

Memorandum 75-74

Subject: Study 52.80 - Undertakings for Costs

Attached to this memorandum is a staff draft of a recommendation relating to undertakings for costs and expenses. The recent case of Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975)(Exhibit I), held unconstitutional the provisions of the California Tort Claims Act allowing a defendant public entity or employee to require the plaintiff to furnish an undertaking for costs upon demand and without a hearing on the ground that it constitutes a taking of property without due process of law. The attached staff draft of a recommendation proposes revision of the Tort Claims Act sections held unconstitutional (Govt. Code §§ 947, 951), as well as a similar statute applicable to actions against the Regents of the University of California (Educ. Code § 23175), under the continuing authority which the Commission has to study matters relating to governmental tort liability in California. See Cal. Stats. 1975, Res. Ch. 15. Since a statute designed to repair the constitutional deficiencies of these sections may also be used in the other situations where an undertaking may be required, the attached recommendation proposes a single, uniform statute to replace all of the existing cost bond statutes. The staff further recommends that the Commission request authority from the Legislature to study the question of whether the statutes relating to undertakings to secure an award of damages should be revised.

The major policy options in the attached recommendation are as follows:

(1) The degree of merit of plaintiff's claim. The constitutionally required due process hearing must test the merit of the plaintiff's claim in the light of the legislative purpose of the undertaking statute before an undertaking may be required. See Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975). The purpose of the undertaking

requirement where the plaintiff is a nonresident is to secure a possible award of costs in the defendant's favor. The purpose of the remaining cost bond statutes is to deter frivolous claims. (See discussion at pages 5-6 of the attached recommendation.) The following table indicates a number of possible standards for evaluating the strength of the plaintiff's claim, and suggests the constitutional limits of the undertaking requirement in view of the statutory purpose:

May an undertaking be constitutionally required when:	and the purpose of the statute is to:	
	deter frivolous claim?	secure a possible award of costs to defendant?
Pltf's claim is clearly frivolous	Yes	Yes
There is a reasonable possibility or probability that pltf. will prevail	Doubtful	Yes
It is more likely than not that pltf. will prevail	No	Yes
There is a reasonable possibility or probability that def't will prevail	No	Yes
There is no possibility that def't will prevail	No	No

The attached recommendation excuses the plaintiff from filing an undertaking, where the purpose of the statute is to deter frivolous claims, when the plaintiff shows that there is a "reasonable probability" he will prevail in the action. This is the standard employed in the existing vexatious litigant statute (Code Civ. Proc. § 391.1). The other three statutes where a hearing is presently provided (Code Civ. Proc. §§ 1029.5, 1029.6; Corp. Code § 800, effective Jan. 1, 1976) use the word "possibility" instead of "probability,"

but this does not appear to make any significant constitutional difference. The staff prefers the use of the word "probability" to discourage an unduly strict construction of the statute which would make it extremely difficult for the defendant to obtain an order requiring an undertaking. To excuse the plaintiff from filing an undertaking only when he shows that there is a reasonable probability he will prevail will promote the statutory objective of deterring frivolous claims without impairing claims which are real and substantial. (See the attached staff draft of a recommendation, at 5 n.27.)

In the case of actions by a nonresident plaintiff (see Code Civ. Proc. § 1030) where the statutory purpose is to secure an ultimate award of costs in the defendant's favor, the proposed uniform statute requires an undertaking in all cases except where there is no reasonable probability that the defendant will prevail.

(2) Burden of proof. The attached recommendation requires the defendant to show that the action is one in which an undertaking may be required, and to prove his probable allowable costs. However, unlike existing statutes which require a hearing [see Code Civ. Proc. §§ 391.1, 1029.5, 1029.6; Corp. Code § 800(d)], the recommendation shifts the burden of proof to the plaintiff to show the merit of his claim, since the plaintiff will more often have superior knowledge of facts relevant to the question of merit, and bears the burden of proof on the ultimate issue at trial.

(3) Amount of undertaking. The attached recommendation establishes the amount of the undertaking at one and one-half times the defendant's probable allowable costs and expenses. This formula would appear to be a reasonable security requirement. Corporation's Code Section 800(d) places an upper limit of \$50,000 in the case of shareholder derivative actions. The staff recommends that this limit not be incorporated into the uniform statute, since it is so

high as to be meaningless where costs but not attorney's fees are recoverable. In defamation actions, recoverable attorney's fees are limited to \$100 (Code Civ. Proc. § 836). Attorney's fees are recoverable in the vexatious litigant statute (Code Civ. Proc. § 391), but there is no upper limit on the undertaking in the existing statute, and none would appear to be necessary.

The staff recommends that the attached recommendation be approved and submitted to the Legislature without first circulating the recommendation for comment, since there is an immediate need for legislative action in the wake of the Beaudreau case. When the recommendation is in bill form, it will be reviewed by interested persons and organizations and any revisions they suggest can be reviewed by the Commission at that time.

Respectfully submitted,

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Staff Draft
RECOMMENDATION RELATING TO UNDERTAKINGS
FOR COSTS

BACKGROUND

A number of California statutes authorize or require the plaintiff in specified types of actions to furnish an undertaking as security for the defendant's recoverable costs.¹ These are generally referred to as "cost bonds."² These statutes should be distinguished from statutes authorizing or requiring undertakings in a variety of situations to indemnify the beneficiary against damages he may suffer.³ These are

1. See Code Civ. Proc. §§ 391-391.6 (vexatious litigant), §§ 830-836 (defamation), § 1029.5 (malpractice action against architects and others), § 1029.6 (malpractice action against physicians and others), § 1030 (action by nonresident plaintiff); Corp. Code § 800 (shareholder derivative suit); Educ. Code § 23175 (action against Regents of the University of California); Govt. Code § 947 (tort action against public entity), § 951 (tort action against public employee).
2. See *Conover v. Hall*, 11 Cal.3d 842, 851-852, 523 P.2d 682, 688, 114 Cal. Rptr. 642, 648 (1974). Three of the California cost bond statutes provide that the undertaking shall also secure attorney's fees in addition to "costs." See Code Civ. Proc. §§ 391(c), 830; Corp. Code § 800(d).
3. See, e.g., Civil Code §§ 3235, 3236 (payment bond for private works of improvement); Code Civ. Proc. § 1171 (small claims appeal bond held unconstitutional in *Brooks v. Small Claims Court*, 8 Cal.3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973)), §§ 512.060(a)(2), 512.080(e), 513.010(b)(2), 514.030, 515.010-515.030 (bond on writ of possession), § 529 (injunction bond), §§ 539-540, 552-556 (attachment bond), § 674 (bond for stay on appeal of judgment lien), §§ 676 through 680-1/2 (bond in action to set aside fraudulent conveyance), § 682a (bond on levy on bank account), §§ 710b through 713-1/2 (bond by third-party claimant in execution proceeding), § 715 (bond required of debtor about to abscond), § 810 (bond in action for usurpation of office), §§ 917.1, 917.2, 917.4, 917.5, 917.9-922 (bond for stay of enforcement during appeal), § 1166a (bond for writ of immediate possession in unlawful detainer), § 1203.60 (bond for release of oil and gas lien), § 1210 (bond on appeal from alias writ of possession), § 1685 (bond to secure payment of out-of-state child support), § 1701.6 (bond by substitute fiduciary), § 1710.50(c)(1) (bond on stay of enforcement of judgment on sister state judgment). See also Code Civ. Proc. §§ 482.090, 484.090(b), 484.520(c), 485.220(a)(6), 485.540(d), 486.020(e), 489.010-489.420, 490.020(b), 490.030(d), 492.020(a)(6), 492.090(c) (attachment bonds--statute operative January 1, 1977). Many of the damage bond statutes also include a provision that the undertaking will secure costs as well.

