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How frivolous filings drain public resources

Vexatious litigants pose unique challenges for public entities when acting as defendants, since existing California statutes focus primarily on abusive plaintiffs, leaving a gap in the law that forces municipalities and other plaintiffs to waste resources responding to frivolous motions and appeals -- a problem that may require legislative reform to address.

By Sarah B. Levett

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Vexatious litigants are especially vexing for public entities, which have an obligation to carefully steward finite amounts of tax dollars and which are frequently targeted by individuals alleging shadowy government conspiracies. Ordinarily, when a self-represented litigant who meets one or more of the criteria set forth in Code of Civil Procedure Section 391(b) files suit, their classification and treatment as vexatious is straightforward. The issue becomes less straightforward, however, when the litigant is not the plaintiff but the defendant. This scenario can arise in the context of code enforcement matters. When such a case is decided adversely to the defendant, the defendant may continue to file frivolous motions and appeals, forcing the municipality to expend valuable resources on responses. Municipalities may thus be understandably reluctant to engage in enforcement operations against known legal troublemakers.

Section 391(b)(2) defines a vexatious litigant as one who, "[a]fter a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." Section 391(b)(3) defines a vexatious litigant as one who "[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay."

Although on its face Section 391(b)(2) suggests that the vexatious litigant must be engaging in improper conduct against a defendant (i.e., the vexatious litigant must be the plaintiff), the precise language matters: Section 391(e) defines a "defendant" as "a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or *maintained* or sought to be brought or maintained" (emphasis added). California courts have held that "[a]pplying section 391, subdivision (b)(3) to both plaintiffs and defendants advances the purpose of the statute – curbing abuse of the judicial system. Likewise, applying section 391, subdivision (b)(2) to any litigant, whether plaintiff or defendant, who repeatedly litigates prior determinations is consistent with the statutory purpose." *Thompson v. Ioane*, 11 Cal. App.5th 1180, 1200 (2017).

Once a litigant is declared vexatious, there are two general means of controlling their conduct: a requirement that the litigant furnish security under Section 391.1, and a pre-filing order under Section 391.7. Section 391.7, which governs pre-filing orders against vexatious litigants, does *not* apply "to a self-represented vexatious litigant's appeal of a judgment or interlocutory order in an action in which he or she was the defendant." *John v. Superior Ct.*, 63 Cal.4th 91, 100 (2016). A public entity cannot prevent a vexatious litigant from properly appealing an adverse final judgment against them where the lawsuit was originally brought by the public entity. Moreover, because the vexatious litigant did not originally initiate the litigation, a pre-filing order which prohibits them from filing new litigation against the public entity does not resolve issues arising from litigation filed by the public entity. And it is unlikely that a court would require a defendant to furnish security in order to file motions to protect their interests. What is a public entity – or any plaintiff – with a legitimate cause of action to do when a vexatious litigant they have sued continuously engages in improper conduct during active litigation? A gap in the current statutory scheme is ripe for legislative action.

Although pre-filing orders control new litigation and security requirements can deter continued meritless filings after an adverse judgment, the statutory scheme does not appear to include any provisions concerning vexatious defendants who file innumerable frivolous motions while the case is active; at best, a plaintiff can point to the court's inherent power under Section 128 and hope that the court agrees to issue a corresponding order. Once the case concludes, if the defendant files a frivolous appeal, the plaintiff may move to have it dismissed under Section 128 and for sanctions under California Rule of Court 8.276. *See Kinney v. Clark*, 12 Cal.App.5th 724 (2017), as modified (June 14, 2017). Otherwise, as the statutory scheme stands presently, plaintiffs who have brought meritorious lawsuits have little in the way of categorical remedies to prevent a defendant from filing such motions, and must instead engage in the time-consuming task of responding to each, even if the court determines the defendant to be vexatious. Plaintiffs should not be deterred from enforcing the law or their rights by a defendant determined to bury them in frivolous paperwork, and the Legislature should consider amendments to the present statutory scheme which provide courts with more direction and less discretion in tackling this problem. Such amendments could include a provision which permits what is akin to a prefiling order; if a litigant is found to be vexatious, the other party would have the right to request that motions be screened before the other party is expected to respond to them (i.e., the motion cannot be granted as "unopposed" unless it has passed screening and the other party still fails to respond). Until and unless the Legislature does tackle this problem, plaintiffs who wish to sue a vexatious litigant to protect their rights or enforce the law do so at their own risk.

Sarah B. Levett *is a litigation and municipal law attorney at Cole Huber LLP.*