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# Due Process and Security for Expense Statutes: An Analysis of California Statutes in Light of Recent Trends

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# Due Process And Security For Expense Statutes: An Analysis Of California Statutes In Light Of Recent Trends

In the past several years, the due process clause of the fourteenth amendment to the federal constitution and similar provisions of the various state constitutions have been used with increasing frequency as the bases for constitutional attacks upon summary prejudgment procedures.<sup>1</sup> In the first of these decisions, *Sniadach v. Family Finance Corporation*,<sup>2</sup> the Supreme Court invalidated a Wisconsin prejudgment wage garnishment statute. In arriving at the conclusion that the statute contravened permissible standards of procedural due process, the Court appeared to emphasize the fact that wages are a unique class of property which presents distinct problems relating to summary procedures.<sup>3</sup> Subsequent litigants attempted to seize upon this language as a means of limiting the Court's holding to wage garnishments;<sup>4</sup> however, the courts were not receptive to such arguments. Thus, the *Sniadach* rationale has been extended to various prejudgment procedures unrelated to the special class of property with which the case dealt. These include prejudgment attachments,<sup>5</sup> claim and delivery statutes,<sup>6</sup> appeal bonds from municipal court judgments,<sup>7</sup> proceedings relating to the revocation of drivers' licenses,<sup>8</sup> garagemen's liens,<sup>9</sup> distraint statutes,<sup>10</sup> and other summary procedures.<sup>11</sup>

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1. See, e.g., *Goss v. Lopez*, 419 U.S. 565, (1975); *Lindsey v. Normet*, 405 U.S. 56, (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1968).

2. 395 U.S. 337 (1968).

3. *Id.* at 340.

4. See *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 547, 488 P.2d 13, 19, 96 Cal. Rptr. 709, 715 (1971).

5. *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971); *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

6. *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

7. *Brooks v. Small Claims Ct.*, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973).

8. *Bell v. Burson*, 402 U.S. 535 (1971); *Rios v. Cozens*, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1973), *vacated sub nom. Dep't of Motor Vehicles of California v. Rios*, 410 U.S. 425 (1973), *Rios v. Cozens*, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973) (clarification on remand).

9. *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

10. *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970).

11. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The California courts have been in the forefront of the movement toward judicial extensions of *Sniadach*.<sup>12</sup> One of the recent areas to which *Sniadach* has been held to be applicable is "security for expense" statutes.<sup>13</sup> Already the California courts have invalidated two such statutes,<sup>14</sup> and there is some question concerning the continued validity of the remaining security for expense statutes. The California security for expense statutes as yet unchallenged on the *Sniadach* rationale include the following: (1) Code of Civil Procedure Section 1030 dealing with suits brought by persons or corporations not residents of California; (2) Code of Civil Procedure Section 1029.5 dealing with suits against architects and related professionals; (3) Code of Civil Procedure Section 1029.6 dealing with suits against professionals in the health fields; (4) Education Code Section 23175 dealing with suits against the University of California's Board of Regents; (5) Corporations Code Section 834 dealing with shareholders' derivative suits; (6) Code of Civil Procedure Section 830 dealing with actions for libel and/or slander; (7) Code of Civil Procedure Sections 391 through 391.6 dealing with vexatious litigants; and (8) Military and Veterans Code Section 393 dealing with suits against persons in the active militia.

This comment will examine the recent cases to determine the due process standards which will likely be applied to such statutes, and will then analyze the statutes to ascertain whether they comply with these standards. Further, where the present statutes are considered to be constitutionally deficient, the comment will suggest means whereby the statutes may be reformed to comply with the constitutional mandates of the due process clause.

#### DUE PROCESS & SECURITY FOR EXPENSE STATUTES: THE ANALYTICAL FRAMEWORK

As a prelude to an analysis of specific cases and statutes, it is important to examine the general analytical framework characteristic of

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12. See, e.g., *Adams v. Dep't of Motor Vehicles*, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974); *Brooks v. Small Claims Ct.*, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971); *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970).

13. The terms "security for expense" and "security for costs" are used interchangeably throughout this comment. The terms refer to a "security which a defendant in an action may require of a plaintiff . . . for the payment of such costs as may be awarded to the defendant." *Black's Law Dictionary* 416 (4th ed. rev. 1970).

14. *Beaudreau v. Super. Ct.*, 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975) (invalidating Government Code Sections 947 and 951 which impose a security for expense requirement in actions against a public entity or public employee); *Nork v. Super. Ct.*, 33 Cal. App. 3d 997, 109 Cal. Rptr. 428 (1973) (invalidating Code of Civil Procedure Section 1029.6(e) which provides for security for costs in actions for medical malpractice wherein the complaint seeks exemplary damages).

cases considering the constitutionality of statutes attacked on the basis of the due process clause. Primarily, courts have used a "definitional" or "elemental" approach to issues of procedural due process.<sup>15</sup> According to this approach, the factors which must be present in order to raise a due process attack are as follows: (a) state action;<sup>16</sup> (b) a protected liberty interest or property right;<sup>17</sup> and (c) a "taking."<sup>18</sup> If all three of these elements are found, courts traditionally have balanced the interests of the respective parties to ascertain whether, in view of the legislative purpose and the relevant facts and circumstances, the particular procedure being scrutinized affords sufficient procedural safeguards to the respective parties.<sup>19</sup>

California's recent decisions dealing with security for expense statutes have not departed from this analytical framework.<sup>20</sup> In 1973, *Nork v. Superior Court of Sacramento County*<sup>21</sup> squarely presented the Third District Court of Appeals with the question of the constitutionality of Code of Civil Procedure Section 1029.6 (e), which deals with damages actions against various professionals in health-related fields<sup>22</sup> wherein exemplary damages are sought. The statute expressly provides

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15. The terms "definitional" and "elemental" are used here to describe the reasoning process whereby a court sets forth the legal requisites for application of a legal concept, herein that of procedural due process, and then attempts to determine whether all of the legal requisites are found in the particular case. See generally *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

16. U.S. CONST. amend. XIV expressly limits the amendment's application to "state action," for it provides:

*No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.* (Emphasis added.)

State action sufficient to raise the fourteenth amendment has been found where state financial aid was given to private institutions; see, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); where private conduct is clothed with the appearance of state participation; see, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); where the coercive powers of the state are involved in private conduct; see, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948); where the state encourages or authorizes private conduct which violates liberty or property rights; see, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); and where private institutions perform an integral part of a governmental scheme; see, e.g., *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964).

17. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell and Blackmun, JJ., concurring); *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972).

18. See, e.g., *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 550, 488 P.2d 13, 21-22, 96 Cal. Rptr. 709, 717-18 (1971).