generally referred to as "damage bonds."⁴

In the case of Beaudreau v. Superior Court,⁵ the California Supreme Court held unconstitutional the cost bond provisions⁶ of the California Tort Claims Act. The California Tort Claims Act allows the defendant public entity or public employee to require an undertaking merely by filing a "demand."⁷ The statute thus runs afoul of the constitutional rule announced in Sniadach v. Family Finance Corp.,⁸ and further developed by later cases,⁹ that the plaintiff must be afforded a hearing which will satisfy due process requirements before he may be deprived, even temporarily, of his property.¹⁰ In this context, the due process hearing must "inquire into the merits of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in the light of the defendant's probable expenses."¹¹

In view of the Beaudreau case, the Commission has examined all of the cost bond statutes. Those which provide for notice and hearing

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4. See note 2 supra.
 5. 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).
 6. Govt. Code §§ 947, 951.
 7. Id.
 8. 395 U.S. 337 (1969).
 9. E.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Brooks v. Small Claims Court, 8 Cal.3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); Randone v. Appellate Dep't, 5 Cal.3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); Blair v. Pitchess, 5 Cal.3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); Cline v. Credit Bureau of Santa Clara Valley, 1 Cal.3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970); McCallop v. Carberry, 1 Cal.3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).
 10. The plaintiff's "property" in this context is either the nonrefundable corporate premium, the plaintiff's cash collateral, or--if he fails to furnish an undertaking--his cause of action which is dismissed. Beaudreau v. Superior Court, 14 Cal.3d 448, 455-456, 535 P.2d 713, 717-718, 121 Cal. Rptr. 585, 589-590 (1975).
 11. Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).

before an undertaking may be required are the statutes relating to shareholder derivative suits,¹² actions by vexatious litigants,¹³ malpractice actions against architects and others,¹⁴ and malpractice actions against physicians and others.¹⁵ Those which require an undertaking with no provision for a hearing are the statutes relating to tort claims against public entities¹⁶ and public employees,¹⁷ actions against the Regents of the University of California,¹⁸ actions by a nonresident plaintiff,¹⁹ and actions for libel or slander.²⁰ All of the statutes in the latter category appear to come within the holding of the Beaudreau case, and thus are unconstitutional.²¹

At a minimum, to satisfy constitutional requirements, a statute authorizing or requiring an undertaking for costs must provide for a hearing after noticed motion, with the hearing directed to the questions

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12. Corp. Code § 800(c). The predecessor section of Section 800 was suggested as a possible model for cost bond statutes in the case of Nork v. Superior Court, 33 Cal. App.3d 997, 1003-1004, 109 Cal. Rptr. 428, 433 (1973). Accord, Beaudreau v. Superior Court, 14 Cal.3d 448, 462, 535 P.2d 713, 722, 121 Cal. Rptr. 585, 594 (1975).
 13. Code Civ. Proc. §§ 391-391.6.
 14. Code Civ. Proc. § 1029.5.
 15. Code Civ. Proc. § 1029.6. Subdivision (e) of this section, which requires an undertaking upon the ex parte application of the defendant where punitive damages are sought, was held unconstitutional in Nork v. Superior Court, 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).
 16. Govt. Code § 947.
 17. Govt. Code § 951.
 18. Educ. Code § 23175.
 19. Code Civ. Proc. § 1030.
 20. Code Civ. Proc. §§ 830-836.
 21. The question of whether some of the damage bond statutes may be unconstitutional is closely analogous to the question in the cost bond context. See Conover v. Hall, 11 Cal.3d 842, 851-852, 523 P.2d 682, 688, 114 Cal. Rptr. 642, 648 (1974) ("[w]e cannot discern why this factual difference [between cost bonds and damage bonds] has any legal significance"). However, the more numerous damage bond provisions present a subject of considerably broader scope. This recommendation is confined to the cost bond problem only.

of the merit of the plaintiff's claim and the reasonableness of the amount of the undertaking in light of the defendant's probable costs.²² If the plaintiff's claim is clearly meritorious, and thus there is not a reasonable probability that the defendant will become entitled to recover costs,²³ an undertaking may not constitutionally be required from the plaintiff.²⁴ The extent to which an undertaking may constitutionally be required when the merit of the plaintiff's claim is less certain depends upon the underlying legislative purpose of the particular cost bond statute.²⁵ At one extreme, where the undertaking is principally for security, an undertaking may constitutionally be required in all except those few cases where there is "no reasonable possibility" that the plaintiff will become liable for costs.²⁶ At the other extreme, where the undertaking is principally to deter frivolous claims, it appears that an undertaking may constitutionally be required only in "actions

22. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).
23. Of course, the plaintiff may become liable for the defendant's costs notwithstanding a meritorious claim if, for example, the defendant makes a statutory offer to compromise under Code of Civil Procedure Section 997 or 998 and the plaintiff fails to achieve a larger recovery.
24. See *Bell v. Burson*, 402 U.S. 535, 540 (1971); *Beaudreau v. Superior Court*, 14 Cal.3d 448, 459, 535 P.2d 713, 719-720, 121 Cal. Rptr. 585, 591-592 (1975); *Rios v. Cozens*, 7 Cal.3d 792, 499 P.2d 979, 103 Cal. Rptr. 299, (1972).
25. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975) (the hearing is "to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement").
26. See *Bell v. Burson*, 402 U.S. 535, 540 (1971) (State of Georgia may not constitutionally require security in damages from uninsured motorist if there is "no reasonable possibility" of a judgment against him); *Beaudreau v. Superior Court*, 14 Cal.3d 448, 459, 535 P.2d 713, 719-720, 121 Cal. Rptr. 585, 591-592 (1975); *Rios v. Cozens*, 7 Cal.3d 792, 794, 499 P.2d 979, 103 Cal. Rptr. 299, (1972) (Department of Motor Vehicles must, before requiring security from uninsured motorist, determine that there is a "reasonable possibility" of a judgment against him).

lacking merit."²⁷ Thus, to determine the constitutionally permissible reach of a cost bond statute, it is necessary to examine the underlying legislative purpose of the statute.

