

## First Supplement to Memorandum 2001-17

### **Award of Costs and Contractual Attorney's Fees to Prevailing Party: Costs Where Recovery is Small; Additional Conforming Revisions**

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This supplement focuses on Code of Civil Procedure Section 1033, which governs a cost award where the recovery in a case is so small that it could have been obtained in a lower jurisdictional classification. The supplement also contains the conforming revisions that were listed on page 43 of the draft attached to Memorandum 2001-17, but not included in that draft. (Attachment pp. 1-18.) If you are aware of any other conforming revisions that should be made, please notify the staff.

#### COSTS WHERE RECOVERY IS SMALL (CODE CIV. PROC. § 1033)

In general, the prevailing party in a civil case is entitled to costs as a matter of right. (Code Civ. Proc. § 1032.) This rule would be continued without substantive change in the draft attached to Memorandum 2001-17. (See proposed Code Civ. Proc. § 1039.10 on pp. 23-24.)

There are a number of exceptions to this general rule, including Code of Civil Procedure Section 1033, which makes a cost award discretionary where the judgment in favor of the prevailing party is so small that it could have been rendered in a case with a lower jurisdictional classification. For example, if the plaintiff in an unlimited civil case recovers less than \$25,000, or the plaintiff in a limited civil case recovers less than \$5,000, the plaintiff's recovery of costs is discretionary with the court:

1033. (a) Costs or any portion of claimed costs shall be as determined by the court in its discretion in a case other than a limited civil case in accordance with Section 1034 where the prevailing party recovers a judgment that could have been rendered in a limited civil case.

(b) When a prevailing plaintiff in a limited civil case recovers less than the amount prescribed by law as the maximum limitation upon the jurisdiction of the small claims court, the following shall apply:

(1) When the party could have brought the action in the small claims division but did not do so, the court may, in its discretion, allow or deny costs to the prevailing party, or may allow costs in part in any amount as it deems proper.

(2) When the party could not have brought the action in the small claims court, costs and necessary disbursements shall be limited to the actual cost of the filing fee, the actual cost of service of process, and, when otherwise specifically allowed by law, reasonable attorneys' fees. However, those costs shall only be awarded to the plaintiff if the court is satisfied that prior to the commencement of the action, the plaintiff informed the defendant in writing of the intended legal action against the defendant and that legal action could result in a judgment against the defendant that would include the costs and necessary disbursements allowed by this paragraph.

The purpose of this provision is to encourage litigants to sue in the appropriate jurisdictional classification. See *Steele v. Jensen Instrument Co.*, 59 Cal. App. 4th 326, 330, 69 Cal. Rptr. 2d 135 (1997); see also *Young v. General Telephone Co.*, 75 Cal. App. 3d 177, 142 Cal. Rptr. 57 (1977) (interpreting predecessor provision).

The draft attached to Memorandum 2001-17 would continue Section 1033 without change, except for correction of the cross-reference to Section 1034. (See proposed Code Civ. Proc. § 1040.80 on p. 37 of the draft.) As discussed below, however, further clean-up may be warranted.

### **Nonsubstantive Clean-up**

Because it differentiates between limited and unlimited civil cases, Section 1033 was one of the provisions that the staff examined in the study of *Unnecessary Procedural Differences Between Limited and Unlimited Civil Cases*. (See Memorandum 2000-55, Exhibit pp. 13-14.) In that regard, we noticed that the drafting of the statute is subject to a number of inconsistencies. For example:

- Why does the court in an unlimited civil case “determine” costs in its discretion, whereas in a limited civil case it may “allow or deny” costs in its discretion?
- Why is the court’s discretion in an unlimited civil case exercised in accordance with Section 1034 (Judicial Council rules), but not in a limited civil case (particularly when Section 1034 by its own terms purports to apply to both)?
- Why are “costs or any portion” allowed in an unlimited civil case, whereas “costs” or “costs in part” are allowed in a limited civil case (except where the limited civil case could not have been

brought in small claims court, in which case specified costs “and necessary disbursements” are allowed)?

- Why does the court in an unlimited civil case have discretion in the award of costs to “the prevailing party” but in a limited civil case only to a “prevailing plaintiff”?
- Why do some provisions of Section 1033 refer to the small claims “court” while others refer to the small claims “division”?
- Why do some provisions of Section 1033 state that costs shall be “allowed” while others refer to costs that are “awarded”?
- Why does the court have discretion in an unlimited civil case where the judgment “could have been rendered” in a limited civil case, whereas the court has discretion in a limited civil case if the recovery “is less than the amount prescribed by law as the maximum limitation upon the jurisdiction” of the small claims court?

The section could benefit from nonsubstantive cleanup for purposes of simplification and consistency.

In the draft tentative recommendation, **this could be achieved by revising proposed Section 1040.80 to read:**

1040.80. (a) Notwithstanding Section 1039.10, the court, in its discretion, may award or deny costs, or any portion of costs, to the prevailing party in an unlimited civil case, if both of the following conditions are satisfied:

(1) The recovery consists solely of relief that could have been granted in a limited civil case.

(2) The prevailing party could have classified the action as a limited civil case but did not do so.

(b) Notwithstanding Section 1039.10, the court, in its discretion, may award or deny costs, or any portion of costs, to the prevailing party in a limited civil case, if both of the following conditions are satisfied:

(1) The recovery consists solely of relief that could have been granted in a small claims case.

(2) The prevailing party could have brought the action in the small claims division but did not do so.

(c) If the recovery consists solely of relief that could have been granted in a small claims case, but the plaintiff could not have brought the action in the small claims division, the following rules apply:

(1) Costs are limited to the actual filing fee, the actual cost of service of process, and, where otherwise allowed by law, reasonable attorney’s fees.

(2) The court shall award costs if it is satisfied that before the commencement of the action, the plaintiff informed the defendant in writing of the intended legal action against the defendant and warned the defendant that the legal action could result in a judgment against the defendant that would include the costs authorized by this subdivision.

**Comment.** Section 1040.80 continues former Section 1033 without substantive change. The provision sets forth an exception to the general rule that the prevailing party is entitled as a matter of right to recover costs (Section 1039.10).

Under subdivisions (a) and (b), costs are discretionary only if the prevailing party could have sued in a lower jurisdictional classification but did not do so. If the option of a lower jurisdictional classification was unavailable, the statute does not apply. See *Young v. General Tel. Co.*, 75 Cal. App. 3d 177, 180-82, 142 Cal. Rptr. 57 (1977) (where party could not have brought suit in lower court, penalizing party “would bear no reasonable relation to the legislative purpose”).

Unlike former Section 1033(a), subdivision (a) of this section does not refer to the provision authorizing the Judicial Council to promulgate rules governing the procedure for recovering costs (Section 1041.10, which continues former Section 1034 without substantive change). Such a reference is unnecessary, because that provision applies to subdivision (a) by its own terms, as well as to subdivisions (b) and (c).

For relief awardable in a limited civil case, see Sections 85 (limited civil cases), 580 (relief awardable). For relief awardable in a small claims case, see Section 116.220 (small claims jurisdiction); see also Section 116.610 (small claims judgment). For limitations on filing small claims actions, see Section 116.231 (limitation on number of actions filed each year). See also Section 88 (unlimited civil case).

### **Definitions of “Prevailing Party” and “Plaintiff”**

A further ambiguity in Section 1033 concerns the terms “prevailing party” and “plaintiff,” which are used in the provision but not defined. Definitions of these terms do appear in Section 1032, which provides in pertinent part:

1032. (a) As used in this section, unless the context clearly requires otherwise:

- (1) “Complaint” includes a cross-complaint.
- (2) “Defendant” includes a cross-defendant or a person against whom a complaint is filed.
- (3) “Plaintiff” includes a cross-complainant or a party who files a complaint in intervention.

(4) “Prevailing party” includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. When any party recovers other than monetary relief and in situations other than as specified, the “prevailing party” shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034.

It is debatable whether the definitions in Section 1032 apply to Section 1033.

This ambiguity would persist in the draft tentative recommendation. Proposed Sections 1039.20-1039.50 set forth rules for determining the prevailing party for purposes of awarding costs pursuant to Section 1039.10 (recovery of costs by prevailing party). Proposed Section 1040.80 (costs where recovery is small) uses the term “prevailing party,” but does not specify whether the “prevailing party” is to be determined according to the rules in proposed Sections 1039.20-1039.50. Further, the draft does not contain definitions of “complaint,” “defendant,” and “plaintiff,” because at the time the draft was prepared, the staff did not consider such definitions necessary.

