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The Security for Costs Requirement in California - A Violation of Procedural Due Process?

Jerel L. Ellington

The Security for Costs Requirement in California—A Violation of Procedural Due Process?

"Security for costs" has been defined as a "[a] security which a defendant in an action may require. . . for payment of such costs as may be awarded to the defendant."[1] A plaintiff, or in some cases an appellant, may be required to provide the security for costs[2] as a condition precedent to his or her access to the court system. The purpose of the security for costs is two-fold: (1) to provide protection for a defendant by ensuring an available fund to defray costs incurred by the defendant in defending a frivolous claim, and (2) to discourage the filing of unmeritorious and frivolous claims.[3]

Recently, several California statutes which require a security for costs have been attacked[4] on the basis of constituting an unconstitutional violation of the procedural due process requirements of the fifth and fourteenth amendments to the Federal

1. BLACK'S LAW DICTIONARY 416 (4th ed. rev. 1970). A "security for costs" may take the form of an "undertaking" or the deposit of a sum of money or bearer bonds. *See* note 2 *infra*. For purposes of this Comment, "security for costs" will be the phrase utilized exclusively as it is inclusive of an "undertaking," whereas an "undertaking" is not inclusive of a "security for costs."

2. The actual form of the security for costs may vary according to California procedure. The statutes which dictate such a security requirement usually call for an "undertaking." CAL. CIV. PROC. CODE §1041 (West 1955) provides the simplified procedure: "Whenever a party to an action or proceeding desires to give an undertaking provided to be given by any statute of this State, it shall be sufficient if the sureties sign an undertaking to be given. Such undertaking may be in form as follows: [suggested form omitted]." Regarding the qualifications of the sureties, *see* 2 WITKIN, CALIFORNIA PROCEDURE, PROVISIONAL REMEDIES §3, 1466-68 (2d ed. 1970).

> In all civil cases, wherein an undertaking is required, the party required to furnish such undertaking may, in lieu thereof, deposit. . . (a) [a] sum of money . . . equal to the amount required to be secured by said undertaking; or, (b) [b]earer bonds or bearer notes . . . having a market value at least equal to the amount of the corporate surety bond otherwise required or permitted to be furnished, . . .

CAL. CIV. PROC. CODE §1054a (West Supp. 1978).

3. *See, e.g.*, VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY, 784-86, 801-2 (1964); Brandt v. Superior Court, 67 Cal. 2d 437, 62 Cal. Rptr. 429 (1967); Bried v. Superior Court, 11 Cal. 2d 351, 79 P. 2d 1091 (1938).

4. *See* note 11 *infra*.

Constitution[5] and corresponding sections of the California Constitution.[6] The gist of the argument is that by requiring a plaintiff or appellant to provide a security for costs without a prior hearing addressing the necessity of such a security or the amount required, that party has been subjected to an unconstitutional "taking."[7]

Several California court decisions[8] have adopted this line of reasoning. The purpose of this comment is to analyze and critique the California courts' application of procedural due process reasoning in holding these statutes unconstitutional.[9]

Initially it is necessary to develop the California position. Next, the decisions are discussed emphasizing the impropriety of a procedural due process analysis. Finally, the effect of these innovative decisions on the security for costs requirement in such summary remedies as the preliminary injunction or temporary restraining order, and whether the security for costs requirement will remain a viable means of protecting an otherwise vulnerable defendant, will be discussed.

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5. U.S. CONST. amend. V provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. XIV §1 provides: " . . . 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."

6. CAL. CONST. art. I §7 1849, amended 1974 provides: "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."

7. The term "taking" has a multi-variant application as a legal word of art and is perhaps misapplied in the context of the law which is the topic of this comment. The term "taking" does not appear in either the Federal or California Constitutions' due process clauses, other than as used in the fifth amendment concerning eminent domain proceedings. Rather, the Federal and California Constitutions provide that a person shall not be *deprived* of property without due process of law. *See* notes 5 & 6 *supra*.

The term "taking" as used in a procedural due process context signifies that a person is deprived of a protected interest. The consequences of establishing a "taking" is that appropriate notice and opportunity to be heard must be provided or the taking is unconstitutional. *See generally* NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW, 490-92 (1978).

8. *See* note 11 *infra*.

9. It must be noted that this line of reasoning was not necessitated by a desire to protect indigent litigants who could not afford the cost of a security for costs requirement. California courts have common law authority to dispense with fees in the case of indigent litigants, and "under proper circumstances California courts do have power to dispense with bond requirements intended to protect an adversary's financial interest." Conover v. Hall, 11 Cal. 3d 842, 850-51, 114 Cal. Rptr. 642, 647, 523 P.2d 682, 687 (1974). *See also* County of Sutter v. Superior Court, 244 Cal. App. 2d 770, 53 Cal. Rptr. 424 (1966).

I. SYNOPSIS OF CALIFORNIA LAW[10]

With the advent of recent decisions in California,[11] it is questionable whether statutes which require a party to file a security for costs for the protection of another party are likely to withstand a procedural due process attack. The California Supreme Court decisions[12] have established strong precedent and the appellate courts are now following suit.[13]

The cases recognize a "two-fold taking"[14] of property whenever, on an *ex parte* motion, a party is forced to post security for the protection of another's costs in defending a claim.[15] On the one hand, if the security requirement is complied with, a taking occurs in either the deprivation of the use of money,[16] occuring where money is deposited in lieu of an undertaking, or in the loss of a nonrefundable premium,[17] such as where a surety has been

10. The following is merely a brief exposition of the law as developing in California. For a more detailed discussion of the law as applied to the security for costs, *see* Comment, *Due Process and Security for Expense Statutes: An Analysis of California Statutes in Light of Recent Trends*, 7 PAC. L.J. 176 (1976).

11. Brooks v. Small Claims Court, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (which held CAL. CIV. PROC. CODE §117 an unconstitutional taking without due process of law. Section 117 requires an undertaking when appealing a judgment in small claims court prior to a hearing with right of counsel.) Nork v. Superior Court, 33 Cal. App. 3d 977, 109 Cal. Rptr. 238 (1973) (holding CAL. CIV. PROC. CODE §1029.6(e), which requires an undertaking in a medical malpractice suit for exemplary damages, an unconstitutional "*taking*" of property); Beaudreau v. Superior Court, 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975) (which held CAL. GOV'T CODE §§947, 951 requiring an undertaking to prosecute a lawsuit against a public entity or employee, an unconstitutional two-fold taking of a protected property interest); Allen v. Jordano's, Inc., 52 Cal. App. 3d 160, 125 Cal. Rptr. 31 (1975) (holding CAL. CIV. PROC. CODE §830, which requires an undertaking in prosecuting a defamation action, an unconstitutional violation of procedural due process rights); and Gonzales v. Fox, 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312 (Dep't. Super. Ct. 1977) (holding CAL. CIV. PROC. CODE §1030, which imposes a security requirement on non-residents seeking access to California courts in order to prosecute a claim, constitutes an unconstitutional "taking.")

