

Memorandum 78-53

Subject: Study J-87 - Security for Costs

Attached to this memorandum is a staff draft of a Recommendation Relating to Security for Costs, which recommends the repeal of six unconstitutional cost bond provisions and the revision of two others.

Prior Commission Recommendation

In 1975, the Commission prepared a recommendation to revise the unconstitutional aspects of the various cost bond statutes and to provide a uniform procedure governing all cost bonds. Assembly Bill 2847 was introduced in the 1976 session to implement the Commission's recommendation; however, the bill did not get out of committee, apparently because the legislators had misgivings about the basic policy underlying cost bonds, and so were not interested in revitalizing the unconstitutional statutes. (A copy of the Recommendation Relating to Undertakings for Costs (1975) is also attached hereto.)

Policy Issues

The attached draft presents two policy issues:

(1) Should the basic recommendation be to repeal the unconstitutional cost bond statutes (as proposed in the attached draft) rather than to revise the statutes to provide constitutional procedures? The attached draft recommends the repeal of the unconstitutional statutes.

(2) Should the cost bond statute for nonresident plaintiffs be repealed or should it be revised to provide a constitutional procedure? The proposed draft would revise this statute to provide a constitutional procedure, but the staff is not certain that the statute should be revised and retained.

Constitutionality Under Equal Protection Clause of Cost Bond Statutes

One matter not discussed in the draft recommendation is the question of the constitutionality under the equal protection clause of cost bonds in malpractice actions against architects and other similar licensees (Code Civ. Proc. § 1029.5) and malpractice actions against health professionals (Code Civ. Proc. § 1029.6). In *Nork v. Superior Court*, 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973), the court explicitly avoided the issue of whether the requirement of a cost bond in

malpractice actions against health professionals resulted in an unconstitutionally favored class, but held the ex parte procedure in Section 1029.6(e) unconstitutional on due process grounds. The equal protection issue was also avoided in Gonzales v. Fox, 68 Cal. App.3d Supp. 16, 137 Cal. Rptr. 312 (1977), which held the nonresident plaintiff cost bond statute unconstitutional. The plaintiffs in Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), raised the equal protection issue with regard to Government Code Sections 947 and 951 (cost bonds in actions against public entities and public employees) but abandoned the issue on appeal. It is argued that these cost bond statutes are needed to deter frivolous litigation which is especially acute in these areas because of the increasing insurance premiums, reduced coverage, and higher deductible amounts. See Review of Selected 1967 Code Legislation 57 (Cal. Cont. Ed. Bar 1967); see also Review of Selected 1969 Code Legislation 65-67 (Cal. Cont. Ed. Bar 1969); Comment, Exemplary Damages In Medical Malpractice Actions: California's Requirement for Posting of a Cost Bond by Plaintiff, 4 Pac. L.J. 903 (1973). Nork, Beaudreau, and Gonzales give no encouragement to those who would plead the equal protection clause as a ground for invalidating these cost bond statutes. The staff does not believe it would be fruitful for the Commission to write a brief arguing the unconstitutionality of these two provisions on equal protection grounds and is doubtful that such a brief would be persuasive with the Legislature, particularly with regard to medical malpractice actions. Accordingly, the draft recommendation is limited to consideration of provisions which are unconstitutional under the due process standards developed in Nork and Beaudreau.

Respectfully submitted,

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RECOMMENDATION

relating to

SECURITY FOR COSTS

Background

Thirteen California statutes require the plaintiff in specified types of actions to furnish an undertaking as security for the defendants recoverable costs.¹ The principal purpose of 12 of the cost bond statutes is to deter frivolous litigation,² although they also serve to

