SB

226

Alaska

February 10, 2008

The Honorable Hollis French
State Capitol Building
Juneau, Alaska 99801-1182

RE: Senate Bill 226 – Vexatious Litigants

Dear Senator French,

On behalf of the National Federation of Independent Business/Alaska, I wish to express our support for Senate Bill 226. The National Federation of Independent Business is the largest small-business advocacy group in the state.

A person who, among other things, repeatedly litigates the same claims or previous adverse decisions against the same parties, files multiple frivolous lawsuits, repeatedly files pleadings or motions that are frivolous or in bad faith, or repeatedly engages in tactics that are without merit or intended to cause unnecessary delay simply drives up unnecessary costs for defendants. Eliminating inappropriate and costly litigation is strongly supported by the members of NFIB.

This bill allows the court to impose reasonable restrictions on vexatious litigants' access to the court. Under SB 226 a court can require conditions, such as the posting of security or prefiling review of a complaint by a presiding judge, before an action filed by a vexatious litigant can proceed. Several states have passed similar legislation to control the problem of vexatious litigation.

Vexatious litigation needlessly burdens the resources of the court system, and creates unnecessary expense for individuals who are the target of this litigation in the public and private sectors. This bill will provide means for screening out extreme examples of meritless cases before they are filed.

We appreciate you sponsoring this important legislation.

Sincerely yours,

Denny

Dennis DeWitt
Alaska State Director

National Federation of Independent Business — ALASKA
P.O. Box 34761 • Juneau, AK 99803 • 907-723-6667 • denny.dewitt@nfib.org

Alaska State Legislature

Senator Hollis French

Sponsor Statement

Senate Bill 226 - Vexatious Litigants

SB 226 creates a process in statute for courts to manage the problem of lawsuits brought by individuals who are "vexatious litigants."

A vexatious litigant is defined as a person who, among other things, repeatedly litigates the same claims or previous adverse decisions against the same parties, files multiple frivolous lawsuits, repeatedly files pleadings or motions that are frivolous or in bad faith, or repeatedly engages in tactics that are without merit or intended to cause unnecessary delay.

This bill allows the court to impose reasonable restrictions on vexatious litigants' access to the court. Under SB 226 a court can require conditions, such as the posting of security or prefiling review of a complaint by a presiding judge, before an action filed by a vexatious litigant can proceed. Several states have passed similar legislation to control the problem of vexatious litigation. The provisions in this bill are based on California's Code of Civil Procedure.

Vexatious litigation needlessly burdens the resources of the court system, and creates unnecessary expense for individuals who are the target of this litigation in the public and private sectors. It is certainly important to recognize and protect the individual's right to litigate claims in our court system. SB 226 will only affect those few cases that are clearly without merit. This bill will provide means for screening out extreme examples of meritless cases before they are filed. Please join me in supporting SB 226.

2006 A.L.R.6th 4 (Originally published in 2006)
(Publication page references are not available for this document.)

American Law Reports ALR6th
The ALR databases are made current by the weekly addition of relevant new cases.

(This annotation has not been released for publication in ALR and is subject to revision or withdrawal).

Validity, Construction, and Application of State Vexatious Litigant Statutes

Robin Miller, J.D.

A state vexatious litigant statute permits restrictions on access to the courts by a litigant judicially determined to be vexatious, at least when the litigant is proceeding pro se. The purpose of such a statute is to prevent abuse of the judicial system by those persons who persistently and habitually file lawsuits without reasonable grounds, or who otherwise engage in frivolous conduct in the courts. These statutes have been consistently upheld by the courts. For example, in Wolfe v. George, 385 F. Supp. 2d 1004 (N.D. Cal. 2005), the court held that: (1) the California vexatious litigant statute does not violate litigants' rights to petition for redress of grievances, procedural due process, equal protection, or protection from double jeopardy; (2) the statute is not unconstitutionally vague or overbroad; (3) the statute does not impose an excessive fine or constitute an ex post facto law or a bill of attainder; and (4) the statute does not violate the Supremacy Clause of the U.S. Constitution. This annotation collects and analyzes the federal and state cases discussing the validity, construction, and application of state vexatious litigant statutes.

TABLE OF CONTENTS

Article Outline
Index
Table of Cases, Laws, and Rules
Research References

ARTICLE OUTLINE

I. PRELIMINARY MATTERS
- § 1. Scope
- § 2. Summary and comment
- § 3. Practice pointers

II. GENERAL PRINCIPLES
- § 4. View that statute is constitutional
- § 5. View that statute does not apply to criminal proceeding

III. PROPRIETY, UNDER CIRCUMSTANCES, OF VEXATIOUS LITIGANT ORDER
- A. Order Finding Party Vexatious Litigant
  - 1. Procedural Issues
    - § 6. Manner of raising issue--Issue properly raised
    - § 7. Manner of raising issue--Issue not properly raised
    - § 8. Motion by proper party--Party proper
    - § 9. Motion by proper party--Party not proper
    - § 10. Necessity of notice and hearing
    - § 11. Necessity of formal findings by court
    - § 12. Timeliness of motion or action--Held timely

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This annotation collects and analyzes the federal and state cases discussing the validity, construction, and application of a state vexatious litigant statute. Such a statute permits restrictions on access to the courts by a litigant judicially determined to be vexatious, at least when the litigant is proceeding pro se.

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

§ 2. Summary and comment

The purpose of a vexatious litigant statute is to prevent abuse of the judicial system by those persons who persistently and habitually file lawsuits without reasonable grounds, or who otherwise engage in frivolous conduct in the courts. Such conduct clogs the court dockets, results in increased costs, and is a waste of judicial resources that are supported by the taxpayers.[FN1]

California enacted the nation's first vexatious litigant statute[FN2] in 1963 after suggestions by both the state bar and the state judiciary.[FN3] This statute was significantly broadened in 1990.[FN4]

The next state to act, Hawaii, did not do so until 1993,[FN5] enacting a statute modeled on California's.[FN6] Other states followed: Ohio in 1996, [FN7] Texas in 1997,[FN8] and Florida in 2000.[FN9] The latter two are also based on (but are not identical to) California's statute, while Ohio's is dissimilar.

The California statute establishes four tests for vexatiousness; a litigant's satisfying any one is a sufficient basis for a determination that the litigant is vexatious:

•In the immediately preceding seven-year period, the person has commenced, prosecuted, or maintained in propria persona at least five litigations, other than in a small claims court, that have been (1) finally determined adversely to the person or (2) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

•After a litigation has been finally determined against the person, he or she repeatedly relitigates or attempts to relitigate, in propria persona, either (1) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (2) 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.

•In any litigation while acting in propria persona, the person 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.

•The person has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

Statutes enacted in Florida, Hawaii, and Texas embrace some or all of the California statute's criteria for a vexatious litigant, occasionally with modifications. The Ohio statute, taking a different approach, applies to a litigant who has habitually, persistently, and without reasonable grounds engaged in "vexatious conduct," which the statute defines as conduct that either: (1) obviously serves merely to harass or maliciously injure another party to the civil action; (2) is imposed solely for delay; or (3) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

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After a litigant has been determined by the court to be vexatious, all the statutes permit two separate remedies: a requirement that the litigant post security for the opposing party's costs in order to continue the litigation, and a prefiling order requiring the litigant to receive advance judicial permission before commencing new pro se litigation.[FN10]

Courts asked to consider the constitutionality of a state vexatious litigant statute have consistently upheld the statute (§ 4). Some courts have ruled that such a statute does not apply to criminal or habeas corpus proceedings (§ 5).

Courts have been asked to address various procedural issues in connection with a motion to have a person declared a vexatious litigant under the state vexatious litigant statute. Thus, courts have held, under the circumstances, that such a motion was (§ 6), or was not (§ 7), made in a manner permitted under the statute; that the motion was (§ 8), or was not (§ 9), made by a party permitted under the statute to assert such a motion; that the statute required prior notice and a hearing (§ 10), but did not require the court to issue formal findings (§ 11), before a party could be declared a vexatious litigant; and that the motion was (§ 12), or was not (§ 13), timely under the statute.

In cases resolving substantive issues concerning the propriety of an order declaring a party to be a vexatious litigant, courts have had to address certain threshold issues. Thus, courts have held, at least under the circumstances, that a vexatious litigant was (§ 14), or was not (§ 15), required to be a natural person; that a vexatious litigant was (§ 18), or was not (§ 19), required to be proceeding pro se; and that, where a vexatious litigant was required to be a "plaintiff," a party's status as a plaintiff was (§ 16), or was not (§ 17), supportable.

In cases applying the various definitions of vexatious litigant found in state vexatious litigant statutes, courts have held, under the circumstances, that a showing that there was no reasonable probability that a litigant would prevail in the litigation was (§ 20), or was not (§ 21), a prerequisite for a determination that the litigant was vexatious; that a determination that a party was a vexatious litigant was (§ 22), or was not (§ 23), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had engaged in persistent vexatious conduct; that a determination that a party was a vexatious litigant was (§ 24), or was not (§ 25), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had been designated as a vexatious litigant in prior litigation; that a determination that a party was a vexatious litigant was (§ 26), or was not (§ 27), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had engaged in repeated dilatory or frivolous conduct; that a determination that a party was a vexatious litigant was (§ 28), or was not (§ 29), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had repeatedly litigated, or attempted to litigate, the same issues; that a determination that a party was a vexatious litigant was (§ 30), or was not (§ 31), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had commenced a specified number of prior unsuccessful litigations; and that a determination that a party was a vexatious litigant was supportable under an unspecified provision in a state vexatious litigant statute (§ 32).

In other cases involving substantive issues in connection with a motion to have a person declared a vexatious litigant under the state vexatious litigant statute, courts have ruled, at least under the circumstances, that neither the fact that a prior court declined to declare the person to be a vexatious litigant under the statute (§ 33), nor the fact that a prior court had sanctioned the person for the allegedly objectionable conduct (§ 34), precluded the court from granting the motion.

In cases addressing the propriety of the issuance, under the state vexatious litigant statute, of a prefiling order requiring a vexatious litigant to obtain advance judicial permission to commence specified litigation, courts have held, under the circumstances, that the proper party made the motion seeking the issuance of the prefiling order (§ 35); that the motion seeking the issuance of the prefiling order, or the court's order granting the motion, was timely filed (§ 36); that it was (§ 37), or was not (§ 38), permissible for the order to extend to litigation in which the vexatious litigant was represented by counsel rather than proceeding pro se; and that it was impermissible for the order to extend to litigation commenced in certain courts (§ 39).

In cases addressing the propriety of the issuance, under the state vexatious litigant statute, of a court order

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requiring a vexatious litigant to post security in order to proceed with specified litigation, courts have held, under the circumstances, that a court was not required to hold a hearing (§ 41), or to make formal findings (§ 40), prior to issuing such an order; that a motion seeking such an order was untimely (§ 42); that the amount of security required was (§ 43), or was not (§ 44), supportable; that the court had (§ 45), or did not have (§ 46), discretion in issuing such an order; that the court properly disposed of unused security (§ 47); that the court improperly specified the form of the security (§ 48); that a finding that a vexatious litigant lacked a reasonable probability of success with respect to certain litigation, so as to support an order for security, was (§ 49), or was not (§ 50), supportable; that it was proper for the order to protect a specified party (§ 51); and that a litigant's receiving judicial permission to proceed with certain litigation did not preclude a court from ordering the litigant to provide security in order to proceed with the litigation (§ 52).

In cases involving the application, rather than the propriety, under the circumstances, of a prefiling order issued against a vexatious litigant under the state vexatious litigant statute, courts have held, under the circumstances, that the litigant sought leave to proceed from the wrong court (§ 53); that the order applied to specific litigation (§ 54); and that the litigant did not submit a sufficient application for leave to proceed (§ 55).

In cases involving the application of an order, under the state vexatious litigant statute, requiring a vexatious litigant to post security in order to proceed with certain litigation, courts have held, under the circumstances, that the order did (§ 56), or did not (§ 57), apply to the litigant's current litigation.

Finally, in several miscellaneous cases arising under state vexatious litigant statutes, courts have held, under the circumstances, that dismissal of the action was an appropriate sanction for a vexatious litigant's failure to comply with the statute or an order issued under the statute (§ 58); that a stay imposed upon the filing of a vexatious litigant motion was (§ 59), or was not (§ 60), preclusive of certain action by the court; that a vexatious litigant's appeal was untimely even taking into account the time expended in complying with a prefiling order (§ 61); and that a pleading filed following a court's denial of a vexatious litigant motion was (§ 62), or was not (§ 63), timely.