In the case of the nonresident plaintiff,²⁸ the purpose of the undertaking is to secure a possible judgment for costs in the defendant's favor.²⁹ Hence, an undertaking for costs may be required in all cases except those where there is no reasonable possibility that the plaintiff will become liable for costs. In all of the remaining cost bond statutes,

27. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 464, 535 P.2d 713, 713, 121 Cal. Rptr. 535, 595 (1975). The precise standard for determining when an action lacks merit is not articulated in *Beaudreau*. A statute designed to deter frivolous claims and limiting the undertaking to those cases where there is no reasonable possibility that the plaintiff will prevail would clearly withstand constitutional attack. Cf. Code Civ. Proc. § 391.1 (no "reasonable probability" that plaintiff will prevail), §§ 1029.5, 1029.6 ("no reasonable possibility" that plaintiff has a cause of action); Corp. Code § 800(c)(1) ("no reasonable possibility" that action will benefit corporation or shareholders). A more liberal undertaking requirement, excusing the plaintiff from giving security only when it appears more likely than not that he will prevail, would be less directly related to the statutory purpose of deterring frivolous claims, but yet might withstand constitutional attack. Cf. *Randone v. Appellate Dep't*, 5 Cal.3d 536, 563, 488 P.2d 13, 31, 96 Cal. Rptr. 709, 727 (1971) (prejudgment attachment may be constitutionally permitted after hearing on "probable validity" of plaintiff's claim). As a matter of policy, it would appear preferable to excuse the plaintiff from filing an undertaking when his claim is real and substantial, although not probably valid, since this will serve the statutory purpose of weeding out frivolous claims without impairing bona fide ones.

28. See Code Civ. Proc. § 1030.

29. *Myers v. Carter*, 178 Cal. App.2d 622, 625, 3 Cal. Rptr. 205, 207 (1960) (undertaking requirement is in recognition of "the probable difficulty or impracticability of enforcing judicial mandates against persons not dwelling within the jurisdiction of the courts").

the purpose is to deter groundless claims.³⁰ Here, the undertaking may be required only in "actions lacking merit."³¹

RECOMMENDATIONS

The Commission recommends the enactment of a uniform statute applicable to all actions and special proceedings, in which an undertaking for costs is authorized. There is no sound reason for continuing the individualized treatment of undertakings in the existing cost bond statutes. A table comparing the important similarities and differences of the existing cost bond statutes and the Commission's recommended statute is set forth following the recommended statute.

The Commission recommends that the following provisions be included in the uniform statute:

(1) Allow the defendant to move for the undertaking at any time until final judgment is entered.

(2) Require the moving party (defendant) to show its probable allowable costs; allow the plaintiff to defeat the motion for an undertaking by showing that there is a reasonable probability that the plain-

30. The purpose of the undertaking requirement in the vexatious litigant statute (Code Civ. Proc. §§ 391-391.6) is to prevent "abuse" by "litigants who constantly file groundless actions." 38 S.B.J. 663 (1963). In the defamation context (Code Civ. Proc. §§ 830-836), it is to discourage "the too common practice of instituting libel and slander suits inspired by mere spite or ill-will and without good faith." *Shell Oil Co. v. Superior Court*, 2 Cal. App.2d 348, 355, 37 P.2d 1078, 1081 (1934), modified, 5 Cal. App.2d 480, 42 P.2d 1049 (1935). The undertaking in the case of malpractice actions against architects, physicians, and others (Code Civ. Proc. §§ 1029.5, 1029.6) is to deter "frivolous" claims. Review of Selected 1969 Code Legislation at 65 (Cal. Cont. Ed. Bar. 1969); Review of Selected 1967 Code Legislation at 57 (Cal. Cont. Ed. Bar. 1967). The requirement in shareholder derivative suits (Corp. Code § 800) is to discourage "frivolous" suits. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 462, 535 P.2d 713, 722, 121 Cal. Rptr. 585, 594 (1975). And the undertaking requirement of the California Tort Claims Act was to deter "unmeritorious and frivolous litigation." *Id.* at 452, 535 P.2d at 715, 121 Cal. Rptr. at 587.

31. See note 27 supra.

tiff's claim is meritorious³² or, in case of a nonresident plaintiff, that there is no reasonable probability that the defendant will prevail in the action or special proceeding.

(3) Fix the amount of the undertaking as one and one-half times the defendant's probable allowable costs and expenses,³³ including attorney's fees when the recovery of attorney's fees is authorized in the action.

(4) Require the plaintiff to file the undertaking within 20 days after the court's order requiring it, or within such greater period as the court may allow.

(5) Provide for dismissal of the action for plaintiff's failure to furnish the undertaking within the time prescribed.

(6) Provide for the court approval of, and a procedure for the defendant to except to, the sureties.³⁴

32. Of course, even if the plaintiff ultimately prevails in the action, that will not necessarily defeat the defendant's right to recover costs. For example, the defendant may have made an offer to compromise pursuant to Code of Civil Procedure Sections 997 or 998. If the plaintiff's judgment is not more favorable than the offer, then the defendant will be entitled to recover costs. See generally 4 B. Witkin, California Procedure, Judgment §§ 87, 89-90, at 3247, 3248-3249 (2d ed. 1971). An undertaking statute could require the plaintiff, when a statutory offer to compromise has been made, to show that it will probably obtain a judgment greater than the amount of the offer in order to avoid the requirement of an undertaking. However, the disadvantages of injecting the issue of probable damages into the hearing on the motion for an undertaking appear to outweigh the additional settlement leverage which might be gained by such a provision.

33. See, e.g., Code Civ. Proc. § 515.010 ("not less than twice the value of the property"), § 539 (one-half of "total indebtedness or damages claimed"), § 677 (not greater than "double the amount of the debt or liability alleged to be due"), § 682a ("not less than twice the amount of the judgment"), § 710c (not greater than "double the amount for which the execution is levied"), § 917.1 ("double the amount of the judgment or order" unless given by licensed corporate surety; then "one and one-half times the amount of the judgment or order"), § 1203.60 ("150 percent of the amount of the claimed lien"), § 1710.50(c)(1) (not exceeding "double the amount of the judgment creditor's claim"), § 489.220(b) (equal to "the probable recovery for wrongful attachment"; statute effective January 1, 1977).

