



APR - ALTERNATIVE MARKETS

DEDICATED TO PUBLIC ENTITY

When Meritless Claims Drain Public Entity Funds, Don't Forget About CCP

Section 1038

Andrew T. Caulfield and Trish Poe

Every risk manager and claims professional has experienced a claimant who pursues a claim against a public entity regardless of the lack of liability, immunities, or other laws affording a complete defense to the public entity. Contrary to public interest, litigation costs to defend these meritless cases quickly mount, inflating municipal budgets and draining taxpayer funds. However, public entity risk managers, claim administrators, and defense counsel in California have an important, although sometimes forgotten, tool available to combat frivolous claims in California Code of Civil Procedure Section 1038 ("Section 1038").

Briefly, Section 1038 allows for the public entity to recover its reasonable attorney's fees and expert witness fees expended to defend a lawsuit in which the court determines that the plaintiff lacks either reasonable cause or good faith in the filing or maintaining of the lawsuit. Although the statute should not be used as a threat to prevent quick and fair settlement of valid claims, when properly used as part of a public entity's defense strategy, the statute acts as a disincentive for a claimant to proceed with a frivolous lawsuit, thereby mitigating defense costs before they are incurred.

A defendant must negate either reasonable cause or good faith to prevail on a motion brought under Section 1038. Whether the claimant had "reasonable cause" to file and maintain a lawsuit against a public entity under Section 1038 is determined objectively and as a matter of law on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide whether "any reasonable attorney would have



thought the claim tenable.” The “good faith” analysis involves a factual inquiry into the plaintiff’s subjective state of mind. Did he or she believe the action was valid? What was his or her purpose in pursuing it? “Good faith” is linked to a belief in a justifiable controversy under the facts and the law.

A motion under Section 1038 may be filed in any civil proceeding brought under the Government Claims Act and in civil actions for express or implied indemnity and contribution. However, it may only be brought upon the granting of certain motions, such as a motion for summary judgment, motion for directed verdict, or nonsuit. Importantly, Section 1038 does not allow for a recovery of defense costs after a successful demurrer.

Effective use of Section 1038 (both to mitigate defense costs before they are incurred and to increase chances of a statutory recovery after they are incurred) includes the early identification of meritless actions and methodical and repeated communication to the plaintiff’s counsel explaining why the action is frivolous and expressing the entity’s intent to pursue a recovery under Section 1038. Public entity risk managers and claims personnel can play a significant role in this process even before litigation is filed. Although each claim is different, and there is no “one size fits all” approach, consider using the following 10 steps to increase chances of an early resolution and a possible fee award if forced to litigate a clearly frivolous claim:

1. When a claim is presented, personnel should analyze it closely for complete defenses that preclude liability as a matter of law and may provide a basis for recovery under Section 1038 should the claim develop into litigation. For example, this might include a dangerous condition of public property claim in which the property identified in the claim is neither owned nor maintained by the public entity. (It may be helpful, especially for less seasoned claims personnel, to seek the advice of an attorney even at this early stage. A faulty legal analysis, combined with an unwarranted threat of fee recovery under Section 1038, may invite, rather than fend off, litigation.)
2. Pick up the phone and contact the claimant’s attorney (or the claimant if no attorney is identified on the claim) to discuss the claim. Explain the basis for the belief that the claim is frivolous and clarify that, if forced to defend against a lawsuit, the public entity will seek to recover its fees and costs under Section 1038. (Note: this may cause the claimant to file an amended claim based on a new legal theory.)
3. Rather than sending a generic claim rejection letter, take the opportunity in the rejection letter to expressly refer to the prior discussion with the claimant’s attorney and state the reason(s) the claim is frivolous, including, in appropriate cases, citation to applicable statutes and/or case law. (For example, in a trip-and-fall case in which the subject sidewalk is not owned or maintained by the public entity, consider providing a



deed of trust or other recorded document, and an affidavit by maintenance personnel, that conclusively prove that the sidewalk identified in the claim is not owned/maintained by the public entity.)

4. Cite to Section 1038 in the rejection letter, providing a warning to the claimant that the public entity will seek to recover its attorney's fees and expert witness fees should a court determine that the lawsuit was not brought in good faith and with reasonable cause.
5. If a summons and complaint is filed after the rejection, hire defense counsel with experience defending against frivolous actions, preferably an attorney who is familiar with Section 1038 and has successfully utilized the statute in the past.
6. Be sure to provide defense counsel with all evidence and materials supporting the conclusion that the claim is frivolous, and provide all correspondence, including notes of discussions with the claimant/claimant's attorney discussing the issue and referring to Section 1038.
7. Collaborate with defense counsel to develop a litigation strategy aimed at early, voluntary dismissal of the case by the plaintiff.
8. Authorize defense counsel to meet and confer early and often with the plaintiff's counsel and continue the dialogue that began at the claims stage. Honest and forthright correspondence with the plaintiff's counsel, providing evidence showing that no reasonable attorney would continue with the lawsuit, is more likely to lead to an early dismissal, or alternatively, a possible recovery under Section 1038 should the plaintiff fail to relent.
9. If litigation on a meritless claim continues, authorize the filing of the Section 1038 motion upon a successful motion for summary judgment or other motion allowing for recovery under the statute. (Again, be cognizant that awards under Section 1038 are only permitted after the granting of certain motions identified in the statute.)
10. In the Section 1038 motion, defense counsel should cite to all prior meet and confer correspondence, including during the claim stage. Although there is no statutory meet and confer requirement under Section 1038, such evidence is pertinent to the issue of whether any reasonable attorney would have thought the claim tenable. (The various factors that may affect whether a fee motion will ultimately be successful are beyond the scope of this article and should be discussed with defense counsel.)



Resources:

California Code of Civil Procedure § 1038

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=1038

Article: California Appellate Court Breaks New Ground Under CCP 1038 While Reiterating Need to Follow Appellate Briefing Rules. Author, Andrew T. Caulfield

<https://caulfieldlawfirm.com/wp-content/uploads/2017/04/ADC-Defense-Comment-Spring-2018-Article.pdf>