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Jeffrey J. Utermohle  
*University of Baltimore School of Law*

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# LOOK WHAT THEY'VE DONE TO MY TORT, MA: THE UNFORTUNATE DEMISE OF "ABUSE OF PROCESS" IN MARYLAND

By Jeffrey J. Utermohle†

## I. INTRODUCTION

When litigants flagrantly misuse the "tools of litigation" (e.g., motions, subpoenas, or discovery) for ulterior purposes, justice requires imposing tort liability for "abuse of process." Otherwise, scofflaws may use coercive tactics with impunity, thereby threatening the integrity of the judicial process and unfairly disadvantaging opponents. Unfortunately, in Maryland, most victims of blatant litigation misconduct have no tort remedy because the state's highest court eviscerated the venerable tort of abuse of process in *One Thousand Fleet Ltd. Partnership v. Guerriero*.<sup>1</sup> As one commentator stated:

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† B.S., Journalism, 1984, University of Maryland, College Park; J.D., 1987, and Law Review Member, University of Baltimore School of Law. Former Judicial Law Clerk to the Honorable Harry A. Cole, Court of Appeals of Maryland. Adjunct Writing Professor, University of Baltimore School of Law. Member, Law Offices of Peter G. Angelos, P.C.

1. 346 Md. 29, 694 A.2d 952 (1997). *One Thousand Fleet* involved a dispute between a real estate developer, One Thousand Fleet Limited Partnership ("Fleet"), and a property owners group including John Guerriero and the Little Italy Community Organization (collectively, "the Guerriero group"). The dispute arose from Fleet's proposed conversion of the Bagby Furniture Warehouse into a 57-unit apartment building located in Baltimore's historic Little Italy neighborhood. *Id.* at 32, 694 A.2d at 953. In April 1993, Fleet agreed with the Bagby Furniture Company ("Bagby") to purchase the warehouse for one million dollars. *Id.* at 33, 694 A.2d at 954. Thereafter, Fleet secured zoning approvals from the Baltimore City Board of Municipal and Zoning Appeals (the "Board"). *Id.* Fleet then obtained state and local funding, a condition of which required Fleet to reserve ten apartment units for persons of moderate income. *Id.* at 33-34, 694 A.2d at 954. Subsequently, in April 1995, John Guerriero offered Bagby \$300,000 cash to purchase the warehouse, but Bagby rejected that offer and later completed the sale to Fleet. *Id.* at 34, 694 A.2d at 954. Meanwhile, members of the Guerriero group had challenged the zoning approvals in Baltimore City Circuit Court (hereinafter "the Zoning Lawsuit"), and Fleet intervened. *Id.* at 34-35, 694 A.2d at 954-55. After the trial court dismissed the Zoning Lawsuit, the property owners appealed, but the court of special appeals dismissed the appeal in December 1995 for lack of prosecution. *Id.* at 35, 694 A.2d at 955. Prior to that dismissal, Fleet filed a separate lawsuit (including counts for abuse of process and malicious use of process) against the Guerriero group, alleging that the Zoning Lawsuit had been filed to interfere with Fleet's ability to finance the warehouse purchase, and to facilitate John Guerriero's purchase of the property at a reduced price. *Id.* Fleet blamed

[T]he [*One Thousand Fleet*] court established a definitive abuse of process damages standard that will be extremely difficult for plaintiffs to meet . . . Essentially, unless a plaintiff who has been the victim of an improper use of process by someone with even the worst possible motive can also establish that he was *arrested* or suffered a *seizure* of property, his action for abuse of process will fail.<sup>2</sup>

The Court of Appeals of Maryland's decision to eviscerate the tort of abuse of process has dire implications for Maryland litigants who fall prey to litigation misconduct. For example, consider the plight of Black Rock<sup>3</sup> Insurance Company employee George "Babe" Ruth,<sup>4</sup>

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the Zoning Lawsuit for its financing difficulties, delays, and lost rental income, but ultimately the circuit court dismissed the abuse of process and malicious use of process claims. *Id.* at 35-36, 694 A.2d at 955. Fleet appealed, and the court of appeals granted by-pass certiorari. *Id.* at 36, 694 A.2d at 955. In affirming the dismissal, the court acknowledged that the Zoning Lawsuit had caused Fleet to lose money, suffer a delay of its project, and face increased construction, legal, and financing costs. *Id.* at 45, 694 A.2d at 960. The *One Thousand Fleet* court reasoned, however, that "[w]e need not consider whether Fleet properly alleged abuse of process . . . because we hold that Fleet did not allege legally cognizable damages [*i.e.*, an arrest or seizure of property]." *Id.* Compare *One Thousand Fleet*, 346 Md. at 29, 694 A.2d at 952 with *Powers v. Leno*, 509 N.E.2d 46, 48-49 (Mass. App. Ct. 1987) (finding that a jury question existed regarding ulterior motive, where the evidence showed that the party challenging zoning approvals did so to keep the property tied up in litigation until the property owner agreed to sell him a strip of land "for a buck." The abuse of process defendant allegedly stated, "[i]f I don't get what I want, I'll make sure these condominiums are never built. I'll delay it in court forever, even if I have to spend one million dollars.").

2. Christopher W. Pate, *Recent Decisions: The Maryland Court of Appeals: Clarifying the Elements of Malicious Use of Process and Abuse of Process Claims*, 57 Md. L. Rev. 1039, 1060-61 (1998) (emphasis added); see *One Thousand Fleet*, 346 Md. at 45, 694 A.2d at 960 (1997) (citing *Bartlett v. Christhilf*, 69 Md. 219, 231, 14 A. 518, 522 (1888)) ("A cause of action for civil abuse of process in Maryland requires that the plaintiff establish that an arrest of the person or a seizure of property of the plaintiff resulted from the abuse of process.").
3. In the American film classic, "Bad Day at Black Rock," (1954) Spencer Tracy played a one-armed World War II veteran (John J. Macreeedy) who visits the isolated Southwestern desert town of Black Rock. See *Movie Review*, at <http://www.filmsite.org/badd3.html> (last visited Jan. 22, 2003). Macreeedy wants to present a posthumous Congressional Medal of Honor for heroism to Komoko, the farming father of a Japanese-American wartime buddy who died saving Macreeedy's life on an Italian battlefield. *Id.* But the hostile, paranoid townfolk of Black Rock harbor a dark secret and they give the stranger a cold, intimidating reception. *Id.* Tracy's performance in "Bad Day at Black Rock" earned an Academy Award nomination for Best Actor. *Id.*
4. This example is fictional, but George Herman "Babe" Ruth was real. Born in Baltimore, Maryland in 1895, Ruth signed his first professional baseball contract in 1914 with the Baltimore Orioles, then members of the International League. See ROBERT W. CREAMER, *BABE: THE LEGEND COMES TO LIFE* 51-52 (Simon & Schuster 1992). The Babe went on to star as a pitcher for the Boston Red Sox (94 wins, 2.28 earned run average, seventeen shutouts)

whose courageous anti-discrimination whistle-blowing<sup>5</sup> cost his employer dearly. Stung by Ruth's disloyalty, Black Rock executives vow to make his life miserable. The company demotes Ruth, slashes his salary, and institutes a company-wide "ostracize Ruth" policy. Adding to their rancor, Black Rock's corrupt top brass learn that Ruth may publish evidence of their insider trading improprieties. Suffering an increasingly unbearable work environment, Ruth sues Black Rock, alleging constructive wrongful discharge.<sup>6</sup>

To avenge Ruth's whistle-blowing, and to coerce him to conceal the insider trading evidence, Black Rock officials ask their attorneys to "put Ruth into the poorhouse" using ultra-aggressive, scorched-earth litigation tactics.<sup>7</sup> Black Rock's legal team zealously proceeds to "paper Ruth to death" with:

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and as a slugging right fielder for the New York Yankees (714 home runs, .342 batting average, 123 stolen bases). See TOTAL BASEBALL: THE OFFICIAL ENCYCLOPEDIA OF BASEBALL 1143, 1730 (John Thorn et al. eds., 7th ed. 2001). To this day, no player has matched the Sultan of Swat's .690 lifetime slugging average. *Id.* at 2295. The Babe's legacy as a national hero was exemplified in World War II when Japanese soldiers charged into battle against the United States with the cry, "To hell with Babe Ruth!" See generally ROBERT W. CREAMER, *BABE* 22 (Simon & Schuster, Penguin Books 1983).

5. "Whistleblower" statutes protect employees from retaliation for disclosing an employer's wrongdoing. See BLACK'S LAW DICTIONARY 1596 (6th ed. 1991). Maryland has three whistleblower protection statutes. See MD. CODE ANN. LAB. & EMPL. § 5-604(b) (2002) (protecting employees who allege violations of the Occupational Safety and Health title); MD. ANN. CODE art. 49B, § 16(f) (1998) (protecting employees who report their employer's unlawful discriminatory practices); MD. ANN. CODE art. 27, § 762 (1996) (prohibiting retaliation against employees who report criminal activity to law enforcement authorities).
6. See *Diamond v. T. Rowe Price Assocs.*, 852 F. Supp. 372, 378 (D. Md. 1994) (noting that the Fourth Circuit has cautioned that "constructive discharge claims must be 'carefully cabined' because they are 'open to abuse by those who leave employment of their own accord.' An employee must show that his or her employer deliberately made working conditions so intolerable that any reasonable person would have resigned.").
7. See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values*, 59 BROOK. L. REV. 931, 944 (1993). The article quotes the American Bar Association's Commission on Professionalism, which was established in late 1984, in stating:

Often, it is clients who ask lawyers to prosecute or defend . . . cases through "scorched earth" tactics. The lawyer has an obligation to the legal system in his capacity as an officer to the court to dissuade the client from . . . using tactics geared primarily to drain the financial resources of the other side.

*Id.*; see also Daniel J. McAuliffe, *Upping the Ante for Junkyard Dogs: Should There be Liability for Abusive Litigation Tactics?*, BUS. L. TODAY, Jan.-Feb. 2000, at 19. The McAuliffe article observes:

A frequent refrain of lawyers identified as abusing the litigation process is "[m]y client made me do it." Given that the client who insists on the conduct of a "war of attrition" in a litigation setting faces abuse-of-process exposure, lawyers representing such a client undoubtedly have an obligation to advise the client of that risk.

1. Frivolous, dilatory motions;<sup>8</sup>
2. Egregiously abusive discovery tactics;<sup>9</sup>
3. Improperly used subpoenas;<sup>10</sup> and

*Id.*; Ralph Nader & Wesley J. Smith, *Speeches and Essays: Lawyers' Roles as New Attorneys*, 80 MARQ. L. REV. 695, 696 (1997). The article notes:

[In the United States' legal system,] "might" fundamentally means "right," [and] individuals seeking justice from the most powerful private and public institutions are often crushed under unremitting "scorched earth" litigation tactics of attorneys who are paid hundreds of dollars an hour to obfuscate, obstruct, delay, and otherwise transform the pursuit of civil justice into a protracted, expensive, and inefficient war of attrition.

*Id.*; Roger C. Cramton, *Lawyer Conduct in the "Tobacco Wars,"* 51 DEPAUL L. REV. 435, 435 (2001) (discussing how tobacco company lawyers engaged in "strategic and abusive litigation conduct designed to delay trials, obstruct discovery of relevant documents, and run up the costs of the plaintiffs' lawyers who finance these cases").

8. See *Nienstedt v. Wetzel*, 651 P.2d 876, 880-81 (Ariz. Ct. App. 1982) ("[W]e therefore consider as 'processes' of the court for abuse of process purposes, the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances.").
9. See Jonathan K. Van Patten & Robert E. Willard, *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Litigation*, 35 HASTINGS L.J. 891, 896 (1984) ("The adoption of the Federal Rules of Civil Procedure in the 1930's and of state discovery statutes after World War II brought 'free and open' discovery designed to reduce surprise and gamesmanship in civil litigation. But the Rules also brought increased costs and abuses of the process."); see also John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them - What Relief Is Available?*, 36 ALA. L. REV. 927, 940 (1985) ("The most commonly abused processes in civil litigation are discovery mechanisms."); Chief Justice Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 65 (1984) (criticizing attorneys who exploit discovery as a "tool of extortion").
10. See generally *Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n, Local 1889*, 343 N.E.2d 278 (N.Y. 1975). In this case, the complaint stated a cause of action for abuse of process because it alleged as follows: first, the attorney for the teachers' association issued judicial subpoenas *duces tecum* to eighty-seven teachers in order to compel their attendance as witnesses before the public employees' relations board; second, the attorney refused the school district's request that a majority of the teachers be excused from attendance at the initial hearing date; and third, the attorney refused to grant a request to stagger the appearances, which resulted in hiring seventy-seven substitute teachers in order to replace the subpoenaed teachers. *Id.* at 280. In *Board of Education v. Farmingdale Classroom Teachers Ass'n, Local 1889*, the court stated:

The subpoenas here were regularly issued process, defendants were motivated by an intent to harass and to injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an inference that the process was being perverted to inflict economic harm on the school district.

*Id.* at 283.

4. Spurious counterclaims<sup>11</sup> with exorbitant *ad damnum* clauses.<sup>12</sup>

Black Rock's executives boast to Ruth that their tactics will continue to "break him" financially, and endlessly delay his lawsuit, unless he:

1. Exonerates Black Rock of the insider trading allegations;
2. Recants his statements that Black Rock unlawfully discriminated;
3. Resigns his employment; and
4. Foregoes filing for unemployment insurance benefits.

Facing great financial pressure from his ever-mounting attorney's fees,<sup>13</sup> and in desperate need for timely resolution of his wrongful discharge suit, Ruth capitulates to Black Rock's demands.

Under such circumstances,<sup>14</sup> when wrongdoers like Black Rock manipulate the tools of litigation for illegitimate purposes (*e.g.*, to exert

11. See Johnson, *supra* note 9, at 940 ("Counterclaims that are dilatory or groundless or filed for an improper purpose also fall within the ambit [of the tort of abuse of process].").

12. See Barry v. Edmunds, 116 U.S. 550, 561 (1886) (observing that a plaintiff makes "an attempted fraud" upon the court when his *ad damnum* is "beyond the amount of a reasonable expectation of recovery"); see also Gemeny v. Starke, No. 98 C 4122, 1998 U.S. Dist. LEXIS 10752, at \*1 (N.D. Ill. July 13, 1998) (criticizing the plaintiff's "*in terrorem* use of a patently excessive *ad damnum* prayer"); Owens Corning v. Bauman, 125 Md. App. 454, 532 n.34, 726 A.2d 745, 783 n.34 (1999) (observing Maryland's legislative intent to "curb the growing amount of excessive *ad damnum* clauses"); Richardson v. Rutherford, 787 P.2d 414, 421-22 (N.M. 1990) (reversing dismissal of claim for abuse of process because a jury could find the ulterior motive behind an excessive *ad damnum* was to "intimidate" the defendant into a settlement).

13. See generally Van Patten, *supra* note 9, at 898-99 (quoting Melvin Belli, *The Law's Delays: Reforming Unnecessary Delay in Civil Litigation*, 8 J. LEGIS. 17 (1981)). The article states:

The ability to cause a financially weak plaintiff to incur additional costs in pursuit of a valid claim gives additional leverage to a stronger defendant. As a result, a defendant with the means to litigate has little incentive to settle early. The plaintiff, however, may be under considerable pressure to settle on terms favorable to the defendant. As Melvin Belli has observed: "After a five year delay, the judgment becomes more a reward to a diligent litigant than an award to a deserving victim."

*Id.* To an unscrupulous defendant inclined to abuse process for dilatory purposes, achieving lengthy delay is a victory in itself. But as the Court of Appeals of Maryland observed in *Langrall, Muir, & Noppinger v. Gladding*, "justice delayed is justice denied." 282 Md. 397, 400, 384 A.2d 737, 739 (1978). Tort liability for abuse of process addresses this concern by providing an effective deterrent against dilatory litigation tactics. See *infra* Part V.

14. Applying the view espoused by one commentator, Black Rock's executives "consummated" an abuse of process the moment they attempted to achieve their ulterior purposes by misusing process. See 1 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* 331 (Little, Brown and Company 1956). Under this approach, for Ruth to properly plead the tort, he need not allege that Black Rock actually achieved its ulterior goals. *Id.* "[T]he moment . . . [a litigant] attempts to attain some collateral objective, outside

coercion or to exact revenge), courts should hold them accountable for “abuse of process.” Unfortunately, in Maryland, victims such as Mr. Ruth have no tort remedy against flagrant litigation misconduct because the Court of Appeals of Maryland eviscerated the long-established tort of abuse of process in *One Thousand Fleet*.<sup>15</sup> The evisceration consisted of adding to the tort a rigid requirement that there be an actual seizure of property, or an arrest of the person.<sup>16</sup> Very few victims of flagrant litigation misconduct can ever satisfy that narrow requirement.<sup>17</sup> For example, although Babe Ruth was badly victimized by Black Rock’s willful perversion of process, Ruth has no redress under Maryland tort law, because he suffered neither a seizure nor an arrest.