On further reflection, this treatment does not seem adequate. The Code of Civil Procedure is replete with provisions that contain definitions like those in Section 1032. See, e.g., Sections 425.11 (as used in this section, “complaint” includes cross-complaint, “plaintiff” includes cross-complainant, and “defendant” includes cross-defendant), 426.10 (as used in this article, “complaint” means complaint or cross-complaint, and “plaintiff” means person who files complaint or cross-complaint). See also Sections 116.130, 425.115, 429.30, 431.30, 435, 438, 481.060, 481.070, 481.180, 581, 583.110. This duplication is cumbersome and raises issues regarding the proper interpretation of provisions that are not subject to the definitions. There are, however, some provisions where differentiation between a complaint and a cross-complaint is intended. See, e.g., Section 871.3 (jurisdictional classification of good faith improver claim).

One way to address this situation would be to include definitions along the following lines at the beginning of the Code of Civil Procedure:

For purposes of this code, unless the provision or context otherwise requires:

(a) “Action” means an action commenced by a complaint, cross-complaint, or complaint in intervention.

(b) “Complaint” means a complaint, cross-complaint, or complaint in intervention.

(c) “Defendant” means a cross-defendant or a person against whom a complaint or complaint in intervention is filed.

(d) “Plaintiff” means a person who files a complaint, cross-complaint, or complaint in intervention.

Similar language could then be deleted from the sections in which it appears. The phrase “unless the provision or context otherwise requires” would provide leeway to account for situations in which differentiation between a complaint and a cross-complaint is appropriate.

Although that may be the optimal approach, the staff is not inclined to pursue it in the instant proposal. Reaching consensus on the issues directly relating to costs and attorney’s fees will be difficult enough, without injecting issues affecting the Code of Civil Procedure more globally. **Instead, we would:**

(1) Add definitions of “action,” “complaint,” “defendant,” and “plaintiff” to the chapter on costs and attorney’s fees. For example, “For purposes of this chapter, unless unless the provision or context otherwise requires, ‘complaint’ means a complaint, cross-complaint, or complaint in intervention.”

(2) Reorganize proposed “Article 1. General Provisions and Definitions” so that the definitions are grouped together in alphabetical order (perhaps dividing the material into two articles, entitled “Definitions” and “General Provisions”).

(3) Clarify that the term “prevailing party” in proposed Section 1040.80 means the prevailing party as determined pursuant to proposed Sections 1039.20-1039.50. (We would *not* attempt to define what it means to “prevail” for purposes of the entire chapter on costs and attorney’s fees. The term is used in a variety of provisions in the chapter relating to specific types of actions or specific circumstances. Sections 1021.4, 1021.6, 1021.9, 1028.5, 1029.6, 1029.8, 1036, 1038. At some point, it may be appropriate to examine each of these provisions and determine whether the prevailing party should be determined using the same approach that the Commission is proposing for costs and contractual attorney’s fees. It seems unwise, however, to expand the scope of the present proposal to encompass such analysis.)

If the Commission is interested, it could also explore the possibility of more global reform in its ongoing study of civil procedure.

## **Inclusion of Attorney's Fees in Determining Amount of Recovery**

Section 1033 makes a cost award discretionary “where the prevailing party recovers a judgment that could have been rendered in a limited civil case.” The amount of damages is determinative in assessing whether a recovery is so small that this rule applies. Appellate courts have consistently held that a potential award of attorney’s fees is not counted. *See, e.g., Steele v. Jensen Instrument Co.*, 59 Cal. App. 4th 326, 330-31, 69 Cal. Rptr. 2d 135 (1997) (“In determining whether the prevailing party recovered a judgment that could have been rendered in a court of lesser jurisdiction, the trial court does not add a potential award of statutory or contractual attorney’s fees”); *see also Korech v. Hornwood*, 58 Cal. App. 4th 1412, 1417-18, 68 Cal. Rptr. 2d 637 (1997); *Dorman v. DWLC Corp.*, 35 Cal. App. 4th 1808, 1815, 42 Cal. Rptr. 2d 459 (1995). These cases are consistent with Code of Civil Procedure Section 85, under which “attorney’s fees, interest, and costs” are excluded in determining whether a case satisfies the amount in controversy requirement for a limited civil case.

The existence of this case law raises a question: Should Section 1033 (proposed Section 1040.80 in the draft tentative recommendation) be revised to make more explicit that a potential attorney’s fee award does not count in determining whether a recovery is so small that a cost award is discretionary? **The staff’s inclination is not to make such a change.** The case law is clear and uncontroverted. The point is also obvious from Section 85, which persons would be likely to check because it defines limited civil case and it would be cited in the Comment to proposed Section 1040.80 (see page 4 *supra*).

If the Commission considers it desirable, we could also refer to the case law in the Comment to proposed Section 1040.80:

### **Comment. ...**

In assessing whether a recovery triggers the statute, the amount of damages is determinative, not the amount of damages plus a potential award of attorney’s fees or other costs. See Section 85(a) (amount in controversy requirement for limited civil case); see also *Korech v. Hornwood*, 58 Cal. App. 4th 1412, 1417-18, 68 Cal. Rptr. 2d 637 (1997); *Steele v. Jensen Instrument Co.*, 59 Cal. App. 4th 326, 330-31, 69 Cal. Rptr. 2d 135 (1997); *Dorman v. DWLC Corp.*, 35 Cal. App. 4th 1808, 1815, 42 Cal. Rptr. 2d 459 (1995).

....

## Discretion in Awarding Attorney's Fees

A further issue is how to interpret the term “costs” in Section 1033. Does the listing of costs in Section 1033.5 (proposed Sections 1040.10-1040.60 in the draft tentative recommendation) govern an award of costs under Section 1033? In particular, do attorney's fees authorized by contract, statute, or law (Section 1033.5(a)(10)) qualify as “costs” within the meaning of Section 1033? In other words, if a recovery is so small that it triggers Section 1033, does the court have discretion in awarding attorney's fees authorized by contract, statute, or law, or does it only have discretion in awarding traditional court costs?

Two cases suggest that the court has discretion in awarding attorney's fees, not just other costs. In *Dorman*, a landlord successfully sued a tenant in superior court, but recovered less than the \$25,000 jurisdictional limit. 35 Cal. App. 4th at 1811-12. The landlord sought attorney's fees pursuant to Civil Code Section 1717, but the trial court denied the request. The court of appeal reversed, explaining that an award of costs *and attorney's fees* was discretionary under Section 1033, but the trial court had abused its discretion because it failed to consider certain factors in denying the landlord's request. *Id.* at 1814-17.

Similarly, in *Haworth v. Lira*, 232 Cal. App. 3d 1362, 284 Cal. Rptr. 62 (1991), the plaintiff sought attorney's fees pursuant to Code of Civil Procedure Section 1021.9. The trial court denied the claim on the ground that Section 1021.9 did not apply. The court of appeal reversed and remanded, explaining that Section 1021.9 was applicable, but an award of fees was not mandatory because “a superior court judge retains the discretion to deny prevailing parties such as plaintiffs an award of costs when the verdict is below the jurisdictional maximum of the municipal court.” *Id.* at 1371. The court of appeal further explained:

In the present case, the trial court explicitly refused to grant plaintiffs' request to claim their legal fees as an item of cost because it believed that Code of Civil Procedure section 1021.9 only applied to commercial ranchers or farmers. The trial court had no occasion to exercise its discretion to deny plaintiffs *their legal fees* pursuant to Code of Civil Procedure section 1033, subdivision (a). On remand, the trial court may exercise its discretion to deny *prejudgment fees as well as fees on appeal* altogether or to determine the amount of *reasonable fees*.

*Id.* at 1371-72 (emphasis added).

In both *Dorman* and *Haworth* the court of appeal interpreted Section 1033 to mean that where the requirements of the statute are met, a court has discretion in awarding attorney's fees as well as traditional court costs. We could codify that approach by adding a new subdivision to proposed Section 1040.80:

(d) As used in this section, "costs" means the items recoverable as costs under Section 1040.10.