1. See Code Civ. Proc. §§ 391-391.5 (action by vexatious litigant), 830-836 (action for libel or slander), 1029.5 (malpractice action against architect or similar licensee), 1029.6 (malpractice action against licensed health professional), 1030 (action by nonresident plaintiff); Corp. Code §§ 800 (shareholders' derivative action under General Corporation Law), 5710 (members' derivative action under Nonprofit Corporation Law) [A.B. 2180, 1978 session], 7710 (members' derivative action under Nonprofit Mutual Benefit Corporation Law) [A.B. 2180, 1978 session]; Educ. Code § 92650 (action against Regents of the University of California); Fin. Code § 7616 (derivative action by shareholder of savings and loan association); Govt. Code §§ 947 (action against public entity), 951 (action against public employee); Mil. & Vet. Code § 393 (action against member of militia).
2. The purpose of the undertaking requirement in the vexatious litigant statute (Code Civ. Proc. §§ 391-391.5) is to prevent "abuse" by "litigants who constantly file groundless actions." Review of 1963 Code Legislation, 38 Cal. St. B.J. 601, 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 65 (Cal. Cont. Ed. Bar 1969); Review of Selected 1967 Code Legislation 57 (Cal. Cont. Ed. Bar 1967); Comment, Exemplary Damages in Medical Malpractice Actions: California's Requirement for Posting of a Cost Bond by Plaintiff, 4 Pac. L.J. 903 (1973). The requirement in shareholder derivative suits (Corp. Code § 834) 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). The undertaking requirement of the California Tort Claims Act (Govt. Code §§ 947, 951) was to deter "unmeritorious and frivolous litigation." *Id.* at 452. 535. P.2d at 715, 121 Cal. Rptr. at 587. See generally McDermott & Williams, Security for Costs, in

secure a possible judgment for costs in the defendant's favor. The statute requiring a nonresident plaintiff to file a cost bond is intended to secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not within the court's jurisdiction.³

Provisions Held Unconstitutional

The provision requiring a cost bond upon the ex parte application of the defendant where punitive damages are sought in a malpractice action against a licensed health professional⁴ was held violative of due process requirements in Nork v. Superior Court⁵ as a deprivation of property without a hearing.

The portions of the California Tort Claims Act which allow the defendant public entity or public employee to require the plaintiff to furnish a cost bond by merely filing a demand⁶ were held unconstitutional in Beaudreau v. Superior Court⁷ for failure to provide for a hearing at which the merit of the plaintiff's action and the reasonableness of the amount demanded could be determined.⁸

1 California Civil Procedure Before Trial §§ 14.1, 14.25, 14.57 (Cal. Cont. Ed. Bar 1977); Comment, Due Process and Security for Expense Statutes: An Analysis of California Statutes in Light of Recent Trends, 7 Pac. L.J. 176 (1976).

3. 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").
4. Code Civ. Proc. § 1029.6(e).
5. 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).
6. Govt. Code §§ 947, 951.
7. 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).
8. The Beaudreau case is another of the many cases since Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), developing the constitutional requirement of a due process hearing before a party may be deprived, even temporarily, of its property. See, 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

On the authority of the Beaudreau case, Allen v. Jordanos' Inc.⁹ held unconstitutional the requirement that a plaintiff in an action for libel or slander provide a cost bond before summons is issued.¹⁰

The court in Gonzalez v. Fox¹¹ applied the standards enunciated in Beaudreau to invalidate the statute requiring a nonresident plaintiff to furnish a cost bond.¹²

Other Unconstitutional Provisions

At a minimum, to satisfy the constitutional requirements set forth in Beaudreau, a statute requiring security for costs must provide for a hearing on noticed motion to "inquire into the merit 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."¹³ If the plaintiff is clearly entitled to prevail and there is thus no reasonable possibility that the defendant will become entitled to recover costs,¹⁴ security may not constitutionally be required from the plaintiff.¹⁵

903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970). The plaintiff's "property" in this context is the nonrefundable corporate premium, the plaintiff's cash collateral, or--if no undertaking is furnished--the cause of action which is dismissed. Beaudreau v. Superior Court, 14 Cal.3d 448, 455-57, 535 P.2d 713, 717-18, 121 Cal. Rptr. 585, 589-90 (1975).

9. 52 Cal. App.3d 160, 125 Cal. Rptr. 31 (1975).

