

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Undertakings for Costs

November 1975

CALIFORNIA LAW REVISION COMMISSION
Stanford Law School
Stanford, California 94305

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NOTE

This pamphlet begins on page 901. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. This pamphlet will appear in Volume 13 of the Commission's *Reports, Recommendations, and Studies*.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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Ex Officio

November 10, 1975

To: THE HONORABLE EDMUND G. BROWN JR.
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission has been directed by the Legislature to study governmental tort liability. See Cal. Stats. 1957, Res. Ch. 202.

In *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), the California Supreme Court held unconstitutional the cost bond provisions (Government Code Sections 947 and 951) of the California Tort Claims Act.

The Commission has made a careful study of the *Beaudreau* case and has concluded that revision of the Government Code sections and other comparable sections is necessary to comply with the constitutional requirements stated in the *Beaudreau* case. The Commission has not reexamined the soundness of the policy underlying each cost bond statute and expresses no view concerning the kinds of cases in which an undertaking should be required. This recommendation, submitted as a result of the Commission's study, is therefore confined to remedying the procedural defects in these statutes.

Respectfully submitted,
MARC SANDSTROM
Chairman

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RECOMMENDATION

Background

Eleven California statutes require the plaintiff in specified types of actions to furnish an undertaking as security for the defendant's recoverable costs.¹ These undertakings are generally referred to as "cost bonds."² In *Beaudreau v. Superior Court*,³ the California Supreme Court held unconstitutional Government Code Sections 947 and 951—the cost bond provisions of the California Tort Claims Act—which allow the defendant public entity or public employee to require the plaintiff to furnish an undertaking for costs merely by filing a "demand." The plaintiff is thus deprived of his property without a hearing, a denial of due process.⁴ On the authority of the *Beaudreau* case, *Allen v. Jordanos' Inc.*⁵ held unconstitutional Section 830 of the Code of Civil Procedure which provides that in actions for libel or slander "the clerk shall require" an undertaking from the plaintiff before summons is issued.

¹ See Code Civ. Proc. §§ 391-391.6 (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 § 834 (shareholder derivative action); Educ. Code § 23175 (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 See, e.g., *Conover v. Hall*, 11 Cal.3d 842, 851-852, 523 P.2d 682, 688, 114 Cal. Rptr. 642, 648 (1974). Four of the California cost bond statutes provide that the undertaking shall secure attorney's fees in addition to "costs." See Code Civ. Proc. §§ 391(c), 836; Corp. Code § 834(b); Fin. Code § 7616. The cost bond statutes should be distinguished from statutes requiring undertakings in a variety of situations to indemnify the beneficiary against damages he may suffer. These undertakings are generally referred to as "damage bonds." See, e.g., *Conover v. Hall*, *supra*. Many of the damage bond statutes provide that the undertaking will secure costs as well.

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

⁴ 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 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 he fails to furnish an undertaking—his cause of action which is dismissed. *Beaudreau v. Superior Court*, 14 Cal.3d 448, 455-457, 535 P.2d 713, 717-718, 121 Cal. Rptr. 585, 589-590 (1975).

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

The Commission has examined all of the cost bond statutes in light of the *Beaudreau* and *Allen* cases. The statutes which provide for notice and hearing before an undertaking may be required, thereby satisfying the requirements of *Beaudreau*, are the ones relating to derivative actions by shareholders of corporations⁶ and savings and loan associations,⁷ actions by vexatious litigants,⁸ malpractice actions against architects and similar licensees,⁹ and malpractice actions against licensed health professionals.¹⁰ The statutes which require an undertaking with no provision for a hearing are the ones relating to tort claims against public entities¹¹ and public employees,¹² actions for libel or slander,¹³ actions against the Regents of the University of California,¹⁴ actions by nonresident plaintiffs,¹⁵ and certain actions against an active member of the state militia.¹⁶ Although the last three of these have not yet been held unconstitutional, their constitutionality appears doubtful.¹⁷

At a minimum, to satisfy the constitutional requirements set forth in *Beaudreau*, a statute requiring an undertaking for costs must provide for a hearing after noticed motion to

⁶ Corp. Code § 834. Section 834 was suggested as a possible model for cost bond statutes in the case of *Nork v. Superior Court*, 33 Cal. App.3d 997, 1003-1004, 109 Cal. Rptr. 428, 433 (1973). As of January 1, 1977, Section 834 will be repealed, but its substance will be revised and continued as Section 800 of the Corporations Code. See Cal. Stats. 1975, Ch. 682.

⁷ Fin. Code § 7616.

⁸ Code Civ. Proc. §§ 391-391.6.

⁹ Code Civ. Proc. § 1029.5.

¹⁰ Code Civ. Proc. § 1029.6. Subdivision (e) of this section, which requires an undertaking upon the ex parte application of the defendant where punitive damages are sought, was held unconstitutional in *Nork v. Superior Court*, 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).

¹¹ Govt. Code § 947.

¹² Govt. Code § 951.

¹³ Code Civ. Proc. §§ 830-836.

¹⁴ Educ. Code § 23175.

¹⁵ Code Civ. Proc. § 1030.

¹⁶ Mil. & Vet. Code § 393.

¹⁷ See Comment, *Due Process And Security For Expense Statutes: An Analysis Of California Statutes In Light Of Recent Trends*, 7 Pac. L.J. 176, 187-192 (1976). 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, 851-852, 523 P.2d 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.

"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."¹⁸ If the plaintiff is clearly entitled to prevail and there is thus no reasonable possibility that the defendant will become entitled to recover costs,¹⁹ an undertaking may not constitutionally be required from the plaintiff.²⁰ The extent to which an undertaking may constitutionally be required, where the merit of the plaintiff's claim is less certain, depends upon the underlying legislative purpose of the particular cost bond statute.²¹ At one extreme, where the undertaking is principally for security, an undertaking may constitutionally be required in all except those few cases where there is "no reasonable possibility" that the plaintiff will become liable for costs.²² At the other extreme, where the undertaking is principally to deter frivolous claims, it appears that an undertaking may constitutionally be required only in "actions lacking merit."²³ Thus, to

¹⁸ *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).

¹⁹ *But see* note 29 *infra*.

²⁰ See *Bell v. Burson*, 402 U.S. 535, 540 (1971); *Beaudreau v. Superior Court*, 14 Cal.3d 448, 458-459, 535 P.2d 713, 719-720, 121 Cal. Rptr. 585, 591-592 (1975); *Rios v. Cozens*, 7 Cal.3d 792, 796-797, 499 P.2d 979, 982, 103 Cal. Rptr. 299, 302 (1972).

²¹ See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975) (the hearing is "to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement").

