

Ever Represent An Out-Of-State Plaintiff?

Code of Civil Procedure § 1030 and What You Should Know



By Alan C. Brown and Trevor J. Herrera

California law treats in-state plaintiffs differently than it treats out-of-state plaintiffs. The state codifies this difference in Code of Civil Procedure (“CCP”) § 1030, wherein an out-of-state plaintiff can be required to post bond for the purpose of securing an award of costs and attorney’s fees which may be awarded to the defendant in the action.

The purpose of CCP § 1030 is to “enable a California resident sued by an out-of-state resident to secure costs in light of the difficulty of enforcing a judgment for costs against a person who is not within the court’s jurisdiction.” (*Yao v. Superior Court* (2002) 104 Cal. App. 4th, 327, 331.) “The statute therefore acts to prevent out-of-state residents from filing frivolous lawsuits against California residents.” (*Id.*)

Although not oft-used, CCP § 1030 is a powerful code section that warrants serious consideration for attorneys

thinking about representing out-of-state plaintiffs. Essentially, California law says that if you want to litigate here, you need to stay here or pay here.

CCP § 1030, provides, in pertinent part:

- (a) When the plaintiff in an action or special proceeding *resides out of the state*, or is a foreign corporation, the defendant may, *at any time*, apply to the court by noticed motion for an order requiring the plaintiff to file an undertaking to secure an award of costs and attorney’s fees which may be awarded in the action or special proceeding
- (b) The motion shall be made on the grounds that the plaintiff resides out

of the state or is a foreign corporation and there is a *reasonable possibility* that the moving defendant will obtain judgment in the action or special proceeding (Italics added.)

In sum, an in-state defendant must only prove two things: (1) that the plaintiff resides out-of-state; and (2) that the in-state defendant possesses a reasonable possibility of prevailing on the merits.

The Plaintiff Must Reside Out-of-State

The first point of analysis is whether the plaintiff “resides” out-of-state. Be wary not to confuse the word “reside” with the word “domicile.” The two are often used interchangeably, but for the purpose of CCP §1030, the term “reside” is plainly construed as the place of plaintiff’s residence; it does not, by contrast, refer to the place of plaintiff’s “domicile.” (*Myers v. Carter* (1960) 178 Cal. App. 2d 622, 626.)

This means that if your client

establishes an out-of-state residency either before or during the pendency of the action, your client has opened the door to a motion for undertaking. Because the operative word is “reside,” it matters not whether your client actually moves to another state, or whether she briefly exits the state with full intent to return. (See, e.g., *Myers v. Carter*; *supra* (plaintiff’s temporary absence from California to take care of his sickly wife rendered him a non-resident for the purposes of CCP § 1030, despite the fact that he lived in California for 27 years, considered California his home, and fully intended to return).) A client who leaves California for a brief period for the purpose of, say, taking care of a sick relative, or pursuing a short-term employment opportunity may seem insignificant, but it can significantly increase the chances of the defense filing a motion for undertaking. Thus, it is important to discuss with any client leaving the state for an extended period the possibility of the being required to post bond.

If your client re-establishes residency within state lines after the motion is filed, the motion thereafter becomes moot. Depending on your client’s situation and the time limit for which bond must be posted, however, such an action may be impossible.

The Reasonable Possibility Standard

If the defendant is successful in establishing that the plaintiff resides out-of-state, the defendant next must establish that he has a *reasonable possibility* of prevailing on the merits. The words “reasonable” and “possibility” are vague enough terms in and of themselves. When coupled together, however, it is clear that CCP § 1030 sets a low threshold for the defense to overcome. Even in cases where liability seems clear, just about any attorney can argue that it’s reasonably *possible* that the defense will prevail.

The plaintiff, in response, is then tasked with proving that the defendant has *no* reasonable possibility of prevailing on

the merits – a very high threshold for the plaintiff to overcome. Essentially, if your client resides out-of-state, the chances of proving that the defendant has no reasonable possibility of prevailing are probably slim at best.