12. Brooks v. Small Claims Court, 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973); Beaudreau v. Superior Court, 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 588 (1975).

13. Nork v. Superior Court, 33 Cal. App. 3d 977, 109 Cal. Rptr. 238 (1973); Allen v. Jordano's Inc. 52 Cal. App. 3d 160, 125 Cal. Rptr. 31 (1975); Gonzales v. Fox, 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312 (1977).

14. A "two-fold taking" should have a neutral connotation. It merely signifies that a taking occurs in either of two ways. It is not a more reprehensible taking because it is a "two-fold taking" as compared to a "taking."

15. *See* Beaudreau v. Superior Court, 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975).

16. *Id.* at 455, 535 P.2d at 717, 121 Cal. Rptr. at 589.

17. *Id.*

employed. In the latter case, there is also the loss of enjoyment or use of collateral which is often required in order to qualify for a bond.[18] If the security requirement is not complied with, however, the second aspect of a taking occurs and is found in the dismissal of a "meritorious" claim.[19]

Regarding the deprivation of the use of money, the court's have relied heavily on recent United States Supreme Court decisions which have held summary garnishment procedures[20] and prejudgment replevin statutes[21] unconstitutional in holding that the deprivation of the use of money, for no matter how brief a period, constitutes a taking for which procedural due process protections must be afforded. *Brooks v. Small Claims Court*,[22] which was the initial case to apply a procedural due process analysis in this con-

18. Brooks v. Small Claims Court, 8 Cal. 3d at 667, 504 P.2d at 1253, 105 Cal. Rptr. at 789 (1973).

19. Beaudreau v. Superior Court, 14 Cal. 3d at 457, 535 P.2d at 718, 121 Cal. Rptr. at 590.

20. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

21. Fuentes v. Shevin, 407 U.S. 67 (1972).

22. 8 Cal. 3d 661, 504 P.2d 1249, 105 Cal. Rptr. 785 (1973). *Brooks* is reviewed in Note, *Application of Procedural Due Process Standards to Small Claims Court Judgement Appeal Bond Requirement*, 62 CALIF. L. REV. 421 (1974).

The facts of *Brooks* are briefly as follows. Defendant sought to appeal a money judgment entered against her by the small claims court. As a prerequisite to appeal, former CAL. CIV. PROC. CODE §§117 (repealed by 976 Cal. Stats. ch. 1289, §1) & 1171 (repealed by 1975 Cal. Stats. ch. 266 §3) required defendant to furnish an undertaking or a security for costs deposit. Defendant filed notice of appeal without complying with the code sections, arguing the requirements would unconstitutionally deprive her of her property before she could obtain a due process hearing with the right of representation by counsel. Defendant had sought but was refused permission to be represented by counsel at small claims court. Defendant's appeal was dismissed because of the noncompliance. Defendant then filed a petition for a writ of mandate to compel respondent to allow her to appeal the adverse judgment without being required to file the undertaking prescribed by law.

The court issued the preemptory writ of mandate, holding the statutes requiring an undertaking or deposit in lieu of an undertaking void as an unconstitutional taking under the fourteenth amendment to the Federal Constitution since appellant was summarily deprived of a protected property interest.

The court's reasoning was two-fold. First, the court noted "the concept of a 'taking' has been extended significantly." 8 Cal. 3d at 666, 504 P.2d at 1253, 105 Cal. Rptr. at 789 (1973). Secondly, the court "discern[ed] compelling policy reasons supportive of [the] conclusion." *Id.* at 668, 504 P.2d at 1254, 105 Cal. Rptr. at 790. The court cited empirical studies indicating that "the institutional creditor, rather than the ordinary individual claimant, is more likely to avail itself of the small claims court." *Id.* at 669, 504 P.2d at 1254, 105 Cal. Rptr. at 790. Institutional creditors are likely to become proficient in use of the small claims court to the disadvantage of the poor litigant. *Id.* Thus there is a need for the defendant to have "access to counsel without being required to first file an undertaking." *Id.*

Whether or not the Court found an unconstitutional taking in the security for costs requirement of former CAL. CIV. PROC. CODE §§117 and 1171 because of compelling policy reasons is now merely academic. The possible constitutional infirmity of the security for costs requirements is now well-established. *See* note 11 *supra*.

text, relied heavily on *Fuentes v. Shevin*[23] in asserting that "any significant taking is within the purview of the Due Process Clause."[24] The court viewed the deprivation of the use of money required as an undertaking or security for costs as such a significant taking, and recognized a basic right to a hearing regarding the deprivation. That the amount may be inconsequential is of little moment.[25]

Beaudreau v. Superior Court[26] elaborated the second aspect of the two-fold taking, the dismissal of a "meritorious action." The *Beaudreau* court liberally interpreted the language of *Board of Regents v. Roth* that "[t]o have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. . . He must, instead, have a legitimate claim of entitlement to it."[27] A meritorious action was held to connote a "legitimate claim of entitlement," and thus a protected property interest.[28] The court held:

> If the plaintiff [does not file the demanded undertaking] and incurs dismissal of his action, he will have suffered a "taking" of his property, since his claim against a public entity or employee—assuming that it is bona fide and potentially meritious—is a "property interest" within the mean-

23. 407 U.S. 67 (1972). *Fuentes* held the Florida and Pennsylvania prejudgment replevin statutes, which permitted a private party to obtain a prejudgment writ of replevin through a summary process of an ex parte application to a court clerk, invalid under the fourteenth amendment since they work a deprivation of property without due process by denial of the right to be heard before chattels are taken from the possessor.

It is the author's position that *Fuentes* has been misapplied by the California courts, and that the California decisions under discussion have gone *beyond* the reasoning underlying *Fuentes*. *See* discussion below part II, B, 1.

24. Brooks v. Small Claims Court, 8 Cal. 3d at 667-68, 504 P.2d at 1253, 105 Cal. Rptr. at 789, *citing* Fuentes v. Shevin, 407 U.S. at 86.

25. In *Brooks*, the Court noted the amounts protected by *Sniadach* and its California progeny involved a range as low as $63.18.