§ 3. Practice pointers

A proceeding under a state vexatious litigant statute is just one tool available to rein in litigants who abuse the judicial system. A court may have inherent power to restrict a vexatious litigant's access to the courts, [FN11] or the party harassed by the litigant may be able to secure an anti-suit injunction.[FN12] Furthermore, a court may have either inherent [FN13] or express statutory[FN14] authority to require a party who pursues vexatious litigation, or the party's attorney, to pay the opposing party's attorney's fees.

A court order declaring a party to be a vexatious litigant is usually considered an interlocutory order that cannot be appealed until final judgment is rendered in the action.[FN15]

The state vexatious litigant statutes enacted to date do not provide a mechanism for that designation, once bestowed, to be removed, and only one court appears to have considered the question of whether a mechanism should be provided.[FN16] According to the California state vexatious litigants website, a person's name can be removed from the state list of vexatious litigants only if the court that issued the original vexatious litigant order vacates that order.[FN17]

Where a state-law claim is asserted in a federal court sitting in a state that has enacted a vexatious litigant statute, it appears that a party's status as a vexatious litigant will be determined under federal law, rather than under the state statute,[FN18] unless the federal court has adopted a local rule embracing the standards articulated in the state statute.[FN19]

II. GENERAL PRINCIPLES

§ 4. View that statute is constitutional

Rejecting the indicated federal or state constitutional challenges, the courts in the following cases held that the state's vexatious litigant statute is constitutional.

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Legal Encyclopedias

Am. Jur. 2d, Constitutional Law § 620

Am. Jur. 2d, Costs § 81

Am. Jur. 2d, Equity § 27

Am. Jur. 2d, Injunctions § § 39, 78, 191, 204

C.J.S., Actions § 73

C.J.S., Costs § 63

C.J.S., Equity § 38

C.J.S., Injunctions § 99

Trial Strategy

Cause of Action Under 28 USC 1927 to Recover Excess Costs, Expenses, and Attorneys' Fees for Unreasonable and Vexatious Multiplication of Proceedings, 19 Causes of Action 447

Additional References

Appellees' Brief [Leonard v. Abbott], 2004 WL 1873171

Appellant's Reply Brief [Leonard v. Abbott], 2004 WL 1292173

Appellant's First Amended Brief [Leonard v. Abbott], 2004 WL 828168

California state vexatious litigants website, http:// www.courtinfo.ca.gov/courtadmin/aoc/vexatious.htm

Ohio state vexatious litigants website, http://www.sconet.state.oh.us/Clerk_of_ Court/vexatious/

Section 2. Footnotes:

[FN1] See Mayer v. Bristow, 91 Ohio St. 3d 3, 2000-Ohio-109, 740 N.E.2d 656 (2000).

[FN2] See Cal. Civ. Proc. Code § § 391 et seq. (effective Sept. 20, 1963).

[FN3] See Taliaferro v. Hoogs, 236 Cal. App. 2d 521, 46 Cal. Rptr. 147 (1st Dist. 1965); McColm v. Westwood Park Ass'n, 62 Cal. App. 4th 1211, 73 Cal. Rptr. 2d 288 (1st Dist. 1998).

[FN4] See Camerado Ins. Agency, Inc. v. Superior Court, 12 Cal. App. 4th 838, 16 Cal. Rptr. 2d 42 (3d Dist. 1993).

[FN5] See Haw. Rev. Stat. § § 634J-1 et seq.

[FN6] See Standard Management, Inc. v. Kekona, 98 Haw. 95, 43 P.3d 232 (Ct. App. 2001).

[FN7] See Ohio Rev. Code Ann. § 2323.52 (effective March 18, 1997).

[FN8] See Tex. Civ. Prac. & Rem. Code Ann. § § 11.001 et seq. (effective Sept. 1, 1997).

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[FN9] See Fla. Stat. Ann. § 68.093 (effective Oct. 1, 2000).

[FN10] See, e.g. Holcomb v. U.S. Bank Nat. Ass'n, 129 Cal. App. 4th 1494, 29 Cal. Rptr. 3d 578 (4th Dist. 2005) (§ 54); Bravo v. Ismai, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (4th Dist. 2002) (§ 10).

Section 3. Footnotes:

[FN11] See, e.g., Melnitzky v. Apple Bank for Savings, 19 A.D.3d 252, 797 N.Y.S.2d 470 (1st Dep't 2005); Jordan v. State ex rel. Dept. of Motor Vehicles and Public Safety, 110 P.3d 30 (Nev. 2005); May v. Barthet, 886 So. 2d 324 (Fla. Dist. Ct. App 4th Dist. 2004).

[FN12] See, e.g., Weaver v. School Bd. Of Leon County, 896 So. 2d 929, 197 Ed. Law Rep. 457 (Fla. Dist. Ct. App. 1st Dist. 2005); Howell v. Texas Workers' Compensation Com'n, 143 S.W.3d 416 (Tex. App. Austin 2004), review denied, (2 pets.) (Apr. 1, 2005).

[FN13] See, e.g., LaMontagne Builders, Inc. v. Bowman Brook Purchase Group, 150 N.H. 270, 837 A.2d 301 (2003); Barnes v. Oklahoma Farm Bureau Mut. Ins. Co., 2000 OK 55, 11 P.3d 162 (Okla. 2000), as corrected, (July 25, 2000) and as corrected, (Aug. 9, 2000) and as corrected, (Jan. 16, 2001).

[FN14] See, e.g., Gibson v. Decatur Federal Sav. & Loan Ass'n, 235 Ga. App. 160, 508 S.E.2d 788 (1998); Lewis v. Powers, 1997 WL 335563 (Ohio Ct. App. 2d Dist. Montgomery County 1997); Township of Lower Merion v. QED, Inc., 762 A.2d 779 (Pa. Commw. Ct. 2000).

[FN15] See, e.g., Stern v. American States Ins. Co., 2003 WL 1611291 (Cal. App. 2d Dist. 2003), unpublished/noncitable, (Mar. 28, 2003); Phillips v. Phillips, 2004 WL 2903519 (Tex. App. Houston 1st Dist. 2004).

[FN16] See PBA, LLC v. KPOD, Ltd., 112 Cal. App. 4th 965, 5 Cal. Rptr. 3d 532 (2d Dist. 2003), review denied, (Jan. 22, 2004) (§ 26), in which the court stated that "[d]espite the apparent unfairness of permanently branding a person as a vexatious litigant, it is unclear how the vexatious litigant determination can be erased in appropriate cases. The statutory scheme ... does not itself provide a procedural mechanism for dissolving an order declaring a person a vexatious litigant."

[FN17] See http://www.courtinfo.ca.gov/courtadmin/aoc/vexfaq.htm.

[FN18] See Fox v. Pope, R.I.C.O. Bus. Disp. Guide (CCH) ¶ 10010, 2001 WL 167913 (N.D. Tex. 2001) (unreported opinion); Benoza v. Target Personnel Services, 1997 WL 446232 (N.D. Cal. 1997) (unreported opinion). See also Carlock v. RMP Financial, 2003 WL 24207625 (S.D. Cal. 2003) (unreported opinion; without deciding the "Erie question" of whether federal or state law controlled, the court found that the party was not a vexatious litigant under either standard).

[FN19] See Sanders v. CleanNet of Southern California, Inc., 135 Fed. Appx. 936 (9th Cir. 2005) (this case may be of limited or no precedential value due to court rule); Weissman v. Quail Lodge, Inc., 179 F.3d 1194 (9th Cir. 1999).

Section 4. Footnotes:

[FN20] In Cent. Ohio Transit Auth. v. Timson, 132 Ohio App. 3d 41, 724 N.E.2d 458 (10th Dist. Franklin County 1998) (abrogated by, Mayer v. Bristow, 91 Ohio St. 3d 3, 2000-Ohio-109, 740 N.E.2d 656 (2000)), the court held that, while most of the state vexatious litigator statute was constitutional, Ohio Rev. Code Ann. § 2323.52(G), precluding any appeal from a court's denial of a vexatious litigator's application for leave to proceed with a case, violated Ohio Const. art. I, § 16, providing that all courts shall be open, and every person, for an injury to his or her land, goods, person, or reputation, shall have remedy by due course of law.

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2006 A.L.R.6th 4

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H

Briefs and Other Related Documents
Wolfe v. GeorgeN.D.Cal.,2005.
United States District Court,N.D. California.
Burton H. WOLFE, Plaintiff,
v.
Ronald M. GEORGE, et al., Defendants.
No. C 00-1047 SBA.
Nos. 264, 276, 285.

Aug. 22, 2005.

Background: Civil rights action was brought against state of California, California's Judicial Council, various California trial and appellate judges, and court services analyst employed by the California Judicial Council, seeking declaration that California's Vexatious Litigant Statute was unconstitutional. The District Court dismissed action for lack of subject matter jurisdiction, and plaintiff appealed. The Court of Appeals, 392 F.3d 358, affirmed in part, reversed in part, and remanded. On remand, parties moved and cross moved for judgment on the pleadings.

Holdings: The District Court, Armstrong, J., held that:

(1) statute did not violate First Amendment right to petition for redress of grievances;

(2) statute was not unconstitutionally vague or overbroad;

(3) statute did not violate procedural due process rights of frequent litigants;

(4) equal protection rights were not violated,

(5) double jeopardy rights were not violated;

(6) security requirement was not impermissible excessive fine;

(7) no ex post facto law or bill of attainder was involved;

(8) no Supremacy Clause violation was involved; and

(9) litigant lacked standing to raise third party claims.

Judgment for state.
West Headnotes

[1] Action 13 9

13 Action
131 Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92 91

92 Constitutional Law
92V Personal, Civil and Political Rights
92k91 k. Right of Assembly and Petition. Most Cited Cases
California Vexatious Litigant Statute, barring frivolous lawsuits, did not violate First Amendment right to petition for redress of grievances; suits based on intentional falsehoods, or knowingly frivolous claims, were not protected by First Amendment. U.S.C.A. Const.Amend. 1; West's Ann.Cal.C.C.P. § 391 et seq.

[2] Action 13 9

13 Action
131 Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92 82(6.1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications
92k82(6.1) k. In General. Most Cited Cases
California Vexatious Litigant Statute was not unconstitutionally vague, despite claims that pro se litigants would not understand technical legal terms, and that judges were given excessive discretion to determine that litigation was vexatious or lacked merit. U.S.C.A. Const.Amend. 1; West's Ann.Cal.C.C.P. § 391 et seq.

[3] Action 13 9

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13 Action
13I Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92 **82(6.1)**

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(6) Particular Rights, Limitations, and Applications
92k82(6.1) k. In General. Most Cited Cases
California Vexatious Litigant statute was not unconstitutionally overbroad; there was compelling government interest in supporting uncluttered operation of court, and there were safeguards against suppression of justifiable litigation. U.S.C.A. Const.Amend. 1; West's Ann.Cal.C.C.P. § 391 et seq.

[4] Action 13 **9**

13 Action
13I Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92 **305(2)**

92 Constitutional Law
92XII Due Process of Law
92k304 Civil Remedies and Proceedings
92k305 Actions
92k305(2) k. Access to Courts; Rights to Hearing and Determination. Most Cited Cases
California Vexatious Litigant Statute did not violate procedural due process rights of frequent litigants; there were no restrictions placed on right to sue until after notice and hearing, and claims that suits filed after entry of order limiting suit were frivolous would be resolved on case by case basis. U.S.C.A. Const.Amend. 14; West's Ann.Cal.C.C.P. § 391 et seq.

[5] Action 13 **9**

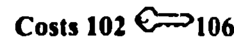
13 Action
13I Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92 **248(1)**

92 Constitutional Law
92XI Equal Protection of Laws
92k243 Creation or Discharge of Liability
92k248 Costs or Fees
92k248(1) k. In General. Most Cited Cases

Constitutional Law 92 **249(1)**

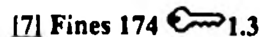
92 Constitutional Law
92XI Equal Protection of Laws
92k249 Civil Remedies and Proceedings
92k249(1) k. In General. Most Cited Cases

Costs 102  **106**

102 Costs
102VI Security for Costs; Proceedings in Forma Pauperis
102k106 k. Statutory Provisions. Most Cited Cases
Equal protection rights of frequent litigants were not violated by California Vexatious Litigant Statute, requiring them to have complaints screened by court before filing and to post security; financial barrier applied only to activities not protected by constitution. U.S.C.A. Const.Amend. 14; West's Ann.Cal.C.C.P. § 391 et seq.

