

## First Supplement to Memorandum 75-74

Subject: Study 52.80 - Undertakings for Costs

At the October, 1975, meeting, the Commission considered Memorandum 75-74 and the attached staff draft of a tentative recommendation relating to undertakings for costs and expenses. The Commission made the following decisions:

1. The recommendation should reflect that the Commission does not necessarily endorse the policy underlying the undertaking requirement, and that the Commission expresses no view concerning the kinds of cases in which an undertaking should be required.
2. Where the purpose of the undertaking is to deter frivolous litigation, the undertaking should be limited to cases in which there is "no reasonable possibility" that the plaintiff will prevail, rather than the "no reasonable probability" standard recommended by the staff.
3. Initially, the burden of producing evidence in support of the motion should be on the moving defendant.
4. The staff should review the question of whether the defendant's right to move for an undertaking should be cut off prior to trial.

The staff has redrafted the tentative recommendation incorporating the Commission decisions referred to in paragraphs 1, 2, and 3 above, and has made other editorial changes. The revised staff draft is attached to this supplement.

Time for Making Motion

The staff has reviewed the question of whether the defendant's right to move for an undertaking should be cut off prior to trial, and concludes that no cutoff should be imposed. The Legislature has just amended the vexatious litigant statute (Code Civ. Proc. § 391.1) to extend the former limit ("within 30 days after service of summons") to "any time until final judgment is entered." Cal. Stats. 1975, Ch. 381, § 1. The argument for allowing the motion later in the litigation is no stronger in the case of the vexatious litigant statute than in the case of any other cost bond statute, since the acts which make the plaintiff a vexatious

litigant will have occurred before service of summons in the action in which an undertaking is sought. See Code Civ. Proc. § 391(b)(five unsuccessful actions by plaintiff in propria persona in preceding seven-year period, or repeated relitigation of issue previously determined). We should therefore defer to this recent declaration of legislative policy. A copy of the bill as introduced (SB 1236) is attached hereto as Exhibit I.

The staff further recommends that the language which authorizes the motion "[a]t any time until final judgment is entered" be amended to authorize the motion "[a]t any time after the filing of the complaint . . . ." This will avoid the question of what constitutes a final judgment, and will make clear that the motion may be made after an appeal is perfected. This is the language employed in existing Government Code Sections 947 and 951, and Education Code Section 23175.

#### Burden of Proof/Burden of Producing Evidence

The staff has implemented the Commission's directive set forth in paragraph (3) above by requiring the defendant to make "a showing" in support of his motion. The staff has concluded that "burden of proof" and "burden of producing evidence" language should be avoided because of the analytical problems such language creates. These problems are discussed briefly here.

The assignment of the burden of proof on an issue amounts to a directive to the court to decide the issue against the party having the burden of proof when the evidence is equally weighty on each side. See Evid. Code §§115, 190. It implies a weighing of the evidence and an assessment of its credibility, a process which should be avoided on this motion where the evidence will not be fully developed and proof will be principally by affidavit.

Moreover, in ruling on the motion for an undertaking, the court must decide whether there is any reasonable possibility that the plaintiff will prevail,

that is, will be able to meet his burden of proof at trial. If the showing the defendant must make on the motion is cast in terms of "burden of proof," the defendant will have the burden of proving that the plaintiff will be unable to meet his burden of proof. Although this is not a logical impossibility, it is confusing.

If "burden of proof" language is avoided but the defendant is required to meet an initial burden of producing evidence to negate the plaintiff's claim, he may be able to do no more than state that he knows of no evidence to support it. This may be insufficient to create an inference that no such evidence exists,<sup>1</sup>

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1. This is the "negative evidence" problem. See, e.g., B. Witkin, California Evidence § 315, at 278 (2d ed. 1966); 2 J. Wigmore, Evidence § 664, at 777-782 (3d ed. 1940). A witness who was in a position to hear may testify that he did not hear a warning bell or whistle to prove that no signal was given. B. Witkin, supra. And the absence of a business entry is, under certain conditions, admissible to prove that an event did not occur. See Evid. Code § 1272. Such evidence is probative when it appears likely that, had the event occurred, the witness would have observed it, there would be a business entry reflecting the event, or other direct evidence would exist. However, the probative value of such evidence may be very weak, as in the case of lack of news of a person to show he is deceased. See 2 J. Wigmore, supra § 664, at 782.