This Article posits that the *One Thousand Fleet* court erred in adding the “seizure or arrest” element to Maryland’s “Traditional Definition” of abuse of process. Part II traces the history of the tort, distinguishes abuse of process from the related but distinct tort of malicious use of process, and defines “process” for purposes of abuse of process. Part II also describes the tort’s Damages Element, as well as the Primary Purpose Rule, and proposes two additional restrictions on abuse of process: the Compulsory Counterclaim requirement, and the Fifteen-day “Safe Harbor” provision. Part III reviews the three phases of Maryland’s abuse of process case law: (1) the confused Nineteenth century cases; (2) the rich treasure trove of modern abuse of process jurisprudence; and (3) the unfortunate *One Thousand Fleet* decision that ignored Maryland’s modern precedents in favor of a fundamentally flawed nineteenth century case. Part IV discusses the *One Thousand Fleet* court’s mischaracterization of the jurisprudence of five so-called “sister states.” Part V analyzes how important public policies support the “Traditional Definition” of abuse of process. Part VI explores why Maryland’s high court may have opted to enfeeble the tort of abuse of process. Part VII concludes by calling on Maryland’s legislature to abrogate the *One Thousand Fleet* decision and to restore abuse of process to its *status quo ante*.

## II. ABUSE OF PROCESS: A UNIVERSALLY RECOGNIZED TORT

The tort of abuse of process first gained recognition in the landmark nineteenth century English case, *Grainger v. Hill*.<sup>18</sup> The

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the scope of the operation of the process employed, a tort has been consummated.” *Id.*

15. 346 Md. 29, 694 A.2d 952 (1997).

16. *Id.* at 45, 694 A.2d at 960 (“A cause of action for civil abuse of process in Maryland requires that the plaintiff establish that an arrest of the person or a seizure of property of the plaintiff resulted from the abuse of process.”).

17. See *supra* text accompanying note 2.

18. 132 Eng. Rep. 769 (1838). In this early case, a sea captain named Grainger used the sailing ship he owned to make commercial voyages from London to Normandy. *Id.* at 770-71. Captain Grainger borrowed a sum of money

*Grainger* court noted the following about its newly recognized tort: (1) in a “case *primae impressionis*,” the court inaugurated a “new species” of tort, for abusing judicial process for an “ulterior purpose”; (2) “[t]he action is not for maliciously putting process in force, but for maliciously abusing the process of the Court”; (3) to prove an abuse of process, it is *unnecessary* to establish that the action in which the process was improperly employed has been determined in favor of the complaining party; and (4) to prove an abuse of process, it is *unnecessary* to show that the suit in which the process was improperly employed was commenced without probable cause.<sup>19</sup>

Today, the United States Supreme Court,<sup>20</sup> all fifty states,<sup>21</sup> and the District of Columbia,<sup>22</sup> recognize the tort of abuse of process or its

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from Hill, pledging his ship as collateral. *Id.* at 769. But when illness confined Grainger to bed, Hill, with no justification, suddenly insisted on early repayment of the loan. *Id.* at 772-73. In fact, Hill threatened to have Grainger arrested unless he immediately repaid the entire loan. *Id.* at 773. When Grainger refused, Hill caused a sheriff’s officer, armed with a *capias*, to insist that unless Grainger handed over his ship’s registry certificate, the officer would either “take him or leave a man with him.” *Id.* Under duress from a threatened arrest, Grainger surrendered the ship’s registry and, as a result, lost four voyages from London to Normandy. *Id.* at 770-71. The tribunal recognized the misuse of its process, and held Hill liable for “abusing the process of the Court” to attain the “ulterior purpose” of coercing Grainger to surrender his ship’s registry. *Id.* at 774. *Black’s Law Dictionary* defines “*capias*” as the name of a writ that requires the officer to take the body of the defendant into custody. See BLACK’S LAW DICTIONARY 188 (5th ed. 1979).

19. *Grainger*, 132 Eng. Rep. at 773-74 (emphasis added).

20. The United States Supreme Court has long recognized the tort of abuse of process. See *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994) (“[F]avorable termination of prior proceedings is not an element of [abuse of process] . . . . The gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends.”); *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 74 (1993) (Stevens, J., concurring) (“The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation . . . .”); see also *Boddie v. Connecticut*, 401 U.S. 371, 381-82 (1971) (“alternatives exist to . . . [protect] parties from frivolous litigation, such as . . . abuse of process”).

21. See *Fifty State Survey* *infra* Appendix I.

22. See *Bown v. Hamilton*, 601 A.2d 1074, 1079 n.14 (D.C. 1992) (citing *Morowitz v. Marvel*, 423 A.2d 196, 198 (D.C. 1980)). The court stated:

[The tort of abuse of process] lies where the legal system “has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be required to do. . . .”

. . . Abuse of process thus stands in marked contrast to the tort of malicious prosecution [malicious use of process], which lies only where the action was brought without probable cause and terminated successfully in favor of the aggrieved party.

*Id.*



functional equivalent.<sup>23</sup> The tort's "Traditional Definition"<sup>24</sup> embodies up to three elements: (1) wrongful use of process; (2) to achieve an ulterior purpose; (3) with damages resulting.<sup>25</sup> Prior to *One Thousand Fleet's* evisceration of the tort, Maryland employed the three-element version of the "Traditional Definition" of abuse of process.<sup>26</sup> The Court of Appeals of Maryland<sup>27</sup> summarized the well-established

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23. Forty-nine jurisdictions, including the District of Columbia, recognize the tort of abuse of process. See state survey *infra* Appendix I. The remaining two jurisdictions, Georgia and New Mexico, recognize the functional equivalent of abuse of process. See state survey *infra* Appendix I. Georgia recognizes the functional equivalent of abuse of process through its "abusive litigation" statutory scheme. See state survey *infra* Appendix I. New Mexico recognizes the "malicious abuse of process" tort, which is the functional equivalent of abuse of process. See state survey *infra* Appendix I.
  24. The "Traditional Definition" of abuse of process essentially comes in two versions: first, the two-element version, and second, the three-element version. The two-element version of the "Traditional Definition" of abuse of process consists of: (1) wrongful use of process; (2) to achieve an ulterior purpose. See state survey *infra* Appendix I. The three-element version of the "Traditional Definition" of abuse of process consists of: (1) wrongful use of process; (2) to achieve an ulterior purpose; (3) with damages resulting. See state survey *infra* Appendix I. In this Article, the "Traditional Definition" of abuse of process refers, collectively, to the two-element version, the three-element version, and the functional equivalents thereof. The "Traditional Definition" of abuse of process, however, excludes the *One Thousand Fleet* court's eviscerated version of the tort. In this Article, Maryland's "Traditional Definition" of abuse of process refers to the three-element version of the "Traditional Definition" of abuse of process, as recognized by Maryland's pre-*One Thousand Fleet* jurisprudence. See *infra* note 26 and accompanying text.
  25. See, e.g., *Berman v. Karvounis*, 308 Md. 259, 262, 518 A.2d 726, 727 (1987).
  26. *Id.* ("To sustain an action of abuse of process the plaintiff must show that: 1. the defendant wilfully used process for an illegal purpose; 2. to satisfy the defendant's ulterior motive; and 3. the plaintiff was damaged by the defendant's perverted use of process.").
  27. *One Thousand Fleet*, 346 Md. at 38-39, 694 A.2d at 956-57. Ironically, prior to eviscerating the tort of abuse of process, the *One Thousand Fleet* court provided a fine exegesis of the tort's essential nature and elements, as defined by Maryland's modern jurisprudence. *Id.* This discussion of Maryland's "Traditional Definition" of abuse of process appeared in a distinct section rather early on in the *One Thousand Fleet* opinion. *Id.* at 38, 694 A.2d at 956. It was only at the very end of the opinion that the *One Thousand Fleet* court added the seizure or arrest element to the abuse of process tort. *Id.* at 45, 694 A.2d at 960. The *One Thousand Fleet* opinion's organizational style may help explain why the Court of Special Appeals of Maryland misinterpreted *One Thousand Fleet* as applying Maryland's "Traditional Definition" of abuse of process. Compare *McCauley v. Suls*, 123 Md. App. 179, 191, 716 A.2d 1129, 1135 (1998) (citing *One Thousand Fleet*, 346 Md. at 38, 694 A.2d at 956) (explaining that an abuse of process claimant must prove "first, that the defendants wilfully used process after it has issued in a manner not contemplated by law; second, that the defendants acted to satisfy an ulterior motive; and third, that damages resulted from the defendants' perverted use of process") (emphasis added), with *One Thousand Fleet*, 346 Md. at 45, 694 A.2d at 960 (limiting abuse of process "cognizable damages" to "an arrest of the person or a seizure of property of the plaintiff").

tort's essential nature and elements, as developed over the years by Maryland's modern abuse of process jurisprudence, as follows:

1. To sustain a cause of action for abuse of process, the plaintiff must prove, "*first*, that the defendant wilfully used process after it has issued in a manner not contemplated by law; *second*, that the defendant acted to satisfy an ulterior motive; and *third*, that damages resulted from the defendant's perverted use of process."<sup>28</sup>
2. Abuse of process is a distinct tort, "essentially different and independent" from malicious use of process.<sup>29</sup>

28. *One Thousand Fleet*, 346 Md. at 38, 694 A.2d at 956 (emphasis added) (citations omitted).

29. *Id.* at 39, 694 A.2d at 956. The *One Thousand Fleet* court accurately set forth the five elements of malicious use of process as follows:

*First*, a prior civil proceeding must have been instituted by the defendant. *Second*, the proceeding must have been instituted without probable cause. Probable cause for purposes of malicious use of process means "a reasonable ground for belief in the existence of such state of facts as would warrant institution of the suit or proceeding complained of." *Third*, the prior civil proceeding must have been instituted by the defendant with malice. Malice in the context of malicious use of process means that the party instituting proceedings was actuated by an improper motive. As a matter of proof, malice may be inferred from a lack of probable cause. *Fourth*, the proceedings must have been terminated in favor of the plaintiff. *Finally*, the plaintiff must establish that damages were inflicted upon the plaintiff by arrest or imprisonment, by seizure of property, or other special injury which would not necessarily result in all suits prosecuted to recover for a like cause of action.

*Id.* at 37, 694 A.2d at 956 (emphasis added) (citations omitted). In affirming dismissal of Fleet's malicious use of process claim, the *One Thousand Fleet* court reasoned:

[Fleet's alleged] damages are inadequate to maintain a cause of action for malicious use of process. Fleet alleges neither an arrest nor seizure of its property. Nor does Fleet allege a "special injury" for purposes of malicious use of process. To qualify as a "special injury," the damages must be different than those that ordinarily result from all suits for like causes of action. Fleet's alleged damages do not qualify as a special injury because any real estate developer facing a legal challenge to the zoning of its property would have suffered the same damages regardless of whether the zoning challenge was rightfully or wrongfully instituted. . . . [The Guerriero group's] zoning challenges would likely have impeded financing, caused delays, and decreased rental revenue under any circumstances. The damages Fleet suffered as a result of [the Zoning Lawsuit] are those that would ordinarily result from proceedings for similar causes of action.

*Id.* at 44-45, 694 A.2d at 959. For an excellent discussion of the ancient origins of the malicious use of process tort, see William C. Campbell, Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1221 (1979) ("Anglo-Saxon courts employed a simple system for guarding against false suits: the complainant unfortunate to lose his cause also lost his tongue, or, if that option proved distasteful, was com-

3. Abuse of process provides a remedy for those cases "in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed."<sup>30</sup>
4. Abuse of process concerns "misuse of the *tools* the law affords litigants once they are in a lawsuit."<sup>31</sup>

Unlike Maryland, a large majority of jurisdictions impose no damages requirement for abuse of process; instead, they prescribe only two elements: (1) wrongful use of process; (2) to achieve an ulterior purpose.<sup>32</sup> Only seventeen states require a damages element.<sup>33</sup> Regardless of whether a particular jurisdiction favors the two-element version or the three-element version of the "Traditional Definition" of abuse of process, the salient point remains that recent case law in all fifty-one jurisdictions, including Maryland, embraces the "Traditional Definition."<sup>34</sup> Maryland's membership in this unanimous group, however, carries an important caveat: Although an intermediate appellate court approved the "Traditional Definition" in *McCauley v. Suls*,<sup>35</sup> it did so only by ignoring *sub silentio* the state supreme court's recent evisceration of the abuse of process tort in *One Thousand Fleet*.<sup>36</sup>

#### A. *Distinguishing Abuse of Process from Malicious Use of Process*

The two torts, abuse of process and malicious use of process, are similar because they are both intentional torts, and they both deal with perversions of the legal system.<sup>37</sup> However, an essential differ-

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pelled to pay his opponent compensation, called *wer*, which was fixed according to the complainant's status.").

30. *One Thousand Fleet*, 346 Md. at 38, 694 A.2d at 956 (quoting W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 121, at 897 (5th ed. 1984)).

31. *Id.* at 39, 694 A.2d at 957.

32. See state survey *infra* Appendix I.

33. See state survey *infra* Appendix I.

34. See *supra* notes 20-23 and accompanying text.

35. 123 Md. App. 179, 716 A.2d 1129 (1998).

36. 346 Md. 29, 43-44, 694 A.2d 952, 959 (1996).

37. *Cuillo v. Shupnick*, 815 F. Supp. 133 (S.D.N.Y. 1993) (observing that abuse of process is an intentional tort); see also McAuliffe, *supra* note 7, at 19. The McAuliffe article states:

The fact that abuse of process and [malicious use of process] are both intentional torts should not prove to be a factor in curtailing their use as weapons against abusive litigation practices. The gimmicks that satisfy the description of "Rambo" litigation tactics are rarely undertaken inadvertently or negligently. To the contrary, they are undertaken purposefully to wear down the opposition so as to achieve a resolution of a controversy on the basis of considerations that bear little or no relationship to its merits.

*Id.*; see also 1 HARPER & JAMES, *supra* note 14, at 4:85 - 4:86 (stating that both actions [abuse of process and malicious use of process] deal with the perversion of the legal system). See generally Johnson, *supra* note 9, at 939. The Johnson article observes:

ence between the two is one of timing: whereas malicious use of process always concerns whether a lawsuit was initiated without cause,<sup>38</sup> abuse of process only deals with perversions of the tools of litigation occurring after a lawsuit has commenced.<sup>39</sup> Therefore, the tort action for abuse of process does not pertain to the filing of a groundless suit.<sup>40</sup>

Another key distinction that emerges from a comparison of the two torts' elements<sup>41</sup> is that malicious use of process claims generally are

The terms malicious [use of process] and abuse of process often are used together, but the two causes of action are not interchangeable. One difference is that, unlike a malicious [use of process] action, an abuse of process claim may be filed before the termination of the original action. The major distinction, however, concerns the different situations in which an abuse of process action applies . . . .

A party has abused legal process if he used the court's processes in a manner not contemplated by law.

*Id.*

38. *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 919 (Conn. 2001) (quoting *Schaefer v. O.K. Tool Co.*, 148 A. 330 (Conn. 1930)) (noting that the distinction between malicious use of process and "abuse of process as tort actions is that in the former the wrongful act is the commencement of an action without legal justification, and in the latter it is in the subsequent proceedings"); *see also supra* note 29 (discussing the elements of malicious use of process) and note 26 (discussing the elements of abuse of process).
39. *See Batten v. Abrams*, 626 P.2d 984, 990-91 (Wash. App. 1981). The *Batten* court stated that:

[T]here must be an act after filing suit using legal process empowered by that suit to accomplish an end not within the purview of the suit .

. . . . [The] initiation of vexatious civil proceedings known to be groundless is not abuse of process . . . . [T]he bringing of a baseless lawsuit will not establish the act that is the essential element of abuse of process.

*Id.*; *see also Philip L. Gordon, Defeating Abusive Claims and Counterclaims for Abuse of Process*, COLO. LAW., Mar. 2001, at 48. The author states that:

The purpose of the court system is to distinguish between meritorious and meritless claims. Therefore, a litigant who files claims subsequently held to be meritless has used the judicial process for its intended purpose, even if the complaint was filed with an ulterior motive. . . . In short, an allegation that a complaint was filed with an ulterior purpose does not in and of itself plead a claim for abuse of process.