[6] Double Jeopardy 135H **22**

135H Double Jeopardy
135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected
135Hk22 k. Particular Proceedings. Most Cited Cases
California Vexatious Litigant Statute, imposing restrictions on persons engaged in frivolous litigation, did not violate double jeopardy clause; no criminal sanctions were involved. U.S.C.A. Const.Amend. 5; West's Ann.Cal.C.C.P. § 391 et seq.

[7] Fines 174  **1.3**

174 Fines
174k1.3 k. Excessive Fines. Most Cited Cases
California Vexatious Litigant Statute, imposing security requirement on litigant found to have engaged in vexatious litigation, did not violate Eighth Amendment prohibition on excessive fines; Eighth Amendment was implicated in criminal and civil forfeiture proceedings, not involved in present case. U.S.C.A. Const.Amend. 8; West's Ann.Cal.C.C.P. §

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391 et seq.

[8] Action 13

13 Action
13I Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92

92 Constitutional Law
92VIII Retrospective and Ex Post Facto Laws
92k198 Retroactive Operation of Ex Post Facto Laws
92k199 k. In General. Most Cited Cases
California Vexatious Litigant Statute, imposing security requirements when persons with history of vexatious litigation bring suit, was not ex post facto law violating Constitution; ex post facto clause applied only to criminal cases. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1; West's Ann.Cal.C.C.P. § 391 et seq.

[9] Action 13

13 Action
13I Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

Constitutional Law 92

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82.5 k. Bills of Attainder, Prohibition Against. Most Cited Cases
California Vexatious Litigant Statute, imposing restrictions on litigants with history of vexatious filings, was not unconstitutional bill of attainder; statute had valid and non punitive purpose of protecting courts and other litigants against abuses of judicial process, rather than purpose of inflicting legislative punishment on frequent litigators. U.S.C.A. Const. Art. 1, § § 9, cl. 3, 10, cl. 1.

[10] Action 13

13 Action
13I Grounds and Conditions Precedent
13k9 k. Unnecessary or Vexatious Actions. Most Cited Cases

States 360

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases
Absence of any conflicting federal statute precluded claim that California Vexatious Litigant Statute, imposing restrictions on persons engaging in frivolous litigation, violated Supremacy Clause. U.S.C.A. Const. Art. 6, cl. 2; West's Ann.Cal.C.C.P. § 391 et seq.

[11] Constitutional Law 92

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.1 Particular Statutes or Actions Attacked
92k42.1(1) k. In General. Most Cited Cases
Litigant lacked standing to raise claims, on behalf of all persons pursuing pro se claims, that California Vexatious Litigant Statute was unconstitutional; litigant was seeking to represent too broad a class, as statute applied only to those with record of frivolous litigation. U.S.C.A. Const. Art. 3, § 2, cl. 1; West's Ann.Cal.C.C.P. § 391 et seq.

Burton H. Wolfe, San Francisco, CA, pro se.
David M. Verhey, Sacramento, CA, Tom Blake, CA State Attorney General's Office, Thomas A. Blake, Jonathan U. Lee, City Attorney's Office, San Francisco, CA, for Defendants.

ORDER

ARMSTRONG, District Judge.
This matter comes before the Court on Plaintiff's Motion for Judgment on the Pleadings [Docket No. 264] and Defendants' Cross-Motion for Judgment on the Pleadings [Docket No. 276]. Having read and considered the arguments presented by the parties in the papers submitted to the Court, and having heard the argument of Plaintiff and Defendants' counsel at the June 28, 2005 hearing, the Court hereby DENIES Plaintiff's Motion for Judgment on the Pleadings and GRANTS Defendants' Cross-Motion for Judgment on the Pleadings.

BACKGROUND

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A. Procedural Background.

On March 27, 2000, Plaintiff Burton Wolfe ("Plaintiff"), filed a Complaint, in propria persona, under 42 U.S.C. § 1983, challenging the constitutionality of California's*1007 Vexatious Litigant Statute. He named as defendants: (1) Justice Gary Strankman, Chief Justice Ronald George, Deborah Silva, the Judicial Council of California, and State of California (collectively known as the "State Defendants"); and (2) Judge Alfred Chiantelli, Judge David Garcia, and Judge Ronald Quidachay (collectively known as the "Judge Defendants").

On March 29, 2002, this Court dismissed Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine after finding that Plaintiff's action appeared to be a de facto appeal of prior state court decisions. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The Court also dismissed the State Defendants and the Judge Defendants from the lawsuit. Plaintiff subsequently appealed.

On December 14, 2004, the Ninth Circuit held that this Court erred by dismissing the suit under *Rooker-Feldman*. *See Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir.2004). Specifically, the Ninth Circuit found that Plaintiff's references to his involvement in prior state court actions went to show that Plaintiff had standing, and were not de facto appeals from the decisions in those prior actions. *Id.* However, the Ninth Circuit affirmed the dismissal of the State of California and the Judicial Council of California on the grounds that they are not "persons" subject to suit under § 1983. *Id.* at 361. The court further affirmed the dismissal of the Judge Defendants, Justice Strankman, and Chief Justice George in his judicial capacity. *Id.* Finally, the court reversed the dismissal of Chief Justice George, in his administrative capacity, and Ms. Silva, and remanded to this Court for further proceedings. *Id.*

On February 8, 2005, Plaintiff filed a First Amended Complaint, in propria persona, on behalf of himself and on behalf of all persons appearing in the courts of California without representation, for Declaratory and Prospective Injunctive Relief. In the First Amended Complaint, Plaintiff alleges that California's Vexatious Litigant Statute, California Code of Civil Procedure §§ 391 *et seq.*, is unconstitutional. On February 23, 2005, Plaintiff filed a Motion for Judgment on the Pleadings or, in the alternative, for Declaratory Judgment. On May 6, 2005, Defendants filed a Cross-Motion for Judgment on the Pleadings.

B. Statutory Background.

California's Vexatious Litigant Statute (the "statute") is codified at California Code of Civil Procedure §§ 391 *et seq.* The statute defines a vexatious litigant as a person who:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After 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.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious*1008 motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

Cal.Code of Civ. Proc. § 391(b)(1)-(4). Pursuant to the statute, a defendant may move the court to require the pro se plaintiff to provide security if the defendant can make a showing that the plaintiff is a vexatious litigant and that there is not a reasonable probability that the plaintiff will prevail in the litigation against the moving party. *See* Cal.Code of Civ. Proc. § 391.1. Upon making the requisite findings, the court may then order the plaintiff to provide a security [FN1] that compensates for the reasonable costs and attorney fees of defending the

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suit. Cal.Code Civ. Proc. § § 391.1, 391.3. If the plaintiff fails to post the security, the action may be dismissed. Cal.Code Civ. Proc. § 391.4.

FN1. A "security" is defined in the statute as an "undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant." Cal.Code Civ. Proc. § 391(c).

Once a plaintiff has been declared a "vexatious litigant" within the meaning of the statute, the court may also enter an order prohibiting that plaintiff from filing new state court litigation absent leave of the presiding judge where the litigation is proposed to be filed. Cal.Code Civ. Proc. § 391.7. This order is referred to as a "prefiling" order. Cal.Code Civ. Proc. § 391.7. After the prefiling order is issued, the presiding judge shall permit the filing of further litigation if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. Cal.Code of Civ Proc. § 391.7(b).

LEGAL STANDARD

A. Motion for Judgment on the Pleadings.

Under Federal Rule of Civil Procedure 12(c), any party may move for judgment on the pleadings at any time after the pleadings are closed but within such time as not to delay the trial. Fed.R.Civ.P. 12(c). "For the purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.,* 896 F.2d 1542, 1550 (9th Cir.1990). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* When brought by the defendant, a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is a "means to challenge the sufficiency of the complaint after an answer has been filed." *New.Net, Inc. v. Lavasoft,* 356 F.Supp.2d 1090, 1115 (C.D.Cal.2004). A motion for judgment on the pleadings is therefore similar to a motion to dismiss. *Id.* When the district court must go beyond the pleadings to resolve an issue on a motion for judgment on the pleadings, the proceeding is properly treated as a motion for summary judgment. Fed.R.Civ.P. 12(c); *Bonilla v. Oakland Scavenger Co.,* 697 F.2d 1297, 1301 (9th Cir.1982).

*1009 B. Declaratory Judgment.

28 U.S.C. § 2201 provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201.

Declaratory judgment is appropriate where, as here, an injunction is not available because there are no pending state court proceedings. *Steffel v. Thompson,* 415 U.S. 452, 463, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("When no state prosecution is pending and the only question is whether declaratory relief is appropriate, the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.")

ANALYSIS

A. Plaintiff's and Defendants' Cross-Motions for Judgment on the Pleadings.

In his Motion for Judgment on the Pleadings, Plaintiff seeks a declaratory judgment from this Court that California's Vexatious Litigant Statute, California Code Civil Procedure § § 391 *et seq.,* is unconstitutional. FN2 Plaintiff asserts the following bases for a finding that the Vexatious Litigant Statute is unconstitutional: (1) it violates the First Amendment; (2) it is overbroad; (3) it is vague; (4) it violates the due process clause of the Fifth and Fourteenth Amendments FN3; (5) it violates the equal protection clause of the Fourteenth Amendment; (6) it violates the double jeopardy clause of the Fifth Amendment; (7) it violates the excessive fines clause

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of the Eighth Amendment; (8) it is an impermissible ex post facto law or bill of attainder; and (9) it generally conflicts with federal law and violates 42 U.S.C. § 1983. Defendants, on the other hand, move for judgment on the pleadings on the basis that the Vexatious Litigant Statute is not unconstitutional on any of the aforementioned grounds. Additionally, Defendants assert that Plaintiff lacks standing to assert third-party rights.[FN4]

FN2. Plaintiff actually contends that the statute is unconstitutional "on its face" and "as applied." However, Plaintiff has not produced any admissible evidence demonstrating that the statute is unconstitutional as "applied" to himself or others. Instead, he relies on vague references to certain "facts" that are clearly outside of his own personal knowledge and "documents" that have not been produced to the Court. *See, e.g.*, Pl's Mot. at 19. Plaintiff has therefore failed on his burden of proof with respect to his "as applied" constitutional challenge and, accordingly, only his facial challenge is discussed below.

FN3. Since Plaintiff is challenging a state statute, his due process cause of action is most appropriately characterized as claim brought under the Fourteenth Amendment, not the Fifth Amendment. Thus, hereafter, discussion of Plaintiff's due process claim will refer exclusively to the Fourteenth Amendment. It should be noted, however, that the due process analysis is the same under both the Fourteenth and Fifth Amendment. *See Rodriguez v. Cook*, 169 F.3d 1176, 1179 n. 4 (9th Cir.1999).

FN4. Although it is not clear from the parties' briefing, both parties conceded at the June 28, 2005 hearing that, pursuant to the Ninth Circuit's ruling in *Wolfe,* Plaintiff's personal standing has been established and is no longer challenged by Defendants. *See Wolfe*, 392 F.3d at 364 ("We construe Wolfe's references to the prior judicial actions ... as ... part of his demonstration that he is sufficiently threatened with actual harm from the future operation of the Vexatious Litigant Statute that he has standing to bring the present suit.").

***1010 1. Constitutionality under the First Amendment.**

a. First Amendment Right to Petition for Grievances.

[1] With respect to Plaintiff's First Amendment claim, the Court must first determine whether the Vexatious Litigant Statute actually encroaches upon a right guaranteed by the First Amendment.