34. See, e.g., Code Civ. Proc. §§ 832-834.

(7) Provide for a mandatory stay of the action if the defendant's motion for an undertaking is filed within 30 days after service of summons, and for a discretionary stay if the motion is later filed.³⁵

(8) Authorize the court to increase or decrease the amount of the undertaking.³⁶

(9) Provide that the determination of the court on the motion for an undertaking shall have no effect on the merits of the action.³⁷

(10) Authorize direct recourse against the sureties when the defendant becomes entitled to recover costs.³⁸

(11) Make the undertaking procedure inapplicable to small claims court actions.³⁹

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35. By a 1975 amendment to the vexatious litigant statute (Code Civ. Proc. § 391.6) effective January 1, 1976, the Legislature continued the provision for a mandatory stay by the filing of a motion for an undertaking even when filed after the commencement of trial. Cal. Stats. 1975, Ch. 381, § 2. This will allow the defendant to use the motion as a dilatory tactic. It would appear preferable to bring the mandatory stay provision into play only when the motion is filed early in the litigation.
36. It is arguable that due process requires a provision for decreasing the undertaking when the defendant's probable costs appear less than upon the initial hearing. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 459-460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).
37. See, e.g., Code Civ. Proc. § 512.110.
38. See, e.g., Code Civ. Proc. §§ 1058a, 489.110, 489.120.
39. See, e.g., Educ. Code § 23175(c); Govt. Code §§ 947(b), 951(b).

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 391.1, 830, 1029.5, 1029.6, and 1030 of, to add Chapter 6.5 (commencing with Section 1040.1) to Title 14 of Part 2 of, and to repeal Sections 391.2, 391.3, 391.4, 391.5, 391.6, 831, 832, 833, 834, and 835 of, the Code of Civil Procedure, to amend Section 800 of the Corporations Code, to amend Section 23175 of the Education Code, and to amend Sections 947 and 951 of the Government Code, relating to undertakings as security for costs and expenses.

The people of the State of California do enact as follows:

Code of Civil Procedure § 391.1 (amended)

SECTION 1. Section 391.1 of the Code of Civil Procedure is amended to read:

391.1. In any litigation, at any time within 30 days after service of summons or other and equivalent process upon him, a defendant may move the court, upon notice and hearing, for an order requiring the any plaintiff who is a vexatious litigant to furnish security as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure. The motion must be based on the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.

Comment. This title is revised to incorporate the uniform procedures for undertakings for costs and expenses enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of The Code of Civil Procedure. Section 391.1 is amended to make the uniform procedure applicable to actions by a vexatious litigant. Sections 391.2 through 391.6 are superseded by the uniform procedures, and are therefore repealed.

Code of Civil Procedure § 391.2 (repealed)

SEC. 2. Section 391.2 of the Code of Civil Procedure is repealed.

~~391.2. At the hearing upon such motion the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.~~

Comment. See the Comment to Section 391.1.

Code of Civil Procedure § 391.3 (repealed)

SEC. 3. Section 391.3 of the Code of Civil Procedure is repealed.

~~391.3. If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that he will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of such moving defendant, security of such nature, in such amount, and within such time, as the court shall fix. The amount of such security may thereafter from time to time be increased or decreased in the court's discretion upon a showing that the security provided has or may become inadequate or excessive.~~

Comment. See the Comment to Section 391.1.

Code of Civil Procedure § 391.4 (repealed)

SEC. 4. Section 391.4 of the Code of Civil Procedure is repealed.

~~391.4. When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.~~

Comment. See the Comment to Section 391.1.

Code of Civil Procedure § 391.5 (repealed)

SEC. 5. Sections 391.5 of the Code of Civil Procedure is repealed.

~~391.5. Upon the termination of the litigation the defendant shall have recourse to the security in such amount as the court shall determine.~~

Comment. See the Comment to Section 391.1.

Code of Civil Procedure § 391.6 (repealed)

SEC. 6. Section 391.6 of the Code of Civil Procedure is repealed.

~~391.6. When a motion pursuant to Section 391.4 is filed the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof.~~

Comment. See the Comment to Section 391.1.

Code of Civil Procedure § 330 (amended)

SEC. 7. Section 330 of the Code of Civil Procedure is amended to read:

~~330. Before issuing the summons in an action for libel or slander,~~

the clerk shall require a written undertaking on the part of the plaintiff in the sum of of five hundred dollars (<\$500>), with at least two- competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment, they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. An action brought without filing the required undertaking shall be dismissed.

In any action for libel or slander, the defendant may move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure.

Comment. This section is amended to incorporate the the uniform procedures for undertakings for costs and expenses enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure to satisfy the constitutional requirement of a due process hearing before an undertaking may be required. See Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). Sections 831 through 835 are superseded by the uniform procedures, and are therefore repealed.

Code of Civil Procedure § 831 (repealed)

SEC. 8. Section 831 of the Code of Civil Procedure is repealed.

~~831-~~ Each surety shall annex to the undertaking an affidavit that he is a resident and householder or freeholder within the the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Comment. See the Comment to Section 830.

Code of Civil Procedure § 832 (repealed)

SEC. 9. Section 832 of the Code of Civil Procedure is repealed.

~~832. Within 10 days after the service of the summons, any defendant may give to the plaintiff or his attorney notice that he excepts to the sureties and requires their justification before a judge of the court at a specified time and place. The time shall be not less than five-ormore than 10 days after the service of the notice, except by- consent of parties. The qualifications of the sureties shall be as required in their affidavits.~~

Comment. See the Comment to Section 830.

Code of Civil Procedure § 833 (repealed)

SEC. 10. Section 833 of the Code of Civil Procedure is repealed.

~~833. For the purpose of justification each surety shall attend before the judge at the time and place mentioned in the notice, and may be examined on oath touching his sufficiency in such manner as the judge deems proper. The examination shall be reduced to writing if either party desires it.~~

Comment. See the Comment to Section 830.

Code of Civil Procedure § 834 (repealed)

SEC. 11. Section 834 of the Code of Civil Procedure is repealed.

~~834. If the judge finds the undertaking sufficient, he shall annex the examination to the undertaking and endorse his approval upon it. If the sureties fail to appear or the judge finds either~~

surety insufficient; he shall order a new undertaking to be given.
The judge may at any time order a new or additional undertaking upon proof that the sureties have become insufficient. If a new or additional undertaking is ordered, all proceedings in the case shall be stayed until the new undertaking is executed and filed, with the approval of the judge.

Comment. See the Comment to Section 830.

Code of Civil Procedure § 835 (repealed)

SEC.12. Section 835 of the Code of Civil Procedure is repealed.