10. Code Civ. Proc. §§ 830-835.

11. 68 Cal. App.3d Supp. 16, 137 Cal. Rptr. 312 (1977).

12. Code Civ. Proc. § 1030.

13. Beaudreau v. Superior Court, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975). The question of whether some of the damage bond statutes may be unconstitutional is closely analogous to the question in the cost bond context. Cf. Conover v. Hall, 11 Cal.3d 842, 851-52, 523 P.3d 682, 688, 114 Cal. Rptr. 642, 648 (1974). However, the more numerous damage bond provisions present a subject of considerably broader scope. The Commission has not made a study of the damage bond statutes. This recommendation is therefore confined to the cost bond problem.

14. It should be noted, however, that the plaintiff may prevail and still be liable for some of the defendant's costs, such as where the defendant makes an offer to compromise under Code of Civil Procedure Section 998 and the plaintiff fails to recover a more favorable judgment.

15. See Bell v. Burson, 402 U.S. 535, 540 (1971); Beaudreau v. Superior Court, 14 Cal.3d 448, 458-59, 535 P.2d 713, 719-20, 121 Cal. Rptr.

The Commission has examined the cost bond statutes which have not yet been tested in light of the applicable constitutional requirements and has concluded that, in addition to those provisions explicitly held unconstitutional, the statutes requiring cost bonds in actions against the Regents of the University of California¹⁶ and in certain actions against active members of the state militia¹⁷ also fail to satisfy the constitutional requirements set forth in Beaudreau because they do not provide for a hearing. The statute requiring cost bonds in malpractice actions against architects and similar licensees¹⁸ provides for a hearing to determine whether "there is no reasonable possibility that the plaintiff has a cause of action" and whether the plaintiff "would not suffer undue economic hardship" if required to file an undertaking, but is of doubtful constitutionality in that it establishes a flat \$500 bond amount whereas it was held in Beaudreau that the reasonableness of the amount of the undertaking should be determined at a hearing.¹⁹

Disposition of Unconstitutional Provisions

This recommendation is concerned with the disposition of the cost bond provisions that are unconstitutional.²⁰ These provisions should either be repealed or be amended to comport with the requirements of due process.

585, 591-92 (1975); *Rios v. Cozens*, 7 Cal.3d 792, 796-97, 499 P.2d 979, 982, 103 Cal. Rptr. 299, 302 (1972).

16. Educ. Code § 92650.

17. Mil. & Vet. Code § 393.

18. Code Civ. Proc. § 1029.5.

19. 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).

20. The following provisions appear to satisfy the constitutional requirements of Beaudreau: Code Civ. Proc. §§ 391-391.5 (action by vexatious litigant), 1029.5 (malpractice action against architect or similar licensee) (except as discussed in the text accompanying note 19 *supra*), 1029.6 (a)-(d), (f), (g) (malpractice action against licensed health professional); Corp. Code §§ 800 (shareholders' derivative action under General Corporation Law), 5710 (members' derivative action under Nonprofit Corporation Law) [A.B. 2180, 1978 session], 7710 (members' derivative action under Non-profit Mutual Benefit Corporation Law) [A.B. 2180, 1978 session]; Fin. Code § 7616 (derivative action by shareholder of savings and loan association).

In determining whether the unconstitutional cost bond statutes should be repealed or revised, the Commission has considered whether the statutory purpose is being promoted and has weighed the need for cost bond provisions against the administrative and financial burdens of a procedure that would satisfy the mandates of Beaudreau.