The United States Supreme Court has long recognized that the right to petition for a redress or grievance is a liberty safeguarded by the Bill of Rights and is intimately connected both in origin and in purpose with the other First Amendment rights of free speech and free press. *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967).[FN5] However, the Supreme Court has also consistently held that "baseless litigation is ***not*** immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 743, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) ("[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition."). In fact, as the Supreme Court stated in *Bill Johnson's Restaurants,* "The first amendment interests involved in private litigation-compensation for violated rights and interest, the psychological benefits of vindication, public airing of disputed facts-are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims." *Id.*

FN5. The First Amendment is "incorporated" against the states by virtue of the Fourteenth Amendment. *Hague v. C.I.O.*, 307 U.S. 496, 512-13, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

Applying the *Bill Johnson's Restaurants* holding to the Vexatious Litigant Statute, the Court finds that the Vexatious Litigant Statute does not violate the First Amendment. By its very terms, the statute is only implicated once the state court has concluded that there is "no reasonable probability that [the plaintiff] will prevail in the litigation against the moving defendant." Cal.Code Civ. Proc. § 391.3. Further, even when a plaintiff has been declared a vexatious litigant, the statute does not preclude a plaintiff from filing subsequent lawsuits, so long as those lawsuits have merit. *See* Cal.Code Civ. Proc. § 391.7; *see Wolfgram v. Wells Fargo Bank*, 53

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Cal.App.4th 43, 60, 61 Cal.Rptr.2d 694 (1997) ("When a vexatious litigant knocks on the courthouse door with a colorable claim, he may enter.") Thus, to the extent that Plaintiff's argument is premised on his belief that the Vexatious Litigant Statute encroaches upon a First Amendment right because it is a prohibitive ban on meritorious litigation, his argument is fatally flawed. The Vexatious Litigant Statute is not, as Plaintiff contends, an absolute ban on the right to petition for grievances.

2. Vagueness.

[2] Plaintiff has also not proven that the Statute is unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). To survive a vagueness challenge, the statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Id.* This is particularly important when sensitive areas of First Amendment freedoms are involved; in such cases, the statute must have sufficiently clear terms such that citizens are not led to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Id.* ***1011** The statute must also provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is prevented. *Id.*

In support of his vagueness challenge, Plaintiff contends that the statute fails to provide warning of what conduct is proscribed because it does not define the terms "finally determined adversely," "unmeritorious pleadings," "unnecessary discovery," or "other tactics that are frivolous." Having considered Plaintiff's arguments, the Court finds that there is absolutely no merit to the contention that words such as "final," "adverse," "unmeritorious," "unnecessary," "tactics," or "frivolous" are incomprehensible to a person of ordinary intelligence. Second, while it may be true that a complete stranger to litigation may not readily understand the correct meaning of the terms "discovery" and "pleadings," Plaintiff's contention that an "ordinary person" would not understand these terms is completely undermined by the fact that the "ordinary person" in this context is a person who either: (1) has engaged in litigation on at least *five* prior occasions within seven years; (2) is actively involved in current litigation; or (3) has recently been involved in litigation and is reinitiating that litigation. *See* Cal.Code Civ. Proc. § 391(b). Thus, the argument that such a person is not able to comprehend fairly basic concepts of litigation is tenuous, at best, and defies credibility. The Vexatious Litigant Statute simply has no applicability to a person who is a complete stranger to litigation.

Moreover, even assuming, *arguendo,* that "sensitive areas of First Amendment freedoms" are involved, the Court does not find that there is any lack of clarity in the statute that would leads citizens to "steer far wider of the unlawful zone" than necessary. The activity "prohibited" by the statute is unmistakeably clear: it is the pursuit of litigation that lacks merit and is instituted solely for the sake of harassment and delay. Indeed, the definition of the term "vexatious litigant" alone contains a considerable amount of detail. *See* Cal.Code Civ. Proc. § 391. Since this is not "a vague, general ... ordinance, but a statute written specifically for the [court] context, where the prohibited disturbances are easily measured by their impact" the Court finds that the statute gives "fair notice to those to whom it is directed." *See Grayned,* 408 U.S. at 112, 92 S.Ct. 2294.

Additionally, since the statute provides for actual notice and a hearing before it is even triggered, there is arguably nothing to "steer clear of" at all, as even a person who unjustifiably pursues frivolous litigation is free to continue his activities until his opponent asks the court to intervene. Cal.Code Civ. Proc. § 391.1. Significantly, even then, the person cannot be declared a "vexatious litigant" until after the court has conducted a hearing and given the plaintiff the opportunity to be heard. *Id.*

Plaintiff's alternative argument, that the alleged "vagueness" of the statute enables judges to interpret the statute in an arbitrary and discriminatory manner, is also unpersuasive. Undisputedly, even outside of the Vexatious Litigant context, judges are *regularly* called upon to determine what constitutes a "final adverse determination," an "unmeritorious pleading," "frivolous tactics," or "unnecessary discovery." *See, e.g.,* Cal.Code Civ. Proc. 128.5 ("Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."); *see also* Cal. Rule of Court 27(e) (permitting Court of Appeal to "impose sanctions, including the award or denial of costs, on a party or an attorney for (a) ***1012** taking a frivolous

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appeal or appealing solely to cause delay; (b) including in the record any matter not reasonably material to the appeal's determination; or (c) committing any other unreasonable violation of these rules."). The fact that a judge performs this function is one of the most fundamental underpinnings of the judicial system. *See, e.g., Ellis v. Roshei Corp.,* 143 Cal.App.3d 642, 648, 192 Cal.Rptr. 57 (1983) ("A trial court is empowered to exercise its supervisory power in such a manner as to provide for the orderly conduct of the court's business and to 'guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.' "). Thus, Plaintiff's argument that "a judge can [not] come up with applicable definitions for such terms" is wholly without merit. The case law makes clear that California state court judges are, in fact, consistently and fairly construing the statute. *See, e.g., Childs v. PaineWebber Inc.,* 29 Cal.App.4th 982, 992, 35 Cal.Rptr.2d 93 (1994).

Plaintiff's position is also based entirely on the faulty premise that "in a CCP 391 proceeding a First Amendment right is at stake." Again, by definition, a "CCP 391 proceeding" involves only litigation where the plaintiff cannot demonstrate that he has any reasonable likelihood of prevailing. Such frivolous litigation is not protected by the First Amendment.

Finally, Plaintiff's concern that litigants are often required to post securities of varying amounts, or subjected to prefiling orders with varying standards, does not compel the conclusion that judges are enforcing the statute in an arbitrary or discriminatory manner. If anything, it suggests that state court judges are appropriately deciding each matter on a case-by-case basis, after giving careful consideration to the particular facts of the situation. This supports a finding of constitutionality. *Grayned,* 408 U.S. at 119, 92 S.Ct. 2294 ("[the] decision is made, as it should be, on an individualized basis, given the particular fact situation."). Accordingly, the Court finds that the Vexatious Litigant Statute is not unconstitutionally vague.

3. Overbreadth.

[3] Plaintiff's argument that the Vexatious Litigant Statute is unconstitutionally overbroad is also flawed. Although "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct," there is simply no basis to conclude that the Vexatious Litigant Statute "sweeps within its prohibitions" constitutionally protected activities. *Grayned,* 408 U.S. at 115, 92 S.Ct. 2294.

First, as set forth above, the Vexatious Litigant Statute is not a prohibitive ban on the general right to petition for *bona fide* grievances. In fact, the Vexatious Litigant Statute does not prohibit the filing of meritorious litigation or special proceedings, such as the filing of a habeas corpus petition. *See, e.g., In re Bittaker,* 55 Cal.App.4th 1004, 1011-12, 64 Cal.Rptr.2d 679 (1997) (holding that a petition for writ of habeas corpus is not a civil action or proceedings within the meaning of the Vexatious Litigant Statute). Second, the purpose of the Vexatious Litigant Statute is undeniably significant and legitimate. Specifically, the purpose of the statute is to protect courts from "the unreasonable burden placed upon [them] by groundless litigation [which] prevents the speedy consideration of proper litigation and [consumes] tremendous time and effort." *First Western Dev. Corp. v. Superior Court,* 212 Cal.App.3d 860, 870, 261 Cal.Rptr. 116 (1989). The Vexatious Litigant also protects the general public, as well, because "[t]he constant suer ... becomes ***1013** a serious problem to others than the defendant he dogs ... [b]y clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts." *Taliaferro v. Hoogs,* 237 Cal.App.2d 73, 74, 46 Cal.Rptr. 643 (1965).

Although Plaintiff does not dispute that the inherent purpose of the Vexatious Litigant Statute is important and legitimate, he argues that the statute must be overturned because there are "many [other] ways of dealing with nuisance litigants that are less drastic than imposing affordable monetary barriers or blacklisting them." However, this argument is entirely insufficient to support an overbreadth challenge to the constitutionality of a statute that (1) serves a substantial and legitimate purpose, and (2) is not aimed at, and does not encompass, constitutionally protected speech or activities. *See Virginia v. Hicks,* 539 U.S. 113, 118, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) ("[T]here comes a point at which ... [one] cannot justify prohibiting ... enforcement of ... a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.' "). Since the Vexatious Litigant Statute is specifically aimed at controlling constitutionally unprotected conduct, the "legitimate state interest" standard mandates that the Court uphold its validity.

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Even assuming that the statute *does* affect constitutionally protected speech, however, Plaintiff has not shown that the statute is unconstitutionally "overbroad." A statute affecting constitutionally protected speech is not overbroad if it is narrowly tailored and does not prohibit substantially more protected speech or conduct than necessary. Ironically, here, the very purpose of the notice and hearing requirement of the statute, as well as the "prefiling order" process set forth in the statute, is to *ensure* that constitutionally protected activities (*i.e.* the filing of meritorious claims) are *not* prohibited in any way. Thus, like the ordinance scrutinized and ultimately upheld by the Supreme Court in *Grayned*, the Vexatious Litigant Statute is constitutional because it is narrowly tailored to further the compelling interest in having a legal system that is not needlessly disrupted by baseless and frivolous litigation. Grayned, 408 U.S. at 121, 92 S.Ct. 2294 ("Far from having an impermissibly broad prophylactic ordinance, ... [the statute] punishes only conduct which disrupts or is about to disrupt normal ... activities."); *see also* Cox v. State of Louisiana, 379 U.S. 559, 562, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) ("Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy."). As such, Plaintiff's overbreadth challenge fails.

4. Constitutionality under the Fourteenth Amendment.

a. Procedural Due Process.

[4] Next, Plaintiff argues that the Vexatious Litigant Statute violates the fundamental precepts of due process of fair treatment, fair play, decency, and justice guaranteed by the Fourteenth Amendment. It should be noted that this same argument was previously considered by the California Court of Appeals in *Wolfgram* and ultimately rejected. *See* Wolfgram, 53 Cal.App.4th at 60, 61 Cal.Rptr.2d 694.

The Supreme Court has established that due process "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to *1014 settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Here, the Vexatious Litigant Statute fulfills the requirements set forth in *Boddie* because (1) the state's interest in controlling the unfettered abuse of the legal system overrides a litigant's personal interest in filing frivolous pleadings, and (2) the statute provides a litigant with an ample and meaningful opportunity to be heard. In fact, it is beyond dispute that the Vexatious Litigant Statute explicitly provides for notice and opportunity to be heard before the plaintiff is subjected to any adverse effects of the statute. Moreover, even when a prefiling order has been entered, there is never a "blanket" prohibition on further filings; a plaintiff deemed to be a vexatious litigant may always file a new action so long as the presiding judge determines that the litigation has merit and has not been filed for the purpose of harassment or delay. Cal.Code Civ. Proc. § 391.7(b). Such determinations are appropriately made on a case-by-case basis. *Id.* If the plaintiff believes that he has been wrongly denied of the opportunity to pursue meritorious litigation, relief by way of mandamus is immediately available to challenge the presiding judge's abuse of discretion. Cal.Code Civ. Proc. § 1085.

b. Substantive Due Process and the Equal Protection Clause of the Fourteenth Amendment.

[5] Plaintiff also argues that the Vexatious Litigant Statute violates the due process and equal protection clauses of the Fourteenth Amendment because it unfairly discriminates against pro se litigants in that it (1) imposes a financial barrier to the pro se litigant's "right to sue," and (2) creates a disparity between how pro se litigants and represented parties are treated by the courts. These arguments, however, are insufficient to invalidate the statute under the Fourteenth Amendment.

First, the fact that the vexatious litigant *may* be required to pay a "security" does not violate the Fourteenth Amendment since this so-called "financial barrier" only serves to bar frivolous litigation, which is not protected by the Constitution. *See* California Code of Civil Procedure § 391.3 (stating that the Court may only order the payment of a security once the court has determined, "after hearing the evidence upon the motion, ... that the plaintiff is a vexatious litigant and that *there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant.*") (emphasis added); *see also* Cal.Code Civ. Proc. § 391(c) (the amount of the

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security is limited to the opposing party's "*reasonable* expenses ... incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.") (emphasis added).