19. See, e.g., *Bd. of Regents v. Roth*, 408 U.S. at 570; *Arnett v. Kennedy*, 416 U.S. at 167-68 (Powell and Blackmun, JJ., concurring).

20. See cases cited in note 12 *supra*.

21. 33 Cal. App. 3d 997, 109 Cal. Rptr. 428 (1973).

22. CAL. CODE CIV. PROC. Section 1029.6 includes the following professionals within its coverage: 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 such under the laws of this state or a licensed hospital as the employer of any such person, . . .

that the defendant in such actions may obtain an *ex parte* order that the plaintiff post bond to indemnify the defendant for costs and reasonable attorney's fees for defending against the claim for exemplary damages where the plaintiff fails to recover on the cause of action for exemplary damages.<sup>23</sup> Failure to provide sufficient bond is grounds for dismissal of the claim for exemplary damages.<sup>24</sup> The court invalidated the statute on due process grounds, basing its opinion primarily on the fact that "[n]o hearing of any kind is required [under the statute] since the proceeding is *ex parte*."<sup>25</sup> In arriving at this conclusion, the court indicated that the taking of property was present because, if a bond was filed, the plaintiff was deprived of the premium paid for the bond, while if cash was deposited in lieu of a bond, the plaintiff would be deprived of the use of the money deposited pending the outcome of the litigation.<sup>26</sup> The court further acknowledged the legislative interest in protecting both medical practitioners and society from the potentially detrimental effects of frivolous claims for punitive damages, but found this purpose lacking in the exigencies necessary to justify the degree of denial of procedural safeguards called for under the statute.<sup>27</sup>

More recently, the California Supreme Court, in *Beaudreau v. Superior Court of Los Angeles County*,<sup>28</sup> invalidated the security for expense provisions of Government Code Sections 947 and 951 which deal with damages actions against public entities and public employees in their official capacities, respectively.<sup>29</sup> The *Beaudreau* court reasoned that the

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23. CAL. CODE CIV. PROC. §1029.6(e).

24. CAL. CODE CIV. PROC. §1029.6(e) provides:

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

25. *Nork v. Super. Ct.*, 33 Cal. App. 3d 997, 1001, 109 Cal. Rptr. 428, 430 (1973).

26. *Id.*, 33 Cal. App. 3d at 1001-1002, 109 Cal. Rptr. at 431-32.

27. *Id.*, 33 Cal. App. 3d at 1000, 109 Cal. Rptr. at 430. (The court also discussed, *inter alia*, the "taking" issue, but assumed *sub silentio* the presence of state action sufficient to raise the fourteenth amendment.)

28. 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

29. CAL. GOV'T CODE §951 provides:

At any time after the filing of the complaint in an 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

statutes in question operate to cause a "taking" in at least two ways. First, whether the plaintiff complies with the security requirement by either posting a bond or paying the equivalent sum of money into court, he suffers a "taking," for in the former case he is at least deprived of the use of the premium paid to acquire the bond, while in the latter case he is deprived of the use of the entire amount of money deposited with the court.<sup>30</sup> Second, a taking results when the plaintiff's meritorious claim is dismissed for failure to provide a sufficient bond.<sup>31</sup>

With respect to the requisite of a liberty or property right,<sup>32</sup> the court found that there were two property rights affected by the statutes. The premium on the bond<sup>33</sup> and/or the money deposited into court in lieu of filing a bond<sup>34</sup> constitute property rights within the ambit of the fourteenth amendment.<sup>35</sup> Further, the court found that a "claim against a public entity or public employee, assuming it is bona fide and potentially meritorious, is a 'property interest' within the meaning of the due process clause."<sup>36</sup>

In balancing the interests of the respective parties,<sup>37</sup> the court determined that the legislative purpose behind the statutes was twofold: first, to discourage the filing of nonmeritorious suits without imposing an

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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.

CAL. GOV'T CODE §947 provides:

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.

30. *Beaudreau v. Super. Ct.*, 14 Cal. 3d 448, 456, 535 P.2d 713, 717, 121 Cal. Rptr. 585, 589 (1975).

31. *Id.* 535 P.2d at 718, 121 Cal. Rptr. at 590.

32. See text accompanying note 16 *supra*.

33. *Beaudreau v. Superior Court*, 14 Cal. 3d at 455, 535 P.2d 717, 121 Cal. Rptr. at 589, *citing* *Fuentes v. Shevin*, 407 U.S. 67 (1972); *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).

34. See note 28 *supra*.

35. Other recognized property rights include public education (*Goss v. Lopez*, 419 U.S. 565 (1975)), welfare benefits (*Goldberg v. Kelly*, 397 U.S. 254 (1970)), a drivers' license (*Bell v. Burson*, 402 U.S. 535 (1971)), and tenured public employment (*Bd. of Regents v. Roth*, 408 U.S. 564 (1972)).

36. *Beaudreau v. Super. Ct.*, 14 Cal. 3d 448, 456-57, 535 P.2d 713, 718, 121 Cal. Rptr. 585, 590 (1975), *citing* *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

37. See text accompanying note 18 *supra*.

unreasonable burden on the filing of meritorious suits,<sup>38</sup> and second, to protect the defendant from the expense of defending against unmeritorious suits.<sup>39</sup> The court then considered the procedural safeguards proffered by the statutes in question, which provide for a mandatory dismissal of the cause of action if the plaintiff fails to provide the demanded security.<sup>40</sup> Finding that all of this took place without any judicial determination of the merit of the claim asserted by the plaintiff, the court concluded that the summary procedures provided for in the statutes were not sufficiently narrowly tailored to meet the legislative purpose behind their enactment, and thus held the statutes invalid.<sup>41</sup> In coming to this conclusion, the court considered several of the statutes' characteristics. The statutes made no provision for a hearing on the issue of whether the statutory purpose behind the security requirement would be served by imposing such a requirement in the particular case.<sup>42</sup> The trial court had no discretion concerning whether to dismiss the action if the plaintiff failed to provide the required security.<sup>43</sup> The statute provided no standards for determining the reasonableness of the amount of the bond demanded from the plaintiff,<sup>44</sup> nor did it define what was "good cause" for demanding that security be posted in an amount greater than that provided for by statute.<sup>45</sup> Thus, according to the court, the procedure "exclude[d] consideration of . . . element[s] essential to the decision"<sup>46</sup> and thereby deny[d] the plaintiff a meaningful hearing "appropriate to the nature of the case."<sup>47</sup> This, the court concluded, failed to meet the standards of procedural due process.

#### CALIFORNIA STATUTES AS YET UNCHALLENGED

From the foregoing analysis it should be obvious that a security for expense requirement constitutes a taking of a property right within the purview of the state and federal constitutional protections. The *Beaudreau* court's analysis is instructive insofar as it points out some of the

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38. *Beaudreau v. Super. Ct.*, 14 Cal. 3d 448, 453, 535 P.2d 713, 715, 121 Cal. Rptr. 585, 587 (1975).