Cost bonds assuredly deter some frivolous litigation. However, in several statutes the amount of the bond does not appear to be a significant bar to unmeritorious suits.²¹ And if an unmeritorious action is brought by an indigent plaintiff, the cost bond requirement may be waived.²² Statutes which permit the defendant to require any plaintiff to furnish a cost bond without regard to the merit of the plaintiff's claim unfairly (and unconstitutionally) restrict access to the courts. While there may be a special need in some of these situations to deter frivolous litigation, it is not clear that the existing provisions are properly designed to accomplish this purpose. The need for cost bond statutes also appears much less acute when it is remembered that there are several other relatively inexpensive devices for summarily disposing

The Commission previously prepared legislation to correct the constitutional defects in the cost bond statutes and to provide a uniform hearing procedure. See Recommendation Relating to Undertakings for Cost, 13 Cal. L. Revision Comm'n Reports 901 (1976). At that time, the Commission expressly reserved judgment on the soundness of the policies underlying cost bond statutes and expressed no view concerning the kinds of cases in which an undertaking should be required. Id. at 903. Legislation to implement this first recommendation was introduced as Assembly Bill 2847 in the 1976 legislative session but was not approved, apparently because of legislators' misgivings about the underlying policy and effect of cost bond statutes.

21. See Code Civ. Proc. §§ 830 (flat \$500 in libel and slander actions), 1029.5 (\$500 per defendant, not to exceed \$3,000, in malpractice actions against architects), 1029.6 (not to exceed \$500 per defendant, or \$1,000 total, in malpractice actions against health professionals).
22. See Beaudreau v. Superior Court, 14 Cal.3d 448, 454, 535 P.2d 713, ___, 121 Cal. Rptr. 585, ___ (1975); Conover v. Hall, 11 Cal.3d 842, 850-53, 523 P.2d 682, ___, 114 Cal. Rptr. 642, ___ (1974). See also Boddie v. Connecticut, 401 U.S. 371 (1971) (waiver of filing fee constitutionally required for indigent plaintiff seeking divorce in "good faith"); Fuller v. State, 1 Cal. App.3d 664, 82 Cal. Rptr. 78 (1969), cert. denied, 400 U.S. 836 (1970) (trial court not required to waive undertaking for indigent plaintiff absent showing of inability to obtain sureties).

of unmeritorious actions, such as motions for summary judgment,²³ motions for judgment on the pleadings,²⁴ general demurrers,²⁵ and objections to all evidence.²⁶

The administrative and financial burdens that would result from revising the unconstitutional cost bond statutes to comply with Beaudreau would be substantial. Under Beaudreau a fairly detailed evidentiary hearing would have to take place to determine the merit of the plaintiff's cause of action and the probable amount of the defendant's allowable costs and attorney's fees, and in some cases the indigency of the plaintiff. Such a hearing would consume time and money of both the parties and the courts. Further delay and expense would occur in proceedings to determine the sufficiency of the sureties or in contesting the findings of the court regarding the validity of the claim and the amount of costs and attorney's fees to be secured. In some situations, the motion for a cost bond could be used as a dilatory tactic by delaying it until late in the proceedings.²⁷ As a consequence of extending the procedures mandated by Beaudreau to all cost bond provisions, frivolous litigation may be proliferated in some cases, both by plaintiffs and defendants contesting determinations in the cost bond proceedings. Furthermore, many plaintiffs with meritorious claims would be subjected to the expense of cost bond proceedings.

23. See Code Civ. Proc. § 437c; 4 B. Witkin, California Procedure Proceedings Without Trial §§ 173-174, at 2825-28 (2d ed. 1971).

24. See 4 B. Witkin, California Procedure Proceedings Without Trial §§ 161-162, at 2816-18; 1 California Civil Procedure Before Trial §§ 13.1-13.15 (Cal. Cont. Ed. Bar 1977).

25. See Code Civ. Proc. § 589; 3 B. Witkin, California Procedure Pleading §§ 796-853, at 2408-56 passim (2d ed. 1971).

26. See 4 B. Witkin, California Procedure Proceedings Without Trial §§ 171-172, at 2823-25 (2d ed. 1971).

27. The courts may look with disapproval upon a demand for security that is made right before trial, absent a showing of excuse for delay. See Straus v. Straus, 4 Cal. App.2d 461, 41 P.2d 218 (1935).