Relying primarily on the Supreme Court's holding in *Boddie,* and the District of Columbia Court of Appeals's holding in *In re Green,* 669 F.2d 779, 785 (D.C.Cir.1981), Plaintiff essentially seeks to have this Court hold that the imposition of *any* cost associated with civil litigation is unconstitutional.[FN6] This is not, however, what the Fourteenth Amendment requires, and Plaintiff's reliance on *Boddie* and *Green* is utterly misplaced. In fact, in *Green,* the ***1015** District of Columbia Court of Appeals expressly acknowledged that the "right of access to the courts ... is neither absolute or unconditional." *In re Green,* 669 F.2d at 785. Further, in *United States v. Kras,* 409 U.S. 434, 446, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), the Supreme Court declined to follow this particular holding in *Boddie* after noting that *Boddie's* holding was limited to cases involving a state's regulation of a fundamental right, such as marriage. *Id.* at 445, 93 S.Ct. 631 ("We are ... of the opinion that the [bankruptcy] filing fee requirement does not deny [the litigant of] the equal protection of the laws."). Thus, under *Kras,* in cases where a fundamental right is not implicated, a statute will be upheld if there is a rational justification for it. *Id.; see also Ortwein v. Schwab,* 410 U.S. 656, 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973) (upholding validity of appellate filing fee applied to indigents seeking to appeal an adverse welfare decision).

FN6. Plaintiff also relies on *Roberts v. LaVallee,* 389 U.S. 40, 42, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) and *Bounds v. Smith,* 430 U.S. 817, 825, 97 S.Ct. 1491, 52 L.Ed.2d 72. However, these cases involve a prisoner's right of access to the courts, which is not applicable in this context. The Vexatious Litigant Statute does not apply to criminal proceedings, *see* Cal.Code of Civ. Proc. 391(a), or to petitions for writ of habeas corpus, *see In re Bittaker,* 55 Cal.App.4th at 1011-12, 64 Cal.Rptr.2d 679.

Plaintiff's alternative argument that the Vexatious Litigant Statute unfairly disadvantages pro se litigants is also fundamentally flawed. While Plaintiff may subjectively believe that the statute is a "weapon" hurled against unsuspecting persons who are "unskilled at law," it has long been recognized that the Vexatious Litigant Statute was enacted for the purpose of protecting *defendants* from overly litigious, vexing, and harassing plaintiffs and protecting the *courts* from having to expend countless hours dealing with meritless litigation. This is clear not only from the history of the statute but also from the very terms of the statute itself. *See, e.g., First Western Dev. Corp. v. Superior Court,* 212 Cal.App.3d 860, 870, 261 Cal.Rptr. 116 (1989) ("The vexatious litigant statutes were enacted to require a person found a vexatious litigant to put up security for the reasonable expenses of a defendant who becomes the target of one of these obsessive and persistent litigants whose conduct can cause serious financial results to the unfortunate object of his attack.")

Additionally, the Vexatious Litigant Statute does not, as Plaintiff's contends, subject pro se litigants to undue burdens that are not equally borne by attorneys and represented parties. Indeed, the Vexatious Litigant Statute is not unique; the California Code of Civil Procedure contains other similar measures intended to control the filing of frivolous litigation. *See, e.g.,* Cal.Code Civ. Proc. § 128.5 (providing for the imposition of sanctions against an attorney or party who litigates in bad faith); Cal.Code of Civ. Proc. § 907 (allowing a Court of Appeals to impose costs on an attorney or party who pursues a frivolous appeal); Cal Code Civ. Proc. § 128.7 (providing for the imposition of sanctions against an attorney who submits papers to the court for the sole purpose of harassing the opposing party or causing delay).

Attorneys are also subject to California Business and Professions Code § 6068, which provides, *inter alia,* that an attorney must: (1) support the Constitution and laws of the United States and California, (2) maintain the respect due to the courts of justice and judicial officers, (3) counsel or maintain only actions, proceedings, or defenses that appear to him or her legal or just; (4) employ means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law; and (5) not encourage either the commencement or the continuance of an action or proceeding for a corrupt motive of passion or interest. Cal. B & P Code § 6068. Additionally, an attorney's conduct is regulated by the State Bar of California and California's Rules of Professional Responsibility. *See* Cal. B & P Code § 6068.7 (providing that a court must notify the ***1016** State Bar when sanctions in excess of $1,000 are imposed.)

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Although Plaintiff attempts to distinguish the Vexatious Litigant Statute by noting that lawyers are not subject to a rule that "disciplines" them for "losing five lawsuits in seven years," Plaintiff conveniently overlooks the fact that a pro se litigant's prior litigation record *only* becomes relevant when that litigant attempts to pursue a *sixth* litigation that has no reasonable probability of success. This distinction is significant and Plaintiff's failure to even acknowledge it makes his argument unpersuasive.

Further, in evaluating Plaintiff's argument, the Ninth Circuit's analysis in *Rodriguez* is instructive. In *Rodriguez,* the Ninth Circuit considered a Fifth Amendment challenge to 28 U.S.C. § 1915(g) (commonly referred to as the "three-strike rule").FN7 *Rodriguez,* 169 F.3d at 1179. In upholding the three-strike rule, the Ninth Circuit noted that "requiring prisoners to make the same financial decisions as non-prisoners before filing a cause of action does not violate equal protection." *Id.* The court also stated that "[a]lthough prisoners are entitled to meaningful access to the courts, courts are not obliged to be a playground where prisoners with nothing better to do continuously file frivolous claims. Only after demonstrating an inability to function within the judicial system is an indigent inmate asked to pay for access to the courts." *Id.* at 1180. Accordingly, the Ninth Circuit concluded that § 1915(g) permissibly "precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status." *Id.* Thus, under the holding of *Rodriguez,* neither the security provision of the Vexatious Litigant Statute nor its analogous "six-strike rule" can be considered unconstitutional.

> FN7. The three-strike rule provides that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding ... [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Accordingly, the Court hereby finds that the Vexatious Litigant Statute does not violate the due process or equal protection clause of the Fourteenth Amendment.

5. Double Jeopardy Clause of the Fifth Amendment.

[6] Plaintiff also argues that the Vexatious Litigant Statute violates the double jeopardy clause of the Fifth Amendment. While the double jeopardy clause may be enforced against the states due to its incorporation into the due process clause of the Fourteenth Amendment, *see Benton v. Maryland,* 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the double jeopardy clause simply does not apply to the Vexatious Litigant Statute.

Specifically, the double jeopardy clause serves to prohibit multiple punishments for *criminal* conduct. *See Abbate v. United States,* 359 U.S. 187, 198-99, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959) ("The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged ***criminal acts.***") (emphasis added). Although the cases upon which Plaintiff relies-namely *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and ***1017***United States v. $405,089.23 U.S Currency,* 33 F.3d 1210 (9th Cir.1994) -discuss the fact that a civil fine may be considered "punitive," significantly, both cases involved a predicate *criminal* offense. *See Halper,* 490 U.S. at 437, 109 S.Ct. 1892 (defendant initially charged under criminal false claims act statute); *see also $405,089.23 U.S. Currency,* 33 F.3d at 1213 (defendants initially charged with conspiracy and money laundering arising out of large-scale methamphetamine manufacturing operation). Further, the holding in *Halper* was later abrogated by the Supreme Court in *Hudson v. United States,* 522 U.S. 93, 98-99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (holding that the double jeopardy clause "protects only against the imposition of multiple criminal punishments for the same offense."). Thus, the fact that Plaintiff subjectively feels that the Vexatious Litigant Statute operates as a "punishment" is irrelevant. The relevant inquiry under the Fifth Amendment is whether the statute serves as a second punishment for a ***criminal*** offense, which it clearly does not. Indeed, in order to reach this conclusion, the Court would have to first accept the utterly preposterous premise that the pursuit of frivolous litigation is criminal conduct. Accordingly, the Court finds that Plaintiff has failed to state a claim under the double jeopardy clause of

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the Fifth Amendment.

6. Excessive Fines Clause of the Eighth Amendment.

[7] Plaintiff's argument that the Vexatious Litigant Statute violates the excessive fines clause of the Eighth Amendment is equally without merit. Plaintiff's specific contention is that the Vexatious Litigant Statute violates the excessive fines clause of the Eighth Amendment because it punishes, as wells as deters, use of the courts. However, like Plaintiff's double jeopardy clause allegation, Plaintiff's excessive fines clause claim relies entirely upon the assumption that the Vexatious Litigant Statute is somehow related to criminal conduct. This assumption is unjustified under the applicable case law.

The Eighth Amendment reads in its entirety: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Const. Amend. VIII. The Supreme Court has long understood the Eighth Amendment to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989); *see, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (stating that Eighth Amendment is inapplicable to deportation because deportation is not punishment for a crime). "Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Browning-Ferris*, 492 U.S. at 263, 109 S.Ct. 2909 (quoting *Ingraham v. Wright*, 430 U.S. 651, 664-668, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)).

Although the Supreme Court has held that the Eighth Amendment excessive fines clause extends to civil forfeiture proceedings, *see Alexander v. United States*, 509 U.S. 544, 559-59, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993), Plaintiff's attempt to equate the "security" provision of the Vexatious Litigant Statute with a "civil forfeiture" is wholly without merit. Notably, there are significant differences between a "civil forfeiture" and a "security" which Plaintiff overlooks. First, a civil forfeiture proceeding necessarily relates to prior criminal conduct. *See, e.g., United States v. Premises Known as RR# 1*, 14 F.3d 864, 869 (3d Cir.1994) ("The Government bears the initial burden of proof in attaching property for trial in civil forfeiture ***1018** cases and to do so it must establish some connection between the alleged criminal activity and the ... property the Government seeks to forfeit."); *see also United States v. Certain Real Property and Premises*, 954 F.2d 29, 33 (2nd Cir.1992) (stating that 21 U.S.C. § 881(a)(7) provides for the forfeiture of real property which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of a violation of the narcotics laws). Second, in a civil forfeiture proceeding, the Government is the entity who retains the money or property. In contrast, under the Vexatious Litigant Statute, the "security" is provided for the exclusive benefit of the opposing party. *See* Cal.Code Civ. Proc. § 391(c) (defining a security as "an undertaking to assure payment, *to the party for whose benefit the undertaking is required to be furnished,* of the party's reasonable expenses.") (emphasis added). These distinctions are important, as they are critical features that bring a civil forfeiture within the ambit of the Eighth Amendment. *See Browning-Ferris*, 492 U.S. at 265, 109 S.Ct. 2909 ("[W]e think it significant that at the time of the drafting and ratification of the Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.").

Accordingly, there is no basis upon which this Court can conclude that the Vexatious Litigant Statute violates the excessive fines clause of the Eighth Amendment.

7. The Ex Post Facto Clause and the Bill of Attainder Clause.

[8][9] Plaintiff's argument that the Vexatious Litigant Statute is an ex post facto law prohibited by the Article 1, Section 10 of the United States Constitution is also baseless. The Supreme Court has expressly held that the ex post facto clause is aimed at laws that "retroactively alter the definition of ***crimes*** or increase the punishment for ***criminal*** acts." *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995) (emphasis added). For example, the ex post facto clause "is violated if a change in the law creates 'a sufficient risk of increasing the measure of punishment attached to the covered crime.' " *Himes v. Thompson*, 336 F.3d 848, 855 (9th Cir.2003) (quoting *California Dep't of Corr. v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)). Since the Vexatious Litigant Statute does not involve

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penal legislation, the ex post facto clause is simply inapplicable to this case.FN8

FN8. Further, as Defendants correctly note, Plaintiff's reliance on *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1944), and *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C.Cir.1985), is misplaced. Both *Landgraf* and *Ralis* concern "retroactive" statutory enactments. *Landgraf*, 511 U.S. at 266-67, 114 S.Ct. 1483; *Ralis*, 770 F.2d at 1123-24. That is not an issue here.

Plaintiff has also not demonstrated that the Vexatious Litigant Statute is an unconstitutional "bill of attainder." A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). As stated by the Supreme Court in *Nixon*, "Just as Article III confines the Judiciary to the task of adjudicating concrete 'cases or controversies,' so too the Bill of Attainder Clause was found to 'reflect ... the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.' " *Id.* (quoting ***1019***United States v. Brown*, 381 U.S. 437, 445, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965)). Given that the inherent concern of the bill of attainder clause is the separation of powers doctrine, Plaintiff's attempt to define the Vexatious Litigant Statute as a "bill of attainder" is decidedly strained. However, even assuming, *arguendo*, that the Vexatious Litigant Statute falls within the ambit of the bill of attainder clause, Plaintiff still fails to demonstrate that it meets the criteria set forth by the Supreme Court in *Selective Service System v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984).