**Comment. ...**

Subdivision (d) clarifies that where a recovery meets the requirements of Section 1040.80, the court has discretion in awarding attorney's fees authorized by contract, statute, or law, not just discretion in awarding other costs. See *Dorman v. DWLC Corporation*, 35 Cal. App. 4th 1808, 1814-17, 42 Cal. Rptr. 2d 459 (1995); *Haworth v. Lira*, 232 Cal. App. 3d 1362, 1371-72, 284 Cal. Rptr. 62 (1991).

For relief awardable ....

**But the staff advises against such codification.** *Dorman* and *Haworth* do not explore in much depth whether the Legislature intended a fee award to be discretionary where the recovery meets the requirements of Section 1033. Attempting to codify the rule of those cases might also create controversy that could impede the Commission's other proposed reforms. Instead of addressing the point in the current proposal, we suggest deferring it to a later time.

Respectfully submitted,

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ADDITIONAL CONFORMING REVISIONS

1 **Bus. & Prof. Code § 17550.45 (amended). Unpaid assessment**

2 SEC. \_\_\_\_\_. Section 17550.45 of the Business and Professions Code is amended  
3 to read:

4 17550.45. (a) If any assessment is not paid within 60 days of the due date, then  
5 the corporation shall notify the office of the Attorney General, which shall  
6 forthwith suspend the registration of the participant who has not paid. The  
7 corporation shall provide a copy of this notification to the participant.

8 (b) The Travel Consumer Restitution Corporation or any entity set forth in  
9 Section 17204 may bring an action at law or in equity against a participant to  
10 recover any unpaid assessment.

11 (c) The Travel Consumer Restitution Corporation shall be awarded costs and  
12 reasonable attorney's fees if it prevails in any action against a participant pursuant  
13 to subdivision (b). Those costs and attorney's fees shall be awarded as an item of  
14 costs, as provided for in ~~paragraph (10) of subdivision (a) and paragraph (5) of~~  
15 ~~subdivision (c) of Section 1033.5~~ Section 1040.50 of the Code of Civil Procedure.

16 **Comment.** Section 17550.45 is amended to correct a cross-reference. The substance of former  
17 Code of Civil Procedure Section 1033.5(a)(10) and (c)(5) is codified in Code of Civil Procedure  
18 Section 1040.50.

19 **Bus. & Prof. Code § 17550.53. Authority to investigate claims**

20 SEC. \_\_\_\_\_. Section 17550.53 of the Business and Professions Code is amended  
21 to read:

22 17750.53. (a) The Travel Consumer Restitution Corporation shall have  
23 independent authority to investigate claims filed by persons aggrieved pursuant to  
24 Section 17550.47.

25 (b) The corporation, upon the request of the office of the Attorney General, may  
26 participate in an examination or investigation of the books and records of a  
27 participant for the purpose of evaluating a claim related to that seller of travel.  
28 There shall be no liability on the part of, and no cause of action of any nature shall  
29 arise against, the State of California or any of its employees, agents, or  
30 representatives for the release of any information furnished to the Travel  
31 Consumer Restitution Corporation pursuant to this subdivision or in connection  
32 with the investigation or review of any claim.

33 (c) With the consent of a majority of its directors, the corporation, in order to  
34 fulfill its obligations under this article, may appoint an independent certified public  
35 accountant or public accountant or hire or appoint a specialized committee or  
36 employees to conduct an examination or investigation authorized by this section.  
37 Any reports as a result thereof shall be furnished to the office of the Attorney  
38 General.

1 (d) To assist the corporation in evaluating a claim related to a participant, the  
2 participant shall provide or make available for inspection by the corporation those  
3 books, accounts, bank account records, and files which are necessary for the  
4 corporation to evaluate the claim.

5 (e) The corporation, any participant, an agent of the corporation or any person  
6 other than a law enforcement agency who uses information obtained under this  
7 section for any purpose not authorized in this article or Article 2.6 (commencing  
8 with Section 17550) is guilty of a misdemeanor.

9 (f) Costs and expenses for any examination under this section shall be paid for  
10 by the participant if a claim directly related to that seller of travel has been  
11 approved and payment has been made to a person aggrieved. The corporation may  
12 maintain an action for recovery of these examination costs and expenses in any  
13 court of competent jurisdiction, and shall recover its reasonable costs and  
14 attorney's fees as an item of costs, as provided for in ~~paragraph (10) of subdivision~~  
15 ~~(a) and paragraph (5) of subdivision (c) of Section 1033.5~~ Section 1040.50 of the  
16 Code of Civil Procedure.

17 **Comment.** Section 17550.53 is amended to correct a cross-reference. The substance of former  
18 Code of Civil Procedure Section 1033.5(a)(10) and (c)(5) is codified in Code of Civil Procedure  
19 Section 1040.50.

20 ☞ **Staff Note.** Subdivision (f) refers to “any court of competent jurisdiction.” This reference may  
21 require revision in light of trial court unification. We plan to address this point in the  
22 Commission’s study of trial court restructuring, rather than in this study of costs and contractual  
23 attorney’s fees.

24 **Code Civ. Proc. § 488.080 (amended) Levy of attachment by registered process server**

25 SEC. \_\_\_\_\_. Section 488.080 of the Code of Civil Procedure is amended to read:  
26 488.080. (a) A registered process server may levy under a writ of attachment on  
27 the following types of property:

- 28 (1) Real property, pursuant to Section 488.315.
- 29 (2) Growing crops, timber to be cut, or minerals or the like (including oil and  
30 gas) to be extracted or accounts receivable resulting from the sale thereof at the  
31 wellhead or minehead, pursuant to Section 488.325.
- 32 (3) Personal property in the custody of a levying officer, pursuant to Section  
33 488.355.
- 34 (4) Equipment of a going business, pursuant to Section 488.375.
- 35 (5) Motor vehicles, vessels, mobilehomes, or commercial coaches used as  
36 equipment of a going business, pursuant to Section 488.385.
- 37 (6) Farm products or inventory of a going business, pursuant to Section 488.405.
- 38 (7) Personal property used as a dwelling, pursuant to subdivision (a) of Section  
39 700.080.
- 40 (8) Deposit accounts, pursuant to Section 488.455.
- 41 (9) Property in a safe-deposit box, pursuant to Section 488.460.
- 42 (10) Accounts receivable or general intangibles, pursuant to Section 488.470.

1 (11) Final money judgments, pursuant to Section 488.480.

2 (12) Interest of a defendant in personal property in the estate of a decedent,  
3 pursuant to Section 488.485.

4 (b) Before levying under the writ of attachment, the registered process server  
5 shall deposit a copy of the writ with the levying officer and pay the fee provided  
6 by Section 26721 of the Government Code.

7 (c) If a registered process server levies on property pursuant to subdivision (a),  
8 the registered process server shall do both of the following:

9 (1) Comply with the applicable levy, posting, and service provisions of Article 2  
10 (commencing with Section 488.300).

11 (2) Request any third person served to give a garnishee's memorandum to the  
12 levying officer in compliance with Section 488.610 on a form provided by the  
13 registered process server.

14 (d) Within five days after levy under this section, all of the following shall be  
15 filed with the levying officer:

16 (1) The writ of attachment.

17 (2) An affidavit of the registered process server stating the manner of levy  
18 performed.

19 (3) Proof of service of the copy of the writ and notice of attachment on other  
20 persons as required by Article 2 (commencing with Section 488.300).

21 (4) Instructions in writing, as required by the provisions of Section 488.030.

22 (e) If the fee provided by Section 26721 of the Government Code has been paid,  
23 the levying officer shall perform all other duties under the writ as if the levying  
24 officer had levied under the writ and shall return the writ to the court. If the  
25 registered process server does not comply with subdivisions (b) and (d), the levy is  
26 ineffective and the levying officer is not required to perform any duties under the  
27 writ and may issue a release for any property sought to be attached. The levying  
28 officer is not liable for actions taken in conformance with the provisions of this  
29 title in reliance on information provided to the levying officer under subdivision  
30 (d) except to the extent that the levying officer has actual knowledge that the  
31 information is incorrect. Nothing in this subdivision limits any liability the  
32 plaintiff or registered process server may have if the levying officer acts on the  
33 basis of incorrect information provided under subdivision (d).

34 (f) The fee for services of a registered process server under this section shall be  
35 allowed as a recoverable cost pursuant to Section ~~1033.5~~ 1040.20.

36 **Comment.** Section 488.080 is amended to correct a cross-reference. The substance of former  
37 Section 1033.5(a)(4) (fees for service of process) and (a)(5) (expenses of attachment) is codified  
38 in Section 1040.20(d) and (e).

