APR - ALTERNATIVE MARKETS

DEDICATED TO PUBLIC ENTITY

LESSONS FROM LOSSES: NOT TAKING "NO" FOR AN ANSWER

"The only mistake in life is the lesson not learned." **—Albert Einstein**

DESCRIPTION

An avid bicyclist set out for a trail ride on a sunny day. To mix adrenaline with inspiring scenery, he picked a trail that offered a combination of challenging curves and inclines with great views. The bicyclist reached the summit of a climb with confidence and assertiveness, and gravity's unyielding pull caused him to pick up speed on the descent. The trail bent on the decline, and because of his fast pace, he was unable to see a bicyclist coming toward him. Both bicyclists sustained injuries in the ensuing head-on collision.

The bicyclist speeding on the downslope suffered a traumatic brain injury and multiple fractures. He hired an attorney and submitted a timely notice of claim form to the City in which he claimed that the trail constituted a dangerous condition of City property and that the City was on notice of the trail's perils, had been negligent in its maintenance of the path, and failed to warn users of a dangerous curve on the trail. However, the City did not actually own or control the trail and therefore issued a nonspecific, timely rejection of the claim without citing any reason for the rejection—that is, without informing the claimant or his attorney that the City did not own or control the trail and that, even if it did, trail immunity would apply. The claimant's attorney filed suit, and the City filed a response asserting that the trail was not in the jurisdiction of the City and that trail immunity applied.

THE RESULT

Litigation and discovery continued for three years and cost the City more than $200,000 to defend. Ultimately, the City prevailed on motion for summary judgment based on the court's finding that the City did not own or control the trail. Satisfied with the win, the City did not pursue a recovery of its attorney and expert witness fees.

THE PROBLEM

Although the City argued that the trail was not in its jurisdiction and trail immunity applied, the plaintiff's counsel relentlessly pursued the case, ignoring liability and instead focusing on the empathetic portion of the case: the injury. The City made no effort at the claim stage to prevent the suit and no attempt was made prior to filing summary judgment to convince the plaintiff to dismiss the suit for lack of liability. The plaintiff conducted multiple depositions and retained medical experts to support the claims of permanency and impact on activities of daily living, and the plaintiff further consulted an economics expert to calculate the diminished future earning capacity. The City incurred fees and costs relating to the depositions and the hiring of independent medical and economics experts to refute the injury and damages. Only after the plaintiff underwent multiple surgeries and the City engaged in lengthy depositions and discovery to rebut the extent of damages did the City file a motion for summary judgment. After success on that motion, defense made no effort to recover fees in this clearly non-jurisdictional case.

LESSONS LEARNED

Frivolous claims and suits drain public entity resources and taxpayer money. California Code of Civil Procedure Section 1038 provides an avenue for public entities to recover the costs of defending meritless actions brought under the California Tort Claims Act. A public entity defendant that has made a record of multiple meet-and-confer attempts that provide evidence that there is no basis for liability is better positioned to avoid costly defense through an early dismissal or, alternatively, to recover fees if the case is not voluntarily dismissed. After a successful motion for summary judgment in a frivolous case, defense counsel should strongly consider filing a motion to recover attorney and expert witness fees under Section 1038. At that time, the burden shifts to the plaintiff to demonstrate that the complaint was warranted because the plaintiff had reasonable cause and a good faith belief that there was a justifiable controversy under the facts and law.

Concise and repetitive communication citing the basis for claim rejection, lack of liability, and intent to pursue all defense costs, including attorneys' fees and expert witness fees, will negate assertions by a plaintiff that the action was justifiable and support a successful action under Section 1038; therefore, the following steps are recommended.

- Analyze new claims for complete defenses that preclude liability as a matter of law.
- Contact the claimant or attorney by phone; discuss liability; explain the basis for the belief that the claim is meritless; and advise that, if a claim is pursued, the City will seek to recover fees and costs under Section 1038.
- Follow up with a rejection letter, make the rationale for rejection clear, and cite Section 1038. Provide a warning that the entity will pursue recovery should the court determine that the lawsuit was not brought in good faith and with reasonable cause.
- If a suit is filed, consider employing a defense counsel who is experienced in defending frivolous actions and has successfully utilized Section 1038 in the past.
- Authorize defense counsel to meet and confer early and often with the plaintiff's counsel and document the communication. The evidence of repeated assertion of viable defenses is pertinent to the issue of whether any reasonable attorney would have thought the claim tenable.
- Authorize the filing of a Section 1038 motion upon a successful motion for summary judgment.
- Although Section 1038 allows recovery against the party and not the party's attorney, consider a sanctions award directly from the attorney under California Code of Civil Procedures Sections 128.5 or 128.7.

Note: Although the statements above are based on an actual loss, some of the facts may have been altered for the purposes of illustration and education. This information should not be relied upon for legal advice. Please contact an attorney for your specific needs.

Allied Public Risk is dedicated to insuring public entities. Please contact anyone on our Alternative Markets Team regarding your public entity accounts:

Margaret Zechlin, Executive Vice President
E: mzechlin@alliedpublicrisk.com
O: 415.761.8628
M: 415.497.6400

Alie Basch, Senior Vice President
E: abasch@alliedpublicrisk.com
O: 347.689.7558
M: 413.335.3092

LaTonya James, Senior Underwriting Analyst
E: ljames@alliedpublicrisk.com
O: 312.762.5003
M: 773.750.5233

Mia Legg, Senior Underwriting Analyst
E: mlegg@alliedpublicrisk.com
O: 312.762.5006
M: 773.750.5233

Melissa Metzger, Senior Underwriting Analyst
E: mmetzger@alliedpublicrisk.com
O: 618.717.0553

Trish Poe, Claims and Risk Management Leader
E: ppoe@alliedpublicrisk.com
O: 909.614.3622