

U.S.C.A. § 2511 (West 2000). They seek compensatory and punitive damages. The defendant Hurd in turn filed an amended counterclaim alleging malicious prosecution by the plaintiffs. In response, the plaintiffs filed the present motion to dismiss the counterclaim, pursuant to Federal Rule of Civil Procedure 12(b)(6), together with a motion for sanctions.

In his amended counterclaim, the defendant alleges that the plaintiffs set on foot a state and federal criminal prosecution against him for allegedly unlawfully intercepting telephone communications of the plaintiffs.¹ Few facts are set forth in the amended counterclaim, but at oral argument the defendant's counsel agreed that the only "prosecution" of the defendant consisted of the questioning of him by a local law enforcement officer and a presentation about the case before a federal grand jury by the United States Attorney.² No warrant or indictment was ever issued, nor was the defendant arrested or required to appear in court. The question is whether these facts are sufficient to make out a claim as a matter of law.

¹ The court's subject matter jurisdiction over the state law counterclaim exists pursuant to its supplemental jurisdiction. *See* 28 U.S.C.A § 1367(a) (West 1993).

² I am not required to accept as true legal characterizations in the counterclaim; however, for the purposes of this motion to dismiss, I will treat the defendant's counsel's recitation of these events relating to the alleged "prosecution" as properly pleaded. *See Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

II

The parties are agreed that Virginia law applies to this counterclaim. Malicious prosecution claims are held in disfavor in Virginia. *See Lee v. Southland Corp.*, 244 S.E.2d 756, 758 (Va. 1978). It is recognized that while the tort of malicious prosecution exists to protect individuals from the costs of needless litigation, citizens should not be hindered from aiding the authorities in criminal prosecutions because the accused might thereafter bring a civil suit. *See id.*

In accordance with this view of malicious prosecution, each element is “more stringent than . . . other tort claims.” *Id.* The elements of malicious prosecution are “(1) that the prosecution was set on foot by the defendant and that it terminated in a manner not unfavorable to the plaintiff; (2) that it was instituted, or procured by the cooperation of the defendant; (3) that it was without probable cause; and (4) that it was malicious.” *Niese v. Klos*, 222 S.E.2d 798, 800 (Va. 1976).

The first element is at issue here. The question of what acts constitute a prosecution in this context has not yet been decided by Virginia highest court. However, other authorities provide guidance.³ The Second Restatement of Torts

³ In order to determine state law, a federal court must follow the decisions of the state’s highest court, or, where the law is unclear, predict how that court would rule, based on “canons of construction, restatements of the law, treatises, recent pronouncements of general rules or policies by the state’s highest court, well considered dicta, and the state’s trial court decisions,” among other things. *Wells v. Liddy*, 186 F.3d 505, 528 (4th Cir.1999).

explains that a “prosecution” within the first element of malicious prosecution requires more than merely making a charge against a party. Restatement (Second) of Torts § 653 cmt. c (1977). Rather, an actual “criminal proceeding” must take place for a malicious prosecution action to accrue. *Id.* Thus, even though a law enforcement agency has considered a complaint, without further action, a prosecution has not yet taken place. *See id.*

The Restatement defines “criminal proceedings” as proceedings where the government seeks to prosecute and impose a penalty. *See* Restatement (Second) of Torts § 654 (1977). Criminal proceedings are instituted when criminal process is issued, an indictment is issued by the grand jury, an information is filed or an arrest is made. *See id.*

Professor Keeton agrees with the Restatement and states that a prosecution has not occurred where alleged facts are merely presented to a grand jury and no indictment is issued. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 119 (W. Page Keeton ed., 5th ed. 1984).

As these authorities demonstrate, the first element of malicious prosecution is not met until formal proceedings have occurred. Here, the defendant does not claim that a warrant was issued or that the defendant ever appeared before an official or a tribunal to determine his guilt or innocence or that a grand jury issued an indictment. Clearly,

the circumstances pleaded by the defendant in his counterclaim do not meet the first element that a “prosecution” was set on foot by the plaintiffs.

At oral argument, the defendant’s counsel argued that a prosecution is deemed, in some jurisdictions, to arise when a party, with malice, merely files a complaint containing false information with authorities. *See* 52 Am. Jur. 2d *Malicious Prosecution* § 21 (1970). In a case for bastardy, the Supreme Court of Indiana stated, in dicta, that an affidavit made and filed maliciously without probable cause would create a claim for malicious prosecution even if no warrant was issued. *See Coffey v. Myers*, 84 Ind. 105, 1882 WL 6301, at *2 (Ind. May Term, 1882).⁴ However, that case did recognize that generally a prosecution is not commenced until “a summons reaches the hands of the officer.” *Id.* at * 1. The court contended that damage was done to the plaintiff’s reputation at the filing of the affidavit, whether or not a warrant was issued. *See id.*

I find the Restatement and other authorities more persuasive than this formulation. That a “prosecution” requires criminal proceedings to have taken place reflects the policy of protection from “unjustifiable litigation,” as opposed to the interests served by other torts. *Boschette v. Buck*, 914 F. Supp. 769, 773 (D.P.R. 1995) (citations omitted). Therefore, for an action based on malicious prosecution to accrue,

⁴ In that case, an arrest warrant was issued. *Id.* at *2.

criminal proceedings must have taken place because otherwise the primary interests protected by this tort have not yet been violated.

In addition, if a “prosecution” were deemed to occur because law enforcement had undertaken an investigation, “it would be impossible to determine at what point in the investigation there existed sufficient process. This would lead to an illogical and unworkable result.” *Gallucci v. Phillips & Jacobs, Inc.*, 614 A.2d 284, 291 (Pa. Super. Ct. 1992).

III

Accordingly, for the reasons stated, it is **ORDERED** as follows:

1. The motion to dismiss (Doc. No. 16) the counterclaim is granted; and
2. The motion for sanctions (Doc. No. 16) is denied.

ENTER: October 17, 2001

United States District Judge