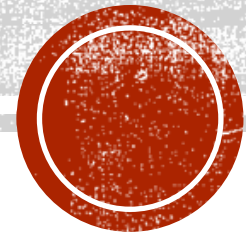


**EFFECTIVE
STRATEGIES TO
COMBAT FRIVOLOUS
LAWSUITS AGAINST
PUBLIC ENTITIES**

Andrew T. Caulfield,
Caulfield Law Firm

Trish Poe, Allied Public
Risk



INTRODUCTION

Who We Are

**Overview of
Presentation**

**Goal of
Presentation**





TRISH POE, SCLA

- Allied Public Risk, LLC
- Claims and Risk Management Leader
- ppoe@alliedpublicrisk.com
- www.linkedin.com/in/ppoe1
- Twenty-five years experience in multiple lines of coverage and jurisdictions.





ANDREW T. CAULFIELD, ESQ.

- Owner, Caulfield Law Firm, El Dorado Hills CA
- 15+ year litigator and trial attorney
- andrew@caulfieldlawfirm.com
- Notable cases involving CCP § 1038:
 - *Ponte v. County of Calaveras* (2017) 14 Cal.App.5th (affirming fee award to County under CCP § 1038; County recovered \$120,000 from plaintiff attorney's malpractice carrier)
 - *Harrington v. County of El Dorado* (2019) (trial court awarded County \$121,837.50 in attorney fees under CCP § 1038, currently pending appeal in CA Third District Court of Appeal)
- Publications involving CCP § 1038:
 - *California Appellate Court Breaks New Ground Under CCP § 1038 While Reiterating Need to Follow Appellate Briefing Rules*, Defense Comment Magazine, Spring 2018



THE FRIVOLOUS LAWSUIT SHOWDOWN

PUBLIC ENTITY



PLAINTIFF



FRIVOLOUS
LAWSUIT



Taxpayer Money

STRATEGIES FOR FRIVOLOUS CLAIMS

Prelitigation

- Analyze claims for complete defenses by completing a thorough and expedient liability investigation.
- Contact the claimant/attorney by telephone and explain the basis for claim rejection.
- Send rejection letter citing defenses and refer to CCP § 1038 with warning that fees and costs will be pursued.

Litigation Stage

- Defense attorney meet and confer early and often with plaintiff's attorney.
- Reiterate entity's defense(s) establishing that suit is not viable.
- Demand plaintiff show their cards—how can they meet burden of proof?
- Stay focused on liability defenses; avoid being distracted by injury.
- File Motion for Summary Judgment or other motion identified in CCP § 1038.
- File CCP § 1038 motion.



CALIFORNIA CODE OF CIVIL PROCEDURE

§ 1038

Effective use can preclude filing of frivolous lawsuits, or force early dismissal/settlement

If plaintiff fails to relent, allows for public entity to recover fees to defend



PURPOSE OF CCP § 1038

- “The plain purpose of section 1038 is to discourage frivolous lawsuits against public entities by providing public entities with an alternative remedy to a constitutionally proscribed action for malicious prosecution.” *Gamble v. Los Angeles Dep’t of Water & Power* (2002) 97 Cal.App.4th 253, 258-259.
- Protects public treasury from unreasonable litigation costs.
- Allows for an award of reasonable attorneys’ fees and expert witness fees reasonably and necessarily incurred in defending frivolous suit.



HOW DOES PUBLIC ENTITY OBTAIN AWARD UNDER CCP § 1038?

Establish that plaintiff lacked either: (1) reasonable cause; or (2) a good faith belief that there was a justifiable controversy.

Plaintiff must show reasonable cause and good faith in both the initial filing of lawsuit and its continued maintenance.



LACK OF REASONABLE CAUSE



Objective standard: “whether any reasonable attorney would have thought the claim tenable.”



Easy case: plaintiff/attorney aware that element of cause of action missing.



Plaintiff bears burden of investigation sufficient to establish basis for reasonable belief that all elements exist; abstract hope not enough.



LACK OF GOOD FAITH



Subjective standard: factual inquiry into Plaintiff's subjective state of mind—i.e., did plaintiff believe action valid? What was his/her intent in pursuing action?



“Good faith” is linked to a belief in a justifiable controversy under the facts and law.



Rarely susceptible to direct proof; can be inferred from circumstantial evidence.



