that follows these prefatory remarks examines a variety of different policy issues raised by this type of litigation in the context of the three most common theories of liability underlying countersuits against attorneys—malicious prosecution, abuse of process, and defamation—and problems faced by lawyers seeking to obtain liability insurance against such countersuits. No attorney is today immune from having such an action filed against him or her, and the risks to every lawyer of becoming the defendant in such an action are increasing every day. Although the courts have thus far allowed these countersuits against attorneys only reluctantly and in the most extreme cases, every lawyer should be aware of the fundamental issues and recent changes in this tumultuous area of the law.

An initial step for analysis of the attorney countersuit problem is to inquire into the reasons for the recent increase in such actions, and a preliminary excursion into these causes is all that will be attempted here. The first place to look for an explanation is toward the plaintiff in this type of action and toward the type of harm that has allegedly been inflicted. Typically, the plaintiff is a physician who has been sued unsuccessfully by the defendant attorney in an earlier malpractice action brought on behalf of a party who suffered harm as a patient under the physician's treatment. The basic claim in the doctor's later countersuit against the lawyer ordinarily alleges that the earlier malpractice suit was groundless, frivolous, and should never have been brought—as a reasonable investigation by the attorney before filing the lawsuit would have revealed. The harm to the defendant in a groundless lawsuit can indeed be very great, involving considerable time, expense, anguish, embarrassment, damage to reputation and professional standing, loss of business, increase

*Professor of Law, University of South Carolina. B.S. 1967, Wharton School of Finance, University of Pennsylvania; J.D. 1971, University of Pennsylvania.

in insurance premiums, and sometimes loss of employment. Even if the defendant in the groundless suit prevails (and there is always some risk of losing even a "groundless" action), his victory in the first action alone often cannot fully remedy many of his losses. It is no wonder, then, that the defendant in a frivolous suit looks to the courts to give him satisfaction.

Another explanation for the proliferation of these claims lies with the defendants to the countersuits examined here—the lawyers themselves. It can be postulated with confidence that some lawyers do sometimes file groundless suits, that sometimes these suits result from the careless (and on occasion reckless) action or inaction of the lawyer who fails adequately to examine the facts or the law of the case, and that sometimes lawyers file actions that they know full well are devoid of merit. It is easy for a lawyer to become so accustomed to living daily with the law that he forgets the awesome power under his control that he can at will turn loose upon another person—whose life may be seriously and irreparably altered as a result when the law appears on his doorstep in the form of a sheriff bearing a summons and complaint. Nor should it be surprising when the plaintiff's attorney in an apparently groundless lawsuit becomes the target in a subsequent action based on his role in the prior suit. Especially when the first action looks clearly frivolous to the defendant, the plaintiff's lawyer in that action may well appear to the defendant as little more than a hired gun, and an unscrupulous one at that. The lawyer, moreover, may have intimidated and embarrassed the defendant at deposition or at trial—perhaps intentionally—in a manner naturally engendering enormous hostility in the person facing the brunt of such attacks. Lawyers themselves, therefore, are to some extent responsible for the increase in countersuits of this type.

A third source of the increasing incidence of these actions lies in the courts. For at least the past generation, judicial activism has been marching forward throughout the nation. Although recent signs indicate that in some respects and places this general movement may be slowing down, and in some instances even turning back toward a policy of restraint, the "forward" march of the courts creating rights and duties from former dust is beginning to appear from place to place in the context of countersuits against attorneys.

A final reason for the increase in these actions may lie in the

law schools. Institutions of legal education have been pumping out more and more new lawyers in recent years, especially over the last decade, and the ramifications for actions of the kind examined here should be apparent. In their search for business, some new attorneys may not fully understand their new-found power and responsibilities and hence may be more likely than their senior brethren to file groundless suits. Moreover, there are presumably only a determinate number of suits with "merit," yet the influx of new lawyers must find business of some type. So, as the supply of "meritorious" legal business spreads thin, some lawyers may look harder for merit in a dispute brought by a potential client who might have been turned away as having a "groundless" suit if there were more "meritorious" business to go around. The law schools may thus be responsible not only for churning out too many lawyers but also for failing to instill in them an adequate sense of their powers and responsibilities as officers of the law and of the courts. Perhaps the emphasis in law schools on creative thinking in deciding *why* and *how* to sue should be tempered by some basic thought regarding the ethics of deciding *whether* and *when* an attorney may *fairly* sue.

Whether countersuits against attorneys will soon become a serious threat is difficult to predict. Yet, because such actions are definitely becoming more common, their essential causes, elements, implications and insurability need to be studied by lawyers, judges and legal academics. The following project examining this topic is thus most timely and should serve as a helpful springboard into this important area of the law.