²² See *Bell v. Burson*, 402 U.S. 535, 540 (1971) (State of Georgia may not constitutionally require security for damages from uninsured motorist if there is "no reasonable possibility" of a judgment against him); *Beaudreau v. Superior Court*, 14 Cal.3d 448, 458-459, 535 P.2d 713, 719-720, 121 Cal. Rptr. 585, 591-592 (1975); *Rios v. Cozens*, 7 Cal.3d 792, 794, 499 P.2d 979, 980, 103 Cal. Rptr. 299, 300 (1972) (Department of Motor Vehicles must, before requiring security from uninsured motorist, determine that there is a "reasonable possibility" of a judgment against him).

²³ See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 464, 535 P.2d 713, 723, 121 Cal. Rptr. 585, 595 (1975). The precise standard for determining when an action lacks merit is not articulated in *Beaudreau*. A statute designed to deter frivolous claims and limiting the undertaking to those cases where there is no reasonable possibility that the plaintiff will prevail would clearly withstand constitutional attack. *Cf.* Code Civ. Proc. §§ 391.1 (no "reasonable probability" that plaintiff will prevail), 1029.5, 1029.6 ("no reasonable possibility" that plaintiff has a cause of action); Corp. Code § 834(b)(1) ("no reasonable possibility" that action will benefit corporation or security holders). A provision which excuses the plaintiff from giving security only when it appears more likely than not that he will prevail would be less directly related to the statutory purpose of deterring frivolous claims, but yet might withstand constitutional attack. *Cf. Randone v. Appellate Dep't*, 5 Cal.3d 536, 563, 488 P.2d 13, 31, 96 Cal. Rptr. 709, 727 (1971) (prejudgment attachment may be constitutionally permitted after hearing on "probable validity" of plaintiff's claim). As a matter of policy, it would appear preferable to excuse the plaintiff from filing an undertaking when his claim is possibly, although not probably, valid since this will serve the statutory purpose of weeding out frivolous claims without impairing bona fide ones.

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

In the case of the nonresident plaintiff,²⁴ the purpose of the undertaking is to secure a possible judgment for costs in the defendant's favor.²⁵ Hence, an undertaking for costs may be required in all cases except those where there is no reasonable possibility that the plaintiff will become liable for costs. In the remaining cost bond statutes, the purpose is to deter groundless claims.²⁶ Here, the undertaking may be required only in "actions lacking merit."²⁷

Recommendations

The Commission recommends that the cost bond statutes be revised to satisfy constitutional due process requirements and that the procedural provisions concerning cost bonds be standardized. The Commission has not reexamined the soundness of the policy underlying each cost bond statute, nor has the Commission considered whether there may be other and better ways to deter frivolous litigation. The Commission, therefore, does not necessarily endorse such policies and expresses no view concerning the kinds of cases in which an undertaking should be required.

The Commission recommends that the statutes which require an undertaking for the purpose of deterring

²⁴ See Code Civ. Proc. § 1030.

²⁵ *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").

²⁶ The purpose of the undertaking requirement in the vexatious litigant statute (Code Civ. Proc. §§ 391-391.6) is to prevent "abuse" by "litigants who constantly file groundless actions." 38 Cal. S.B.J. 663 (1963). In the defamation context (Code Civ. Proc. §§ 830-836), it is to discourage "the too common practice of instituting libel and slander suits inspired by mere spite or ill-will and without good faith." *Shell Oil Co. v. Superior Court*, 2 Cal. App.2d 348, 355, 37 P.2d 1078, 1081 (1934), *modified*, 5 Cal. App.2d 480, 42 P.2d 1049 (1935). The undertaking in the case of malpractice actions against architects, physicians, and others (Code Civ. Proc. §§ 1029.5, 1029.6) is to deter "frivolous" claims. *Review of Selected 1969 Code Legislation* at 65 (Cal. Cont. Ed. Bar 1969); *Review of Selected 1967 Code Legislation* at 57 (Cal. Cont. Ed. Bar 1967). The requirement in shareholder derivative suits (Corp. Code § 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). And the undertaking requirement of the California Tort Claims Act was to deter "unmeritorious and frivolous litigation." *Id.* at 452, 535 P.2d at 715, 121 Cal. Rptr. at 587.

²⁷ See note 23 *supra*.

frivolous claims, but which now take no account of the merit of the plaintiff's claim,²⁸ be revised so that the undertaking may be required only when there is "no reasonable possibility" that the plaintiff will prevail.²⁹ This is the standard now used in four of the five cost bond statutes which provide for notice and hearing.³⁰ With respect to a nonresident plaintiff,³¹ where the principal purpose of the undertaking is to secure the defendant's costs,³² the court should be authorized to require the undertaking in any case where there is a reasonable possibility that the *defendant* will prevail. The standards contained in the five cost bond statutes that provide for notice and hearing should be preserved.³³

The Commission further recommends that the standardized procedures for cost bonds be enacted as a new chapter in the Code of Civil Procedure containing the following provisions:

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

(2) The defendant must show its probable allowable costs and, if recovery is authorized, attorney's fees.

(3) The undertaking shall be in an amount equal to the

²⁸ See Code Civ. Proc. §§ 830-836; Educ. Code § 23175; Govt. Code §§ 947, 951; Mil. & Vet. Code § 393.

²⁹ The plaintiff may prevail and still become liable for some of the defendant's costs, *e.g.*, if the defendant makes an offer to compromise under Section 998 of the Code of Civil Procedure and the plaintiff fails to obtain a more favorable judgment. The statute could be drawn to require the undertaking if there is no reasonable possibility that the plaintiff will obtain a judgment greater than the offer. However, this would go beyond merely weeding out frivolous claims, and the disadvantages of injecting the issue of damages into the hearing on the motion for an undertaking appear to outweigh the additional settlement leverage which might be gained by such a provision.

Under the Commission's recommendation, the court's assessment of the case will be limited to the issue of liability. Since evidence of a previous offer to compromise cannot be given at trial, Code Civ. Proc. § 998(b), it should have no bearing on the motion for an undertaking. *Cf.* Evid. Code § 1152.

³⁰ See Code Civ. Proc. §§ 1029.5, 1029.6; Corp. Code § 834(b)(1); Fin. Code § 7616.

³¹ Code Civ. Proc. § 1030.

³² See note 25 *supra*.

³³ See Code Civ. Proc. §§ 391.1 (vexatious litigant: "not a reasonable probability" that plaintiff will prevail), 1029.5, 1029.6 (malpractice actions: "no reasonable possibility" that plaintiff has a cause of action); Corp. Code § 834(b)(1) (shareholder derivative actions: "no reasonable possibility" that action will benefit corporation or security holders); Fin. Code § 7616 (derivative actions by shareholder of savings and loan association: incorporates standard of Corp. Code § 834).

defendant's probable allowable costs and, if recovery is authorized, attorney's fees.³⁴

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

(5) If the plaintiff fails to furnish the undertaking within the time prescribed, the action shall be dismissed.