The Bond and Dismissal

As for the amount of the undertaking, subsection (b) requires the moving party to submit an affidavit with the court setting forth the “nature and amount of the costs and attorney’s fees the defendant *has incurred and expects to incur* by the conclusion of the action or special proceeding.” (Italics added.) Significantly,



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the amount of the undertaking for which plaintiff is responsible is not contingent upon when the motion is filed. Even if filed late in the action, the plaintiff is nonetheless responsible for covering *all* fees and expenses, even those incurred prior to the date the filing.

If the defendant is successful in proving that the plaintiff resides out-of-state and that he possesses a reasonable possibility of prevailing on the merits, subdivision (c) of § 1030 mandates that

the court “*shall order that the plaintiff file the undertaking in an amount specified in the court’s order as security for costs and attorney’s fees.*” (Italics added.) Pursuant to § 1030 subdivision (d), the plaintiff has only thirty days (or any other time specified by the court) after service of the court’s order to post bond. Subdivision (d) further states that if the plaintiff fails to post bond within the allotted time period, the plaintiff’s action “*shall be dismissed.*” It is important to note, however, that because the dismissal is not based on the merits of the action, the dismissal will be without prejudice. (*Rosenthal v. McMann* (1892) 93 Cal. 505.)

Relief for Indigent Plaintiffs

Despite the mandatory provision in the statute, California provides relief for indigent plaintiffs. Where the plaintiff establishes indigency, “a trial court has discretion to waive the posting of security under CCP section 1030.” (*Bank of America v. Superior Court* (1967) 255 Cal. App. 2d 575, 578.) The plaintiff, however, will need to make a “prima facie showing that he has unsuccessfully attempted to obtain the required undertaking or that he is unable to furnish it.” (*Baltayan v. Estate of Getemyan* (2001) 80 Cal. App. 4th 1429, 1434). Further, CCP § 995.240 also provides that the court may waive a provision for a bond if the court determines that the plaintiff is indigent and is unable to obtain sufficient funds.

The Motion Can Be Brought At Any Time

Take note that, pursuant to subdivision (a), the motion can be brought at *any time* – even on the eve of trial. The case *Shannon v. Sims Service Center, Inc.* (1984) 164 Cal. App. 3d 908 is illustrative. In *Shannon*, the plaintiff initiated the lawsuit as a resident of the state. During the pendency of the action, the plaintiff moved out of state, and, only a month prior to trial, the defense filed a motion

for undertaking for costs and attorney's fees. (*Id.* at 910.) The court granted the motion, and because the plaintiff could not post bond, the court dismissed the case. (*Id.* at 911.)

CCP § 1030 and Cross-Complainants

Also important to consider is that CCP § 1030 does *not* apply to out-of-state cross-complainants. (*Yao v. Superior Court, supra*, 104 Cal. App. 4th at 331.) In other words, if a California resident sues an out-of-state defendant, and the defendant responds, in part, by filing a cross-complaint, the plaintiff cannot move for the defendant / cross-complainant to post security with the court. In *Yao*, the court reasoned that the legislature was clear in its intent not to include out-of-state cross-complainants within the language of the statute, and that requiring said cross-complainants to post bond was not in furtherance of the statute's purpose. (*Id.* at 333-34.)

Conclusion

CCP § 1030 is a small, but powerful tool in the defense's repertoire. Imagine a scenario where you've invested tremendous time, money, and effort into a case, only to have it dismissed by an unforeseen, last-minute motion for undertaking. Indeed, mindfulness of this easily overlooked code section can affect your case strategy, and most certainly your case selection.

Further, cognizance of this code section will allow you to better warn your clients who might be thinking of moving out-of-state of the potential necessity to post bond. Anticipating the possibility of the motion will allow you and your client to prepare for it beforehand. By advising your client of this possibility, you will at least avoid an awkward "Why didn't you advise me of this earlier?" conversation with your client. In sum, be prepared, and don't let CCP § 1030 catch you by surprise.



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