In *Selective Service System*, the Supreme Court noted that, to constitute a bill of attainder, the statute must (1) specify the affected persons, and (2) inflict punishment (3) without a judicial trial. *Id.* Three inquiries determine whether a statute inflicts punishment on the specified individual or group:(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. *Id.* at 852, 104 S.Ct. 3348. Although Plaintiff vigorously argues that the Vexatious Litigant Statute is a "sadistic" statute that was enacted for the sole purpose of punishing pro se litigants, there is simply no credible support for this conclusion outside of Plaintiff's own speculative theories. As noted previously, it has been consistently recognized that the purpose of the statute was to protect courts and defendants from "the unreasonable burden placed upon [them] by groundless litigation." *First Western Dev. Corp. v. Superior Court*, 212 Cal.App.3d 860, 870, 261 Cal.Rptr. 116 (1989). Since this purpose is decidedly legitimate and non-punitive, Plaintiff has not demonstrated that the Vexatious Litigant Statute is a "bill of attainder."

8. Supremacy Clause.

Last, Plaintiff argues that the Vexatious Litigant Statute conflicts with numerous federal laws thereby violating the Supremacy Clause of the United States Constitution. Specifically, he contends that the Vexatious Litigant Statute "conflicts with the right under Title 28 U.S.C. § 1654 to litigate in pro per and the right provided under Title 28 U.S.C. § 1915 ... to conduct a case without prepayment of fees or imposition of 'security.' " Additionally, Plaintiff argues that the statute violates 42 U.S.C. § 1983. FN9 All of these arguments lack merit.

FN9. Plaintiff also argues that the Vexatious Litigant Statute improperly "enables a state court to prohibit and punish a pro se litigant for failing to prevail in five litigations in a federal court under federal standards." However, he fails to articulate how this violates the Supremacy Clause.

[10] First, there is no inherent conflict with 28 U.S.C. § 1654, which provides that "parties may plead and conduct their own cases personally" according to *the rules of such courts*. *Id.* Nor is there a conflict with 28 U.S.C. § 1915, which explicitly provides that a federal court may dismiss a case filed *in forma pauperis* if the court determines that the action or appeal is frivolous, malicious, or fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e). As to Plaintiff's § 1983 claim, as previously explained, *supra*, this is premised on his flawed assumption that a person has an absolute right

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to file litigation, regardless of its merits. There is no such right under the Constitution. *See Bill Johnson's Restaurants, Inc.,* 461 U.S. at 743, 103 S.Ct. 2161 ("[B]aseless litigation is not immunized by the First Amendment right to petition."). Accordingly, ***1020** Plaintiff has failed to state a claim under the Supremacy Clause.

9. Third Party Standing.

[11] Although the Court has concluded that the Vexatious Litigant Statute is constitutional and that Defendants are entitled to judgment as a matter of law on the merits of Plaintiff's Complaint, the Court will briefly address Defendant's objection to Plaintiff's purported third-party standing.

As previously noted, *supra,* Plaintiff seeks declaratory judgment in this action on behalf of himself and on behalf of "all persons appearing or trying to appear in the Courts of California without benefit of representation by counsel." First Amended Complaint ("FAC") at 1:23-25. Defendants have conceded that Plaintiff has standing to pursue this action on behalf of himself. *See Wolfe,* 392 F.3d at 364 (finding that Plaintiff's prior state court actions are sufficient to establish that Plaintiff is threatened with actual harm from the future operation of the Vexatious Litigant Statute and therefore sufficient to establish standing). However, Defendants argue that Plaintiff does *not* have standing to assert constitutional rights on behalf of other persons.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' " *Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (citations omitted). Generally, there are three requirements for Article III standing: (1) injury in fact, which means an invasio.. o a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendants, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing each of these elements. *Id.*

Courts typically employ a presumption against third-party standing. *Singleton v. Wulff,* 428 U.S. 106, 113-14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). However, the presumption may be rebutted in circumstances where: (1) the litigant has suffered an injury in fact and has a close relation to the third party; and (2) where there is some hindrance to the third-party's ability to protect his or her own interests. *See Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Plaintiff argues that he meets both of these exceptions due to the unique nature and circumstances of this case.[FN10] The Court ***1021** does not find Plaintiff's argument persuasive. First, Plaintiff's contention that "all persons appearing or trying to appear in the Courts of California without benefit of representation by counsel" are subjected to the Vexatious Litigant Statute results from a gross misreading of the Statute. As this Court has observed, *supra,* the terms of the Statute make it clear that it applies to only a limited class of persons; specifically, it applies only to those persons who have demonstrated a clear inability to pursue meritorious litigation or who have utterly failed to adroitly navigate the California court system. Accordingly, the class of persons that Plaintiff seeks to represent is unnecessarily overbroad and, therefore, Plaintiff has not demonstrated that he has a close relationship with such parties. Second, Plaintiff has not effectively demonstrated that there is any hindrance to the third parties' abilities to protect their own interests. To the contrary, as Defendants correctly note, a person determined to be a "vexatious litigant" can always challenge such determination through the appropriate appellate process. In fact, it appears that Plaintiff's belief that third parties are hindered in pursuing such litigation is premised solely on Plaintiff's subjective belief that other persons are not capable of "proceeding with the level of ability and competence that they now have with Wolfe effectively representing them." Pl's Supp. Reply to Def's Mot. at 12:8-10. This argument has no basis in law or fact. Further, because the Court has concluded that Plaintiff has not raised a cognizable claim under the First Amendment, the Supreme Court's holding in *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) does not support Plaintiff's position. *See id.* (finding that the restriction on third-party standing is relaxed when the plaintiff is asserting a First Amendment claim). Accordingly, the Court sustains Defendants' objection to Plaintiff's assertion of standing on behalf

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of "all persons appearing or trying to appear in the Courts of California without benefit of representation by counsel."

FN10. Plaintiff has also filed a Request for Judicial Notice [Docket No. 285] asking the Court to take judicial notice of the following documents: (1) a June 30, 1999 copy of the Vexatious Litigant List, (2) an incomplete excerpt from a December 15, 2004 article of the *Daily Journal* regarding Plaintiff; (3) a copy of the Prefiling Order form used by the California courts; and (4) an April 29, 2005 copy of the Vexatious Litigant List. Plaintiff does not clearly explain why he wants the Court to take judicial notice of these documents. However, it appears to the Court that some of these documents are tangentially related to Plaintiff's third-part standing argument. Accordingly, Plaintiff's Request for Judicial Notice is GRANTED IN PART AND DENIED IN PART. The Court hereby takes judicial notice of the June 30, 1999 copy of the Vexatious Litigant List, the December 15, 2004 *Daily Journal* article, and the April 29, 2005 copy of the Vexatious Litigant List for the limited purpose of determining whether Plaintiff has third-party standing.

CONCLUSION

IT IS HEREBY ORDERED THAT Plaintiff's Motion for Judgment on the Pleadings [Docket No. 264] is DENIED and Defendants' Cross-Motion for Judgment on the Pleadings [Docket No. 276] is GRANTED.

IT IS FURTHER ORDERED THAT Plaintiff's Request for Judicial Notice [Docket No. 285] is GRANTED IN PART AND DENIED IN PART.

IT IS SO ORDERED.

JUDGMENT

In accordance with the Court's Order denying Plaintiff's Motion for Judgment on the Pleadings and granting Defendants' Cross-Motion for Judgment on the Pleadings,

IT IS HEREBY ORDERED THAT final judgment is entered in favor of Defendants on all of Plaintiff's causes of action. All matters calendared in this action are VACATED. The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

N.D.Cal.,2005.
Wolfe v. George
385 F.Supp 2d 1004

Briefs and Other Related Documents (Back to top)

• 4:00CV01047 (Docket) (Mar. 27, 2000)

END OF DOCUMENT

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Citation/Title
167 P.3d 674, DeNardo v. Cutler, (Alaska 2007)

*674 167 P.3d 674

Supreme Court of Alaska.

Daniel DeNARDO, Appellant,
v.
Louisiana CUTLER, Preston Gates & Ellis LLP, Mark Rindner, Alaska Cleaners, Inc., Appellees.

No. S-11976.
Sept. 21, 2007.

Background: After his first age discrimination suit was dismissed on appeal for failure to post a cost bond, and his second action to set aside the judgment was dismissed, plaintiff filed a third suit, claiming abuse of process and violation of his civil rights in violation of § 1983 by the defendant, defendant's attorneys, and the presiding judge in the first lawsuit. The Superior Court, Third Judicial District, Anchorage, John E. Suddock, J., dismissed the judge on immunity grounds and awarded him attorney fees and granted the remaining defendants' motion for summary judgment. Plaintiff appealed.

Holdings: The Supreme Court, Carpeneti, J., held that:

(1) allegation of ulterior motive was insufficient to support claim of abuse of process;

(2) allegation that defendants acted under court procedures to obtain dismissal of suit was insufficient to show they acted under color of state law required for his § 1983 claim; and

(3) award of attorney fees to judge for plaintiff's frivolous claims was not an abuse of discretion.

Affirmed.

West Headnotes

[1] Appeal and Error 863

30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

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[See headnote text below]

[1] Appeal and Error 🔑934(1)

30 ----
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) In General.

A trial court's decision to dismiss claims on summary judgment is reviewed independently, and all reasonable inferences are drawn in favor of the nonmoving party.

[2] Appeal and Error 🔑863

30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 In General.

The Supreme Court will uphold summary judgment only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

[3] Appeal and Error 🔑893(1)

30 ----
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) In General.

The question of whether collateral estoppel or res judicata applies in an action is reviewed de novo.

[4] Appeal and Error 🔑840(1)

30 ----
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k840 Review of Specific Questions and Particular Decisions
30k840(1) In General.

[See headnote text below]

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[4] Appeal and Error ⚿984(5)

30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(5) Attorneys' Fees.

The independent standard of review applies to considering whether the trial court properly applied the law when awarding attorney's fees, while the trial court's fact-based decisions as to whether attorney's fees are reasonable and should be awarded are reviewed for abuse of discretion.

[5] Appeal and Error ⚿984(5)

30 ----
30XVI Review
30XVI(H) Discretion of Lower Court
30k984 Costs and Allowances
30k984(5) Attorneys' Fees.

The Supreme Court will overturn an award of attorney fees only when the award is manifestly unreasonable.

[6] Process ⚿168

313 ----
313IV Abuse of Process
313k168 Nature and Elements of Cause of Action.

The abuse of process tort comprises two elements: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.

[7] Process ⚿168

313 ----
313IV Abuse of Process
313k168 Nature and Elements of Cause of Action.

The ulterior purpose element of an abuse of process claim usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club.

[8] Process ⚿171

313 ----
313IV Abuse of Process

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313k171 Actions.

Plaintiff's allegation that defendant's ulterior motive in filing motions to dismiss plaintiff's age discrimination suit was retribution for filing of the suit was insufficient to support his abuse of process claim; allegations did not support inference that defendant's purpose in filing motions was anything other than dismissal of discrimination suit.

[9] Civil Rights 1326(10)

78 ----
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(10) Attorneys and Witnesses.

Although lawyers are "officers of the court," a lawyer representing a client is not, by virtue of being an officer of the court, a state actor "under color of state law" within the meaning of § 1983. 42 U.S.C.A. § 1983.

[10] Civil Rights 1326(5)

78 ----
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(3) Private Persons or Corporations, in General
78k1326(5) Cooperation with State Actor.

[See headnote text below]

[10] Civil Rights 1396

78 ----
78III Federal Remedies in General
78k1392 Pleading
78k1396 Color of Law; State Action.

Private parties may come under the reach of § 1983 as acting under color of state law if they conspire with a state actor, but where that association is the basis for the necessary state action, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action. 42 U.S.C.A. § 1983.

[11] Civil Rights 1326(10)

78 ----
78III Federal Remedies in General

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78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(10) Attorneys and Witnesses.

[See headnote text below]

[11] Civil Rights 🔑1326(11)

78 ----
78III Federal Remedies in General
78k1323 Color of Law
78k1326 Particular Cases and Contexts
78k1326(11) Employment Practices.