39 **Code Civ. Proc. § 685.040 (amended). Right to costs of enforcing judgment**

40 SEC. \_\_\_\_\_. Section 685.040 of the Code of Civil Procedure is amended to read:

41 685.040. The judgment creditor is entitled to the reasonable and necessary costs  
42 of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not

1 included in costs collectible under this title unless otherwise provided by law.  
2 Attorney's fees incurred in enforcing a judgment are included as costs collectible  
3 under this title if the underlying judgment includes an award of attorney's fees to  
4 the judgment creditor pursuant to ~~subparagraph (A) of paragraph (10) of~~  
5 ~~subdivision (a) of Section 1033.5~~ paragraph (1) of subdivision (a) of Section  
6 1040.50.

7 **Comment.** Section 685.040 is amended to correct a cross-reference. The substance of former  
8 Section 1033.5(a)(10)(A) (attorney's fees authorized by contract) is codified in Section  
9 1040.50(a)(1).

10 **Code Civ. Proc. § 685.095 (amended). Costs for service of writ by levying officer or**  
11 **registered process server**

12 SEC. \_\_\_\_\_. Section 685.095 of the Code of Civil Procedure is amended to read:  
13 685.095. When a writ is served by a levying officer or registered process server,  
14 the costs for that service, as determined pursuant to Section ~~1033.5~~ 1040.20, shall  
15 be added to and become part of the judgment.

16 **Comment.** Section 685.040 is amended to correct a cross-reference. The substance of former  
17 Section 1033.5(a)(4) (fees for service of process) is codified in Section 1040.20(d).

18 **Code Civ. Proc. § 699.080 (amended). Levy by registered process server under writ of**  
19 **execution**

20 SEC. \_\_\_\_\_. Section 699.080 of the Code of Civil Procedure is amended to read:  
21 699.080. (a) A registered process server may levy under a writ of execution on  
22 the following types of property:

23 (1) Real property, pursuant to Section 700.015.

24 (2) Growing crops, timber to be cut, or minerals or the like (including oil and  
25 gas) to be extracted or accounts receivable resulting from the sale thereof at the  
26 wellhead or minehead, pursuant to Section 700.020.

27 (3) Personal property in the custody of a levying officer, pursuant to Section  
28 700.050.

29 (4) Personal property used as a dwelling, pursuant to subdivision (a) of Section  
30 700.080.

31 (5) Deposit accounts, pursuant to Section 700.140.

32 (6) Property in a safe-deposit box, pursuant to Section 700.150.

33 (7) Accounts receivable or general intangibles, pursuant to Section 700.170.

34 (8) Final money judgments, pursuant to Section 700.190.

35 (9) Interest of a judgment debtor in personal property in the estate of a decedent,  
36 pursuant to Section 700.200.

37 (b) Before levying under the writ of execution, the registered process server shall  
38 deposit a copy of the writ with the levying officer and pay the fee provided by  
39 Section 26721 of the Government Code.

40 (c) If a registered process server levies on property pursuant to subdivision (a),  
41 the registered process server shall do both of the following:

1 (1) Comply with the applicable levy, posting, and service provisions of Article 4  
2 (commencing with Section 700.010).

3 (2) Request any third person served to give a garnishee's memorandum to the  
4 levying officer in compliance with Section 701.030 on a form provided by the  
5 registered process server.

6 (d) Within five days after levy under this section, all of the following shall be  
7 filed with the levying officer:

8 (1) The writ of execution.

9 (2) An affidavit of the registered process server stating the manner of levy  
10 performed.

11 (3) Proof of service of the copy of the writ and notice of levy on other persons as  
12 required by Article 4 (commencing with Section 700.010).

13 (4) Instructions in writing, as required by the provisions of Section 687.010.

14 (e) If the fee provided by Section 26721 of the Government Code has been paid,  
15 the levying officer shall perform all other duties under the writ as if the levying  
16 officer had levied under the writ and shall return the writ to the court. If the  
17 registered process server does not comply with subdivisions (b) and (d), the levy is  
18 ineffective and the levying officer is not required to perform any duties under the  
19 writ and may issue a release for any property sought to be levied upon.

20 (f) The fee for services of a registered process server under this section shall be  
21 allowed as a recoverable cost pursuant to Section ~~1033.5~~ 1040.20.

22 **Comment.** Section 699.080 is amended to correct a cross-reference. The substance of former  
23 Section 1033.5(a)(4) (fees for service of process) is codified in Section 1040.20(d).

24 **Code Civ. Proc. § 706.108 (amended). Issuance and service of earnings withholding order by**  
25 **registered process server**

26 SEC. \_\_\_\_\_. Section 706.108 of the Code of Civil Procedure is amended to read:

27 706.108. (a) If a writ of execution has been issued to the county where the  
28 judgment debtor's employer is to be served and the time specified in subdivision  
29 (b) of Section 699.530 for levy on property under the writ has not expired, a  
30 judgment creditor may deliver an application for issuance of an earnings  
31 withholding order to a registered process server who may then issue an earnings  
32 withholding order.

33 (b) If the registered process server has issued the earnings withholding order, the  
34 registered process server, before serving the earnings withholding order, shall  
35 deposit with the levying officer a copy of the writ of execution, the application for  
36 issuance of an earnings withholding order, and a copy of the earnings withholding  
37 order, and shall pay the fee provided by Section 26750 of the Government Code.

38 (c) A registered process server may serve an earnings withholding order on an  
39 employer whether the earnings withholding order was issued by a levying officer  
40 or by a registered process server, but no earnings withholding order may be served  
41 after the time specified in subdivision (b) of Section 699.530. In performing this

1 function, the registered process server shall serve upon the designated employer all  
2 of the following:

3 (1) The original and one copy of the earnings withholding order.

4 (2) The form for the employer's return.

5 (3) The notice to employee of earnings withholding order.

6 (4) A copy of the employer's instructions referred to in Section 706.127, except  
7 as otherwise prescribed in rules adopted by the Judicial Council.

8 (d) Within five days after service under this section, all of the following shall be  
9 filed with the levying officer:

10 (1) The writ of execution, if it is not already in the hands of the levying officer.

11 (2) Proof of service on the employer of the papers listed in subdivision (c).

12 (3) Instructions in writing, as required by the provisions of Section 687.010.

13 (e) If the fee provided by Section 26750 of the Government Code has been paid,  
14 the levying officer shall perform all other duties required by this chapter as if the  
15 levying officer had served the earnings withholding order. If the registered process  
16 server does not comply with subdivisions (b), where applicable, and (d), the  
17 service of the earnings withholding order is ineffective and the levying officer is  
18 not required to perform any duties under the order and may terminate the order and  
19 may release any withheld earnings to the judgment debtor.

20 (f) The fee for services of a registered process server under this section may, in  
21 the court's discretion, be allowed as a recoverable cost upon a motion pursuant to  
22 Section 685.080. If allowed, the amount of the fee is governed by Section 1033.5  
23 1040.20 but may not exceed one dollar and fifty cents (\$1.50).

24 **Comment.** Section 706.108 is amended to correct a cross-reference. The substance of former  
25 Section 1033.5(a)(4) (fees for service of process) is codified in Section 1040.20(d).

26 ➡ **Staff Note.** Subdivision (f) limits the recoverable fee to \$1.50. This amount was established in  
27 1980 (1980 Cal. Stat. ch. 34, § 1). Although it might be appropriate to adjust the amount to  
28 account for inflation, it seems unwise to complicate the instant proposal with such a reform.

29 **Code Civ. Proc. § 715.040 (amended). Service and posting by registered process server**

30 SEC. \_\_\_\_\_. Section 715.040 of the Code of Civil Procedure is amended to read:

31 715.040. (a) A registered process server may execute the writ of possession of  
32 real property as provided in subdivisions (a) and (b) of Section 715.020 if a proper  
33 writ of possession is delivered to the sheriff or marshal and that officer does not  
34 execute the writ as provided in subdivisions (a) and (b) of Section 715.020 within  
35 three days (Saturday, Sunday, and legal holidays excluded) from the day the writ  
36 is delivered to that officer. If the writ is not executed within that time, the levying  
37 officer shall upon request give the writ to the judgment creditor or to a registered  
38 process server designated by the judgment creditor.