26. 14 Cal. 3d 448, 535 P.2d 713, 121 Cal. Rptr. 585 (1975). In *Beaudreau*, plaintiffs sought to prosecute a claim against a school district and public employees. Defendants demanded that plaintiffs post undertakings in an amount approximating $25,000 as security for costs which might be awarded defendants. In a mandamus proceeding, the California Supreme Court held CAL. GOV'T CODE §§947 & 951, which required the security for costs, an unconstitutional "taking" because notice and a hearing were not held before the taking.

The court noted that "the taking to which a plaintiff is subjected under the above statutes must be preceded by a hearing in the particular case in order to determine whether the statutory purpose is promoted by the imposition of the undertaking requirement." *Id.* at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592.

27. *Id* at 456, 535 P.2d at 718, 121 Cal. Rptr. at 590.

28. *Id.* at 457, 535 P.2d 718, 121 Cal. Rptr. at 590.

ing of the due process clause.[29]

In finding a "taking," the decisions have relied strongly on *Sniadach v. Family Finance Corp.*[30] as marking a significant departure into the burgeoning realm of applying procedural due process limitations to the field of summary remedies.[31] In fact, the decisions summarily dismiss the taking issue by such language as "[u]nder *Sniadach* and its progeny . . . this is of course a taking."[32] These decisions are consistent with the application of the *Sniadach* rationale in other California decisions.[33]

Having found a "taking" the decisions note as a "basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing."[34] And, "[a]bsent extraordinary circumstances justifying resort to summary procedures, this hearing must take place *before* an individual is deprived of a sig-

29. *Id.* 456, 535 P.2d 718, 121 Cal. Rptr. at 590, *citing* Board of Regents v. Roth, 408 U.S. 564 (1972).

30. 395 U.S. 337 (1969). *Sniadach* held the Wisconsin prejudgment garnishment procedure, which allowed a summons to be issued at the request of the creditor's lawyer causing wages to be frozen pending trial of the main suit, unconstitutional as providing for no right to be heard as to the legitimacy of the garnishment before the wages were frozen. *Sniadach* has been the subject of countless law review articles, and is generally viewed as a landmark case in the area of summary procedure.

31. Indicative of the sacrosanct attitude toward *Sniadach* is the following language from Nork v. Superior Court, 33 Cal. App. 3d 997, 1001, 109 Cal. Rptr. 428, 431 (1973):

> We would preliminarily observe that just as *Mapp v. Ohio* (citation deleted) created ever enlarging waves which eroded many time-honored precedents in the field of searches and seizures and *Brown v. Board of Education* (citation deleted) did likewise in the civil rights field so has *Sniadach v. Family Finance Corp.* (citation deleted) wrought many changes in the field of summary remedies.

32. Brooks v. Small Claims Court, 8 Cal. 3d at 667, 504 P.2d at 1253, 105 Cal. Rptr. at 789; Beaudreau v. Superior Court, 14 Cal. 3d at 455, 535 P.2d at 717, 121 Cal. Rptr. at 589 (citations deleted).

33. *See, e.g.*, McCallop v. Carberry, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 669, (1970) (prejudgment attachments); Cline v. Credit Bureau of Santa Clara Valley, 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970) (also prejudgment attachments); Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971) (claim and delivery statutes); Rios v. Cozens, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 145 (1974) (garagemen's liens), Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970) (distraint statutes); Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976), *appeal dismissed* 429 U.S. 1056 (1977) (mechanics' lien recognized as a taking, but statute upheld); Randone v. Appellate Dep't. of Sacramento Co., 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971) (attachment and garnishment).

34. Beaudreau v. Superior Court, 14 Cal. 3d at 458, 535 P.2d at 719, 121 Cal. Rptr. at 591, *citing* North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974) (Powell, J., concurring); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

nificant property interest."[35]

Precisely what standard of review is required is never fully addressed, other than that the hearing must be "meaningful" and "appropriate to the nature of the case,"[36] although the *Beaudreau* court did note that "[i]t is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision does not meet this standard."[37] The procedure devised in California Corporations Code Section 834[38] was cited as a possible model in *Nork v. Superior Court*.[39] This procedure provides for notice and a hearing prior to setting the amount of security required, thereby enabling the court to fix the nature and amount of the security based upon the probable reasonable expenses which will be incurred in defending the suit.[40]

In *Gonzales v. Fox*,[41] the court noted that *Beaudreau* sets forth three procedural safeguards which must be afforded. Specifically, there must be a "meaningful pretaking hearing which will allow inquiry into: (1) the validity of the claim; (2) the reasonableness of the amount of the bond to be posted, and inferentially, the reasonableness of not requiring any bond; and (3) the ability of a person to furnish a bond."[42]

Applying the above criteria, several statutes have been held unconstitutional[43] under the fifth and fourteenth amendments to the

35. Beaudreau v. Superior Court, 14 Cal. 3d at 458, 535 P.2d at 719, 121 Cal. Rptr. at 591.

36. *Id.*

37. *Id., citing* Bell v. Burson, 402 U.S. 535, 541-42 (1971). The *Beaudreau* court noted that since the statutes which were under attack "are purportedly designed to protect public entities and public employees against the cost of defending frivolous lawsuits, 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," Beaudreau, 14 Cal. 3d at 460, 535 P.2d at 720, 121 Cal. Rptr. at 592.

38. CAL. CORP. CODE §834 was repealed by 1975 Cal. Stats. ch. 682, §6, effective Jan. 1, 1977. The equivalent of §834 is now CAL. CORP. CODE §800 (West 1977) added by 1975 Cal. Stats. ch. 682, §7 effective Jan. 1, 1977.

39. 33 Cal. App. 3d 977, 109 Cal. Rptr. 428 (1973).

40. CAL. CORP. CODE §800 (West 1977). *See* note 38 *supra*.

41. 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312 (1977).

42. *Id.* at 18, 137 Cal. Rptr. at 313.