Recommendations

Repeal of Unconstitutional Cost Bond Statutes

The Commission recommends that, with three exceptions, the unconstitutional cost bond statutes be repealed because, in these cases, the need for cost bonds to deter frivolous litigation is not sufficient to justify imposing the procedural burden that would necessarily result from revising these statutes to comply with Beaudreau. Accordingly, statutes providing for cost bonds in the following types of actions should be repealed: actions for libel or slander, actions against the Regents of the University of California, actions against public entities, actions against public employees, and actions against members of the state militia. The three exceptions, discussed below, are cost bonds in malpractice actions against architects and licensed health professionals and cost bonds in actions by nonresident plaintiffs.

Malpractice Actions Against Architects and Licensed Health Professionals

The Commission does not recommend the repeal of statutes providing for cost bonds in malpractice actions architects and licensed health professionals.²⁸ These are recently enacted statutes which, it has been argued, are needed to deter frivolous litigation that is especially acute in these areas because of increasing insurance premiums, reduced coverage, and higher deductible amounts.²⁹

The cost bond statute in malpractice actions against architects should be amended to make the \$500 bond amount a maximum rather than a flat amount. The \$500 flat amount provided in Code of Civil Procedure Section 1029.5 is of doubtful constitutionality because the amount of the undertaking must be reasonable in the light of the defendant's probable expenses.³⁰

28. Code Civ. Proc. §§ 1029.5 (malpractice action against architect or similar licensee), 1029.6 (malpractice action against licensed health professional).

29. See Review of Selected 1967 Code Legislation 57 (Cal. Cont. Ed. Bar 1967); see also Review of Selected 1969 Code Legislation 65-67 (Cal. Cont. Ed. Bar 1969); Comment, Exemplary Damages in Medical Malpractice Actions: California's Requirement for Posting of a Cost Bond by Plaintiff, 4 Pac. L.J. 903 (1973).

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

The cost bond statute in malpractice actions against licensed health professionals should be amended to delete the unconstitutional ex parte procedure for requiring cost bonds in cases where the plaintiff sues for exemplary damages.³¹

Actions by Nonresident Plaintiffs

The need to secure costs and attorney's fees in actions by non-resident plaintiffs is significant if there is a reasonable possibility that the defendant will prevail. However, as already discussed, the existing statute³² is seriously deficient in that it does not meet the requirements of Beaudreau. The cost bond statute in actions by non-resident plaintiffs should be revised to comply with constitutional requirements and to more effectively achieve its purpose of securing expenses that otherwise might be unrecoverable. The following revisions should be made:

(1) The undertaking should secure the defendant's allowable costs and, where otherwise authorized, attorney's fees. The existing statute provides for an undertaking to secure the defendant's "costs and charges," but the logic supporting the requirement for security for costs applies equally to security for attorney's fees which are otherwise recoverable.

(2) The defendant should be required to show the probable allowable costs and, if recovery is authorized, attorney's fees, at a hearing held on noticed motion. Under existing law, the defendant merely serves the plaintiff with a notice that security is required and the plaintiff must file an undertaking in the amount of at least \$300; this amount may be increased upon a showing that the original undertaking is insufficient security.³³

31. Code of Civil Procedure Section 1029.6(e) was held unconstitutional in *Nork v. Superior Court*, 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).

32. Code Civ. Proc. § 1030.

33. All of the defendant's probable costs and attorney's fees (if recoverable) should be secured if the court finds that the plaintiff's claim lacks merit. The plaintiff is protected against exorbitant cost bond requirements by the opportunity to appear at a hearing, the necessity of the defendant's establishing probable costs and attorney's fees, and by the provision for a decrease in the amount of the undertaking if it later appears to be excessive.

(3) The court should be authorized to require the undertaking in any case where there is a reasonable possibility that the defendant will prevail, since the purpose of the undertaking is to secure the defendant's costs. Under existing law, an undertaking may be required merely on the basis of nonresidency.

(4) The action should be dismissed if the plaintiff does not file the undertaking within 30 days after notice of the court's order, or within such longer period as the court allows.³⁴

(5) The sureties should be subject to the approval of the court and the defendant should be permitted to object to the sureties. Existing law does not provide for approval of or objection to sureties; they may be challenged only by way of a motion for a new or additional undertaking.³⁵

(6) The court should be authorized to increase or decrease the amount of the undertaking after a hearing on noticed motion.