(6) The sureties should be subject to the approval of the court and the defendant should be permitted to object to the sureties.³⁵

(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 later filed.³⁶

(8) The court should be authorized to increase or decrease the amount of the undertaking.³⁷

(9) The determination of the court on the motion for an undertaking should have no effect on the determination of

³⁴ The Commission recommends that the provisions in some of the cost bond statutes fixing the undertaking at a flat or minimum amount not be continued. See Code Civ. Proc. §§ 830 (flat \$500), 1029.5(a) (flat \$500 per defendant); Govt. Code §§ 947 (\$100 minimum for one plaintiff, \$200 minimum for multiple plaintiffs), 951 (\$100 minimum); Educ. Code § 23175 (same as Govt. Code § 947); Mil. & Vet. Code § 393 (\$100 minimum). Such provisions are of doubtful constitutionality since the amount of the undertaking must be reasonable in the light of the defendant's probable expenses. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975). The Commission recommends that the \$50,000 maximum amount set forth in new Section 800 of the Corporations Code—Cal. Stats. 1975, Ch. 682, effective January 1, 1977—be retained as a reasonable upper limit but that the much lower maximums of the other cost bond statutes not be continued; see Code Civ. Proc. §§ 1029.5(c) (\$3,000 maximum for all defendants), 1029.6(c) (\$1,000 maximum for all defendants), 1030 (\$300 maximum). If the court finds that the plaintiff's claim lacks merit, all of the defendant's probable costs should be secured. The plaintiff is protected under the recommended statute by the hearing requirement, the necessity of the defendant's establishing its probable costs, and by the provision for a decrease in the amount of the undertaking if it later appears to be excessive. See proposed Code Civ. Proc. §§ 1040.15-1040.25, *infra*.

³⁵ See, e.g., Code Civ. Proc. §§ 832-834.

³⁶ In 1975, Code of Civil Procedure Sections 391.1 and 391.6 (vexatious litigant statute) were amended to extend the time for making the motion for an undertaking "until final judgment is entered," and to continue the provision that the litigation is stayed by the making of the motion, even when filed after commencement of trial. See Cal. Stats. 1975, Ch. 381. The defendant may thus use the motion as a dilatory tactic. The mandatory stay provision should be brought into play only when the motion is filed early in the litigation.

³⁷ It is arguable that due process requires a provision for decreasing the undertaking when the defendant's probable costs appear less than upon the initial hearing. See *Beaudreau v. Superior Court*, 14 Cal.3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 592 (1975).

any issues on the merits of the action.³⁸

(10) When entitled to recover costs, the defendant should have direct recourse against the sureties.³⁹

(11) An undertaking for costs should not be required in actions commenced in a small claims court.⁴⁰

(12) A party making or resisting a motion for an undertaking in bad faith should be liable for costs and attorney's fees of the other party.⁴¹

A table comparing the important similarities and differences of the existing cost bond statutes and the provisions recommended by the Commission is set forth on the following pages.

³⁸ See, *e.g.*, Code Civ. Proc. §§ 391.2, 512.110, 1029.5(a), 1029.6(a); Corp. Code § 834(b).

³⁹ See, *e.g.*, Code Civ. Proc. §§ 1058a, 489.110, 489.120.

⁴⁰ See, *e.g.*, Educ. Code § 23175(c); Govt. Code §§ 947(b), 951(b).

⁴¹ The prerequisite for recovery under this provision, which has no counterpart in the existing cost bond statutes, would be considerably more stringent than the comparable sanction provision in the discovery statute. See Code Civ. Proc. § 2034(a).

	Recommended uniform statute	Actions against public entities, employees, and U.C. Regents	Shareholder derivative suits	Nonresident plaintiff	Malpractice actions against architects and others	Malpractice actions against health professionals	Libel and slander	Vexatious litigant in propria persona	Actions against active member of state militia
Notice and hearing?	YES	NO	YES	NO	YES	YES	NO	YES	NO
Amount of undertaking	Equal to de- fendant's prob- able recoverable expenses (\$50,000 maxi- mum in share- holder deriva- tive suits)	\$100 minimum for 1 plaintiff; \$200 minimum for multiple plaintiffs*	Court's dis- cretion not to exceed \$50,000	Not to exceed \$300	\$500 per de- fendant not to exceed \$3,000	Not to exceed \$500 per de- fendant or \$1,000 total	Flat \$500	Court's discre- tion	\$100 minimum
Provision for in- creasing or decreas- ing amount?	YES	NO	YES	YES	NO	NO	YES	YES	NO
Time to file undertaking	20 days or such greater time as court allows	20 days	Court's discre- tion	30 days	Court's discre- tion	Court's discre- tion	5 days	Court's discre- tion	Not specified

* The provision for an undertaking in the minimum amount of \$200 for multiple plaintiffs is contained only in Section 947 of the Government Code (actions against public entities) and Section 23175 of the Education Code (actions against the Regents of the University of California) and not in Section 951 of the Government Code (actions against public employees).

	Recommended uniform statute	Actions against public entities, employees, and U.C. Regents	Shareholder derivative suits	Nonresident plaintiff	Malpractice actions against architects and others	Malpractice actions against health professionals	Libel and slander	Vexatious litigant in propria persona	Actions against active member of state militia
Provision for stay?	YES	NO	YES	YES	NO	NO	YES	YES	NO
Provision for court approval of sureties?	YES	YES	YES	YES	Implied	YES	YES	YES	NO
Effect of failure to file undertaking	Dismissal	Dismissal	Dismissal	Dismissal	Dismissal	Dismissal	Dismissal	Dismissal	Not specified
Provision that findings not to affect merits?	YES	(No hearing)	YES	(No hearing)	YES	YES	(No hearing)	YES	NO
Provision for direct recourse against surety?†	YES	NO	YES	NO	YES	YES	NO	YES	NO
Express exception for small claims court?	YES	YES	NO	NO	YES	YES	NO	NO	NO

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

PROPOSED LEGISLATION

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

An act to amend Sections 391.1, 830, 1029.5, 1029.6, and 1030 of, to add Chapter 6.5 (commencing with Section 1040.05) to Title 14 of Part 2 of, and to repeal Sections 391.2, 391.3, 391.4, 391.5, 391.6, 831, 832, 833, 834, and 835 of, the Code of Civil Procedure, to amend Section 800 of the Corporations Code, to amend Section 23175 of the Education Code, to amend Section 7616 of the Financial Code, to amend Sections 947 and 951 of the Government Code, and to amend Section 393 of the Military and Veterans Code, relating to undertakings as security for costs and attorney's fees.