43. These include former CAL. CIV. PROC. CODE §1771 (West 1954) (which required an undertaking in connection with appeal from a small claims court judgment [*repealed by* 1975 Cal. Stats. ch. 266, §3]); CAL. CIV. PROC. CODE §830 (West 1955) (requiring an undertaking in a medical malpractice suit for exemplary damages); CAL. CIV. PROC. CODE §1030 (West 1955) (imposing a security requirement on nonresident plaintiffs); CAL. GOV'T CODE §947 (West Supp. 1978) (requiring an

Federal Constitution, and corresponding sections of the California Constitution.[44] The statutes have the following in common. On an *ex parte* motion, a party prosecuting a claim, or seeking appellate review of an adverse judgment, must file a security for costs, or suffer dismissal of the claim or appeal. No procedure is provided which will allow a prior hearing to determine the costs likely to be incurred, the legitimacy of the claim, or the ability of the plaintiff or appellant to comply with the requirement. Nor are there sufficient "extra-ordinary circumstances" to warrant a post deprivation hearing. Doubtless, other statutes having the same characteristics are prone to attack.[45]

The decisions which have held the statutes constitutionally infirm[46] have established strong precedent. In the most recent case,[47] the court of appeal summarily held that California Code of Civil Procedure Section 1030, requiring a nonresident plaintiff to post a security for costs as a prerequisite to access to the California judicial system, falls within the criteria of *Beaudreau*, and is thus unconstitutional. Additionally, the California Supreme Court has cited *Brooks* and *Beaudreau* in its discussion of other procedural due process cases.[48]

II. Impropriety of the California Decisions

A. Irrebuttable presumption analysis as the possible foundation of the decisions

While the California cases[49] are purportedly based on procedural due process reasoning, there is a strong indication that they actually rely on an irrebutable presumption analysis.[50] An ir-

undertaking in order to prosecute suit against a government entity); and Cal. Gov't Code §951 (West Supp. 1978) (requiring an undertaking in order to prosecute action against a government employee).

44. Thus because of independent and adequate state grounds the decisions are not reviewable by the United States Supreme Court. *But see* Brooks v. Small Claims Court, note 18 *supra*, which was based solely on an application of the fourteenth amendment. Respondent did not appeal the decision to the United States Supreme Court, however.

45. A discussion of the effects of security for costs required prior to the issuance of preliminary injunctions and temporary restraining orders is below part III.

46. *See* note 11 *supra*.

47. Gonzales v. Fox, 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312.

48. *See, e.g.*, Connolly Development, Inc. v. Superior Court, 17 Cal. 3d 803, 535 P.2d 637, 132 Cal. Rptr. 477; T.M. Cobb Co. v. County of Los Angeles, 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655 (1976); Skelly v. State Personnel Bd., 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

49. *See* note 11 *supra*.

50. For a general development of the irrebutable presumption doctrine, *see generally* Turner v. Dep't. of Employment, 423 U.S. 44 (1975); Cleveland Bd. of Education v. LaFleur, 414 U.S. 632 (1974); United States Dep't. of Agric. v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S.

rebutable presumption exists in a situation where, because a basic fact exists, a presumed fact is deemed to exist. The United States Supreme Court had[51] invoked the doctrine to fill the gap left by the two-tiered substantive due process/equal protection analysis,[52] and when the private interests affected were considered important.[53]

Beaudreau[54] involved students and parents attempting to prosecute a pending action against a school district, the district's su-

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645 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); and Bell v. Burson, 402 U.S. 535 (1971). The irrebutable presumption doctrine is criticized in Note, *Irrebutable Presumption: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975) and Note, *The Irrebutable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

Bell v. Burson, supra, typifies the admixture of an irrebutable presumption analysis with a procedural due process analysis. In *Bell* petitioner challenged the constitutionality of Georgia's Motor Vehicle Safety Responsibility Act which provided that the motor vehicle registration and driver's license of an uninsured motorist involved in an accident shall be suspended unless a security is posted sufficient to cover the amount of damages claimed by aggrieved parties in reports of the accident. At the administrative hearing prior to suspension of driving privileges, no consideration was given to the questions of the motorist's fault or liability. The Court held the Georgia scheme unconstitutional, rejecting the presumption that all uninsured motorists who have been in an accident must deposit sufficient security to ensure payment of damages claimed against them. But the Court did so under the guise of procedural due process reasoning. The Court held that in this case a hearing "appropriate to the nature of the case" necessitates a determination whether there is a reasonable possibility of judgment in amounts claimed being rendered against the licensee.

Regarding the recent cases applying an irrebutable presumption analysis in the context of procedural due process reasoning (*e.g., Bell, Vlandis, La Fleur, Murry*, and *Turner*) it has been commented:

> It now seems readily apparent that these cases actually rest on an equal protection rationale, for the objectionable portion of each law was the way it classified individuals . . . . In none of the cases would a "process" have saved the law because the procedure would only have determined whether an individual fitted into one of these arbitrary classifications.

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51. The irrebutable presumption doctrine has fallen into disrepute. *See generally* Weinberger v. Salfi, 422 U.S. 749 (1975) (which limited the irrebutable presumption doctrine to fundamental rights) and Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (which is interpreted as the final retreat from the irrebutable presumption doctrine by Comment, *The Burger Court's "Newest" Equal Protection: Irrebutable Presumption Rejected—Two Tier Review Reinstated*, 1977 WASH. UNIV. L.Q. 15).

52. *See generally* TRIBE, AMERICAN CONSTITUTIONAL LAW, §16-32, at 1092-97 (1978).

53. *See id.*, and United States Dep't. of Agric. v. Murry, 413 U.S. 508.

54. *See Statute Requiring Plaintiffs to Post Security for Costs Held Violation of Procedural Due Process*, 89 HARV. L. REV. 1006 (1976) for a succinct discussion of *Beaudreau*'s application of an irrebutable presumption analysis.

perintendent of schools, and a director of contemporary education programs without filing an undertaking as prescribed by California Government Code sections 947 and 951. The court recognized and avowed the purpose of the sections, "to protect the public entities and public employees against the cost of defending frivolous law suits. . . ."[55] Nevertheless, the statute did not adequately draw into focus the necessity of a security requirement based on the circumstances of the individual case, but rather, membership in a statutory class conclusively defined the need for the security requirement. This was the "crux of the court's dissatisfaction."[56] *Beaudreau* rejected the presumption that all public entities or employees require protection regarding costs incurred in defending lawsuits.

The language of *Gonzales v. Fox*[57] provides an even stronger suggestion that an irrebutable presumption has actually been the basis of the Court's discontent. In *Gonzales*, California Code of Civil Procedure section 1030, requiring nonresident plaintiffs to post a security for costs before being permitted to prosecute an action against resident defendants, came under attack. In holding that section unconstitutional, the court noted "a blanket imposition of security requirements on nonresidents in *every case* is not meaningfully directed toward [preventing filing of frivolous lawsuits.]"[58] *Gonzales* rejected the presumption that all California defendants are in need of protection regarding costs incurred in defending lawsuits filed by nonresident plaintiffs.

It thus appears that in *Beaudreau* and *Gonzales* an irrebutable presumption analysis was adopted. As mentioned above, this analytical approach had been used to fill the void left by the substantive due process and equal protection analysis of the high court. However, California is not confined to such a rigid framework,[59] and the California Supreme Court has been more open to the recognition of new fundamental rights[60] and suspect classifi-

55. *Beaudreau*, 14 Cal. 3d at 450, 635 P.2d at 720, 121 Cal. Rptr. at 592.