(7) There should be a mandatory stay of the action if the defendant's motion for an undertaking is filed within 30 days after service of summons, and a discretionary stay if the motion is filed later. The existing statute does not limit the time within which the defendant may require the undertaking.³⁶ The recommended limitation is necessary to inhibit the use of the cost bond procedure as a dilatory tactic.

(8) The determination of the court on the motion for an undertaking should have no effect on the determination of the merits of the action.³⁷

34. Under existing law, the statutory time limit may be extended upon a showing of good cause. See Code Civ. Proc. § 1054.

35. See Estate of Baker, 176 Cal. 430, 434, 168 P. 881, ____ (1917).

36. But see note 27 supra.

37. Similar provisions appear in Code Civ. Proc. §§ 391.2, 1029.5(a), 1029.6(a); Corp. Code § 800(d).

Proposed Legislation

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

An act to amend Sections 1029.5, 1029.6, and 1030 of, to add Section 1037 to, and to repeal Chapter 7 (commencing with Section 830) of Title 10 of Part 1 of, the Code of Civil Procedure, to repeal Section 92650 of the Education Code, to repeal Sections 947 and 951 of the Government Code, and to amend Section 393 of the Military and Veterans Code, relating to security for costs and attorney's fees.

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Libel and Slander Actions

Code of Civil Procedure §§ 830-836 (repealed)

SECTION 1. Chapter 7 (commencing with Section 830) of Title 10 of Part 1 of the Code of Civil Procedure is repealed.

~~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 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.~~

Comment. Section 830 has been repealed because it was held unconstitutional in *Allen v. Jordanos' Inc.*, 52 Cal. App.3d 160, 164, 125 Cal. Rptr. 31, ___ (1975). See also *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

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~~831. Each surety shall annex to the undertaking an affidavit that he is a resident and householder or freeholder within 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.

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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.

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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.

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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.

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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.

836. If the plaintiff recovers judgment, he shall be allowed as costs one hundred dollars ~~(\$100)~~ to cover counsel fees in addition to the other costs. If the action is dismissed or the defendant recovers judgment, he shall be allowed one hundred dollars ~~(\$100)~~ to cover counsel fees in addition to other costs, and judgment shall be entered accordingly.

Comment. Former Section 836 is reenacted without substantive change as Section 1037.

Malpractice Actions Against Architects and Others

Code of Civil Procedure § 1029.5 (amended)

SEC. 2. 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 for 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 a sum of not to exceed five hundred dollars (\$500) as security for the costs of defense as provided in subdivision (d), which may be awarded against such plaintiff. Such motion shall be supported by 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 not to exceed 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. Subdivisions (a) and (c) of Section 1029.5 are amended to change the flat \$500 amount to a maximum amount to conform to the constitutional standard enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975). This amendment makes Section 1029.5 consistent in this respect with Section 1029.6.

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Malpractice Actions Against Doctors and Others

Code of Civil Procedure § 1029.6 (amended)

SEC. 3. 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. 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 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 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 the 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)~~ (e) 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)~~ (f) 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. Former subdivision (e) has been deleted because it was held unconstitutional in *Nork v. Superior Court*, 33 Cal. App.3d 997, 1000-01, 109 Cal. Rptr. 428, ____ (1973). See also *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). Former subdivisions (f) and (g) have been renumbered as subdivisions (e) and (f), respectively.

32688

Actions by Nonresident Plaintiffs

SEC. 4. 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 at any time move the court for an order requiring the plaintiff to furnish a written undertaking to secure an award of costs and attorney's fees which may be awarded in the action or special proceeding .

(b) The motion shall be made on the grounds that the plaintiff resides out of the state or is a foreign corporation and that there is a reasonable possibility that the moving defendant will obtain judgment in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.

(c) If the court, after hearing, determines that the grounds for the motion have been established, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees.

(d) 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 and attorney's fees which the defendant will have incurred by the conclusion of the action or special proceeding.