*Id.*

40. *See, e.g., Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 U.S. Dist. LEXIS 2877, at \*6 (W.D. Mich. Feb. 26, 2001); *Wells v. Orthwein*, 670 S.W.2d 529 (Mo. Ct. App. 1984); *Brault v. Smith*, 679 P.2d 236 (Mont. 1984); *Key Bank of Northern New York v. Lake Placid Co.*, 103 A.D.2d 19, 479 N.Y.S.2d 862 (App. Div. 1984); *Martin v. Trevino*, 578 S.W.2d 763 (Tex. App. 1978); *see also supra* note 39.
41. *See supra* note 26 (discussing the elements of abuse of process) and *supra* note 29 (discussing the elements of malicious use of process).

more difficult to establish than abuse of process claims.<sup>42</sup> This dichotomy serves the important public policy of promoting “free access to the courts” in two ways: *First*, if courts made it too easy to prove malicious use of process claims, the resulting “chilling effect” could dissuade plaintiffs from filing suit for fear that if they lose they could face tort liability for malicious use of process. *Second*, if courts made it too difficult to prove abuse of process claims, litigants could no longer challenge an opponent’s abusive tactics, and their right to “free access to the courts” could become a hollow pretense.<sup>43</sup>

B. “Process,” for purposes of abuse of process, encompasses the full panoply of procedures incident to litigation, including: motions, subpoenas, and discovery.<sup>44</sup>

“Process,” as used in the tort of abuse of process, is “interpreted broadly to encompass the entire range of procedures incident to litigation.”<sup>45</sup> As the California Supreme Court observed, “[t]he broad reach of the ‘abuse of process’ tort can be explained historically, since the tort evolved as a ‘catch-all’ category to cover improper uses of the

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42. Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 WAKE FOREST L. REV. 671, 687 (1997). The article states:

Comparison of the elements of the two torts indicates that it should be easier to establish a claim for abuse of process than a claim for malicious [use of process]. Both torts call for an improper purpose. Malicious [use of process], however, requires termination of the proceeding in favor of the plaintiff, while abuse of process does not. In addition, malicious [use of process] requires that the proceeding be brought without probable cause. Abuse of process does not have this requirement; the tort occurs when process is used for a purpose other than that for which it was intended.

*Id.*; see also *Wesko v. G.E.M., Inc.*, 272 Md. 192, 195, 321 A.2d 529, 531 (1974) (“[In an action for abuse of process] recovery may generally be had without the necessity of showing lack of probable cause or the termination of the proceeding in favor of the plaintiff.”); *Devaney v. Thriftway Mktg. Corp.*, 953 P.2d 277, 282 (N.M. 1997) (“Originally, the tort of abuse of process was created in order to alleviate the harsh procedural requirements of malicious [use of process].”); John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 451 (1986) (“Courts have looked with more favor on abuse of process than on malicious civil prosecution.”).

43. See *infra* Part V.A-B.

44. Wade, *supra* note 42, at 450 n.60.

45. *Barquis v. Merchants Collection Ass’n of Oakland, Inc.*, 496 P.2d 817, 824 (Cal. 1972); see also *Nienstedt v. Wetzel*, 651 P.2d 876, 880 (Ariz. Ct. App. 1982) (citing *Barquis*, 496 P.2d at 824). The Arizona court stated that “through developing case law the word ‘process’ as used in the tort of ‘abuse of process’ is not restricted to the narrow sense of that term. Rather, it has been interpreted broadly, and encompasses the entire range of procedures incident to the litigation process.” *Id.*

judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious [use of process]."<sup>46</sup>

The abuse of process tort's protean nature is illustrated by numerous court decisions finding in favor of abuse of process plaintiffs.<sup>47</sup> The following list exemplifies the variety of civil judicial procedures encompassed by the term "process" for purposes of abuse of process:

1. Motions (*e.g.*, motions for protective orders, change of judge, sanctions, and continuances);<sup>48</sup>
2. Subpoenas;<sup>49</sup>
3. Summonses;<sup>50</sup>

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46. *Barquis*, 496 P.2d at 824. The *Barquis* court referred to malicious use of process as "malicious prosecution." *Id.* The two terms are essentially synonymous. *De Leo v. Anthony A. Nunes, Inc.*, No. 86-516-Appeal, 1988 R.I. LEXIS 122, at \*9 (R.I. Aug. 24, 1988) (discussing "[t]he tort of malicious prosecution, or malicious use of process as it is sometimes called"). In this Article, for the sake of clarity, most references to "malicious prosecution" have been changed to "malicious use of process." On occasion, Maryland courts have drawn a terminological distinction between "malicious prosecution" (maliciously causing criminal process to issue for its ostensible purpose, but without probable cause), and "malicious use of process" (maliciously causing civil process to issue for its ostensible purpose, but without probable cause); *see infra* note 125.

This Article focuses on abuse of process in the civil context. For the essential Maryland case concerning abuse of criminal process, *see Krashes v. White*, 275 Md. 549, 555, 341 A.2d 798, 801-02 (1975). In *Krashes*, the Court of Appeals of Maryland held that, for purposes of establishing the elements of abuse of process in a criminal case, "the issuance by a court of some sort of criminal process against a party is necessary before that party can properly bring an action . . . [but] . . . there is no requirement that the party be arrested or that an arrest warrant against him be issued." *Id.* In sum, the *Krashes* court held that "arrest is not an essential element of the tort of abuse of criminal process." *Id.* at 556, 341 A.2d at 802.

47. Twenty-three court decisions from twelve jurisdictions have found the elements of abuse of process to be satisfied. *See Case Law Survey infra* Appendix II.

48. *See, e.g., Nienstedt*, 651 P.2d at 880-81 ("[W]e therefore consider as 'processes' of the court for abuse of process purposes, the noticing of depositions, the entry of defaults, and the utilization of various motions such as motions to compel production, for protective orders, for change of judge, for sanctions and for continuances.").

49. *See, e.g., Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n, Local 1889*, 343 N.E.2d 278, 283 (N.Y. 1975). The court explained:

The subpoenas here were regularly issued process, defendants were motivated by an intent to harass and to injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an inference that the process was being perverted to inflict economic harm on the school district.

*Id.*; *see also* MINN. STAT. § 45.01 (2001) ("Subpoenas shall be issued only in connection with a duly noted deposition . . . . Violation of this provision constitutes an abuse of process, and shall subject the attorney or party to appropriate sanctions or damages.").

50. *See, e.g., Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200 (Colo. Ct. App. 1998) (upholding an abuse of process judgment against a plaintiff that had summonsed its opponent to defend a lawsuit in a distant forum

4. Discovery<sup>51</sup> (e.g., interrogatories,<sup>52</sup> depositions,<sup>53</sup> and requests for admissions<sup>54</sup>);
5. *Lis pendens*,<sup>55</sup>
6. Default orders;<sup>56</sup> and
7. *Ad damnum* clauses.<sup>57</sup>

### C. Limitations on the Tort of Abuse of Process

#### 1. The Damages Element

Only 17 jurisdictions (including Maryland) limit the tort of abuse of process by requiring a damages element.<sup>58</sup> For example, under Maryland's pre-*One Thousand Fleet* jurisprudence, the abuse of process damages element encompassed damages other than an arrest or seizure of property.<sup>59</sup> Specifically, an abuser of process was "liable for all the consequences that reasonably result[ed]" from the abuse of process.<sup>60</sup> In *One Thousand Fleet*, the court made an abrupt about-face by limiting "cognizable damages" to those resulting from a seizure or arrest.<sup>61</sup> But in other jurisdictions, due to the tort's flexible nature, cognizable damages for abuse of process continue to run the gamut according to

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despite knowledge that the distant forum lacked personal jurisdiction over the defendant); *Wanzer v. Bright*, 52 Ill. 35, 36 (1869) (affirming abuse of process judgment against a creditor that misused a summons by fraudulently inducing a debtor to come within the jurisdiction of the court so as to render him amenable to its process).

51. See *supra* note 9 and accompanying text.
52. See, e.g., *Younger v. Solomon*, 113 Cal. Rptr. 113, 118 (Cal. Ct. App. 1974) (interpreting the term "process," as used in the tort of abuse of process, as including written interrogatories).
53. See, e.g., *Hopper v. Drysdale*, 524 F. Supp. 1039, 1042 (D. Mont. 1981) ("[A]buse of the authority to notice and take depositions may serve as the basis for the tort of abuse of process.").
54. See, e.g., *Twyford v. Twyford*, 63 Cal. Rptr. 145, 149 (Cal. Ct. App. 1976) ("[A] request for admissions is . . . capable of being abused in the same way as interrogatories and depositions, and therefore can form the basis for an abuse of process action.").
55. See, e.g., *Station Assocs., Inc. v. Long Island R.R.*, 188 N.Y.S.2d 435, 439-40 (App. Div. 1959) (upholding abuse of process claim based on improper use of a *lis pendens* for ulterior purposes); see state survey *infra* Appendix II.
56. See *supra* note 48.
57. See *supra* note 12.
58. See state survey *infra* Appendix I.
59. See, e.g., *Wesko v. G.E.M., Inc.*, 272 Md. 192, 321 A.2d 529 (1974) (recognizing that proof of damage other than an arrest or a seizure of property is sufficient to establish the tort of abuse of process).
60. *Palmer Ford, Inc. v. Wood*, 65 Md. App. 390, 397-98, 500 A.2d 1055, 1059 (1985) (observing that when criminal or civil process has been "perverted by misapplication to an end for which that process was never intended, the abuser is liable for all the consequences that reasonably result from the process").
61. *One Thousand Fleet*, 346 Md. at 45, 694 A.2d at 960; see also *supra* note 2 and accompanying text.

the special circumstances and conditions present in each case.<sup>62</sup> For example, an abuse of process victim may be awarded the following compensatory damages:

1. The cost of hiring substitutes for employees improperly subpoenaed;<sup>63</sup>
2. Excessive litigation expenses;<sup>64</sup>
3. Reputational or emotional harm;<sup>65</sup>
4. Lost profits;<sup>66</sup> and
5. All harm reasonably flowing from the abuse of process.<sup>67</sup>

In order to achieve the abuse of process tort's goal of restitution, our civil justice system must adequately compensate abuse of process victims. The Supreme Court of New Hampshire insightfully echoed this sentiment:

[A]nyone who has been a litigant knows that the fact of litigation has a profound effect upon the quality of one's life . . . . Litigation is a disturbing influence to one degree or another. The litigant may have the benefit of skilled and conscientious counsel as well as a strong and well-founded case on the facts, but until such time as the favorable verdict is in hand beyond the reach of appeal, there is a day-to-day uncertainty of the outcome. One wonders about the availability of witnesses at the appropriate times and whether their information will be adequately imparted. One may have gnawing uncertainty about the myriad things that can go wrong in a lawsuit.<sup>68</sup>

Therefore, when the price of litigation, in terms of time, money, and uncertainty is substantially exacerbated by an opponent's abuse of process, "the litigant is not made whole if the only remedy is reimbursement of counsel fees."<sup>69</sup> Unfortunately, the *One Thousand Fleet*

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62. See *infra* notes 63-67 and accompanying text.

63. Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n., Local 1889, 43 N.E.2d 278, 280 (N.Y. 1975) (school district suffered "economic harm" by being forced to hire seventy-seven substitute teachers to replace improperly subpoenaed teachers).

64. *Nienstedt*, 651 P.2d at 882 (abuse of process defendant's "primary purpose" was to subject his opponent to "excessive litigation expenses").

65. *Devaney v. Thriftway Mktg. Corp.*, 953 P.2d 277, 290 (N.M. 1997) ("[A malicious abuse of process plaintiff] has the burden of demonstrating actual damages for all forms of harm, including reputational or emotional harm.>").

66. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, No. 92 C 7768, 1999 U.S. Dist. LEXIS 917, at \*2 (N.D. Ill. Jan. 15, 1999) (applying Arizona law) (holding that the question of calculating lost profit damages for the alleged abuse of process was a jury question).

67. *Palmer Ford, Inc. v. Wood*, 65 Md. App. 390, 397-98, 500 A.2d 1055, 1059 (1985).

68. *Aranson v. Schroeder*, 671 A.2d 1023, 1028 (N.H. 1995).

69. *Id.*



court limited "cognizable damages" to those resulting from a seizure or arrest,<sup>70</sup> thereby thwarting the goal of restitution by denying compensation to abuse of process victims for all harm proximately resulting from the abuse.<sup>71</sup>

## 2. The "Primary Purpose" Rule

The *Restatement (Second) of Torts* recognizes an important limitation on the tort of abuse of process by defining it as the use of process "primarily to accomplish a purpose for which it is not designed."<sup>72</sup> The *Restatement's* comment explains the significance of the Primary Purpose Rule:

"Primarily." The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.<sup>73</sup>

In *Nienstedt v. Wetzel*,<sup>74</sup> the Arizona court cogently explained how the Primary Purpose Rule applies to the tort of abuse of process:

We recognize that the utilization of virtually any available litigation procedure by an attorney will generally be accompanied by an awareness on that attorney's part that his action will necessarily subject the opposing party to additional legal expenses. The range of feeling in the initiating attorney evoked by that awareness might well vary from instances of actual indifference to instances of intense satisfaction. By our holding in this case we do not intend to suggest that liability for abuse of process should result from either of the said instances alone. *Liability should result only when the sense of awareness progresses to a sense of purpose, and, in addition, the utilization of the procedure for the purposes for which it was designed becomes so lacking in justification as to lose its legitimate function as a reasonably justifiable litigation procedure. . . .* There was evidence presented here of many instances from which a trier of fact could have concluded that the ulterior or collateral purpose of appellant Manfred Wetzel to subject the Nien-

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70. See *supra* note 2 and accompanying text.

71. See *supra* note 2 and accompanying text.

72. Section 682 of the *Restatement (Second) of Torts* provides: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." RESTATEMENT (SECOND) OF TORTS § 682 (1977).

73. *Id.* cmt. b. *But cf.* RESTATEMENT OF THE LAW GOVERNING LAWYERS (THIRD) § 110 cmt. c, 172 (2000) ("[L]itigation measures may not be taken for an improper purpose, even in instances in which they are otherwise minimally supportable.").

74. 651 P.2d 876 (Ariz. Ct. App. 1982).

stedts to excessive litigation expenses was in fact his *primary purpose*, and that his use of various legal processes was not justified or used for legitimate or reasonably justifiable purposes of advancing appellants' interests in ongoing litigation.<sup>75</sup>

### 3. The Compulsory Counterclaim Requirement

Another limitation on the tort of abuse of process should be the requirement to assert an abuse of process claim within the very same litigation in which the alleged abuse occurred.<sup>76</sup> Such a requirement makes good sense both to promote judicial economy, and to spare litigants the inconvenience and expense of multiple litigations.<sup>77</sup> Because abuse of process may occur during any stage of litigation, procedural rules<sup>78</sup> should be applied flexibly to permit "late" filed pleadings asserting abuse of process.<sup>79</sup>

### 4. The Fifteen-day "Safe Harbor" Provision

Another limitation on the tort of abuse of process should be the creation of a "Safe Harbor" affording alleged abusers of process fifteen days prior notice of the intent to bring an abuse of process claim, a period during which they may avoid liability by abandoning the abusive conduct.<sup>80</sup> Georgia's abusive litigation statute<sup>81</sup> and Federal Rule

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75. *Id.* at 882 (emphasis added).

76. See generally Joseph B. Maher, *Survival of the Common Law Abuse of Process Tort in the Face of a Noerr-Pennington Defense*, 65 U. CHI. L. REV. 627, 628 n.7 (1998). The author recognized that "[one] advantage of the abuse of process tort is that it may be alleged as a counterclaim within the same trial. [In contrast, the malicious use of process] requirement, that a suit be favorably terminated, would otherwise require a defendant to initiate her own suit at a later time. This not only inconveniences the defendant, but also wastes judicial resources." *Id.*

77. *Id.*

78. See, e.g., MD. RULE 2-331(d) (Maryland's thirty-day deadline for asserting counterclaims); MD. RULE 2-341 (Maryland's fifteen-days-before-trial deadline for amending complaints).