~~835. If the undertaking as required is not filed in five days after the order therefor, the judge or court shall order the action dismissed.~~

Comment. See the Comment to Section 830.

Code of Civil Procedure § 1029.5 (amended)

SEC. 13. Section 1029.5 of the Code of Civil Procedure is amended to read:

1029.5. ~~(a)~~ Whenever a complaint for damages is filed against any architect, landscape architect, engineer, building designer, or land surveyor, duly licensed as such under the laws of this state, in an action for error, omission, or professional negligence in the creation and preparation of plans, specifications, designs, reports or surveys which are the basis of work performed or agreed to be performed on real property, but not including any action for bodily injury or wrongful death, any such defendant may, within 30 days after service of summons, move the court for an order, upon notice and hearing, requir-

ing the plaintiff to furnish a written undertaking, with at least two sufficient sureties, in the sum of five hundred dollars (\$500) as security for the cost of defense as provided in subdivision (d), which may be awarded against such plaintiff as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure. Such motions shall be supported by an affidavit showing that the claim against such defendant is frivolous.

At the hearing upon such motion, the court shall order the plaintiff to file such security if the defendant shows to the satisfaction of the court that (i) the plaintiff would not suffer undue economic hardship in filing such written undertaking, and (ii) there is no reasonable possibility that the plaintiff has a cause of action against each named defendant with respect to whom the plaintiff would otherwise be required to file such written undertaking. No appeal shall be taken from any order made pursuant to this subdivision to file or not to file such security.

A determination by the court that security either shall or shall not be furnished or shall be furnished as to one or more defendants and not as to others, shall not be deemed a determination of any one or more issues in the action or of the merits thereof. If the court,

upon any such motion, makes a determination that a written undertaking be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court.

(b) This section does not apply to a complaint for bodily injury or for wrongful death, nor to an action commenced in a small claims court.

~~(c)~~ Whenever more than one such defendant is named, the undertaking shall be increased to the extent of five hundred dollars ~~(\$500)~~ for each additional defendant in whose favor such undertaking is ordered not to exceed the total of three thousand dollars ~~(\$3,000)~~.

~~(d)~~ In any action requiring a written undertaking as provided in this section, upon the dismissal of the action or the award of judgment to the defendant, the court shall require the plaintiff to pay the defendant's costs of defense authorized by law. Any sureties shall be liable for such costs in an amount not to exceed the sum of five hundred dollars ~~(\$500)~~ for each defendant with respect to whom such sureties have executed a written undertaking. If the plaintiff prevails in the action against any defendant with respect to whom such security has been filed, such defendant shall pay the cost to plaintiff of obtaining such written undertaking.

Comment. This section is amended to incorporate the uniform procedures for undertakings for costs and expenses enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure.

Code of Civil Procedure § 1029.6 (amended)

SEC. 14. Section 1029.6 of the Code of Civil Procedure is amended to read:

1029.6. ~~(a)~~ Whenever a complaint for damages for personal injuries is filed against a physician and surgeon, dentist, registered nurse, dispensing optician, optometrist, pharmacist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or

veterinarian, duly licensed as such under the laws of this state, or a licensed hospital as the employer of any such person, in an action for error, omission, or negligence in the performance of professional services, or performance of professional services without consent, any such defendant may, within six months after service of summons, move the court for an order, upon notice to plaintiff and all defendants having appeared in the action, and hearing, requiring the plaintiff to furnish a written undertaking, with at least two sufficient sureties, in a sum not to exceed five hundred dollars (\$500), or to deposit such sum or equivalent security approved by the court with the clerk of the court, as security for the costs of defense as provided in subdivision (d), which may be awarded against such plaintiff as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure. Such motion shall be supported by affidavit showing that the claim against such defendant is frivolous. Any defendant having appeared in the action and within 30 days after receipt of notice may join with the moving party requesting an order under this section as to such additional defendant. The failure of any defendant to join with the moving party shall preclude each such defendant from subsequently requesting an order under this section.

At the hearing upon such motion, the court shall order the plaintiff to furnish such security if the defendant shows to the satisfaction of the court that (i) the plaintiff would not suffer undue economic hardship in filing such written undertaking or making such deposit

and (ii) there is no reasonable possibility that the plaintiff has a cause of action against each named defendant with respect to whom the plaintiff would otherwise be required to file such written undertaking or make such deposit.

A determination by the court that security either shall or shall not be furnished or shall be furnished as to one or more defendants and not as to others, shall not be deemed a determination of any one or more issues in the action or of the merits thereof. If the court, upon any such motion, makes a determination that a written undertaking or deposit be furnished by the plaintiff as to any one or more defendant, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court.

(b) This section does not apply to a complaint in an action commenced in a small claims court.

(c) Whenever more than one such defendant is named, the undertaking or deposit shall be increased to the extent of not to exceed five hundred dollars (\$500) for each additional defendant in whose favor such undertaking or deposit is ordered, not to exceed the total of one thousand dollars (\$1,000).

(d) In any action requiring a written undertaking or deposit as provided in this section, upon the dismissal of the action or the award of judgment to the defendant, the court shall require the plaintiff to pay the defendant's court costs. Any sureties shall be liable for such costs in an amount not to exceed the sum of five

hundred dollars (\$500) or the amount of the undertaking, whichever is lesser, for each defendant with respect to whom such sureties have executed a written undertaking or the plaintiff has made a deposit. If the plaintiff prevails in the action against any defendant with respect to whom such security has been filed, such defendant shall pay the costs to plaintiff incurred in obtaining such written undertaking or deposit and defending the motion for dismissal authorized by this section.

(e) Whenever a complaint described in subdivision (a) requests an award of exemplary damages, any defendant against whom the damages are sought may move the court for an ex parte order requiring the plaintiff to file a corporate surety bond, approved by the court, or make a cash deposit in an amount fixed by the court. Upon the filing of motion, the court shall require the plaintiff to file the bond or make the cash deposit. In no event shall the bond or cash deposit be less than two thousand five hundred dollars (\$2,500). The bond or cash deposit shall be conditioned upon payment by the plaintiff of all costs and reasonable attorney's fees incurred by the defendant in defending against the request for the award of exemplary damages, as determined by the court, if the plaintiff fails to recover any exemplary damages. The order requiring the bond or cash deposit shall require the bond to be filed or cash deposit to be made with the clerk of the court not later than 30 days after the order is served. If the bond is not filed or the cash deposit is not made within such period, upon the motion of the defendant, the court shall strike the portion of the complaint which requests the award of exemplary damages.

(f) Any defendant filing a motion under this section or joining with a moving party under this section is precluded from subsequently filing a motion for summary judgment.