Of course, a negative proposition may be proved by direct evidence (e.g., evidence of timely payment to prove no default), in which case no negative evidence problem is involved.

and he would thus fail to meet his burden. His motion would be denied although the plaintiff's claim might be entirely groundless.

For these reasons, the staff recommends that burden of proof and burden of producing evidence language be avoided in our recommended statute. To require the defendant simply to make a "showing" will impose on him some initial burden without obscuring the real inquiry: Is there any reasonable possibility the plaintiff can meet his burden of proof at trial?

#### Other Changes

In this revised draft, the standard ("no reasonable possibility" plaintiff will prevail) is removed from proposed Chapter 6.5 of Title 14 of Part 2 of the Code of Civil Procedure, and placed in each statute which authorizes an undertaking. This will avoid the necessity of creating special exceptions in the nonresident plaintiff situation (Code Civ. Proc. § 1030) and in shareholder derivative suits (Corp. Code § 800).

The phrase "costs and expenses" is changed to "costs and attorney's fees," and, in a new definitional section (proposed Code Civ. Proc. § 1040.10), "attorney's fees" are defined to mean such fees "as the defendant may, apart from this chapter, become entitled to recover from the plaintiff." The addition of this section necessitates the renumbering of the other sections in Chapter 6.5. Other minor editorial changes have been made

Mr. Brian Paddock of the Western Center on Law and Poverty expressed concern over the mandatory stay provision where the motion for an undertaking is filed within 30 days after service of summons. See proposed Code Civ. Proc. § 1040.40. Mr. Paddock noted that much of the litigation his organization is concerned with is for injunctive relief in which there is an immediate need for discovery, and that a mandatory stay provision would impair such litigation. The staff is of the view, however, that, if the plaintiff's claim is frivolous, the defendant should

not be put to the expense of pleading or engaging in discovery before the plaintiff furnishes the undertaking. The staff therefore recommends that the Commission adopt proposed Code of Civil Procedure Section 1040.40 in its present form. Other possible alternatives would be (1) to make the stay provision always discretionary, regardless of when the motion is filed, (2) to bring the stay provision into play only when the motion for an undertaking is granted, or (3) to impose sanctions on a defendant who moves for an undertaking in bad faith and solely for the purpose of delay. Cf. Code Civ. Proc. § 2034 (discovery sanctions). Such a provision, although not recommended by the staff, might take the following form:

1040.55. If at the hearing on the motion for an undertaking the court finds that the motion was made in bad faith and solely for the purpose of harassment or delay, the court may require the moving defendant to pay the reasonable costs and attorney's fees incurred by the plaintiff in opposing the motion.

Respectfully submitted,

Robert J. Murphy III  
Legal Counsel

**SENATE BILL**

**No. 1236**

**Introduced by Senator Moscone**

**May 15, 1975**

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**An act to amend Sections 391.1 and 391.6 of the Code of Civil Procedure, relating to vexatious litigants.**

**LEGISLATIVE COUNSEL'S DIGEST**

**SB 1236, as introduced, Moscone. Vexatious litigants: motions.**

Existing law permits a defendant in any litigation to move the court at any time within 30 days after service of summons or other and equivalent process upon him for an order requiring the plaintiff to furnish the security based upon the ground that the plaintiff is a vexatious litigant and there is not a reasonable probability the plaintiff will prevail in the litigation.

This bill would permit the defendant to make such a motion at any time until final judgment is entered.

Existing law provides for the stay of the litigation following the filing of the above motion and a corresponding stay of the moving defendant's need to plead until 10 days following either the denial of the motion or the plaintiff's furnishing of the required security.

This bill would make the above provisions applicable where the motion is filed prior to trial and would provide that where such a motion is filed at any time thereafter, the litigation shall be stayed for such period following the denial of the motion or the furnishing of security as the court shall determine.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

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

3 391.1. In any litigation, at any time ~~within 30 days~~  
4 ~~after service of summons or other and equivalent process~~  
5 ~~upon him until final judgment is entered~~, a defendant  
6 may move the court, upon notice and hearing, for an  
7 order requiring the plaintiff to furnish security. The  
8 motion must be based upon the ground, and supported  
9 by a showing, that the plaintiff is a vexatious litigant and  
10 that there is not a reasonable probability that he will  
11 prevail in the litigation against the moving defendant.