79. See Anne Proffitt, *Yost v. Torok and Abusive Litigation: A New Tort to Solve an Old Problem*, 21 GA. L. REV. 429, 452 (1986). Proffitt recognizes that "abuse of the litigation process, however, does not always occur during the pleading stage, but sometimes during discovery and even at trial. . . . [T]rial judges must be willing to permit the pleader to supplement the original pleading with a counterclaim that matured or was acquired after pleading." *Id.*

80. See Carroll County Water Auth. v. Bunch, 523 S.E.2d 412, 413-14 (Ga. Ct. App. 1999) (citing Talbert v. Allstate Ins. Co., 408 S.E.2d 125 (Ga. Ct. App. 1991)) (emphasizing Georgia's abusive litigation statute's notice requirement's "overriding purpose to give a prospective defendant the chance to change position and avoid liability"). Georgia's Annotated Code states:

As a condition precedent to any claim for abusive litigation, the person injured by such act shall give written notice by registered or certified mail or statutory overnight delivery or some other means

11<sup>82</sup> both employ this common-sense measure that encourages litigants to “work it out” among themselves, thereby promoting the important public policy favoring judicial economy.<sup>83</sup>

### III. MARYLAND’S ANCIENT AND MODERN ABUSE OF PROCESS JURISPRUDENCE

In *One Thousand Fleet*,<sup>84</sup> for no overt reason, and contrary to important public policy considerations,<sup>85</sup> the Court of Appeals of Maryland added “arrest or seizure” as a new element to abuse of process,<sup>86</sup> thereby enfeebling a perfectly valid and useful tort. The state’s highest court mistakenly justified its decision by relying on a confused, century-old Maryland case,<sup>87</sup> and by mischaracterizing the jurispru-

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evidencing receipt by the addressee to any person against whom such injured person intends to assert a claim for abusive litigation and shall thereby give the person against whom an abusive litigation claim is contemplated an opportunity to voluntarily withdraw, abandon, discontinue, or dismiss the civil proceeding, claim, defense, motion, appeal, civil process, or other position.

GA. CODE ANN. § 51-7-84(a) (2000); Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1091-92 (1994). The article states that:

Under the 1993 amendments [to Federal Rule 11], a litigant cannot file or present a sanctions motion to the district court until twenty-one days after serving the motion on the alleged offender. Within the twenty-one day “safe harbor,” the offender can withdraw or correct the challenged document and thus avoid sanctions. The function of the “safe harbor” provision is to lessen the chilling effect of Rule 11 by insulating litigants from sanctions for correctable mistakes.

*Id.*

81. See GA. CODE ANN. § 51-7-81 (2000) (“Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts: (1) with malice; and (2) without substantial justification.”); see also *supra* note 80.

82. Rule 11(b) of the *Federal Rules of Civil Procedure* provides:

Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11(b); see also *supra* note 80.

83. See *supra* notes 81-82.

84. 346 Md. 29, 694 A.2d 952 (1997); see also *supra* note 1 and accompanying text.

85. See *infra* Part V.

86. See *supra* note 2 and accompanying text.

87. *Bartlett v. Christhilf*, 69 Md. 219, 14 A. 518 (1888); see *infra* notes 90-108 and accompanying text.

dence of several “sister states” as “in accord” with its decision.<sup>88</sup> Instead of unwisely burdening the tort with a new element, the *One Thousand Fleet* court should have simply applied Maryland’s “Traditional Definition” of abuse of process.<sup>89</sup> To place the *One Thousand Fleet* court’s mistake in proper perspective, this Article next will analyze Maryland’s ancient and modern abuse of process jurisprudence.

A. Maryland’s “Confused” Nineteenth Century Abuse of Process Jurisprudence

1. *Bartlett v. Christhilf*

In the 1888 case of *Bartlett v. Christhilf*,<sup>90</sup> the Court of Appeals of Maryland committed the common mistake<sup>91</sup> of confusing the elements of abuse of process with those applicable to malicious use of

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88. See *infra* Part IV.

89. See *supra* note 24 and accompanying text.

90. 69 Md. 219, 14 A. 518 (1888). *Bartlett* concerned a dispute between two court-appointed co-receivers, Kemp Bartlett Jr. and Henry Christhilf. In the litigation in which Bartlett and Christhilf were receivers (the “Underlying Lawsuit”), Christhilf filed a petition seeking Bartlett’s removal for his alleged embezzlement and other improprieties. *Id.* at 222, 14 A. at 518. Before any hearing on the petition, the Underlying Lawsuit was settled and dismissed. *Id.* Subsequently, Bartlett sued Christhilf for “malicious abuse of process” based on the filing of the removal petition. *Id.* Ostensibly, the *Bartlett* opinion concerned “malicious abuse of process,” but its holding turned on the principle, unique to the law of malicious use of process, that one who institutes an unfounded suit faces no liability in the absence of a seizure or arrest. *Id.* at 231, 14 A. at 522. Because the *Bartlett* opinion confused the two torts, it offered no insight into the abuse of process tort.

91. Courts and commentators have recognized that the torts of abuse of process and malicious use of process are often confused with one another. See *Access Fin. Lending Corp. v. Keystone State Mortgage Corp.*, No. 96-191, 1996 U.S. Dist. LEXIS 14073, at \*7 (W.D. Pa. Sept. 4, 1996) (“In determining whether the defendant has stated a claim for abuse of process, a review of Pennsylvania jurisprudence addressing not only that tort, but also the tort of malicious use of process, is helpful. The two torts are often confused.”); *Keller v. Ray, Quinney & Nebeker*, 896 F. Supp. 1563, 1570 n.15 (D. Utah 1995) (“The court’s research reveals that it is common to confuse abuse of process with malicious [use of process] both substantively and also through a failure to recognize distinctions in terminology.”); *Warwick Dev. Co. v. GV Corp.*, 469 So. 2d 1270, 1274 (Ala. 1985) (“Abuse of process is often confused with the tort of malicious [use of process].”); *Devaney v. Thriftway Mktg. Corp.*, 953 P.2d 277, 282 (N.M. 1997) (“Many courts and litigants have experienced a great deal of difficulty in distinguishing a claim of abuse of process from one of malicious [use of process] because these two torts are closely related.”); *Bd. of Educ. v. Farmingdale Classroom Teachers Ass’n, Local 1889*, 343 N.E.2d 278, 280-81 (N.Y. 1975) (“Abuse of process, *i.e.*, causing process to issue lawfully but to accomplish some unjustified purpose, is frequently confused with malicious [use of process], *i.e.*, maliciously causing process to issue without justification.”); See also *Wade, supra* note 42, at 451 (“Although the two torts are quite different and need to be carefully distinguished, their similarity has not infrequently produced confusion in the understanding of some courts, with erroneous decisions resulting.”).

process.<sup>92</sup> Although the *Bartlett* opinion ostensibly considered the plaintiff's claim as one for "malicious abuse of process,"<sup>93</sup> in reality, the court's analysis focused on the elements required to establish tort liability for initiating an unfounded lawsuit,<sup>94</sup> a concept that is uniquely associated with malicious use of process.<sup>95</sup> For important public policy reasons, such as the prevention of unending litigation and promotion of free access to the courts,<sup>96</sup> some courts require a high damage threshold (*e.g.*, seizure or arrest) to impose malicious use of process liability for initiating an unfounded lawsuit.<sup>97</sup> On the other hand, the mere initiation of an unfounded suit, without more, cannot amount to an abuse of process.<sup>98</sup> Abuse of process evolved as a more flexible tort to redress perversion of the tools of litigation occurring after the initiation of a well-founded suit.<sup>99</sup> With these principles in mind, it is clear that the *Bartlett* court confused the two torts.<sup>100</sup> To outward appearances, the *Bartlett* opinion concerned "malicious abuse of process,"<sup>101</sup> but its holding emphasized the principle, unique to the law of malicious use of process, that one who institutes an unfounded suit faces no liability in the absence of a seizure or arrest.<sup>102</sup> Specifically, in language quoted in *One Thousand Fleet*,<sup>103</sup> the *Bartlett* court stated that "[i]t will hardly be seriously contended that where there has been no wrongful deprivation of liberty or no illegal seizure of property, that each unfounded suit . . . will sustain an action against the one who instituted it."<sup>104</sup>

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92. The *Bartlett* court referred to malicious use of process as "malicious prosecution of a civil suit without probable cause." 69 Md. at 228, 14 A. at 522; *see supra* note 29 (discussing the elements of malicious use of process); *see supra also* note 26 (discussing the elements of abuse of process)

93. 69 Md. at 228, 14 A. at 520 (1888).

94. *Id.* at 230, 14 A. at 521-22.

95. Claims alleging initiation of an unfounded suit are properly analyzed under the malicious use of process rubric. *See supra* notes 38-42 and accompanying text.

96. *See supra* text accompanying note 43 (discussing the threat to "free access to the courts" in the context of malicious use of process); *see also infra* Part V. (discussing the threat of "endless litigation" in the context of malicious use of process).

97. *See supra* note 29.

98. *See generally, e.g.,* *Berman v. Karvounis*, 308 Md. 259, 518 A.2d 726 (1987) (illustrating the often-stated rule that the mere *initiation* of suit, no matter how unfounded, cannot amount to an abuse of process); *see supra* notes 38-42 and accompanying text; *see also infra* note 121.

99. *Gordon v. Cmty. First State Bank*, 587 N.W.2d 343, 351 (Neb. 1998) ("Historically, the tort of abuse of process evolved as a 'catch-all' category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of [malicious use of process]."); *see also supra* notes 38-40, 98 and accompanying text.

100. *See supra* notes 90-98 and accompanying text.

101. 69 Md. at 228, 14 A. at 520.

102. *Id.* at 230-31, 14 A. at 521-22.

103. 346 Md. at 46, 694 A.2d at 960.

104. 69 Md. at 231, 14 A. at 522.

In sum, *Bartlett* focused on elements of liability for the initiation of unfounded suits,<sup>105</sup> a concept completely foreign to an abuse of process analysis.<sup>106</sup> Consequently, the *Bartlett* opinion offered little insight into the tort of abuse of process.<sup>107</sup> Thus, *Bartlett* formed a poor foundation for the *One Thousand Fleet* court's holding, which more than a century later would add the rigid, eviscerating "seizure or arrest" element to the abuse of process tort.<sup>108</sup>

## 2. *Gore v. Condon*

The court of appeals' early confusion regarding abuse of process persisted in the 1898 case, *Gore v. Condon*.<sup>109</sup> Nine decades later, in 1987, Maryland's highest court candidly acknowledged that its nineteenth century brethren had indeed "confused" the elements of abuse of process and malicious use of process.<sup>110</sup> Specifically, the *Gore* court erred by stating that "[i]n an action for malicious [use of process] or abuse of process the plaintiff must allege and prove that the suit was instituted maliciously, and without probable cause."<sup>111</sup> In reality, an

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105. *Id.* at 230, 14 A. at 522.

106. The mere institution of a lawsuit, no matter how unfounded, cannot amount to an abuse of process. *See supra* notes 38-42, 98 and accompanying text.

107. *See Bartlett*, 69 Md. at 227-32, 14 A. at 520-22.

108. *See supra* note 2 and accompanying text.

109. 87 Md. 368, 39 A. 1042 (1898). *Gore* concerned a dispute between a property owner, Martha Gore, and Levi Condon. *Id.* at 372, 29 A. at 1042. Although Condon knew that Ms. Gore owned a certain parcel, he fraudulently obtained a mortgage on the parcel from Daniel Fraizer. *Id.* at 372, 39 A. at 1042-43. Under color of the fraudulent mortgage, Condon obtained an *ex parte* decree from the Baltimore City Circuit Court ordering the sale of Gore's property. *Id.* at 372-73, 39 A. at 1043. Gore filed a complaint in the circuit court, seeking to halt the sale. *Id.* at 373. The trial court dismissed the complaint, and Gore appealed to the Court of Appeals of Maryland. 87 Md. at 373, 39 A. at 1043. While the appeal was pending, Condon sold Gore's property. *Id.* The appeals court, however, reversed the circuit court, declaring the mortgage to be fraudulent, and Condon's sale of the property was set aside. *Id.* at 374, 39 A. at 1043. Subsequently, Gore sued Condon to recover for her lost rents and property value depreciation caused by Condon's fraudulent scheme. *Id.* at 374-75, 39 A. at 1043-44. The circuit court dismissed Gore's claim, but the court of appeals again reversed the trial court, reasoning as follows:

It would certainly seem just that if a man *knows* that certain property is not his, but another's, and that he acquired an apparent title to the same by fraud, and that the title is void, then his intermeddling with such property to the damage of the real owner is an unlawful act, for which a remedy should be afforded.

*Id.* at 376, 39 A. at 1044.

110. *Berman v. Karvounis*, 308 Md. 259, 263, 518 A.2d 726, 728 (1987) (describing *Gore v. Condon* as "apparently confusing the elements of abuse of process and malicious [use of process]").

111. 87 Md. at 375, 39 A. at 1044.

action for abuse of process does not require proof that the suit was commenced maliciously and without probable cause.<sup>112</sup>

*B. Maryland's Modern Abuse of Process Jurisprudence*

1. *Walker v. American Security & Trust Co. of Washington, D.C.*

In 1964, the Court of Appeals of Maryland auspiciously inaugurated the Old Line State's<sup>113</sup> modern era abuse of process jurisprudence in *Walker v. American Security & Trust Co. of Washington, D.C.*<sup>114</sup> The *Walker* case included the following exposition:

A tort action for abuse of process, on the one hand, and the tort actions for malicious prosecution and malicious use of process, on the other hand, are essentially different and independent actions. An action for abuse of process differs from actions for malicious prosecution and malicious use of process in that abuse of process is concerned with the improper use of criminal or civil process in a manner not contemplated by law after it has been issued, without the

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112. *Berman*, 308 Md. at 262, 518 A.2d at 727 ("In short, prior termination of proceedings in favor of the plaintiff in the abuse of process case is not an element of the tort.")

113. See Maryland State Archives at [www.mdarchives.state.md.us/msa/mdmanual/olglance/html/nickname.html](http://www.mdarchives.state.md.us/msa/mdmanual/olglance/html/nickname.html) (last visited Feb. 13, 2003) ("According to some historians, [General] George Washington bestowed the name 'Old Line State' and thereby associated Maryland with its regular line troops, the Maryland Line, who served courageously in many Revolutionary War battles.")

114. 237 Md. 80, 205 A.2d 302 (1964). In *Walker*, a court appointed American Security & Trust Co. of Washington, D.C. (the "Trust Company") as conservator of Alonsita Walker's person and estate. *Id.* at 83, 205 A.2d at 304. Shortly thereafter, Ms. Walker's son, Aldace Walker, without the knowledge or consent of the Trust Company, secretly took his mother from her Washington, D.C. apartment, where she had been receiving round-the-clock nursing care, to Webley, the mother's farm in Talbot County. *Id.* After the Trust Company filed a petition for a writ of habeas corpus to regain custody of Ms. Walker, a sheriff served the writ, and mother and son appeared before the Talbot County Circuit Court. *Id.* at 84, 205 A.2d at 305. The circuit court determined that Ms. Walker should remain at her farm "for the time being to afford the parties an opportunity to try to reconcile their differences amicably." *Id.* The Trust Company employed a nurse to remain with Ms. Walker at Webley, and dismissed the habeas corpus proceeding. *Id.* at 84-85, 205 A.2d at 305. Subsequently, Aldace Walker sued the Trust Company for abuse of process. *Id.* at 85, 205 A.2d at 305. In rejecting that claim, the Court of Appeals of Maryland reasoned:

Here, where the conservator had legal custody of the plaintiff's mother, her removal from Washington to Talbot County absent the consent or approval of the conservator was sufficient to justify resorting to the writ of habeas corpus to determine the custodial rights of the respective parties. As the effort of the conservator to regain control of its ward under the writ was proper, no action would lie for malicious abuse of process.

*Id.* at 88, 205 A.2d at 307.

necessity of showing lack of probable cause or termination of the proceeding in favor of the plaintiff, while actions for malicious prosecution and malicious use of process are concerned with maliciously causing civil or criminal process to issue for its ostensible purpose, but without probable cause.<sup>115</sup>

2. *Wesko v. G.E.M., Inc.*

In *Wesko v. G.E.M., Inc.*,<sup>116</sup> the Court of Appeals of Maryland elucidated that the historical origins for the tort of abuse of process trace back to the enactment of the Statute of Marlbridge.<sup>117</sup> The court observed:

In England, an action on the case lay for malicious use of process until the enactment of the Statute of Marlbridge. The rationale of this statute, which awarded costs to a successful tenant by way of amercement in actions brought by an overreaching landlord, would appear to have been later extended to cases where amercement was granted *pro falso clamore* . . . . Thereafter, for there to be a recovery, an arrest (malicious prosecution on criminal charges), a seizure of property (malicious use of civil process), or *other special damage (abuse of process)* had to be shown.<sup>118</sup>

115. *Id.* at 87, 205 A.2d at 306-07.