56. *Statute Requiring Plaintiffs to Post Security for Costs Held Violation of Procedural Due Process, supra* note 54 at 1012.

57. 68 Cal. App. 3d Supp. 16, 137 Cal. Rptr. 312 (1977).

58. *Id.* at 18, 137 Cal. Rptr. at 313 (emphasis in original).

59. *See generally* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). In a footnote, the court noted that recently the United States Supreme Court had, in certain cases, departed from an "artificial analysis" which accompanies application of the traditional rational basis test, demanding that "statutory classifications bear some substantial relationship to an actual, not 'constructive' legislative purpose." *Id.* at 865 n.7, 506 P.2d at 219, 106 Cal. Rptr. at 395. The court also held that whatever the interpretation of the federal equal protection clause, a traditional rational basis test was inappropriate "to sustain the present statute in the face of our state constitutional guarantees." *Id.* at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

60. "[W]hen defining fundamental interests under the California Constitution,

cations,[61] thus invoking strict scrutiny. California is also more prone to the utilization of at least a middle level[62] test, sometimes referred to as a rational basis test with bite,[63] a strict rationality test,[64] or an intermediate level of review.[65] No matter what denomination, the standard of review is "poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny . . ."[66] and fills the gap of the two-tiered approach. The significance of applying an irrebutable presumption analysis is that the legislature's hands are tied to exacting all but perfect classifications.

B. Procedural due process analysis: A piece in the wrong puzzle

The California decisions have chosen to treat the security for costs as a protected property interest in itself. This raises a significant problem. Rather than analyzing whether proper procedural due process is afforded in the litigation of a substantive claim, the decisions shift to a consideration of whether proper procedural due process is afforded the very procedure devoted to the litigation of a substantive claim.[67] In other words, the court uses due process analysis to examine whether the statutes which provide for a security for costs, a form of due process itself, are unconstitutional for want of proper procedural due process safeguards. The error here is that the guarantee of the due process

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we exercise our inherent power as a court of last resort independant of fundamental interest determinations which may be reached by the United States Supreme Court solely on interpretation of the Federal Constitution." People v. Olivas, 17 Cal. 3d 236, 246, 551 P.2d 375, 381, 131 Cal. Rptr. 55, 61 (1976). Pursuant thereto, the following have been held fundamental: right to work or profession (Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); Endler v. Schutzbank, 68 Cal. 2d 162, 436 P.2d 297, 65 Cal. Rptr. 297 (1968)); holding public office (Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971)); unanimous jury verdict in a criminal trial (People v. Superior Court, 67 Cal. 2d 929, 434 P.2d 623, 64 Cal. Rptr. 327 (1967)); unanimous jury verdict under the mentally disordered sex offender law (*id*).

61. Sex held a suspect classification. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 259, 95 Cal. Rptr. 329 (1971).

62. *See* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

63. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

64. *See* Note, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 123 (1973).

65. As phrased in TRIBE, AMERICAN CONSTITUTIONAL LAW 1082 (1978).

66. *Id.*

67. For a strong criticism of this shift, *See Statute Requiring Plaintiffs to Post Security for Costs Held Violation of Procedural Due Process*, 89 HARV. L. REV. 1006, 1010 (1976).

clause itself is examined under the aegis of procedural due process standards.[68]

1. Recognition of a two-fold property interest

The California decisions have concluded that there is a two-fold taking manifested by the security for cost requirement.[69] Regarding the loss of the use or enjoyment of money,[70] the decisions rely on "*Sniadach* and its progeny."[71] Thus a comparison of *Sniadach* and *Beaudreau* is in order. *Sniadach* involved a situation in which petitioner's wages were garnished upon an *ex parte* motion without a prior hearing. The Court found this a reprehensible "taking."[72] *Beaudreau* found a two-fold taking in the requirement of a security for costs before an action could be prosecuted against a government entity or employees.[73]

The two cases do have much in common. Upon an *ex parte* motion, one party is deprived of the use of money until a formal proceeding is commenced. No prior hearing exists to determine the legitimacy of the claim, nor the reasonableness of the "taking."

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68. *Id. Cf.* Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 452 (1977):

> As the fifth and fourteenth amendments read in fact, due process is not a protected entitlement. Rather, the protected interests are "life, liberty, [and] property." Due process stands in relation to these not as an equivalent constitutionally established entitlement, but only as a condition to be observed insofar as the state may move to imperil one of the named substantive interests. That is:
>
> > No State shall deprive any person of life, liberty or property, without due process of law . . . .

69. *See* note 17 *supra* and accompanying text.

70. A correct analysis of procedural protection for property entails two fundamental questions:

> 1) What constitutes "property"? 2) When is the government depriving someone of property?

NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 490 (1978).

The latter question is "really a state action issue: the due process clauses protect against governmental, rather than private deprivations of property." *Id.* The first question is exceedingly complex. *See, e.g.*, Reich, *The New Property*, 73 YALE L. J. 733 (1964); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); and Comment, *From Goss to Bishop: The Demise of the Entitlement Doctrine*, 5 PEPPERDINE L. REV. 523 (1978).

It is beyond the scope of this comment to thoroughly address the two analytical questions posed above. Therefore the discussion is limited to a critique of the reasoning utilized by the California courts in concluding there is a "taking" in this context.

71. *See, e.g.*, Brooks v. Small Claims Court, 8 Cal. 3d at 677, 504 P.2d at 1253, 105 Cal. Rptr. at 789; Beaudreau, 14 Cal. 3d at 455, 535 P.2d at 718, 121 Cal. Rptr. at 589; and Nork, 33 Cal. App. 3d at 1002, 109 Cal. Rptr. at 432.

72. Sniadach v. Family Finance Corp., 395 U.S. at 342.

73. Beaudreau v. Superior Court, 14 Cal. 3d at 457, 535 P.2d at 716-19, 121 Cal. Rptr. at 590-91.

However, in *Sniadach*, the substantive claim to be litigated centered on the right to ownership of the garnished wages. Thus, the hearing on that issue was summarily decided by the prejudgment garnishment. The summary procedure preempted the hearing to be had on that issue. Truly this is a "taking."[74] However, the security for costs is only a requirement of access to the judicial process in order to litigate a substantive claim. The security for costs is not *the substantive claim*, and therefore the plaintiff has not been temporarily deprived of the use of the subject of that claim pending a hearing. The distinction is critical. The procedural due process requirements called for by *Sniadach* have significance in the litigation of *the substantive claim*, right to ownership of wages, and summary denial of its use pending a full hearing on that claim. California has gone beyond *Sniadach* in recognizing that the loss of use or enjoyment of money for the purpose of satisfying a security for cost requirement is a protected interest in itself. As mentioned above, this in essence is an inspection of the rights afforded by due process litigation of a substantive claim couched in terms of due process itself.