39. *Beaudreau v. Super. Ct.*, 14 Cal. 3d at 457, 535 P.2d at 718, 121 Cal. Rptr. at 590.

40. *Beaudreau v. Super. Ct.*, 14 Cal. 3d at 453-54, 535 P.2d at 716, 121 Cal. Rptr. at 588.

41. *See Beaudreau v. Super. Ct.*, 14 Cal. 3d at 460, 535 P.2d at 720-21, 121 Cal. Rptr. at 592-93; *see also Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1968).

42. *Beaudreau v. Super. Ct.*, 14 Cal. 3d at 460, 535 P.2d at 720-21, 121 Cal. Rptr. at 592-93.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*, quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971).

47. *Beaudreau v. Super. Ct.*, 14 Cal. 3d 448, 460, 535 P.2d 713, 720-21, 121 Cal. Rptr. 585, 592-93 (1975), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1964) and *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 313 (1950).

characteristics upon which it based its determination that the statutes before it were unconstitutional.<sup>48</sup> It remains to be determined, however, precisely what procedural safeguards are required in the various other actions wherein security for expenses is required by statute in California.

#### A. *Shareholder's Derivative Suits*

When a person brings a derivative suit<sup>49</sup> on behalf of a corporation, the California Corporations Code provides a comparatively elaborate procedure for security for costs.<sup>50</sup> Briefly, the code provides that the defendant corporation or corporate director may move the court for an order requiring the furnishing of security.<sup>51</sup> Such a motion may be had only upon notice and hearing, and must be based on the grounds that either there is no reasonable possibility that the action will benefit the corporation or its security holders, or that the defendant did not partici-

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48. *Beaudreau v. Super. Ct.*, 14 Cal. 3d 460, 535 P.2d at 720-21, 121 Cal. Rptr. at 592-93. (Key considerations include the fact that the statute makes no provision for a hearing upon notice to the plaintiff, nor does the court have discretion to deny the security request. Further, there is no standard for determining the reasonable value of the services secured, or the necessity of security in the particular case.)

49. *O'Hare v. Marine Elec. Co.*, 229 Cal. App. 2d 33, 39 Cal. Rptr. 799 (1964) indicates that a derivative suit is one based on injury to the corporation or to its stockholders collectively as opposed to an injury directly to an individual shareholder.

50. CAL. CORP. CODE §834 provides, in pertinent part, as follows:  
the corporation or 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 as hereinafter provided. Such motion shall be based upon one or more 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 security holders;

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

At the hearing upon such motion, the court shall consider such evidence . . . as may be material: (a) to the ground or grounds upon which the motion is based, or (b) to a determination of the probable reasonable expenses, including attorney's 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 at the hearing, 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 twenty-five thousand dollars (\$25,000) . . . . The corporation and the moving party shall have recourse to such security in such amount as the court shall determine upon the termination of such action. The amount of such security may . . . be increased or decreased in the discretion of the court upon showing that the security provided has or may become inadequate or excessive . . . . 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 California legislature recently enacted a substantial revision of the current Corporations Code. Included within those revisions is a section dealing with security for costs in shareholders' derivative suits, however the statutory procedure provided in the new statute makes no significant change in the current law. See CAL. CORP. CODE §800, enacted CAL. STATS. 1975-76, c. 682 §7 at — (effective Jan. 1, 1977).

51. CAL. CORP. CODE §834(b).



pate in the transaction complained of in any capacity.<sup>52</sup> The requisite hearing must include all evidence material to a determination of the grounds for the motion, and the reasonable expenses which will be incurred by the defendant in defending against the action.<sup>53</sup> If the court determines, as a result of this hearing, that the defendant has established the probable validity of the grounds for the motion, it may then require the plaintiff to post a bond up to \$25,000 to secure to the defendant such costs as may be awarded by the court upon termination of the action.<sup>54</sup> Failure to provide the ordered security within such reasonable time as determined by the court may yield mandatory dismissal of the action against the defendant(s) requesting the posting of security.<sup>55</sup> Pending the court's decision on the motion for security, the prosecution of the action is suspended.<sup>56</sup>

The purpose behind this security for expense requirement is not merely to create a fund from which the court awarded fees and costs may be recovered, but also to lessen the potential for multiple suits and provide for an orderly procedure for derivative litigation.<sup>57</sup> Considering these statutory procedures in light of this legislative purpose, it is a near certainty that a due process attack would be unsuccessful.<sup>58</sup> Even the most careful scrutiny of the statute reveals none of the procedural inadequacies upon which courts have relied in finding a denial of procedural due process. The statute narrowly limits the security requirement to situations where there is no reasonable possibility that the litigation will be beneficial to the moving party.<sup>59</sup> Further, no security

52. CAL. CORP. CODE §834(b).

53. CAL. CORP. CODE §834(b).

54. CAL. CORP. CODE §834(b).

55. CAL. CORP. CODE §834(b).

56. CAL. CORP. CODE §834(c).

57. See *Freeman v. Goldberg*, 55 Cal. 2d 622, 625, 361 P.2d 244, 245, 12 Cal. Rptr. 668, 669, (1961); *Bailey v. Fosca Oil Co.*, 216 Cal. App. 2d 813, 31 Cal. Rptr. 380 (1963).

58. For an earlier case rejecting a due process attack on CAL. CORP. CODE §834, see *Beyerbach v. Juno Oil Co.*, 42 Cal. 2d 11, 265 P.2d 1, *appeal dismissed* 347 U.S. 985 (1954).

The Supreme Court, in *Cohen v. Benef. Ind. Loan Corp.*, 337 U.S. 541 (1949) rejected a due process attack on a New Jersey statute which provided that, at any time prior to judgment, the defendant in a shareholders' derivative suit may require the plaintiff to post bond to indemnify the defendant for his reasonable costs. The statute to which *Cohen* addressed itself made no provision for a hearing of any kind on the question of the propriety of imposing an undertaking requirement in the particular case, nor did it provide for a hearing on the question of the reasonableness of the amount of bond demanded by the defendant. The *Cohen* holding is entirely inconsistent with the recent trend in this area, and it is therefore submitted that *Cohen* would be decided differently modernly.