116. 272 Md. 192, 321 A.2d 529 (1974). In *Wesko*, the Court of Appeals of Maryland rejected a debtor's claim for malicious use of process because the creditor's misconduct – the wrongful filing of an attachment – was merely a “clerical mistake . . . not actuated by any improper motive or purpose” and the creditor's attorney dismissed the attachment as soon as he learned of the “goof.” *Id.* at 199, 321 A.2d at 533.

117. *Id.* at 195 n.1, 321 A.2d at 531 n.1. See generally David K. Godschalk, *Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits Under the Fair Housing Act*, 27 PEPP. L. REV. 477 (2000) (“The Statute of Marlbridge . . . includ[ed] the first provision in English law permitting the recovery of costs by a defendant in a civil action as a remedy for [malicious use of process]. The law enabled a defendant in a [malicious use of process] action to recover his costs and damages.”). The Statute of Marlbridge, provided in relevant part as follows:

And if any chief Lords do maliciously implead such feoffees, faining this case, namely, where the feoffments were made lawful and in good faith, then the feoffees shall have their damages awarded, and their costs which they have sustained by occasion of the fore-said plea, and the plaintiffs shall be grievously punished by amerciament.

*Id.* at 490 n.47. *Black's Law Dictionary* defines “feoffment” as “the grant of a feud or fee; that is, a barony or knight's fee, for which certain services were due from the feoffee to the feoffor.” See BLACK'S LAW DICTIONARY 557 (5th ed. 1979).

118. *Wesko v. G.E.M., Inc.*, 272 Md. 192, 195 n.1, 321 A.2d 529, 531 n.1 (1974) (emphasis added) (citations omitted). *Black's Law Dictionary* defines “amercement” as “[A] money penalty in the nature of a fine imposed upon an officer for some misconduct or neglect of duty. At common law, it was



The Court of Appeals of Maryland thus recognized that proof of damage *other than* an arrest or a seizure of property is sufficient to establish the tort of abuse of process.<sup>119</sup>

### 3. *Berman v. Karvounis*

After noting the "considerable attention" paid by Maryland's appellate courts in recent years to the tort of abuse of process,<sup>120</sup> in *Berman v. Karvounis*<sup>121</sup> the Court of Appeals of Maryland distilled the state's modern abuse of process jurisprudence as follows:

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asserted by the peers of the delinquent, or the affeerors, or imposed arbitrarily at the discretion of the court or the lord." BLACK'S LAW DICTIONARY 557 (5th ed. 1979). Individuals are amerced when they are "at the king's mercy with regard to the fine to be imposed." 3 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES 1338 (Lewis ed. 1922). *Black's Law Dictionary* defines "*pro falso clamore suo*" as "[a] nominal amercement of a plaintiff for his false claim, which used to be inserted in a judgment for the defendant." See BLACK'S LAW DICTIONARY 557 (5th ed. 1979). The Statute of Marlbridge is part of the "common law," which includes "all the statutory and case law background of England and the American colonies before the American Revolution." BLACK'S LAW DICTIONARY 251 (5th ed. 1979); see also *Pickett v. Sears, Roebuck & Co.*, 365 Md. 67, 775 A.2d 1218 (2001). In *Pickett*, the court noted:

That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . .

*Id.* at 89, 775 A.2d at 1231 (quoting Article 5 of the Maryland Declaration of Rights). *But see* *Krashes v. White*, 275 Md. 549, 555, 341 A.2d 798, 801 (1975) ("[T]he plaintiff in a criminal malicious prosecution action need not prove any special damages, such as arrest or seizure of property.").

119. *Wesko*, 272 Md. at 195, 321 A.2d at 531.

120. *Berman v. Karvounis*, 308 Md. 259, 260, 518 A.2d 726 (1987); see, e.g., *Keys v. Chrysler Credit Corp.*, 303 Md. 397, 402, 494 A.2d 200, 202 (1985); *Palmer Ford, Inc. v. Wood*, 298 Md. 484, 485-86, 471 A.2d 297 (1984); *Krashes v. White*, 275 Md. 549, 555, 341 A.2d 798, 801-02 (1975).

121. *Berman* involved a contract dispute between Demitrios Karvounis and Malcolm Berman. *Berman*, 308 Md. at 260-61, 518 A.2d at 726-27. Karvounis filed twelve suits in two jurisdictions against Berman (the "Contract Lawsuits"), alleging that Berman fraudulently induced Karvounis to enter into certain contracts, and seeking compensatory and punitive damages. *Id.* at 261, 518 A.2d at 727. Prior to resolution of the Contract Lawsuits, Berman brought a separate suit in Baltimore City Circuit Court against Karvounis (the "Abuse of Process Lawsuit"), charging Karvounis with, *inter alia*, abuse of process. *Id.* The trial court dismissed Berman's abuse of process claim without prejudice, and Karvounis appealed. *Id.* The court of appeals ruled that the mere initiation of the Contract Lawsuits failed to demonstrate, as required to prove abuse of process, "a wilful act in the use of process not proper in the regular course of the proceeding." *Id.* at 264-65, 518 A.2d at 728-29 (quoting W. PROSSER & W. KEETON, *THE LAW OF TORTS*, § 121 at 898 (5th ed. 1984)). The court stated that "here there are no facts to show how the process was used for any purpose other than the normal one of ob-

The essential elements of abuse of process as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Put otherwise:

To sustain an action of abuse of process the plaintiff must show that:

1. the defendant wilfully used process for an illegal purpose;
2. to satisfy the defendant's ulterior motive; and
3. the plaintiff was damaged by the defendant's perverted use of process.<sup>122</sup>

In *Berman*, the court of appeals refined the damages element of abuse of process. By requiring proof of mere damages (as opposed to "special damages," a concept uniquely associated with malicious use of process), the court aligned Maryland with the minority of jurisdictions embracing the three-element version of the "Traditional Definition" of abuse of process.<sup>123</sup>

#### 4. *One Thousand Fleet Ltd. Partnership v. Guerriero*

In *One Thousand Fleet*, the court of appeals disregarded its modern precedents.<sup>124</sup> Overlooking Maryland's rich treasure trove of modern abuse of process jurisprudence,<sup>125</sup> the high court instead relied on its "confused" nineteenth century case law to defend eviscerating the venerable tort of abuse of process by adding a *sine qua non* of "seizure or arrest."<sup>126</sup> The *One Thousand Fleet* court disregarded its modern precedents concerning the damages element of abuse of process, under which proof of damages, other than an arrest or a seizure of

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taining personal jurisdiction over [Berman]." *Berman*, 308 Md. at 265, 518 A.2d at 729. In sum, the *Berman* opinion illustrated the often-stated rule that the mere initiation of suit, no matter how unfounded, cannot amount to an abuse of process. *Id.*; see also *supra* notes 38-40 and accompanying text.

122. *Berman*, 308 Md. at 262, 518 A.2d at 727 (citing R.P. GILBERT ET AL., MARYLAND TORT LAW HANDBOOK § 5.4 (1986); W. PROSSER & W. KEETON, THE LAW OF TORTS, § 121 at 898 (5th ed. 1984)).

123. *Id.*; accord *Palmer Ford, Inc. v. Wood*, 65 Md. App. 390, 397-98, 500 A.2d 1055, 1059 (1985) (observing that when criminal or civil process has been "perverted by misapplication to an end for which that process was never intended, the abuser is liable for all the consequences that reasonably result from the process."). See *supra* note 58.

124. See *One Thousand Fleet* at 45-48, 694 A.2d at 959-61.

125. See *Berman*, 308 Md. at 262, 518 A.2d at 727; *Wesko*, 272 Md. at 195 n.1, 321 A.2d at 531 n.1 (recognizing that abuse of process damages other than an arrest or a seizure of property are sufficient to establish the tort); *Walker v. Am. Sec. & Trust Co. of Washington, D.C.*, 237 Md. 80, 87, 205 A.2d 302, 306 (1964) ("A tort action for abuse of process, on the one hand, and the tort actions for malicious prosecution and malicious use of process, on the other hand, are essentially different and independent actions."); *Palmer Ford*, 65 Md. App. at 397-98, 500 A.2d at 1059.

126. *One Thousand Fleet*, 346 Md. at 45-46, 694 A.2d at 960 (citing *Bartlett v. Christhif*, 69 Md. 219, 231, 14 A. 518, 522 (1888)).

property, were sufficient to establish the tort.<sup>127</sup> Instead, the *One Thousand Fleet* court reached back more than a century to its fundamentally flawed *Bartlett* opinion to justify engrafting the "seizure or arrest" requirement onto the "Traditional Definition" of abuse of process.<sup>128</sup> In one fell swoop, the court of appeals consigned abuse of process to the trash bin of Maryland's legal history because in only rare cases can an abuse of process victim satisfy the seizure or arrest element.<sup>129</sup> In the wake of *One Thousand Fleet*, even the most egregious perversions of judicial machinery face no tort remedy in Maryland.

As ostensible justification for debilitating the tort of abuse of process, Maryland's high court relied not only on the flawed *Bartlett* opinion, but also the jurisprudence of five "sister states" that it mischaracterized as "in accord" with its decision.<sup>130</sup> This Article next will review the jurisprudence of the five so-called "sister states."

#### IV. THE *ONE THOUSAND FLEET* COURT MISCHARACTERIZED THE JURISPRUDENCE OF FIVE SO-CALLED "SISTER STATES" (MONTANA, ILLINOIS, OREGON, KENTUCKY, AND NEW MEXICO).

The *One Thousand Fleet* court defended its decision to engraft a "seizure or arrest" requirement onto Maryland's "Traditional Definition" of abuse of process by errantly asserting that "[t]he law of several sister states is in accord."<sup>131</sup> For that assertion to be correct would require at least three other states to be "in accord" with Maryland's decision to require a seizure or arrest as an essential element of abuse of process.<sup>132</sup> However, none of the five so-called "sister states" cited in *One Thousand Fleet* currently follow Maryland's rigid approach.<sup>133</sup> To the contrary, recent case law in each of the five "sister states" recognize the "Traditional Definition" of abuse of process.<sup>134</sup>

##### A. *Montana*

The first "sister state" relied upon as being in accord with Maryland law in *One Thousand Fleet* was Montana.<sup>135</sup> The Court of Appeals of

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127. See *supra* note 2 and accompanying text.

128. See *supra* note 24 and accompanying text; see *infra* 129 and accompanying text.

129. See *supra* note 2 and accompanying text.

130. See *infra* Part IV.

131. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

132. *Webster's* defines "several" as "more than two but fewer than many." See RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1227 (Robert B. Costello ed., 1992).

133. See *infra* Part IV.

134. See *supra* note 24.

135. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

Maryland, however, erred in characterizing *Hopper v. Drysdale*<sup>136</sup> as “applying Montana law.”<sup>137</sup> To the contrary, the *Hopper* case applied Pennsylvania law, not Montana law.<sup>138</sup> Specifically, the *Hopper* court cited to an anachronistic, 1963 Pennsylvania precedent<sup>139</sup> that represents the current approach of neither Pennsylvania nor Montana. In fact, recent cases in both Montana and Pennsylvania recognize the “Traditional Definition” of abuse of process.<sup>140</sup> In sum, the *One Thousand Fleet* court incorrectly characterized Montana as “in accord” with Maryland’s adoption of an ultraconservative definition of abuse of process.<sup>141</sup>

### B. Illinois

The second “sister state” relied upon in *One Thousand Fleet* was Illinois.<sup>142</sup> Unfortunately, the Court of Appeals of Maryland also erred when it characterized Illinois as “in accord” with *One Thousand Fleet*’s ultra-narrow definition of abuse of process.<sup>143</sup> In reality, recent Illinois case law recognizes the “Traditional Definition” of abuse of process.<sup>144</sup> However, the court of appeals relied on an older, fundamentally flawed, and anomalous intermediate appellate decision, *Withall v. Capitol Federal Savings of America*,<sup>145</sup> that required the rigid “arrest or seizure” element.<sup>146</sup> The *Withall* court mistakenly justi-

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136. 524 F. Supp. 1039 (D. Mont. 1981).

137. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

138. See *Hopper*, 524 F. Supp. at 1041.

139. *Id.* (citing *Mina v. Melnick*, 222 F. Supp. 92 (E.D. Pa. 1963) (applying Pennsylvania law)).

140. *Todi v. Stursberg*, No. 01-2539, 2001 U.S. Dist. LEXIS 20098, at \*5 (E.D. Pa. Dec. 4, 2001) (applying Pennsylvania law) (“To establish a claim for abuse of process it must be shown that a litigant (1) used a legal process against another, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the other party.”); *Courtnage v. City of Havre*, 8 P.3d 124, No. 99-690, slip op. at 2 (Mont. May 25, 2000) (“In order to establish an abuse of process claim, a plaintiff must prove (1) an ulterior purpose, and (2) a willful act in the use of process which is not proper in the regular conduct of the proceeding.”).

141. See *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

142. *Id.*

143. See *id.*

144. See *Evans v. West*, 935 F.2d 922, 923 (7th Cir. 1991) (quoting *McGrew v. Heinhold Commodities, Inc.*, 497 N.E.2d 424, 429 (Ill. App. 1986)) (“Under Illinois law, a plaintiff pleading abuse of process must establish the existence of both ‘an ulterior purpose or motive for the use of regular court process,’ and ‘an act in the use of process not proper in the regular prosecution of a suit.’”); see also *Chambers v. The Habitat Co.*, No. 99-C-2095, 2002 U.S. Dist. LEXIS 4959, at \*18 (N.D. Ill. 2002) (“Under Illinois law, the elements for a claim of abuse of process are: (1) existence of an ulterior motive or purpose, and (2) some act in the use of legal process not proper in the regular prosecution of the proceedings.”).

145. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960 (citing *Withall v. Capitol Fed. Sav. of Am.*, 508 N.E.2d 363, 368 (Ill. App. 1987)).

146. *Withall*, 508 N.E.2d at 368.

fied its decision by relying on precedent that mischaracterized the preeminent Illinois Supreme Court decision of *Bonney v. King*.<sup>147</sup>

In *Bonney v. King*,<sup>148</sup> the Illinois court could not have been more clear in identifying abuse of process as having but “two elements”: “First, the existence of an ulterior purpose; and second, an act in the use of process not proper in the regular prosecution of the proceeding.”<sup>149</sup> Long after the pellucid *Bonney v. King* opinion, the Illinois intermediate appellate court inexplicably mischaracterized *Bonney* as requiring seizure or arrest as an element of abuse of process.<sup>150</sup> Contrary to the misguided opinion relied upon by the Court of Appeals of Maryland, however, more recent Illinois jurisprudence shows that Illinois indeed recognizes the “Traditional Definition” of abuse of process.<sup>151</sup>

### C. Oregon

The third “sister state” relied upon in *One Thousand Fleet* was Oregon.<sup>152</sup> The Maryland court mischaracterized Oregon as “in accord” with its decision to add the “seizure or arrest” element.<sup>153</sup> In fact, Oregon recognizes the “Traditional Definition” of abuse of process.<sup>154</sup> In *Reynolds v. Givens*,<sup>155</sup> the fundamentally flawed, intermedi-

147. *Id.* (citing *John Allan Co. v. Brandow*, 207 N.E.2d 339 (Ill. App. 1965)). The *Brandow* court incorrectly characterized *Bonney v. King* as stating that an abuse of process action will not lie without an arrest or seizure. *Id.*

148. 66 N.E. 377 (Ill. 1903). In *Bonney*, the plaintiff alleged that the defendant’s institution of an unfounded action against him “to recover upon a pretended note,” had damaged his “credit and standing” among lenders. *Id.* The Illinois court’s holding focused on the tort of “malicious prosecution of a civil suit without probable cause,” rather than abuse of process. *Id.* at 377-78. The court properly identified the elements of an action for “malicious prosecution of a civil suit without probable cause” as including an “arrest of the person or seizure of the property, or other special injury” and favorable termination of the underlying lawsuit. *Id.* Because there was no allegation that the plaintiff had been arrested or had his property seized, and because the underlying lawsuit still remained “pending in the courts for trial,” the *Bonney* court correctly dismissed the claim for malicious prosecution of a civil suit without probable cause. *Id.* at 378.