39 (b) Within five days after executing the writ under this section, all of the  
40 following shall be filed with the levying officer:

41 (1) The writ of possession of real property.

1 (2) An affidavit of the registered process server stating the manner in which the  
2 writ was executed.

3 (3) Proof of service of the writ.

4 (4) Instructions in writing, as required by the provisions of Section 687.010.

5 (c) If the writ is executed by a registered process server, the levying officer shall  
6 perform all other duties under the writ and shall return the writ to the court.

7 (d) The fee for services of a registered process server under this section may, in  
8 the court's discretion, be allowed as a recoverable cost upon a motion pursuant to  
9 Section 685.080. If allowed, the amount of the fee to be allowed is governed by  
10 Section ~~1033.5~~ 1040.20.

11 **Comment.** Section 715.040 is amended to correct a cross-reference. The substance of former  
12 Section ~~1033.5(a)(4)~~ (fees for service of process) is codified in Section 1040.20(d).

13 **Code Civ. Proc. § 917.1 (amended). Stay pending appeal**

14 SEC. \_\_\_\_\_. Section 917.1 of the Code of Civil Procedure is amended to read:

15 (a) Unless an undertaking is given, the perfecting of an appeal shall not stay  
16 enforcement of the judgment or order in the trial court if the judgment or order is  
17 for any of the following:

18 (1) Money or the payment of money, whether consisting of a special fund or not,  
19 and whether payable by the appellant or another party to the action.

20 (2) Costs awarded pursuant to Section 998 which otherwise would not have been  
21 awarded as costs pursuant to ~~Section 1033.5~~ 1040.10.

22 (3) Costs awarded pursuant to Section 1141.21 which otherwise would not have  
23 been awarded as costs pursuant to ~~Section 1033.5~~ 1040.10.

24 (b) The undertaking shall be on condition that if the judgment or order or any  
25 part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to  
26 pay shall pay the amount of the judgment or order, or the part of it as to which the  
27 judgment or order is affirmed, as entered after the receipt of the remittitur, together  
28 with any interest which may have accrued pending the appeal and entry of the  
29 remittitur, and costs which may be awarded against the appellant on appeal. This  
30 section shall not apply in cases where the money to be paid is in the actual or  
31 constructive custody of the court; and such cases shall be governed, instead, by the  
32 provisions of Section 917.2. The undertaking shall be for double the amount of the  
33 judgment or order unless given by an admitted surety insurer in which event it  
34 shall be for one and one-half times the amount of the judgment or order. The  
35 liability on the undertaking may be enforced if the party ordered to pay does not  
36 make the payment within 30 days after the filing of the remittitur from the  
37 reviewing court.

38 (c) If a surety on the undertaking pays the judgment, either with or without  
39 action, after the judgment is affirmed, the surety is substituted to the rights of the  
40 creditor and is entitled to control, enforce, and satisfy the judgment, in all respects  
41 as if the surety had recovered the judgment.

1 (d) Costs awarded by the trial court under Chapter 6 (commencing with Section  
2 1021) of Title 14 shall be included in the amount of the judgment or order for the  
3 purpose of applying paragraph (1) of subdivision (a) and subdivision (b).  
4 However, no undertaking shall be required pursuant to this section solely for costs  
5 awarded under Chapter 6 (commencing with Section 1021) of Title 14.

6 **Comment.** Section 917.1 is amended to correct cross-references. The substance of former  
7 Section 1033.5 is codified in Sections 1040.20-1040.60. Section 1040.10 (components of cost  
8 award) is an introductory provision that integrates Sections 1040.20-1040.60.

9 **Code Civ. Proc. § 998 (amended). Offer of compromise**

10 SEC. \_\_\_\_\_. Section 998 of the Code of Civil Procedure is amended to read:

11 998. (a) ~~The costs allowed under Sections 1031 and 1032~~ Section 1039.10 shall  
12 be withheld or augmented as provided in this section.

13 (b) Not less than 10 days prior to commencement of trial or arbitration (as  
14 provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, any  
15 party may serve an offer in writing upon any other party to the action to allow  
16 judgment to be taken or an award to be entered in accordance with the terms and  
17 conditions stated at that time.

18 (1) If the offer is accepted, the offer with proof of acceptance shall be filed and  
19 the clerk or the judge shall enter judgment accordingly. In the case of an  
20 arbitration, the offer with proof of acceptance shall be filed with the arbitrator or  
21 arbitrators who shall promptly render an award accordingly.

22 (2) If the offer is not accepted prior to trial or arbitration, within 30 days after it  
23 is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given  
24 in evidence upon the trial or arbitration.

25 (3) For purposes of this subdivision, a trial or arbitration shall be deemed to be  
26 actually commenced at the beginning of the opening statement of the plaintiff or  
27 counsel, and if there is no opening statement, then at the time of the administering  
28 of the oath or affirmation to the first witness, or the introduction of any evidence.

29 (c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to  
30 obtain a more favorable judgment or award, the plaintiff shall not recover his or  
31 her postoffer costs and shall pay the defendant's costs from the time of the offer.  
32 In addition, in any action or proceeding other than an eminent domain action, the  
33 court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable  
34 sum to cover costs of the services of expert witnesses, who are not regular  
35 employees of any party, actually incurred and reasonably necessary in either, or  
36 both, preparation for trial or arbitration, or during trial or arbitration, of the case by  
37 the defendant.

38 (2)(A) In determining whether the plaintiff obtains a more favorable judgment,  
39 the court or arbitrator shall exclude the postoffer costs.

40 (B) It is the intent of the Legislature in enacting subparagraph (A) to supersede  
41 the holding in *Encinitas Plaza Real v. Knight*, 209 Cal. App. 3d 996, that

1 attorney's fees awarded to the prevailing party were not costs for purposes of this  
2 section but were part of the judgment.

3 (d) If an offer made by a plaintiff is not accepted and the defendant fails to  
4 obtain a more favorable judgment or award in any action or proceeding other than  
5 an eminent domain action, the court or arbitrator, in its discretion, may require the  
6 defendant to pay a reasonable sum to cover costs of the services of expert  
7 witnesses, who are not regular employees of any party, actually incurred and  
8 reasonably necessary in either, or both, preparation for trial or arbitration, or  
9 during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's  
10 costs.

11 (e) If an offer made by a defendant is not accepted and the plaintiff fails to  
12 obtain a more favorable judgment or award, the costs under this section, from the  
13 time of the offer, shall be deducted from any damages awarded in favor of the  
14 plaintiff. If the costs awarded under this section exceed the amount of the damages  
15 awarded to the plaintiff the net amount shall be awarded to the defendant and  
16 judgment or award shall be entered accordingly.

17 (f) Police officers shall be deemed to be expert witnesses for the purposes of this  
18 section; plaintiff includes a cross-complainant and defendant includes a cross-  
19 defendant. Any judgment or award entered pursuant to this section shall be  
20 deemed to be a compromise settlement.

21 (g) This chapter does not apply to an offer that is made by a plaintiff in an  
22 eminent domain action.

23 (h) The costs for services of expert witnesses for trial under subdivisions (c) and  
24 (d) shall not exceed those specified in Section 68092.5 of the Government Code.

25 (i) This section shall not apply to labor arbitrations filed pursuant to memoranda  
26 of understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with  
27 Section 3512) of Division 4 of Title 1 of the Government Code).

28 **Comment.** Section 998 is amended to correct the cross-reference to former Section 1032. The  
29 substance of former Section 1032(b) is codified in Section 1039.10. For the components of a cost  
30 award pursuant to Section 1039.10, see Section 1040.10 & Comment.

31 The cross-reference to Section 1031 is deleted as unnecessary, because attorney's fees  
32 authorized by statute are a component of a cost award pursuant to Section 1039.10. See Sections  
33 1040.10(a)(2), 1040.50(a)(2).

34 **Code Civ. Proc. § 1141.21 (amended). Costs and fees after trial de novo**

35 SEC. \_\_\_\_\_. Section 1141.21 of the Code of Civil Procedure is amended to read:

36 1141.21. (a) If the judgment upon the trial de novo is not more favorable in  
37 either the amount of damages awarded or the type of relief granted for the party  
38 electing the trial de novo than the arbitration award, the court shall order that party  
39 to pay the following nonrefundable costs and fees, unless the court finds in writing  
40 and upon motion that the imposition of such costs and fees would create such a  
41 substantial economic hardship as not to be in the interest of justice:

42 (i) (1) To the county, the compensation actually paid to the arbitrator, less any  
43 amount paid pursuant to paragraph (iv) (4).