59. CAL. CORP. CODE §834(b); see, e.g., *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 541, 488 P.2d 13, 15, 96 Cal. Rptr. 709, 711 (1971) (statute must be narrowly tailored to serve the asserted legislative purpose); *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 342-43 (1968) (Harlan, J., concurring) (necessity of inquiry into probable validity of claim); *Bell v. Burson*, 402 U.S. 535, 540 (1971) (necessity of inquiry into probable validity of claim).

can be required except on prior notice and hearing to the plaintiff,<sup>60</sup> and at the hearing the court must consider all evidence material to the question of the propriety of a security deposit and the reasonableness of the amount requested.<sup>61</sup> This is clearly the type of procedure which would be considered "meaningful" and "appropriate to the nature of the case,"<sup>62</sup> and therefore in keeping with the requirements of procedural due process.

### B. Libel or Slander

As a condition precedent to the issuance of a summons in an action for libel or slander, California Code of Civil Procedure Section 830 requires the plaintiff to file a bond in the amount of \$500 to secure to the defendant the costs and charges which may be awarded against the plaintiff.<sup>63</sup> The statute further provides for a mandatory dismissal of the action if it is brought without filing the required bond.<sup>64</sup>

In addition to the obvious purpose of securing to the defendant the costs which may be awarded to him by the court,<sup>65</sup> the statute has been held to serve other significant purposes. *Shell Oil Company v. Superior Court*<sup>66</sup> indicates that the bond requirement is "to protect those who in good faith are exercising their constitutional guaranties of free speech and freedom of the press against the too common practice of instituting libel and slander suits inspired by mere spite or ill-will and without good faith."<sup>67</sup> This was further clarified in *Brandt v. Superior Court*<sup>68</sup> wherein the court stated that

[t]he need to post an undertaking impresses upon a party who feels aggrieved the gravity of litigation, tends to engender mature consideration of the propriety of going forward with a lawsuit, and thereby, indirectly, gives some protection to those exercising their right to express opinions.<sup>69</sup>

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60. CAL. CORP. CODE §834(b). *Mihans v. Municipal Ct.*, 7 Cal. App. 3d 479, 485, 87 Cal. Rptr. 17, 21 (1970) (regarding general due process requirement of prior notice and hearing); *Fuentes v. Shevin*, 407 U.S. 67, 79 (1972) (regarding general due process requirement of prior notice and hearing).

61. CAL. CORP. CODE §834(b); *Beaudreau v. Super. Ct.*, 14 Cal. 3d 448, 462, 535 P.2d 713, 722, 121 Cal. Rptr. 585, 594 (1975).

62. *Beaudreau v. Super. Ct.* 14 Cal. 3d at 460, 535 P.2d at 721, 121 Cal. Rptr. at 593; *see also Bell v. Burson*, 402 U.S. 535, 542 (1971).

63. CAL. CODE CIV. PROC. §830.

64. CAL. CODE CIV. PROC. §830.

65. *See Bried v. Super. Ct.*, 11 Cal. 2d 351, 354, 79 P.2d 1091, 1093 (1938); *Brandt v. Super. Ct.*, 67 Cal. 2d 437, 441, 432 P.2d 31, 34, 62 Cal. Rptr. 429, 432 (1967).

66. 2 Cal. App. 2d 348, 37 P.2d 1078 (1934).

67. *Id.* at 355, 37 P.2d at 1081.

68. 67 Cal. 2d 437, 432 P.2d 31, 62 Cal. Rptr. 429 (1967).

69. *Brandt v. Super. Ct.*, 67 Cal. 2d 437, 441, 432 P.2d 31, 34, 62 Cal. Rptr. 429, 432 (1967).

Even with such a laudatory legislative purpose, however, it is still at best doubtful whether this statute provides sufficient safeguards to be constitutional under the *Sniadach* line of cases. This is because the statutory procedure contains nearly every characteristic of which this line of cases disapproves.

The most obvious deficiency in the statutory procedure is that it makes no provision for *any* form of notice or hearing.<sup>70</sup> It is elementary to current due process thinking that where there is a taking of property within the scope of the fourteenth amendment, procedural due process *at the very least* requires some form of prior notice and a hearing appropriate to the nature of the particular case.<sup>71</sup>

*Nork v. Superior Court*<sup>72</sup> presented the same problem with respect to a statute's failure to provide for any form of notice prior to imposition of a security for costs requirement, but in the context of punitive damages in medical malpractice suits.<sup>73</sup> Holding the statute invalid, the *Nork* court summarized its provisions as follows:

the order is made ex parte, no showing of merit or lack thereof is required, an arbitrary minimum bond or cash deposit . . . is required, . . . and no proof is required as to the probable costs or attorney's fees likely to be incurred by the defendant seeking the bond. If such a bond so fixed is not posted . . . the cause of action . . . must be dismissed.<sup>74</sup>

This characterization could be applied almost verbatim to Code of Civil Procedure Section 830. That section makes no provision for any judicial participation whatsoever in the bond procedure, for it is the clerk who requires the filing of a bond as a condition precedent to the issuance of a summons.<sup>75</sup> Considerations relating to the merits of the underlying defamation action, to the necessity or propriety of the bond in the particular circumstances and to its reasonable amount are conspicuously absent from the statute.

Such a total absence of procedural safeguards can only be condoned

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70. Both the *Beaudreau* and *Nork* cases, for example, indicate the significance of the absence of any form of notice or hearing prior to the taking of a protected property interest. *Beaudreau v. Super. Ct.*, 14 Cal. 3d at 458, 535 P.2d at 719, 121 Cal. Rptr. at 591; *Nork v. Super. Ct.*, 37 Cal. App. 3d 997, 109 Cal. Rptr. 428 (1973).

71. See generally *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1968); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1970).

72. *Nork v. Super. Ct.*, 37 Cal. App. 3d 997, 109 Cal. Rptr. 428 (1973).

73. CAL. CODE CIV. PROC. §1029.6.

74. *Nork v. Super. Ct.*, 37 Cal. App. 3d at 1000, 109 Cal. Rptr. at 431 (Note that the minimum bond requirement imposed pursuant to CAL. CODE CIV. PROC. §1029.6 is \$2,500, while CAL. CODE CIV. PROC. §830 requires a \$500 bond).

75. After *Sniadach* it can no longer be doubted that the clerk does not function as a judicial officer for due process purposes, for it is this very type of participation that was invalidated in *Sniadach*. 395 U.S. 337, 338 (1968).

under exceptional circumstances.<sup>76</sup> Circumstances under which courts have condoned this degree of infringement upon interests protected by the due process clause have related to internal revenue service debts, national war, economic disaster or bank collapse and contaminated or misbranded food or drugs.<sup>77</sup> Clearly no such "public necessity"<sup>78</sup> exists with respect to actions for defamation. Nor is Code of Civil Procedure Section 830 "narrowly tailored"<sup>79</sup> to serve the asserted legislative purpose. Since the statute requires an undertaking of *all* plaintiffs, it fails to distinguish between cases where the statutory purpose is served by imposing the security requirement, and where it is not served. For example, libel may be actionable on its face, or it may be actionable only upon proof of special damages.<sup>80</sup> By making no inquiry into the propriety of imposing the security requirement in a particular case, the statute may operate to deprive a plaintiff of an unquestionably valid cause of action merely because of the failure to provide a bond, while at the same time permitting the filing of a clearly invalid cause of action merely because the particular plaintiff posts bond as requested.<sup>81</sup> For these reasons as well as others discussed above,<sup>82</sup> Code of Civil Procedure Section 830 should be held invalid when properly challenged on the basis of procedural due process.