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

CODE OF CIVIL PROCEDURE

§ 391.1 (amended)

SECTION 1. Section 391.1 of the Code of Civil Procedure as amended by Chapter 381 of the Statutes of 1975 is amended to read:

391.1. In any litigation, at any time until final judgment is entered, a defendant may move the court ; ~~upon notice and hearing,~~ for an order requiring the plaintiff to furnish security *as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2*. The motion ~~must~~ *shall* be ~~based~~ *made upon* on the ground ; ~~and supported by a showing,~~ that the plaintiff is a vexatious litigant and that there is ~~not a~~ *no* reasonable probability that he will prevail in the litigation against the moving defendant.

Comment. Section 391.1 is amended to incorporate the uniform provisions for undertakings for costs. The notice and hearing requirement has been deleted; this requirement is continued in the uniform provisions. The phrase "not a reasonable probability" has been changed to "no reasonable probability" to conform to the language used in former Section 391.3. The term "security" as used in Section 391.1 is defined in Section 391(c) and means cash, an undertaking by a surety, or

other security. Compare Code Civ. Proc. § 1054a. Section 391(c) includes attorney's fees among the defendant's reasonable expenses to be secured.

Sections 391.2-391.6 are superseded by the uniform provisions and are therefore repealed. The first sentence of Section 391.2 is not continued since Section 2009 of the Code of Civil Procedure allows an affidavit to be used "upon a motion," and the court may receive testimonial evidence in addition. 4 B. Witkin, *California Procedure*, Proceedings Without Trial §§ 24-25, at 2693-2694 (2d ed. 1971). The second sentence of Section 391.2 is continued in substance in Section 1040.45 (no effect on merits). The first sentence of Section 391.3 is superseded by Sections 1040.20 (hearing and determination of motion), 1040.25 (amount of undertaking), 1040.30 (time for filing), and 1040.35 (sureties). The second sentence of Section 391.3 is superseded by Section 1040.25(b) (increase or decrease of undertaking). Section 391.4 is continued in substance in Section 1040.30 (dismissal for failure timely to file). Section 391.5 is superseded by Section 1040.60 (recourse against surety). Section 391.6 is superseded by Section 1040.40 (stay).

§ 391.2 (repealed)

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

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

Comment. See the Comment to Section 391.1.

§ 391.3 (repealed)

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

~~391.3. If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that he will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of such moving defendant, security of such nature, in such amount, and within such time, as the court shall fix. The~~

~~amount of such security may thereafter from time to time be increased or decreased in the court's discretion upon a showing that the security provided has or may become inadequate or excessive.~~

Comment. See the Comment to Section 391.1.

§ 391.4 (repealed)

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

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

Comment. See the Comment to Section 391.1.

§ 391.5 (repealed)

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

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

Comment. See the Comment to Section 391.1.

§ 391.6 (repealed)

SEC. 6. Section 391.6 of the Code of Civil Procedure as amended by Chapter 381 of the Statutes of 1975 is repealed.

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

Comment. See the Comment to Section 391.1.

§ 830 (amended)

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

830. Before issuing the summons in an action for libel or slander, the clerk shall require a written undertaking on the part of the plaintiff in the sum of five hundred dollars (\$500), with at least two competent and sufficient sureties, specifying their occupations and residences, to the effect that if the action is dismissed or the defendant recovers judgment, they will pay the costs and charges awarded against the plaintiff by judgment, in the progress of the action, or on an appeal, not exceeding the sum specified. An action brought without filing the required undertaking shall be dismissed. *In any action for libel or slander, the defendant may at any time move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2. The motion shall be made on the ground that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.*

Comment. Section 830 is amended to incorporate the uniform provisions for undertakings for costs. The uniform provisions include the notice and hearing necessary to comply with the constitutional requirements enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975), and *Allen v. Jordanos' Inc.*, 52 Cal. App.3d 160, 125 Cal. Rptr. 31 (1975). The provision fixing the undertaking at \$500 is superseded by Section 1040.25 which provides that the undertaking shall be in an amount equal to the defendant's probable allowable costs and attorney's fees (\$100 attorney's fees authorized by Section 836).

Sections 831 through 835 are superseded by the uniform procedures. The contents of the affidavit of an individual surety are prescribed in Section 1057; hence, the special provisions of Section 831 are repealed. The first sentence of Section 832, the first sentence of Section 833, and the second and third sentences of Section 834 are superseded by Section 1040.35 (sureties). The second sentence of Section 832, the second sentence of Section 833, and the first sentence of Section 834 are not continued. The last sentence of Section 832 is adequately governed by general law. See Sections 1056 and 1057. The last sentence of Section 834 is superseded by Section 1040.40 (stay). Section 835 is superseded by Section 1040.30 which extends the time for filing an undertaking from five days to 20 days after the court's order requiring it.

§ 831 (repealed)

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

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

§ 832 (repealed)

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

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

Comment. See the Comment to Section 830.

§ 833 (repealed)

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

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

Comment. See the Comment to Section 830.

§ 834 (repealed)

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

~~834. If the judge finds the undertaking sufficient, he shall annex the examination to the undertaking and~~

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

Comment. See the Comment to Section 830.

§ 835 (repealed)

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

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

Comment. See the Comment to Section 830.

§ 1029.5 (amended)

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

1029.5. (a) Whenever a complaint for damages is filed against any architect, landscape architect, engineer, building designer, or land surveyor, duly licensed as such under the laws of this state, in an action for error, omission, or professional negligence in the creation and preparation of plans, specifications, designs, reports or surveys which are the basis 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 sum of five hundred dollars (\$500) as security for the costs of defense as provided in subdivision (d), which may be awarded against such plaintiff as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2.~~ *The motion shall be made on the grounds that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant and that the plaintiff will not suffer undue economic hardship by filing the undertaking. 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 five hundred dollars ~~(\$500)~~ for each additional defendant in whose favor such undertaking is ordered not to exceed the total of three thousand dollars ~~(\$3,000)~~.

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

Comment. Section 1029.5 is amended to incorporate the uniform provisions for undertakings for costs.

The deleted language of the first sentence of subdivision (a) and of subdivision (c) fixing the undertaking at \$500 per defendant not to exceed a total of \$3,000 is superseded by Section 1040.25 which provides that the undertaking shall be in an amount equal to the defendant's probable allowable costs. The rest of the deleted language of the first paragraph of subdivision (a) is superseded by Sections 1040.15 (noticed motion; affidavit), 1040.20 (hearing), and 1040.35 (sureties).