(g) Any defendant filing a motion for summary judgment is precluded from subsequently filing a motion, or joining with a moving party, under this section.

Comment. This section is amended to incorporate the uniform procedures for undertakings for costs and expenses enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure.

Code of Civil Procedure § 1030 (amended)

SEC. 15. Section 1030 of the Code of Civil Procedure is amended to read:

1030. (a) When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceedings must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, or with the judge if there be no clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars (\$300). A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional

undertaking is executed and filed. Any stay of proceedings granted under the provisions of this section shall extend to a period 10 days after service upon the defendant of written notice of the filing of the required undertaking.

After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge, may order the action or special proceeding to be dismissed. the defendant may move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure.

(b) Notwithstanding Section 1040.3, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for the allowable costs and expenses which may be awarded against the plaintiff if the court, after hearing, finds all of the following:

(1) That the plaintiff is a plaintiff described in subdivision (a) of this section.

(2) That the defendant will have incurred allowable costs, expenses, or both, by the conclusion of the action or special proceeding.

(3) That the plaintiff has failed to establish that there is no reasonable probability that the defendant will obtain judgment in action the or special proceeding.

Comment. This section is amended to incorporate the uniform procedures for undertakings for costs and expenses enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code

of Civil Procedure, except that this section contains a special provision for determining the degree of merit of the plaintiff's claim which must be shown for the plaintiff to defeat the motion for an undertaking. The purpose of this section is primarily to secure an award of costs which may be made in favor of the defendant which would otherwise be difficult to enforce against a nonresident plaintiff, and not merely to deter frivolous litigation. Therefore, this section requires an undertaking in all cases except where there is no reasonable probability that the defendant will prevail in the action. See Bell v. Burson, 402 U.S. 535, 540 (1971).

Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure (added)

SEC. 16. Chapter 6.5 (commencing with Section 1040.1) is added to Title 14 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 6.5. UNDERTAKINGS FOR COSTS AND EXPENSES

§ 1040.1. Application of chapter

1040.1. (a) This chapter applies only to an action or special proceeding to which it is specifically made applicable by statute.

(b) This chapter does not apply to any action commenced in a small claims court.

Comment. Subdivision (a) of Section 1040.1 limits the application of this chapter to actions or special proceedings where a separate statute so provides. E.g., Code Civ. Proc. §§ 391.1 (actions by vexatious litigant in propria persona), 830 (actions for libel and slander), 1029.5 (malpractice actions against architects and others), 1029.6 (malpractice actions against licensed health professionals), 1030 (actions by nonresident plaintiff); Corp. Code § 800 (shareholder derivative suits); Educ. Code § 23175 (actions against Regents of the University of California); Govt. Code § 947 (actions against public entity), 951 (actions against public employee). Also the chapter does not apply to a myriad of situations where a damage bond may be required. Subdivision (b) makes the chapter not applicable to an action commenced in a small claims court.

This chapter affords a procedure for the defendant to compel the plaintiff to furnish an undertaking for costs and expenses which comports with constitutional due process requirements. See Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

§ 1040.2 Motion of plaintiff to require undertaking for costs; supporting affidavit

1040.2. At any time until final judgment is entered, the defendant may move the court, upon notice, for an order requiring the plaintiff to furnish a written undertaking as security for the allowable costs and expenses which may be awarded against the plaintiff. The defendant shall, in an affidavit or declaration in support of the motion, set forth with particularity the allowable costs and expenses it expects to have incurred by the conclusion of the action or special proceeding.

Comment. This Section authorizes the defendant to move for an order requiring the plaintiff, in actions to which this chapter is applicable, to furnish a written undertaking as security for the defendant's allowable costs and expenses. This includes reasonable attorney's fees incurred by the defendant when the recovery of attorney's fees is authorized in the particular action or proceeding. See, e.g., Code Civ. Proc. §§ 391(c), 836; Corp. Code § 800(d).

§ 1040.3. Hearing and determination of motion

1040.3. The court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for the allowable costs and expenses which may be awarded against the plaintiff if the court, after hearing, finds all of the following:

(a) The action or special proceeding is one in which such an undertaking may be required.

(b) The defendant will have incurred allowable costs, expenses, or both, by the conclusion of the action or special proceeding.

(c) The plaintiff has failed to establish that there is a reasonable probability that such plaintiff will obtain judgment in the action or special proceeding.

Comment. This section sets forth the conditions upon which the defendant will become entitled to an order requiring the plaintiff to file an undertaking. The defendant will have made a prima facie case of entitlement when it shows that the action is one in which an undertaking may be required and that it will have incurred allowable costs and expenses by the conclusion of the action. The court will usually be able to take judicial notice that the action is a proper one for an undertaking, and that some costs (e.g., filing fee) have been incurred by the defendant. See Evid. Code §§ 452, 453. The defendant will have the burden of showing its probable future costs to furnish the basis for determining the amount of the undertaking.

The plaintiff, by showing that there is a reasonable probability that it will prevail in the action, will defeat the motion. This is so even though it may appear likely that the defendant will ultimately be entitled to recover costs, e.g., by having made an offer to compromise under Code of Civil Procedure Sections 997 or 998, or by recovering a net judgment on a cross-complaint. See 4 B. Witkin, California Procedure, Judgment §§ 87, 90, at 3247, 3249 (2d ed. 1971).

The "reasonable probability" standard of this section has been upheld in a similar statute against the contention that the language was fatally uncertain. See Taliaferro v. Hoogs, 236 Cal. App.2d 521, 529, 46 Cal. Rptr. 147, 152 (1965).

At the hearing the usual showing is by declarations and counterdeclarations, although the court may receive oral and documentary evidence as well. 4 B. Witkin, California Procedure, Proceedings Without Trial §§ 24-25, at 2693-2694 (2d ed. 1971).

§ 1040.4. Amount of undertaking

1040.4. The amount of the undertaking shall be an amount equal to one and one-half times the probable allowable costs and expenses the defendant has shown it will have incurred by the conclusion of the

action or special proceeding. The amount of the undertaking initially determined may be increased or decreased by the court, after further hearing upon noticed motion, if the court determines that the undertaking has or may become inadequate or excessive because of a change in the amount of the probable allowable costs, expenses, or both, which the defendant will have incurred by the conclusion of the action or special proceeding.

Comment. This section sets the amount of the undertaking at one and one-half times the defendant's probable allowable costs and expenses, including attorney's fees where authorized. Although the language of this section is mandatory, the court has the common law authority to dispense with the undertaking if the plaintiff is financially unable to comply. E.g., Conover v. Hall, 11 Cal. 3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974). If the court orders the undertaking increased as authorized in this section, the time period for compliance provided in Section 1040.5 applies.

