

PROFESSIONAL LIABILITY UPDATE

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MALICIOUS PROSECUTION

California Law

By Ann Strayer

*The Second District reverses an order dismissing a malicious prosecution action arising from an insurer's action for additional premiums. A malicious prosecution action may be maintained where most but not all of the amount sought in the prior action was claimed without probable cause. The insurer's abandonment of the case and acknowledgment that the premium was paid constituted a favorable termination.*

**Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Insurance Corporation**  
(2003) 114 Cal.App.4<sup>th</sup> 906

Citi-Wide Preferred Couriers, Inc. purchased a one-year workers' compensation insurance policy from Golden Eagle Insurance Company. After an audit of Citi-Wide's payroll records, Golden Eagle billed Citi-Wide "additional earned premiums" due to an error about the number of Citi-Wide employees. Citi-Wide refused to pay the additional premium, explained the error, and suggested a re-audit. Golden Eagle declined the offer and sued Citi-Wide for the additional premium.

In response to interrogatories propounded by Citi-Wide, Golden Eagle conceded that Citi-Wide owed an amount substantially less than the amount claimed and offered to settle for the lesser amount. Citi-Wide's attorney died prior to a response. Four days before trial, counsel for Golden Eagle sent a letter to Citi-Wide's owner demanding the originally claimed amount and expressing confidence that it

could recover this sum if the case was tried. Citi-Wide found new counsel and when the matter was called for trial Golden Eagle dismissed the lawsuit with prejudice and acknowledged that Citi-Wide had paid the premiums due. The dismissal was without prejudice to Citi-Wide's right to sue Golden Eagle for malicious prosecution.

In the subsequent malicious prosecution lawsuit the trial court granted Golden Eagle's motion *in limine* to preclude Citi-Wide from presenting evidence to show that Golden Eagle lacked probable cause because Citi-Wide's owner admitted at his deposition that the company owed some money to Golden Eagle. With the issue of probable cause resolved in favor of Golden Eagle, an order of dismissal was entered.

The Second District reversed, noting that probable cause is not established by a debtor's admission that a single dollar is

owed on a large claim. The court noted that prior case law established that a malicious prosecution suit may be maintained where only one of several claims in the prior action lacked probable cause. By the same token, a malicious prosecution action can be maintained where most but not all of the amounts sought in the prior action are claimed without probable cause.

In this case Golden Eagle grossly miscalculated the amount owed by Citi-Wide and then refused to respond to Citi-Wide's request for clarification. Golden Eagle did not accept Citi-Wide's invitation to re-audit its payroll taxes, and demanded payment in full before it would even consider a protest. Golden Eagle admitted that the amount owed was substantially less than the claimed amount, but refused to settle for anything less than the amount of the original claim when Citi-Wide found itself without counsel. When Citi-Wide retained new counsel and declared itself ready for trial, Golden Eagle reversed its position and admitted that Citi-Wide's premiums were fully paid. Golden Eagle's unconditional surrender was a favorable termination and Citi-Wide was permitted to proceed.

*Comment:* As stringent as the standards are for malicious prosecution, *Citi-Wide* is one of several recent cases that confirm that it is still a viable tort. Attorneys are both targets and instigators of many malicious prosecution claims. Many of these claims can be prevented, within the bounds of zealous advocacy, by maintaining cordial and professional relationships, by not over-pleading cases, and by discouraging clients from overreaching claims.