The first sentence of the second paragraph of subdivision (a) (grounds for motion) is rewritten and reenacted in subdivision (a). The second sentence of the second paragraph of subdivision (a) is superseded by Section 1040.50 (order not appealable).

The third paragraph of subdivision (a) is superseded by Sections 1040.30 (dismissal for failure timely to file undertaking) and 1040.45 (no effect on merits).

The deleted language of subdivision (b) (section not applicable to action commenced in small claims court) is continued in substance in Section 1040.05 (b).

The first sentence of subdivision (d) is adequately governed by general law (see Sections 1031 and 1032) as is the third sentence of that subdivision (see Section 1035). The second sentence of subdivision (d) is superseded by Section 1040.60 (liability of surety limited to amount of undertaking).

§ 1029.6 (amended)

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

1029.6. ~~(a)~~ Whenever a complaint for damages for personal injuries is filed against a physician and surgeon, dentist, registered nurse, dispensing optician, optometrist, pharmacist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, or veterinarian, duly licensed as such under the laws of this state, or a licensed hospital as the employer of any such person, in an action for error, omission, or negligence in the performance of professional services, or performance of professional services without consent, any such defendant may, within six months after service of summons, move the court for an order; ~~upon notice to plaintiff and all~~

defendants having appeared in the action; and hearing, requiring the plaintiff to furnish a written undertaking; with at least two sufficient sureties, in a sum not to exceed five hundred dollars (\$500); or to deposit such sum or equivalent security approved by the court with the clerk of the court, as security for the costs of defense as provided in subdivision (d); which may be awarded against such plaintiff as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2. The motion shall be made on the grounds that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant and that the plaintiff will not suffer undue economic hardship by filing the undertaking. 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 (c) 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) Any defendant filing a motion under this section or joining with a moving party under this section is precluded from subsequently filing a motion for summary judgment.~~

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

Comment. Section 1029.6 is amended to incorporate the uniform provisions for undertakings for costs.

The deleted language of the first sentence of subdivision (a) and of subdivision (c)—placing an upper limit on the amount of the undertaking of \$500 for one defendant and \$1,000 for two or more defendants—is superseded by Section 1040.25 which provides that the undertaking shall be in an amount equal to the defendant's probable allowable costs. The rest of the deleted language of the first sentence of subdivision (a) is superseded by Sections 1040.15 (noticed motion), 1040.20 (hearing), and 1040.35 (sureties). The second sentence of subdivision (a) is superseded by Section 1040.15 (affidavit).

The third and fourth sentences of subdivision (a), requiring a defendant to join in his codefendant's motion within 30 days from receipt of notice or be precluded from later so moving, are not continued. Similar provisions in subdivisions (f) and (g), requiring the defendant to elect between a motion for an undertaking and a motion for summary judgment, are not continued. The defendant may thus make the motion when fully prepared to do so, and is not deprived of effective procedural devices for disposing of frivolous claims prior to trial. The plaintiff is protected against a bad faith motion by Section 1040.55 (sanctions).

The second paragraph of subdivision (a) (grounds for motion) is rewritten and reenacted in subdivision (a).

The third paragraph of subdivision (a) is superseded by Sections 1040.30 (dismissal for failure timely to file undertaking) and 1040.45 (no effect on merits).

The substance of subdivision (b) is continued in Section 1040.05 (b) (no undertaking in action commenced in small claims court).

The first and third sentences of subdivision (d) are adequately governed by general law. See Sections 1031, 1032, and 1035. The

second sentence of subdivision (d) is superseded by Section 1040.60 (liability of surety limited to amount of undertaking).

Subdivision (e), authorizing an ex parte order for an undertaking where punitive damages are sought, was held unconstitutional and is therefore not continued. See *Nork v. Superior Court*, 33 Cal. App.3d 997, 109 Cal. Rptr. 428 (1973).

§ 1030 (amended)

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

1030. (a) When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, ~~security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action or special proceedings must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, or with the judge if there be no clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars (\$300). A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed. Any stay of proceedings granted under the provisions of this section shall extend to a period 10 days after service upon the defendant of written notice of the filing of the required undertaking.~~

After the lapse of 30 days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge, may order the action or special proceeding to be dismissed: *the defendant may at any time move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2.*

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

Comment. Section 1030 is amended to incorporate the uniform provisions for undertakings for costs and to provide the standard for determining whether an undertaking may be required. 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, it 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).

The deleted language of the first sentence of this section is superseded by the new language added in subdivision (a) (defendant may move the court) and by Section 1040.15 (security is for costs and, if authorized, attorney's fees). The language of the second sentence placing an upper limit of \$300 on the amount of the undertaking is superseded by Section 1040.25 which provides that the undertaking shall be in an amount equal to the defendant's probable allowable costs and, if authorized, attorney's fees. The rest of the language of the second sentence is superseded by Sections 1040.35 (sureties) and 1040.40 (stay of proceedings). The third sentence is superseded by Sections 1040.35 (new undertaking ordered if surety found insufficient) and 1040.40 (stay upon exception to surety). The fourth sentence is superseded by Section 1040.40 (time when stay expires).

The language deleted from the second paragraph of this section is superseded by Section 1040.30 (time for filing undertaking; dismissal for failure timely to file).

CHAPTER 6.5. UNDERTAKINGS FOR COSTS AND ATTORNEY'S FEES

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

CHAPTER 6.5. UNDERTAKINGS FOR COSTS AND ATTORNEY'S FEES

§ 1040.05. Application of chapter

1040.05. (a) This chapter applies only to an **action or special proceeding** to which it is **specifically made** applicable by statute.

(b) No undertaking to secure an **award of costs or attorney's fees** may be required in any **action or proceeding**

referred to in subdivision (a) which is commenced in a small claims court.

Comment. Subdivision (a) of Section 1040.05 limits the application of this chapter to actions or special proceedings where a separate statute makes it applicable. See Code Civ. Proc. §§ 391.1 (actions by vexatious litigant), 830 (actions for libel and slander), 1029.5 (malpractice actions against architects and similar licensees), 1029.6 (malpractice actions against licensed health professionals), 1030 (actions by nonresident plaintiff); Corp. Code § 800 (shareholder derivative actions); Educ. Code § 23175 (actions against Regents of the University of California); Fin. Code § 7616 (derivative actions by shareholder of savings and loan association); Govt. Code §§ 947 (actions against public entity), 951 (actions against public employee); Mil. & Vet. Code § 393 (certain actions against active member of state militia). This chapter does not apply to a myriad of situations where a damage bond may be required.