(e) The plaintiff shall file or increase the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court. If the plaintiff fails to file or increase the undertaking within the time allowed, the plaintiff's action or special proceeding shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

(f) Except as otherwise provided by statute, 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 except to a surety by noticed motion requiring the appearance of the surety before the court at a time specified in the notice for examination under oath concerning the sufficiency of the surety. If the surety

fails to appear, or if the court finds the surety insufficient, the court shall order that a new undertaking be given.

(g) If the defendant's motion for an order requiring an undertaking is filed not later than 30 days after service of summons on the defendant, no pleading need be filed by the defendant and all further proceedings are 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. If the defendant's motion for an order requiring an undertaking is filed later than 30 days after service of summons on the defendant, if the defendant excepts to a surety, 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.

(h) The determinations of the court under this section have no effect on the determination of any issues on the merits of the action or special proceeding and may not be given in evidence nor referred to in the trial of the action or proceeding.

(i) An order granting or denying a motion for an undertaking under this section is not appealable.

Comment. Section 1030 is amended to conform to the constitutional standards enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), and *Gonzales v. Fox*, 68 Cal. App.3d Supp. 16, 137 Cal. Rptr. 312 (1977).

Subdivision (a) of Section 1030 permits the defendant to require the plaintiff to file an undertaking to secure both costs and allowable attorney's fees whereas Section 1030 formerly referred to "costs and charges." This section does not provide any authority for an award of attorney's fees not otherwise made recoverable by contract or statute. The provision for requiring an undertaking for the probable amount of costs and attorney's fees without limitation supersedes the former provision for an initial undertaking not exceeding \$300 with the opportunity to obtain a new or increased undertaking without limitation. See *McDermott & Williams, Security for Costs*, in 1 California Civil Procedure Before Trial § 14.23, at 477 (Cal. Cont. Ed. Bar 1977).

Since the purpose of this section is to afford security for an award of costs which the defendant might otherwise have difficulty enforcing against a nonresident plaintiff, subdivision (b) permits an undertaking to be required whenever there is a "reasonable possibility" that the defendant will prevail in the action. Cf. *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 motorist).

Subdivisions (b) and (c) provide for a hearing on noticed motion whereas this section formerly provided for a hearing only when the defendant sought a new or additional undertaking. Although the language of subdivision (c) is mandatory, the court has the common law authority

to dispense with the undertaking if the plaintiff is indigent. E.g., Conover v. Hall, 11 Cal.3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974). Under Section 1054a, the plaintiff may deposit money or bearer bonds or bearer notes of the United States or California in lieu of an undertaking.

Subdivision (d) continues the substance of a portion of what was formerly the third sentence of Section 1030, and also permits the amount of the undertaking to be decreased.

Subdivision (e) provides for dismissal if the undertaking is not filed within 30 days, as did the former last paragraph of Section 1030, but the 30-day period runs from service of the order on the plaintiff rather than from service of a notice that security is required. Failure to file within the prescribed time is not jurisdictional, and the court may accept a late filing. Boyer v. County of Contra Costa, 235 Cal. App.2d 111, 115-18, 45 Cal. Rptr. 58, 61-63 (1965). If the court authorizes the undertaking to be decreased as provided by subdivision (d), compliance by the plaintiff is optional.

The first sentence of subdivision (f) continues a portion of what was formerly the second sentence of Section 1030. The provision for excepting to the sufficiency of sureties is new. Formerly, sureties could be challenged only by way of a motion for a new or additional undertaking. See Estate of Baker, 176 Cal. 430, 168 P. 881 (1917). See also Sections 1056 (single corporate surety sufficient), 1057 (qualifications of individual surety), 1057a-1057b (qualifications and justification of corporate surety).

Subdivision (g) is a new provision which supersedes the former provision for an indefinite stay and for a stay of 10 days after service on the defendant of notice of the filing of the undertaking.

Subdivision (h) is new and is derived from comparable provisions in cost bond statutes requiring hearings. See, e.g., Code Civ. Proc. §§ 391.2, 1029.5(a), 1029.6(a); Corp. Code § 800(d).