Plaintiff's allegations that defendant former employer and its attorneys obtained intervention of state chancellor to obtain dismissal of plaintiff's age discrimination suit were insufficient to show that the defendants acted under color of state law, as required element of plaintiff's § 1983 claim, where former employer and its attorneys were private parties, there were no allegations that defendants "conspired" with the judge, and the attorneys filed an affidavit specifically denying any ex parte communications with the judge. 42 U.S.C.A. § 1983.

[12] Civil Rights 🔑1484

78 ----
78III Federal Remedies in General
78k1477 Attorney Fees
***674** 78k1484 Awards to Defendants; Frivolous, Vexatious, or Meritless Claims.

[See headnote text below]

[12] Costs 🔑194.44

102 ----
102VIII Attorney Fees
102k194.44 Bad Faith or Meritless Litigation.

Award of attorney fees to judge, who presided in underlying age discrimination action, for pro se plaintiff bringing frivolous abuse of process and § 1983 claims was not an abuse of discretion, where suit was brought merely because plaintiff disagreed with judge's ruling to dismiss his claims in the underling action, and plaintiff had prior knowledge of judicial immunity. 42 U.S.C.A.§§ 1983, 1988.

[13] Appeal and Error 🔑172(3)

30 ----

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30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k172 Grounds of Action or Relief
30k172(3) Relief Not Asked Below.

Defendant judge waived for appellate review issue of whether a plaintiff who filed abuse of process claim against judge should have his access to the courts restricted by court order as vexatious litigant, where judge raised the issue for the first time on appeal.

***675** Daniel DeNardo, Anchorage, pro se.

Jennifer M. Coughlin, Preston Gates & Ellis LLP, Anchorage, for Appellees Louisiana Cutler, Preston Gates & Ellis LLP and Alaska Cleaners, Inc.

James Cantor, Assistant Attorney General, Anchorage, and David W. Márquez, Attorney General, Juneau, for Appellee Mark Rindner.

Before: FABE, Chief Justice, MATTHEWS, EASTAUGH, BRYNER, and CARPENETI, Justices.

OPINION

CARPENETI, Justice.

I. INTRODUCTION

In this case Daniel DeNardo, for the third time, seeks a determination that Superior Court Judge Mark Rindner incorrectly dismissed his lawsuit in *DeNardo v. Alaska Cleaners, Inc.* (FN1) ("first lawsuit"). When that dismissal was on direct appeal before this court, DeNardo failed to post a cost bond, and we dismissed the appeal *sua sponte* in July 2004. Two years later, in July 2006, we affirmed the dismissal of DeNardo's Alaska Civil Rule 60(b) motion to set aside the judgment in the first lawsuit. (FN2) DeNardo's 2006 claim was that the actions of Alaska Cleaners constituted a fraud upon the court. We rejected DeNardo's claim as "both untimely and inadequate on the merits." In the present lawsuit, the third iteration of this case, DeNardo argues that the rulings in the first lawsuit constituted an abuse of process, and DeNardo has named as parties Alaska Cleaners, Inc., the lawyer and law firm that represented Alaska Cleaners in the first lawsuit, as well as Judge Rindner, the presiding judge in the first lawsuit. DeNardo also argues that he has a valid 42 U.S.C. § 1983 claim against everyone but Judge Rindner, whose dismissal from the case is not at issue in this appeal. DeNardo also argues that the superior court erred in awarding attorney's fees to Judge Rindner. We conclude that ***676** DeNardo failed to establish the elements of an abuse of process or a § 1983 claim, and that the superior court properly awarded attorney's fees. Accordingly, we affirm the superior court's decision in all respects.

II. FACTS AND PROCEEDINGS

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A. Facts

Daniel DeNardo filed a previous lawsuit in federal court against his employer, Alaska Cleaners, Inc. alleging unlawful termination due to age discrimination. In that lawsuit, Alaska Cleaners retained Preston Gates & Ellis LP ("Preston") for its defense, and Louisiana Cutler, a Preston partner, was primarily responsible for the case. Because DeNardo did not wish to divulge his address to opposing counsel (or provide a fax number), Cutler and DeNardo stipulated in a signed order that Preston could notify DeNardo by phone of a document to be served. DeNardo would then come to the Preston offices in Anchorage to receive hand delivery. Under the agreement, service was deemed completed as of 5 p.m. on the day the phone call was made. Preston alleges that in July 2003 the phone number provided by DeNardo was no longer in service and DeNardo refused to provide a new phone number or a physical address. DeNardo sought a voluntary dismissal of his federal case against Alaska Cleaners and refiled the case in state court under Case No. 3AN-03-13497.

DeNardo's state age discrimination claim was heard by Judge Rindner. Alaska Cleaners filed a motion to enforce a provision similar to the service stipulation that had been in effect in the federal case, requiring DeNardo to provide either a telephone number or physical address. DeNardo opposed this request, citing his right to privacy. In January 2004 Judge Rindner issued an order requiring DeNardo to provide Alaska Cleaners with his physical address and a working telephone number within five days. Judge Rindner noted that Civil Rule 76(d)(1) (FN3) requires parties to provide both a telephone number and an address and that, because it contemplates personal service, the requirement of a physical address is reasonable. In February 2004 Judge Rindner denied DeNardo's motion for reconsideration of the Order Regarding Telephone Contact and Address. Judge Rindner advised DeNardo to dismiss the case or file a petition to review the court's order with the supreme court if he did not wish to obey the court order. The judge warned that barring a reversal, DeNardo's failure to comply with the court order would result in sanctions including, potentially, dismissal of the case.

DeNardo did not comply with the court order and did not appeal the order. On February 23, 2004, Alaska Cleaners filed a motion to compel compliance with the court's order and for sanctions. In mid-March Judge Rindner dismissed the case without prejudice as a sanction for failing to comply with the court order. Judge Rindner entered a final judgment of dismissal without prejudice on March 23, 2004. On April 28, 2004 Judge Rindner granted Alaska Cleaners's motion for Rule 82 attorney's fees in the amount of $1,315. DeNardo appealed to the supreme court and moved to waive the cost bond. We denied DeNardo's motion to waive the cost bond, and when he failed to pay, dismissed the appeal *sua sponte* for want of prosecution. We denied DeNardo's subsequent petition for rehearing.

In July 2006 we heard a second iteration of this case when we affirmed the dismissal of DeNardo's separate Civil Rule 60(b) motion to set aside the judgment in the first lawsuit. (FN4) We held that his motion was "both untimely and inadequate on the merits." (FN5)

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DeNardo's present lawsuit alleges that the dismissal of his first lawsuit was a result of abuse of process and violated his rights to due process.

***677 B. Proceedings**

DeNardo filed the present lawsuit on March 22, 2004, before his motion for reconsideration of dismissal of the first lawsuit had been ruled upon. DeNardo sued Alaska Cleaners, Preston, Cutler, and Judge Rindner. His central claims, as advanced in his amended complaint, alleged abuse of process, stating that the defendants "conspired ... to delay and dismiss plaintiff's age discrimination action." DeNardo also argued that he had a valid 42 U.S.C. § 1983 claim against Alaska Cleaners, Preston, and Cutler, and that Civil Rule 5 did not require him to give his telephone number and thus his first lawsuit was unfairly dismissed. DeNardo's case was assigned to Superior Court Judge John E. Suddock.

On April 6, 2004, Judge Rindner filed a motion to dismiss the action with respect to himself because of judicial immunity. On April 26, 2004, DeNardo's answer to the motion apparently conceded that Judge Rindner did indeed have immunity. Judge Suddock issued a court order granting Judge Rindner's motion to dismiss on May 5, 2004, and issued a final judgment on all claims against Judge Rindner on July 6, 2004. The superior court awarded Judge Rindner $1,275 in attorney's fees on August 5, 2004, and denied reconsideration.

In February 2005 the remaining defendants moved for summary judgment. In April 2005 Judge Suddock granted the motion for summary judgment on the basis of (1) *res judicata* and collateral estoppel, (2) a finding that DeNardo's complaint did not satisfy the elements of an abuse of process claim, and (3) a finding that the 42 U.S.C. § 1983 claim failed as a matter of law because the defendants were not acting under color of law. The order noted that any one of the above reasons would have been sufficient to require dismissal of DeNardo's claims. Judge Suddock denied reconsideration of summary judgment on May 23, 2005. DeNardo appealed to this court on June 22, 2005, stating that he was appealing the summary judgment of April 2005 and the denial of reconsideration of May 2005. He also appealed the denial of his recusal motion and motion to compel discovery. On August 1, 2005, DeNardo amended his points on appeal to include the grant of attorney's fees to Judge Rindner. Judge Rindner included in his brief to this court a proposition that we should take some preventative action to control DeNardo's repeated filings.

At issue on appeal is: (1) whether the superior court properly dismissed DeNardo's abuse of process claim; (2) whether the superior court properly held that attorneys using the courts are not acting "under color of law" for the purpose of a 42 U.S.C. § 1983 suit; (3) whether Judge Suddock (and Judge Dan A. Hensley, the Third Judicial Presiding Judge who reviewed Judge Suddock's decision) erred in denying DeNardo's motions to disqualify Judge Suddock; (4) whether the superior court erred in denying DeNardo's motion to compel discovery; (5) whether the superior court abused its discretion in awarding attorney's fees to Judge Rindner; and (6) whether this court should take action to control DeNardo's repeated filings.

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III. STANDARD OF REVIEW

[1][2][3] We independently review the decision to dismiss DeNardo's 42 U.S.C. § 1983 and abuse of process claims on summary judgment, drawing all reasonable inferences in favor of the nonmoving party. (FN6) We will uphold summary judgment "only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." (FN7) Additionally, we review *de novo* the question of whether collateral estoppel or*res judicata* applies. (FN8)

[4][5] "The independent standard of review ... applies to considering whether the trial court properly applied the law when awarding attorney's fees," (FN9) while we review for "abuse of discretion a trial court's fact- ***678** based decisions as to whether attorney's fees are reasonable and should be awarded." (FN10) We will overturn an award only when the award is "manifestly unreasonable." (FN11)

IV. DISCUSSION

A. The Superior Court Properly Dismissed DeNardo's Abuse of Process Claim.

[6][7] The abuse of process tort comprises two elements: (1) "an ulterior purpose" and (2) "a willful act in the use of the process not proper in the regular conduct of the proceeding." (FN12) The ulterior purpose "usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club." (FN13) In *Kollodge v. State,* (FN14) we emphasized that the second element of the tort "contemplates some overt act done in addition to the initiating of the suit," (FN15) and noted that threatening suit, initiating suit, and requesting discovery did not qualify as overt acts even if done for an ulterior purpose. Similarly, we held in *Meidinger v. Koniag Inc.,* (FN16) that "actions taken in the regular course of litigation ... cannot be a proper basis for an abuse of process claim." (FN17)

[8] DeNardo claims that the appellee's ulterior motive was "retribution" because DeNardo had sued Alaska Cleaners. DeNardo argues further that the appellees wanted to "coerce DeNardo to abandon his cause of action" while they also, allegedly, wanted to "create a multiplicity of actions and appeals substantially increasing the costs and expenses of DeNardo's pursuit of his [r]ight of action." It is clearly incorrect to argue that appellees sought to have DeNardo's case dismissed in order to create more appeals. Additionally, DeNardo's claim is not sufficient to support any inference that the appellees were attempting anything other than the successful dismissal of a lawsuit, which is not an ulterior motive. For this reason alone, the superior court's dismissal of the claim was proper.

DeNardo never asserts a clear "willful act" other than the filing of motions which were ruled upon favorably. The superior court did not err in holding that an action taken in the regular course of litigation without an ulterior motive, such as the defendants' filing of a motion to compel compliance with a court

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order, cannot serve as the basis for an abuse of process claim.

B. The Superior Court Properly Dismissed DeNardo's 42 U.S.C. § 1983 Claims Because No Defendant Was Acting Under Color of State Law.