Subdivision (b) provides that an undertaking for costs may not be required in actions to which this chapter is applicable and which are commenced in a small claims court. This generalizes the substance of provisions formerly found in Government Code Sections 947(b) and 951(b), Education Code Section 23175(c), and Code of Civil Procedure Sections 1029.5(b) and 1029.6(b).

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

§ 1040.10. Attorney's fees and costs defined

1040.10. As used in this chapter:

(a) "Attorney's fees" means reasonable attorney's fees a party may be authorized to recover by a statute apart from this chapter, by Section 1040.55, or by contract.

(b) "Costs" means allowable costs which may be awarded in the action or special proceeding.

Comment. Section 1040.10 defines "attorney's fees" and "costs." Subdivision (a) makes clear that, except for Section 1040.55, this chapter does not provide any authority for an award of attorney's fees not otherwise made recoverable by contract or statute. In actions for libel or slander (to which this chapter is made applicable by Section 830), the prevailing party "shall be allowed one hundred dollars (\$100) to cover counsel fees" Code Civ. Proc. § 836. Three other statutes which incorporate

the provisions of this chapter provide that the expenses to be secured by the undertaking include attorney's fees. See Code Civ. Proc. § 391(c); Corp. Code § 800(d); Fin. Code § 7616. See also *Freeman v. Goldberg*, 55 Cal.2d 622, 626, 361 P.2d 244, 246, 12 Cal. Rptr. 668, 670 (1961) (shareholder derivative action: no award of attorney's fees where security is not furnished and action is dismissed). In addition, recovery of attorney's fees is authorized by a number of other statutes. See 4 B. Witkin, *California Procedure*, Judgment §§ 116-134, at 3267-3284 (2d ed. 1971).

Allowable costs are those which are "necessarily incurred" in the action. Code Civ. Proc. § 1033; 4 B. Witkin, *supra*, § 100, at 3256.

§ 1040.15. Motion for order requiring undertaking; supporting affidavit

1040.15. Subject to any time limitations provided in the statute referred to in subdivision (a) of Section 1040.05, the defendant may apply to the court by noticed motion for an order requiring the plaintiff to furnish a written undertaking as security for costs, attorney's fees, or both. 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, attorney's fees, or both, the defendant has incurred and expects to incur by the conclusion of the action or special proceeding.

Comment. Section 1040.15 authorizes the defendant to move for an order requiring the plaintiff, in actions to which this chapter is applicable, to furnish a written undertaking as security for costs, attorney's fees, or both, as defined in Section 1040.10.

The grounds for the motion are as set forth in each statute which incorporates the procedures of this chapter. See Comment to Section 1040.20. The same is true of the time limits for making the motion. See Code Civ. Proc. §§ 391.1 ("at any time until final judgment is entered"), 830 ("at any time"), 1029.5 ("within 30 days after service of summons"), 1029.6 ("within six months after service of summons"), 1030 ("at any time"); Corp. Code § 800(c) ("within 30 days after service of summons" **subject to extension**); Educ. Code § 23175 ("[a]t any time"); Fin. Code § 7616 (same as Section 800 of the Corporations Code); Govt. Code §§ 947, 951 ("[a]t any time"); Mil. & Vet. Code § 393 ("at any time").

Under Section 2015.5, the defendant may submit a declaration in lieu of the affidavit required by this section.

§ 1040.20. Hearing and determination of motion

1040.20. 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, attorney's fees, or both.

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

Where the primary purpose of the undertaking requirement is to deter frivolous litigation, it must be established that the plaintiff's action lacks merit. Seven statutes require a showing that there is no reasonable "possibility" that the plaintiff will prevail. See Code Civ. Proc. §§ 830 (actions for libel or slander), 1029.5, 1029.6 (malpractice actions); Educ. Code § 23175 (actions against Regents of University of California); Govt. Code §§ 947, 951 (actions against public entities and employees); Mil. & Vet. Code § 393 (certain actions against active member of state militia). The two statutes relating to shareholder derivative actions authorize an undertaking if the defendant shows that there is "no reasonable possibility" that the action will benefit the business entity or its shareholders. See Corp. Code § 800(c) (corporations); Fin. Code § 7616 (savings and loan associations). One statute requires a showing that there is no reasonable "probability" that the plaintiff will prevail. See Code Civ. Proc. § 391.1 (vexatious litigant).

In the case of an action brought by a nonresident plaintiff, where the purpose of the undertaking is to secure an award of costs in the defendant's favor which might otherwise be difficult to collect, it must be established that there is a reasonable possibility that the defendant will prevail. See Code Civ. Proc. § 1030.

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

Although the language of this section 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). 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).

Under Section 1054(a), the plaintiff may deposit money or bearer bonds or bearer notes of the United States or the State of California in lieu of an undertaking.

§ 1040.25. Amount of undertaking

1040.25. (a) The undertaking shall be in an amount equal to the probable allowable costs and attorney's fees the defendant has shown it will have incurred by the conclusion of the action or special proceeding.

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

Comment. Section 1040.25 fixes the undertaking at an amount equal to the defendant's probable allowable costs and, where authorized, attorney's fees.

Where the plaintiff is indigent, the court has the common law authority to dispense with the undertaking. See Comment to Section 1040.20.

If the court orders the undertaking increased as authorized in this section, the time period for compliance provided in Section 1040.30 applies.

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

1040.30. (a) Any plaintiff required to file or **increase an** undertaking shall do so not later than **20 days after service** of the court's order requiring it or **within such greater time** as the court may allow.

(b) If a plaintiff fails to comply with subdivision (a), the plaintiff's action or special proceeding shall be dismissed as to the defendant in whose favor the order requiring the undertaking was made.

Comment. Section 1040.30 requires the plaintiff to file the undertaking within 20 days after the order requiring it, or within such greater time as the court may allow, or suffer dismissal as to the moving defendant. Failure to file within the prescribed time is not jurisdictional, and the court may accept a late filing. *E.g., Boyer v. County of Contra Costa*, 235 Cal. App.2d 111, 115-118, 45 Cal. Rptr. 58, 61-63 (1965).

If the court authorizes the undertaking to be decreased as provided in Section 1040.25, compliance by the plaintiff is optional.

§ 1040.35. Sureties; exception to sureties

1040.35. (a) Except as otherwise provided by statute, the undertaking shall have at least two sufficient sureties to be approved by the court.

(b) If the undertaking is given by individual sureties, the defendant may except to a surety by noticed motion requiring the appearance of such surety before the court at a time specified in the notice for examination under oath concerning the surety's sufficiency. If the surety fails to appear, or if the court finds the surety insufficient, the court shall order that a new undertaking be given.