1 (ii) (2) To the other party or parties, all costs specified in Section 1033.5  
2 1040.10, and the party electing the trial de novo shall not recover his or her costs.

3 (iii) (3) To the other party or parties, the reasonable costs of the services of  
4 expert witnesses, who are not regular employees of any party, actually incurred or  
5 reasonably necessary in the preparation or trial of the case.

6 (iv) (4) To the other party or parties, the compensation paid by the other party or  
7 parties to the arbitrator, pursuant to subdivision (b) of Section 1141.28.

8 Such costs and fees, other than the compensation of the arbitrator, shall include  
9 only those incurred from the time of election of the trial de novo.

10 (b) If the party electing the trial de novo has proceeded in the action in forma  
11 pauperis and has failed to obtain a more favorable judgment, the costs and fees  
12 under paragraphs (ii) (2) and (iii) (3) of subdivision (a) shall be imposed only as an  
13 offset against any damages awarded in favor of that party.

14 (c) If the party electing the trial de novo has proceeded in the action in forma  
15 pauperis and has failed to obtain a more favorable judgment, the costs under  
16 paragraph (i) (1) of subdivision (a) shall be imposed only to the extent that there  
17 remains a sufficient amount in the judgment after the amount offset under  
18 subdivision (b) has been deducted from the judgment.

19 **Comment.** Section 1141.21 is amended to correct a cross-reference. The substance of former  
20 Section 1033.5 is codified in Sections 1040.20-1040.60. Section 1040.10 (components of cost  
21 award) is an introductory provision that integrates Sections 1040.20-1040.60.

22 Technical changes are also made for conformity with preferred drafting style.

23 **Fin. Code § 17314.3 (amended). Deductible and payment of loss**

24 SEC. \_\_\_\_\_. Section 17314.3 of the Financial Code is amended to read:

25 17314.3. (a) A deductible shall apply to each loss suffered by a member in the  
26 amount of five thousand dollars (\$5,000), plus 5 percent of the amount by which  
27 the loss exceeds five thousand dollars (\$5,000). If a member with more than one  
28 licensed location suffers a covered loss at more than one location, the deductible  
29 shall apply to each location separately in proportion to the amount of the loss  
30 suffered at each such licensed location.

31 (b) Fidelity Corporation shall pay the full amount of any member's loss to the  
32 member or the member's successor in interest. The member shall be obligated to  
33 pay to Fidelity Corporation the amount of the member's deductible after payment  
34 in full of the loss by Fidelity Corporation.

35 (c) In the event a license is surrendered, suspended, or revoked prior to payment  
36 in full by the member of all or any portion of the deductible, the member shall  
37 nevertheless be liable to Fidelity Corporation for the amount of the deductible. If  
38 the license of the member is surrendered, suspended, or revoked prior to payment  
39 in full of the deductible, Fidelity Corporation shall have priority over all other  
40 claimants, except the State of California and any conservator or receiver of the  
41 member's estate, against the assets of the licensee, including the bond required  
42 under Section 17202.

1 (d) Nothing in this section shall be construed to give any person or entity not (1)  
2 a member of Fidelity Corporation, or (2) a successor in interest of a member, or  
3 (3) the commissioner any right of action or any right to make a claim directly  
4 against Fidelity Corporation, its officers, directors, agents, or employees. Fidelity  
5 Corporation shall be entitled to recover its reasonable costs and attorney's fees as  
6 an item of costs, as provided for in ~~paragraph (10) of subdivision (a) and~~  
7 ~~paragraph (5) of subdivision (c) of Section 1033.5~~ Section 1040.50 of the Code of  
8 Civil Procedure, in defending any claim made directly against Fidelity  
9 Corporation, not authorized in this division.

10 (e) If a member fails to pay the deductible within the time set forth in the bylaws  
11 of Fidelity Corporation, Fidelity Corporation may bring an action at law or in  
12 equity against the member to recover the amount of the deductible. Fidelity  
13 Corporation shall recover its reasonable costs and attorney's fees as an item of  
14 costs, as provided for in ~~paragraph (10) of subdivision (a) and paragraph (5) of~~  
15 ~~subdivision (c) of Section 1033.5~~ Section 1040.50 of the Code of Civil Procedure,  
16 provided, that the payment of the costs and attorney's fees will not cause the  
17 member to be in violation of Section 17202, 17202.1, or 17210.

18 **Comment.** Section 17314.3 is amended to correct cross-references. The substance of former  
19 Code of Civil Procedure Section 1033.5(a)(10) and (c)(5) is codified in Code of Civil Procedure  
20 Section 1040.50.

21 **Fin. Code § 17323 (amended). Unpaid assessment**

22 SEC. \_\_\_\_\_. Section 17323 of the Financial Code is amended to read:

23 17323. (a) In the event any member fails to pay an assessment when due,  
24 Fidelity Corporation shall by written demand addressed to the member request the  
25 payment of the assessment within 30 days of the demand letter. If the member fails  
26 to pay an assessment, the commissioner may issue an order pursuant to  
27 subdivision (b).

28 (b) If a member fails to pay the assessment, or any applicable late fee, the  
29 commissioner may by order summarily suspend the license issued to the company.  
30 If after the order is made, a request for a hearing is filed in writing and a hearing is  
31 not held within 60 days thereafter, the order is deemed rescinded as of its effective  
32 date. During any period when its license is suspended, a company shall not  
33 conduct business pursuant to this division, except as may be permitted by order of  
34 the commissioner. However, the suspension of a license shall not affect the powers  
35 of the commissioner as provided in this division.

36 (c) Fidelity Corporation may bring an action at law or in equity against the  
37 member to recover any assessment or fees.

38 (d) Fidelity Corporation may be awarded costs and reasonable attorney's fees, if  
39 it prevails in any action against a member, or against a third party, except the  
40 commissioner, to enforce a claim against the bond or other security posted by the  
41 member pursuant to Section 17202, or in any action against a member pursuant to  
42 subdivision (c). Those costs and attorney's fees may be awarded as an item of

1 costs, as provided for in ~~paragraph (10) of subdivision (a) and paragraph (5) of~~  
2 ~~subdivision (c) of Section 1033.5~~ Section 1040.50 of the Code of Civil Procedure,  
3 provided that the payment of the costs and attorney's fees will not cause the  
4 member to be in violation of Section 17202, 17202.1, or 17210.

5 **Comment.** Section 17323 is amended to correct a cross-reference. The substance of former  
6 Code of Civil Procedure Section 1033.5(a)(10) and (c)(5) is codified in Code of Civil Procedure  
7 Section 1040.50.

8 **Fin. Code § 17332 (amended). Subrogation**

9 SEC. \_\_\_\_\_. Section 17332 of the Financial Code is amended to read:

10 17332. When either Fidelity Corporation or the insurer providing the fidelity  
11 bond or insurance policy, if any, under Section 17310, or both, pay an obligation  
12 on behalf of a member, Fidelity Corporation and the insurer shall be subrogated to  
13 the rights, claims, and remedies of the member up to the amount paid by Fidelity  
14 Corporation and the insurer on behalf of the member. In any subrogation action  
15 filed by Fidelity Corporation, the provider of the fidelity bond or insurance policy  
16 if payment was made thereunder, or both, Fidelity Corporation shall have the first  
17 right to the proceeds of any judgment or settlement obtained against the principal  
18 obligors and any other party who is held liable jointly or severally, in whole or in  
19 part, with the principal obligors, up to the amount actually paid on the claim by  
20 Fidelity Corporation. Fidelity Corporation and the insurer, as subrogees, shall also  
21 recover in the subrogation action reasonable costs and attorney's fees which may  
22 be awarded either as part of any judgment or as an item of costs, as provided for in  
23 ~~paragraph (10) of subdivision (a) and paragraph (5) of subdivision (c) of Section~~  
24 1033.5 Section 1040.50 of the Code of Civil Procedure. No member engaged in  
25 business pursuant to Section 17200 shall be required to pay those costs and  
26 attorney's fees awarded pursuant to this section. Amounts recouped by Fidelity  
27 Corporation through subrogation, minus all costs, attorney's fees, and other  
28 administrative expenses incurred in obtaining that recovery, shall be credited to the  
29 fidelity fund.