12 SEC. 2. Section 391.6 of the Code of Civil Procedure  
13 is amended to read:

14 . 391.6. When a motion pursuant to Section 391.1 is filed  
15 *prior to trial* the litigation is stayed, and the moving  
16 defendant need not plead, until 10 days after the motion  
17 shall have been denied, or if granted, until 10 days after  
18 the required security has been furnished and the moving  
19 defendant given written notice thereof. *When a motion*  
20 *pursuant to Section 391.1 is made at any time thereafter,*  
21 *the litigation shall be stayed for such period after the*  
22 *denial of the motion or the furnishing of the required*  
23 *security as the court shall determine.*

Staff DraftRECOMMENDATION 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.<sup>1</sup> These are generally referred to as "cost bonds."<sup>2</sup> 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.<sup>3</sup> These are generally referred to as "damage bonds."<sup>4</sup>

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.

4. See note 2 supra.



In the case of Beaudreau v. Superior Court,<sup>5</sup> the California Supreme Court held unconstitutional the cost bond provisions<sup>6</sup> 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."<sup>7</sup> The statute thus runs afoul of the constitutional rule announced in Snidach v. Family Finance Corp.,<sup>8</sup> and further developed by later cases,<sup>9</sup> that the plaintiff must be afforded a hearing which will satisfy due process requirements before he may be deprived, even temporarily, of his property.<sup>10</sup> 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."<sup>11</sup>

In view of the Beaudreau case, the Commission has examined all of the cost bond statutes. Those which provide for notice and hearing before an undertaking may be required are the statutes relating to shareholder derivative suits,<sup>12</sup> actions by vexatious litigants,<sup>13</sup>

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, 587-590 (1975).
11. Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).
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.

malpractice actions against architects and others,<sup>14</sup> and malpractice actions against physicians and others.<sup>15</sup> Those which require an undertaking with no provision for a hearing are the statutes relating to tort claims against public entities<sup>16</sup> and public employees,<sup>17</sup> actions against the Regents of the University of California,<sup>18</sup> actions by a nonresident plaintiff,<sup>19</sup> and actions for libel or slander.<sup>20</sup> All of the statutes in the latter category appear to come within the holding of the Beaudreau case, and thus are of doubtful constitutionality.<sup>21</sup>

At a minimum, to satisfy constitutional requirements as presently interpreted by the California Supreme Court, a statute authorizing or requiring an undertaking for costs must provide for a hearing after noticed motion, with the hearing directed to the questions 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.<sup>22</sup> If the plaintiff's claim is clearly meritorious, and thus there is not reasonable possibility that the defendant will become entitled to recover costs,<sup>23</sup> an undertaking

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.

22. See Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 542 (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.

may not constitutionally be required from the plaintiff.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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 lacking merit."<sup>27</sup>

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, 794, 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 for 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).
27. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 464, 535 P.2d 713, 723, 121 Cal. Rptr. 585, 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.

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,<sup>28</sup> the purpose of the undertaking is to secure a possible judgment for costs in the defendant's favor.<sup>29</sup> 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, the purpose is to deter groundless claims.<sup>30</sup> Here, the undertaking may be required only in "actions lacking merit."<sup>31</sup>

#### RECOMMENDATIONS

The Commission recommends the enactment of a single statutory scheme applicable to all actions and special proceedings in which an undertaking for costs may be required. The Commission does not necessarily endorse the policy underlying the undertaking requirement and expresses no view concerning the kinds of cases in which an undertaking should be

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").

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, 1087 (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.

required. However, there is no sound reason for continuing the individualized treatment of undertakings in the existing cost bond statutes, and the statutory procedure should comport with constitutional requirements.

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 legislation.

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

(1) Provide that the undertaking is to secure the allowable costs and, where otherwise authorized, attorney's fees which may be awarded to the defendant.

(2) Allow the defendant to move for the undertaking at any time.

(3) Require the defendant to show its probable allowable costs and, if recovery is authorized, attorney's fees.

(4) Where the purpose of the undertaking is principally to deter frivolous litigation, require the defendant to show that there is no reasonable possibility the plaintiff will obtain judgment against the moving defendant.<sup>32</sup> Where the purpose of the undertaking is principally to surmount expected difficulties in enforcing an award of costs (e.g., nonresident plaintiff), authorize the undertaking in all cases except where the plaintiff shows there is no reasonable possibility the defendant will obtain judgment in the action.