Comment. Section 1040.35 requires the undertaking to have at least two sufficient sureties except as otherwise provided by statute. Where the surety is a "corporate or reciprocal insurer" described in Section 1056, one such surety will suffice. Under Section 1054a, the plaintiff may deposit money or bearer bonds or bearer notes of the United States or the State of California in lieu of an undertaking.

The qualifications of a surety are set forth in Sections 1057 (individual surety) and 1057a (corporate surety). Section 1040.35 sets forth the procedure for excepting to an individual surety. Exceptions to a corporate surety are as provided in Sections 1057a and 1057b.

If the court finds a surety insufficient and orders that a new undertaking be given, the time period for compliance provided in Section 1040.30 applies.

§ 1040.40. Stay of proceedings

1040.40. (a) If the defendant's motion for an order requiring an undertaking is filed not later than 30 days after service of summons on such defendant, no pleading need be filed by such defendant and all further proceedings are thereby stayed until 10 days after the motion is denied or, if granted, until 10 days after the required undertaking has been filed and the defendant has been given written notice of the filing.

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

Comment. Section 1040.40 provides for a mandatory stay of the proceedings if the motion for an undertaking is filed within 30 days after the moving defendant is served with summons, and for a discretionary stay if the motion is later filed. The court may thus consider the timeliness of the motion and whether a stay might delay trial.

Subdivision (b) does not extend the time within which the motion for an undertaking must be made. For a summary of these time limits, see the Comment to Section 1040.15.

§ 1040.45. Effect of court's determinations

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

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

§ 1040.50. Order not appealable

1040.50. An order granting or denying a motion for an undertaking under this chapter is not appealable.

Comment. Section 1040.50 codifies existing law. See *Horton v. City of Beverly Hills*, 261 Cal. App.2d 306, 67 Cal. Rptr. 759

(1968) (order requiring undertaking under Government Code Section 951 not appealable); *Efron v. Kalmanovitz*, 185 Cal. App.2d 149, 8 Cal. Rptr. 107 (1960) (order denying motion for undertaking in shareholder derivative suit not appealable). Although the order granting or denying a motion for an undertaking is not appealable, it 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) (review of order granting motion for an undertaking). Cf. *Hayward Unified School Dist. v. Superior Court*, 233 Cal. App.2d 737, 43 Cal. Rptr. 895 (1965) (review of order accepting late filing and denying motion to dismiss). And a judgment of dismissal following the plaintiff's failure to furnish required security is appealable as a final judgment. *Efron v. Kalmanovitz*, *supra*, at 156-157, 8 Cal. Rptr. at 112.

§ 1040.55. Sanctions for motion made or resisted in bad faith

1040.55. If, at the hearing on the motion for an undertaking, the court determines that the motion was made in bad faith and solely for the purpose of harassment or delay, or was resisted by the plaintiff without a good faith belief in the validity of the claim, the court shall require the offending party or its attorney to pay the reasonable costs and attorney's fees incurred by the opposing party in connection with the motion.

Comment. Section 1040.55 provides for sanctions against a defendant or its attorney who makes a motion for an undertaking in bad faith and solely for the purpose of harassment or delay or against a plaintiff or its attorney who resists such motion with no good faith belief in the validity of its claim. The prerequisite for sanctions under this section is considerably more stringent than the comparable provision in the discovery statute. See Section 2034(a) (sanctions where party acts "without substantial justification").

§ 1040.60. Enforcement of liability on undertaking

1040.60. If at the conclusion of the action or special proceeding the defendant is legally entitled to recover costs, attorney's fees, or both, the defendant may proceed against the sureties on the undertaking as provided in Section 1058a. A motion to enforce liability on the undertaking may not be filed more than one year after the

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

Comment. Section 1040.60 supplements Section 1058a which allows a motion to enforce liability on the undertaking to be directed to the sureties. Although Section 2845 of the Civil Code formerly allowed a surety to require its creditor to proceed first against its principal, a 1972 amendment to Section 2845 made that section expressly “subject to the provisions of Section 1058a . . .” Cal. Stats. 1972, Ch. 391, § 1. Section 1040.60 makes clear that the liability may be enforced directly against the sureties. The one-year limitation period of this section for such a motion does not affect the limitation period applicable to an independent action against the surety. See, *e.g.*, 2 B. Witkin, *California Procedure*, Actions § 298, at 1144 (2d ed. 1970). This section limits only the sureties’ liability. The sureties’ principal (the plaintiff) remains liable to the full extent of the defendant’s allowable costs and, if recoverable, attorney’s fees.

CORPORATIONS CODE

§ 800 (amended)

SEC. 17. Section 800 of the Corporations Code as enacted by Chapter 682 of the Statutes of 1975 is amended to read:

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

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

(1) The plaintiff alleges in the complaint that plaintiff was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or

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

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

(c) In any action referred to in subdivision (b), at any time within 30 days after service of summons upon the corporation or upon any defendant who is an officer or director of the corporation, or held such office at the time of the acts complained of, the corporation or such defendant may move the court for an order; ~~upon notice and hearing~~, requiring the plaintiff to furnish ~~security~~ a *written undertaking as hereinafter provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure*. The motion shall be based upon one or both of the following grounds:

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

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

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

~~(d) At the hearing upon any motion pursuant to subdivision (c), the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material (1) to the ground or grounds upon which the motion is based; or (2) to a determination of the probable reasonable expenses, including attorneys' fees, of the corporation and the moving party which will be incurred in the defense of the action. If the court determines, after hearing the evidence adduced by the parties, that the moving party has established a probability in support of any of the grounds upon which the motion is based, the court shall fix the nature and amount of security, not to exceed fifty thousand dollars (\$50,000), to be furnished by the plaintiff for reasonable expenses, including attorneys' fees, which may be incurred by the moving party and the corporation in connection with the action, including expenses for which the corporation may become liable pursuant to Section 317. A ruling by the court on the motion shall not be a determination of any issue in the action or of the merits thereof. The amount of the security may thereafter be increased or decreased in the discretion of the court upon a showing that the security provided has or may become inadequate or is excessive, but the court may not in any event increase the total amount of the security beyond fifty thousand dollars (\$50,000). If the court, upon any such motion, makes a determination that security shall be furnished by the plaintiff as to any one or more defendants, the action shall be dismissed as to such defendant or defendants, unless the security required by the court shall have been furnished within such reasonable time as may be~~

fixed by the court. The corporation and the moving party shall have recourse to the security in such amount as the court shall determine upon the termination of the action.

(d) The undertaking shall secure the reasonable expenses, including attorney's fees, which may be incurred by the moving party and the corporation in connection with the action, including expenses for which the corporation may become liable pursuant to Section 317. Notwithstanding Section 1040.25 of the Code of Civil Procedure, the amount of the undertaking shall not exceed fifty thousand dollars (\$50,000).