149. *Id.*

150. See *supra* note 147 and accompanying text.

151. See *supra* note 144 and accompanying text.

152. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

153. See *id.* at 45-46, 694 A.2d at 960.

154. *Accord Columbia County v. Sande*, 28 P.3d 657 (Or. App. 2001). The Oregon court noted that:

Under Oregon law, the tort of “abuse of process” is the perversion of a process that is regular on its face to a purpose for which the process is not intended . . . . We have described it as “the use of the process as a club by which to extort something unrelated to the process from the other party.” . . . As such, to plead a claim for abuse of process, a plaintiff must allege some ulterior purpose, unrelated to the process, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding.

ate appellate case relied upon in *One Thousand Fleet*, the Oregon court made the common mistake of confusing the tort of abuse of process with the tort of malicious use of process.<sup>156</sup> In addition, the *Reynolds* court mistakenly relied upon Illinois precedent that mischaracterized the preeminent Illinois Supreme Court decision, *Bonney v. King*.<sup>157</sup> Contrary to the *Reynolds*<sup>158</sup> opinion relied upon by the Court of Appeals of Maryland, more recent Oregon jurisprudence shows that Oregon unequivocally recognizes the "Traditional Definition" of abuse of process.<sup>159</sup>

#### D. Kentucky

The fourth "sister state" relied upon in *One Thousand Fleet* was Kentucky.<sup>160</sup> The court of appeals, however, erroneously characterized Kentucky as "in accord" with *One Thousand Fleet*'s ultra-narrow definition of abuse of process.<sup>161</sup> In fact, recent Kentucky case law recognizes the "Traditional Definition" of abuse of process.<sup>162</sup> *Raine v. Drasin*,<sup>163</sup> the older Kentucky case relied upon in *One Thousand Fleet*, did obtusely refer to "an injury to the person or his property" as a requirement for abuse of process.<sup>164</sup> Ultimately, given the opportunity to comprehensively redefine the "essential elements"<sup>165</sup> of abuse

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*Id.* at 661 (citations omitted); see *Larsen v. Credit Bureau, Inc. of Ga.*, 568 P.2d 657, 658 (Or. 1977) (identifying the "essential elements" of abuse of process as: "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding").

155. 695 P.2d 946 (Or. App. 1985).

156. See *id.* at 950-51. In *Reynolds*, the alleged abuse of process consisted of the initiation of "frivolous and vindictive lawsuits." *Id.* at 950. However, the mere initiation of litigation, no matter how frivolous, cannot be an abuse of process. See *supra* notes 38-40, 98 and accompanying text.

157. See *John Allan Co. v. Brandow*, 207 N.E.2d 339, 343 (Ill. App. 1965) (mischaracterizing *Bonney* as stating that an abuse of process action will not lie without an arrest or seizure).

158. 695 P.2d 946.

159. See *supra* note 154 and accompanying text.

160. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

161. *Id.*

162. *Accord* *Pennington v. Dollar Tree Stores, Inc.*, 104 F. Supp. 2d 710, 713-14 (E.D. Ky. 2000). The *Pennington* court stated that:

Under Kentucky law, a *prima facie* showing of abuse of process requires that (1) the process instituted by the defendant was for some ulterior purpose, and (2) that the defendant instituting the process must have performed a willful act in using the process that is not a part of the regular conduct of the proceeding.

*Id.*; see *Simpson v. Laytart*, 962 S.W.2d 392, 394-95 (Ky. 1998) ("The essential elements of an action for abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.").

163. 621 S.W.2d 895 (Ky. 1981).

164. *Id.* at 902.

165. *Simpson*, 962 S.W.2d at 394-95.

of process, the Supreme Court of Kentucky, in *Simpson v. Laytart*,<sup>166</sup> opted not to include "injury to person or property" as an element, thereby restoring Kentucky's status as a jurisdiction recognizing the "Traditional Definition" of abuse of process.<sup>167</sup>

#### E. *New Mexico*

New Mexico was the fifth "sister state" relied upon in *One Thousand Fleet*.<sup>168</sup> Unfortunately, the court of appeals misconstrued *Hertz Corp. v. Paloni*<sup>169</sup> as "in accord" with its decision to impose "seizure or arrest" as an element of abuse of process.<sup>170</sup> To the contrary, the *Hertz* opinion did not prescribe "seizure or arrest" as an element.<sup>171</sup> In fact, only proof of "damages" is required to prove malicious abuse of process in New Mexico.<sup>172</sup> This is a far cry from the rigid "seizure or arrest" element.<sup>173</sup>

### V. IMPORTANT PUBLIC POLICIES SUPPORT THE TRADITIONAL DEFINITION OF ABUSE OF PROCESS

#### A. *The Traditionally Defined Tort of Abuse of Process Poses an Effective Deterrent Against Oppressive Litigation Tactics, Thereby Facilitating a Level Playing Field.*

An indispensable attribute of the abuse of process tort lies in its value as an "effective deterrent against Rambo litigation tactics."<sup>174</sup> Because abuse of process is an intentional tort,<sup>175</sup> the prospect of a jury awarding punitive damages provides a strong disincentive against abusive litigation practices.<sup>176</sup> Even the most powerful, deep-pocketed

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166. 962 S.W.2d 392.

167. *See id.* at 394; *see also supra* note 162 and accompanying text.

168. *One Thousand Fleet*, 346 Md. at 46, 694 A.2d at 960.

169. 619 P.2d 1256 (N.M. App. 1980).

170. *One Thousand Fleet*, 346 Md. at 45-46, 694 A.2d at 960.

171. In *Hertz*, the New Mexico intermediate appellate court rejected an abuse of process claim because the institution of a replevin action "did not result in any damage" to the plaintiff. *Hertz*, 619 P.2d at 1259. Thus, the *Hertz* plaintiff failed to satisfy an essential element of abuse of process, namely, that "the plaintiff must suffer damages." *Id.* In dicta, the *Hertz* opinion did note that courts had "sometimes" required "an unlawful interference with the plaintiff's person or property." *Id.* However, in *Devaney v. Thriftway Marketing Corp.*, the New Mexico Supreme Court resolved any ambiguity raised by the *Hertz* opinion's dicta by holding that the malicious abuse of process tort merely requires proof of "damages." 953 P.2d 277, 289 (N.M. 1997).

172. *Devaney*, 953 P.2d at 288.

173. *Id.*

174. McAuliffe, *supra* note 7, at 19.

175. *See* Cuillo v. Shupnick, 815 F. Supp. 133, 136 (S.D.N.Y. 1993) (observing that abuse of process is an intentional tort).

176. *See* McAuliffe, *supra* note 7, at 19. The author states that:

The fact that abuse of process and malicious prosecution are both intentional torts should not prove to be a factor in curtailing their use as weapons against abusive litigation practices. The gimmicks

litigants are wary when the possibility of punitive damages is present. In contrast, they may view the threat of relatively *de minimus* court-imposed attorney fee sanctions<sup>177</sup> as a mere “cost of doing business,”<sup>178</sup> an acceptable *quid pro quo* for the ability to employ scorched-earth litigation schemes. Although trial judges may discretionarily impose limited attorney fee awards,<sup>179</sup> only a tort action entitles an abuse of process victim to a jury determination of consequential and punitive damages.<sup>180</sup> In sum, trial court procedural sanctions are an inadequate substitute for abuse of process tort liability. Similarly, professional discipline plays little or no role in deterring misconduct in litigation.<sup>181</sup> On the other hand, civil liability for abuse of process

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that satisfy the description of “Rambo” litigation tactics are rarely undertaken inadvertently or negligently. To the contrary, they are undertaken purposefully to wear down the opposition so as to achieve a resolution of a controversy on the basis of considerations that bear little or no relationship to its merits.

*Id.*

177. *See, e.g.*, MD. RULE 1-341. The rules states that:

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney’s fees, incurred by the adverse party in opposing it.

*Id.*; *see also supra* note 82 and accompanying text.

178. *See infra* note 179 accompanying text. Although court sanctions allow for an award of attorney’s fees, they provide for neither consequential damages nor punitive damages. *See infra* note 179.

179. *See Wade, supra* note 42, at 486 n.250 (noting that, unlike tort actions for malicious civil prosecution and abuse of process, Federal Rule 11 fails to allow the injured parties to recover for consequential damages such as emotional distress). The article further states that:

The [Rule 11] sanctions are within the proper function of the trial judge in the litigation itself, for the purpose of maintaining efficient and orderly procedure in the litigation process, and it is regarded as appropriate to allocate money charges to compensate a party to the trial who has been put to unnecessary litigation expense. Consequential damages, however, would come within the scope of the guaranties of jury trial in [a] tort action. . . .

*Id.*

180. *Id.* at 486.

181. *See Roger C. Cramton, Furthering Justice By Improving the Adversary System and Making Lawyers More Accountable*, 70 *FORDHAM L. REV.* 1599, 1610 (2002). The article states that:

Professionalism or civility codes will have little substantial effect on current abuses of adversarialism, which are driven by deeply ingrained attitudes of adversarial duty that are economically and psychologically rewarding to trial lawyers in a society that is increasingly self-interested rather than public-interested. Consequently, serious attention must be given to improving accountability through . . . civil liability.



protects the integrity of the judicial process and facilitates a level playing field for all litigants.<sup>182</sup>

B. *The Traditional Definition of Abuse of Process Promotes the Public Policy Favoring Free Access to the Courts.*

The potent deterrent posed by abuse of process tort liability protects litigants who otherwise may fall victim to their guileful opponents' extortionate tactics. But if the threshold to prove abuse of process claims is raised too high, and plaintiffs can no longer challenge an adversary's abusive misconduct, the right to free access to the courts becomes a hollow pretense.<sup>183</sup> As one commentator cogently observed:

[The tort of abuse of process] recognizes that the adversary system itself can promote injustice if one side has superior knowledge of the system and harbors the inclination to bend the rules. The tort of abuse of process is intended to limit wrongful adversarial conduct by clients and their attorneys. This limit is consistent with the public policy favoring open access to courts.<sup>184</sup>

The "Traditional Definition" of abuse of process,<sup>185</sup> unfettered by the insuperable "seizure or arrest" element, promotes the public policy favoring free access to the courts. Moreover, abuse of process is an equal-opportunity tort; defendants as well as plaintiffs benefit from its salutary deterrent effect.

C. *The "Arrest or Seizure" Element Is Unnecessary Because Abuse of Process Claims Pose No Threat of "Endless Litigation."*

The public policy concern for safeguarding against a series of endless litigation<sup>186</sup> finds expression in the high threshold required to

Under present resource limitations and often ambiguous standards of ethics rules, professional discipline has little or no role in preventing misconduct in litigation. . . .

. . . The initiative in this area must come from judges or legislators, who are more willing to create such standards in procedure codes and, at least sometimes, to enforce them once put in place. Standards embodied in procedural rules and subsequently enforced can have a powerful effect on lawyer conduct. The basic limitation, especially in jurisdictions where judges are subject to frequent elections, is that judges do not like to devote time to matters of lawyer conduct and hate to criticize members of the bar.

*Id.* at 1610-11.

182. *Id.* at 1611.

183. See Van Patten, *supra* note 9, at 898-99.

184. *Id.* at 908.

185. See *supra* note 24 and accompanying text.

186. One commentator described this objection as the "shuttlecock" argument:

prove a malicious use of process claim.<sup>187</sup> Because malicious use of process claims may be asserted only after the conclusion of a favorably terminated suit,<sup>188</sup> malicious use of process defendants incur the expense, time, and trouble that accompanies the defense of an entirely new litigation. In contrast, abuse of process defendants face far less expense and inconvenience because abuse of process claims may be resolved during the very same proceeding in which the alleged abuse occurred.<sup>189</sup> Therefore, the "prevention of endless litigation" justification for narrowly circumscribing the tort of malicious use of process simply does not hold true for abuse of process. Imposing unnecessary impediments against the abuse of process tort, such as the seizure or arrest element, serves no public policy. Instead, it leaves underhanded litigants free to abuse the judicial machinery with impunity, so long as they avoid the use of an arrest or seizure.

#### VI. WHY DID THE COURT OF APPEALS CHOOSE TO EVISCERATE THE TORT OF ABUSE OF PROCESS?

One could posit that the Court of Appeals of Maryland opted to impose the eviscerating "seizure or arrest" element onto abuse of process because the legal community simply prefers to minimize the degree of redress available for misuse of the tools of litigation.<sup>190</sup> As one scholar observed, "judges do not like to devote time to matters of lawyer conduct and hate to criticize members of the bar."<sup>191</sup> Behind every litigant held liable for abuse of process stands a lawyer chagrined by the implicit criticism of his handling of the litigation.<sup>192</sup>

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If the original defendant brings an action against the original plaintiff for malicious [use of process] and loses, the latter may then retaliate with a similar action, and the shuttlecock would be passed back and forth indefinitely. This is not just the product of an uncontrolled imagination; it has actually happened on occasion.

Wade, *supra* note 42, at 455.

187. See *supra* note 29 (discussing the elements of malicious use of process). Without substantial prophylactic safeguards imposed on the malicious use of process tort (*e.g.*, the seizure or arrest damages element), every defendant who successfully defends a suit might be tempted to turn around and sue for malicious use of process, thereby creating the potential for a series of endless litigation. See Van Patten, *supra* note 9, at 899.

188. See *supra* note 29 and accompanying text.

189. Keller v. Ray, Quinney & Nebeker, 896 F. Supp. 1563, 1570-71 (D. Utah 1995) ("[A]n abuse of process claim may be brought prior to termination of proceedings – most frequently as a counterclaim."). The Compulsory Counterclaim requirement advocated in this Article would spare abuse of process defendants the inconvenience and expense of multiple litigations. See *supra* notes 76-79 and accompanying text.

190. See generally Cramton, *supra* note 181, at 1605 ("[H]igh court judges. . . tend to reflect the entrenched attitudes, interests and constant influence of the organized bar.").

191. *Id.* at 1611.

192. A judge who refuses to dismiss an abuse of process claim incurs the displeasure of a lawyer or, perhaps, that lawyer's entire firm. In addition, the law-

In some cases, the lawyer may even suffer *personal* liability for abuse of process.<sup>193</sup> A desire to avoid such unpleasantness may help explain why judges who "hate to criticize members of the bar" would eviscerate the tort of abuse of process.<sup>194</sup>

## VII. CONCLUSION

For important public policy reasons, courts must not shy away from their obligation to hold litigants accountable for willful abuses of the tools of litigation. It may be an onerous challenge to discern the difference between legitimately aggressive litigation tactics, on the one hand, and clearly abusive misconduct on the other.<sup>195</sup> But when the legal system rises to that challenge by recognizing a tort remedy for abuse of process, it fulfills its fundamental duty to facilitate a level playing field, free from extortionate chicanery. As the Supreme Court of Michigan sagely observed:

As difficult as the process is, the fact is that trial judges, like trial lawyers . . . are constantly called upon to resolve issues regarding what conduct permissibly pushes the system to the limit, and what is abuse of the process. A system that imposes such refined and particularized responsibility rests on the notion that humankind has choices and that consequences flow from one choice or the other. This is a moral postulate ingrained in our tradition.<sup>196</sup>

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yer has an unhappy client, a problem that only intensifies the lawyer's own dissatisfaction.

193. See *Inlet Assocs. v. Harrison Inn Inlet, Inc.*, 324 Md. 254, 269-70, 596 A.2d 1049, 1057 (1991) ("For the purposes of this case, we will assume that an attorney could be personally liable for an abuse of process. . . based on a suit filed on behalf of a client.").

194. See *supra* note 191 and accompanying text.

195. See W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 61-62 (1999) (discussing the "difficult question" of how to permit lawyers to exercise their duty of loyalty to clients without allowing them to "degenerate into 'Rambo' advocates" who use "scorched earth litigation tactics"); see also James M. Havey, *Exploring the Benefits of Civility*, NEW JERSEY LAW., Dec., 1996 at 24. The author states that:

There is a fine line between aggressive, effective lawyering and the "mad dog" litigator. The former zealously protects the interests of the client. He or she may demand from the adversary overdue expert reports so that the litigator's own expert will not be prejudiced in the preparation of a competing opinion. The latter abuses the rules of pretrial practice. He or she makes incessant and unnecessary motions for more specific interrogatories when a courteous but forceful letter may suffice. The "mad dog's" purpose is to overload the system, enervate the adversary, or drain the opposition's financial resources. His or her purpose may, regrettably, even be to "churn" the process in order to increase fees charged to his or her own client.

*Id.*

196. *People v. Adams*, 425 N.W.2d 437, 445 (Mich. 1988).