(5) Fix the amount of the undertaking as one and one-half times the defendant's probable allowable costs and, if recovery is authorized,

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.

attorney's fees.<sup>33</sup>

(6) 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.

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

(8) Provide for court approval of, and a procedure for the defendant to except to, the sureties.<sup>34</sup>

(9) 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.<sup>35</sup>

(10) Authorize the court to increase or decrease the amount of the undertaking.<sup>36</sup>

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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.

35. By a 1975 amendment to the various 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).

(11) Provide that the determination of the court on the motion for an undertaking shall have no effect on the determination of any issues on the merits of the action.<sup>37</sup>

(12) Authorize direct recourse against the sureties when the defendant becomes entitled to recover costs.<sup>38</sup>

(13) Make the undertaking procedure inapplicable to small claims court actions.<sup>39</sup>

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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 § 23173(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 1040.05) 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 attorney's fees.

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 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure . The motion ~~must~~ shall be based made on the ground ~~;~~ and supported by a showing ~~;~~ that ~~the plaintiff is a vexatious litigant and that there is not a no reasonable probability possibility that he the plaintiff will prevail obtain judgment in the litigation~~ against the moving defendant.



Comment. This title is revised to incorporate the uniform procedures for undertakings for costs and attorney's fees enacted in Chapter 6.5 (commencing with Section 1040.05) 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.

968/870

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.

968/871

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.

968/872

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.

968/873

Code of Civil Procedure § 391.5 (repealed)

SEC. 5. Section 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.

968/874

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 391.1 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.

968/875

Code of Civil Procedure § 830 (amended)

SEC. 7. Section 830 of the Code of Civil Procedure is amended to read:

830 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 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure. The motion shall be made on the ground and supported by a showing that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.

Comment. Section 830 is amended to incorporate the uniform procedures for undertakings for costs and attorney's fees enacted in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of

Civil Procedure, and to comport with the constitutional requirements enunciated in 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.

404/162

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.

404/163

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 or more 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.

404/164

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.

404/165

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.

404/166

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.

404/167

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, any such defendant may, within 30 days after service of summons, move the court for an order, upon notice and hearing, requiring 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 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure. The motion shall be made on the ground and supported by a showing that there is no reasonable possibility that the plaintiff

will obtain judgment against the moving defendant. 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. Section 1029.5 is amended to incorporate the uniform procedures for undertakings for costs enacted in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure.

404/170

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 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure . The motion shall be made on the ground and supported by a showing that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant. 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. Section 1029.6 is amended to incorporate the uniform procedures for undertakings for costs enacted in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure.

404/174

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 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure.

(b) The motion shall be made on the ground and supported by a showing that the plaintiff is one described in subdivision (a) and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding.

Comment. Section 1030 is amended to incorporate the uniform procedures for undertakings for costs and attorney's fees enacted in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure. The purpose of this section is primarily to secure an award of costs in favor of the defendant which would otherwise be difficult to enforce against a nonresident plaintiff. Therefore, this section allows the defendant to require an undertaking for costs whenever there is a reasonable possibility that the defendant will prevail in the action. Cf. Bell v. Burson, 402 U.S. 535, 540 (1971).

404/176

Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure (added)

SEC. 16. Chapter 6.5 (commencing with Section 1040.05) is added to Title 14 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 6.5. UNDERTAKINGS FOR COSTS AND ATTORNEY'S FEES

§ 1040.05. Application of chapter

1040.05. (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 1040.05 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). 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 generalizes the substance of provisions formerly found in Government Code Sections 947(b) and 951(b), Education Code Section 23175(c), and Code of Civil Procedure Sections 1029.5(b) and 1029.6(b).

This chapter affords a procedure for the defendant to compel the plaintiff to furnish an undertaking for costs and attorney's fees 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).

100/880

§ 1040.10. Costs and attorney's fees defined

1040.10. As used in this chapter:

(a) "Attorney's fees" means such reasonable attorney's fees as the defendant may, apart from this chapter, become entitled to recover from the plaintiff.

(b) "Costs" means the allowable costs which may be awarded in favor of the defendant and against the plaintiff.

Comment. Section 1040.10, which defines "attorney's fees" and "costs," makes clear that recovery of attorney's fees must be authorized by independent provision of law to come within the scope of this chapter. See, e.g., Code Civ. Proc. §§ 391(c), 836; Corp. Code § 800(d).