(e) If the plaintiff shall, either before or after a motion is made pursuant to subdivision (c), or any order or determination pursuant to such motion, post good and sufficient bond or bonds in the aggregate amount of fifty thousand dollars (\$50,000) to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff has complied with the requirements of this section and with any order for ~~security~~ *an undertaking* theretofore made pursuant hereto, and any such motion then pending shall be dismissed and no further or additional bond or other security *or undertaking* shall be required.

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

Comment. Section 800 is amended to incorporate the uniform procedures for undertakings for costs and attorney's fees enacted in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure.

The language deleted from subdivision (c) requiring notice and hearing is continued in Sections 1040.15 and 1040.20 of the Code of Civil Procedure. The first sentence of subdivision (d) is superseded by Section 1040.20 (hearing and determination of motion). The second sentence is superseded by Sections 1040.20, 1040.25 (amount of undertaking), and the new language added to subdivision (d) (\$50,000 maximum). The third sentence is superseded by Section 1040.45 (no effect on merits). The fourth sentence is superseded by Section 1040.25(b) (amount of undertaking may be increased or decreased) and the new language added to subdivision (d) (\$50,000 maximum). The fifth sentence is superseded by Section 1040.30 (time to file;

dismissal). The sixth sentence is superseded by Section 1040.60 (direct recourse against surety). Subdivision (f) is superseded by Section 1040.40 (stay).

EDUCATION CODE

§ 23175 (amended)

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

23175. ~~(a)~~ At any time ~~after the filing of the complaint~~ in 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~~ *move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure. The motion shall be made on the ground that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.*

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

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

Comment. Section 23175 is amended to incorporate the uniform provisions for undertakings for costs. The uniform provisions include the notice and hearing necessary to comply with the constitutional requirements enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

The phrase "after the filing of the complaint" has been deleted from subdivision (a) as unnecessary. The language allowing a

“demand” for an undertaking is superseded by Section 1040.15 of the Code of Civil Procedure (motion for order for undertaking). The second sentence of subdivision (a) is superseded by Sections 1040.25 (amount of undertaking) and 1040.35 (sureties). The third sentence is superseded by Section 1040.30 (time to file; dismissal).

Subdivision (b) is adequately governed by general law. See Code Civ. Proc. §§ 1031, 1032. It is therefore not continued.

The substance of subdivision (c) is continued in Section 1040.05(b) of the Code of Civil Procedure.

FINANCIAL CODE

§ 7616 (amended)

SEC. 19. Section 7616 of the Financial Code is amended to read:

7616. No action may be instituted or maintained in the right of any association by any shareholder or certificate holder, as such. Such action may not be instituted or maintained by a stockholder of any association, unless all of the following conditions exist:

(1) The plaintiff alleges in the complaint that he was a registered stockholder at the time of the transaction or any part thereof of which he complains or that his stock thereafter devolved upon him by operation of law from a holder who was a holder at the time of the transaction or any part thereof complained of.

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

(3) The commissioner shall have determined, after a hearing upon at least 20 days' written notice to such association and each of its directors, that such action (a) is proposed in good faith and (b) there is reasonable possibility that the prosecution of such action will benefit the association and its stockholders.

Subdivisions ~~(b) and~~ (c), (d), and (e) of Section ~~834~~ 800 of the Corporations Code shall be applicable in the case of any such action.

Comment. Section 7616 is amended to conform it to the repeal of Section 834 and the enactment of Section 800 of the Corporations Code by Chapter 682 of the Statutes of 1975 and to the 1976 amendments to Section 800.

GOVERNMENT CODE

§ 947 (amended)

SEC. 20. Section 947 of the Government Code is amended to read:

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

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

Comment. Section 947 is amended to incorporate the uniform provisions for undertakings for costs. The uniform provisions include the notice and hearing necessary to comply with the constitutional requirements enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

The phrase “after the filing of the complaint” has been deleted from subdivision (a) as unnecessary. The language allowing a “demand” for an undertaking is superseded by Section 1040.15 of the Code of Civil Procedure (motion for order for undertaking). The second sentence of subdivision (a) is superseded by Sections 1040.25 (amount of undertaking) and 1040.35 (sureties). The third sentence is superseded by Section 1040.30 (time to file; dismissal). The substance of subdivision (b) is continued in Section 1040.05 (b).

§ 951 (amended)

SEC. 21. Section 951 of the Government Code is amended to read:

951. ~~(a)~~ At any time ~~after the filing of the complaint~~ in any action against a public employee or former public employee, if a public entity undertakes to provide for the defense of the action, the attorney for the public employee may ~~file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars (\$100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of the demand therefor, his action shall be dismissed~~ *move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure. The motion shall be made on the ground that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.*

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

Comment. Section 951 is amended in the same manner as Section 947. The phrase “after the filing of the complaint” has been deleted from subdivision (a) as unnecessary. The language allowing a “demand” for an undertaking is superseded by **Section 1040.15** of the Code of Civil Procedure (motion for order for undertaking). The second sentence of subdivision (a) is superseded by Sections 1040.25 (amount of undertaking) and 1040.35 (sureties). The third sentence is superseded by Section

1040.30 (time to file; dismissal). The substance of subdivision (b) is continued in Section 1040.05(b).

MILITARY & VETERANS CODE

§ 393 (amended)

SEC. 22. Section 393 of the Military and Veterans Code is amended to read:

393. (a) When 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 official capacity in the discharge of duty, or an alleged omission by him to do an act which it was his 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 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~~ *at any time move the court for an order requiring the plaintiff to furnish a written undertaking as provided in Chapter 6.5 (commencing with Section 1040.05) of Title 14 of Part 2 of the Code of Civil Procedure. The motion shall be made on the ground that there is no reasonable possibility that the plaintiff will obtain judgment against the moving defendant.*

(b) The defendant in all cases may make a general denial and give special matter in evidence. A defendant in whose favor a final judgment is rendered in any such action or proceeding shall recover treble costs.

(c) 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.

(d) 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. Section 393 is amended to incorporate the uniform provisions for undertakings for costs. The uniform provisions include the notice and hearing necessary to comply with the constitutional requirements enunciated in *Beaudreau v. Superior Court*, 14 Cal.3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). The deleted language of subdivision (a) is superseded by Sections 1040.15 (motion for order for undertaking), 1040.20 (hearing and determination of motion), and 1040.25 (amount of undertaking) of the Code of Civil Procedure. The provision fixing the amount of the undertaking at "not less than one hundred dollars" is not continued. Under Section 1040.25 of the Code of Civil Procedure, the undertaking shall be in an amount equal to the defendant's probable allowable costs.

(946-1000 blank)