Unfortunately, in Maryland, unscrupulous litigants can abuse process without fear of the consequences that tort liability would impose. Therefore, Maryland's legislature should abrogate the *One Thousand Fleet* decision and restore abuse of process to an improved version of its *status quo ante*. Specifically, a statutorily reformulated tort of abuse of process should include the following components:

1. An arrest of the person or a seizure of property is not required to establish the tort of abuse of process.<sup>197</sup>
2. Abuse of process consists of the following elements: *first*, that the defendant willfully used process after it has issued in a manner not contemplated by law; *second*, that the defendant acted primarily to satisfy an ulterior motive; and *third*, that damages resulted from the defendant's perverted use of process.<sup>198</sup>
3. "Process," for purposes of abuse of process, encompasses the entire range of procedures incident to litigation, including but not limited to motions, subpoenas, and discovery.<sup>199</sup>
4. Cognizable damages for abuse of process include all harm proximately resulting from the abuse.<sup>200</sup>
5. A tort claim for abuse of process must, if practicable, be asserted within the very same litigation in which the alleged abuse occurred.<sup>201</sup> Courts should liberally exercise discretion to permit amended pleadings asserting an abuse of process.<sup>202</sup>
6. A fifteen-day "Safe Harbor" applies to the tort of abuse of process.<sup>203</sup> Thus, as a condition precedent to asserting an abuse of process claim, an alleged abuser of process must be given fifteen days prior notice of the intent to bring an abuse of process claim. During that period, the alleged abuser of process may avoid liability by abandoning the challenged conduct. Provided, however, liability may be avoided by abandoning the challenged conduct only in cases of "correctable mistakes," *i.e.*, misconduct that has not already resulted in damages.

So long as the *One Thousand Fleet* decision stays in effect, Maryland litigants will remain vulnerable to coercive manipulations of judicial process. Remedial legislation can and should restore the tort of abuse of process to its erstwhile status as an effective deterrent against flagrant misuse of the tools of litigation.

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197. See *supra* notes 59, 125 and accompanying text.

198. See *supra* note 26 and accompanying text.

199. See *supra* Part II.B.

200. See *supra* notes 59-60 and accompanying text.

201. See *supra* notes 76-77 and accompanying text.

202. See *supra* notes 78-79 and accompanying text.

203. See *supra* note 80 and accompanying text.

## APPENDIX I

FIFTY STATE SURVEY OF CASES IDENTIFYING THE ELEMENTS  
OF THE TORT OF ABUSE OF PROCESS

**Alabama:** *Willis v. Parker*, 814 So. 2d 857, 865-66 (Ala. 2001) (quoting *C.C. & J., Inc. v. Hagood*, 711 So. 2d 947, 950 (Ala. 1998)) (stating that, “[t]o establish a claim of abuse of process. . . [one] must prove: (1) the existence of an ulterior purpose; (2) a wrongful use of process; and (3) malice,” defined as seeking some result “not properly achieved by the process undertaken” and “for an end not germane” thereto).

**Alaska:** *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 86 (Alaska 2001) (“The tort of abuse of process consists of 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.”).

**Arizona:** *Giles v. Marce*, 988 P.2d 143, 146 (Ariz. Ct. App. 1999) (citing *Nienstedt v. Wetzel*, 651 P.2d 876 (Ariz. Ct. App. 1982)) (noting that the essential elements of the tort of abuse of process are “an ulterior purpose and a willful act in the use of judicial process not proper in the regular conduct of the proceeding”).

**Arkansas:** *S. Ark. Petroleum Co. v. Schiesser*, 36 S.W.3d 317, 323 (Ark. 2001) (citing *Routh Wrecker Serv., Inc. v. Washington*, 980 S.W.2d 240 (1998)) (“[T]he test of abuse of process is whether a judicial process is used to extort or coerce. The key to the tort is the improper use of process after its issuance in order to accomplish a purpose for which the process was not designed.”).

**California:** *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund*, 14 P.3d 234, 252 (Cal. 2001) (stating that an abuse of process claim involves the use of a procedure “incident to litigation”); *Barquis v. Merchants Collection, Ass’n*, 496 P.2d 817, 824 (Cal. 1972) (“[T]wo fundamental elements” comprise the tort of abuse of process: “first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding.”).

**Colorado:** *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 202 (Colo. Ct. App. 1998) (citing *James H. Moore & Assoc. Realty, Inc. v. Arrowhead at Vail*, 892 P.2d 367, 373 (Colo. Ct. App. 1994)). The Colorado court stated that:

[A] claim for abuse of process requires proof of the following elements: (1) an ulterior purpose for the use of a judicial proceeding; (2) willful action in the use of that process which is not proper in the regular course of the proceedings, *i.e.*, use of a legal proceeding in an improper manner; and (3) resulting damage. . . . [The court also noted] a fourth element is added to the analysis when a claim for abuse of process is premised upon an action that constitutes an exercise of a First Amendment right. . . . [In such cases] . . . a

claimant must also prove that the action taken lacked a reasonable factual basis or, if so supported, that it lacked a cognizable basis in law.

*Id.*

**Connecticut:** *QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 919 n.16 (Conn. 2001) (citing *Schaefer v. O.K. Tool Co.*, 148 A. 330 (Conn. 1930)). The Connecticut court stated that:

Abuse of process is the misuse of process regularly issued to accomplish an unlawful ulterior purpose. The gravamen of the complaint is the use of process for a purpose not justified by law. The distinction between malicious use of process . . . and abuse of process as tort actions is that in the former the wrongful act is the *commencement* of an action without legal justification, and in the latter it is in the *subsequent* proceedings.

*Id.* (emphasis added).

**Delaware:** *Ferguson v. Wesley College, Inc.*, No. C.A. 99C-07-109 WTQ, 2000 WL 706833, at \*3 (Del. Super. Ct. Mar. 23, 2000) (citing *Read v. Carpenter*, No. 95C-03-171, 1995 WL 567241 (Del. Super. Ct. June 8, 1995)) (“The essential elements of a claim for abuse of process are: 1) a willful and improper act in the use of process; 2) any form of coercion; and 3) a collateral advantage to Defendants arising from said coercion.”).

**Florida:** *Hardick v. Homol*, 795 So. 2d 1107, 1111 n.2 (Fla. Dist. Ct. App. 2001) (citing *Thomas McKinnon Sec., Inc. v. Light*, 534 So. 2d 757, 760 (Fla. 1998)). The court stated that:

A cause of action for abuse of process requires proof that: (1) the defendant made an illegal, improper, or perverted use of process; (2) the defendant had an ulterior motive or purpose in exercising the illegal, improper or perverted process; and (3) the plaintiff was injured as a result of defendant’s action.

*Id.*

**Georgia:** *Carroll County Water Auth. v. Bunch*, 523 S.E.2d 412, 413 (Ga. Ct. App. 1999) (quoting GA. CODE ANN. § 51-7-81(1999)) (“Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts [with malice and without] substantial justification.”). The court also noted that the notice requirement for the statutory tort of abusive litigation is “strictly construed in order to accomplish its overriding purpose to give a prospective defendant the chance to change position and avoid liability.” *Id.*; see also *Great Western Bank v. Southeastern Bank*, 507 S.E.2d 191, 192 (Ga. App. 1998) (describing statutory remedies available against those who abuse dis-

covery, act in bad faith, are “stubbornly litigious,” or cause an opponent “unnecessary trouble and expense”).

**Hawaii:** *Wong v. Panis*, 772 P.2d 695, 699-700 (Haw. Ct. App. 1989) (citing *Myers v. Cohen*, 687 P.2d 6 (Haw. Ct. App. 1984)) (“The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding.”).

**Idaho:** *Beco Constr. Co. v. City of Idaho Falls*, 865 P.2d 950, 954 (Idaho 1993) (citing *Badell v. Beeks*, 765 P.2d 126, 159 (Idaho 1988)) (“The essential elements of abuse of process are: (1) an ulterior, improper purpose; and (2) a wilful act in the use of the process not proper in the regular conduct of the proceeding.”).

**Illinois:** *Chambers v. Habitat Co.*, No. 99-C-2095, 2002 U.S. Dist. LEXIS 4959, at \*18 (N.D. Ill. Mar. 20, 2002) (citing *Commerce Bank, N.A. v. Plotkin*, 627 N.E.2d 746, 748 (Ill. App. Ct. 1994)) (“Under Illinois law, the elements for a claim of abuse of process are: (1) existence of an ulterior motive or purpose, and (2) some act in the use of legal process not proper in the regular prosecution of the proceedings.”).

**Indiana:** *Reichhart v. City of New Haven*, 674 N.E.2d 27, 30 (Ind. Ct. App. 1996) (citing *Broadhurst v. Moenning*, 633 N.E.2d 326 (Ind. Ct. App. 1994)) (“In order to prevail upon a claim of abuse of process, a party must prove the following elements: 1) [a]n ulterior purpose; and 2) a willful act in the use of process not proper in the regular conduct of the proceeding.”).

**Iowa:** *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 398 (Iowa 2001) (citing *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 421 (Iowa 1997)) (“An abuse-of-process claim has three elements: (1) the use of a legal process (2) in an improper or unauthorized manner (3) that causes the plaintiff to suffer damages as a result of that abuse.”).

**Kansas:** *McShares, Inc. v. Barry*, 970 P.2d 1005, 1015 (Kan. 1998) (citing *Porter v. Stormont-Vail Hosp.*, 621 P.2d 411 (Kan. 1980)) (“[The essential elements for abuse of process are] a knowingly illegal or improper use of the process done for the purpose of harassing or causing hardship, which resulted in damage [to the plaintiff]”).

**Kentucky:** *Simpson v. Laytart*, 962 S.W.2d 392, 394 (Ky. 1998) (citing *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765 (Ky. Ct. App. 1980)) (“The essential elements of an action for abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.”).

**Louisiana:** *Pipewelders Marine, Inc. v. Edwards*, No. 96-3629, 1997 U.S. Dist. LEXIS 13410, at \*10-\*11 (E.D. La. Aug. 29, 1997) (citing *Simon v. Perret*, 619 So. 2d 155 (La. Ct. App. 1993)) (“[Under Louisiana law] [t]he two essential elements of abuse of process are an ulte-

rior purpose and a wilful act in the use of the process not proper in the regular conduct of the proceeding.”).

**Maine:** *Dumont v. Fleet Bank of Maine*, 760 A.2d 1049, 1053 (Me. 2000) (citing *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998)). (“The elements necessary to establish an abuse of process are (1) ‘the use of process in a manner improper in the regular conduct of the proceeding’ and (2) ‘the existence of an ulterior motive.’”).

**Maryland:** *McCauley v. Suls*, 132 Md. App. 179, 191, 716 A.2d 1129, 1135 (1998) (discussing that an abuse of process claimant must prove “first, that the defendants wilfully used process after it has issued in a manner not contemplated by law; second, that the defendants acted to satisfy an ulterior motive; and third, that damages resulted from the defendants’ perverted use of process.”). *But see One Thousand Fleet Ltd. P’ship v. Guerriero*, 346 Md. 29, 45, 694 A.2d 952, 960 (1997) (adding “seizure or arrest” element to Maryland’s “Traditional Definition” of abuse of process). *See supra* note 27 (discussing the interrelationship of the *McCauley* and *One Thousand Fleet* cases).

**Massachusetts:** *Ladd v. Polidoro*, 675 N.E.2d 382, 384 (Mass. 1997) (citing *Gabriel v. Borowy*, 85 N.E.2d 435 (Mass. 1949)) (“To constitute a cause of action for [abuse of process] it must appear that the process was used to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed.”).

**Michigan:** *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 U.S. Dist. LEXIS 2877, at \*4\*5 (W.D. Mich. Feb. 26, 2001) (citing *Friedman v. Dozorc*, 312 N.W.2d 585 (Mich. 1985)) (applying Michigan law) (“[T]o state a claim for abuse of process, a claimant must allege (1) an ulterior purpose and (2) an act in the use of the process which is improper in the regular prosecution of the proceeding.”). The court also quoted the *Restatement (Second) of Torts*, which describes the “gravamen” of the tort of abuse of process as “the misuse of process . . . for any purpose other than that which it was designed to accomplish.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS, § 682 cmt. a (1997)).

**Minnesota:** *Kellar v. VonHoltum*, 568 N.W.2d 186, 192 (Minn. Ct. App. 1997) (citing *Hoppe v. Klapperich*, 28 N.W.2d 780, 786 (Minn. 1947)). The court stated:

The essential elements for a cause of action for abuse of process are the existence of an ulterior purpose and the act of using the process to accomplish a result not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not.

*Id.*



**Mississippi:** *McClinton v. Delta Pride Catfish, Inc.*, 792 So. 2d 968, 975 (Miss. 2001) (citing *Moon v. Condere Corp.*, 690 So. 2d 1191, 1197 (Miss. 1997)). The court stated that:

The elements of abuse of process are: (1) an illegal and improper perverted use of the process, which was neither warranted nor authorized by the process; (2) ulterior motive or purpose of a person in exercising such illegal, perverted, or improper use of process; and (3) resulting damage or injury.

*Id.*

**Missouri:** *Howard v. Youngman*, 81 S.W.3d 101, 118 (Mo. Ct. App. 2002) (citing *Pipefitters Health & Welfare Trust v. Waldo R., Inc.*, 760 S.W.2d 196, 198 (Mo. Ct. App. 1988)) (“The elements of abuse of process are (1) an illegal and unauthorized use of process; (2) an ulterior motive for the use of that process; and (3) resulting damages.”).

**Montana:** *Courtnage v. City of Havre*, No. 99-690, 2000 Mont. LEXIS 136, at \*4 (Mont. May 25, 2000) (citing *Brault v. Smith*, 679 P.2d 236, 240 (Mont. 1984)) (“In order to establish an abuse of process claim, a plaintiff must prove (1) an ulterior purpose, and (2) a willful act in use of the process which is not proper in the regular conduct of the proceeding.”).

**Nebraska:** *Gordon v. Cmty. First State Bank*, 587 N.W.2d 343, 351 (Neb. 1998) (citing *Vybiral v. Schildhauer*, 265 N.W. 241, 244 (Neb. 1936)). The court stated that:

“Abuse of process” . . . means the perversion of it, *i.e.*, accomplishing some illegal object or purpose for which such process was not legally intended . . . . “[T]o make out a cause of action for abuse of process, the plaintiff must prove irregular steps taken under cover of the process after its issuance, and damage resulting therefrom .”

. . . .  
 . . . Historically, the tort of abuse of process “evolved as a ‘catch-all’ category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious [use of process].”

*Id.*

**Nevada:** *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002) (“[T]he elements of an abuse of process claim are: (1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.”).

**New Hampshire:** *Long v. Long*, 611 A.2d 620, 623 (N.H. 1992) (“A party claiming abuse of process must prove the following elements: (1) a person used (2) legal process, whether criminal or civil, (3) against the party (4) primarily to accomplish a purpose for which it is

not designed and (5) caused harm to the party (6) by the abuse of process.”).

**New Jersey:** *Bergen v. Gervasi*, No. 98-1475, 1998 U.S. Dist. LEXIS 20755, at \*14 (D.N.J. Nov. 23, 1998) (citing *Harmon v. Holmes*, 712 F. Supp. 451, 454 n.6 (D.N.J. 1978)) (applying New Jersey law). The New Jersey court stated:

Abuse of process has only two elements. First, defendant must have set in motion legal process for an improper ulterior purpose, and second, in causing process to issue, defendant must have committed a willful act that perverts the normal conduct of the proceeding in order to accomplish an improper purpose.

*Id.*

**New Mexico:** *Devaney v. Thriftway Mktg. Corp.*, 953 P.2d 277, 283 (N.M. 1997). The court defined the tort of “malicious abuse of process” by the following elements:

(1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages. In short, there must be both a misuse of the power of the judiciary by a litigant and a malicious motive.

*Id.*

**New York:** *Labensky v. Rozzi*, No. 98-7512, 1999 U.S. App. LEXIS 4241, at \*4 (2d Cir. Mar. 15, 1999) (citing *Cook v. Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994)). The court stated that:

In New York, a malicious abuse of process claim lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification (3) in order to obtain a collateral objective that is outside the legitimate ends of the process.

*Id.*

**North Carolina:** *Martin v. Parker*, 563 S.E.2d 216, 219 (N.C. Ct. App. 2002) (quoting *Fowle v. Fowle*, 140 S.E.2d 398, 401 (N.C. 1965)) (“The North Carolina Supreme Court has defined ‘abuse of process’ as ‘the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process after issuance to accomplish some purpose not warranted or commanded by the writ.’”).

**North Dakota:** *Wachter v. Gratech Co.*, 608 N.W.2d 279, 287 (N.D. 2000). The court stated that:

The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required.

*Id.*

**Ohio:** *Nationwide Ins. Enter. v. Progressive Specialty Ins. Co.*, No. 01AP-1223, 2002 Ohio App. LEXIS 3082, at \*19 (Ohio Ct. App. June 20, 2002) (quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 626 N.E.2d 115, 118 (Ohio 1994)). The Ohio court stated that:

[T]he elements of a claim for abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.

*Id.*

**Oklahoma:** *Callaway v. Parkwood Vill., L.L.C.*, 1 P.3d 1003, 1004 (Okla. 2000) (quoting *Greenberg v. Wolfberg*, 890 P.2d 895, 905 (Okla. 1994)) (“The elements of an abuse of process claim are ‘(1) the improper use of the court’s process (2) primarily for an ulterior or improper purpose (3) with resulting damage to the plaintiff asserting the misuse.’”).