This statute could easily be rehabilitated to comport with the requirements of procedural due process. Using Corporations Code Section 834 as a model, the statute could be rewritten to provide for a hearing upon notice to the parties, said hearing to address itself to the question of whether there is any reasonable possibility of the plaintiff recovering judgment in his favor. If no such reasonable possibility of recovery exists then the court should hear all evidence relevant to a determination of the reasonable expenses which may be incurred by the defendant in defending the suit. The court should then order the filing of a bond in that reasonable amount, subject to the caveat that failure to provide the bond is grounds for dismissal of the action. The adversary hearing provided

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76. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1968) (Harlan, J., concurring).

77. *Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1972) (citations omitted).

78. *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 550-51, 488 P.2d 13, 22, 96 Cal. Rptr. 709, 718-19 (1971), citing *Mendoza v. Small Claims Ct.*, 49 Cal. 2d 668, 672, 321 P.2d 9, 12 (1958).

79. See generally *Sniadach v. Family Finance Corporation*, 395 U.S. at 339.

80. See generally 3 WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§276-92 (8th ed. 1974).

81. Although the hypothetical posed here is unlikely, it serves to point to the necessity for some logical nexus between the goals sought to be achieved by a statute and the statutory vehicle designed to accomplish these goals.

82. See text accompanying notes 53-63 *supra*. It should be noted that one appellate court, upon consideration of the constitutionality of Code of Civil Procedure Section 830 in light of *Beaudreau*, has held the statute unconstitutional as a deprivation of due process and equal protection. *Allen v. Jordanos' Inc.*, 52 Cal. App. 3d 160, — Cal. Rptr. — (1975).

by this suggested procedure would serve the legislative purpose of protecting the good faith exercise of the constitutional freedoms of speech and press against defamation suits "inspired by mere spite or ill-will and without good faith,"<sup>83</sup> for it is only reasonable to assume that such suits will not be filed where the court has already determined that there is no reasonable possibility of judgment for the plaintiff. Where such a case is pursued after a judicial determination that it appears to lack merit, the defendant's rights are protected by securing to him the costs of defending the nonmeritorious action. The plaintiff's right to vindication of his good name is also protected by this suggested procedure, since the security requirement will not be imposed where the plaintiff has a meritorious cause of action.

### C. *Nonresident Plaintiffs & Foreign Corporations*

By the terms of Code of Civil Procedure Section 1030, a defendant in a suit brought by a nonresident plaintiff or foreign corporation<sup>84</sup> may require the plaintiff to post bond in an amount not to exceed \$300.<sup>85</sup> A new or additional bond may be obtained only by court order upon proof of the insufficiency of the original bond.<sup>86</sup> The proceedings are suspended until the required bond is filed.<sup>87</sup> If the bond is not filed within 30 days from service of notice upon the plaintiff, the court may dismiss the case.<sup>88</sup>

The cases which have interpreted and applied this section indicate that the defendant in a suit brought by a nonresident plaintiff has an almost absolute right to have the plaintiff post bond prior to continuing with the proceedings, and that this right is not subject to infringement even by the courts.<sup>89</sup> The nondiscretionary nature of the imposition of a bond requirement under this statute is further indicated by the legislative provision for a mandatory stay of the proceedings until the bond is filed, which impliedly indicates that the court may be acting beyond its powers if it proceeds with the case without the bond requested by the defendant.<sup>90</sup>

Particularly important to the due process analysis are the judicial

83. *Shell Oil Co., v. Super. Ct.*, 2 Cal. App. 2d 348, 355, 37 P.2d 1078, 1081 (1934).

84. Hereinafter, all references in this section to "nonresident plaintiff" or to "plaintiff" are intended to include foreign corporations.

85. CAL. CODE CIV. PROC. §1030.

86. CAL. CODE CIV. PROC. §1030.

87. CAL. CODE CIV. PROC. §1030.

88. CAL. CODE CIV. PROC. §1030.

89. *Carter v. Super. Ct.*, 176 Cal. 752, 757, 169 P. 667, 669 (1917); *Clune v. Sullivan*, 56 Cal. 249, 251 (1880); *Gadette v. Recorder's Ct. of East San Diego*, 53 Cal. App. 72, 73, 199 P. 817, 818 (1921); *Mead County Bank v. Bailey*, 137 Cal. 447, 448, 70 P. 297 (1902).

90. *Gadette v. Recorder's Ct. of East San Diego*, 53 Cal. App. 72, 74, 199 P. 817, 818 (1921).

interpretations of the last sentence of Code of Civil Procedure Section 1030 which address the court's power to dismiss the case for failure to comply with the bond requirement. Although the language of the statute is cast in permissive as opposed to mandatory terms,<sup>91</sup> the courts have not interpreted it so. This permissive language has been read as indicating merely that the court must dismiss the action if the bond is not filed within 30 days from the demand *unless* the failure to file the bond is excused.<sup>92</sup> The court's discretion here extends only to allowing the filing of a late bond, *not* to proceeding with the case without a bond.<sup>93</sup> Therefore, the statute, as interpreted, effectively imposes upon the plaintiff a security for expense requirement without judicial participation in any form and without giving the court any discretion to waive the requirement except in proceedings *in forma pauperis*.<sup>94</sup>

The legislative purpose or justification for this near total absence of procedural safeguards is "the probable difficulty or impracticability of enforcing judicial mandates against persons not dwelling within the jurisdiction of the courts."<sup>95</sup> Assuming *arguendo* the propriety and wisdom of this legislative premise which prompted the statutory enactment, it is still necessary to determine whether there exist sufficient exigent circumstances to justify the degree of denial of procedural safeguards called for pursuant to the statute.<sup>96</sup> It should be noted preliminarily that the burden upon the court and the defendant in permitting the plaintiff a hearing on the issue of the necessity and/or propriety of imposing the undertaking requirement in a particular case is nominal when one considers that both the plaintiff and the defendant are already subject to the court's jurisdiction at the time a security requirement is imposed. In addition, the burden upon the plaintiff by virtue of a deprivation of a protected property interest without any procedural safeguards may be significant.<sup>97</sup> Furthermore, individual security for litigation expenses is not the type of public necessity which the courts have recognized as sufficient to justify such extreme depar-

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91. CAL. CODE CIV. PROC. §1030 provides, in part, that [a]fter 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.