Subdivision (i) codifies existing law. See Horton v. City of Beverly Hills, 261 Cal. App.2d 306, 67 Cal. Rptr. 759 (1968). An order granting or denying a motion for an undertaking may sometimes be reviewed by extraordinary writ. See Beaudreau v. Superior Court, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). A judgment of dismissal following the plaintiff's failure to furnish required security is appealable as a final judgment. Efron v. Kalmanovitz, 185 Cal. App.2d 149, 156-57, 8 Cal. Rptr. 107, 112 (1960).

32689

Attorney's Fees in Libel and Slander Actions

Code of Civil Procedure § 1037 (added)

SEC. 5. Section 1037 is added to the Code of Civil Procedure, to read:

1037. If the plaintiff recovers judgment in an action for libel or slander, the plaintiff shall be allowed as costs one hundred dollars (\$100) to cover counsel fees in addition to the other costs. If the action is dismissed or the defendant recovers judgment, the defendant shall be allowed one hundred dollars (\$100) to cover counsel fees in addition to other costs, and judgment shall be entered accordingly.

Comment. Section 1037 continues former Section 836 without substantive change.

Actions Against Regents of University of California

Education Code § 92650 (repealed)

SEC. 6. Section 92650 of the Education Code is repealed.

92650. (a) At any time after the filing of the complaint 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.

(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 plaintiffs.

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

Comment. Section 92650 has been repealed. This section did not meet the constitutional standards enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), which held unconstitutional Government Code Sections 947 and 951, the cost bond provisions of the California Tort Claims Act.

Actions Against Public Entities

Government Code § 947 (repealed)

SEC. 7. Section 947 of the Government Code is repealed.

947. (a) At any time after the filing of the complaint 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.

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

Comment. Section 947 has been repealed. This section was held unconstitutional in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460-65, 535 P.2d 713, 720-____, 121 Cal. Rptr. 585, 592-____ (1975).

32692

Actions Against Public Employees

Government Code § 951 (repealed)

SEC. 8. Section 951 of the Government Code is repealed.

951. (a) At any time after the filing of the complaint in any action 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.

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

Comment. Section 951 has been repealed. This section was held unconstitutional in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460-65, 535 P.2d 713, ____, 121 Cal. Rptr. 585, ____ (1975).

32693

Actions Against Members of Militia

Military & Veterans Code § 393 (amended)

SEC. 9. Section 393 of the Military and Veterans Code is amended to read:

393. (a) When In an action or proceeding of any nature ~~is~~ commenced in any court against an active member of the militia or a member of the militia in active service in pursuance of an order of the President of the United States as a result of a state emergency for an act done by such member in ~~his~~ an official capacity in the discharge of duty, or an alleged omission by ~~him~~ to do an act which it was ~~his~~ the member's duty to perform, or against any person acting under the authority or order of an officer ; or by virtue of a warrant issued by ~~him~~ an officer pursuant

to law; the defendant may require the person instituting or prosecuting the action or proceeding to file security in an amount of not less than one hundred dollars (\$100); to be fixed by the court; for the payment of costs that may be awarded to the defendant therein- law:

(1) The defendant in all cases may make a general denial and give special matter in evidence.

(2) A defendant in whose favor a final judgment is rendered in any such action or proceeding shall recover treble costs.

(b) The Attorney General shall defend such active member or person where the action or proceeding is civil. The senior judge advocate on the state staff or one of the judge advocates shall defend such active member or person where the action or proceeding is criminal, and the Adjutant General shall designate the senior judge advocate on the state staff, or one of the judge advocates, to defend such active member or person.

(c) In the event such active member or person is not indemnified by the federal government, Section 825 of the Government Code shall apply to such active member or person.

Comment. The provision permitting the defendant to require the plaintiff to provide security for costs has been deleted from Section 393 because it was in conflict with the constitutional standards enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), which held unconstitutional Government Code Sections 947 and 951, the cost bond provisions of the California Tort Claims Act.