30 **Comment.** Section 17332 is amended to correct a cross-reference. The substance of former  
31 Code of Civil Procedure Section 1033.5(a)(10) and (c)(5) is codified in Code of Civil Procedure  
32 Section 1040.50.

33 **Fin. Code § 17336 (amended). Authority to conduct investigation, examination, or audit**

34 SEC. \_\_\_\_\_. Section 17336 of the Financial Code is amended to read:

35 17336. (a) Fidelity Corporation shall have independent authority to investigate  
36 claims filed by members pursuant to Section 17330.

37 (b) Fidelity Corporation, upon submitting written notice to the commissioner,  
38 may conduct an examination or investigation of the business practices of a  
39 member's handling and processing of trust obligations or the failure to pay an  
40 assessment under Section 17320, 17321, or 17321.1. The result of every  
41 investigation or examination shall be reported to the commissioner together with  
42 the recommendations of the Board of Directors of Fidelity Corporation. The

1 investigation or examination reports prepared by the duly designated  
2 representatives of the board of the Escrow Agents' Fidelity Corporation shall not  
3 be public records.

4 (c) Fidelity Corporation may submit reports and make recommendations to a  
5 member on its findings as a result of an examination or investigation conducted  
6 pursuant to this section. These reports and recommendations shall not be public  
7 documents. A copy of all reports and recommendations shall be furnished to the  
8 commissioner by Fidelity Corporation. There shall be no liability on the part of,  
9 and no cause of action of any nature shall arise against, Fidelity Corporation or its  
10 members, directors, officers, employees, stockholders, or agents or the  
11 commissioner or commissioner's authorized representatives for any statements  
12 made by them in any reports or recommendations made hereunder.

13 (d) Fidelity Corporation, upon the request of the commissioner, may participate  
14 in an examination or investigation of the books and records of a member. There  
15 shall be no liability on the part of, and no cause of action of any nature shall arise  
16 against, the State of California, the commissioner, or members of the  
17 commissioner's staff or the commissioner's authorized representative for the  
18 release of any information furnished to Fidelity Corporation pursuant to this  
19 subdivision.

20 (e) With the written consent of a majority of its directors, Fidelity Corporation,  
21 in order to fulfill its obligations under this section, may appoint an independent  
22 certified public accountant or public accountant or hire or appoint a specialized  
23 committee or employees to conduct an examination or investigation authorized by  
24 this section. Any reports as a result thereof shall be furnished to the commissioner  
25 pursuant to the provisions of subdivision (c).

26 (f) For the purposes of conducting an examination or investigation, Fidelity  
27 Corporation or its appointee shall have free access to the offices and places of  
28 business, books, accounts, bank account records and statements, papers, records,  
29 files, safes and vaults of the member.

30 (g) Fidelity Corporation may cause an examination or audit of the places of  
31 business, books, accounts, bank account records, papers, records, files, safes and  
32 vaults of a member to be conducted in accordance with Fidelity Corporation's  
33 bylaws and rules.

34 (h) Costs and expenses for the examination or investigation conducted pursuant  
35 to subdivision (b) shall be paid to the Fidelity Corporation by the licensee, its  
36 shareholders, directors, and officers, or person examined, each of whom shall be  
37 jointly and severally liable therefor. The Fidelity Corporation may maintain an  
38 action for recovery of these costs in any court of competent jurisdiction, and shall  
39 recover its reasonable costs and attorney's fees as an item of costs as provided for  
40 in ~~paragraph (10) of subdivision (a) and paragraph (5) of subdivision (c) of Section~~  
41 1033.5 Section 1040.50 of the Code of Civil Procedure, provided that the payment  
42 of the costs and attorney's fees will not cause the member to be in violation of  
43 Section 17202, 17202.1, or 17210.

1 (i) Fidelity Corporation, any member of Fidelity Corporation, an agent of  
2 Fidelity Corporation or of its members, or any person who uses any information  
3 obtained under this section for any purpose not authorized herein is guilty of a  
4 misdemeanor.

5 (j) Fidelity Corporation may cause an examination or audit of a member, to be  
6 conducted in accordance with Fidelity Corporation's Bylaws and Rules, whenever:

7 (1) The member has failed to pay an assessment as provided for under Section  
8 17320, 17321, or 17321.1.

9 (2) Fidelity Corporation has received any information of irregular or improper  
10 handling of the trust obligations of the member or of an occurrence which may  
11 give rise to a claim for loss of trust obligations.

12 (3) Fidelity Corporation so elects, either with or without notice.

13 (k) Costs and expenses for any examination under this section shall be paid for  
14 by the member. Fidelity Corporation shall also be entitled to recover costs and  
15 expenses for any examination under this section from those persons, if any, who  
16 are discovered to be responsible for, or to have caused, any irregular or improper  
17 handling of trust obligations of the member or any occurrence which may give rise  
18 to a claim for loss of trust obligations, or otherwise by failure to cooperate,  
19 unnecessarily increase the cost of the examination. Fidelity Corporation may  
20 maintain an action for recovery of these examination costs and expenses in any  
21 court of competent jurisdiction, and shall recover its reasonable costs and  
22 attorney's fees as an item of costs, as provided for in ~~paragraph (10) of subdivision~~  
23 ~~(a) and paragraph (5) of subdivision (c) of Section 1033.5~~ Section 1040.50 of the  
24 Code of Civil Procedure, provided that the payment of the costs and attorney's  
25 fees will not cause the member to be in violation of Section 17202, 17202.1, or  
26 17210.

27 **Comment.** Section 17336 is amended to correct a cross-reference. The substance of former  
28 Code of Civil Procedure Section 1033.5(a)(10) and (c)(5) is codified in Code of Civil Procedure  
29 Section 1040.50.

30 **Gov't Code § 25845 (amended). Procedure for abatement of nuisance**

31 SEC. \_\_\_\_\_. Section 25845 of the Government Code is amended to read:

32 25845. (a) The board of supervisors, by ordinance, may establish a procedure for  
33 the abatement of a nuisance. The ordinance shall, at a minimum, provide that the  
34 owner of the parcel, and anyone known to the board of supervisors to be in  
35 possession of the parcel, be given notice of the abatement proceeding and an  
36 opportunity to appear before the board of supervisors and be heard prior to the  
37 abatement of the nuisance by the county. However, nothing in this section  
38 prohibits the summary abatement of a nuisance upon order of the board of  
39 supervisors, or upon order of any other county officer authorized by law to  
40 summarily abate nuisances, if the board or officer determines that the nuisance  
41 constitutes an immediate threat to public health or safety.

1 (b) In any action to abate a nuisance, whether by administrative proceedings,  
2 judicial proceedings, or summary abatement, the owner of the parcel upon which  
3 the nuisance is found to exist shall be liable for all costs of abatement incurred by  
4 the county, including, but not limited to, administrative costs, and any and all costs  
5 incurred in the physical abatement of the nuisance. Recovery of costs pursuant to  
6 this section shall be in addition to and shall not limit any prevailing party's right to  
7 recover costs pursuant to Sections ~~1032 and 1033.5~~ 1039.10 and 1040.10 of the  
8 Code of Civil Procedure or any other provision of law.

9 (c) A county may, by ordinance, provide for the recovery of attorneys' fees in  
10 any action, administrative proceeding, or special proceeding to abate a nuisance. If  
11 the ordinance provides for the recovery of attorneys' fees, it shall provide for  
12 recovery of attorneys' fees by the prevailing party, rather than limiting recovery of  
13 attorneys' fees to the county if it prevails. The ordinance may limit recovery of  
14 attorneys' fees by the prevailing party to those individual actions or proceedings in  
15 which the county elects, at the initiation of that individual action or proceeding, to  
16 seek recovery of its own attorneys' fees. In no action, administrative proceeding,  
17 or special proceeding shall an award of attorneys' fees to a prevailing party exceed  
18 the amount of reasonable attorneys' fees incurred by the county in the action or  
19 proceeding.

20 (d) If the owner fails to pay the costs of the abatement upon demand by the  
21 county, the board of supervisors may order the cost of the abatement to be  
22 specially assessed against the parcel. The assessment may be collected at the same  
23 time and in the same manner as ordinary county taxes are collected, and shall be  
24 subject to the same penalties and the same procedure and sale in case of  
25 delinquency as are provided for ordinary county taxes. All laws applicable to the  
26 levy, collection, and enforcement of county taxes are applicable to the special  
27 assessment.