(Emphasis added.)

92. Carter v. Super. Ct., 176 Cal. 752, 755, 169 P. 667, 668 (1917); *see also* Hertz v. Super. Ct., 35 Cal. App. 83, 169 P. 258 (1917).

93. *See, e.g.*, Rodgers v. Horn, 85 Cal. App. 2d, 339, 193 P.2d 42 (1948).

94. Roberts v. Super. Ct., 264 Cal. App. 2d 235, 239-41, 70 Cal. Rptr. 226, 229-30 (1968); Bank of America v. Super. Ct., 255 Cal. App. 2d 575, 577-78, 63 Cal. Rptr. 366, 367-68 (1967).

95. Myers v. Carter, 178 Cal. App. 2d 622, 625-26, 3 Cal. Rptr. 205, 207-08 (1960), *quoting* Morek v. Smolak, 282 N.Y.S. 418, 419 (1935).

96. *See, e.g.*, Beaudreau v. Super. Ct., 14 Cal. 3d 448, 460-61, 535 P.2d 713, 721, 121 Cal. Rptr. 585, 593 (1975).

97. *See generally* Goss v. Lopez, 419 U.S. 565 (1975).

tures from the procedural requisites of the due process clause.<sup>98</sup>

The use of summary procedures by residents against nonresidents was addressed by the United States Supreme Court in *Ownbey v. Morgan*,<sup>99</sup> wherein the court rejected a constitutional attack on a statute which provided for prejudgment attachment of a nonresident's local assets by a resident creditor. There is significant dicta in *Randone v. Appellate Department*,<sup>100</sup> however, that *Ownbey* was decided on the basis of

notions of jurisdictional authority controlling at the time of the . . . decision, [which] frequently provided [for prejudgment attachment as] the only basis by which a state could afford its citizens an effective remedy for injuries inflicted by nonresidents.<sup>101</sup>

This dictum indicates that with the currently expanded notions of state jurisdiction, the exigencies justifying the *Ownbey* decision may no longer exist, and therefore the case might be decided differently today. If this is the case, it logically follows that Code of Civil Procedure Section 1030 could also be held invalid modernly.

As with the statute discussed previously, it is suggested that Corporations Code Section 834 serve as a model for rehabilitating Section 1030 of the Code of Civil Procedure to comport with the requirements of procedural due process.<sup>102</sup> A judicial inquiry into the question of the existence of a reasonable possibility of the plaintiff recovering judgment, and the interposition of a security requirement only where no such possibility exists, would clearly satisfy the requirements of procedural due process. In fact, insofar as the legislative purpose is to guard against the potential nonenforceability of the state's judicial decrees,<sup>103</sup> it is highly possible that a standard more stringent than that of "reasonable possibility" might be constitutionally imposed upon a nonresident plaintiff in order to excuse the necessity of filing a bond to secure the defendant his costs.<sup>104</sup>

*D. Members of the Active Militia and the Regents  
of the University of California*

Education Code Section 23175, which deals with suits against the

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98. See text accompanying note 60 *supra*.

99. 256 U.S. 94 (1921).

100. 5 Cal. 3d 536, 448 P.2d 13, 96 Cal. Rptr. 709 (1971).

101. 5 Cal. 3d at 554, 448 P.2d at 24, 96 Cal. Rptr. at 715.

102. See text accompanying notes 58-62 *supra* for a discussion of CAL. CORP. CODE §834.

103. See note 73 *supra*.

104. See, e.g., *McCallop v. Carberry*, 1 Cal. 3d 903, 905, 464 P.2d 122, 124, 83 Cal. Rptr. 666, 668 (1970); see also *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343 (1968) (Harlan, J., concurring).

University of California, and Military and Veterans Code Section 393, which deals with suits against persons for wrongs committed in their official capacities with the active militia, contain substantially similar provisions, and are therefore analyzed together.

Pursuant to the provisions of Education Code Section 23175, in any suit against the Regents of the University of California, the regents may demand that the plaintiff file a bond to secure to the defendant regent(s) the allowable costs incurred in defending the suit.<sup>105</sup> The statute fixes the bond at \$100 if there is a single plaintiff, and \$200 in the event there are multiple plaintiffs.<sup>106</sup> The court may fix bond in a greater sum upon a showing of good cause by the defendant.<sup>107</sup> If the plaintiff fails to file the demanded bond within 20 days after service of the demand, the statute provides that the action *shall* be dismissed.<sup>108</sup>

Section 393 of the Military and Veterans Code utilizes a similar procedure. This section provides that when suit is brought

against an active member of the militia or a member of the militia in active service . . . for an act [or omission to act] done by such member in his official capacity in the discharge of duty . . . the defendant may require the person instituting or prosecuting the action . . . to file security in an amount 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.<sup>109</sup>

The statute further provides that, depending upon whether the suit is civil or criminal, the Attorney General or a judge advocate shall defend the defendant in the suit.<sup>110</sup>

Inasmuch as there are no reported cases construing or interpreting these sections and nothing instructive in the published legislative history, the legislative purpose behind their enactment remains obscure. Among the several possible purposes which may have prompted the legislature to enact these sections are the following: (1) to discourage the filing of frivolous suits against persons engaged in the performance of their official duties, and (2) to indemnify the defendant for the litigation costs incurred by him by virtue of his official position.

With respect to discouraging frivolous suits, the analysis in *Beaudreau v. Superior Court*<sup>111</sup> is directly on point. In analyzing the statutes before

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105. CAL. EDUC. CODE §23175.

106. CAL. EDUC. CODE §23175.

107. CAL. EDUC. CODE §23175.

108. CAL. EDUC. CODE §23175.

109. CAL. MIL. & VETS. CODE §393.

110. CAL. MIL. & VETS. CODE §393.

111. 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).



it<sup>112</sup> the *Beaudreau* court found that

the procedure prescribed by these statutes to effectuate such purpose does not distinguish between the classes of plaintiffs on the basis of the merit of the actions brought by them . . . . [The] defendants are given the absolute right to demand an undertaking for costs as specified by the . . . sections.