The decisions also rest heavily upon an application of *Fuentes v. Shevin*.[75] However, it is merely the naked rule[76] of *Fuentes* which is applied, and not the rationale. The basis for the decision in *Fuentes* was that:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a

74. *Sniadach* represents a rather extreme situation. At issue in *Sniadach* was the Wisconsin prejudgment garnishment procedure which permitted up to 50% of a person's wages to be frozen without a prior hearing. The Court noted " 'The idea of wage garnishment in advance of judgment, of trustee process, of wage attachment, or whatever it is called, is a most inhuman doctrine. It compels the wage earner, trying to keep his family together, to be driven below the poverty level.' " 395 U.S. at 340, quoting Congressman Reuss, 114 CONG. REC. 1832 (1968).

75. *See* note 23 *supra* and accompanying text.

76. The naked rule of *Fuentes* has been severely criticized:

> In sweeping language, *Fuentes v. Shevin* (citation omitted), enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the disposition and however slight his monetary interest in the property. The Court's decision today withdraws significantly from the full reach of that principle, and to this extent I think it fair to say that *Fuentes* opinion is overruled.

Mitchell v. W.T. Grant Co., 416 U.S. 600, 623 (1974) (Powell, J., concurring). While *Fuentes* has been limited by subsequent Supreme Court decisions, Justice Powell was premature in signaling the overruling of *Fuentes*. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc. 419 U.S. 601 (1975).

> person of his possessions. The purpose of this requirement is not only to ensure abstract *fair play* to the individual. Its purpose, more particularly, is to protect his use and possession of his property from *arbitrary encroachment*—to minimize substantively *unfair* or *mistaken* deprivations of property . . . .[77]

In the context of security for costs requirements, there is no arbitrary encroachment upon a person's possession of property, nor is there a denial of fair play to the individual. The security for costs is extracted so that important public policies may be furthered: the protection of innocent defendants by ensuring recovery of costs and the prevention of frivolous law suits.

Regarding the second aspect of the two-fold taking, the dismissal of a meritorious claim, the decisions have applied the *Board of Regents v. Roth* "legitimate claim of entitlement" test in determining the existence of a property interest within the meaning of the due process clauses.[78] The *Beaudreau* court summarily concluded that "[a] meritorious action against a public entity or public employee clearly connotes a 'legitimate claim of entitlement' within the meaning of *Roth*."[79]

That a meritorious[80] action is not a property interest is difficult to conceive. For example, a chose in action may be attached by a creditor.[81]

However, a "meritorious action" exists within the framework of the procedure established to litigate a substantive claim. Without the judicial system a plaintiff could not obtain a money judgment. Therefore a plaintiff has a "legitimate claim of entitlement" to a money judgment so long as he has a potentially meritorious claim and has complied with all the procedural prerequisites to the litigation of the claim. For example, should the plaintiff neglect to file his action before the statute of limitations has run he would no longer have a "legitimate claim of entitlement." Likewise, if a plaintiff fails to comply with a security for costs requirement, a longstanding element of recognized procedure requisite to the litigation of a substantive claim, the plaintiff no longer maintains a "legitimate claim of entitlement."

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77. 407 U.S. at 80-81 (emphasis added).

78. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it. Beaudreau v. Superior Court, 14 Cal. 3d at 456, 535 P.2d 718, 121 Cal. Rptr. at 590 *citing* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

79. *Id.* at 457, 535 P.2d at 718, 121 Cal. Rptr. at 590.

80. The etymon of "meritorious" is "that brings in money." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1414 (1971).

81. CAL. CIV. PROC. CODE §487.010(2) (West Supp. 1978).

2. Implications of the California Position

The implications of the California position are significant.[82] The effect upon an already backlogged judicial system and the questionable ability of the legislature to deter frivolous claims present two very formidable problems. The *Beaudreau* court noted deterence of frivolous lawsuits may well be a proper concern, and that the security for costs is not necessarily an improper method of effectuating this purpose. Nevertheless, "since this method subjects the plaintiff to a taking of his property, it must satisfy due process principals. This it fails to do."[83] Due process thus necessitates a prior hearing to determine whether a claim is, in fact, frivolous. If the claim is then found to lack substantiality, the security requirement is in order. In *Beaudreau*, the court noted "[t]he delay occasioned by a prior due process hearing would not interfere with the state's interest in detering unmeritorious litigation, as the hearing would be designed to bring to light actions lacking merit before proceeding further with them."[84] The problem with the court's reasoning is apparent. Part of the legislative purpose was to deter frivolous suits, thus preventing congestion of the courts. Yet now a hearing must be afforded to determine whether in fact the policy considerations exist.[85]

California's most reasonable view is expressed in *Vinnicombe v. State*.[86] In *Vinnicombe*, the court addressed itself to the constitutionality of the predecessor to sections 947 and 951 of California

82. For example, what are to be the effects on the necessity of a security for costs regarding the granting of a preliminary injunction or temporary restraining order? In these cases, such a security is a significant protection afforded a defendant. This is discussed in depth in the textual material part C *infra*.

83. Beaudreau, 14 Cal. 3d at 464, 535 P.2d at 723, 121 Cal. Rptr. at 595.

84. *Id.*

85. It may be contended that a brief hearing would not aggravate the current court backlog. The author takes the position that any additional workload cast on the courts must of necessity enlarge the congestion of the courts.