§ 1040.5. Time for filing undertaking; effect of failure to file

1040.5. Any plaintiff required to file, refile, or increase an undertaking shall do so within 20 days after service of the court's order requiring it or within such greater time as the court may allow. If a plaintiff fails to comply with this section, the plaintiff's action or special proceeding shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

Comment. This Section requires the plaintiff to file the undertaking within 20 days after the order requiring it, or within such greater time as the court may allow, or suffer dismissal as to the moving defendant. Failure to file within the prescribed time is not jurisdictional, and the court may accept a late filing. E.g., Boyer v. County of Contra Costa, 235 Cal. App. 2d 111, 115-118, 45 Cal. Rptr. 58, 61-63 (1965).

§ 1040.6. Sureties

1040.6. Except as provided in Section 1056, the undertaking shall have at least two sufficient sureties to be approved by the court. If the undertaking is given by individual sureties, the defendant may give notice to the plaintiff that the defendant excepts to any surety and requires the appearance of such surety before the court at a time specified in the notice for examination under oath concerning the surety's sufficiency. If the surety fails to appear, or if the court finds the undertaking insufficient, the court shall order that a new undertaking be given.

Comment. This section requires the undertaking to have at least two sufficient sureties, except, where the surety is an insurer described in Section 1056, one such surety will suffice. This section sets forth the procedure for excepting to an individual surety. Exceptions to a corporate surety are as provided in Sections 1057a and 1057b. If the court finds a surety insufficient and orders that a new undertaking be given, the time period for compliance provided in Section 1040.5 applies.

§ 1040.7. Stay of proceedings

1040.7. (a) If the defendant's motion for an order requiring an undertaking is filed within 30 days after service of summons on such defendant, no pleading need be filed by such defendant and all further proceedings shall be stayed until 10 days after the motion is denied or, if granted, until 10 days after the required undertaking has been filed and the defendant has been given written notice of the filing.

(b) If the defendant's motion for an undertaking is filed later than 30 days after service of summons on such defendant, if the defendant excepts to the sureties, or if the court orders the amount of

the undertaking increased, the court may in its discretion stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been given written notice of the filing.

Comment. This section provides for a mandatory stay of the proceedings if the motion for an undertaking is filed within 30 days after the moving defendant is served with summons, and for a discretionary stay if the motion is later filed. The court may thus consider the timeliness of the motion, and whether a stay might delay trial.

§ 1040.8. Limitation on effect of court's determinations

1040.8. The determinations of the court under this chapter shall have no effect on the determination of any issues in the action or special proceeding other than the issues relevant to any motion to require, increase, or decrease an undertaking, nor shall they affect the rights of any party in any other action or proceeding arising out of the same claim. The determinations of the court under this chapter shall not be given in evidence nor referred to in the trial of any such action or proceeding.

Comment. This section prevents any determination of the court on a motion for an undertaking from affecting the merits of the litigation.

§ 1040.9. Enforcement of liability on undertaking

1040.9. If at the conclusion of the action or special proceeding the defendant is legally entitled to recover costs, expenses, or both, the defendant may proceed against the sureties on the undertaking provided pursuant to this chapter as provided in Section 1058a. A motion to enforce liability on the undertaking may not be filed more than one year after the judgment becomes final. A judgment of liability on the undertaking shall be in favor of the defendant and against the sureties

and may be enforced by the defendant directly against the sureties. The liability of the surety is limited to the amount of the undertaking. Nothing in this section affects any right of subrogation of a surety against its principal.

Comment. This section supplements Section 1058a which allows a motion to enforce liability on the undertaking to be directed to the sureties. Although Section 2845 of the Civil Code formerly allowed a surety to require its creditor to proceed first against its principal, a 1972 amendment to Section 2845 made that expressly "subject to the provisions of Section 1058a" Cal. Stats. 1972, Ch. 391, § 1. Section 1040.9 makes clear that the liability may be enforced directly against the sureties. The one-year limitation period of this section for such a motion does not affect the limitation period applicable to an independent action against the surety. See, e.g., 2 B. Witkin, California Procedure, Actions § 298, at 1144 (2d ed. 1970). This Section limits only the sureties' liability. The sureties' principal (the plaintiff) remains liable to the full extent of the defendant's allowable costs and expenses.

Corporations Code § 800 (amended)

SEC. 17. Section 800 of the Corporations Code is amended to read:

800. (a) As used in this section, "corporation" includes an unincorporated association; "board" includes the managing body of an unincorporated association; "shareholder" includes a member of an unincorporated association; and "shares" includes memberships in an unincorporated association.

(b) No action may be instituted or maintained in right of any domestic or foreign corporation by any holder of shares or of voting trust certificates of such corporation unless both of the following conditions exist:

(1) The plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or any part thereof of which plaintiff complains or that plaintiff's shares or voting trust certificates thereafter devolved upon plaintiff by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of; provided, that any shareholder who does not meet such requirements may nevertheless be allowed in the discretion of the court to maintain such action on a preliminary showing to and determination by the court, by motion and after a hearing, at which the court shall consider such evidence, by affidavit or testimony, as it deems material, that (i) there is a strong prima facie case in favor of the claim asserted on behalf of the corporation, (ii) no other similar action has been or is likely to be instituted, (iii) the plaintiff acquired the shares before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains, (iv) unless the action can be maintained the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty, and (v) the requested relief will not result in unjust enrichment of the corporation or any shareholder of the corporation; and

(2) The plaintiff alleges in the complaint with particularity his plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file.

(c) ~~In any action referred to in subdivision (b), at any time within 30 days after service of summons upon the corporation or upon any defendant who is an officer or director of the corporation, or held such office at the time of the acts complained of, the corporation or such~~
any defendant who is an officer or director of the corporation, or held such office at the time of the acts complained of, may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security a written undertaking as hereinafter provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure . The motion shall be based upon one or both of the following grounds:

~~(1) That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its shareholders.~~

~~(2) That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity.~~

~~The court on application of the corporation or any defendant may, for good cause shown, extend the 30-day period for an additional period or periods not exceeding 60 days.~~

~~(d) At the hearing upon any motion pursuant to subdivision (c), the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material (1) to the ground or grounds upon which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorneys' fees, of the corporation and the moving party which will be incurred in the defense of the action. If the court determines, after hearing the evidence adduced by the parties, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security, not to exceed fifty thousand dollars (\$50,000), to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation in connection with the action, including expenses for which the corporation may become liable pursuant to Section 317. A ruling by the court on the motion shall not be a determination of any issue in the action or the merits thereof. The amount of the security~~

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~~may thereafter be increased or decreased in the discretion of the court upon a showing that the security provided has or may become inadequate or is excessive, but the court may not in any event increase the total amount of the security beyond fifty thousand dollars (\$50,000). If the court, upon any such motion, makes a determination that security shall be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be fixed by the court. The corporation and the moving party shall have recourse to the security in such amount as the court shall determine upon the termination of the action.~~

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Notwithstanding Section 1040.3 of the Code of Civil Procedure, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order, but not to exceed fifty thousand dollars (\$50,000), as security for the allowable costs and expenses, including attorney's fees, which may be awarded against the plaintiff if the court, after hearing, finds all of the following:

- (1) That the moving party is a defendant described in subdivision (c).
- (2) That the moving party will have incurred allowable costs, expenses, or both, by the conclusion of the action.
- (3) Either that the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity, or that the plaintiff has failed to establish that there is a reasonable probability that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its shareholders.