If a defendant limits his demand to the amount automatically allowable by statute . . . , no prior or subsequent judicial approval is required . . . . [U]pon application of the defendant (apparently ex parte) and upon "good cause shown," the court may fix undertakings in greater amounts.<sup>113</sup>

The statutes make no provision for inquiry into the merit of the plaintiff's claim or of the need for an undertaking and its reasonable sum, and "the court has no discretion to dispense with the undertaking requirement."<sup>114</sup> Under the *Beaudreau* analysis, insofar as

these statutes are purportedly designed to protect . . . against the cost of defending frivolous law suits, a due process hearing would necessarily inquire into the merit of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in light of the defendant's probable expenses.<sup>115</sup>

Another case, *Bell v. Burson*,<sup>116</sup> suggests the due process ramifications of the second legislative purpose mentioned above, namely that of indemnifying the defendant for litigation costs incurred by him by virtue of his official position.<sup>117</sup> Although dissimilar on its facts,<sup>118</sup> *Bell* may be said to stand for the general proposition that wherever a deposit requirement is imposed, due process requires a hearing to determine both the reasonable possibility of success in the underlying action, and the reasonableness of the amount of the deposit in light of the depositor's potential liability.<sup>119</sup> Inasmuch as neither Military and Veterans Code Section 393 nor Education Code Section 23175 provides for

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112. *Beaudreau* dealt with CAL. GOV'T CODE §§947 and 951; 14 Cal. 3d 448, 53 P.2d 713, 121 Cal. Rptr. 585 (1975).

113. *Beaudreau v. Super. Ct.*, 14 Cal. 3d at 453-54, 535 P.2d at 716, 121 Cal. Rptr. at 588.

114. *Id.* at 454, 535 P.2d at 715, 121 Cal. Rptr. at 588.

115. *Beaudreau v. Super. Ct.*, 14 Cal. 3d at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592. Also note that CAL. MIL. & VETS. CODE §393 provides that the defendant is defended by the Attorney General or judge advocate, thereby substantially reducing the defendant's litigation costs.

116. 402 U.S. 535 (1971).

117. See text preceding note 81 *supra*.

118. *Bell v. Burson* involved a challenge to the constitutionality of a state statute which provided that when an uninsured motorist was involved in an automobile accident, he was required to either deposit a statutorily fixed sum of money or suffer the suspension of his drivers license. The Court held that the statute failed to comply with the procedural requirements of the due process clause. See text accompanying note 119 *infra*.

119. *Bell v. Burson*, 402 U.S. 535, 540 (1971).

any inquiry into the reasonableness of the amount of deposit required in the particular case or the reasonable possibility of success in the underlying action, it is submitted that both sections fail to conform to the requirements of procedural due process.

As indicated in *Bell v. Burson*<sup>120</sup> and *Beaudreau v. Superior Court*,<sup>121</sup> a statutory procedure providing for judicial inquiry into the questions of (1) whether, in the particular case, the statutory purpose would be promoted by interposing an undertaking requirement, and (2) the reasonableness of the amount of such an undertaking, would undoubtedly satisfy the mandates of procedural due process. Such a procedure would protect the plaintiff's interests by not imposing an undertaking requirement unnecessarily, while at the same time promoting the defendant's interests by imposing such a requirement where the circumstances warrant its imposition.

### E. Architects and Physicians

The following analysis addresses itself to the constitutionality of Code of Civil Procedure Sections 1029.5 and 1029.6. Although the professional fields dealt with in these statutes are unrelated,<sup>122</sup> the statutory procedures with respect to each are nearly identical. Where these statutes do differ, such differences will be pointed out in the discussion.

These statutes provide that in a suit against an architect or physician, the defendant may, within a limited time after service of process<sup>123</sup> and upon notice and hearing to the plaintiff,<sup>124</sup> move the court for an order requiring the plaintiff to file a bond to secure to the defendant the costs which may be awarded against the plaintiff.<sup>125</sup> Such motion for a security bond must be accompanied by an affidavit indicating that the plaintiff's claim is frivolous.<sup>126</sup> In order to obtain a bond, the defendant must show

- 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

120. *Id.*

121. 14 Cal. 3d 448, 460, 535 P.2d 713, 720, 121 Cal. Rptr. 585, 594 (1975).

122. CAL. CODE CIV. PROC. §1029.5 deals with architects, engineers, building designers or land surveyors licensed under California law; CAL. CODE CIV. PROC. §1029.6 deals with the fields listed in note 22 *supra*.

123. CAL. CODE CIV. PROC. §1029.5 provides that the bond request must be filed within 30 days from the service of process; CAL. CODE CIV. PROC. §1029.6 provides that such a request must be made within 6 months from service of process.

124. CAL. CODE CIV. PROC. §§1029.5 and 1029.6.

125. CAL. CODE CIV. PROC. §1029.5(c) provides for a bond in the sum of \$500 per defendant, up to a \$3,000 maximum; CAL. CODE CIV. PROC. §1029.6(c) provides for a bond not to exceed \$500 per defendant, up to a maximum of \$1,000.

126. CAL. CODE CIV. PROC. §§1029.5(a) and 1029.6(a).

of action against each named defendant with respect to whom the plaintiff would otherwise be required to file such written undertaking.<sup>127</sup>

Failure to provide the bond within such reasonable time as is set by the court is grounds for dismissal of the action.<sup>128</sup>

The legislative purpose behind these statutes is undoubtedly to discourage the filing of frivolous suits, and to secure the defendant's recovery of his costs in such suits. The statutes are carefully worded to permit the imposition of a security requirement only where there is no reasonable possibility that the plaintiff has a valid cause of action.<sup>129</sup> Thus they are narrowly tailored to serve their intended purpose. The statutes provide for notice to all parties and a hearing before a judge, with the judicial inquiry limited to the only questions relevant to the security requirement, *i.e.* the existence of a reasonable possibility of the plaintiff's success in the action, and whether the security requirement would be unduly burdensome on the particular plaintiff.<sup>130</sup> These statutory safeguards clearly fall within the permissible range of procedures contemplated by procedural due process. In fact, the language of these statutes is nearly identical to that used in many of the more recent due process cases in suggesting how statutes could be written to conform to the requirements of procedural due process.<sup>131</sup> It is therefore submitted that these statutes would withstand a constitutional attack based on the due process clause of the state and federal constitutions.

#### F. Vexatious Litigants

California's Vexatious Litigant Statute<sup>132</sup> provides that a defendant may move the court, upon notice and hearing, for an order that the plaintiff, a vexatious litigant, post security for the defendant's reasonable litigation costs which may be awarded at the termination of the litigation.<sup>133</sup> Such a motion must be made within 30 days from service of

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127. CAL. CODE CIV. PROC. §1029.5(a) provides that the court's determination on the question of whether or not to impose a bond is not appealable, while CAL. CODE CIV. PROC. §1029.6 has no such provision. The former section, as written, raises a substantial due process question. It is probable that if the section is challenged, it will be construed as permitting review on the basis of substantial evidence and abuse of discretion, and thus held constitutional in that respect.