86. 172 Cal. App. 2d 54, 341 P.2d 705 (1959). *See also* Beyerbach v. Juno Oil Co., 42 Cal. 2d 11, 265 P.2d 1 (1954), which held the security for costs requirement, as a limitation upon the right of a stockholder to maintain a derivative suit, a reasonable limitation; Boyer v. County of Contra Costa, 235 Cal. App. 2d 111, 45 Cal. Rptr. 58 (1965), which upheld the security for costs requirement in a wrongful death action against a public entity; Stafford v. People *ex rel.* Dept. of Public Works, 195 Cal. App. 2d 148, 15 Cal. Rptr. 402 (1961), which upheld the statute requiring a security for costs as a condition precedent to the prosecution of a quiet title action as against the state; Rio Vista Gas Assn. v. California, 188 Cal. App. 2d 555, 10 Cal. Rptr. 559 (1961), which held a cost bond may be required in inverse condemnation proceedings against the state; and Standahl v. Splivalo, 13 Cal. App. 2d 85, 56 P.2d 298 (1936), affirming the dismissal of plaintiff's action by summarily applying statu-

Code of Civil Procedure, held unconstitutional in *Beaudreau*. The court held these sections[87] to be reasonable provisions to protect the state against the costs and expenses of defending unfounded and baseless claims.[88] The *Vinnicombe* court noted that the legislature may enact *reasonable* regulations as to the enforcement of a substantive claim, "*so long as the right itself is not curtailed* or its exercise *unreasonably burdened*."[89] Thus, the *Vinnicombe* court correctly addressed itself to the issue of whether the overall procedure was consistent with norms of "integrity and fundamental fairness." Several other jurisdictions have manifested adoption of the *Vinnicombe* position, holding the security for costs to be consistent with the fair adjudication of a substantive claim.[90]

III. Avoiding Adverse Consequences

At least one commentator has lauded the innovative California position,[91] but this position may be untenable not withstanding the above criticism. Several other California statutes contain security for costs provisions. For the purposes of this comment, the most notable of these statutes concern preliminary injunctions[92] and temporary restraining orders (TRO's).[93] These security requirements are imposed to protect a defendant from adverse ef-

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tory provisions requiring a security for costs in the presentation of negligence claims against the state.

87. Cal. Gov't Code §§16041, 16047 (repealed 1959).

88. Vinnicombe, 172 Cal. App. 2d at 57, 341 P.2d at 707.

89. *Id.* at 77, 341 P.2d at 707 (emphasis in original).

90. *See, e.g.*, Driscoll v. Plymouth Township, 15 Pa. Commw. Ct. 404, 320 A.2d 444 (1974) (which upheld what might be considered an exhorbitant bond in order to maintain an appeal contesting the development of neighboring land); State *ex rel.* Reece v. Gies, 198 S.E. 2d 211 (Supe. Ct. W. Va. 1973) (bond requirement in an amount double that of a judgment rendered against the tenant for damages and an amount sufficient to cover the rent for one year held constitutional as bearing a reasonable relation to the amount that may be subject to recovery under the bond if the landlord prevails on appeal); Houston v. Brown, 292 So. 2d 911 (La. App. 1970) (bond requirement in double the amount of reparation awarded against appellant pursuant to Perishable Agriculture Commodities Act upheld); O'Day v. George Arakelian Farms, Inc., 536 F.2d 856 (9th Cir. 1976) (holding that the state may properly condition the right to appeal upon posting security sufficient to protect an appellee from loss of damages already awarded, interest, and costs on appeal, including reasonable attorney's fee; but that a double bond requirement is not rationally related to the effectuation of such a purpose); and Bowman v. Waldt, 9 Wash. App. 562, 513 P.2d 559 (1973) (requirement of filing fees and indemnity bond as a condition to maintaining suit on judgment debtor's property held constitutional).

91. *See Bond Requirements Imposed Upon Plaintiffs Suing Public Entities Held to Violate Due Process When No Prior Hearing Is Provided to Determine Necessity or Reasonableness of Bond*, 21 Vill. L. Rev. 282, 290 (1976).

92. Cal. Civ. Proc. Code §529 (West 1954) provides an undertaking is required prior to the granting of an injunction. This includes the preliminary injunction. *See generally* Griffin v. Lima, 124 Cal. App. 2d 697, 269 P.2d 191 (1954).

93. Cal. Civ. Proc. Code §513.010 (West Supp. 1978).

fects of such summary procedures. There also exists a strong policy of deterring frivolous claims, and ensuring that the restrained party may recover losses (costs) incurred pending a hearing. There exists a *quid pro quo*. The plaintiff sacrifices the use of a security; the defendant sacrifices the enjoyment of a right or privilege.[94] It would be ironic indeed if the developing law in California, which was given birth by *Sniadach* and *Fuentes*,[95] causes the rejection of the needed protection for those subject to a preliminary injunction or TRO.

The code sections which impose the security for cost requirement in the context of either a preliminary injunction or a TRO provide the party who is required to furnish it no opportunity to contest the necessity or amount of such security nor the ability of the party to furnish it.[96] The security for costs is required without a prior hearing,[97] and the amount is fixed.[98] Only the person en-

94. For a good discussion and illustration, *see* Driscoll v. Plymouth Township, 14 Pa. Comm. W. Ct. 404, 320 A.2d 444.

95. In *Fuentes*, the prejudgment replevin laws, found unconstitutional for failure to adequately protect the debtor's right of due process by not providing a predeprivation hearing, required a security bond to be posted. This bond requirement alone was insufficient protection of the debtor's rights.

96. CAL. CIV. PROC. CODE §513.010 (West Supp. 1978) provides:

> (b) A temporary restraining order may issue ex parte if all of the following are found: . . .
> (2) the plaintiff has provided an undertaking as required in Section 515.010.

CAL. CIV. PROC. CODE §515.010 (West Supp. 1978) provides:

> The court shall not issue a restraining order or a writ of possession until the plaintiff has filed with the court a written undertaking. The undertaking shall provide that the sureties are bound to the defendant in the amount of the undertaking for the return of the property to the defendant, if return thereof be ordered, and for the payment to him of any sum he may recover against plaintiff. The undertaking shall be executed by two or more sufficient sureties in an amount not less than twice the value of the property as determined by the court.

CAL. CIV. PROC. CODE §529 (West 1954) provides:

> On granting an injunction, the court or judge must require . . . a written undertaking on the part of the applicant . . . to the effect that he will pay to the party enjoined such damages, not exceeding an amount to be specified as such party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto. Within five days after the service of the injunction, the person enjoined may except to the sufficiency of the sureties, and unless within five days thereafter, upon notice of not less than two days to the person enjoined, such sureties, or others in their place, justify before a judge of the court, or the clerk thereof, at a time and place designated in such notice, the order granting the injunction must be dissolved.

97. *Id.*

98. The security for cost must be an amount equal to such damages as the en-

joined may challenge the sufficiency of the security for costs.[99]

The loss of use or enjoyment of money as either a nonrefundable premium or as collateral for a surety in the context of the security for costs is now well established as a "taking" and thus a protected property interest.[100] To be a constitutional taking, there must be compliance with the requisite procedural safeguards dictated by the particular circumstances.[101]

The decisions recognize that once there is a "taking," due process requires some form of notice and a hearing.[102] "Absent extraordinary circumstances . . . the hearing must take place *before* an individual is deprived of a significant property interest."[103] However, the court will weigh competing interests to determine whether a hearing, consistent with due process, may take place after the security for costs is required.[104] In the context of a preliminary injunction or TRO, because of the significant need of protecting an enjoined party, this balance would likely be struck in favor of permitting the hearing *after* the security requirement has been met. This conclusion is consistent with recent decisions in other analagous situations.