[9] DeNardo also sued Alaska Cleaners, Cutler, and Preston under 42 U.S.C. § 1983. That section provides a cause of action for deprivation of rights against persons acting "under color of any statute, ordinance, regulation, custom or usage, of any State." (FN18) In *West v. Atkins* (FN19) the United States Supreme Court explained that "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of ***679** state law.' " (FN20) The Supreme Court has also held that lawyers representing clients are not acting under color of state law: "It is often said that lawyers are 'officers of the court.' But ... a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983." (FN21) Additionally, the court noted that "the absolute immunity traditionally accorded judges [is] preserved under § 1983." (FN22)

[10] Private parties may come under the reach of § 1983 if they conspire with a state actor. (FN23) But where that association is the basis for the necessary state action, "mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action." (FN24)

[11] Alaska Cleaners is a private corporation, Cutler is a private citizen not employed by the state, and Preston is a private law firm organized as a limited liability partnership. As appellees Cutler, Preston, and Alaska Cleaners note in their brief, lawyers using a courtroom to engage in private litigation are not acting under color of state law, and nothing in the record supports the notion that they "conspired" with a state actor. Cutler filed an affidavit specifically denying any ex parte communication with Judge Rindner and DeNardo has not presented any evidence whatsoever of a conspiracy.

DeNardo alleges that Cutler, Preston, and Alaska Cleaners acted under color of state law because they "could not obtain dismissal [of the first lawsuit] but for the intervention of the state chancellor as a state actor pursuant to state court procedures." This is not sufficient to support a finding of conspiracy with a state actor and use of the court system by private parties for the purpose of litigation is not sufficient to bring them under "color of state law." Thus, the superior court correctly dismissed DeNardo's § 1983 claims. (FN25)

C. DeNardo's Claims Regarding Judge Recusal and Motions To Compel Discovery Need Not Be Addressed.

DeNardo also argues that Judge Suddock, the superior court judge who heard this case, erred in failing to recuse himself from this case and abused his discretion in failing to grant DeNardo's requests to compel discovery. Because DeNardo's

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abuse of process and § 1983 claims are insufficient as a matter of law, we need not reach the merits of DeNardo's procedural complaints from the present lawsuit.

D. The Superior Court Did Not Abuse Its Discretion in Awarding Attorney's Fees to Judge Rindner.

[12] In *Hughes v. Rowe* (FN26) the United States Supreme Court held that in order for attorney's fees to be awarded against a plaintiff in a civil rights action under 42 U.S.C. § 1983, "[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation." (FN27) The fact that a plaintiff loses his case, standing alone, is not sufficient for awarding the defendant attorney's fees. (FN28) Judge Suddock specifically cited *Hughes* in his order granting attorney's fees and found that DeNardo's action more ***680** than met the standard, declaring it "vexatious and in bad faith." The Supreme Court held in *Christiansburg Garment Co. v. EEOC* (FN29) that while "bad faith" is not required for an award of attorney's fees in the analogous actions brought under Title VII of the Civil Rights Act of 1964, its presence provides "an even stronger basis for charging [the plaintiff] with the attorney's fees incurred by the defense." (FN30)

DeNardo misreads the law on this point and argues that 42 U.S.C. § 1988 "forbids the award of fees against plaintiffs" seeking to enforce a provision of 42 U.S.C. § 1983. In support of his proposition he cites *DeNardo v. Municipality of Anchorage.* (FN31) In that case, this court found that although DeNardo's action was barred by collateral estoppel, the award of attorney's fees was improper in a civil rights claim "[u]nless DeNardo's action was frivolous, unreasonable or without foundation." (FN32) The court found "nothing in the record" suggesting that DeNardo's suit was frivolous, unreasonable or without foundation. (FN33) On the contrary, the trial court in that suit "remarked in passing that his claim appeared to have merit." (FN34)

The record here is very different. There is no reason to believe that the superior court abused its discretion in deciding that DeNardo's claim met the standard of being frivolous, nor that the award of $1,275 was manifestly unreasonable. DeNardo may not sue a judge merely because he disagrees with a ruling. (FN35) That he persisted in doing so despite his apparent understanding of the law supports Judge Suddock's conclusion that he initiated the action in bad faith. We affirm Judge Suddock's award of attorney's fees.

E. Future Action To Control DeNardo's Repeated Filings Against Judges

Though not a formal point on appeal, Judge Rindner in his brief argues that this court should take action to control DeNardo's repetitive pleadings, and in particular his lawsuits against judges. Rindner lists nine separate lawsuits that DeNardo has filed against judges since he was informed in *DeNardo v. Michalski* that judges are immune from lawsuit even when they allegedly violate a party's rights. (FN36) Judge Rindner has since supplemented the record multiple times with new suits brought by DeNardo.

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Judge Rindner focuses on DeNardo's multiple suits against judges, though he also notes that as of the time of the filing of his brief, DeNardo had filed a total of thirty-seven known cases since 1990 in state and federal court. These suits, like the instant case, are often repetitive reiterations of prior lawsuits. Judge Rindner points out that

> [e]ach time DeNardo files another fruitless pleading against a judge, the judge must obtain representation at public expense from the Office of the Attorney General. It is sometimes necessary for the judge to provide notice of that representation to parties in litigation unrelated to DeNardo because the Attorney General's representation can raise conflicts in other cases pending before the judge. This raises the potential need to hire conflict counsel at public expense.

Judge Rindner makes compelling points about the costs to the court system and to the public of DeNardo's litigation against judges. In many ways, moreover, judges are the more fortunate of DeNardo's targets in litigation because they have judicial immunity and can extricate themselves from a case relatively quickly.

While rare, there is support in the case law for court orders prospectively limiting the litigation of a pro se litigant. The U.S. Supreme ***681** Court recognized in *In re McDonald* (FN37) that:

> Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end. Although we have not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding in forma pauperis.[(FN38)]

Similarly, American Jurisprudence (Second) addressed this topic in its section on "Vexatious, frivolous, or oppressive litigation":

> Although litigiousness alone will not support an injunction restricting a plaintiff's filing activities, the courts have the authority to enjoin persons engaged in the manifest abuse of the judicial process, regardless of whether the threatened litigation is legal or equitable in character, or whether the vexatious litigation results from the prosecution of many suits by the same individual, or from many suits by different individuals. The courts may take creative actions to discourage hyperactive litigators so long as some access to courts is allowed, such as by limiting the amount of filings a litigant may make, and prescribing conditions precedent to those filings so as to determine the propriety of a suit on a case by case basis.
>
> ....

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> That the plaintiff had objective good faith in filing vexatious lawsuits in a Federal District Court is not a factor in determining the court's power to exercise control over abuse of that court as a legal forum by enjoining future pro se pleadings.... [(FN39)]

[13] While at least five states have statutory solutions to the problem of vexatious litigants, (FN40) courts also have inherent power to control this problem. (FN41) The Ninth Circuit has held that courts may issue "orders restricting a person's access to the courts" so long as they are "based on adequate justification in the record and narrowly tailored to the abuse perceived." (FN42)

Control of judicial resources is an important concern of our court system. A request for an injunction or other court order should be raised initially in the superior court in order to allow all parties the proper due process which must include a hearing, adequate justification in the record, and a narrowly tailored order. Because Judge Rindner's request for a court order controlling DeNardo's actions was raised for the first time on appeal, we decline to reach the merits of that request.

V. CONCLUSION

Because the superior court properly ruled on DeNardo's claims, we AFFIRM the grant of summary judgment. Because the award of attorney's fees was not an abuse of discretion, we AFFIRM that award. But because ***682.** the request for an injunctive order was not raised in the superior court, we decline to reach Judge Rindner's suggestion that DeNardo's future filings be restrained.

(FN1.) Case No. 3AN-03-13497 CI (Alaska Super., March 11, 2004).

(FN2.) *DeNardo v. Alaska Cleaners, Inc.,* Mem. Op. & J. No. 1256, 2006 WL 1868489 (Alaska, July 5, 2006).

(FN3.) Civil Rule 76(d)(1) provides:

> *Attorney Information.* The name, address and telephone number of the attorney appearing for a party to an action or proceeding, or of a person appearing in propria personal, should be typewritten or printed in the left-margin of the first page of the document....

(FN4.) *DeNardo v. Alaska Cleaners, Inc.,* Mem. Op. & J. No. 1256 2006 WL 1868489 (Alaska, July 5, 2006).

(FN5.) *Id.* at *1.

(FN6.) *Fuller v. City of Homer,* 113 P.3d 659, 662 (Alaska 2005).

(FN7.) *Id.*

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(FN8.) *Renwick v. State, Bd. of Marine Pilots,* 971 P.2d 631, 633 (Alaska 1999).

(FN9.) *Ellison v. Plumbers & Steam Fitters Union Local 375,* 118 P.3d 1070, 1073 (Alaska 2005).

(FN10.) *Marron v. Stromstad,* 123 P.3d 992, 998 (Alaska 2005).

(FN11.) *Id.*

(FN12.) *Kollodge v. State,* 757 P.2d 1024, 1026 (Alaska 1988).

(FN13.) W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 121, at 897 (5th ed.1984). *See also Barquis v. Merchants Collection Ass'n,* 7 Cal.3d 94, 101 Cal.Rptr. 745, 496 P.2d 817, 825 (1972) (collection agency abused process where it instituted suits in improper county with ulterior purpose of making action more difficult to defend, thereby forcing adversary to default or to settle on terms favorable to agency).

(FN14.) 757 P.2d 1024 (Alaska 1988).

(FN15.) 757 P.2d at 1026.

(FN16.) 31 P.3d 77 (Alaska 2001).

(FN17.) *Id.* at 86.

(FN18.) 42 U.S.C. § 1983.

(FN19.) 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

(FN20.) *Id.* at 50, 108 S.Ct. 2250 (quoting *United States v. Classic,* 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941)).

(FN21.) *Polk County v. Dodson,* 454 U.S. 312, 318, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981).

(FN22.) *Owen v. City of Independence, Mo.,* 445 U.S. 622, 637, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

(FN23.) *See Sooner Prods. Co. v. McBride,* 708 F.2d 510, 512 (10th Cir.1983).

(FN24.) *Id.*

(FN25.) Because we affirm the superior court's grant of summary judgment and dismissal of DeNardo's abuse of process and § 1983 claims, we need not address the superior court's alternative *res judicata* and collateral estoppel grounds for decision. *See M.J. S. v. State, Dep't of Health and Soc. Servs.,* 39 P.3d 1123, 1126 n. 12 (Alaska 2002) ("Our decision affirming the superior court on this ground makes it unnecessary to address the court's findings on alternative

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grounds....").

(FN26.) 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980).

(FN27.) *Id.* at 14, 101 S.Ct. 173.

***682** (FN28.) *Id.*

(FN29.) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

(FN30.) *Id.* at 422, 98 S.Ct. 694.

(FN31.) 775 P.2d 515 (Alaska 1989).

(FN32.) *Id.* at 518.

(FN33.) *Id.*

(FN34.) *Id.*

(FN35.) *See DeNardo v. Michalski,* 811 P.2d 315, 317 (Alaska 1991) (holding that judicial immunity applies to all judicial actions within the scope of a judge's subject matter jurisdiction).

(FN36.) *See id.*

(FN37.) 489 U.S. 180, 184, 109 S.Ct. 993, 103 L.Ed.2d 158 (1989).

(FN38.) *Id.*

(FN39.) 42 Am.Jur.2d *Injunctions* § 191 (electronic edition, updated May 2006) (citing as examples of creative actions courts have taken *Abdul-Akbar v. Watson,* 901 F.2d 329 (3d Cir.1990) (require prior leave of the court to file); *In re Vincent,* 105 F.3d 943 (4th Cir.1997); *Filipas v. Lemons,* 835 F.2d 1145 (6th Cir.1987); *In re Tyler,* 839 F.2d 1290 (8th Cir.1988); *Bd. of County Comm'rs of Morgan County v. Winslow,* 862 P.2d 921 (Colo.1993) (litigant could no longer appear pro se); *Howard v. Sharpe,* 266 Ga. 771, 470 S.E.2d 678 (Ga.1996) (require prior judicial approval); *Spickler v. Dube,* 644 A.2d 465 (Me.1994) (require prior judicial approval) (other footnotes omitted).

(FN40.) CAL.CIV.PROC.CODE § 391 (2006); FLA. STAT. § 68.093 (2006); HAW.REV.STAT. § 634J (2006); OHIO REV.CODE Ann. § 2323.52 (2006); TEX. CIV. PRAC. & REM.CODE Ann. § 11.054 (2005).

(FN41.) *See Tripati v. Beaman,* 878 F.2d 351, 352 (10th Cir.1989) ("There is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.").

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(FN42.) *De Long v. Hennessey,* 912 F.2d 1144, 1149 (9th Cir.1990).

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