128. CAL. CODE CIV. PROC. §§1029.5(a) and 1029.6(a).

129. CAL. CODE CIV. PROC. §§1029.5(a) and 1029.6(a).

130. For a discussion of the *in forma pauperis* power of the courts, see generally *Conover v. Hall*, 11 Cal. 3d 842, 850-53, 523 P.2d 682, 686-89, 114 Cal. Rptr. 642, 646-49, (1974); *County of Sutter v. Super. Ct.*, 244 Cal. App. 2d 770, 773-75, 53 Cal. Rptr. 424, 426-27 (1966).

131. See, e.g., *Nork v. Super. Ct.*, 33 Cal. App. 3d 997, 109 Cal. Rptr. 428 (1973).

132. CAL. CODE CIV. PROC. §§391-391.6.

133. CAL. CODE CIV. PROC. §391.1 provides that

[i]n any litigation, at any time within 30 days after service of summons or other and equivalent process upon him, a defendant may move the court, upon

process and must be based upon a showing that the plaintiff is a vexatious litigant and that there is no reasonable possibility that the plaintiff will prevail in the litigation.<sup>134</sup> At the hearing held upon notice to the plaintiff, the court must consider all evidence material to the question of whether the plaintiff is a vexatious litigant within the meaning of the statute and whether there is any reasonable possibility that the plaintiff will prevail in the litigation.<sup>135</sup> If the court finds that the plaintiff is a vexatious litigant and that there is no reasonable possibility that the plaintiff will prevail on the merits, the court must order the plaintiff to post security in such form and amount as the court may fix as sufficient to secure the defendant's reasonable litigation costs.<sup>136</sup> Such security may be increased or decreased at the court's discretion upon a showing that it has become inadequate or excessive.<sup>137</sup> Failure to provide the security yields mandatory dismissal of the litigation as to the defendant for whose benefit the security was ordered.<sup>138</sup>

The legislative purpose behind the enactment of the vexatious litigant statute is probably twofold: (1) to alleviate congestion in the judicial system caused by vexatious litigation, and (2) to protect the defendant from the unnecessary expense of defending against multiple litigation initiated by a vexatious litigant.<sup>139</sup>

In the past decade, California courts have twice rejected constitutional attacks upon the Vexatious Litigant Statute.<sup>140</sup> The earlier of these cases, *Taliaferro v. Hoogs*,<sup>141</sup> placed substantial reliance upon *Beyerbach v. Juno Oil Co.*,<sup>142</sup> a case rejecting a due process attack against Corporations Code Section 834. More recently, in *Muller v. Tanner*,<sup>143</sup> the court reaffirmed both the holding and the rationale of *Taliaferro*;

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notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, 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.

CAL. CODE CIV. PROC. §391(c) provides that

"[s]ecurity" means cash, undertaking by a surety, or other security, of such nature and in such amount as may be fixed by the court, to assure payment, to the party for whose benefit such security is required to be furnished, of such party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

134. CAL. CODE CIV. PROC. §391.1.

135. CAL. CODE CIV. PROC. §391.2.

136. CAL. CODE CIV. PROC. §391.3.

137. CAL. CODE CIV. PROC. §391.3.

138. CAL. CODE CIV. PROC. §391.4.

139. See Comment, *The Vexatious Litigant*, 54 CAL. L. REV. 1769, 1778 (1966).

140. *Muller v. Tanner*, 2 Cal. App. 3d 445, 82 Cal. Rptr. 738 (1969); *Taliaferro v. Hoogs*, 236 Cal. App. 2d 521, 46 Cal. Rptr. 147 (1965).

141. 236 Cal. App. 2d 521, 46 Cal. Rptr. 147 (1965).

142. 42 Cal. 2d 11, 265 P.2d 1 (1954).

143. 2 Cal. App. 3d 445, 82 Cal. Rptr. 738 (1969).

however, it remains to be determined whether the statutory procedures comply with the rapidly emerging standards of procedural due process.

From the statutes already analyzed it should be clear that Code of Civil Procedure Sections 391 through 391.6 operate to cause a taking of a property interest protected by the fourteenth amendment. This is because the security requirement deprives the plaintiff of the use of the money or property deposited with the court, or the use of the money which the plaintiff must pay in order to secure a bond if that is the form of security required by the court.<sup>144</sup> Assuming, therefore, that the elements of state action, a property right and a taking are present, it remains only to balance the respective interests of the parties to determine whether the statutory procedures are justifiable in light of current due process standards.<sup>145</sup> On the one hand is the legislative purpose of the smooth and efficient operation of the judicial system and the protection of defendants against multiple suits by vexatious litigants with no reasonable probability of success, while on the other hand we have an individual's right to his day in court.<sup>146</sup> Certainly a person is not deprived of his day in court when he appears before the court for a determination of the existence of a reasonable possibility that his litigation will be successful. Nor can it seriously be argued that the statutory procedures in question are inadequate in light of their purpose. The statute provides for notice and hearing prior to the taking of any protected property interest,<sup>147</sup> and the hearing specifically addresses itself to the questions of whether the plaintiff falls within the statutory definition of a vexatious litigant and whether there exists no reasonable probability that the plaintiff will recover in the litigation.<sup>148</sup> It is only where both of these requirements are fulfilled that the court may require the plaintiff to post security for the defendant's benefit.<sup>149</sup> Thus, inasmuch as the statute provides for notice and hearing as well as an inquiry into the potential merit of the cause of action, it is submitted that the requirements of procedural due process are met by the statute.

#### CONCLUSION

Using an elemental approach to procedural due process, this comment has analyzed several California statutes which impose security for expense requirements. Drawing on the cases which have interpreted and

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144. See text accompanying notes 30-36 *supra*.

145. See text accompanying notes 18-19 *supra*.

146. See Comment, *The Vexatious Litigant*, 54 CAL. L. REV. 1769, 1778 (1966).

147. CAL. CODE CIV. PROC. §391.1.

148. CAL. CODE CIV. PROC. §391.1.

149. CAL. CODE CIV. PROC. §391.3.

extended the *Sniadach* rationale, it has been shown that, in all probability, at least four of the current California statutes would be held invalid when properly challenged on the basis of procedural due process, while the other four statutes could withstand such an attack. With respect to the statutes found constitutionally deficient, two problems are recurrent: (1) the statute provides for an *ex parte* proceeding which cannot be justified in light of the statutory purpose, and (2) where there is a hearing, the scope of the hearing is not narrowly tailored to serve the legislative purpose, *i.e.* the scope of the inquiry is not limited to those issues which are material to the furtherance of the legislative purpose asserted as a justification for the imposition of a security for expense requirement in the particular case. As has been shown, these statutes could easily be rehabilitated using Corporations Code Section 834 as a model. The legislature should take it upon itself to make these changes. This course of action would render unnecessary further judicial inquiry into the constitutionality of the remaining security for expense statutes.

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