In *T.M. Cobb Co. v. County of Los Angeles*,[105] the court held that the summary procedure for seizure of unsecured property to enforce payment of taxes constituted a "taking" subject to requirements of due process, but that sufficient interests justified the procedure.[106] Specifically, the court held that if a hearing were granted *before* the seizure, an assessee would not be prevented from dissipating his or her assets and impeding the collection of taxes owed. In other words, the substantial government interest in collection of taxes justified the summary procedure.

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joined party may incur by reason of the injunction if the action is for a preliminary injunction, or not less than twice the value of the property as determined by the court if a TRO is sought. *Id.*

99. *Id.*

100. *See* part I *supra*.

101. This is, of course, only if a "taking" is found. By the binding force of stare decisis, surely such a conclusion must be drawn. However, this does not alter the author's conclusion that a "taking" in this context is an inappropriate legal conclusion because of the misapplication of *Sniadach* and *Fuentes*. *See* discussion part II *supra*.

102. "We start with the basic proposition that in every case involving a deprivation of property within the purview of the due process clause, the Constitution requires some form of notice and a hearing." Beaudreau, 14 Cal. 3d at 458, 535 P. 2d at 719, 121 Cal. Rptr. at 591.

103. *Id.* (citations omitted).

104. *See* Comment, *Due Process and Security for Expense Statutes: An Analysis of California Statutes in Light of Recent Trends*, 7 PAC. L.J. 176 (1976).

105. 16 Cal. 3d 606, 547 P.2d 431, 128 Cal. Rptr. 655 (1976).

106. *Id.* The statute was found unconstitutional on other grounds, specifically that it authorized the *sale* of seized property without affording the taxpayer a prior administrative hearing.

This case is analagous to the situation created by a plaintiff seeking a preliminary injunction or TRO. In these situations a defendant is deprived of the unfettered enjoyment of a right. In *Cobb*, the assessees were likewise deprived of the use and enjoyment of the seized property. The only hindrance to drawing a complete analogy is that whereas in *Cobb* there was a substantial *government* interest, in the context of the preliminary injunction or TRO there is a substantial governmental interest in the protection of a *private* interest. Nonetheless, these are exigent circumstances which demand some sort of protection to the party to be restrained, and this protection is partially provided by the security for costs.[107]

Connolly Development, Inc. v. Superior Court[108] also applied a balancing analysis to determine whether sufficient interest necessitated a post deprivation hearing. In *Connally* the court held that:

> [T]he recordation of a mechanic's lien, or the filing of a stop notice, inflicts upon the owner only a minimal deprivation of property; that the laborer and materialman have an interest in the specific property subject to the lien since their work and materials have enhanced the value of that property; and that state policy strongly supports the preservation of laws which give the laborer and materialman security for their claims.[109]

Again the analogy is clear.[110] There is only a minimal deprivation to the plaintiff, albeit of a recognized property interest, and there are strong reasons to hold the hearing after the security for costs is required.

Thus the decisions recognize that once there is a "taking," some type of notice and a hearing is required. Absent "extraordinary circumstances," the hearing must be afforded before the taking

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107. The summary procedure is needed in order to prevent "irreparable harm," a prerequisite to such remedies. *See* CAL. CIV. PROC. CODE §526 (West 1954) and CAL. CIV. PROC. CODE §513.010 (West Supp. 1978). Therefore dissolution of these remedies is not in order. Rather, needed protection is afforded the defendant by the bond requirements.

108. 17 Cal. 3d 803, 535 P.2d 637, 132 Cal. Rptr. 477 (1976).

109. *Id.* at 827, 553 P.2d at 653, 132 Cal. Rptr. at 493.

110. The technical analogy would be that a post deprivation hearing is not required. This conclusion would pivot on whether the "taking" manifest in security for costs requirement is as minimal a deprivation as the recordation of a mechanic's lien and whether the public policy supporting the security for costs in the context of the preliminary injunction or TRO is as strong as that which supports the mechanic's lien or stop notice law. The author would contend this is a viable and logical conclusion, but this point has not been elaborated because of the court's apparent hostility toward the security for costs requirement, at least without some form of a hearing as to its propriety.

occurs. However, the court will make "an appropriate accommodation of the competing interest involved"[111] to determine whether the hearing may be after the taking. It is posited that sufficient extraordinary circumstances exist in the context of the preliminary injunction and TRO to appropriately accommodate such interests by allowing a post deprivation hearing.

The statutes as they now read must be construed to be unconstitutional if the court is to be consistent in its determination that the security for costs requirement constitutes a two-fold taking. Of course the court could decline to find a protected property interest, or that a hearing is required, but *stare decisis* precludes this. Thus the statutes must be revised to provide for a hearing which would allow the party required to file the security for costs an opportunity to contest the necessity of the security, as well as its amount. Most likely this hearing can properly be held after the party has filed the security for costs.

IV. CONCLUSION

The recent California cases which have dealt with the validity of the security for costs requirements of various California statutes in light of recent United States Supreme Court decisions regarding the denial of procedural due process in summary remedy situations are truly "innovative." While it might appear that the decisions have misapplied *Sniadach*, the decisions represent California's own view as to what constitutes a "taking," and the protections which must therefore be afforded.[112] In other words, the decisions go beyond *Sniadach*, but are consistent with other trends in California law.

The court will view any security for costs requirement as a taking for which a hearing must be afforded. The court will weigh competing interests to determine whether the hearing may, consistent with due process, be granted after the initial deprivation. It is contended that in such extraordinary situations as the preliminary injunction or TRO, the security requirement will be sustained as a protective mechanism to a defendant to such action provided the legislature will revise these sections to provide for a hearing after the security for costs requirement has been met. At this hearing there should be a consideration of (1) the need for the security for costs (*i.e.*, whether the defendant will incur damages); (2) the amount of damages likely to be suffered, and conse-

111. Skelly v. State Personnel Bd., 15 Cal. 3d 194, 209, 539 P.2d 774, 785, 124 Cal. Rptr. 14, 25 (1975).

112. *See generally*, Bishop v. Wood, 426 U.S. 341 (1976) and Board of Regents v. Roth, 408 U.S. 564 (1972).

quently the amount of the security for costs; and (3) the ability of the party to furnish the security for costs.[113]

JEREL L. ELLINGTON

113. *See supra* note 35 and accompanying text.