(e) If the plaintiff shall, either before or after a motion is made pursuant to subdivision (c), or any order or determination pursuant to such motion, post good and sufficient bond or bonds in the aggregate amount of fifty thousand dollars (\$50,000) to secure the reasonable expenses of the parties entitled to make the motion, the

plaintiff has complied with the requirements of this section and with any order for security theretofore made pursuant hereto, and any such motion then pending shall be dismissed and no further or additional bond or other security shall be required.

~~(f) If a motion is filed pursuant to subdivision (e), no pleading need be filed by the corporation or any other defendant and the prosecution of the action shall be stayed until 10 days after the motion has been disposed of.~~

Comment. This section is amended to incorporate the uniform procedures for undertakings for costs and expenses enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure, except that this section contains special provisions concerning the grounds for the motion. A defendant described in subdivision (c) who will incur costs and expenses in the action will be entitled to an order requiring security either if the defendant shows that it did not participate in the transaction complained of in any capacity, or the plaintiff fails to show that there is a reasonable probability that the action will benefit the corporation or its shareholders. The "reasonable probability" standard of this section has been upheld against the contention that the language was fatally uncertain. See Taliaferro v. Hoogs, 236 Cal. App. 2d 521, 529, 46 Cal. Rptr. 147, 152 (1965).

Education Code § 23175 (amended)

SEC. 18. Section 23175 of the Education Code is amended to read:

23175. (e) At any time after the filing of the complaint in in any action against the Regents of the University of California, the regents may

~~file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars (\$100) for the plaintiff or in the case of multiple plaintiffs in the amount of two hundred dollars (\$200), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed.~~

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strikeout

move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure.

(b) If judgment is rendered for the regents in any action against the regents, allowable costs incurred by the regents in the action shall be awarded against the plaintiff.

(c) This section does not apply to an action commenced in a small claims court.

Comment. This section is amended to incorporate the uniform procedures enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure to satisfy the constitutional requirement of a due process hearing before an undertaking may be required. See Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

Government Code § 947 (amended)

SEC. 19. Section 947 of the Government Code is amended to read:

947. (a) At any time after the filing of the complaint in In any action against a public entity, the public entity may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ~~(\$100)~~ for each plaintiff or in the case

~~of multiple plaintiffs in the amount of two hundred dollars (\$200), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed.~~

move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure.

(b) This Section does not apply to an action commenced in a small claims court.

Comment. This section is amended to incorporate the uniform procedures enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure to satisfy the constitutional requirement of a due process hearing before an undertaking may be required. See Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

Government Code § 951 (amended)

SEC. 20. Section 951 of the Government Code is amended to read:

951. (a) At any time after the filing of the complaint in in any action against a public employee or

~~former public employee, if a public entity undertakes to provide for the defense of the action, the attorney for the public employee may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars (\$100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of the demand therefor, his action shall be dismissed.~~

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strikeout

move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure .

(b) This Section does not apply to an action commenced in a small claims court.

Comment. This section is amended to incorporate the procedures enacted in Chapter 6.5 (commencing with Section 1040.1) of Title 14 of Part 2 of the Code of Civil Procedure to satisfy the constitutional requirement of a due process hearing before an undertaking may be required. See Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

APPENDIX I

	Commission's recommended statute	Actions against public entities, employees, & U.C. Regents	Shareholder derivative suits	Nonresident plaintiff	Malpractice actions against architects & others	Malpractice actions against health professionals	Libel &
Notice & hearing?	YES	NO	YES	NO	YES	YES	Clerk request for summary
Time for request by defendant for undertaking?	Any time before judgment	Any time	Within 30 days after service of summons	Any time	Within 30 days after service of summons	Within 6 months after service of summons	
Undertaking may be required:	If no reasonable probability plaintiff will prevail	Whether or not plaintiff's claim is meritorious	If no reasonable possibility that action will benefit corporation or shareholders	Whether or not plaintiff's claim is meritorious	If no reasonable possibility that plaintiff has a cause of action	If no reasonable possibility that plaintiff has a cause of action	Whether not plaintiff's claim meritorious
Amount of undertaking	1-1/2 times defendant's probable recoverable expenses	\$100 for 1 plaintiff, \$200 for multiple plaintiffs, or as court may fix	Court's discretion not to exceed \$50,000	Not to exceed \$300	\$500 per defendant not to exceed \$3,000	Not to exceed \$500 per defendant or \$1,000 total	Flat \$500
Time for plaintiff to file undertaking	20 days or such greater time as court may allow	20 days	Court's discretion	30 days	Court's discretion	Court's discretion	5 day

40. This provision was enacted in Cal. Stats. 1975, Ch. 381, § 1, which becomes effective January 1, 1976. Until then, the defendant in an action by a vexatious litigant in propria persona must move for an undertaking "within 30 days after service of summons" Code Civ. Proc. § 391.1.

APPENDIX I
(continued)

Provision for stay until undertaking furnished?	YES	Commission's recommended statute	NO	Actions against public entities, employees, & U.C. Regents	YES	Shareholder derivative suits	YES	Nonresident plaintiff	NO	Malpractice actions against architects & others	NO	Malpractice actions against health professionals	YES, if new or additional undertaking ordered	Libel & slander
Provision for court approval of sureties?	YES		YES		YES		YES		Implied		YES		YES	
Consequences of plaintiff's failure to file undertaking	Dismissal		Dismissal		Dismissal		Dismissal		Dismissal		Dismissal		Dismissal	
Provision for increasing or decreasing amount of undertaking?	YES		NO		YES		YES		NO		NO		NO	YES
Provision that findings not to affect merits?	YES		(No hearing)		YES		(No hearing)		YES		YES		YES	(No hearing)
Provision for direct recourse against 41 surety?	YES		NO		YES		NO		YES		YES		NO	

41. Even where direct recourse against the surety is not specifically authorized in the statute referred to in this table, it is authorized by the general provisions of Code of Civil Procedure Section 1058a.