§ 1040.15. Motion of plaintiff to require undertaking for costs and attorney's fees: supporting affidavit

1040.15. At any time after the filing of the complaint, the defendant may move the court, upon notice, for an order requiring the plaintiff to furnish a written undertaking as security for costs, attorney's fees, or both. The defendant shall, in an affidavit in support of the motion, set forth with particularity the nature and amount of the costs, attorney's fees, or both, it has incurred and expects to incur by the conclusion of the action or special proceeding.

Comment. Section 1040.15 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 costs, attorney's fees, or both, as defined in Section 1040.10. Under Code of Civil Procedure Section 2015.5, the defendant may submit a declaration in lieu of the affidavit required by this section.

§ 1040.20. Hearing and determination of motion

1040.20. The court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs, attorney's fees, or both, if the court, after hearing, finds that the grounds for the motion have been established.

Comment. Section 1040.20 requires the order for an undertaking if the grounds for the motion have been established. Initially, the defendant must show that the action or special proceeding is one in which an undertaking is authorized by statute. See Comment to Section 1040.05. The grounds for the motion are set forth in the authorizing statute and are derived from the underlying purpose of the statute.

Where the primary purpose of the statute is to deter frivolous

litigation, it must be established that there is no reasonable possibility that the plaintiff will prevail. See Code Civ. Proc. §§ 391.1 (vexatious litigant in propria persona), 830 (actions for libel or slander), 1029.5 (actions against architects and others), 1029.6 (actions against licensed health professionals); Educ. Code § 23175 (actions against Regents of the University of California); Govt. Code § 947 (actions against public entity), 951 (actions against public employee). Cf. Corp. Code § 800(c) (shareholder derivative suits). Where the primary purpose of the statute is to secure an ultimate award of costs in the defendant's favor which would otherwise be difficult to collect, it must be established that there is a reasonable possibility that the defendant will prevail. See Code Civ. Proc. § 1030 (nonresident plaintiff).

404/179

§ 1040.25. Amount of undertaking

1040.25. The amount of the undertaking shall be an amount equal to one and one-half times the probable allowable costs and attorney's fees 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, attorney's fees, or both, which the defendant will have incurred by the conclusion of the action or special proceeding.

Comment. Section 1040.25 sets the amount of the undertaking at one and one-half times the defendant's probable allowable costs and, where authorized, attorney's fees. 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 1040.30 applies.

404/180

§ 1040.30. Time for filing undertaking; effect of failure to file

1040.30. 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. Section 1040.30 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).

404/305

§ 1040.35. Sureties

1040.35. 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. Section 1040.35 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 1040.30 applies.

406/162

§ 1040.40. Stay of proceedings

1040.40. (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. Section 1040.40 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.

§ 1040.45. Limitation on effect of court's determinations

1040.45. The determinations of the court under this chapter shall have no effect on the determination of any issues on the merits of the action or special proceeding, and shall not be given in evidence nor referred to in the trial of any such action or proceeding.

Comment. Section 1040.45 prevents any determination of the court on a motion for an undertaking from affecting the merits of the litigation.

§ 1040.50. Enforcement of liability on undertaking

1040.50. If at the conclusion of the action or special proceeding the defendant is legally entitled to recover costs, attorney's fees, 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. Section 1040.50 supplements Section 1053a 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 1040.50 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, if recoverable, attorney's fees.

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 60 days after service of suit was 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 or written undertaking as hereinafter provided in Chapter 6.5 (commencing with Section 1040.05) 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.~~

The undertaking shall secure the reasonable expenses, including attorney's  
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. Notwithstanding Section  
1040.25 of the Code of Civil Procedure, the amount of the undertaking  
shall not exceed fifty thousand dollars (\$50,000).

(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 (c), no~~  
~~pleadings 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. Section 800 is amended to incorporate the uniform procedures  
for undertakings for costs and attorney's fees enacted in Chapter 6.5  
(commencing with Section 1040.05) of Title 14 of Part 2 of the Code of  
Civil Procedure.

Education Code § 23175 (amended)

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

23175. (a) 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.~~

ALL in  
Strikeout

move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure . The motion shall be made on the ground and supported by a showing that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.

(b) If judgment is rendered for the regents in any action against it, 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 1040.05) 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 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure . The motion shall be made on the ground and supported by a showing that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.

(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 1040.05) 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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move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure . The motion shall be made on the ground and supported by a showing that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.

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

Comment. See Comment to Section 947.