28 (e) If the board of supervisors specially assesses the cost of the abatement  
29 against the parcel, the board also may cause a notice of abatement lien to be  
30 recorded. The notice shall, at a minimum, identify the record owner or possessor  
31 of property, set forth the last known address of the record owner or possessor, set  
32 forth the date upon which abatement of the nuisance was ordered by the board of  
33 supervisors and the date the abatement was complete, and include a description of  
34 the real property subject to the lien and the amount of the abatement cost.

35 (f) However, if the board of supervisors does not cause the recordation of a  
36 notice of abatement lien pursuant to subdivision (e), and any real property to  
37 which the costs of abatement relates has been transferred or conveyed to a bona  
38 fide purchaser for value, or a lien on a bona fide encumbrancer for value has been  
39 created and attaches to that property, prior to the date on which the first  
40 installment of county taxes would become delinquent, then the cost of abatement  
41 shall not result in a lien against that real property but shall be transferred to the  
42 unsecured roll for collection.

1 (g) Recordation of a notice of abatement lien pursuant to subdivision (e) has the  
2 same effect as recordation of an abstract of a money judgment recorded pursuant  
3 to Article 2 (commencing with Section 697.310) of Chapter 2 of Division 2 of  
4 Title 9 of Part 2 of the Code of Civil Procedure. The lien created has the same  
5 priority as a judgment lien on real property and continues in effect until released.  
6 Upon order of the board of supervisors, or any county officer authorized by the  
7 board of supervisors to act on its behalf, an abatement lien created under this  
8 section may be released or subordinated in the same manner as a judgment lien on  
9 real property may be released or subordinated.

10 (h) The board of supervisors may delegate the hearing required by subdivision  
11 (a), prior to abatement of a public nuisance, to a hearing board designated by the  
12 board of supervisors. The hearing board shall make a written recommendation to  
13 the board of supervisors. The board of supervisors may adopt the recommendation  
14 without further notice of hearing, or may set the matter for a de novo hearing  
15 before the board of supervisors.

16 (i) The board of supervisors may, by ordinance, delegate to a hearing officer  
17 appointed pursuant to Section 27720 the powers and duties specified by this  
18 section.

19 **Comment.** Section 25845 is amended to correct cross-references. The substance of former  
20 Code of Civil Procedure Section 1032(b) is codified in Section 1039.10. The substance of former  
21 Code of Civil Procedure Section 1033.5 is codified in Sections 1040.20-1040.60. Section 1040.10  
22 (components of cost award) is an introductory provision that integrates Sections 1040.20-  
23 1040.60.

24 **Ins. Code § 11580.9 (amended). Primary and excess insurance**

25 SEC. \_\_\_\_\_. Section 11580.9 of the Insurance Code is amended to read:

26 11580.9. (a) Where two or more policies affording valid and collectible  
27 automobile liability insurance apply to the same motor vehicle in an occurrence  
28 out of which a liability loss shall arise, and one policy affords coverage to a named  
29 insured engaged in the business of selling, repairing, servicing, delivering, testing,  
30 road-testing, parking, or storing motor vehicles, then both of the following shall be  
31 conclusively presumed:

32 (1) If, at the time of loss, the motor vehicle is being operated by any person  
33 engaged in any of these businesses, or by his or her employee or agent, the  
34 insurance afforded by the policy issued to the person engaged in the business shall  
35 be primary, and the insurance afforded by any other policy shall be excess.

36 (2) If, at the time of loss, the motor vehicle is being operated by any person other  
37 than as described in paragraph (1), the insurance afforded by the policy issued to  
38 any person engaged in any of these businesses shall be excess over all other  
39 insurance available to the operator as a named insured or otherwise.

40 (b) Where two or more policies apply to the same loss, and one policy affords  
41 coverage to a named insured engaged in the business of renting or leasing motor  
42 vehicles without operators, it shall be conclusively presumed that the insurance  
43 afforded by that policy to a person other than the named insured or his or her agent

1 or employee, shall be excess over and not concurrent with, any other valid and  
2 collectible insurance applicable to the same loss covering the person as a named  
3 insured or as an additional insured under a policy with limits at least equal to the  
4 financial responsibility requirements specified in Section 16056 of the Vehicle  
5 Code. The presumption provided by this subdivision shall apply only if, at the time  
6 of the loss, the involved motor vehicle either:

7 (1) Qualifies as a “commercial vehicle” as that term is used in Section 260 of the  
8 Vehicle Code.

9 (2) Has been leased for a term of six months or longer.

10 (c) Where two or more policies are applicable to the same loss arising out of the  
11 loading or unloading of a motor vehicle, and one or more of the policies is issued  
12 to the owner, tenant, or lessee of the premises on which the loading or unloading  
13 occurs, it shall be conclusively presumed that the insurance afforded by the policy  
14 covering the motor vehicle shall not be primary, notwithstanding anything to the  
15 contrary in any endorsement required by law to be placed on the policy, but shall  
16 be excess over all other valid and collectible insurance applicable to the same loss  
17 with limits up to the financial responsibility requirements specified in Section  
18 16056 of the Vehicle Code; and, in that event, the two or more policies shall not  
19 be construed as providing concurrent coverage, and only the insurance afforded by  
20 the policy or policies covering the premises on which the loading or unloading  
21 occurs shall be primary and the policy or policies shall cover as an additional  
22 insured with respect to the loading or unloading operations all employees of the  
23 owner, tenant, or lessee while acting in the course and scope of their employment.

24 (d) Except as provided in subdivisions (a), (b), and (c), where two or more  
25 policies affording valid and collectible liability insurance apply to the same motor  
26 vehicle or vehicles in an occurrence out of which a liability loss shall arise, it shall  
27 be conclusively presumed that the insurance afforded by that policy in which the  
28 motor vehicle is described or rated as an owned automobile shall be primary and  
29 the insurance afforded by any other policy or policies shall be excess.

30 (e) Any insurance policy which, under the terms of subdivisions (a) to (d),  
31 inclusive, applies as excess coverage may provide with respect to any primary  
32 policy or to any loss to which primary insurance is not valid and collectible in  
33 whole or in part, that the excess policy shall apply only to the extent necessary to  
34 provide the insured with the coverage limits specified in Section 16056 of the  
35 Vehicle Code.

36 (f) The presumptions stated in subdivisions (a) to (d), inclusive, may be modified  
37 or amended only by written agreement signed by all insurers who have issued a  
38 policy or policies applicable to a loss described in these subdivisions and all  
39 named insureds under these policies.

40 (g) Where two or more personal policies affording valid and collectible liability  
41 insurance apply to the same motor vehicle in an occurrence out of which a loss  
42 shall arise, and one policy, as defined in subdivision (a) of Section 660, is primary,  
43 either by its terms or by operation of law, and one or more of the personal policies

1 providing liability insurance, as defined in Section 108, are excess, either by their  
2 terms or by operation of law, then the following shall apply:

3 (1) Each insurer shall pay its share of the defense costs. Each insurer's share of  
4 the defense costs shall be the percentage of the total defense costs equal to the  
5 amount of damage paid by that insurer as a percentage of total damages paid by all  
6 insurers whose policies apply to that motor vehicle.

7 (2) The term "defense costs" means, for purposes of this subdivision, reasonable  
8 attorney's fees and expenses, investigation expenses, expert witness fees, and costs  
9 allowable under Section ~~1033.5~~ 1040.10 of the Code of Civil Procedure.

10 (h) For purposes of this article, a certificate of self-insurance issued pursuant to  
11 Section 16053 of the Vehicle Code or a deposit of cash made pursuant to Section  
12 16054.2 of the Vehicle Code or a bond in effect pursuant to Section 16054 of the  
13 Vehicle Code or a report of governmental ownership or lease filed pursuant to  
14 Section 16051 of the Vehicle Code shall be considered a policy of automobile  
15 liability insurance. However, this subdivision does not establish or provide the  
16 basis for any other form of liability for or upon a self-insurer or other person or  
17 entity holding, issuing, or establishing any form of security as described herein.

18 **Comment.** Section 11580.9 is amended to correct a cross-reference. The substance of former  
19 Code of Civil Procedure Section 1033.5 is codified in Sections 1040.20-1040.60. Section 1040.10  
20 (components of cost award) is an introductory provision that integrates Sections 1040.20-  
21 1040.60.