CAVEATS ON USE OF § 1038

- Must be proceeding brought under the Government Claims Act (Gov. Code § 810, *et seq.*) or for express/implied indemnity.
- Does not apply to inverse condemnation or civil rights claims brought under 42 U.S.C. § 1983.
- Only available if public entity prevails on certain motions identified in statute:
 - Motion for summary judgment (summary adjudication not included);
 - Motion for directed verdict;
 - Motion for judgment under CCP § 631.8;
 - Nonsuit.
- 1038 motion must be made before discharge of jury or entry of judgment.
- Must be noticed motion; before same judge who heard substantive motion.
- Can only be awarded against plaintiff and not their attorney (consider also CCP §§ 128.5, 128.7).
- Pro se litigant considerations.



KEY CASES RE CCP § 1038

- *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851
 - Key CA SC case on § 1038.
 - Fees may be awarded if plaintiff brought or maintained action without either good faith or reasonable cause; don't need to show both. Reversed appellate decision requiring County to show both.
 - “[P]laintiff must bear a burden of investigation sufficient to establish at least a basis for reasonable belief that all elements exist. Abstract hope is not reasonable belief...[plaintiff] cannot simply name every conceivable defendant and rely on what future discover may turn up.” *Id.* at 858.
- *Carroll v. State of California* (1990) 217 Cal.App.3d 134
 - Affirmed fee award under § 1038 where public entities advised plaintiff before filing suit that they did not have jurisdiction over intersection where accident occurred.
 - Plaintiff repeatedly refused to dismiss county and state and showed no facts to support naming them in first place.
 - “Plaintiffs have failed to justify the initial filing of the complaint against these defendants and continued to maintain the lawsuit against [them] with a certain arrogance. Plaintiffs have attempted to shift the burden from themselves to defendants to determine whether defendants had any possible liability.” *Id.* at 143; see also, *Ramsey v. City of Lake Elsinore* (1990) 220 Cal.App.3d 1530.
- *Ponte v. County of Calaveras* (2017) 14 Cal.App.5th 551
 - Affirmed fee award under § 1038 in case involving public contracting requirements and promissory estoppel.
 - <https://caulfieldlawfirm.com/wp-content/uploads/2017/04/ADC-Defense-Comment-Spring-2018-Article.pdf>



KEY CASES (CONT'D)

- Lee v. Dept. of Parks & Rec. (2019) 38 Cal.App.5th 206
 - Reversed § 1038 award against pro se plaintiff because issue of trail immunity relating to stairway not so clear cut that lawsuit lacked reasonable cause.
- Suarez v. City of Corona (2014) 229 Cal.App.4th 325; Settle v. State of California (2014) 228 Cal.App.4th 215
 - Both cases found that a fee award under § 1038 is not permitted against attorney.



**HYPOTHETICAL:
CLAIM
PRESENTED TO
WRONG ENTITY**

- Plaintiff presents claim to County seeking \$1 million for personal injury based on dangerous condition of public property.
- County does not own either the property identified in the claim or any adjacent property.



CLAIM STAGE TIPS

- Issuing non-specific, template rejection notice with only statutory language is missed opportunity to: (a) prevent filing of suit; and (b) set up fee recovery from outset if suit is filed!
- Instead, cite to Gov. Code §§ 830, 835 in rejection and explain that subject property is not owned/controlled by public entity.
- Attach deed of trust/plat maps showing true owner.
- Attach declaration from DOT/Public Works Director showing lack of ownership/maintenance.
- Provide warning: if suit is filed, County will seek to recover all fees and costs under CCP §§ 1038, 128.5, 128.7.



LAWSUIT STAGE TIPS

- Despite evidence provided, Plaintiff files suit.
- Kill the suit before it grows! Use § 1038 as leverage. Meet and confer early and often, citing to CCP § 1038.
- Although there is no statutory meet and confer requirement, courts scrutinize meet and confer correspondence, especially when determining issue of reasonable cause.
- Be stern but always professional. Remember: correspondence will be attached to motion.
- Demand that Plaintiff provide evidence establishing that County owns/controls subject property.
- File a demurrer or be prepared to explain why you did not in your § 1038 motion.
- File MSJ or other motion identified in statute.



TIPS RE FILING OF 1038 MOTION

- Attach claim rejection notice and evidence provided at claim stage re no County ownership/control of subject property.
- Attach all meet and confer correspondence after suit filed.
- Scrutinize fee invoices and seek all reasonable fees incurred.
- Give judge blocks of fee increments, from case inception to present, and alternatively, from certain dates to present.
 - Allows judge to find case tenable at outset but upon receiving certain evidence, should have been dismissed and award fees from that date forward.





QUESTIONS???