**Oregon:** *Columbia County v. Sande*, 28 P.3d 657, 661 (Or. Ct. App. 2001) (citing *Larsen v. Credit Bureau, Inc.*, 568 P.2d 657 (Or. 1977)). The court stated that:

Under Oregon law, the tort of ‘abuse of process’ is the perversion of a process that is regular on its face to a purpose for which the process is not intended. We have described it as “the use of the process as a club by which to extort something unrelated to the process from the other party.” As such, to plead a claim for abuse of process, a plaintiff must allege some ulterior purpose, unrelated to the process, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding.

*Id.* (citations omitted).

**Pennsylvania:** *Todi v. Stursberg*, No. 01-2539, 2001 U.S. Dist. LEXIS 20098, at \*5 (E.D. Pa. Dec. 4, 2001) (applying Pennsylvania law) (quoting *Rosen v. American Bank of Rolla*, 627 A.2d 190, 192 (Pa. Super. Ct. 1993)) (“To establish a claim for abuse of process it must be shown that a [litigant] (1) used a legal process against [another], (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the [other party].”).

**Rhode Island:** *Toste Farm Corp. v. Hadbury, Inc.*, 782 A.2d 901, 907 (R.I. 2002) (quoting *Clyne v. Doyle*, 740 A.2d 781, 783 (R.I. 1999)) (“To show abuse of process, a plaintiff must demonstrate that ‘a legal proceeding, although set in motion in proper form, becomes perverted to accomplish an ulterior or a wrongful purpose for which it was not designed.’”).

**South Carolina:** *Hainer v. Am. Med. Int’l, Inc.*, 492 S.E.2d 103, 107 (S.C. 1997) (citing *Huggins v. Winn-Dixie Greenville, Inc.*, 153 S.E.2d 693 (S.C. 1967)) (“The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding.”).

**South Dakota:** *Specialty Mills, Inc. v. Citizens State Bank*, 558 N.W.2d 617, 623 (S.D. 1997) (citing *Meissner v. All Dakota Ins. Assocs., Inc.*, 515 N.W.2d 198, 200 (S.D. 1994)). The court stated that:

The essential elements of [abuse of process] are 1) an ulterior purpose, and 2) an act in the use of process which is improper in the regular prosecution of the proceeding. [A]buse of process differs from [malicious use of process] in that it is not necessary to show that the action in which the process was used was without probable cause or that it terminated favorably to the plaintiff.

*Id.*

**Tennessee:** *Givens v. Mullikin*, 75 S.W.3d 383, 400 (Tenn. 2002) (citing *Bell ex rel Snyder*, 986 S.W.2d 550, 555 (Tenn. 1999)). The court stated that:

[T]he gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish . . . . To this end, a plaintiff must establish by evidence two elements to recover for abuse of process: (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.

*Id.*

**Texas:** *Laparade v. Rivera*, No. 01-99-00723-CV, 2002 Tex. App. LEXIS 3487, at \*26 n.4 (Tex. Ct. App. 2002) (citing *Graham v. Mary Kay Inc.*, 25 S.W.3d 749, 756 (Tex. Ct. App. 2000)). The Texas court stated that:

The elements of abuse of process are (1) the defendant made an illegal, improper, or perverted use of the process, a use neither warranted nor authorized by the process, (2) the defendant had an ulterior motive or purpose in exercising such illegal, perverted, or improper use of the process, and (3) plaintiff was damaged as a result of the illegal act.

*Id.*

**Utah:** *Gilbert v. Ince*, 981 P.2d 841, 845 (Utah 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 682 (1997)) (“[The abuse of process comprises one of the] three separate categories of similar but distinct torts involving abusive manipulation of public judicial resources. . . . [A]buse of process applies to ‘[o]ne who uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed.’”).

**Vermont:** *Jacobsen v. Garzo*, 542 A.2d 265, 268 (Vt. 1988) (“[A] plaintiff alleging the tort of abuse of process must plead and prove: 1) an illegal, improper or unauthorized use of a court process; 2) an ulterior motive or an ulterior purpose; and 3) resulting damage to the plaintiff.”).

**Virginia:** *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 369 S.E.2d 857, 862 (Va. 1988) (“To sustain a cause of action for abuse of process, a plaintiff must plead and prove: (1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceedings.”).

**Washington:** *Walker v. City of Kennewick*, No. 19610-1-III, 2001 Wash. App. LEXIS 2540, at \*19 (Wash. Ct. App. 2001) (citing *Mark v. Williams*, 724 P.2d 428 (Wash. Ct. App. 1986)) (“The essential elements of an abuse of process claim are: (1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process; and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings.”).

**West Virginia:** *Southern States Coop. Inc. v. I.S.P. Co., Inc.*, 198 F. Supp. 2d 807, 816 (N.D.W. Va. 2002) (quoting *Preisner v. MacQueen*, 352 S.E.2d 22 (W. Va. 1985)). The court stated that:

The tort of abuse of process is well-grounded in West Virginia law . . . . [T]he West Virginia Supreme Court of Appeals explained the claim of abuse of process as follows: “The distinctive nature of an action for abuse of process . . . is that it lies for the improper use of a regularly issued process, not for maliciously causing process to issue . . . .

The authorities are practically unanimous in holding that to maintain the action for abuse of process there must be proof of a willful and intentional abuse or misuse of the process for the accomplishment of some wrongful object – an intentional and willful perversion of it to the unlawful injury of another . . . .

. . . .

In an action for abuse of process, as distinguished from an action for [malicious use of process], it is not necessary to aver and prove the termination of the proceeding in which the process was issued. It is sufficient that one party has willfully abused the process after its issuance to the damage of the other.

*Id.*

**Wisconsin:** Heil Co. v. Hartford Accident and Indem. Co., 937 F. Supp. 1355, 1363 (E.D. Wis. 1996) (citation omitted) (The court stated that under Wisconsin law, “[t]he tort of abuse of process has two essential elements: ‘a willful act in the use of process not proper in the regular conduct of the proceedings and an ulterior motive.’”).

**Wyoming:** Meyer v. Conlon, 162 F.3d 1264, 1274 (10th Cir. 1998) (citing Bosler v. Shuck, 714 P.2d 1231, 1234 (Wyo. 1986)) (“To show abuse of process in Wyoming, a plaintiff must demonstrate (1) ‘an ulterior purpose, and (2) the wilful act in the use of the process which is not proper in the regular conduct of the legal proceeding.’”).

## APPENDIX II

## CASE LAW SURVEY: TWENTY-THREE COURT DECISIONS FINDING THE ELEMENTS OF ABUSE OF PROCESS TO BE SATISFIED

**Arizona:** *Nienstedt v. Wetzel*, 651 P.2d 876, 876-82 (Ariz. App. 1982). The *Neinstedt* court upheld the jury award of compensatory and punitive damages for abuse of process based on evidence that, in prior litigation between neighboring property owners concerning sharing the cost of building a retaining wall, the abuse of process defendant's "primary purpose" was to subject his neighbors to "excessive litigation expenses." *Id.* The evidence showed that the abuse of process defendant had told his neighbors that:

[throughout the case,] he was going to make . . . [their] attorney a rich man; that he . . . could break people financially (impliedly through subjecting them to legal fees and expenses); and, that because he was a lawyer representing himself it would not be necessary for him to incur similar fees and expenses.

*Id.*; see also Rebecca Porter, *Jury Punishes Allstate for "Scorched-Earth" Tactics*, TRIAL, Dec. 2001, at 70 (describing a jury awarding damages to plaintiffs who sued Allstate Insurance for abuse of process because of the insurer's practice of using "scorched earth litigation tactics" for the ulterior purpose of coercing claimants in minor-impact crashes to accept low settlement offers).

**California:** *Barquis v. Merch. Collection Ass'n*, 496 P.2d 817, 839 (Cal. 1972) (finding that in a class action suit, evidence showed a gross abuse of process by a collection agency that knowingly filed statutorily inadequate "form complaints" in improper, distant counties, for the ulterior purpose of impairing class members' ability to defend those actions, and with the intent, and effect, of obtaining default judgments and coercing payments from debtors); see also *Templeton Feed & Grain v. Ralston Purina Co.*, 446 P.2d 152, 155 (Cal. 1968) (finding that it was an abuse of process for a mortgagee to procure the seizure of turkeys, when it knew or should have known it was not entitled to possession of the turkeys in order to force the payment of another's debt); *Younger v. Solomon*, 113 Cal. Rptr. 113, 117 (Cal. Ct. App. 1974) (holding that summary judgment on abuse of process claim was improper where an issue of fact existed as to whether cross-defendant used discovery process to disclose material to injure appellant's reputation and disclosure was not reasonably related to underlying action).

**Colorado:** *Aztec Sound Corp. v. Western States Leasing Co.*, 510 P.2d 897, 899-900 (Colo. Ct. App. 1973) (affirming judgment in favor of an abuse of process claim against a creditor that sought to attach plaintiff's manufacturing equipment despite the fact that the plaintiff

had fully repaid the loan); *see also* *Lauren Corp. v. Century Geophysical Corp.*, 953 P.2d 200, 203 (Colo. Ct. App. 1998) (upholding an abuse of process judgment against a plaintiff who had summonsed its opponent to defend a lawsuit in a distant forum despite knowledge that the distant forum lacked personal jurisdiction).

**Illinois:** *Wanzer v. Bright*, 52 Ill. 35, 42 (1869) (affirming abuse of process judgment against a creditor that misused a summons by fraudulently inducing a debtor to come within the jurisdiction of the court to render him amenable to its process); *see also* *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, No. 92 C 7768, 1999 U.S. Dist. LEXIS 917, at \*7 (N.D. Ill. Jan. 15, 1999) (applying Arizona law) (refusing to dismiss abuse of process claim against Milberg Weiss law firm based on evidence that the firm used an amended complaint for the ulterior purpose of extorting false testimony).

**Massachusetts:** *Powers v. Leno*, 509 N.E.2d 46, 48-49 (Mass. App. Ct. 1987). The court found that a jury question existed regarding ulterior motive, where evidence showed that the party challenging zoning approvals did so to keep the property tied up in litigation until property owner agreed to sell him a strip of land "for a buck." *Id.* In addition, an abuse of process issue was raised when the defendant allegedly stated, "[a]nd if I don't get what I want, I'll make sure these condominiums are never built. I'll delay it in court forever, even if I have to spend one million dollars." *Id.*

**Michigan:** *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726, 2001 U.S. Dist. LEXIS 2877, at \*5-\*8 (W.D. Mich. Feb. 26, 2001) (applying Michigan law) (denying motion to dismiss abuse of process counterclaim that alleged Amway issued subpoenas "for the ulterior motive of harassing and intimidating" website operators that publish information critical of Amway).

**Montana:** *Hopper v. Drysdale*, 524 F. Supp. 1039, 1042 (D. Mont. 1981) (denying defendant's motion for summary judgment where the plaintiff alleged that his deposition in a civil case had been noted for the "ulterior motive of having him present in the jurisdiction of Gallatin County so that he could be arrested on the outstanding contempt order").

**Nevada:** *Nev. Credit Rating Bureau, Inc. v. Williams*, 503 P.2d 9, 13 (Nev. 1972). The court found an abuse of process under the following circumstances: creditors attached a debtor's property valued at over \$30,000 to secure a debt of less than \$5,000; the property was attached in its entirety even though it was divisible; and the creditors summarily rejected the debtor's efforts to release parts of the property, despite the creditor's full knowledge of the devastating effect of the attachment upon the attachee's mining business in which he used the attached machinery. *Id.*

**New Mexico:** *Richardson v. Rutherford*, 787 P.2d 414, 421-22 (N.M. 1990) (reversing dismissal of claim for abuse of process because a jury



could find the ulterior motive behind an excessive *ad damnum* was to "intimidate" the defendant into a settlement).

**New York:** *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506, 509, 515 (S.D.N.Y. 1979) (reversing dismissal of abuse of process claim because the intentional elements of the tort were clearly satisfied). The *Avigliano* case noted that:

[The] plaintiffs' purpose in bringing proceedings before administrative and judicial tribunals has been to coerce Sumitomo into acceding to their demands for work assignments for which they were unqualified and for payment of additional compensation to which they were not entitled. Such allegations clearly satisfy the intentional elements of the tort of abuse of process.

*Id.*; see also *Bd. of Educ. v. Farmingdale Classroom Teachers Ass'n, Local 1889*, 343 N.E.2d 278, 280, 283 (N.Y. 1975). The court found that the complaint stated a cause of action for abuse of process because it alleged that the attorney for the teachers' association issued judicial subpoenas *duces tecum* to eighty-seven teachers in order to compel their attendance as witnesses before the public employees' relations board. *Id.* at 280. In doing so, the attorney refused to accept the school district's request that a majority of the teachers be excused from attendance at the initial hearing date. *Id.* In addition, the attorney also refused to grant the board's request to stagger the appearances, which resulted in the board having to hire seventy-seven substitute teachers to replace the subpoenaed teachers. *Id.* The court held that:

The subpoenas here were regularly issued process, defendants were motivated by an intent to harass and to injure, and the refusal to comply with a reasonable request to stagger the appearances was sufficient to support an inference that the process was being perverted to inflict economic harm on the school district.

*Id.* at 283; *Station Assocs., Inc. v. Long Island R.R. Co.*, 188 N.Y.S.2d 435, 439-40 (N.Y. App. Div. 1959) (upholding property seller's abuse of process claim against a property purchaser under the following circumstances: (1) the purchaser ran into financial difficulties and abandoned its intention to purchase the property; (2) the purchaser induced the seller to declare the purchaser in default; (3) the purchaser filed a *lis pendens* so that the property could not become the subject of other sale negotiations; and (4) all of this was done for the purpose of coercing a settlement and relieving the purchaser of any liability caused by its own abandonment of the contract); *Cardy v. Maxwell*, 169 N.Y.S.2d 547, 550 (N.Y. App. Div. 1957) The court found that:

Threats to give wide publicity to the contents of a complaint, in order to coerce and extort payments from the defendant in the action, motivated by a desire to escape adverse publicity, and the consummation of such threats do not constitute a legitimate and proper use of the process of the court. The [wife's] action for deceit . . . [against her husband was] transformed from its lawful function to an instrument of attempted blackmail and extortion.

*Id.*; *Rothbard v. Ringler*, 77 N.Y.S.2d 351 (N.Y. App. Div. 1947) (rejecting motion to dismiss a claim for abuse of process where service of a summons and complaint for jail commitment due to alimony arrearage was purposefully delayed until the beginning of a Memorial Day weekend when the courts would be closed, so that a release from custody would not be possible until the end of the long holiday weekend); *Dishaw v. Wadleigh*, 44 N.Y.S. 207, 209-11 (N.Y. App. Div. 1897). In *Dishaw*, the court found that the attorney was liable for abuse of process, because he issued a subpoena in a distant part of the State, not for the purpose of procuring a witness's attendance and testimony, but rather, for the ulterior purpose of coercing the subpoenaed party to pay the claim against him. *Id.* The attorney reasoned that since the claim was small, the other party would not "submit to the discomfort, inconvenience, and expense of attending court at so great a distance, [and would instead] . . . pay the claim." *Id.* The court opined that such trickery and cunning was "degrading to an honorable profession, and well calculated to bring the administration of justice into reproach and contempt." *Id.*

**Ohio:** *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 662 N.E.2d 9, 15 (Ohio 1996) (finding facts sufficient to support a claim for abuse of process where yacht club members used judicial proceedings to coerce other members into dropping club grievances against them; a letter to the membership essentially admitted the ulterior motive: "Remember, no grievances, the case is dead and you members stop paying . . . VOTE TO DROP THE GRIEVANCES."); *see also Black v. Pheils*, No. WD-98-029, 1998 Ohio App. LEXIS 5663, at \*9 (Ohio Ct. App. Dec. 4, 1998) (overruling summary judgment disposing of abuse of process claim where affidavits established an "ulterior purpose" to saddle opponents with "burdensome and unnecessary litigation expenses for the purpose of denying [them] the ability to improve their property").

**Pennsylvania:** *Minnesota Corn Processors, Inc. v. McCormick*, No. 99-5932, 2000 U.S. Dist. LEXIS 9441 at \*25-\*26 (E.D. Pa. July 6, 2000) (applying Pennsylvania law) (reversing dismissal of counterclaim for abuse of process against litigant that threatened to force its opponent into bankruptcy unless he promptly acceded to demands extrinsic to the scope of the lawsuit).